REMEDIATING RESISTANCE

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"If we abdicate responsibility to address the difficult questions of our time, those in need of refuge from the torrents of political, economic, and religious forces will find no haven in the law and the law will no longer be supreme."

– Judge Frank M. Johnson, Jr.[1]

INTRODUCTION

A century after Robert E. Lee surrendered at Appomattox Court House, moral battles inflected by race, resistance, and states' rights continued to break out across the American South. A hallowed site of the civil rights struggles of the twentieth century was another courthouse at the corner of Lee Street and South Court Street in Montgomery, Alabama. There, only a few blocks from the former capitol of the so-called Confederate States of America, a southern federal court witnessed, confronted, and resolved uniquely American dilemmas.

In that federal courthouse, Judge Frank M. Johnson, Jr. served as legal arbiter in some of the most profound moments in the history of American apartheid. It was Judge Johnson who served on the district court panel that, at the helm of the Civil Rights Movement, ruled in favor of Rosa Parks and her fellow black Alabamians who challenged a law that required them to sit at the back of buses.[2] It was Judge Johnson who issued rulings aimed at protecting Freedom Riders from violence.[3] It was Judge Johnson who issued legal orders that cleared the way for tens of thousands of Americans to march to Selma to help achieve black Americans' right to vote in the South.[4] All of this in the shadow of bloody, barbaric physical violence, including mob violence in 1961 against the Freedom Riders directly adjacent to the federal courthouse at the corner of Court and

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1. Judge Frank M. Johnson, *Reflections on the Judicial Career of Robert S. Vance*, 42 ALA. L. REV. 964, 968 (1991).

2. Browder v. Gayle, 142 F. Supp. 707, 710–11 (M.D. Ala.), *aff'd*, 352 U.S. 903 (1956) *and aff'd sub nom.* Owen v. Browder, 352 U.S. 903 (1956).

3. United States v. U.S. Klans, 194 F. Supp. 897 (M.D. Ala. 1961); Lewis v. Greyhound Corp., 199 F. Supp. 210 (M.D. Ala. 1961).

4. Williams v. Wallace, 240 F. Supp. 100, 108 (M.D. Ala. 1965).

Lee.[5] And all of this, as America morally struggled in 1963 with conflicting cries of Governor George Wallace's "segregation forever"[6] insistence and Dr. King's egalitarian dream at the March on Washington.[7]

This Essay is about one subset of Johnson's innovative rulings during turbulent times: remedies aimed at reforming government institutions, sometimes in ways that required sustained judicial involvement. In *Carr v. Montgomery County Board of Education*,[8] Judge Johnson's orders integrated the local schools of Montgomery; his remedial efforts lasted for over a decade.[9] In his most notable institutional-reform case, *Wyatt v. Stickney*,[10] his orders reformed the treatment Alabamians experienced in the state's mental-health facilities. That case lasted until 2004[11]—five years after Judge Johnson's death[12] and twelve years after the courthouse where he had served was renamed in his honor.[13] In *Newman v. Alabama* and *Pugh v. Locke*, Judge Johnson brought the lessons from *Wyatt* to bear in the context of prisons, innovatively forging the way toward adequate medical care for inmates.[14] That order lasted for about a decade, ending in a dramatic confrontation in which another federal judge who inherited the case attempted to release prisoners by means of habeas corpus.[15]

This Essay views Judge Johnson's institutional rulings through a lens that I will call the "political economy of constitutional adjudication." This concept references two aspects of constitutional adjudication. First, how is constitutional adjudication shaped by institutional actors' relative distribution of political, economic, and moral capital? And second, how does constitutional adjudication shape institutional actors' relative distribution of political, economic, and moral capital? Scholars have broadly argued that courts invoke various methods of judicial restraint or minimalism to avoid confrontations with, or excessive entanglements with, politically accountable actors.[16] Scholars have also written about the legitimacy and efficacy of constitutional remedies that

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5. Kathryn Abrams & Ronald Wright, *Judge Frank Johnson in the Long Run*, 51 ALA. L. REV. 1381, 1381 (2000).

6. BYRON WILLIAMS, 1963: THE YEAR OF HOPE AND HOSTILITY 15 (2013).

7. *Id.* at 301–02.

8. Carr v. Montgomery Cty. Bd. of Educ., 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).

9. Abrams & Wright, *supra* note 5, at 1387–88.

10. Wyatt v. Stickney, 325 F. Supp. 781, 785 (M.D. Ala. 1971), *aff'd sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974).

11. Wyatt *ex rel.* Rawlins v. Sawyer, 219 F.R.D. 529, 531–33 (M.D. Ala. 2004).

12. Robert D. McFadden, *Frank M. Johnson Jr., Judge Whose Rulings Helped Desegregate the South, Dies at 80*, N. Y. TIMES, July 24, 1999, at A12.

13. The law "designate[s] the Federal Building and the United States Courthouse located at 15 Lee Street in Montgomery, Alabama, as the 'Frank M. Johnson, Jr. Federal Building and United States Courthouse.'" Pub. L. No. 102-261, 106 Stat. 86 (1992).

14. Pugh v. Locke, 406 F. Supp. 318 (M.D. Ala. 1976), *aff'd sub nom.* Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977), *rev'd in part sub nom.* Alabama v. Pugh, 438 U.S. 781 (1978).

15. *See infra* notes 129–39 and accompanying text.

16. *See infra* notes 31–38 and accompanying text.

perpetually constrain governmental actors' resources and the range of otherwise constitutionally permissible choices.[17] A premise that undergirds these debates is that courts, as the "least dangerous" branch,[18] have limited capital in our republic because they control neither the purse nor the sword.[19] And thus, they should spend that capital carefully. After all, the esteem of the judiciary depends on the public's faith in the institution and, by extension, the politically accountable actors' willingness to comply.

It is undoubtedly important for courts to exercise prudent judgment in determining whether or how the judiciary should commit itself in politically charged, countermajoritarian, or discretion-laden rulings. But the question of when the judiciary should spend its limited capital—lest its legitimacy be depleted—invites other questions. How should courts deal with the possibility that the failure to declare legal wrongs can also diminish the perceived esteem of courts? And what are the mechanisms through which courts *build* the capital that they should be so careful about spending? Judge Johnson provides an exceptional case study to explore these questions because he issued bold, innovative constitutional remedies that constrained governmental actors across multiple domains over three decades.

Part I defines a concept I will call the "political economy of constitutional adjudication." Since the earliest days of the republic, courts and commentators have wrestled with questions about the judiciary's relatively limited power compared to politically accountable branches. And these anxieties and realities have shaped constitutional adjudication. Judicial restraint is often offered as an antidote, but it is an inherently limited one. Part II explores ways that Judge Johnson's institutional reform carefully navigated this complex political economy. His strategic innovation sometimes came at the remedial stage. His remedies were characterized by deference and cooperation, as well as the enlistment and empowerment of actors beyond courts to protect constitutional norms. Part III posits that his approach sometimes served not only to preserve his capital but also to build it in ways that lasted long after he left the Middle District of Alabama.

I. THE POLITICAL ECONOMY OF CONSTITUTIONAL ADJUDICATION

This Part outlines the "political economy of constitutional adjudication" and ways that it often shapes dialogue about judicial restraint or minimalism. The argument has often been made that judicial minimalism is an important means of preserving the judiciary's limited capital. While this is undoubtedly

17. *See infra* notes 46–48 and accompanying text.

