

## OVERCOMING AT THE UNIVERSITY OF ALABAMA

*Alfred L. Brophy\**

The editors of this new journal, perhaps taking their cue from John Winthrop's sermon on the *Arabella*, ask an important question at their embarkation: "Have we overcome?" Winthrop's sermon, delivered as he and his fellow travelers were crossing the Atlantic Ocean for a new world in 1630, addressed a fundamental question: the purpose of their settlement.<sup>1</sup> The editors' question invites a similar kind of introspection. In asking have we overcome, we might also wonder: Are we already where we want to be? And if we are not there yet, where might we go? What is it that we want to accomplish?

There are many ways to think about these questions. We might ask a narrower question about our role as students and scholars, "What good is legal scholarship anyway?" And even if we think scholarship can help redirect law, is there anything left to do? To further extend the analogy to Puritan writings, what is the nature of civil rights lawyers' "errand into the wilderness"?<sup>2</sup>

Several vignettes from the University of Alabama School of Law suggest that scholarship can make something of a difference. Take, for instance, Alabama law professor Jay Murphy. In the tough days following the Supreme Court's decision in *Brown v. Board of Education*, as the Alabama legislature contemplated its response to *Brown*, Murphy wrote an article against a proposal to close the public schools.<sup>3</sup> Murphy thought the plan unconstitutional, and he worked with calmer heads in the legislature

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1. JOHN WINTHROP, A MODEL OF CHRISTIAN CHARITY (1630), available at <http://religiousfreedom.lib.virginia.edu/sacred/charity.html>.

2. PERRY MILLER, ERRAND INTO THE WILDERNESS 1-15 (1956).

3. See generally Jay Murphy, *Can Public Schools Be "Private"?*, 7 ALA. L. REV. 48 (1954). See also Jay Murphy, *Some Judicial Limitations in Free Speech Protections*, 8 ALA. L. REV. 251 (1956) (Phi Beta Kappa address to the University).

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who made sure the plan did not pass. Murphy's victory, of course, was not the end of conflict in our state or our nation; however, it is testimony that scholars can sometimes talk to people of action, and together they can move forward in a positive fashion.

This harkens back to the call that young Professor Henry Tutwiler made at the University of Alabama in 1834. Tutwiler, still in his twenties and recently arrived in Alabama from the University of Virginia, spoke to the Alabama student literary societies about students' and teachers' duties to think for themselves. In recalling the Dark Ages, Tutwiler blamed them on unquestioning following of authority.<sup>4</sup> "What," Tutwiler asked

but the disposition to receive at second hand the opinions of others without examination, shed such disastrous twilight, for so many centuries, over the human intellect—when it was a sufficient reason for theories the most absurd and repugnant to common sense to say *the master hath said it*?<sup>5</sup>

Liberation came when those ideas fell away:

[W]hen the human mind was freed from the trammels of authority it sprang forward with an elasticity which has not yet ceased to act. The ardent inquirer after knowledge will never give his assent but upon reflection; neither will he seek for arguments merely to support preconceived opinions: 'his most anxious inquiry will be *what is truth?*' and he will 'woo her with the unwearying ardor of a lover.' As *accuracy* is only another name for *truth*, let me urge upon you the importance of aiming at it in all your acquisitions; at least, *learn one thing thoroughly*, with which, as a standard, you may be able to compare your other knowledge.<sup>6</sup>

Close followers of oratory in the 1830s will hear parallels between Tutwiler's speech and *The American Scholar* address Ralph Waldo Emerson gave three years later in 1837 to the Harvard Phi Beta Kappa Society.<sup>7</sup> I will even hazard a bold statement here. If Southern intellectual historians were as numerous as those of New England, we might hear as much about Tutwiler's speech as we do of Emerson's *American Scholar*.<sup>8</sup>

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4. See HENRY TUTWILER, ADDRESS DELIVERED BEFORE THE EROSOPHIC SOCIETY AT THE UNIVERSITY OF ALABAMA AUG. 9, 1834 12 (Tuscaloosa, Robinson & Davenport 1834) (on file with the Alabama Civil Rights & Civil Liberties Law Review).

5. *Id.*

6. *Id.*

7. See generally KENNETH S. SACKS, UNDERSTANDING EMERSON: "THE AMERICAN SCHOLAR" AND HIS STRUGGLE FOR SELF-RELIANCE 5–20 (2003).

8. See Alfred L. Brophy, "The Law of the Descent of Thought": Law, History, and Civilization in Antebellum Literary Addresses, 20 LAW & LITERATURE 343 (2008) (drawing inferences about

We know far too little about Professor Tutwiler, but some of the fragments of his thought that do survive hint at his mind and his humanity. We know he was a leader of the American Colonization Society, a moderate antislavery organization in the 1820s and 1830s, and that he worked with James G. Birney, who later ran for president on the Liberty Party ticket.<sup>9</sup> Tutwiler stands as a person whose promise as an intellectual leader was unfulfilled, or at least whose legacy is undocumented. He left the University in the late 1830s, as the University, like the South more generally, became more ardently proslavery; he then taught for a while at La-Grange College, and he later founded Green Springs School in Greene County (now Hale County), Alabama.<sup>10</sup>

The University of Alabama faculty and the *Alabama Law Review* have emerged in more recent debates about our state's and our nation's struggle to define and interpret civil rights. The law review's first issue of 1963—a year of trouble for both the University and our nation—began with a brave speech by Dean M. Leigh Harrison, *The Law and the Changing Times*, in which Harrison had the fortitude to attack the popular idea “that the judge is a type of I.B.M. machine.”<sup>11</sup> Shortly after that, the *Alabama Law Review* celebrated Hugo Black's eightieth birthday with an essay by one of his former clerks, the Birmingham lawyer Jerome A. Cooper.<sup>12</sup> Perhaps that began to make amends for the failure to invite Mr. Justice Black to his law school class's fiftieth reunion in 1956 because of local disdain for his position on *Brown*. Two years later, the law review published an address to the Alabama ACLU by Justice William O. Douglas,<sup>13</sup> along with student commentary on the African-American members of the Alabama Bar<sup>14</sup> and a study of political attitudes towards civil rights of the 1969 graduating class.<sup>15</sup> That social science research revealed important divisions between students from more liberal Birmingham and those from more conservative Black Belt counties.<sup>16</sup> In the 1960s, Alabama law professor Roy Lucas

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Alabama's antebellum intellectual history from literary addresses given by faculty and visitors at the University of Alabama).

