THE DESEGREGATION OF TULANE UNIVERSITY

A Thesis

Presented to

the Faculty of the Graduate School

University of New Orleans

In Partial Fulfillment

of the Requirements for the Degree

Master of Arts in History

by

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December 1982

ACKNOWLEDGMENTS

I am deeply grateful to Professor Joseph Logsdon whose invaluable aid helped me to develop this work. I am also grateful to Professors Warren Billings and Arnold Hirsch for their constant encouragement and cooperation. My deep appreciation goes to John Nelson for inspiring this thesis and to my mother, Elizabeth Miner Cunningham, for sustaining me through its completion.

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ABSTRACT

In 1938 the Supreme Court set the federal judiciary on a course that would eventually end segregation in public education. With the Brown decision in 1954, the courts nullified "separate but equal" in public education at every level.

Private schools did not fall entirely outside the force of these landmark decisions. Following Brown, the federal courts warned that any institution that had some state support or control also fell under the demands of the Fourteenth Amendment. Tulane University was one such institution. Tulane, in 1961, still refused to admit black students. The university's admissions policy stemmed partly from racial restrictions imposed in 1884 by its benefactor, but was also maintained by a board reluctant to challenge the city's tradition of segregation.

One man not so reluctant was John Nelson. He was hired by Rosa Keller, a prominent New Orleanian, who had been active in race relations since World War II. Nelson's imaginative lawsuit, first heard in 1961 by J. Skelly Wright, proved that Tulane was a quasi-public institution amenable to the Fourteenth Amendment. Nelson's victory pushed the Tulane board into a campaign designed

to ensure private status for the university. In a second trial before Frank B. Ellis in 1962, the board succeeded in reversing Wright's decision and then desegregated in 1963 before an appeal could be filed by the plaintiffs.

The federal court missed a chance to extend the application of the Fourteenth Amendment to private schools; instead, it ended a controversy at Tulane. Ellis' decision restored the university's private status and allowed the board to claim it had voluntarily desegregated. In the end, Tulane satisfied its restless faculty, regained its liberal reputation, and ensured continued foundation support. It was a better university but only because John Nelson did for Tulane what its own board would not do.

INTRODUCTION

In 1938, the Gaines v. Canada decision (305 U. S. 337, 1938) set the United States Supreme Court and the rest of the federal judiciary on a course that would eventually overturn all laws that segregated public colleges and universities in the United States. For the next sixteen years the federal courts overturned such segregationist devices as out-of-state tuition grants, segregated college classrooms, and one-person schools. The course reached a logical conclusion when the Supreme Court nullified "separate but equal" in public education at every level in 1954.

Private schools did not fall outside the force of this landmark decision; during the 1950s, the Supreme Court, in Cooper v. Aaron (358 U. S. 1, 1958) and the Girard College Cases (386 Pa 548, 127 A. 2d. 287, 1957), warned that any private institution that had some state support or control also fell under the demands of the Fourteenth Amendment. If the dictates of conscience, national reputation, and financial pressures had not already encouraged these lily-white, quasi-public institutions to change their admissions policy, the federal courts certainly warned them of their legal responsibilities. And yet, as late as 1961, the administrators of Tulane University of Louisiana,

a private institution that enjoyed a reputation as the "Harvard of the South," still denied admission to black students.

In April of that year, the administrators had decided to admit qualified black students if legally permissible. The legal complications stemmed from racial restrictions imposed on the university eighty years before by its benefactor, Paul Tulane. By the end of that year, the administrators, unwilling to initiate the test of their legal responsibility to their benefactor, found themselves in federal court defending the university against a Fourteenth Amendment class-action suit. Their resistance to voluntary desegregation nearly cost the university its private status.

Examination of the legal battle that prompted the desegregation reveals our legal system as powerful, flexible, and even contradictory. This study supports the maxim that our courts not only administer justice but that they also end controversy. What began as an attempt by John Nelson to encourage Tulane to change its admissions policy became a struggle between two constitutionally protected ideals--the ideal of racial equality and the sanctity of private institutions. One man, J. Skelly Wright, read the evidence, interpreted the law, and decided in favor of racial equality; another man, Frank B. Ellis, read the same evidence, interpreted the same law, and restored the university's private status.

In February 1963, Tulane admitted eleven black students. The court, in the end, did not order desegregation but neither was the board's action, as the myth now prevails, entirely voluntary. Unwilling to challenge the racial mores of the city, the Tulane board needed goading, and John Nelson accepted the challenge of that assignment. The legal battle that Nelson initiated forced the administrators to re-examine their obligation as educators. The court eventually produced an accommodation rather than a clear settlement; but John Nelson, not the Tulane board, brought desegregation to Tulane University.

CHAPTER I

THE ORDEAL OF VOLUNTARY DESEGREGATION

> The Administrators of the Tulane Educational Fund . . . voted Wednesday that Tulane would admit qualified students regardless of race or color if legally permissible.
>
> Joseph Merrick Jones

In 1961, Tulane University of Louisiana touted its parity with the most selective, private universities in the country. Tulane, situated on a 110-acre campus in the "uptown" section of New Orleans on stately St. Charles Avenue, had undergone enormous change and development during the two previous decades and by 1961, had 7000 students enrolled in its eleven graduate and undergraduate departments, law school, and medical school. Its academic prestige was challenged in the South only by, perhaps, Duke and Vanderbilt.