18. THE FEDERALIST NO. 78 (Alexander Hamilton).

19. *See generally* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1962).

true, it is also incomplete, because it is also important to have an account of when or how the failure to declare legal wrongs can undermine judicial legitimacy. Moreover, what circumstances enhance (rather than deplete) the range of choices a court can make without risking illegitimacy, the diminution of power, or irrelevance?

A. Definition

The phrase "political economy of constitutional adjudication" could be subject to multiple meanings, and it is therefore useful to refine what is meant here. In invoking this term, I do not mean to reference ways in which economic theory is sometimes translated into interpretive accounts of doctrine.[20] Nor do I mean to reference ways that economic conditions have shaped public law as a historical matter.[21] I instead mean two things. First, how does the relative political, economic, and moral capital of governmental actors shape constitutional adjudication? Second, how does constitutional adjudication shape the political, economic, and moral capital of government actors?

Both of these questions have long been prominent features of constitutional commentary and law. The question of how government actors' relative capital shapes adjudication is at least as old as Alexander Hamilton's *Federalist 78*. There, he famously spoke of the federal judiciary as the "least dangerous" branch, observing that it lacked the executive's power of the sword and the legislature's power of the purse.[22] Dominant interpretations of *Marbury v. Madison*[23] often rely on this mode of understanding as well; it is often said that Chief Justice Marshall built and preserved the Court's standing by announcing that it had the power of judicial review in a case in which another government official could not disobey the resultant order.[24] Scholars have also argued that over a

20. *See, e.g.*, GANESH SITARAMAN, THE CRISIS OF THE MIDDLE CLASS CONSTITUTION (2017); Joseph Fishkin & William E. Forbath, *The Anti-Oligarchy Constitution*, 94 B.U. L. REV. 669, 669 (2014); *see also* JOSEPH FISHKIN & WILLIAM E. FORBATH, THE ANTI-OLIGARCHY CONSTITUTION (2019); *cf.* Otis v. Parker, 187 U.S. 606, 608–09 (1903) ("Considerable latitude must be allowed for differences of view, as well as for possible peculiar conditions which this court can know but imperfectly, if at all. Otherwise a constitution, instead of embodying only relatively fundamental rules of right, as generally understood by all English-speaking communities, would become the partisan of a particular set of ethical or economical opinions, which by no means are held *semper ubique et ab omnibus*.").

21. *See, e.g.*, ALISON LACROIX, THE INTERBELLUM CONSTITUTION: UNION, COMMERCE, AND SLAVERY FROM THE LONG FOUNDING MOMENT TO THE CIVIL WAR (forthcoming 2020); Ernest A. Young, *Its Hour Come Round at Last? State Sovereign Immunity and the Great State Debt Crisis of the Early Twenty-First Century*, 35 HARV. J.L. & PUB. POL'Y 593, 593–96 (2012).

22. THE FEDERALIST NO. 78, *supra* note 17 (Alexander Hamilton).

23. 5 U.S. (1 Cranch) 137 (1803).

24. For a collection of works that posit this view, see Richard H. Fallon, Jr., Marbury *and the Constitutional Mind: A Bicentennial Essay on the Wages of Doctrinal Tension*, 91 CAL. L. REV. 1, 18 (2003) (calling the opinion in *Marbury* a "prudent retreat"); John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. REV. 962, 995–96 (2002); Jed Handelsman Shugerman, Marbury *and Judicial Deference: The Shadow of* Whittington v. Polk *and the Maryland Judiciary Battle*, 5 U. PA. J. CONST. L.

century later, when President Franklin Roosevelt threatened to "pack the Court" with additional Justices, the President's relatively powerful position in comparison to courts influenced the willingness of at least one Justice to uphold New Deal policies.[25] And toward the end of the twentieth century, debates roared about efficacy of institutional injunctions, given the relative democratic standing of the politically accountable actors charged with enforcing them.[26] Each of these three examples involves claims about how the relative political, economic, or moral capital of another branch purportedly either shape, or should shape, how judges approach constitutional adjudication.

As for how constitutional adjudication shapes this relative capital, this has long been a central feature of constitutional commentary as well. Eminent constitutional theorist James Bradley Thayer, for example, argued that courts should be wary of engaging in too much judicial review, in part because of what this would mean for other government officials' ability to perform their duties.[27] He wrote, "The checking and cutting down of legislative power, by numerous detailed prohibitions in the constitution, cannot be accomplished without making the government petty and incompetent."[28] An overactive judiciary obscures

> the safe and permanent road towards reform, [which] is that of impressing upon our people a far stronger sense than they have of the great range of possible harm and evil that our system leaves open, and must leave open, to the legislatures, and of the clear limits of judicial power; so that responsibility may be brought sharply home where it belongs.[29]

Implicit here is the argument that if government officials assume that courts will always intervene to correct constitutional problems, then, over time, elected officials will pass laws without making their own assessment about whether the

58, 107 (2002) (describing the decision to decline jurisdiction "a wise survival strategy"); Louise Weinberg, *Our* Marbury, 89 VA. L. REV. 1235, 1412 n.101 (2003) (citing CHARLES F. HOBSON, THE GREAT CHIEF JUSTICE: JOHN MARSHALL AND THE RULE OF LAW 49 (1996) ("*Marbury* actually marked a strategic retreat by the judiciary . . . .")).

25. *See, e.g.*, KENNETH S. DAVIS, FDR: INTO THE STORM 1937–1940, at 81 (1993); GERALD GUNTER, CONSTITUTIONAL LAW 457 (2010); Michael Ariens, *A Thrice-Told Tale, or Felix the Cat*, 107 HARV. L. REV. 620, 676 (1994).

26. *Compare* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976), *and* Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979), *with* Frank H. Easterbrook, *Justice and Contract in Consent Judgments*, 1987 U. CHI. LEGAL F. 19 (1987), *and* William A. Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635 (1982), *and* Michael W. McConnell, *Why Hold Elections? Using Consent Decrees to Insulate Policies from Political Change*, 1987 U. CHI. LEGAL F. 295 (1987), *and* Robert F. Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 STAN. L. REV. 661 (1978).

27. James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893); *see also* SANFORD BYRON GABIN, JUDICIAL REVIEW AND THE REASONABLE DOUBT TEST (1980); EVAN TSEN LEE, JUDICIAL RESTRAINT IN AMERICA: HOW THE AGELESS WISDOM OF THE FEDERAL COURTS WAS INVENTED (2011); *cf.* Richard A. Posner, *The Rise and Fall of Judicial Self-Restraint*, 100 CAL. L. REV. 519, 556 (2012).

28. Thayer, *supra* note 27, at 156.

29. *Id.*

laws comport with the Constitution. On this view, then, constitutional adjudication is not only shaped by its relative role in our system but also iteratively helps construct that role.