9. See JOHN W. QUIST, *RESTLESS VISIONARIES: THE SOCIAL ROOTS OF ANTEBELLUM REFORM IN ALABAMA AND MICHIGAN* 317 (1998).

10. 4 THOMAS MCADORY OWEN, *HISTORY OF ALABAMA AND DICTIONARY OF ALABAMA BIOGRAPHY 1694–95* (S. J. Clarke Publ'g Co. 1921); see also WILLIS G. CLARK, *HISTORY OF EDUCATION IN ALABAMA 1702–1889*, at 205 (Wash., D.C., Gov't Printing Office 1889).

11. M. Leigh Harrison, *The Law and the Changing Times*, 16 ALA. L. REV. 1, 2 (1963).

12. Jerome A. Cooper, *Mr. Justice Hugo L. Black: Free Man*, 17 ALA. L. REV. 195 (1965).

13. William O. Douglas, *Federal Courts and the Democratic System*, 21 ALA. L. REV. 179 (1969).

14. Note [Robert L. Potts], *Negro Members of the Alabama Bar*, 21 ALA. L. REV. 306 (1969).

15. Note [John C.H. Miller], *A Profile of the 1969 Senior Class of the University of Alabama School of Law*, 21 ALA. L. REV. 333 (1969).

16. *Id.* at 340. One ought, of course, to think of the other important empirical work that the review published around that time. See, e.g., Note [Joseph A. Colquitt and Richard T. Dorman], *The Office of the Probate Judge in Alabama: His Duties, Qualifications, and Problems*, 22 ALA. L. REV. 157 (1969).

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published an article in the *North Carolina Law Review* that provided an important source of reasoning for the extension of personal autonomy to abortion.<sup>17</sup>

Several times while I was on the faculty in the 2000s, Alabama faculty took controversial stands in the pages of the *Alabama Law Review*. Alabama tax professor Susan Hamill published an important critique of the Alabama tax code in 2002.<sup>18</sup> The article, which was reprinted as a separate volume by Books-A-Million,<sup>19</sup> won her coverage on the front page of the *Wall Street Journal*<sup>20</sup> and a listing as one of the best ideas of 2003 in the *New York Times Magazine*.<sup>21</sup> Shortly afterwards, Pratik A. Shah wrote an analysis of a proposed amendment to the Alabama Constitution that was opposed on the disingenuous grounds that it would raise taxes on schools.<sup>22</sup>

My favorite example of advocacy by the University of Alabama School of Law comes from the students. In February 2005, Alabama State Representative Gerald Allen of Cottondale introduced a bill to prohibit the use of public money “for the purchase of textbooks or library materials that recognize or promote homosexuality as an acceptable lifestyle.”<sup>23</sup> University students, led by law student Nic Carlisle, organized a protest on the steps of the Gorgas library. They read passages from books that would be banned under the bill and started a petition to oppose Allen’s bill.<sup>24</sup> Allen said something about digging a big hole and dumping the gay literature in it,<sup>25</sup> so one person at the protest carried a shovel, as a remind-

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17. Roy Lucas, *Federal Constitutional Limitations on the Enforcement and Administration of State Abortion Statutes*, 46 N.C. L. REV. 730, 755–56 (1968).

18. Susan Pace Hamill, *An Argument For Tax Reform Based on Judeo-Christian Ethics*, 54 ALA. L. REV. 1 (2002).

19. SUSAN PACE HAMILL, *THE LEAST OF THESE: FAIR TAXES AND THE MORAL DUTY OF CHRISTIANS* (2003).

20. Shailagh Murray, *Divine Inspiration: Seminary Article In Alabama Sparks Tax-Code Revolt*, WALL ST. J., Feb. 12, 2003, at A1.

21. Jason Zengerle, *The 3rd Annual Year In Ideas: Biblical Taxation*, N.Y. TIMES MAG., Dec. 14, 2003, at 6, 52.

22. Pratik A. Shah, *The Hypothetical Impact of Alabama’s Failed Amendment 2 on Public School Funding*, 56 ALA. L. REV. 863 (2005).

23. “An Act to prohibit the expenditure or use of public funds or public facilities by any state agency or public entity for the purchase, production, or promotion of printed or electronic materials or activities that sanction, recognize, foster, or promote a lifestyle or actions prohibited by the sodomy and sexual misconduct laws of the state,” H.B. 30, Alabama Legislature (February 1, 2004), available at [http://www.alsde.edu/legislative\\_bills/2005Regular/HB0030\\_OR.pdf](http://www.alsde.edu/legislative_bills/2005Regular/HB0030_OR.pdf). See also Gary Taylor, ‘We Have to Protect People,’ GUARDIAN, Dec. 9, 2004, available at <http://www.guardian.co.uk/books/2004/dec/09/gayrights.usa> (providing an analysis of the bill).

24. See Jennifer Daniel, *Burying Books in Alabama*, <http://www.campusprogress.org/features/205/burying-books-in-alabama/index.php> (last visited Apr. 20, 2010); and Mike Faulk & Nick Beadle, *Allen: Likely No Action on Gay Lit Bill this Year*, CRIMSON WHITE (Tuscaloosa, Ala.), Mar. 18, 2005 (on file with the *Alabama Civil Rights and Civil Liberties Law Review*). See also Anne Klinefelter, *First Amendment Limits on Library Collection Management*, 102 LAW LIBRARY JOURNAL 343 (2010).

25. Daniel, *supra* note 24.

er of what might happen.<sup>26</sup> The women of the Kappa Kappa Gamma Sorority were there too, “dressed in black Holly Golightly attire: a dress, a hat, earrings, and alligator shoes complete with big, black sunglasses a la Jacqueline Kennedy Onassis.”<sup>27</sup> Their presence harkened back to the days when the Kappa Kappa Gammas supported Cleo Thomas, the first and only black man ever elected Alabama student body president.<sup>28</sup> It just so happened that Alice Walker was on campus that day and she read about the protest in the student newspaper, *The Crimson White*.<sup>29</sup> She walked over from the hotel where she was staying and signed the petition. I suppose there was some particular justice in that because Allen had identified Walker’s *The Color Purple* as one of the books he found offensive—yet another example of the unexpected outdoing itself in its power to surprise.

