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SYMPOSIUM: IN HONOR OF FRED GRAY:
MAKING CIVIL RIGHTS LAW FROM ROSA
PARKS TO THE TWENTY-FIRST CENTURY -
Introduction

Jonathan L. Entin

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—Symposium—

IN HONOR OF FRED GRAY:
MAKING CIVIL RIGHTS LAW
FROM ROSA PARKS TO THE
TWENTY-FIRST CENTURY

INTRODUCTION

Jonathan L. Entin[†]

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This issue of the *Case Western Reserve Law Review* focuses on the work of Fred Gray, one of the nation's preeminent civil rights lawyers and a 1954 graduate of our law school. Mr. Gray's many accolades include the American Bar Association's Thurgood Marshall Award, the Federal Bar Association's Sarah T. Hughes Award, Harvard Law School's Charles Hamilton Houston Medallion of Freedom, and numerous honorary degrees. He has served as president of the National Bar Association and was the first African-American president of the Alabama State Bar Association. In addition, he was one of the first two African Americans elected to the Alabama legislature since Reconstruction. This issue contains Articles that were presented at a symposium that took place in October 2016.

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I. BACKGROUND

Growing up in Montgomery, Alabama, Fred Gray expected to enter the ministry. To that end, he left his hometown to enroll in a church-related high school called the Nashville Christian Institute.¹ There he became a “boy preacher” who traveled around the country with the Institute’s president on fund-raising and recruiting trips and served as a part-time minister for area congregations.² He returned to Montgomery and graduated in 1951 from what was then the Alabama State College for Negroes (now Alabama State University). While at Alabama State, Fred Gray decided to become a lawyer who would “use the law to ‘destroy everything segregated [he] could find.’”³

Because Alabama was rigidly segregated at the time, Mr. Gray had to attend law school elsewhere. The state, although unwilling to give him a legal education within its borders, had a program that would cover some of his expenses at an institution outside the South. These arrangements almost certainly were unlawful even in 1951.⁴ More interested in becoming a lawyer than in being a litigant and convinced that the white power structure would prevent him from becoming a lawyer if he challenged the admissions rules, he enrolled at what then was called Western Reserve University in the fall of 1951.⁵ After graduating in 1954, he returned home and was admitted to the Alabama bar.⁶ Perhaps providentially for his goal of destroying everything segregated he could find, less than a month before he graduated the Supreme Court

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1. FRED D. GRAY, *BUS RIDE TO JUSTICE* 7–8, 269 (rev. ed. 2013).
 2. *Id.* at 9, 270.
 3. *Id.* at 13. He did not abandon his interest in religion. During his college years, he was a part-time minister at several churches in the Montgomery area; while in law school he was assistant minister at a Cleveland church. *Id.* at 270–71. And after becoming a lawyer, he served as minister of churches in Montgomery and Tuskegee for many years. *Id.* at 272–74.
 4. The separate-but-equal doctrine, *see Plessy v. Ferguson*, 163 U.S. 537 (1896), was still in effect at the time. But under that rule, the Supreme Court had held that states with whites-only law schools had to provide substantially equal opportunities for legal education to persons of all races, *see Sipuel v. Bd. of Regents*, 332 U.S. 631 (1948) (per curiam), and had applied a rigorous standard of substantial equality. *See Sweatt v. Painter*, 339 U.S. 629 (1950). And more than a dozen years before Mr. Gray entered law school, the Court had rejected the kind of out-of-state subsidy that Alabama offered him. *See Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938).
 5. GRAY, *supra* note 1, at 13–15.
 6. *Id.* at 27. Before sitting for the Alabama bar examination in July 1954, he prudently sat for the Ohio bar in June just in case anything went wrong at home. *Id.* at 22. He passed both tests. *Id.* at 27.

issued its ruling against school segregation in *Brown v. Board of Education*.⁷

II. SUPREME COURT CASES

In his first ten years as a lawyer, Fred Gray played a significant role in four landmark Supreme Court cases. He also has handled numerous other civil rights cases for more than six decades.⁸ Let us begin with the Supreme Court cases before turning to other civil rights issues.

*A. The Montgomery Bus Boycott: Gayle v. Browder*⁹

Fred Gray's remarkable legal career effectively began with the December 1, 1955, arrest of Rosa Parks for refusing to surrender her seat on a Montgomery bus to a white passenger. Mr. Gray, who had not yet reached his twenty-fifth birthday, represented her.¹⁰ The arrest of Mrs. Parks led to a 382-day boycott of the buses.¹¹ That protest movement was coordinated by the newly created Montgomery Improvement Association. Mr. Gray was the lawyer for the MIA.¹² And the most visible leader of that organization was a previously unknown young minister named Martin Luther King, Jr. Mr. Gray was Dr. King's lawyer for several years until King moved to Atlanta.¹³

While the Rosa Parks case wended its way through the Alabama court system, Fred Gray filed a separate lawsuit in federal court that directly challenged the constitutionality of the Montgomery ordinance and the Alabama statute that required segregation on the buses.¹⁴ The

7. 347 U.S. 483 (1954); see GRAY, *supra* note 1, at 186.

8. One of Mr. Gray's law school professors encouraged him to consult with other lawyers and not to hesitate giving them credit for their help. GRAY, *supra* note 1, at 17. He has followed that advice consistently. I generally do not indicate the other lawyers with whom he worked on the cases discussed here, but the references to his memoir do acknowledge those other lawyers by name.

9. 352 U.S. 903 (1956) (per curiam).

10. GRAY, *supra* note 1, at 49–50, 55–57; see Parks v. City of Montgomery, 92 So. 2d 683, 684 (Ala. Ct. App. 1957).

11. GRAY, *supra* note 1, at 37 & n.3.

12. *Id.* at 52–53.

13. *Id.* at 53–54. Mr. Gray declined Dr. King's invitation to move with him to Atlanta, preferring to remain in Montgomery to continue his fight against segregation there. *Id.* at 145, 155.