B. The Role of Minimalism

Judicial "minimalism" or "restraint" is commonly offered as a means of either acknowledging or preserving the balance of institutional capital in the American system.[30] Thayer's argument, for example, was both descriptive and prescriptive. He contended that courts should only overturn actions that are unconstitutional beyond a reasonable doubt.[31] Two generations later, the view that courts are and should be "[t]he least dangerous branch" helped inspire Alexander Bickel's arguments that courts should strategically deploy doctrines of justiciability, such as standing and political question, in order to avoid engaging controversial, fraught constitutional questions.[32]

More broadly, Cass Sunstein has written in a characteristically insightful manner about how relative institutional capital sometimes shapes arguments about judicial minimalism.[33] For example, one case for judicial restraint is that a controversial, countermajoritarian ruling could potentially be ignored by politically accountable actors, "render[ing] a judicial decision futile."[34] A second view is that an imprudently unrestrained constitutional ruling could sometimes be counterproductive or perverse, fueling political resistance that instantiates, rather than remediates, the problem. Third, restraint is sometimes thought to preserve "the Court's own 'capital.'"[35] On this view, "[l]acking electoral legitimacy or a police force, judges are highly dependent on public acceptance of their authority. If the public is outraged, judicial authority might well be jeopardized."[36] Congress could even retaliate through "jurisdiction-stripping bills and other legislative efforts to reduce the Court's authority and independence."[37] For this reason, "[i]f a judicial ruling would compromise the Court's own role in the constitutional structure, it may well make sense to exercise the passive virtues or to proceed in minimalist fashion."[38]

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30. *See* Cass R. Sunstein, *If People Would Be Outraged by Their Rulings, Should Judges Care?*, 60 STAN. L. REV. 155, 168–69 (2007). As Cass Sunstein has observed, "minimalism" can reference both how deep and how broad a ruling is. *Id.* A ruling, for example, can be narrow but deep by only applying in a single case but relying on reasoning that has deep substantive content. *Id.*

31. Thayer, supra note 27, at 140.

32. BICKEL, *supra* note 18, at 1.

33. Sunstein, *supra* note 30, at 171.

34. *Id.* at 170 (emphasis omitted).

35. *Id.* at 171.

36. *Id.*

37. *Id.* at 171–72.

38. *Id.* at 172.

Sometimes federal judges have expressly offered arguments for judicial restraint grounded in the political economy of constitutional adjudication. Roughly forty years ago, Judge Clifford Wallace of the Ninth Circuit reasoned, "Legal economy . . . justifies judicial restraint. Many disputes are better resolved in a nonjudicial setting. Courts are cost-effective, for the most part, in settling disputes. They become cost-ineffective when asked to re-engineer social structures and reorganize social priorities."[39] He added, "In this era of international economic competition, we should hardly wish to excel in the category of litigation expense. Judicial restraint addresses this problem by being cautious about jurisdiction and the extension of causes of action."[40] And more recently, Judge Harvie Wilkson of the Fourth Circuit explained, "Suffice it to say the caution befitting the judiciary's interpretive task and unelected station is periodically forgotten–often to the accompaniment of short-term applause but at the expense of long-term institutional respect."[41] These arguments, while different, share a common feature: they are arguments about how the relative institutional capital of the various branches counsel in favor of judicial restraint.

One concrete setting that sometimes stands as evidence for such arguments is federal courts' caution with respect to implementing racial integration in the wake of *Brown v. Board of Education*. For example, Paul Gerwitz has explored the possibility that the Supreme Court's minimalist approach of permitting state and local government to implement *Brown* with "all deliberate speed" could well have been the "most effective remedy possible given resistance and the imperfections likely under all available alternative remedies."[42] That is,

> [i]n allowing delay, the Supreme Court promised time for social adjustment, as its own direct way of trying to secure public cooperation (including the cooperation of the lower courts); it also gave the lower courts time to use their powers and strategies to try to defuse public opposition in their communities.[43]

Another more recent, central academic voice in this dialogue is Michael Klarman. His provocative idea is that the violent backlash to *Brown* helped spur national sympathy and a congressional response that was more effective at ending segregation than either *Brown* itself or the initial anemic judicial remedies used to facilitate that decision.[44]

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39. J. Clifford Wallace, *The Jurisprudence of Judicial Restraint: A Return to the Moorings*, 50 GEO. WASH. L. REV. 1, 7 (1981).

40. *Id.*

41. J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253, 255 (2009)

42. Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 621 (1983).

43. *Id.*

44. MICHAEL KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 442 (2004).

C. Beyond Restraint

Judicial power is shaped by, and must be attentive to, courts' limited institutional capital. And judicial restraint is undoubtedly a vital component of how that limited capital is, or should be, preserved. Under the conventional account of *Marbury*, for example, had Chief Justice Marshall ordered James Madison to comply with a writ of mandamus, that assertion of power could have proven disastrous for the Court's long-term ability to engage in nonfutile judicial review.[45] But there is necessarily more to the story than preservation of capital through restraint.

First, in considering the relationship between restraint and power, there are presumably circumstances in which undue judicial restraint can *undermine* legitimacy and reduce the judiciary's capital. When scholars like Tom Tyler write that judicial procedural fairness helps facilitate compliance with the law,[46] they invite the possibility that restraint, if viewed as unfair abdication, might not serve the goal of preserving capital at all. And when Richard Fallon writes that courts ought to be faithful to expressed, accepted legal principles across ideological settings, his assertion raises similar questions.[47] To the extent that judicial restraint is deployed in a manner viewed as divorced from these principles, can restraint actually undermine—rather than preserve—judicial capital? Gerald Gunther once charged that "a virulent variety of free-wheeling interventionism lies at the core of [some] devices of restraint."[48]

Indeed, even the most faithful judicial minimalist would concede that the institution has been haunted by "moments where the Court shamefully refused"[49] to invalidate legislation, such as in *Plessy v. Ferguson*.[50] By contrast, reversing *Plessy* increased the Court's capital. As Pamela Karlan put it, "*Brown* has become the crown jewel of the *United States Reports*, [such that] every constitutional theory must claim *Brown* for itself. A constitutional theory that cannot produce the result reached in *Brown*—the condemnation of de jure Jim Crow—is a constitutional theory without traction."[51]

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45. *See* sources cited *supra* note 24.

46. *See* Jason Sunshine & Tom R. Tyler, *The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing*, 37 LAW & SOC'Y REV. 513, 519 (2003); Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283, 350 (2003).

47. RICHARD H. FALLON, JR., LAW AND LEGITIMACY IN THE SUPREME COURT (2018); Tara Leigh Grove, *The Supreme Court's Legitimacy Dilemma*, 32 HARV. L. REV. 2240 (2019) (book review).

48. Gerald Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1, 25 (1964).

49. Wilkinson, *supra* note 41, at 254.

50. 163 U.S. 537 (1896).

51. Pamela S. Karlan, *What Can Brown Do for You?: Neutral Principles and the Struggle over the Equal Protection Clause*, 58 DUKE L.J. 1049, 1060 (2009).

Second, are there circumstances in which judicial restraint can enhance (rather than merely preserve) judicial capital? In analyzing that question, it is helpful to disaggregate some of the different moments in which a court can exercise restraint. Sometimes, appeals to judicial restraint involve claims about the *threshold* stage of litigation, implicating whether a court should exercise jurisdiction in the first instance. For example, Bickel's arguments for the strategic deployment of doctrines like standing could result in a court refusing to hear a case at all and an early dismissal. Justice Felix Frankfurter's approach to restraint had a similar quality; he was a proponent of abstention doctrines that could potentially keep certain cases out of federal court.[52] Other proponents of restraint have focused on the *merits* stage. Theorists like Thayer and John Hart Ely urged cautious deployment of judicial review by erecting a high standard with respect to how certain a jurist should be before overturning duly enacted legislation.[53] Other approaches to restraint focus on the *remedial* stage.[54] Can restraint during any of these stages bolster a court's relative capital? The work of Judge Frank Johnson, as described in the following Parts of this Essay, furnishes some evidence in answering that question.