The university's growth had been meticulously planned in 1937 under President Rufus Carrollton Harris when the university set a goal to raise Tulane's standards and reputation to the level of those enjoyed by the Ivy League schools of the East.[1] Tulane began to strengthen its liberal arts colleges and graduate school in the hopes

of providing the intellectual leadership sorely needed in the South.[2] The board spent tens of millions of dollars over the next twenty years enlarging the university's physical plant, adding courses and degree offerings, hiring new faculty and administrators, all to recapture the region's best high school graduates who in growing numbers made their way East to pursue higher degrees and then stayed there.[3]

Joseph Merrick Jones, named chairman of the Tulane board in 1947 and totally supportive of Tulane's commitment to excellence, had to steer the board away from a tradition of fiscal conservatism to a policy of deficit spending and heavy borrowing in order to continue the ambitious expansion program and pay the bills.[4] Although the board had hoped to tap the wealth exuding from the region's newly-awakened gas, oil, and sulphur industries, debts continued to mount and Tulane had come to depend more heavily on gifts from the federal government and the larger foundations.[5] True, the board's efforts won for the university an improved academic reputation, but Tulane remained, in a very important way, a world apart and a century behind. The year, 1961, was late for any university of its ambitions to maintain racial restrictions in its admissions policy.

The board was being pressured from many sides to admit black students. The Graduate School faculty was the first to condemn formally the board's admissions policy. In April 1954, one month before

Chief Justice Earl Warren delivered the Court's opinion in Brown, that faculty unanimously adopted a resolution recommending that the board admit black students to the university.[6] Although President Harris endorsed this recommendation and carried it to the board, the resolution met stiff opposition.[7] Throughout the fifties, the board repeatedly refused to change its policy and stimulated only more opposition among the faculty.[8]

Among those openly leading the assault was Henry L. Mason, professor of political science and President of Tulane's chapter of The American Association of University Professors (AAUP). Although the faculty had no direct representation on the board in those years, Mason was able to have faculty members' displeasure relayed to the board through administrative channels by deans sympathetic to their cause.[9] The messages carried to the board warned of growing faculty exasperation over the hypocrisy of teaching in a so-called progressive university for a board that had not yet come to terms with their own racial prejudices. Admission of black students was not the only issue. On occasion, administrators denied the faculty use of campus buildings to host racially-mixed conferences.[10]

The board, no doubt, considered the high costs of continuing its racist policy. Faculties enjoyed great mobility during the sixties, and the chances of the university's losing a considerable number of

its graduate and liberal arts professors seemed great.[11] But faculty pressure, considerable as it was, could not spur the board to challenge tradition and open Tulane's doors.

Attempting to live up to a national reputation, to pacify an aroused faculty and, at the same time, to maintain the color line had proved increasingly difficult but not insurmountable. But, by the sixties, continued resistance to desegregation had also become financially impractical. In 1961 the university was facing a growing, burdensome debt. As the university flourished under new leadership in the fifties, the board's designs had steered Tulane into deep financial trouble. Board proposals called for the recruiting of even better faculty and administrators--all at higher salaries. The board also expanded the physical plant and the library holdings to accommodate the increased enrollment and improved programs. They added classroom and administrative buildings, auditoriums, dormitories, and research buildings at a cost of millions of dollars.[12] And although the board had raised student fees, borrowed from the federal government, and appealed to its alumni to augment the university's income and cover costs, by 1961, all these measures had proved inadequate to clear the debt the board's ambitious program had incurred.[13]

In 1945-46, operating costs of the university were $3,753,000; in 1950-51, $6,228,285.[14] By the 1960's, the costs tripled and ex-

ceeded income. The Financial Report for 1960-61 disclosed that the board had operated an $18 million university on a $17 million income. Student fees had brought in $4.5 million, and restricted and unrestricted gifts and grants raised nearly $6 million. The university's auxiliary enterprises, such as the food service, residence halls, and bookstore, raised $4 million; the endowment generated only $1.75 million.[15] When Herbert Eugene Longenecker replaced Harris as president in September 1960, he took over a university that had operated $1 million in the red for three consecutive years and was fast approaching the point where further deficit financing was dangerous.[16] Student fees and grants accounted for over half of the 1960-61 income and clearly sustained the university, but the administrators were questioning the feasibility of raising tuition again. Measures to increase the endowment and alumni giving would have to be undertaken, but the larger foundations seemed to offer the best solution to the university's financial dilemma.

Winning foundation money was not so easy. In 1960 Tulane had gained grants from many of the larger foundations: Ford, Rockefeller, duPont, Kaiser, American Cancer, National Science Foundation, U.S. Public Health Service.[17] Of particular appeal to President Longenecker and the board was the matching grant the Ford Foundation was making available to southern universities.[18] If secured, Tulane stood to re-

ceive $6 million from that grant alone. The university had clearly met the academic standards Ford demanded of its recipients. That, however, was not enough. The larger foundations, including Ford, were becoming increasingly reluctant to subsidize segregated institutions.[19] Ford had already begun to establish the "policy in its grant-making programs to advance desegregation."[20] Continuing to win grants in the sixties, while maintaining a lily-white admissions policy, would be difficult with most foundations, but the Ford matching grant was definitely out of their reach. Ford's matching grant "was made under a Trustee-determined policy which limited such grants to institutions with racially integrated student bodies, that is, those which enrolled American Blacks."[21] Even under this pressure the board refused to support voluntary desegregation.