14. Because of the way the prosecutor structured the charges against Mrs. Parks, her case did not present a clear opportunity for a direct challenge to the constitutionality of the ordinance. *Id.* at 56.

named plaintiffs in *Browder v. Gayle*¹⁵ included Claudette Colvin, whose arrest earlier in 1955 for refusing to relinquish her seat nearly precipitated a mass protest.¹⁶ Rosa Parks deliberately was omitted from the case in order to preempt any claim that the federal case represented a collateral attack on her state-court proceedings.¹⁷ The Supreme Court, in November 1956, summarily affirmed a three-judge district court ruling that the ordinance was unconstitutional, a decision that vindicated the Montgomery bus boycott and helped to lead to the desegregation of the buses.¹⁸

*B. Freedom of Association: NAACP v. Alabama ex rel. Patterson*¹⁹

Meanwhile, many segregationists thought that the Montgomery bus boycott must have been fomented by outside agitators and subversives. Alabama Attorney General John Patterson, claiming that the NAACP was a foreign corporation that had not qualified to do business in the state, demanded that the organization produce the names, addresses, and telephone numbers of all its Alabama members.²⁰ His theory was transparent if only implicit: the NAACP was behind the civil rights movement, helping African Americans gain admission to whites-only public universities such as the University of Alabama²¹ and supporting the bus boycott as well as other efforts to undermine segregation. If only the NAACP could be shut down, Alabama's otherwise contented Negroes would return to life as usual.

Fred Gray was local counsel to the NAACP throughout the litigation over the state's effort to prevent it from operating in Alabama. When the organization refused to surrender its membership records, a state judge issued a contempt order and imposed a fine of \$100,000. The dispute ultimately went to the Supreme Court, which ruled in *NAACP v. Alabama ex rel. Patterson* that the order to disclose the membership records violated the First Amendment. The Court reasoned that mandatory disclosure of membership information might deter individuals from joining or remaining in the organization for fear of physical or economic reprisal, particularly when the identity of the group's members had nothing to do with Alabama's purported interest

15. 142 F. Supp. 707 (M.D. Ala.) (three-judge court), *aff'd mem.*, 352 U.S. 903 (1956).

16. GRAY, *supra* note 1, at 43–45, 72.

17. *Id.* at 72.

18. *Id.* at 92–95.

19. 357 U.S. 449 (1958).

20. GRAY, *supra* note 1, at 105–06.

21. An African-American woman, Autherine Lucy, briefly attended the University of Alabama in 1956. See *infra* text accompanying notes 84–85.

in determining whether the NAACP was required to register to do business in the state.²² This foundational case established important principles about freedom of association and laid the foundation for a series of later decisions that struck down other efforts to harass or outlaw the NAACP and other controversial groups.²³

*C. Racial Gerrymandering: Gomillion v. Lightfoot*²⁴

Even before the *NAACP* case reached the Supreme Court, segregationist politicians launched another attack on civil rights by redrawing the boundaries of Tuskegee, a city with an unusually large proportion of African-American professionals who worked at Tuskegee Institute (now Tuskegee University) and a large Veterans Administration hospital that served only black patients during the segregation era.²⁵ The gerrymandering law²⁶ transformed the shape of Tuskegee from a square to what Mr. Gray described as a “25-sided sea dragon”²⁷ and what the Supreme Court in *Gomillion v. Lightfoot*²⁸ described as “an uncouth twenty-eight-sided figure.”²⁹ This cartographic sleight of hand removed all but four or five of the approximately 400 African-American voters

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22. *Id.* at 462–66; GRAY, *supra* note 1, at 107. This ruling did not discourage Patterson, who was elected governor in November 1958 after a bruising primary against George Wallace, or other state officials. They litigated for six more years, including three more trips to the Supreme Court, before the NAACP was allowed to operate there. *See NAACP v. Ala. ex rel. Flowers*, 377 U.S. 288, 290–93 (1964) (summarizing subsequent developments); GRAY, *supra* note 1, at 106.
23. *See, e.g.*, *Gibson v. Fla. Legislative Investigation Comm.*, 372 U.S. 539 (1963); *NAACP v. Button*, 371 U.S. 415 (1963); *Louisiana ex rel. Gremillion v. NAACP*, 366 U.S. 293 (1961); *Shelton v. Tucker*, 364 U.S. 479 (1960); *Bates v. City of Little Rock*, 361 U.S. 516 (1960); *see generally* NUMAN V. BARTLEY, *THE RISE OF MASSIVE RESISTANCE: RACE AND POLITICS IN THE SOUTH DURING THE 1950S*, 212–24 (1969); MARK V. TUSHNET, *MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936–1961*, 283–300 (1994); Walter F. Murphy, *The South Counterattacks: The Anti-NAACP Laws*, 12 W. POL. Q. 371, 374–80, 386–88 (1959).
24. 364 U.S. 339 (1960).
25. *See* GRAY, *supra* note 1, at 109.
26. Act of July 15, 1957, No. 140, 1957 Ala. Acts 185.
27. GRAY, *supra* note 1, at 113.
28. 364 U.S. 339 (1960). I have discussed this case in considerably more detail in an article that appeared in another civil rights symposium. *See* Jonathan L. Entin, *Of Squares and Uncouth Twenty-Eight-Sided Figures: Reflections on Gomillion v. Lightfoot After Half a Century*, 50 WASHBURN L.J. 133 (2010).
29. *Gomillion*, 364 U.S. at 340.