II. REPUBLICAN REMEDIES

Judge Johnson's storied career is a generative site to study the political economy of constitutional adjudication. This is true for at least two reasons. First, Judge Johnson adjudicated cases in changing political contexts, often in the face of extreme resistance. As the Civil Rights Movement began to flourish, Judge Johnson issued integration orders amid loud calls of "segregation forever" from Governor George Wallace, which mirrored the prevailing public opinion.[55] Judge Johnson also issued orders to facilitate a civil rights workers' peaceful protest across the Edmund Pettus Bridge in Selma in the 1960s, amid an era of violent brutality of segregationists. And still other important rulings by Judge Johnson were issued in the 1970s; he navigated cases that called for prison reform during an era in which "tough on crime" reverberated on the state and national stage.[56]

52. Fred O. Smith, Jr., *Undemocratic Restraint*, 70 VAND. L. REV. 845, 863 (2017).

53. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 8 (1980); Thayer, *supra* note 27.

54. *See generally* Part II. These categories are not, of course, hermetically sealed. The possibility of an aggressively consequential remedy can shape whether a court exercises jurisdiction at all. Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies—And Their Connections to Substantive Rights*, 92 VA. L. REV. 633, 639 (2006).

55. *See* WILLIAMS, *supra* note 6; *see also* JACK BASS, TAMING THE STORM: THE LIFE AND TIMES OF JUDGE FRANK M. JOHNSON, JR. AND THE SOUTH'S FIGHT OVER CIVIL RIGHTS 289–90 (1993) (noting that the judge did not have popular local support during these desegregation cases).

56. Harry A. Chernoff et al., *The Politics of Crime*, 33 HARV. J. ON LEGIS. 527, 538 (1996).

Second, Judge Johnson's awareness of these various political contexts is well-documented. He sometimes publicly spoke about the importance of issuing constitutional rulings amid difficult political contexts. As he once explained, "If we abdicate responsibility to address the difficult questions of our time, those in need of refuge from the torrents of political, economic, and religious forces will find no haven in the law and the law will no longer be supreme."[57] In a 1974 address in Texas, Judge Johnson further explained that "the paramount duty of the federal judiciary is to uphold that law . . . when a state fails to meet constitutionally mandated requirements, it is the solemn duty of the courts to assure compliance with the Constitution."[58] The criticism that important reforms occurred too often at the hands of the federal judiciary was "familiar."[59] And yet, as Johnson stated, "[a]s long as those state officials entrusted with the responsibility for fair and equitable governance completely disregard that responsibility, the judiciary must and will stand ready to intervene on behalf of the deprived."[60]

As his words in the Texas address suggest, Judge Johnson's approach to cases did not reveal a tremendous amount of restraint at the threshold or merits stage. He believed he had a duty to hear cases duly within his jurisdiction, especially when noncompliance with the federal Constitution was at issue. Further, when the evidence revealed the existence of constitutional violations, he did not hesitate to say so. And yet his work was characterized by features designed to protect, and even enhance, judicial capital.

These features sometimes included restraint at the remedial stage. Indeed, his remedies sometimes involved what could be fairly called "cooperative minimalism." When it came to reforming constitutionally deficient institutions, his remedial models were highly deferential and tended to presume a set of cooperative governmental actors who wanted to comply with their joint duty to uphold the Constitution. He generally afforded those actors the first opportunity to put forward a plan for compliance. His more coercive and less flexible remedies tended to be in proportion to how much resistance or recalcitrance his more cooperative remedies faced. Moreover, Judge Johnson also enlisted nonjudicial actors, like the United States Department of Justice, and empowered nonjudicial actors by means of innovative human rights committees.

57. BASS, *supra* note 55, at 278.

58. Frank M. Johnson, *The Constitution and the Federal District Judge*, 54 TEX. L. REV. 903, 914–915 (1976).

59. Wayne McCormack, *The Expansion of Federal Question Jurisdiction and the Prisoner Complaint Caseload*, 1975 WIS. L. REV. 523, 536 (1975).

60. Johnson, *supra* note 58, at 915; McCormack, *supra* note 59, at 536.

A. Cooperative Minimalism

Time and again, after identifying constitutional violations by government actors, Judge Johnson initially offered flexible, open-ended remedies, providing elected officials with wide latitude to correct their own errors. Moreover, while the judge sometimes threatened contempt, he rarely actually used the contempt power. One net result is that when officials resisted his relatively modest, federalism-laden rulings, this had the practical effect of strengthening the judge's esteem (and power) and weakening that of recalcitrant officials.

A key example of this dynamic is *Lee v. Macon County Board of Education*.[61] In that lawsuit, black residents in Tuskegee, Alabama, sought to integrate the county's public schools. In August 1963, in an opinion by Judge Johnson, the federal district court found that the county was in violation of the Equal Protection Clause because the Macon County Board of Education had taken "no steps . . . to desegregate its public school system" in the years after *Brown v. Board of Education*.[62] Still, the court concluded that the chairman of the board's testimony "candidly acknowledge[d] that under the law they have the primary responsibility of taking the initiative in bringing to an end the operation of a school system that violates the constitutional rights of a large majority of the citizens in Macon County."[63] The court expressed that it was "assured" that the defendants would begin integrating by the fall of 1963 and that by December 12, 1963, the school district would produce its own plan to operate a unitary, nonsegregationist school district.[64]

The court's flexible, deferential approach initially resulted in compliance. That fall, thirteen black students were admitted to the previously all-white Tuskegee High School.[65] But resistance quickly followed. On multiple occasions, Governor Wallace issued an executive order demanding that Alabama state troopers prevent black students from entering the school.[66] In those orders, he purported to stop "the threat of forced and unwarranted integration of the public schools of this State."[67] The Alabama Board of Education—which Governor Wallace led on an ex officio basis—also attempted to stop Macon County from complying.[68] In short, comity had been met by cooperation from local officials but resistance from state officials.

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61. Lee v. Macon Cty. Bd. of Educ., 221 F. Supp. 297 (M.D. Ala. 1963), *supplemented per curiam*, 231 F. Supp. 743 (M.D. Ala. 1964).

62. *Id.* at 299.

63. *Id.*

64. *Id.* at 299–300.

65. Lee v. Macon Cty. Bd. of Educ., 231 F. Supp. 743, 745 (M.D. Ala. 1964) (per curiam).

66. *Id.*

67. *Id.* at 747.

68. *Id.* at 747–49.