As happens so often in life, changes and new ideas come from the students. We see this in their scholarship. In one instance, a student note attacked Alabama’s anti sex toys statute.<sup>30</sup> Yet, that statute still stands, difficult as it is to square with well-established constitutional law.<sup>31</sup> The Alabama students are still taking a run at the statute.<sup>32</sup>

The student journals, indeed, are the place for a lot of creative scholarship. Several of my favorites from the years I taught at Alabama are Amy Leigh Wilson’s analysis of the ways that attempts to regulate jazz in the early years of the twentieth century influenced the development of property law,<sup>33</sup> Chad Bryan’s work on reparations for slavery and Jim Crow,<sup>34</sup> Elizabeth Tyler Bates’s analysis of ownership of art created by slaves,<sup>35</sup> Leah Green’s analysis of the ways that the Erie Canal influenced the development of property law in the nineteenth century,<sup>36</sup> Michael

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26. *Id.*

27. *Id.* I must confess I did not know anything about Holly Golightly until I began researching this essay. But I now see she is someone important. See TRUMAN CAPOTE, *Breakfast at Tiffany’s in BREAKFAST AT TIFFANY’S: A SHORT NOVEL AND THREE STORIES* (1958) and *BREAKFAST AT TIFFANY’S* (Paramount Pictures 1961).

28. See *U. of Alabama Gets First Black Student Gov’t. Head*, JET, Feb. 26, 1976, at 14; *The View From Inside the Machine*, CRIMSON WHITE (Tuscaloosa, Ala.), Feb. 26, 2009 (on file with the *Alabama Civil Rights and Civil Liberties Law Review*).

29. See Faulk & Beadle, *supra* note 24.

30. Angela Holt, Note, *From My Cold Dead Hands: Williams v. Pryor and the Constitutionality of Alabama’s Anti-Vibrator Law*, 53 ALA. L. REV. 927 (2002).

31. *Williams v. Attorney Gen. of Ala.*, 378 F.3d 1232, 1233 (11th Cir. 2004) (upholding the Alabama Anti-Obscenity Enforcement Act, ALA. CODE §§ 13A-12-200.1-.12 (1975)).

32. See Karthik Subramanian, Note, *It’s a Dildo in 49 States, But It’s a Dildon’t in Alabama: Alabama’s Anti-Obscenity Enforcement Act and the Assault on Civil Liberty and Personal Freedom*, 1 ALA. C.R. & C.L. L. REV. 113 (2011).

33. Amy Leigh Wilson, Note, *A Unifying Anthem or Path to Degradation?: The Jazz Influence in American Property Law*, 55 ALA. L. REV. 425 (2004).

34. Chad W. Bryan, Note, *Precedent for Reparations? A Look at Historical Movements for Redress and Where Awarding Reparations for Slavery Might Fit*, 54 ALA. L. REV. 599 (2003).

35. Elizabeth Tyler Bates, Note, *Contemplating Lawsuits for the Recovery of Slave Property: The Case of Slave Art*, 55 ALA. L. REV. 1109 (2004).

36. Leah Moren Green, Note, *The Erie Canal and the American Imagination: The Erie Canal’s*

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Kuffner's story of the integration of libraries in the wake of *Brown v. Board of Education*,<sup>37</sup> John P. Norman's analysis of the idea of "states' rights" in the Confederacy,<sup>38</sup> and Heather Fann's analysis of the ways that gay families are treated by family law.<sup>39</sup> You can tell a lot about an institution, I think, by its literary output. Or at least, if ideas matter, you ought to be able to tell a lot by its output.<sup>40</sup>

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On the campus of the University of Alabama, the question "Have we overcome?" can be partly answered by looking to changes on the Tuscaloosa campus. Thus, I would like to rephrase the editors' question to a more modest and manageable one: "Has the University of Alabama overcome?" I would like to use the University's rich and lengthy history as a way of addressing a question about our nation's history. For just as one might write the history of the United States out of Alabama history,<sup>41</sup> one might write Alabama (and our nation's) history out of the history of this most venerable and important institution, the University of Alabama. The University is a place that, like our country, has changed in huge, almost unimaginable, ways. Therein lies a most American story: an institution that survives, contributes to our country in positive and sometimes negative ways, and remakes itself. The obvious answer to the editors' question, "Have we overcome?" is "Absolutely." I arrive at this by looking at what we have overcome.

One of the University's first acts after it was chartered in the 1820s was the purchase of a human being, Ben, to prepare the ground for the new school.<sup>42</sup> African American people were, thus, present (though in some ways invisible) from the start of the institution. Moreover, the University's early history was one of promotion of proslavery thought. After the University opened, it owned and rented people, its faculty owned people, and its students sometimes brought their enslaved human property to the campus. As Royal Dumas has shown, the University's early stu-

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*Effects on American Legal Development, 1817-1869*, 56 ALA. L. REV. 1167 (2005).

37. Michael R. Kuffner, Note, *From Public Schools to Public Libraries: Examining the Impact of Brown v. Board of Education on the Desegregation of Public Libraries*, 59 ALA. L. REV. 1247 (2008).

38. John P. Norman, "Self-Preservation is the Supreme Law": *State Rights vs. Military Necessity in Alabama Civil War Conscription Cases*, 60 ALA. L. REV. 727 (2009).

39. Heather Fann Latham, Student Article, *Desperately Clinging to the Cleavers: What Family Law Courts Are Doing About Homosexual Parents, and What Some Are Refusing to See*, 29 LAW & PSYCHOL. REV. 223 (2005).

40. See Alfred L. Brophy, *The Republics of Liberty and Letters: Progress, Union, and Constitutionalism in Graduation Addresses at the Antebellum University of North Carolina*, 90 N.C. L. REV. (forthcoming 2011) (drawing inferences about constitutional thought from addresses given by alumni and other distinguished speakers at UNC graduations from the 1830s through the 1850s).