from Tuskegee while leaving every single white voter within the city limits.³⁰

Mr. Gray filed *Gomillion v. Lightfoot* on behalf of many of the excluded voters, but the lawsuit faced a seemingly insurmountable obstacle in the form of the Supreme Court's 1946 decision in *Colegrove v. Green*,³¹ which had rejected a challenge to the way a state had drawn its congressional districts as a nonjusticiable political question. So daunting was this obstacle that national NAACP general counsel Robert Carter, who worked with Gray on both *Browder v. Gayle* and *NAACP v. Alabama ex rel. Patterson*, initially discouraged him from pursuing the Tuskegee case.³² Gray eventually persuaded Carter that the lawsuit could succeed, and the two divided the oral argument in the Supreme Court.³³

At the very beginning of the *Gomillion* litigation, Mr. Gray obtained a map showing the Tuskegee city limits before and after passage of the gerrymandering law. He never got to use the map in the district court, which dismissed the case on the basis of *Colegrove v. Green*.³⁴ But he had the map mounted on an easel when he appeared in the Supreme Court.³⁵ Scarcely a minute into his argument, he was interrupted by Justice Frankfurter, a stickler for procedure and the author of the *Colegrove* opinion. Instead of a professorial scolding about jurisdictional technicalities, Frankfurter asked the twenty-nine-year-old lawyer to show him the location of Tuskegee Institute. When Gray pointed to the map showing that the Institute no longer was within the city limits, the justice was incredulous.³⁶ Indeed, Frankfurter wrote the opinion for a unanimous Court striking down the Tuskegee gerrymandering law. Unlike *Colegrove*, the Tuskegee case involved a complete denial of the right to vote and therefore did not involve a nonjusticiable political question.³⁷ As if to underscore the point, the Court reproduced Mr. Gray's map as an appendix to its opinion.³⁸

30. *Id.* at 341; GRAY, *supra* note 1, at 3, 113–14.

31. 328 U.S. 549 (1946).

32. GRAY, *supra* note 1, at 114–15. Carter's skepticism seemed well founded when the case failed in the lower courts. *Gomillion v. Lightfoot*, 167 F. Supp. 405 (M.D. Ala. 1958), *aff'd*, 270 F.2d 594 (5th Cir. 1959).

33. GRAY, *supra* note 1, at 115, 117.

34. *Id.* at 116.

35. *Id.* at 3, 117–18.

36. *Id.* at 4, 118.

37. *Gomillion*, 364 U.S. at 346–47.

38. *Id.* at 348. Mr. Gray also has reproduced the map. See GRAY, *supra* note 1, at 228.

Mr. Gray believes that *Gomillion v. Lightfoot* was his “most important” case.³⁹ It was the Supreme Court’s first racial gerrymandering decision, and it has become a leading precedent in the law of voting rights. It also has figured prominently in equal protection doctrine more generally, as Alabama’s unsubtle effort to exclude African Americans from Tuskegee has become a leading example of how to infer discriminatory intent in constitutional cases.⁴⁰ Moreover, *Gomillion v. Lightfoot* laid a key part of the foundation for *Baker v. Carr*⁴¹ and the long line of reapportionment decisions that followed from that ruling.

D. Constitutionalizing the Law of Defamation:
*New York Times Co. v. Sullivan*⁴²

Even before *Gomillion* was argued in the Supreme Court, yet another of Mr. Gray’s landmark cases was getting started. On March 29, 1960, less than two months after the first sit-in demonstration in Greensboro, North Carolina, and not long after Alabama authorities had indicted Martin Luther King and had him arrested for perjury in connection with his state income taxes,⁴³ the *New York Times* published a full-page advertisement condemning segregation and seeking political, moral, and financial support for the civil rights movement.⁴⁴ The publication of this advertisement set in motion the events that culminated in the Supreme Court’s decision in *New York Times Co. v. Sullivan*.⁴⁵ Claiming that several statements in the ad defamed him, Montgomery Police Commissioner L.B. Sullivan filed a libel suit seeking \$500,000 in damages. Sullivan named as defendants the newspaper and four Alabama ministers whose names appeared in the ad. The inclusion of Ralph Abernathy, Joseph Lowery, S.S. Seay, Sr., and Fred Shuttlesworth as parties meant that the case, which arose under Alabama law, would have to proceed in the state courts because the case

39. GRAY, *supra* note 1, at 119.

40. *See also* Yick Wo v. Hopkins, 118 U.S. 356 (1886).

41. 369 U.S. 186 (1962). *See generally* Law Review Symposium 2011: Baker v. Carr After 50 Years: Appraising the Reapportionment Revolution: Introduction, 62 CASE W. RES. L. REV. 941 (2012).

42. 376 U.S. 254 (1964).

43. GRAY, *supra* note 1, at 146; *see infra* Part III.B.

44. Comm. to Defend Martin Luther King and the Struggle for Freedom in the South, *Heed Their Rising Voices*, N.Y. TIMES, Mar. 29, 1960, at 25, reprinted in N.Y. Times Co. v. Sullivan, 376 U.S. 254 App. (1964).

45. 376 U.S. 254 (1964).

would not fall under the diversity jurisdiction of the federal courts.⁴⁶ Fred Gray represented the four ministers.⁴⁷

At trial he presented evidence that the names of the ministers had been included without their knowledge or consent and argued that Sullivan had offered only one slender piece of testimony about their involvement: they had not responded to his letter demanding that they retract the allegedly defamatory statements in the ad.⁴⁸ To that contention Gray noted that the ministers had nothing to do with the ad and therefore could not “retract that which they had not tracted.”⁴⁹ Nevertheless, the jury quickly returned a verdict for the full \$500,000 that Sullivan had sought.⁵⁰

All of the defendants filed timely appeals. Unfortunately, the ministers could not afford to post a *supersedeas* bond and, for strategic reasons, the *Times* would not agree to let them subscribe to its bond.⁵¹ This meant that Sullivan could sell their assets to satisfy the judgment even during the pendency of the appeal. Although successful plaintiffs customarily did not levy against the property of a defendant before the conclusion of the appellate process, Sullivan did in fact levy against property belonging to all of the ministers.⁵² Of course, this was no ordinary case: the whole point of the litigation was to punish civil rights activists⁵³ and to make it difficult, if not impossible, for the national press to report on the movement.⁵⁴ The Supreme Court recognized the significance of the case and overturned the judgment, establishing strong First Amendment protection for critics of public officials. This ruling provided much of the grounding for modern defamation law. In order for public officials and public figures to recover, they must prove, by clear and convincing evidence, that a defamatory statement was

46. Mr. Gray had opened his first law office in space he sublet from Dr. Seay. GRAY, *supra* note 1, at 28.

47. *Id.* at 156. Two other Alabama lawyers, including Solomon S. Seay, Jr., were part of the ministers’ defense team that Mr. Gray coordinated. *Id.* at 157.