The net result was a more sweeping set of orders. Pursuant to a motion by the United States, the court issued a temporary restraining order and ultimately an injunction against the Governor, ordering that he not interfere with or obstruct the local board's attempts to integrate its schools.[69] This temporary injunction was "enlarged to a preliminary injunction against all the defendants, including the Governor of the State of Alabama as ex officio President of the State Board of Education, the State Superintendent of Education, and the State Board of Education and the individual members thereof."[70] A three-judge district court panel then ordered those defendants put forth a plan to integrate the *entire* public-school system of Alabama.[71] The Governor's interference had essentially enlarged the scope of the case and the jurisdiction of the federal district court. The court reasoned that in light of the evidence, there was "no question that the State of Alabama ha[d] an official policy favoring racial segregation in public education."[72] Notably, however, even the more sweeping plan provided a fair amount of flexibility by giving state officials a chance to produce a plan to integrate schools across the state. As one author has put it, "Johnson's patience had been rewarded with recalcitrance. He, in turn, rewarded resistance with more sweeping decrees—and yet more patience."[73]

Then, in 1967, the additional patience reached its tipping point. A three-judge district court panel (which included Judge Johnson) issued a significantly more detailed order, specifying the steps that the State of Alabama needed to take to comply.[74] In doing so, the court described the changing moral and political environment in which it operated. It noted that since the commencement of the litigation, "the focus on the rights of American citizens, regardless of their race or color—and in particular on the right of Negro children to attend public schools without discrimination on account of their race [or] color—has increasingly sharpened."[75] As evidence of this sharpened focus, the court highlighted the Civil Rights Act of 1964, observing that by passing that law, Congress "declared it to be a national policy that students shall have the right to attend public schools without regard to their race, color, religion or national origin."[76] The court further noted that black Americans "ha[d] begun filing individual lawsuits in greater volume [than] ever before, for the purpose of desegregating public school facilities."[77] The court contrasted this shifting political

69. *Id.* at 758.

70. *Id.*

71. Lee v. Macon Cty. Bd. of Educ., 267 F. Supp. 458, 480 (M.D. Ala. 1967) (per curiam), *aff'd sub nom.* Wallace v. United States, 389 U.S. 215 (1967).

72. *Lee*, 231 F. Supp. at 750.

73. LARRY W. YACKLE, REFORM AND REGRET: THE STORY OF FEDERAL JUDICIAL INVOLVEMENT IN THE ALABAMA PRISON SYSTEM 19 (1989).

74. *Lee*, 267 F. Supp. at 480–91.

75. *Id.* at 464.

76. *Id.*

77. *Id.* at 465.

and legal environment with the "relentless opposition of these defendant state officials."[78] The court observed,

> Not only have these defendants, through their control and influence over the local school boards, flouted every effort to make the Fourteenth Amendment a meaningful reality to Negro school children in Alabama; they have apparently dedicated themselves and, certainly from the evidence in this case, have committed the powers and resources of their offices to the continuation of a dual public school system such as that condemned by Brown v. Board of Education.[79]

The continued fierce resistance of state decision makers to the court's flexible, deferential rulings—even as the nation had come to reject de jure segregation—opened the door to a more detailed, less deferential order. In the words of the court,

> Based upon this fact and a continuation of such conduct on the part of these state officials as hereafter outlined, it is now evident that the reasons for this Court's reluctance to grant the relief to which these plaintiffs were clearly entitled over two years ago are no longer valid.[80]

In tandem with this opinion, the district court issued a detailed decree that spanned over 6,900 words.

The cooperative approach taken in the *Lee* litigation is consistent with the approach Judge Johnson took a few years later in a highly influential case challenging the state's public mental-health facilities. Following a cut to a cigarette tax, scores of employees were cut from the payroll at mental-health facilities in the state.[81] Initially, employees at Bryce Hospital challenged these dismissals as a violation of their labor rights.[82] But based on questioning from Judge Johnson during an early hearing in the case, the plaintiffs' claims and strategy shifted to one that challenged the institutional conditions' effects on the constitutional rights of the individuals receiving treatment.[83]

In 1971, Judge Johnson concluded that the conditions in the understaffed hospital violated patients' rights.[84] Among other things, the State violated due process by involuntarily depriving people of liberty, all while preventing the patients from an opportunity for meaningful self-improvement or treatment.[85] But as he had done before, Judge Johnson again provided state officials with

78. *Id.*

79. *Id.* (citing Brown v. Bd. of Educ., 347 U.S. 483 (1954)).

80. *Id.*

81. Jules B. Gerard, *A Restrained Perspective on Activism*, 64 CHI.-KENT L. REV. 605, 608 (1988).

82. Note, *The* Wyatt *Case: Implementation of a Judicial Decree Ordering Institutional Change*, 84 YALE L.J. 1338, 1347 (1975).

83. *Id.*

84. Wyatt v. Stickney, 325 F. Supp. 781, 785 (M.D. Ala. 1971), *aff'd sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974).

85. *Id.*

the first opportunity to devise a plan to abate these violations. The court gave officials six months "to promulgate and implement proper standards for the adequate mental care of the patients" at Bryce Hospital.[86]

Nine months after that order, the court assessed the defendants' progress toward curing these constitutional deficiencies. Upon finding that the lack of progress was "wholly inadequate,"[87] the court concluded that the psychological and physical environment of Bryce was inhumane, in part because there was insufficient staff to provide adequate treatment.[88] Safety hazards and overcrowding also still plagued the facility.[89] The court further broadened the class, observing that the evidence suggested that the problems were systemic and extended to two other facilities: Searcy Hospital for the mentally ill and Partlow State School and Hospital for the mentally retarded.[90] Accordingly, the court held a hearing to determine the proper content of a more specific decree beyond the flexible, deferential one it had issued earlier. In 1972, having conducted that hearing, the court entered injunctions that required the defendants to comply with carefully articulated, minimum constitutional standards.[91] These requirements have come to be known as the *Wyatt* standards, and variations of those standards have been adopted across the United States.[92] The standards were designed to achieve three "fundamental conditions for adequate and effective treatment[:] . . . (1) a humane psychological and physical environment, (2) qualified staff in numbers sufficient to administer adequate treatment and (3) individualized treatment plans."[93]

Judge Johnson had again engaged in a kind of cooperative minimalism. First he issued a flexible, deferential opportunity for politically accountable officials to correct constitutional violations. Only when that failed did he extend the remedies both in terms of breadth (applying the remedies to a broader range of actors) and depth (providing specific metrics as to what compliance required). As one commentator put it in 1975, "At each stage the court apparently

86. *Id.*

87. *Wyatt v. Stickney,* 334 F. Supp. 1341, 1344 (M.D. Ala. 1971), *aff'd sub. nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974).

88. *Id.* at 1344.

89. *Id.* at 1343 (stating that "[o]ther conditions which render the physical environment at Bryce critically substandard are extreme ventilation problems, fire and other emergency hazards, and overcrowding caused to some degree by poor utilization of space").

90. *Id.* at 1344.

91. *Wyatt v. Stickney,* 344 F. Supp. 373 (M.D. Ala. 1972) (ordering standards for mentally ill patients), *aff'd in relevant part,* 503 F.2d 1305 (5th Cir. 1974); 344 F. Supp. 387 (M.D. Ala. 1972) (ordering standards for intellectually disabled patients), *aff'd in relevant part,* 503 F.2d 1305 (5th Cir. 1974).

92. *Federal Judge Holds State Violates Rights of Alabama Patients*, NAT'L BAR ASS'N, January/February 1998 ("The standards, modified over the years, continue to govern care in Alabama's institutions—and other states that have adopted them, ether legislatively or as a result of litigation modeled on *Wyatt*. The Wyatt Standards also formed the basis for federal Medicaid rules and hospital-accreditation criteria.").