41. See, e.g., Richard H. Pildes, *Book Review*, 27 LAW & HIST. REV. 228 (2009) (reviewing BRIAN K. LANDSBERG, *FREE AT LAST TO VOTE: THE ALABAMA ORIGINS OF THE 1965 VOTING RIGHTS ACT* (2007)).

42. 1 JAMES B. SELLERS, *HISTORY OF THE UNIVERSITY OF ALABAMA* 38 (1953).

dents came predominantly from the slave-holding ranks.<sup>43</sup> None of this is a surprise, of course. It was slave owners who had the money to send their children to college, and the people of Alabama could not have been expected to support an institution that taught anti-slavery doctrines. In fact, a major reason advanced for supporting Southern colleges was their support for the institution of slavery.

Joseph Taylor, a lawyer and newspaper editor from Eutaw, spoke to students at the University in 1847 about the centrality of slavery to Southern society. The institution of slavery was essential to Southern wealth, constitutionally protected, and morally right. Slaves “have grown up with us, and have become an element of our social life, which cannot be, harmlessly, removed. We believe them to be lawful, judged either by the laws of reason or by the canons of Revelation.”<sup>44</sup> It was Southern colleges and universities that would provide the defense of that institution:

[T]he champions of the South must be her sons, their weapons the pulpit and the press, their schools of discipline our own Colleges and Universities. . . . The sons of the South are its legitimate, its reliable, and its appointed defenders; and, in the Universities of the South, must they be indued with the skill and force in the use of the weapons of reason necessary to the high encounter to which they are called. If they be educated elsewhere, may they not imbibe the doctrines of our assailants, and thus, returning to us in the guise of friends, help to drag over the walls and into the very citadel of our domestic Troy, some fatal horse pregnant with the implements of fanatic propagandists and unreformed reformers?<sup>45</sup>

Taylor encapsulated his thoughts in one sentence: “The University is useful in enabling the State to protect the peculiar rights and institutions which belong to it, as one of the Plantation States of the South.”<sup>46</sup>

In 1850, the year of the great compromise that saved the union for a decade, George D. Shortridge, a judge in Tuscaloosa who ran in 1855 on the Know-Nothing ticket for governor of Alabama, gave an address to alumni at the University with a similar theme. Shortridge, who was an 1833 graduate of the University, spoke of the virtues of the university for training southern students in the defense of Southern institutions: “The

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43. Royal Dumas, *My Son and My Money Go to the University of Alabama? The Students at the University of Alabama in 1845 and the Families That Sent Them*, 1 ALA. C.R. & C.L. L. REV. 69 (2011).

44. JOSEPH W. TAYLOR, ADDRESS DELIVERED BEFORE THE EROSOPHIC AND PHILOMATHIC SOCIETIES OF THE UNIVERSITY OF ALABAMA: A PLEA FOR THE UNIVERSITY OF ALABAMA AUG. 9, 1847 24 (Tuscaloosa, M. D. J. Slade 1847) (on file with the Alabama Civil Rights & Civil Liberties Law Review).

45. *Id.* at 25.

46. *Id.* at 23 (emphasis omitted).

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formation of a distinct, independent State character, is absolutely conditioned upon the education of our youth upon their native soil, in our own social atmosphere, amidst our own political institutions, under our own southern sky."<sup>47</sup> Shortridge justified and celebrated the role of the University's education for Southerners by saying, "[o]ur social institutions, our social and political sympathies are intensely *southern*."<sup>48</sup> Shortridge warned Southerners to patronize Southern institutions and then asked,

Are you doing this, when you send your sons to New England, to Virginia and to the Carolinas, to have their sympathies and opinions moulded under influences, which may prepare them for other circumstances, but not for ours—influences moral, social, and political, which now threaten the Union and jeopardize the rights of the South?<sup>49</sup>

The University's faculty rose to the challenge. For instance, Landon Garland, the university's president in the years leading into the Civil War, delivered a series of three lectures to the Tuscaloosa YMCA in 1860 to support slavery.<sup>50</sup>

Down in Mobile, Josiah Nott taught at a medical school while co-editing a book, *Types of Mankind*.<sup>51</sup> That book, which argued that the races had separate origins, was an important proslavery text, as was Nott's 1857 co-edited book, *Indigenous Races of the Earth; Or, New Chapters of Ethnological Inquiry*.<sup>52</sup> There is some irony, I suppose, in the University's naming its biology building in the early twentieth century after Nott, whose polygenesis was so thoroughly debunked by the time the naming decision was made.

The names of other buildings at the University illustrate how far we have come. For instance, Morgan Hall, where the English Department is housed, is named after a man who said in the Alabama secession convention that he would like to reopen the African slave trade.<sup>53</sup> Then, near the

47. GEORGE D. SHORTRIDGE, CHAIRMAN, COMM. OF ALUMNI, AN ADDRESS FROM THE ALUMNI OF THE UNIVERSITY OF ALABAMA TO THE PEOPLE OF ALABAMA 7 (1850) (emphasis omitted) (on file with the Alabama Civil Rights & Civil Liberties Law Review).

48. *Id.* at 8.

49. *Id.*

50. See JAMES BENSON SELLERS, SLAVERY IN ALABAMA 352–54 (1950) (summarizing Garland's three lectures, as reprinted in the Tuscaloosa *Independent Monitor*, given on March 10, March 17, and March 31, 1860).

51. JOSIAH C. NOTT & GEORGE R. GLIDDON, TYPES OF MANKIND (Philadelphia, Lippincott, Grambo & Co., 1854).

52. JOSIAH C. NOTT & GEORGE R. GLIDDON, INDIGENOUS RACES OF THE EARTH; OR, NEW CHAPTERS OF ETHNOLOGICAL INQUIRY (Philadelphia, J. B. Lippincott & Co., 1857).

53. WILLIAM R. SMITH, THE HISTORY AND DEBATES OF THE CONVENTION OF THE PEOPLE OF ALABAMA, BEGUN AND HELD IN THE CITY OF MONTGOMERY, ON THE SEVENTH DAY OF JANUARY, 1861, at 195 (The Reprint Co., Publishers 1975) (1861) (“[I]f I were to feel at liberty to carry out my

end of the century, when he was in the United States Senate, a commission he headed white-washed the annexation of Hawaii.<sup>54</sup> Indeed, a tour of the Quad illustrates how differently we think today from even the early twentieth century, when many of the naming and monument decisions were made.