The pressures wrought by the pro-integrationists began to weigh heavily on the board members, but other influences worked to discourage them from changing the status quo. When two, local black women applied for a 1961-62 admission to the Graduate School and forced a showdown, these other influences proved to have greater force. The board's response reflected the paralysis of moderate white Southerners in the sixties--their inability to escape the clutches of prejudice. The board sought to escape these pressures by formulating a "new" policy that would, in fact, effect no change in admissions

and yet somehow appease all sides.

Unlike other private universities that aspired to national reputions, Tulane could not establish a broadly based board to govern its operations. Its by-laws had limited board membership to residents of Louisiana. The dilemma, brought into sharp focus by the women's applications, fell upon a board composed largely of New Orleanians. These prominent men and women--leading lawyers, business executives, and investments specialists--were part of an elite core around which much of the city's social, financial, and to some degree political life revolved. Joseph W. Montgomery, an executive with United Fruit, was named to the board in 1947, the same year Jones, a prominent attorney, had been elected chairman. Two more attorneys, Joseph McCloskey and George A. Wilson (who was also a corporate executive) were named the following year. In 1951, Clifford Favrot and George S. Farnsworth, owners of local construction firms, were elected. Mrs. George M. Snellings, a member of a prominent and wealthy family from Monroe, Louisiana, was also elected in 1951. In 1953, Lester J. Lautenschlaeger, an attorney, and Darwin S. Fenner, managing partner of the brokerage firm, Merrill, Lynch, Fenner, & Pierce, joined the board. Isidore Neman II, owner of Maison Blanche Department Stores, Leon Irwin, Jr., owner of an insurance company, and Ashton Phelps, attorney and soon-to-be chairman of the Times

Picayune Publishing Corporation, were elected in 1955. Richard W. Freeman, son of the Coca Cola magnate, joined in 1959, followed by Gerald L. Andrus, president of New Orleans Public Service Inc., in 1960. Edgar B. Stern, Jr., nationally recognized entrepreneur and grandson of Julius Rosenthal, whose fortune had subsidized black education in the South, also joined, along with Jacob S. Landry, an attorney, in 1960. Finally, in 1961, the board elected Arthur L. Jung, owner of a bed manufacturing company and future owner of the Jung Hotel located in the downtown business district. Although these men and women were heralded for their generosity and benevolence in dealing with many matters of university life, most cherished or supported the social and racial mores of the South. As Tulane alumni and residents of Louisiana, they were reluctant to take the first step to end the university's century-old tradition of segregation.

The fact that segregation was the social arrangement preferred by most whites living in the South in 1961 is undisputed. Although the degree of resistance to public school integration varied across the region, "no southern state matched the vigor, imagination, and frenzy displayed by Louisiana in battling to maintain segregated public schools."[22] And the resistance displayed by the people of New Orleans fit that description. The city that some had expected to be the model for desegregation had turned out to be the model, instead, for massive

resistance.[23] Many New Orleanians, fortified by the massive pep rallies staged by Leander Perez and Willie Rainach in downtown Municipal Auditorium, took to the streets in defiance of Federal District Judge J. Skelly Wright's orders. And reaction was not the preserve just of mobs or unscrupulous politicians. The elite, whose support would have eased the success of any fundamental change in the social structure, had sat on the sidelines for months, refusing to restrain mob rule, resist Governor Jimmie Davis' steamroller tactics, and solve the crisis.[24]

Integration, then, in New Orleans in 1960 had met with resistance in all sectors of the white community. The board, no doubt, wondered whether desegregating their university would evoke the same response. True, the national press, in particular Time magazine and NBC's Huntley-Brinkley news broadcasts, exaggerated the events in the streets and caused the city's reputation irreparable harm, but the Tulane board had come away from the crisis with one major lesson: integration was an unacceptable and unwelcomed arrangement for white New Orleanians. The city establishment did eventually, although reluctantly, help end the school crisis; but the board wondered whether, so soon after one crisis, its peers would fight another round and whether the city and the university would survive it.[25]

The board also worried about offending Tulane alumni, who in greater numbers then, were New Orleanians raised in and acclimated to a segregated world. Their vocal support for such a change was essential; their continued financial support to the university vital. Alumni giving, of course, had proved inadequate to pay Tulane's recent debts, but the board, by 1960, still depended heavily upon alumni donations and hoped to increase them.

Broadly based alumni giving was also a recent phenomenon at the university. Tulane had, since its founding, suffered from the popular presumption that because it attracted to its rolls the city's wealthy elite, it also enjoyed a substantial return in the form of the elite's generous financial support. Generous support, however, the university did not receive until the fifties when, expansion underway, the board launched a vigorous drive to capture it. In 1953, they created the Division of Development and made soliciting gifts, including alumni donations, a full-time project. As a result, the university began to see real growth in alumni support almost over night. Beatrice Field, who had replaced Thomas Hale Boggs as Director of Alumni Giving in 1942, raised $45,000 in 1950.[26] In 1960, her office solicited $331,000.[27] Although a small sum compared to the gifts the foundations offered, the alumni had proved their loyalty and provided considerable financial support when called upon. More seemed imminent.