93. *Wyatt,* 334 F. Supp. at 1343.

sought to encourage voluntary compliance by the defendants while making clear that it would assume a more active role if necessary."[94]

B. Expansion and Empowerment

Beyond cooperative minimalism, another feature of Judge Johnson's adjudication was his tendency to expand and, when necessary, empower the cast of actors invested in achieving compliance with the Constitution. One of the approaches that Judge Johnson took was requesting that the United States Department of Justice participate in various cases. In the *Lee* case, for example, the court determined that it was "appropriate and necessary that the United States of America be designated to appear and participate as a party in all proceedings in this action before this Court."[95] Indeed, by the time his most sweeping order in that case reached the Supreme Court three years later in 1967, the case was styled *Wallace v. United States*.[96] As Larry Yackle has written, drafting the Department of Justice and, concomitantly, the FBI, meant that "agents produced volumes of sensitive information that might not otherwise have been available to litigants attacking segregation."[97] Instantly, those who were attacking racial segregation had a "resourceful" and "powerful" ally.[98]

Judge Johnson took a similar step in *Wyatt*, as well as in monumental prison-reform litigation cases.[99] In those cases, at Judge Johnson's urging, the Department of Justice served as amici.[100] A key figure in leading that effort was Ira DeMent, the United States Attorney for the Middle District of Alabama.[101] In those cases too, then, a ruling of unconstitutional was accompanied by the prestige and resources of the federal government.

Judge Johnson also empowered local actors. Indeed, DeMent—who later became a federal district court judge—was a well-connected local actor. Among other roles, DeMent previously served as a legal advisor to Police Commissioner L. B. Sullivan, as well as an attorney for the city of Montgomery.[102] But beyond that, Judge Johnson sometimes created committees that were tasked with implementing complex judicial orders. Such committees successfully

94. Note, *supra* note 81, at 1348.
95. Lee v. Macon Cty. Bd. of Educ., 231 F. Supp. 743, 744–45 (M.D. Ala. 1964).
96. 389 U.S. 215 (1967).
97. YACKLE, *supra* note 73, at 19.
98. *Id.* at 20.
99. *Id.* at 23.
100. *Id.* at 19.
101. *Id.*
102. *Id.*

helped implement school integration[103] and helped ensure that the *Wyatt* standards were implemented adequately.[104] In so doing, Judge Johnson essentially ensured that a broader group of community members were invested in constitutional compliance.

III. IMPACT

The question remains: how did Judge Johnson's cooperative minimalism, enlistment, and empowerment influence the relative capital of governmental actors in Alabama? There are substantial reasons to believe that Judge Johnson's approaches enhanced his esteem, increased respect for the federal judiciary more broadly, and elevated the national importance of the Middle District of Alabama. Moreover, as this symposium shows, he left a legacy that tends to remind that courts are an indispensable force in the American republic with respect to constitutional compliance, *especially* in the face of countermajoritarian resistance.

A. Direct

Examples of how Judge Johnson's approaches enhanced his judicial capital can be found in the language of appellate courts when they affirmed his rulings. Perhaps the most striking example can be found in the case of *Carr v. Montgomery County Board of Education*.[105] In that case, Judge Johnson engaged in cooperative minimalism with orders designed to desegregate the faculty and staff at schools in Montgomery County. In 1966, Judge Johnson issued a desegregation order that required that the county put forth a comprehensive desegregation plan.[106] But in terms of compliance, the order contained the kind of flexible discretion that should now be familiar to readers. Officials were asked to take "affirmative steps" to transfer faculty and staff to ameliorate the effects of de jure segregation.[107] And each new teacher or staff member was to be considered for "any position in the system where there is a vacancy for which they are qualified."[108]

In a pattern that should also be familiar to readers, the order met resistance, or at least noncompliance. The court observed in 1968 that, "While there is

103. Carr v. Montgomery Cty. Bd. of Educ., 377 F. Supp. 1123, 1140 (M.D. Ala. 1974), *aff'd*, 511 F.2d 1374 (5th Cir. 1975), *rev'd sub nom.* United States v. Montgomery Cty. Bd. of Educ., 395 U.S. 225 (1969).

104. NANCY CALLAHAN, THE FREEDOM QUILTING BEE: FOLK ART AND THE CIVIL RIGHTS MOVEMENT 228 (2005); BASS, *supra* note 55, at 341.

105. Carr v. Montgomery Cty. Bd. of Educ., 253 F. Supp. 306 (M.D. Ala. 1966).

106. *Id.* at 307.

107. *Id.* at 310.

108. *Id.*

some faculty desegregation in the elementary schools in the system, it is extremely small."[109] Moreover, there had been "very little, if any, faculty desegregation in the schools located outside the City of Montgomery."[110] The court noted that after its earlier order, the defendants "[had] assigned or transferred approximately 75 new teachers to faculties where their race was in the majority."[111] In addition, of the thirty-two newly hired teachers, all of the black teachers had been assigned to predominately black schools, and the vast majority of the white teachers had been assigned to majority-white schools.[112] Accordingly, Judge Johnson issued an order that involved numerical quotas for the challenged schools.[113]

When the quotas were challenged and upheld by the United States Supreme Court, Judge Johnson's previous remedial cooperation was expressly cited and lauded. The Court concluded that the quotas were justified "under all the circumstances of this case."[114] As it accepted the "specific and expeditious order of Judge Johnson," it noted that his "patience and wisdom are written for all to see and read on the pages of the five-year record before us."[115] The combination of Judge Johnson's patience, and the contrasting noncompliance, appears to have helped sustain his highly specific order, racial quotas notwithstanding.

B. Jurisdiction

As an objective matter, federal district courts' authority over civil rights cases increased during and after the era in which jurists in the South, like Judge Johnson, issued rulings designed to dismantle segregation and bring state institutions into compliance with federal norms. Three examples are Congress's amendment of 28 U.S.C. § 1343, passage of the Civil Rights Act of 1964, and amendment of 42 U.S.C. § 1988.

In 1957, as district courts sought to enforce *Brown v. Board of Education*,[116] Congress expanded the scope of federal courts' jurisdiction by way of § 1343.[117] Specifically, the statute gave federal district courts the authority to entertain civil

109. Carr v. Montgomery Cty. Bd. of Educ., 289 F. Supp. 647, 650 (M.D. Ala. 1968), *aff'd*, 400 F.2d 1 (5th Cir. 1968), *rev'd sub nom.* United States v. Montgomery Cty. Bd. of Educ., 395 U.S. 225 (1969).

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* at 654 (stating that, by the 1968–1969 school year, "[a]t every school with fewer than 12 teachers, the board will have at least two full-time teachers whose race is different from the race of the majority of the faculty and staff members at the school. At every school with 12 or more teachers, the race of at least one of every six faculty and staff members will be different from the race of the majority of the faculty and staff members at the school. This Court will reserve, for the time being, other specific faculty and staff desegregation requirements for future years.").

114. *Montgomery Cty. Bd. of Educ.*, 395 U.S. at 235–36.

115. *Id.*

116. Brown v. Bd. of Educ., 347 U.S. 483 (1954), *supplemented by* 349 U.S. 294 (1955).

117. 28 U.S.C. § 1343 (2018).

rights actions rooted in federal law, regardless of the amount in controversy.[118] This was important because, until the early 1980s, the more general federal-question statute had an amount in controversy requirement.[119] By amending § 1343, Congress essentially removed this hurdle in civil rights cases, expanding the power of federal district courts.

Moreover, the Civil Rights Act of 1964 expanded federal courts' ability to issue injunctive relief against discrimination in places of public accommodation.[120] That statute also authorized the Attorney General to bring suits to desegregate educational facilities and schools.[121] This is consistent with Judge Johnson's reliance on the Department of Justice in desegregation cases, a practice that, to some degree, preceded the Civil Rights Act of 1964 and then took on more force after that Act's passage.