48. *Id.* at 160.

49. *Id.* at 160–61.

50. *Sullivan*, 376 U.S. at 256; GRAY, *supra* note 1, at 161.

51. GRAY, *supra* note 1, at 161–62.

52. *Id.*

53. *Id.* at 162.

54. Several other Alabama officials also had sued the *Times*. See *Sullivan*, 376 U.S. at 278 n.18. The newspaper faced potential liability of \$5.6 million in eleven libel suits, and CBS faced another potential liability of \$1.7 million in five others. *Id.* at 295 (Black, J., concurring).

published with actual malice—in other words, with knowledge that the statement was false or with reckless disregard for its truth.⁵⁵

Of particular significance, the Court accepted the argument that Mr. Gray had made at trial: that “there was no evidence whatever” that the ministers were responsible for any “erroneous statements” in the ad.⁵⁶ On a practical level, this ruling also meant that Sullivan could not keep the ministers’ property against which he had levied. They never got back the actual property at issue, but Sullivan did have to remit the proceeds of the sale of those assets.⁵⁷

III. OTHER CASES

A. The Tuskegee Syphilis Litigation

Mr. Gray’s best-known case that did not reach the Supreme Court dealt with the infamous Tuskegee syphilis study.⁵⁸ This forty-year project was designed to examine the effects of untreated syphilis, but participants were never told the purpose of the study, never received accurate information about their health, and never got treatment even when such treatment was readily available. The lawsuit resulted in a settlement that provided financial compensation to the living participants and to the heirs of those who had died.⁵⁹ And in 1997, President Bill Clinton formally apologized on behalf of the United States government for what it had done.⁶⁰

Beyond this case and the high-profile Supreme Court cases discussed earlier, Fred Gray played an important role in numerous others that dramatically reshaped Alabama. Some of them had significant implications for more general legal developments, paving the way for later Supreme Court decisions and for cases elsewhere in the nation. They

55. *Id.* at 279–80, 285–86. The *Sullivan* case dealt only with public officials, but the actual-malice rule soon was extended to public figures. See *Curtis Publ’g Co. v. Butts*, 388 U.S. 130 (1967).

56. *Sullivan*, 376 U.S. at 286.

57. GRAY, *supra* note 1, at 163.

58. See *Pollard v. United States*, 384 F. Supp. 304 (M.D. Ala. 1974) (denying defendants’ motions for summary judgment on most federal claims); *Pollard v. United States*, 69 F.R.D. 646 (M.D. Ala. 1976) (awarding attorneys’ fees following settlement). Mr. Gray has written his own account of that case. FRED D. GRAY, *THE TUSKEGEE SYPHILIS STUDY* (2013). For other accounts, see JAMES H. JONES, *BAD BLOOD: THE TUSKEGEE SYPHILIS EXPERIMENT* (new and expanded ed. 1993); SUSAN M. REVERBY, *EXAMINING TUSKEGEE: THE INFAMOUS SYPHILIS STUDY AND ITS LEGACY* (2009).

59. GRAY, *supra* note 1, at 300.

60. *Id.* at 367.

involved sit-in demonstrators, Freedom Riders, the desegregation of public schools and universities, and voting rights.

B. The Perjury Trial of Martin Luther King

Martin Luther King moved to Atlanta in late 1959, but the Alabama authorities continued their effort to discredit him. Acting at the behest of John Patterson, who by then had become governor,⁶¹ the prosecutor in Montgomery indicted Dr. King for perjury in connection with his 1956 and 1958 state income tax returns.⁶² This apparently was the first time that anyone in Alabama ever had been charged with a felony in connection with alleged tax evasion.⁶³ Moreover, state authorities took the public step of having him arrested in Atlanta instead of quietly notifying him of charge so that he could arrange to return discreetly to post bond as was customary in many criminal cases.⁶⁴

The perjury charge threatened to destroy Dr. King's credibility as the moral leader of the civil rights movement by portraying him as a selfish, dishonest con man who was enriching himself at the expense of gullible supporters.⁶⁵ As noted earlier, the advertisement that gave rise to *New York Times Co. v. Sullivan* sought to raise funds at least in part to support his legal defense in the perjury case.⁶⁶ Fred Gray coordinated the legal team that represented Dr. King in the perjury case.⁶⁷ The lawyers meticulously presented their defense, but mindful of the verdict against the ministers at Commissioner Sullivan's trial they were not entirely confident that the jurors would decide the case on the evidence.⁶⁸ Much to their surprise and relief, the all-white jury returned a verdict of not guilty.⁶⁹ That verdict enabled Dr. King to retain his credibility. It also might account for why this potentially devastating trial has fallen into relative obscurity despite its danger to Dr. King and the civil rights movement.⁷⁰

61. See *supra* note 22.

62. GRAY, *supra* note 1, at 146.

63. *Id.* at 147.

64. *Id.* at 146.

65. *Id.* at 147–48.

66. See *supra* text accompanying notes 43–44.

67. GRAY, *supra* note 1, at 149.

68. See *id.* at 152–54.

69. *Id.* at 154.