The members of the board thought they knew the minds and the pocketbooks of the alumni. They were all alumni themselves. Four of them had served as president of the Tulane Alumni Association: Clifford F. Favrot in 1939, Lester J. Lautenschlaeger in 1945, Gerald L. Andrus in 1951, and Jacob S. Landry in 1956. They concluded that, if they opened the doors, future generosity would not be forthcoming from an alumni presumed to loathe integration. [28]

Even discounting the negative reaction the board anticipated, there were still the legal obstacles that would have to be cleared before they voluntarily desegregated the university. The obstacles stemmed from race restrictions imposed in the donations mady by Paul Tulane, the university's original benefactor and for whom it was named, and Josephine Louise Newcomb, for whose daughter the women's liberal arts college was founded. Although Mr. Tulane had requested that his gifts be used for the education of "white young persons in the city of New Orleans" and Newcomb, for "white girls and young women," the board had frequently and without legal reservation admitted persons of age beyond youth, persons residing outside the city, and persons of color other than white--Chinese, Indonesians, Latin Americans, and American Indians. Everyone simply assumed that what Tulane and Newcomb had meant by "white" was, in fact, the exclusion of Negroes.

For as long as the issue of desegregation had been before the board, the Legal Committee, composed of the attorneys on the board, and the university's legal counsel had been studying it. At risk in voluntary desegregation, the Legal Committee advised, was the possibility that any of the eight living Tulane and Newcomb heirs would file suit against the board either to restrain it from desegregating or to recover the worth of their forbearers' donations. Also at stake were the "many donations, important and fundamental ones, . . . given in consideration of the gift of Paul Tulane and Josephine Newcomb that might too be retrievable in a legal contest" brought by opponents of desegregation.[29] And the possibility of the state's revoking the university's charter was not remote.[30]

But the Legal Committee had found a remedy, what Jones told friends was a "simple solution."[31] If the board wanted to open the university's doors but was hesitant for fear of a backlash of litigation, solution lay in the board's filing a rather uncomplicated action themselves, in federal court, under the diversity of citizenship doctrine. A declaratory judgment could grant them permission--free of legal ramification--to change the policy on mandatory segregation. Jones, apparently in favor of filing the suit, had determined that "when and if integration should come it would be by the unanimous vote of the board."[32] But unanimity on voluntary desegregation was beyond his

reach.

Instead, in response to the two black women's applications, the board, by unanimous vote on April 8, 1961, announced the following policy:

> The Administration of the Tulane Educational Fund met Wednesday and voted that Tulane University would admit qualified students regardless of race or color if it were legally permissible.
>
> Times have changed since the university was founded. To meet these changes and the obligations to create and maintain a great university, it was decided to establish this policy. This course of action was taken in the knowledge that Tulane University must move ahead and assume its rightful place of leadership among America's outstanding universities.

The policy clearly revealed a perplexed board, bewildered by the powerful and conflicting pressures begot by integration in the South. Although not a noble one, the decision reflected a desperate attempt to appease all who had awaited a decision. It did not open the university to black students; instead, it hinted at the board's willingness to do so but suggested that its ability to act was legally prescribed. Such a stance, they apparently thought, would satisfy the foundations for at least one more year and also avoid alienating the alumni. [33]

The board did not reveal its deliberations to the public. The Times-Picayune assumed the predictable, conservative posture it had

taken during the public school crisis the year before: it spared criticism but denied support for the stand the board had taken. The newspaper's posture probably demonstrated that the board had not arrived at its half-hearted decision easily. On the other hand, support for the decision by WDSU, the major broadcasting corporation in New Orleans, also showed a probable source of positive leadership. On April 19, WDSU, with whom the university had connections through alumni and board member Edgar B. Stern, Jr., editorialized over both radio and television that "rigid segregationist policies of the past were no longer desirable."[34]

Although the station saw the board's statement as a "hopeful sign for New Orleans and Louisiana," its editorial hardly coincided with the tracts the extreme right released.[35] The South Louisiana Citizens' Council immediately lashed out at the board for "trading the moral and financial backing of the Tulane alumni for the bigger prizes offered by the foundations."[36] The New Radical, published by the Southern Republican Society, which like the Citizens' Council was aghast at the first sign of racial tolerance, accused the board of "selling its soul to the devil."[37] In return for turning to the "enlightened, grant, tax-exempt foundations," the university could expect a drop in enrollment and in alumni support as the board was dragged through the courts all the way up to the bench of Earl Warren.[38]