Outside of the University, elsewhere in Alabama, there were other teachers who wrote proslavery defenses and who linked the life of the mind to the cause of slavery. For instance, Caroline Hentz, who taught for a while at a female academy in Tuscaloosa, wrote an important proslavery novel, *The Planter's Northern Bride*,<sup>55</sup> in response to *Uncle Tom's Cabin*. And perhaps most surprisingly, Hentz wrote a short story about a college president who reclaimed a free black child from a slave trader who had kidnapped him.<sup>56</sup> Hentz also wrote a poem that was delivered to the University of Alabama Erosophic Society.<sup>57</sup> You never can tell what odd mixture of attitudes you will find in Tuscaloosa, or even within a single person.<sup>58</sup>

In Greensboro, C. F. Sturgis, the president of the Greensboro Female Seminary and a Baptist minister, published an essay titled *Melville Letters; or, the Duties of Masters to Their Servants*, in the form of a Socratic dialogue between two brothers, one a lawyer and the other a minister.<sup>59</sup> Greene County was a place of extraordinary misery and brutality. Yet even there, other ideas and possibilities were in circulation. Presbyterian Minister Thomas Witherspoon of Greensboro left a will devising nearly thirty enslaved people in trust to the American Colonization Society so that they would be freed.<sup>60</sup> James Cocke of Virginia established a plantation in

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convictions of what a pure Christian philanthropy requires at the hands of this generation—if I could consent to commit the State to the active work of Christian evangelization—I should pledge all its powers to go to Africa and to bring over ship loads of poor, savage slaves to a country where they could be raised to the condition of Christian slaves, which is the highest point that the negro race can reach, consistently with Divine Law, and with their mental and physical organization.”).

54. JOHN TYLER MORGAN, REPORT FROM THE COMMITTEE ON FOREIGN RELATIONS AND APPENDIX IN RELATION TO THE HAWAIIAN ISLANDS, S. REP. NO. 53-227 (1894).

55. CAROLINE LEE HENTZ, *THE PLANTER'S NORTHERN BRIDE* (Philadelphia, A. Hart 1854).

56. CAROLINE LEE HENTZ, *Wild Jack; or, the Stolen Child*, IN *WILD JACK; OR, THE STOLEN CHILD: AND OTHER STORIES* 17 (Philadelphia, A. Hart 1853).

57. CAROLINE LEE HENTZ, HUMAN AND DIVINE PHILOSOPHY: A POEM, WRITTEN FOR THE EROSOPIIC SOCIETY OF THE UNIVERSITY OF ALABAMA ... AND RECITED BY A. W. RICHARDSON DECEMBER 12, 1843 (Tuscaloosa, Journal and Flag Office 1843).

58. For more on Hentz, see Brophy, “*The Law of the Descent of Thought*,” *supra* note 8, at 359–62.

59. C. F. Sturgis, *Melville Letters; Or, the Duties of Masters to Their Servants*, in *DUTIES OF MASTERS TO SERVANTS: THREE PREMIUM ESSAYS* 47 (Charleston, S.C., S. Baptist Publ'n Soc'y 1851).

60. See Stephen Duane Davis II & Alfred L. Brophy, “*The Most Solemn Act of My Life*”: *Family, Property, Will, and Trust in the Antebellum South* 44, 61 *ALA. L. REV.* (forthcoming 2011) available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1398522](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1398522) (discussing Reverend Thomas Witherspoon's attempted emancipation of “twenty-five of his slaves”).

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Greensboro run by enslaved people as part of his plans to show the possibilities of freedom.<sup>61</sup>

Things changed dramatically in Tuscaloosa over time, of course. The early twentieth century was a time of progressive ideas in the state in many ways. One way of gauging those changes is through University of Alabama English professor Carl Carmer's famous book, *Stars Fell on Alabama*.<sup>62</sup> Carmer, who arrived in 1921 and stayed about a decade, wrote of the beauty, the magic, and the mystery of Alabama, as well as its contradictions. As any Alabamian will testify, the state is beautiful. Not for nothing is the scholarship that looks back with nostalgia on the old South known as the "moonlight and magnolia school." While at some points Carmer introduced African-Americans into his narrative of Alabama,<sup>63</sup> at other points he casually introduces elements of Jim Crow. For instance, he wrote about a segregated gathering in Greene County.<sup>64</sup> The newspapers, he reports, ran advertisements inviting all the white citizens of Tuscaloosa County and Greene County.<sup>65</sup> At other times there is invocation of the N-word.<sup>66</sup>

Carmer's book was more famous (and more moderate) than other social commentary, but he was far from alone. Clement Wood's 1922 novel titled, rather provocatively, *Nigger*, spanned more than sixty years, from the late days of slavery through the end of the First World War, as it traced an African-American family from the era of slavery on a plantation in Dallas County, to emancipation, migration to Birmingham, and work there.<sup>67</sup> Wood was born in Tuscaloosa and educated at the University of Alabama, then took a law degree at Yale.<sup>68</sup> After a few years working in Birmingham, he moved to New York City.<sup>69</sup> The book, published after he moved to New York, helped expose the brutality at the heart of Jim Crow and the attempts by members of the African-American community to overcome, partly through religion and partly through law. Wood details lynchings,<sup>70</sup> which motivate an "exodus" from Dallas County;<sup>71</sup> a prosecution for vagrancy;<sup>72</sup> an attempt to register to vote in Birmingham which was denied by "white man's law;"<sup>73</sup> and the aspirations of some to get a legal

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61. G. WARD HUBBS, *GUARDING GREENSBORO: A CONFEDERATE COMPANY IN THE MAKING OF A SOUTHERN COMMUNITY* 65–66 (2003).

62. CARL CARMER, *STARS FELL ON ALABAMA* (The Univ. of Ala. Press 1985) (1934).

63. *See, e.g., id.* at 159, 212.

64. *Id.* at 85.