70. *Id.* Perhaps that helps to explain why this episode has received such limited scholarly attention. For more detailed discussion, see Edgar Dyer, *A "Triumph of Justice" in Alabama: The 1960 Perjury Trial of Martin Luther King, Jr.*, 88 J. AFR.-AM. HIST. 245 (2003); Leonard S. Rubinowitz, *Martin*

C. Sit-In Demonstrators

The King perjury trial was not the only case that grew out of events discussed in the advertisement that gave rise to *New York Times Co. v. Sullivan*. One of the statements at issue in the ad related to the expulsion of several Alabama State students in connection with a civil rights demonstration. The ad mistakenly said that the demonstration had taken place on the steps of the state capitol when in fact the students had held a sit-in at a lunch counter in the county courthouse.⁷¹ This demonstration took place in late February 1960, one of the hundreds of similar protests that were inspired by the Greensboro sit-in at the beginning of the month.⁷² Although the students were not arrested, the college president yielded to pressure from Governor Patterson and expelled the students.⁷³

Mr. Gray filed suit in federal court, claiming that the expulsions without notice or hearing deprived the students of due process of law. The United States Court of Appeals for the Fifth Circuit, in *Dixon v. Alabama State Board of Education*,⁷⁴ ruled that the vital importance of education meant that the state could not arbitrarily dismiss, for disciplinary reasons, a student who otherwise was in good standing. Carefully limiting its ruling to cases involving misbehavior as opposed to unsatisfactory academic performance, the court explained that the institution had to provide the students with specific notice of the charges against them and an opportunity for at least a rudimentary adversarial proceeding before expelling them.⁷⁵

This decision had profound implications.⁷⁶ It marked the first time that a court had held that students at public colleges and universities had a sufficiently strong interest in obtaining an education that procedural due process required a hearing before they could be dismissed for misbehavior. The Supreme Court later described *Dixon* as a “landmark decision” when it found that public school students also enjoyed due process protection that entitled them to some kind of hearing before being suspended or expelled.⁷⁷

Luther King’s Perjury Trial: A Potential Turning Point and a Footnote to History, 5 IND. J.L. & SOC. EQUALITY 237 (2017).

71. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 259 (1964).

72. See GRAY, *supra* note 1, at 165–66.

73. *Id.* at 166–67.

74. 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961).

75. *Id.* at 158–59.

76. See GRAY, *supra* note 1, at 168–69.

77. Goss v. Lopez, 419 U.S. 565, 576 n.8 (1975).

But *Dixon* had even broader significance. Existing doctrine reflected the right-privilege distinction: due process required a pre-deprivation hearing only when a constitutional right was at stake, and courts had defined rights narrowly; interests that did not rise to the level of constitutional rights were treated as privileges that were not subject to due process protections.⁷⁸ Although the Supreme Court had expressed ambivalence about the rigidity of the right-privilege distinction when *Dixon* arose, it would be another decade before the Court formally abandoned that approach. And the justices invoked *Dixon* when they finally did so.⁷⁹

D. Freedom Riders

When the Freedom Riders reached Montgomery in May 1961, Fred Gray helped to represent them. A mob of white rioters attacked the riders when they arrived at the local Greyhound bus station.⁸⁰ After this group continued on their trip several days later, another group, including Ralph Abernathy and Yale University chaplain William Sloan Coffin, was arrested at the Trailways terminal while seeking service at the whites-only lunch counter. Mr. Gray took a leading role in the litigation arising from these events.⁸¹ First, he handled the criminal cases in the Alabama courts. Although the defendants were found guilty at trial, the Supreme Court eventually overturned the convictions.⁸² Meanwhile, he also obtained an injunction directing Greyhound, Trailways, and their affiliates to operate their buses and terminals on a desegregated basis.⁸³

E. Desegregation of Public Education

Alabama implacably resisted desegregation of public education at any level. An African-American student attended the University of Alabama for a few days in February 1956. Autherine Lucy applied while Fred Gray was still in law school and was admitted in February 1956 pursuant to a court order that the state litigated all the way to the

78. As Justice Holmes famously put it in a case involving a police officer who was fired for engaging in political activity: “The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.” *McAuliffe v. Mayor of New Bedford*, 29 N.E. 517, 517 (Mass. 1892).

79. See *Goldberg v. Kelly*, 397 U.S. 254, 263 n.9 (1970); see also *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 n.2 (1969) (citing *Dixon* in establishing that public school students enjoy free speech rights).

80. GRAY, *supra* note 1, at 173–75.

81. *Id.* at 175–78.

82. *Abernathy v. State*, 155 So. 2d 586 (Ala. Ct. App. 1962), *rev’d mem.*, 380 U.S. 447 (1965).

83. *Lewis v. Greyhound Corp.*, 199 F. Supp. 210 (M.D. Ala. 1961).

Supreme Court.⁸⁴ Segregationists rioted against her presence on campus, and she was first suspended (supposedly for her own safety) and then expelled (supposedly for criticism that she and her lawyers made of the university's handling of the situation).⁸⁵ Otherwise, as late as 1963 not a single public school or university in the state had begun to desegregate. Mr. Gray played a major role in ending segregation in those institutions.