If the board's policy reflected a disposition to straddle the fence, it also reflected division--division among the members themselves over whether desegregation was right. Counting heads and naming names are difficult tasks. During the twenty-one years that have passed since the board formulated the policy that prompted the federal suit, many of the principal figures have died, including Jones, several other board members, Federal District Judge Frank B. Ellis, and defense counsellor John P. Little. Tulane University guards its records closely. And the survivors' reluctance to talk makes naming names little more than a speculative exercise. From the available evidence we do know that some of the members, perhaps only a minority in 1961, wanted to desegregate.[39] Some were perhaps sensitive to the need for desegregation but felt a greater obligation, as trustees, to their benefactor's wishes.[40] And some, no doubt, while feeling compassion for the black man's struggle for equality, lacked the conviction and courage to take a direct role in the struggle. Instead, the board formulated a policy that prompted a lawsuit and afforded them the more comfortable position of defendant rather than plaintiff in a civil rights action.[41]

CHAPTER II

THE UNLIKELY HEROES

> It seemed quite obvious that the Tulane board would not make the decision to admit Negroes unless goaded. They needed help. A lawsuit was the only way.
>
> Rosa Keller

The board's policy did evoke an immediate response. On April 18, 1961, Walter L. Kindelsperger, dean of the School of Social Work, in conformance with the board's recent determination on black admission informed Mrs. Pearlie Hardin Elloie of the illegality of admitting her even though she was educationally and scholarly qualified.[1] Before the day's end a team of "unlikely heroes" took the first overt step to bring desegregation to Tulane University: they sought the legal services of the distinguished A. P. Tureaud and asked him to sue the board in federal court for violating Mrs. Elloie's constitutionally protected civil rights.[2]

Actually, the lawsuit had been in the making for quite some time. A group of people, some loyal friends of Tulane's, banded together to do for the university what the board had been unable to do. In the fall of 1960, convinced that the board would not vote to admit blacks that

year, three New Orleanians--Rosa F. Keller, Henry L. Mason, and John B. Furey--plotted a scheme that would force a board response: they found two black women of undisputed qualification to apply to the Graduate School. They hoped that the board would re-examine its admissions policy and, mindful of the faculty restlessness and foundation displeasure, would voluntarily admit them or initiate legal proceedings that would lead to their admission. The cabal more realistically assumed, however, that they would have to sue the board into changing the policy; and, for this, they were already prepared when the first letter of rejection went out to Mrs. Elloie.[3]

These three people, Keller, Mason, and Furey, had been faithful friends of Tulane, but they also shared a deep loyalty to the principle of racial equality. Rosa Keller, herself a victim of prejudice following her marriage to a Jew, had established a well-known reputation as "an important, constructive influence in New Orleans race relations."[4] Aside from her efforts to desegregate public facilities such as the Y. W. C. A. and the city's public libraries, Mrs. Keller served on the boards of both the Urban League and Dillard University. She also wielded influence in the city. By self admission her presence, and that of her peers, "added dignity to many an occasion."[5] She was a member of the city's elite. She knew the right people to see in order to bring about change, and she had the family name to gain access to

those people. She was a Freeman. While few others in New Orleans would ever dare challenge the city's elite, such as those on the Tulane board, and even fewer question their racial policy, Mrs. Keller could and did.

Her challenge was not born of malice. Quite the contrary. Mrs. Keller had enjoyed a long, close relationship with Tulane: her father, Alfred B. Freeman, had been on its board from 1941-1955, and her brother, then a member of the board, had been elected in 1959. The university had continuously been a recipient of their great financial support, education being a top priority in Freeman donations.[6] Her devotion to Tulane also sprang from her own personal association with the university. As director of the Foreign Students Program with an office in the University Center, she was in the thick of things at Tulane.

Her regular contact made her notice that the campus served only whites. She sensed the faculty unrest. She knew many of them personally.[7] She also knew the members of the board, some of them well, and their inability to deal with the delicate and highly emotional issue.[8] When approached, then, by Mason and Furey to help bring desegregation to Tulane she, for both the good of the university and the principle of racial equality, assented.

Henry L. Mason, educated in England and at Columbia, came to

Tulane under a Rockefeller grant in 1952. By 1961, he was chairman of the political science department and president of Tulane's AAUP chapter. A long-time integrationist and board member of the Urban League, Mason also wanted the university desegregated. Although he had no direct contact with the board, he knew, from conversations with the dean of the Graduate School, Robert M. Lumiansky, of the unlikelihood of a voluntary decision. The conclusion Lumiansky had reached, after numerous meetings with the president who spoke for the board, was that only an outside lawsuit would prompt the board to action.[9] And Mason accepted the dual task of finding the plaintiffs and securing finances.

Securing the financial backing was the easier of the two jobs. Mrs. Keller willingly accepted the burden of hiring counsel and paying for the litigation, which she and Mason hoped would prove unnecessary. The more difficult of the tasks was finding one or two highly qualified black graduates who were interested in pursuing higher degrees in sociology and social work and who were also brave enough to withstand the rigors of a lawsuit aimed at the local establishment. This responsibility fell to John B. Furey.

Furey, a political science professor at Dillard, had known Mason since their days in graduate school at Columbia. He, a long time integrationist and an active member of the ACLU, had also taught

summer session and evening classes at Tulane. During those times, he often delivered a political science lecture to his black students on one campus, and then drove to the opposite corner of the city to deliver the lecture again to his white students, all because of the racial barrier that white southerners had erected.[10] He was only too happy to participate in a scheme that would break down that barrier.[11] Since desegregation at the graduate level had proved easier in universities, the applicants would have to be college graduates. The doctoral program in sociology and the master's program in social work were selected as appropriate targets for two reasons: the acute need for social workers in the area was obvious, and Tulane was the only institution in the city that offered these programs. And after thoroughly canvassing suitable Dillard graduates, Furey finally found two would-be plaintiffs.