In 1976, Congress again moved to facilitate civil rights actions in federal district courts, embracing litigation as an important means of achieving constitutional compliance. That year, Congress passed the Attorney's Fees Award Act, which resulted in 28 U.S.C. § 1988(b). That provision allows a "prevailing party" in a federal civil rights action to recover reasonable attorney's fees from the defendant.[122] The statute expressly applies to constitutional actions brought against state actors accused of violating federal rights.[123] Courts have subsequently defined *prevailing party* to refer to one who has a achieved a judgment that "materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the [party]."[124]

Collectively, these actions by Congress tend to suggest that federal courts' significant intervention in areas like integration and institutional reform did not reduce judicial capital. Instead, in tangible ways, Congress increased judicial power during the period that Judge Johnson and other courageous jurists enforced the egalitarian commands of the Constitution and federal law.

C. Descendible Capital?

In June of 1979, Judge Johnson ascended to the Fifth Circuit Court of Appeals.[125] The judge for whom I clerked, Judge Myron H. Thompson, succeeded him. Judge Johnson left a lasting, indelible mark on that institution. This is true, perhaps, in two ways. First, some of Judge Johnson's cases—like *Wyatt* and

118. *Id.*

119. 28 U.S.C. § 1331 (2018) (amending 28 U.S.C. § 1331 (1980)).

120. 42 U.S.C. §§ 2000a-3, 2000a-5, 2000a-6 (2018).

121. 42 U.S.C. § 2000a-5 (2018).

122. 42 U.S.C. § 1988(b) (2018).

123. *Id.*

124. Farrar v. Hobby, 506 U.S. 103, 111–12 (1992).

125. *Johnson, Frank Minis, Jr.*, FED. JUD. CTR, https://www.fjc.gov/history/judges/johnson-frank-minis-jr. (last visited Feb. 26, 2020).

Pugh—were inherited by other judges on the Middle District. Second, the Middle District of Alabama has continued to be at the vanguard of constitutional adjudication in the domain of civil rights.

1. Prison Cases

In 1979, toward the end of Judge Johnson's time as a district judge, he appointed Governor Fob James as the receiver of the Alabama Prison System. He did so with evident frustration. He wrote, "Time does not stand still, but the Board of Corrections and the Alabama Prison System have for six years. Their time has now run out. The Court can no longer brook noncompliance with the clear command of the Constitution, represented by the orders of the Court in this case."[126] Judge Johnson noted that appointing the Governor as receiver was a less extreme measure than some of the alternatives, such as the "closing of several prison facilities."[127] Receivership was "the more reasonable and the more promising approach."[128] Years into the case, his approach to adjudication still bore hallmarks of cooperative minimalism.

Upon Judge Johnson's departure, Judge Robert E. Varner was assigned *Pugh v. Locke* and the consolidated companion case, *Newton v. Alabama*. His remedial approach was markedly different from Judge Johnson's. While some commentators have expressed doubts as to whether the case would have emerged as a sweeping institutional class action if Judge Varner had been initially assigned the case,[129] there is no doubt that his remedies were substantially more aggressive. In the face of perpetual noncompliance, Judge Varner ordered the release of 352 prisoners.[130] In addition, he held the state attorney general and police commissioner in contempt, imposing large fines.[131]

These more aggressive remedies may have spelled the litigation's demise. The Eleventh Circuit overturned Judge Varner's order releasing prisoners.[132] It noted that such a measure could only be justified if the court had first attempted coercive measures, such as contempt, and those measures had then failed.[133] Upon remand, Judge Varner attempted to hold the defendants in contempt.[134]

126. Newman v. Alabama., 466 F. Supp. 628, 635 (M.D. Ala. 1979).

127. *Id.*

128. *Id.*

129. Barry Friedman, *Right and Remedy*, 43 VAND. L. REV. 593, 608 (1990) (reviewing YACKLE, *supra* note 73) ("Judge Robert Varner was in many ways the antithesis of Frank Johnson. While Johnson was sympathetic to the claims of prisoners and anxious to achieve reform, Varner was hostile to civil rights plaintiffs generally.").

130. *Id.*

131. *Id.*

132. Newman v. Alabama, 683 F.2d 1312 (11th Cir. 1982).

133. *Id.* at 1317.

134. *See* Newman v. Graddick, 740 F.2d 1513 (11th Cir. 1984).

But the Eleventh Circuit then overturned that order.[135] The court took the view that in light of the financial conditions, full compliance by the defendants was essentially impossible.[136] And, in any event, the appellate court ruled the defendants had not been given a full, reasonable opportunity to bring themselves into compliance before facing the contempt sanction.[137] According to commentators, this spelled the end of reform.[138] The parties recommended *Pugh* and *Newman* be dismissed, and accordingly, they were.[139]

Notably, however, this marks just one chapter in the Middle District of Alabama's adjudication of constitutional issues related to state prison reform. The most recent chapter comes by way of *Braggs v. Dunn*.[140] In 2017, following a bench trial, the district court found that the provision of mental-health care in the Alabama prison system was "horrendously inadequate" in violation of the Eighth Amendment.[141] In the third footnote of the opinion, the court cited to earlier chapters in prison litigation in the Middle District, including Judge Johnson's opinion in *Pugh*.[142] Judge Thompson approached the remedy, however, with the kind of cooperative minimalism generally displayed by Judge Johnson. The initial opinion finding a violation of the Eighth Amendment was not accompanied by an injunction or detailed order. Rather, the court ordered "that the court and the parties will meet to discuss a remedy."[143] In this instance, the State proposed a resolution, and in February 2018, the court found that the State's proposed remedy was "minimally adequate and acceptable, albeit with minor modifications."[144] Consistent with the State's plan, the court ordered staffing increases, as well as the hiring of two consultants to determine how to go about recruiting, hiring, and retaining staff.[145]

2. Mental-Institution Cases

When Judge Johnson was elevated to the Eleventh Circuit, the *Wyatt* mental-health case was assigned to Judge Thompson. In 1986, the court ratified a consent decree that required all of the *Wyatt* factors to "remain in effect."[146] Further, it required that the State make substantial progress in complying with

135. *Id.* at 1525.

136. *Id.*

137. *Id.*

138. Friedman, *supra* note 129, at 609.

139. *Id.* at 610.

140. Braggs v. Dunn, 257 F. Supp. 3d 1171 (M.D. Ala. 2017) (Thompson, J.).

141. *Id.* at 1267.

142. *Id.* at 1181 n.3.

143. *Id.* at 1268.