His efforts began with his work on behalf of Vivian Malone and James Hood; she would become the University of Alabama's first African-American graduate. They were admitted to the university in June 1963 pursuant to another federal court order, but not before Governor George Wallace's notorious "stand in the schoolhouse door" as an act of symbolic defiance.⁸⁶ A few months later, Mr. Gray helped to obtain an injunction that led to the admission of Harold Franklin as the first African-American student at Auburn University.⁸⁷

Mr. Gray also played a significant part in a series of cases that sought to desegregate public elementary and secondary schools around the state.⁸⁸ The most important of these lawsuits involved Macon County, where Governor Wallace intervened to prevent local authorities from complying with a federal court order to desegregate the Tuskegee schools.⁸⁹ Wallace's intervention proved to be a colossal legal blunder, because it afforded Mr. Gray the opportunity to add the governor as a defendant and led ultimately to an injunction requiring the desegregation of *all* public schools throughout Alabama.⁹⁰

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84. *Lucy v. Adams*, 134 F. Supp. 235 (N.D. Ala.), *aff'd per curiam*, 228 F.2d 619 (5th Cir. 1955), *cert. denied*, 351 U.S. 931 (1956). The lawsuit seeking Ms. Lucy's admission to the university was filed in 1953; the legal process leading to her matriculation consumed the better part of three years. See E. CULPEPPER CLARK, *THE SCHOOLHOUSE DOOR* 39 (1993); JACK GREENBERG, *CRUSADERS IN THE COURTS* 225 (1994); GRAY, *supra* note 1, at 186.
85. See *United States v. Alabama*, 628 F. Supp. 1137, 1141–42 (N.D. Ala. 1985), *rev'd on other grounds*, 828 F.2d 1532 (11th Cir. 1987). See generally CLARK, *supra* note 84, at 53–104.
86. *Lucy v. Adams*, 224 F. Supp. 79 (N.D. Ala. 1963), *aff'd per curiam sub nom. McCorvey v. Lucy*, 328 F.2d 892 (5th Cir. 1964); GRAY, *supra* note 1, at 187–88. See generally CLARK, *supra* note 84, at 145–237.
87. *Franklin v. Parker*, 223 F. Supp. 724 (M.D. Ala. 1963), *aff'd per curiam as modified*, 331 F.2d 841 (5th Cir. 1964); GRAY, *supra* note 1, at 191–92.
88. See GRAY, *supra* note 1, at 198–203.
89. *Id.* at 203–12; see *Lee v. Macon Cty. Bd. of Educ.*, 231 F. Supp. 743 (M.D. Ala. 1964) (three-judge court).
90. GRAY, *supra* note 1, at 209–10; see *Lee v. Macon Cty. Bd. of Educ.*, 267 F. Supp. 458, 480 (M.D. Ala. 1967) (three-judge court), *aff'd mem. sub nom. Wallace v. United States*, 389 U.S. 215 (1967).

He also took a leading role in a desegregation case involving public schools in Montgomery that led to another major decision. Mr. Gray obtained an order requiring that the public schools begin desegregation in the fall of 1964.⁹¹ But desegregation of faculty lagged far behind. Accordingly, he returned to court in *Carr v. Montgomery County Board of Education*.⁹² The district court imposed specific numerical hiring goals and timetables for each school in the district.⁹³ Although the court of appeals thought that this approach was overly rigid,⁹⁴ the Supreme Court unanimously upheld the district court's remedial order.⁹⁵ This landmark ruling authorized courts to use goals and timetables as a remedy for racial discrimination, a principle that the high court itself has endorsed in several subsequent cases that relied on the *Montgomery County* ruling.⁹⁶

F. Voting Rights

The Tuskegee gerrymandering case, *Gomillion v. Lightfoot*,⁹⁷ protected the right of African Americans to vote. But that case was only one of Fred Gray's contributions to voting rights law. He played a central role in the litigation surrounding the Selma-Montgomery march that helped to pave the way for passage of the Voting Rights Act of 1965,⁹⁸ and he filed two of the earliest and most consequential lawsuits under that new law.

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91. *Carr v. Montgomery Cty. Bd. of Educ.*, 232 F. Supp. 705 (M.D. Ala. 1964). That ruling required the desegregation of the first, tenth, eleventh, and twelfth grades in 1964. *Id.* at 709. The court subsequently ordered the desegregation of all grades by the fall of 1967. *Carr v. Montgomery Cty. Bd. of Educ.*, 253 F. Supp. 306, 307 (M.D. Ala. 1966). The subsequent order also directed that the board of education take steps to desegregate the faculty in all schools. *See id.* at 310.
 92. 289 F. Supp. 647 (M.D. Ala. 1968), *aff'd as modified*, 400 F.2d 1 (5th Cir. 1968), *rev'd sub nom.* *United States v. Montgomery Cty. Bd. of Educ.*, 395 U.S. 225 (1969).
 93. *Id.* at 654. *See* GRAY, *supra* note 1, at 202.
 94. *Carr*, 400 F.2d at 7–8.
 95. *Montgomery Cty. Bd. of Educ.*, 395 U.S. at 235.
 96. *See, e.g.*, *United States v. Paradise*, 480 U.S. 149, 180 n.30 (1987) (desegregation of state police department); *Local 28 of the Sheet Metal Workers' Int'l Ass'n v. Equal Emp't Opportunity Comm'n*, 478 U.S. 421, 450 n.27 (1986) (alleviation of discriminatory labor union membership policies); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 19–20 (1971) (desegregation of public schools).
 97. *See supra* Part II.C.
 98. Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 52 U.S.C. §§ 10301–10702 (2012)).

Following the events of Bloody Sunday at the Edmund Pettus Bridge in Selma, civil rights advocates promised that they would complete the march to Montgomery that state and local law enforcement officers had so brutally suppressed. On March 8, 1965, the day after Bloody Sunday, Fred Gray filed suit in federal district court seeking an order requiring Governor Wallace and other officials to permit the march to proceed.⁹⁹ In *Williams v. Wallace*,¹⁰⁰ the United States District Court for the Middle District of Alabama issued a preliminary injunction directing state and local authorities not only to allow the march but also to protect the marchers, and it also approved the detailed plans for the route of the demonstration.¹⁰¹

After the Voting Rights Act was adopted, due in no small measure to the Selma-Montgomery march, Fred Gray filed two of the earliest lawsuits under the new law. The first of these cases, *Sellers v. Trussell*,¹⁰² helped to establish the principle that proof of a disparate impact on a protected class could establish a statutory violation.¹⁰³ The dispute arose when the Alabama legislature extended the four-year terms of some incumbent county commissioners to six years. That move prevented African Americans in that county from voting for those positions for two more years and kept in place commissioners who had been elected when blacks were not allowed to cast ballots, so the extension of the incumbents' terms had a discriminatory effect.¹⁰⁴

Mr. Gray's other case was the first vote-dilution suit brought under the Voting Rights Act and paved the way for numerous others.¹⁰⁵ *Smith*

99. GRAY, *supra* note 1, at 216.

100. 240 F. Supp. 100 (M.D. Ala. 1965). For a discussion of the broader First Amendment implications of this decision, see Ronald J. Krotoszynski, Jr., *Celebrating Selma: The Importance of Context in Public Forum Analysis*, 104 YALE L.J. 1411 (1995).