The first to come forward was Pearlie Hardin Elloie, a 1960 magna cum laude graduate of Dillard. She was later joined by Miss Barbara Guillory, a former graduate of Dillard and recent graduate of Louisiana State University in Baton Rouge where she took a master's in sociology. Both women applied for a 1961-62 admission to Tulane's graduate school and passed the various educational requirements.[12] Much to the regret of Mrs. Keller, Mason, and Furey, both were nonetheless rejected--Elloie on April 18, 1961, and Guillory on June

23, 1961.[13] Hiring an attorney to file suit was the next step.

Before such a response was fully underway, Mrs. Keller took the uncomfortable but unavoidable step of telling her life-long friends on the board that she intended to back a suit.[14] Her revelation drew the anger of most, including her own brother, and the relief of a few others, especially Jones.[15] Confident that she was acting in the best interest of the university, Mrs. Keller sought legal counsel.[16]

Keller, Mason, and Furey agreed that the logical choice for legal representation was the accomplished jurist, A. P. Tureaud. A black lawyer who had imaginatively and tirelessly spent a lifetime challenging racial discrimination for the NAACP, he listened to their complaint and even met with Tulane's Legal Committee and university counsel Edmund McIlhenny. Tureaud's successful dedication to legal remedies had earned him the respect, acceptance, and even friendship of a number of leaders in the white legal community; that acceptance, however, also worked to weaken his identification with the aggressive black movement of the sixties.[17] For some reason he was cautious. He had little confidence in the strategy of filing a Fourteenth Amendment suit against the Tulane Board; and some suspected that he had little enthusiasm for filing suit against the private establishment.[18] Noting that he was already involved in heavy litigation for the NAACP and that the Tulane case was too inconsequential to the

civil rights movement to warrant NAACP services, Tureaud declined to take the case.[19]

Mrs. Keller had not left his office empty handed. Tureaud suggested that she contact a young, white attorney named John Pettit Nelson, Jr., who had established a reputation as an energetic civil rights lawyer. And in Nelson, she found a man sympathetic to her cause, aggressive in the pursuit of racial equality, and fearless in challenging local community leaders.

Nelson had devoted his career to making racial equality a reality. Compelled by the religious conviction inspired by his Roman Catholic faith and his own sense of justice, Jack Nelson had often participated in drives to end segregation. In 1958, for example, he ran for a seat on the Orleans Parish School Board on a platform that called for compliance with the federal courts. Not surprisingly, he lost the election but, within the next two years, helped organize Save Our Schools, Inc. and the "Back to School Fund," both of which were designed to thwart the tactics used by the white supremacists during the public school crisis. Also in 1960, he began defending a "sit-in" case that would eventually earn him the distinction as the first white attorney from the South (unaffiliated with any organization) to represent a black plaintiff in a civil rights case before the United States Supreme Court.[20] And that contest he won. A suit against Tulane would be

"a tremendous legal contest" and one he looked forward to "with a great deal of relish."[21]

Having removed the last obstacle of securing legal counsel, Keller, Mason, and Furey completed their essential roles. Bringing desegregation to Tulane was, from that point on, Nelson's responsibility; the type of lawsuit, his choice. Nelson had, at first, researched a procedure that had been used in testamentary proceedings in state court. The cy pres doctrine was used to afford beneficiaries a legal way of disobeying instructions left in wills. But the guidelines of the doctrine were very strict and very limiting.[22] Anticipating being "pleaded to death" by the Tulane attorneys and reluctant to bring a civil rights suit before state judges, he searched for an alternative course of action.[23] And in researching the history of the university he found an unexpected expedient.

There was, at that time, no published history of the university. But while rummaging through the public library's collection of nineteenth century statutes and court decisions, Nelson discovered that Tulane University, far from having been created in 1884, had been the legal successor to the University of Louisiana, a public school which existed between 1847 and 1884. And in 1886 the Louisiana State Supreme Court had specially declared Tulane University a state institution.[24] A brief perusal of the 1884 statute that transferred the Uni-

versity of Louisiana to the Tulane board was sufficient to convince him that he had excellent grounds to file a suit in federal court under the Fourteenth Amendment.

Filing a Fourteenth Amendment suit against Tulane University brought an initial setback. Nelson had hoped that Katherine Wright would join him in the action as an associate attorney, but she now balked. She had taken her Master's of Law at Tulane, and her husband held a position in the university's math department. She had serious qualms about declaring Tulane a state school just to bring about desegregation. Although an ardent integrationist, Mrs. Wright despaired over the ramifications of a Fourteenth Amendment suit, particularly of state legislative interference in the daily affairs of the university if the suit was won.[25] But her anger over the board's refusal to act was a greater concern; in January 1962, she agreed to assist Nelson.