65. *Id.*

66. *See, e.g., id.* at 212.

67. CLEMENT WOOD, *NIGGER: A NOVEL* (1922).

68. *See* CLEMENT WOOD, *THE GLORY ROAD: AN AUTOBIOGRAPHY* 13 (1936).

69. *See id.*

70. *See, e.g.,* WOOD, *supra* note 67, at 54–69.

71. *Id.* at 67–69.

72. *Id.* at 133.

73. *Id.* at 128–31.

education.<sup>74</sup> One character urged a young man aspiring to a career as a lawyer to learn “the law is a white man’s game, and that the black man is out of it—and’s gotter stay out and play his own game.”<sup>75</sup> One subplot of the novel was about a black lawyer who was less than successful in suits against corporations on behalf of black clients. Sadly, there was a lot of reality to the novel’s depiction in the 1920s.<sup>76</sup>

Indeed, some of Wood’s characters turned in other directions. In fact, they sang one spiritual, “I’s Troubled in My Mind,” and then another, “Take All the World, but Leave Me Jesus,” to evoke the place that religion might serve when a people are left without law.<sup>77</sup> Wood concluded, “[T]he great flock of souls, who had seen the white man take most of the world, and gladly surrender Jesus to them, poured themselves into the words of distant promise.”<sup>78</sup> That spiritual’s message, “Take All the World, but Leave Me Jesus,”<sup>79</sup> echoed down to Ralph Ellison’s *Invisible Man* thirty years later when Harlem residents responded to an eviction with the call for at least “fifteen minutes of Jesus.”<sup>80</sup> Yet, even in the 1910s and 1920s, the seeds of change were being laid; indeed, those seeds had already been laid by African-American intellectuals like W.E.B. Du Bois. On how that optimism in the promise of law—or maybe it was just a retreat to all that was left, I’m not sure—remade our nation, I shall have something at the end of this essay.

Meanwhile, the state and nation was dealing with the Scottsboro Boys.<sup>81</sup> Tuscaloosa avoided a similar spectacle through a double lynching in the fall of 1933.<sup>82</sup> A few years after that, a labor activist in Tuscaloosa County, Byron Thornhill, inspired an important First Amendment case.<sup>83</sup> One of the many pleasures of teaching in Tuscaloosa was a trip I made with Martha Morgan’s advanced constitutional law class out to Browns-

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74. *Id.* at 179–80.

75. *Id.* at 179.

76. *See, e.g.*, WOOD, *supra* note 67, at 101. For more on the grim days of Jim Crow in the early twentieth century, see ALFRED L. BROPHY, *RECONSTRUCTING THE DREAMLAND: THE TULSA RIOT OF 1921—RACE, REPARATIONS, RECONCILIATION* (2002); Alfred L. Brophy, *Norms, Law, and Reparations: The Case of the Klu Klux Klan in 1920s Oklahoma*, 20 HARV. BLACKLETTER L. J. 17–48 (2004).

77. WOOD, *supra* note 67, at 119.

78. *Id.*

79. *Id.*

80. RALPH ELLISON, *INVISIBLE MAN* 279 (2d ed. Vintage Int’l 1995) (1952). *See generally* Steven H. Hobbs, *Ralph Ellison as Oral Storyteller*, 26 OKLA. CITY U. L. REV. 927 (2001).

81. *See generally* Powell v. Alabama, 141 So. 201 (Ala. 1932), *rev’d*, 287 U.S. 45 (1932); F. Raymond Daniel, ‘Observers’ Leave Scottsboro Trial: Leibowitz Threatened to Quit Case if Radical Group Remained in Decatur, N.Y. TIMES, Apr. 3, 1933, at 34; Leibowitz in Harlem Stirs 4,000 By Plea: Promises to “Fight with Every Drop of Blood” in the Scottsboro Case, N.Y. TIMES, Apr. 14, 1933, at 5.

82. *See RACES: Three at Tuscaloosa*, TIME MAG., Aug. 21, 1933, <http://www.time.com/time/magazine/article/0,9171,753896,00.html>.

83. Thornhill v. Alabama, 310 U.S. 88 (1940).

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ville back in the summer of 2005 to get a better understanding of the setting of *Thornhill v. Alabama*. Yes, Alabama is full of contradictions and of people of extraordinarily different ideologies.

There is something magical in Tuscaloosa that permits—indeed encourages—the growth of progressive ideas. There is something in the land, a power to transform people, for good and ill both. In Alabama and at the University, we see ourselves in our moments of hatred and in our moments of joy, love, and learning.

This struggle—in which we were the objects of national and local politics rather than the governors of them—continued for decades. In the 1940s, a young man from Bessemer, Alabama, Paul R. Jones, applied for admission to the University's law school. In February 1949, he received a letter rejecting him, for no better reason than his race. The letter acknowledged that the Supreme Court might force integration, but he was told, in essence, to not file a lawsuit. The letter read in part:

We recognize it is entirely conceivable that the Supreme Court of the United States can say to the State of Alabama that it must either provide in a separate institution for colored people opportunities for the study of law equal to those being provided for white people or, as an alternative, admit colored people to the institution maintained by the State for white people, assuming that the applicant can in every case meet the entrance in force at the institutions maintained by the State for whites. . . .

While this may be gratuitous, I am adding that we at the University of Alabama are convinced that relationships between the races, in this section of the country at least, are not likely to be improved by pressure on behalf of members of the colored race in an effort to gain admission to institutions maintained by the State for members of the white race. On the contrary, we feel that inter-racial relationships would suffer if there is insistence that the issue be joined at this time. The better elements of both races deplore anything that tends to retard or jeopardize the development of better relationships between the races. For these reasons, therefore, we hope that you can persuade yourself not to press further your application for admission here.<sup>84</sup>

The honorary degree that the University awarded Jones in 2006 is one of many signs that we have overcome. A sign of his magnanimity and his

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84. Letter from William Adams, Dean of Admissions, Univ. of Ala. to Paul R. Jones (Feb. 4, 1949).

reconciliation with the University is that he gave his multi-million dollar art collection to the University.<sup>85</sup>