101. *Williams*, 240 F. Supp. at 108, 110; *id.* at 120–21; see GRAY, *supra* note 1, at 216–17. The court of appeals denied the state's emergency motion for a stay of the district court's order. *Williams v. Wallace*, 10 Race Rel. L. Rep. 230 (5th Cir. Mar. 19, 1965); see GRAY, *supra* note 1, at 217 (detailing the hectic trip to New Orleans for an expedited hearing on the state's request of a stay). Mr. Gray and his wife also hosted most of the march leaders in their home for a meeting to draw up the plans for the fifth and final day of the march, and he was among the delegates who met with Governor Wallace in the state capitol in a fruitless effort to persuade him to support voting rights for African Americans. *Id.* at 218–19.

102. 253 F. Supp. 915 (M.D. Ala. 1966) (three-judge court).

103. See GRAY, *supra* note 1, at 246–47. The Supreme Court endorsed this principle under Title VII five years later. See *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

104. *Sellers*, 253 F. Supp. at 917.

105. GRAY, *supra* note 1, at 249–50.

*v. Paris*¹⁰⁶ challenged a change to the system for electing members of the Democratic Party executive committee in George Wallace's home county.¹⁰⁷ For many years, the overwhelming majority of committee members were elected from districts, which were referred to as beats. Many African Americans registered to vote for the first time after the passage of the Voting Rights Act. Several African-Americans who lived in majority-black beats ran for seats on the executive committee. The party thereupon adopted a system of at-large election for all executive committee members. Although the African-American candidates won in their beats, they lost the at-large contest to white candidates in a county with a large majority of white voters who refused to vote for black candidates.¹⁰⁸ This sequence of events, the United States District Court for the Middle District of Alabama concluded, provided compelling evidence of a discriminatory purpose to dilute the votes of African Americans.¹⁰⁹ This scheme of vote dilution therefore was unlawful.¹¹⁰

IV. THE SYMPOSIUM

Fred Gray has spoken many times at our law school and at the university. He has been a member of the board of trustees and has received numerous tributes, including an honorary degree from the university in 1992 and the Centennial Medal, the law school's highest award, in 1993.¹¹¹ He also is no stranger to the pages of this journal.¹¹² But the editors of the *Case Western Reserve Law Review* decided to conduct a daylong symposium focusing on Fred Gray's extraordinary legal career. That symposium took place on October 14, 2016. This issue contains articles that were presented on that occasion.¹¹³

106. 257 F. Supp. 901 (M.D. Ala. 1966), *modified and aff'd per curiam*, 386 F.2d 979 (5th Cir. 1967).

107. GRAY, *supra* note 1, at 249–50.

108. *Smith*, 257 F. Supp. at 903.

109. *Id.* at 904.

110. *Id.* at 905. The United States Court of Appeals for the Fifth Circuit fully endorsed the district court's reasoning, but modified the remedy to take effect sooner than the lower court had ordered. *Id.* at 980.

111. *See* GRAY, *supra* note 1, at 400. Indeed, on the day of this symposium the university conferred its Distinguished Alumnus Award on Mr. Gray.

112. *See* Fred D. Gray, *The Sullivan Case: A Direct Product of the Civil Rights Movement*, 42 CASE W. RES. L. REV. 1223 (1992); Fred D. Gray, *Bus Ride to Justice: A Conversation with Fred Gray (Introduction by Jonathan L. Entin)*, 64 CASE W. RES. L. REV. 733 (2014).

113. A video recording of the entire symposium is available online. Case Western Reserve University School of Law, *In Honor of Fred Gray: Making Civil Rights Law from Rosa Parks to the 21st Century*, YOUTUBE (Oct. 14, 2016),

David Garrow, eminent historian of the civil rights movement,¹¹⁴ begins the symposium by placing Mr. Gray's work on the Montgomery bus boycott into broader perspective.¹¹⁵ Professor Garrow explains the background to that famous protest, including the role of the Women's Political Council and its leaders who helped to mobilize and implement the boycott. In the process, he shows how Mr. Gray went beyond litigating on behalf of Rosa Parks and those who directly challenged the constitutionality of Montgomery's segregation ordinance to providing vital behind-the-scenes leadership that helped to make the boycott effective.

The next three articles address various aspects of school desegregation. Kevin Brown focuses on the fear of interracial sexual relations that lay at the heart of the justification for segregation, especially in educational institutions.¹¹⁶ He notes that the Supreme Court first endorsed school desegregation in *Brown v. Board of Education*,¹¹⁷ promoted school desegregation in a series of subsequent rulings,¹¹⁸ then limited the scope of remedies in school desegregation cases,¹¹⁹ and finally loosened the standards for finding that previously segregated districts had attained unitary status.¹²⁰ Professor Brown also traces the evolution of attitudes toward interracial sexual relationships from colonial times to the present and suggests not only that a connection exists between the effort to desegregate public education and the acceptance of such relationships, but also that the growing acceptance has persisted even as the courts have withdrawn their engagement with school desegregation.

Next, Wendy Parker traces the process of school desegregation in Alabama through a careful examination of *Lee v. Macon County Board*

<https://www.youtube.com/watch?v=J3T1MHjFBwI> [<https://perma.cc/55PN-A2UZ>].