The board's worst fears had become a reality on September 1, 1961, although Nelson had met with the Legal Committee and Edmund McIlhenny during the summer and warned them of his intentions.[26] The board had anticipated a lawsuit when it formulated the "new" policy in April, but the suit Nelson filed--characterizing Tulane as a public institution amenable to the Fourteenth Amendment--was not the suit they had expected nor one they fancied.[27] Nelson's suit chal-

lenged more than a benefactor's legacy of segregation; it threatened the university's freedom from governmental control in other areas. The days of legislative "witch-hunting" for "subversive" professors on college campuses were still rampant in Louisiana.[28] And the state's record in higher education was marked by political meddling and even corruption. Before 1961, the board's opponents of segregation had begun to waiver; but, by the end of 1961, they could unify around the task of preserving the board as "sole master of the university's destiny."[29] The board, having "access to the best legal talent in town," hired John Patrick Little of Guste, Barnett & Little and Wood Brown III, both Tulane Law School graduates, to defend the university against Nelson's assault.[30]

Despite Mrs. Keller's pessimistic appraisal of the match as "the equivalent of David and Goliath--or worse," in fact, Nelson held two major advantages.[31] First, as admitted by Tulane's attorneys, plaintiffs in civil rights suits in federal court had "unwritten presumptions running in their favor," which meant that any "defendant in an integration suit in those days started with 2-1/2 strikes on him."[32] Second, the case, as it turned out, would be tried before one of the greatest trailblazers in civil rights ever to sit on the federal bench, J. Skelly Wright. A brilliant constitutional jurist and ironically a native New Orleanian, Wright was a man "absolutely unswayed

by anything" in his quest to bring racial equality to New Orleans.[33] Appointed to the federal bench for Louisiana's eastern division in 1949 by President Truman, Wright was accustomed to battling against massive resistance. He had tamed Governor Jimmie Davis and nullified the interposition tactics of the state courts and the legislature during the public school desegregation crisis that began in 1956.[34] He was heralded as a champion, an "aggressive integrationist" by those friendly to integration and marked an arrogant, diabolic, and communistic scalawag by his foes.

The Tulane board had reason to be nervous about defending a civil rights case before Judge Wright. Little's motions to dismiss had been denied and his hopes of moving this case to state courts dashed. Nonetheless the board only stiffened: they took to the field to win and gave their lawyers the order--"Come back behind the shield or on it."[35]

CHAPTER III

SUI GENERIS: THE LAWYER AND THE UNIVERSITY

> I do hereby express to you my intention to donate to you . . ., all the real estate I own . . . in the said city of New Orleans . . . for the promotion . . . of intellectual, moral, and industrial education among the white young persons in the city of New Orleans . . . . I have entire confidence that you will carry out with wisdom, equity, and fidelity my expressed suggestions.
>
> Paul Tulane

Understanding the desegregation of Tulane University requires an understanding of the unusual history of New Orleans. Few areas in the American South would have produced a native white lawyer who marshalled the determination and idealism of John Nelson. No southern state legislature, moreover, would probably have created a quasi-public institution like Tulane University.

In 1939, following publication of Professor Howard W. Odum's Southern Regions of the United States and President Franklin Roosevelt's National Emergency Council reports--both of which proclaimed the South an economic wasteland--the National Social Action Congress committed the Catholic Church to reform the non-Catholic South.

The result of the committment was the creation of the Catholic Committee of the South (CCS). Spurred initially by the goal of economic reform, the CCS held ten conventions between 1940 and 1953 and probed areas of southern life in dire need of reform including labor relations, education, and race relations. The CCS never engendered a mass movement; it was a minority within a minority.[1] But because it sought reform through the social action of the Catholic Church, it was only fitting that the CCS chose New Orleans, with its large Catholic population as its executive headquarters; and it was not surprising that the New Orleans archdiocesan unit of the CCS became one of the more aggressive and longlived units in the South.

Beginning in the 1940s, Father Louis J. Twomey, S.J., of Loyola University of the South, founder of the Institute of Industrial Relations, and Father Joseph Fichter, S.J., also of Loyola and founder of the Committee on Human Rights (the New Orleans archdiocesan unit of the CCS), openly pushed for collective bargaining and school desegregation. They appealed to the Catholic Church--clergy and laity alike--to lead the way in New Orleans and the Protestant South. As early as 1948 they staged Interracial Days and conducted social action forums at Loyola and, in 1954, openly supported the Brown decision. But their efforts, as did those of other CCS leaders, challenged the racial and religious mores of the segregated, Protestant

South. These trailblazers fell far short in their efforts to win the support of even the Catholic Church; indeed, they were styled communistic and their efforts discredited by white supremacists. The CCS held its last convention in 1953; the CHR barely survived the volatile political climate that took grip of New Orleans in 1956. But they did not fail. Their efforts "contributed leaders who were in the vanguard of the labor and civil rights struggles of the next generation" and made possible the transformation that came later. [2]

John Nelson was one of these leaders. One of five children, he was born in Gulfport, Mississippi, in 1921. His father, John Pettit Nelson, Sr., moved his wife, Stella Foret Nelson, and children back to New Orleans in 1923 in search of work. Although an eighth-grade dropout of Holy Cross School of New Orleans and out of work between 1929 and 1931, Nelson's father worked as a clerk for various railroad and shipping companies in the city and provided a lower-middle class standard of living for his family.