Paul Jones didn't file that lawsuit, but others did. In the 1950s, a lawsuit in the Northern District of Alabama forced the University to integrate temporarily.<sup>86</sup> In February 1956, Aurtherine Lucy enrolled and began classes at the University, though she was subsequently expelled by the University's trustees because of the riots that followed.<sup>87</sup> For far from the last time in our nation's history, mob violence prevailed over law.<sup>88</sup> Then came 1963 and several African-American applicants—Vivian Malone and James Hood—Governor Wallace, the National Guard, a lot of reporters, and the attention of our country. On June 11, 1963, in front of Foster Auditorium, the world changed.<sup>89</sup>

Yet, while the ideas in circulation in Tuscaloosa are vastly different from those fifty, one hundred, one hundred fifty, and one hundred seventy-five years ago, pieces of the physical environment are the same. The president's mansion still stands (thanks to the advocacy of the wife of the president) and so do the slave quarters out back of it. So, too, does Foster Auditorium. Time and events conferred majesty on Foster Auditorium. Because of the struggle that took place at its door, it has become a symbol of integration and of progress. All of this is testimony to how much our institution is different today from 1963. Perhaps no school—not William and Mary, not the University of Virginia, not Randolph Macon, not Harvard, not Yale, not Princeton, not Brown<sup>90</sup>—has changed as much over their history as we have in the 180 years since we opened in 1831.

Of course, back in 1963 and 1964, events were overtaking the University; we were the dependent variable in a world of racial politics. Through the overzealous enforcement of the law, Bull Connor helped to bring our nation the Civil Rights Act of 1964.<sup>91</sup> It is far from the first time in our

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85. See Ashley Boyd, *Black Art Collection Aims to Educate*, TUSCALOOSA NEWS, Jan. 30, 2009, available at [http://www.tuscaloosaneews.com/article/20090130/NEWS/901290219/1007?Title=Black\\_art\\_collection\\_aims\\_to\\_educate](http://www.tuscaloosaneews.com/article/20090130/NEWS/901290219/1007?Title=Black_art_collection_aims_to_educate).

86. *Lucy v. Adams*, 134 F. Supp. 235, 239 (N.D. Ala. 1955), *aff'd*, 228 F.2d 619 (5th Cir. 1955).

87. E. CULPEPPER CLARK, *THE SCHOOLHOUSE DOOR: SEGREGATION'S LAST STAND AT THE UNIVERSITY OF ALABAMA* 99–102 (1993); see also *Alabama U. Rally Protests a Negro*, N.Y. TIMES, Feb. 5, 1956, at 60.

88. CLARK, *supra* note 87, at 223–31 (describing George Wallace's "stand in the schoolhouse door" at Foster Auditorium).

89. *Id.* at xvii–xviii.

90. We can compare our history to that of Brown because of the detailed record that is now available about Brown. See UNIV. STEERING COMM. ON SLAVERY & JUSTICE, BROWN UNIV., *SLAVERY AND JUSTICE* 7–32 (2006), available at [http://www.brown.edu/Research/Slavery\\_Justice/documents/SlaveryAndJustice.pdf](http://www.brown.edu/Research/Slavery_Justice/documents/SlaveryAndJustice.pdf); see also Terry Meyers, "A First Look at the Worst: Slavery and Race Relations at the College of William and Mary," 16 WILLIAM AND MARY BILL OF RIGHTS JOURNAL 1141–1168 (2008).

91. See J. MILLS THORNTON III, *DIVIDING LINES: MUNICIPAL POLITICS AND THE STRUGGLE FOR CIVIL RIGHTS IN MONTGOMERY, BIRMINGHAM, AND SELMA* 309–14 (2002) (describing attacks on

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history—or the last—in which people are such terrible politicians that they bring about exactly the opposite of what they sought. Bull Connor provided a lesson, as if one were needed, of how violence is so frequently counterproductive. And somewhere in our country we need a statue of Bull Connor for everything that he did to bring about the Civil Rights Movement of the 1960s. In the words of a very smartly titled book, *But for Birmingham*<sup>92</sup>—and I might add, especially but for Bull Connor—the civil rights struggle of the 1960s might have been very different.

Or maybe not; maybe Birmingham was helpful to the movement but not indispensable. The corollary to the apt observation that “there is nothing so powerful as an idea whose time has come” is “there is nothing so powerless as an idea whose time has passed,” and our nation had come by the mid-1960s to a conclusion that it was time for formal equality. Ten years past *Brown v. Board of Education*, we were getting used to a different world order in many places. Even in the places where politics were pointing backward rather than forward, things were about to change. They changed in Wilcox County—in the heart of the Black Belt—through the actions of thousands of people, who started out on the road from Selma to Montgomery—twice.<sup>93</sup> They changed in Lowndes County, where the roots of the Black Panthers lie.<sup>94</sup> They changed in Marion, county seat of Perry County, where in 1958, Jimmy Wilson, a black man, was sentenced to death by a jury for stealing \$1.95 from Estelle Baker.<sup>95</sup> Six years later, Jimmie Lee Jackson was shot near the courthouse square amidst a protest over the integration of a local restaurant. His death a few days later was the impetus for the first, abbreviated, Selma to Montgomery march.<sup>96</sup>

And we’re still grappling with the violence of the 1960s. In 2002, I attended the trial of the last of the 16th Street Baptist Church bombers. It was a sad affair in a lot of ways. The day in court that Carol Denise McNair, Cynthia Diane Wesley, Carole Rosamond Robertson, Addie Mae Collins, and their families deserved had been put off for so long. Bobby Frank Cherry was in poor health. Yet after the jury returned its guilty verdict, veterans of the Civil Rights Movement, including Fred Shuttles-

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protestors during the demonstrations of 1963); see also H.R. REP. NO. 88-914 (1963), reprinted in BUREAU OF NAT’L AFFAIRS, THE CIVIL RIGHTS ACT OF 1964: TEXT, ANALYSIS, LEGISLATIVE HISTORY, 135, 152 (1964) (“[I]n the last decade it has become increasingly clear that progress has been too slow and that national legislation is required to meet a national need which becomes ever more obvious.”).