144. Braggs v. Dunn, No. 2:14CV601-MHT, 2018 WL 985759, at *1 (M.D. Ala. Feb. 20, 2018).

145. *Id.*

146. Wyatt *ex rel.* Rawlins v. Wallis, No. CIV. A. 3195-N, 1986 WL 69194, at *7 (N.D. Ala. Sept. 22, 1986).

those standards.[147] It also provided for steps to help integrate individuals with mental disabilities into communities across the state.[148] At the same time, the consent decree eliminated certain monitoring requirements and a receivership, substantially reducing the court's ongoing supervision.[149] Instead, the decree created a system that was designed to aid the State in complying with the terms of the decree.[150] The committee was made up of individuals appointed by the State, by plaintiffs, and by the system's Director of Advocacy Services.[151] The committee remained in effect until 1991, when modifications were made to the decree.[152] By 1997, the court concluded that the State was substantially in compliance with its legal requirements and commitments,[153] and by 2004, the case closed in its entirety.[154]

When the case ended, Judge Thompson extolled the legacy of Judge Johnson. In a 2004 opinion, Judge Thompson noted, "In 1971, when Judge Frank M. Johnson, Jr. issued the first order in this case, there were thousands of patients hospitalized in Alabama," often involuntarily committed, "without the constitutional protections that are afforded defendants in criminal proceedings." [155] The conditions were "inhumane," "non-therapeutic," and unhygenic.[156] The *Wyatt* standards not only improved conditions in Alabama but also "had a reverberating impact on state and national law and, perhaps even more importantly, on public consciousness about mental illness."[157] Judge Thompson observed, "The standards have been incorporated into state and federal mental-health codes and regulations," including the Americans with Disabilities Act of 1990.[158] Further, "[t]he nationwide Protection and Advocacy system is a 'direct descendant' of the Human Rights Committees Judge Johnson appointed in the *Wyatt* case."[159] He poignantly added, "This legacy of this litigation cannot be terminated by any court."[160]

147. *Id.* at *3, *7.
148. *Id.* at *8.
149. *Id.* at *2.
150. Wyatt *ex rel.* Rawlins v. Rogers, 985 F. Supp. 1356, 1364–65 (M.D. Ala. 1991).
151. *Id.*
152. Wyatt *ex rel.* Rawlins v. Horsley, 793 F. Supp. 1053, 1054 (M.D. Ala. 1991) (Thompson, J.).
153. Wyatt *ex rel.* Rawlins v. Rogers, 985 F. Supp. at 1356.
154. Wyatt *ex rel.* Rawlins v. Sawyer, 219 F.R.D. 529, 531–33 (M.D. Ala. 2004).
155. *Id.* at 531 (citing Wyatt *ex rel.* Rawlins v. Stickney, 325 F. Supp. 781, 784 (M.D. Ala. 1971)).
156. Jack Bass described the conditions as follows:

> Human feces were caked on the toilets and walls, urine saturated the aging oak floors, many beds lacked linen, some patients slept on floors, archaic shower stalls had cracked and spewing shower heads. One tiny shower closet served 131 male patients; the 75 women patients also had but one shower. Most of the patients at Jemison were highly tranquilized and had not been bathed in days. All appeared to lack any semblance of treatment. The stench was almost unbearable.

BASS, *supra* note 55, at 292.
157. *Rawlins*, 219 F.R.D. at 532.
158. *Id.*
159. *Id.*
160. *Id.* at 533.

3. Constitutional Litigation

Forty years after Judge Johnson's elevation and twenty years after his passing, the Middle District also continues to be at the vanguard of constitutional adjudication. On issues ranging from excessive force[161] to voting rights[162] to death penalty protocols[163] to debtors' prison reform,[164] the Middle District has left a considerable impression on American law. With respect to debtors' prison reform, for example, a pressing national issue is under which circumstances a government may keep a person incarcerated on the grounds that she cannot afford to pay a fine or bail. In 2014, the Middle District preliminarily enjoined Montgomery, Alabama, from jailing people who could not afford to pay certain fees and fines.[165] It invalidated the City of Clanton's rigid money-bail scheme in 2015.[166] "Justice that is blind to poverty and indiscriminately forces defendants to pay for their physical liberty is no justice at all," Judge Thompson wrote.[167] The latter case was cited in Judge Lee Rosenthal's groundbreaking 2017 opinion invalidating money bail for those accused of misdemeanors in Houston, Texas.[168] With respect to civil rights, the Middle District remains an esteemed judicial leader.

161. Ayler v. Hopper, 532 F. Supp. 198, 201 (M.D. Ala. 1981) (Thompson, J.) ("To the extent that [Alabama law] purports to authorize the use of deadly force in situations where the use of such force is not necessary to prevent imminent, or at least a substantial likelihood of, death or bodily harm—as the statute certainly appears to do—it is unconstitutional."). The United States Supreme Court adopted the rule advanced by Judge Thompson in *Tennessee v. Garner*, 471 U.S. 1, 12–20 (1985). *See also* Hope v. Pelzer, 536 U.S. 730, 741–44 (2002) (finding that "obvious" violations of law are not entitled to qualified immunity in an excessive force case, expressly relying in part on Judge Thompson in *Austin v. Hopper*, 15 F. Supp. 2d 1210, 1244–46 (M.D. Ala. 1998)).

162. *See generally* Pamela S. Karlan, *The Alabama Foundations of the Law of Democracy*, 67 ALA. L. REV. 415, 415 (2015).

163. Ty Alper, *Blind Dates: When Should the Statute of Limitations Begin to Run on a Method-of-Execution Challenge?*, 60 DUKE L.J. 865, 885 (2011).

164. Jones v. City of Clanton, No. 215CV34-MHT, 2015 WL 5387219, at *3 (M.D. Ala. Sept. 14, 2015).

165. Mitchell v. City of Montgomery, No. 2:14-cv-00186 (M.D. Ala. May 5, 2014) (order granting preliminary injunction).

166. *Id.* at *3.

167. *Id.*

168. O'Donnell v. Harris County, 251 F. Supp. 3d 1052, 1081 (S.D. Tex. 2017), *aff'd as modified*, 882 F.3d 528 (5th Cir. 2018), *and aff'd*, 892 F.3d 147 (5th Cir. 2018); *see* Fred O. Smith, Jr., *Abstention in the Time of Ferguson*, 131 HARV. L. REV. 2283, 2353 (2018).

CONCLUSION

Judge Johnson donned the cover of *Time Magazine* in 1967.[169] The federal courthouse in Montgomery bears his name.[170] Significant books have been written about his work and life.[171] He has been the subject of previous symposia in the *Yale Law Journal*,[172] as well as dedicated academic work in this journal.[173] He is, in all likelihood, the most influential and most celebrated federal district court judge in the history of the republic.[174] We celebrate him *not* because he exhibited a brand of Thayerian or even Bickelian judicial restraint, declining to identify and declare constitutional violations in the shadow of a countermajoritarian difficulty. He did not hesitate to declare violations of the Constitution. Nor do we celebrate him for unyielding, coercive, inflexible remedies, demanding immediate compliance. His remedies braided deference, flexibility, and patience. For decades, Judge Johnson navigated what one commentator has called the "politics of remedies,"[175] without sacrificing a commitment to the rule of law and to justice. His judicious investments have born untold dividends for his memory, for morality, and for the mantle that judges continue to carry in the federal courthouse at the corner of Court and Lee.

169. *Federal Judge Frank Johnson*, TIME, May 12, 1967, http://content.time.com/time/covers/0,16641,19670512,00.html.

170. *See supra* note 13.

171. *See, e.g.*, BASS, *supra* note 55; ROBERT F. KENNEDY, JR., JUDGE FRANK M. JOHNSON, JR. (1978); FRANK SIKORA, THE JUDGE: THE LIFE AND OPINIONS OF ALABAMA'S FRANK M. JOHNSON, JR. (2007); YACKLE, *supra* note 73.

172. Myron H. Thompson, *Measuring a Life: Frank Minis Johnson, Jr.*, 109 YALE L.J. 1257, 1257 (2000).

173. Abrams & Wright, *supra* note 5, at 1381.

174. *Cf.* Hon. James E. Baker, *What Process Is Due? The Role of Judging in National Security*, 67 RUTGERS U. L. REV. 1523, 1540 (2015) ("Frank Johnson was once the most famous judge in America.").

175. *See* Friedman, *supra* note 129, at 610.