114. See, e.g., DAVID J. GARROW, BEARING THE CROSS: MARTIN LUTHER KING, JR., AND THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE (1986); DAVID J. GARROW, PROTEST AT SELMA: MARTIN LUTHER KING, JR., AND THE VOTING RIGHTS ACT OF 1965 (1978); see also JO ANN GIBSON ROBINSON, THE MONTGOMERY BUS BOYCOTT AND THE WOMEN WHO STARTED IT (David J. Garrow ed., 1987).
115. David Garrow, *In Honor of Fred Gray: Making Civil Rights Law*, 67 CASE W. RES. L. REV. 1045 (2017).
116. Kevin Brown, *The Enduring Integration School Desegregation Helped to Produce*, 67 CASE W. RES. L. REV. 1055 (2017).
117. 347 U.S. 483 (1954).
118. See, e.g., *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971); *Green v. Cty. Sch. Bd.*, 391 U.S. 430 (1969).
119. See, e.g., *Milliken v. Bradley*, 418 U.S. 717 (1974).
120. See, e.g., *Missouri v. Jenkins*, 515 U.S. 70 (1995); *Bd. of Educ. v. Dowell*, 498 U.S. 237 (1991).

of *Education*,¹²¹ the long-running litigation in which Fred Gray has played such a prominent role.¹²² Professor Parker documents the progress in desegregation throughout the state but also analyzes the persistence of racial inequality and disparity in Alabama schools, concluding with a thoughtful meditation about the uses and limitations of litigation as a means of effecting social reform.

Natasha Strassfeld builds on Professor Parker's concern about continuing racial disparities by examining the persistent disproportion in the placement of African American students in special education even after schools nominally have been desegregated.¹²³ This phenomenon, like tracking and ability grouping, can promote segregation within schools and reinforce racial isolation in communities and the nation as a whole. She also analyzes efforts to combat significantly disproportionate placement of students of color in special education classes as well as administrative efforts to address the practice.

Two other articles focus on race and health care, building on the lessons of the Tuskegee syphilis scandal. Jonathan Kahn addresses the intersection of race and patent law.¹²⁴ Specifically, he focuses on the growing trend of granting regulatory approval of and patent protection for drugs that are promoted for use in patients of a particular race. Professor Kahn strongly criticizes this development and raises both normative and scientific objections to incorporating race as an explicit aspect of the medical system.

Then Ruqaiyah Yearby builds directly on the lessons of the Tuskegee syphilis study by examining the extent to which economically disadvantaged minority children are exploited in medical research studies and the relationship between this exploitation and their access to health care more generally.¹²⁵ Specifically, she advocates a reformulation of the bioethical principle of justice to include a requirement that researchers provide a benefit to the population from which the research subjects are drawn.

The final portion of the symposium addresses more general issues. Leonard Rubinowitz uses the concept of courage as a lens for understanding the work of Fred Gray and other civil rights lawyers who put

121. See *supra* notes 88–90 and accompanying text.

122. Wendy Parker, *Why Alabama School Desegregation Succeeded (and Failed)*, 67 CASE W. RES. L. REV. 1091 (2017).

123. Natasha M. Strassfeld, *The Future of IDEA: Monitoring Disproportionate Representation of Minority Students in Special Education and Intentional Discrimination Claims*, 67 CASE W. RES. L. REV. 1121 (2017).

124. Jonathan Kahn, *Revisiting Racial Patents in an Era of Precision Medicine*, 67 CASE W. RES. L. REV. 1153 (2017).

125. Ruqaiyah Yearby, *Exploitation in Medical Research: Forty Years After the Tuskegee Syphilis Study*, 67 CASE W. RES. L. REV. 1171 (2017).

their safety and sometimes even their lives at risk in their work.¹²⁶ In addition to Mr. Gray, Professor Rubinowitz discusses Arthur Shores, the dean of black Alabama lawyers; Clifford Durr, a white Alabamian; Robert Carter, the general counsel of the NAACP; and Constance Baker Motley, associate counsel of the NAACP Legal Defense and Educational Fund. Courage for these purposes involves both professional and physical aspects, and Professor Rubinowitz explores all aspects of this subject in relation to these five different but significant lawyers.

My concluding article seeks to pick up on many of the themes addressed by the other authors and also to relate Fred Gray's remarkable career to broader debates about the utility of law as a vehicle for social reform.¹²⁷ Mr. Gray's work demonstrates that the role of a truly superior lawyer defies easy categorization. No doubt, he is an excellent litigator, but he also understands that winning a lawsuit is only the first step in a complex process and that the law is a means to an end for clients and others.

This was an extraordinary symposium. Like any extraordinary program, many persons made it possible. Deans Jessica Berg and Michael Scharf of the Case Western Reserve University School of Law enthusiastically supported this project from the instant that they heard about it. Their support went well beyond financial; they also made sure that everything went smoothly at every step of the process.

Thanks also to the *Case Western Reserve Law Review* for sponsoring the symposium and publishing these articles. Executive Symposium Editor Chad Aronson, Editor-in-Chief Sean Sweeney, and all of the other members of the *Law Review* have performed well beyond the call of duty.

Behind the scenes, Nancy Pratt and her staff made sure that the symposium appeared to be perfectly choreographed, even when they had to bail us out when we overlooked details that could have derailed the whole program.

Finally, Fred Gray graced us with his presence and his illuminating comments throughout the program and provided the reason for the symposium. Thank you, Fred, for everything.

126. Leonard S. Rubinowitz, *The Courage of Civil Rights Lawyers: Fred Gray and His Colleagues*, 67 CASE W. RES. L. REV. 1227 (2017).

127. Jonathan L. Entin, *Fred Gray and the Role of Civil Rights Lawyers*, 67 CASE W. RES. L. REV. 1277 (2017).