92. GLENN T. ESKEW, *BUT FOR BIRMINGHAM: THE LOCAL AND NATIONAL MOVEMENTS IN THE CIVIL RIGHTS STRUGGLE* (1997).

93. THORNTON, *supra* note 91, at 486-89.

94. HASAN KWAME JEFFRIES, BLOODY LOWNDES: CIVIL RIGHTS AND BLACK POWER IN ALABAMA’S BLACK BELT 152-53 (2009).

95. Mary L. Dudziak, *The Case of “Death for a Dollar Ninety-Five”: Miscarriages of Justice and Constructions of American Identity*, in WHEN LAW FAILS: MAKING SENSE OF MISCARRIAGES OF JUSTICE 25, 26-28 (Charles J. Ogletree, Jr. & Austin Sarat eds., 2009).

96. THORNTON, *supra* note 91, at 486-87.

worth, spontaneously broke into song outside the Birmingham courthouse—the Battle Hymn of the Republic. “Glory, glory hallelujah! His truth is marching on.”

It is well worth a visit to downtown Birmingham. It surprised me the first time I visited it in 2000 how small the downtown was, how close everything was, and how the monuments of the civil rights struggle are all still there—the Boutwell Memorial Auditorium, where the Dixiecrats held their 1948 convention to nominate Strom Thurmond, the once-segregated Birmingham Public Library, and even the Birmingham Art Museum, a wonderful 1960s building. Even it, too, was segregated when it first opened. (Tuesdays, as I recall, were reserved for black people). How strange that this most beautiful and modern building, which contains such beauty, was in its early days a holdout of Jim Crow.

Think about how far our nation has come, too, in the wake of the Civil Rights Act of 1964. We have forgotten—and in many ways this is positive—just how bad things were. I was reminded of what has slipped from our consciousness when I was in the Tuscaloosa County Courthouse with a student in my trusts and estates practicum a few years back. We were recording a deed, and I pointed out to her that on a shelf in the room behind the registrar's desk they had some marriage registries which were labeled white and black (or maybe it was negro, I don't properly remember). The student asked, quite innocently, “What if you were both? . . . Or neither?” That drove home how far we have moved—that a smart and successful upper-level law student in Tuscaloosa, Alabama found it surprising and puzzling how Jim Crow had worked and then asked about what would happen to an interracial couple. There is something really heartening about the idea that we are so far separated from the days of Jim Crow—which in the case of prohibitions on interracial marriage only ended in 1967<sup>97</sup>—that a law student wouldn't know how it functioned and would think of the labels as an issue in recording rather than prohibiting marriage. We may recall Yale University historian David Blight's apt remark that we are burdened too much with memory—though maybe we are getting to the stage where we are no longer so burdened with it.<sup>98</sup>

To continue the analogy to Protestant religion with which I began this essay, there is the sense that our mission is never ending. I suppose Americans will always be on a mission, always seeking to overcome something. The job of America is to struggle, to find new tasks, to seek perfection. And our founding documents, like the Declaration of Independence, set us on our mission. The Declaration's mission has guided us, as has the Four-

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97. See *Loving v. Virginia*, 388 U.S. 1 (1967).

98. David W. Blight, *If You Don't Tell it Like it Was, it Can Never Be as it Ought to Be*, in *SLAVERY AND PUBLIC HISTORY: THE TOUGH STUFF OF AMERICAN MEMORY* 19, 25 (James Oliver Horton & Lois E. Horton eds., 2006) (“[T]he world is riven with too much memory.”).

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teenth Amendment's Equal Protection Clause. The clause has a religious significance, of course, because it seems to be a secular version of Matthew 7:12 (the golden rule). As we have come over the course of the twentieth century to see the humanity of each other, we have made forward progress. Those changes and that progress in moral thought leads us to a place where law can follow, for law almost always lags changes in morality. The ideas expressed in books, in the street, and in the state house come at some later time to appear in the courthouse and in the pages of the *Alabama Reports* and the *United States Reports*.

Perhaps, in fact, the remaking of American ideas of equality came about in large part because of the ideas of African-American intellectuals, like W.E.B. Du Bois, who explored the extraordinary inequality in American society in the years leading into the Civil Rights Movement. Their explorations and their talk, in the pages of the vehicles of the renaissance like *The Crisis*, helped point out to the rest of society how unfair the law was to African-Americans. They taught the rest of us the meaning of equal protection and helped move the Equal Protection Clause from the point where Justice Oliver Wendell Holmes proclaimed it the last refuge of constitutional arguments in *Buck v. Bell*<sup>99</sup> in 1927 to the center-point of constitutional law in *Brown v. Board of Education*.<sup>100</sup> Ralph Ellison identified those changes even before *Brown*—he named what African-American intellectuals were seeking “The Great Constitutional Dream Book.”<sup>101</sup> That was the name Ellison gave to the constellation of ideas about equal treatment, from the abolition of lynching to equal financing of public schools to the right to use public transportation on an equal basis with white people. Ideas elegant in their simplicity saw fruition in Du Bois's life.<sup>102</sup>

Have we overcome? I think most certainly. Are our tasks as students and scholars done? We as individuals struggle and we as a people struggle together towards the next goal. I am not sure it is possible to ever finish our task. One need only look at the fervor with which Alabama fans pursue the next national football and gymnastics championships to know that our tasks are never done. The University has been the vehicle for uplift, and with increasing resources like the *Alabama Civil Rights and Civil Liberties Law Review*, I am sure it will continue that important mission of training the state's students in the civil rights struggle in which we all have so much at stake. For that, we all ought to be very proud.

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99. *Buck v. Bell*, 274 U.S. 200, 208 (1927).

100. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (“[T]he opportunity of an education . . . is a right which must be made available to all on equal terms.”).

101. ELLISON, *supra* note 80, at 273.

102. See Alfred L. Brophy, *The Great Constitutional Dreambook*, in 2 ENCYCLOPEDIA OF THE SUPREME COURT OF THE UNITED STATES 360 (David S. Tanenhaus ed., 2008); see also Alfred L. Brophy, *Invisible Man as Literary Analog to Brown v. Board of Education*, in RALPH ELLISON AND THE RAFT OF HOPE: A POLITICAL COMPANION TO INVISIBLE MAN 119 (Lucas E. Morell ed., 2004).

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Overcoming at the University of Alabama

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