Following graduation from St. Aloysius High School, John Nelson completed two years of college in LSU before he volunteered for the United States Army in 1940. His five-year tour of duty took him to Guadalcanal, New Britain, and the Philippines, where he was shot during an effort to evacuate wounded members of his rifle company. By 1945, when he was discharged, Nelson was decorated with the

Silver Star, the Bronze Star, and the Purple Heart.

It was upon his return to college in 1945--this time in Loyola University--that Nelson awakened to the injustices of the South. While studying economics and then law in Loyola, Nelson came to know Father Twomey. His participation in Loyola's Interracial Days won him many invitations to speak to local black organizations, and from these he began to understand the social problems that plagued the South. More importantly, he began to formulate solutions.

During the 1950s Nelson joined the NAACP and sat on the board of the Urban League. Later, he joined the Louis A. Martinet Legal Society, an organization of black, Louisiana lawyers. He continued to participate in Interracial Days during the 1950s but soon grew impatient with the Church's response to the problems--to accept and live within the system rather than change it.[3] He helped organize the St. Thomas More Lawyers' Guild, a group of white, Catholic lawyers, in order to assist Archbishop Francis Rummel in desegregating the Catholic schools. Quickly he despaired over its reluctance even to talk about the mores of the South, let alone challenge them.[4] His opportunity to condemn racism and challenge white supremacists came in 1958 when he was asked by Father Twomey and leading black businessmen to run for the Orleans Parish School Board against the avowed segregationist, Emile Wagner.

Up to that time, the Citizens' Council of New Orleans had managed to eliminate almost all organized support for the Brown decision. It paralyzed the city's leaders as it intimidated those who supported Brown by styling them communists. John Nelson was not so easily intimidated; he ran for the office on a platform that called for compliance with Brown. No one, including Nelson, expected him to win; and, of course, he lost. Instead, he thought his mission was to challenge the reign of the Citizens' Council, to raise issues, to encourage the people of New Orleans to talk about their race problem, and finally to keep their schools open.[5] That, he did.

As a result of his contest, Nelson established himself nationally as an integrationist and a civil rights lawyer. In 1959, he received the annual Freedom Award from the Catholic Council on Civil Liberties and was presented the James J. Hoey Award, a prize given by the New York Catholic Interracial Council to one black and one white layman who have made an outstanding contribution to interracial justice. He was, in 1961, one of a very few white lawyers in New Orleans and the South who accepted civil rights cases. He was, then, Mason's, Keller's, and Furey's best and only hope of challenging the Tulane board and bringing desegregation to the university. The course he chose was to have Tulane declared a public institution for the purposes of the Fourteenth Amendment. Critical to understanding his

case is understanding the history of the university.

Paul Tulane, who was the third of five sons of Louis and Maria Tulane, was born in Princeton, New Jersey, in 1801. He had come to New Orleans with his two older brothers in the 1820s to make his fortune. He began with a small but reputable clothing operation, Paul Tulane & Company, on North Peters Street, and aided by the prosperity the city enjoyed before the war, expanded his clothing operation and secured holdings in the heart of the city's merchandising area on Gravier Street, all the while speculating in prime real estate in the city. By the 1850s Paul Tulane had made his fortune. While his business savvy in merchandising and real estate operations had made him a millionaire, it also had developed his good sense to liquidate his assets before the Civil War. Having taken his capital out of New Orleans and back to New Jersey--he, unlike other southern businessmen, had been spared the great personal and financial losses the war wrought. But the war had ended his career in New Orleans and wreaked havoc on the South. As a disillusioned but wealthy man, Tulane left New Orleans for the last time in 1873 to enjoy his money and spend his remaining years on his estate outside Princeton.

Unlike the success of Paul Tulane was the failure of higher education in Louisiana, particularly in New Orleans. Early attempts to

establish a college, especially a medical school, in New Orleans had been dashed by the legislature's stinginess. That body, prefering to invest the state's wealth, although meager, in upstate ventures, left the city of New Orleans to fend for itself; and, in so doing, it left the task of education to private efforts. Having secured from the state in 1834 a lease to land in downtown New Orleans in exchange for their free service at Charity Hospital, seven physicians incorporated the Medical College of Louisiana in 1835. The Medical College, almost entirely privately supported, flourished into a regional medical center, but New Orleanians continued to clamor for a state-supported university.

In 1847 the legislature created the University of Louisiana for its New Orleans constituents but withheld the necessary financial support. It siphoned money from the city to invest in its pet enterprise, the Louisiana State Seminary of Learning and Military Academy, in Alexandria, Louisiana (the parent institution of what would become Louisiana State University in 1877). The state authorities allowed the city's elite to maintain the New Orleans university, which in addition to academic and law departments set up the Medical College as its medical department. Private donations, however, proved inadequate to support the combined enterprise. By 1857 the Academic Department graduated its first pupils--a class of three; and the Law De-

partment had not fared much better. Then came the war. "Parsimonious legislatures and lethargic citizens of New Orleans had failed to kill the university; but the war now administered the coup de grace."[6]

After the war, the Republican state legislature looked upon education with more favor, but it turned its support to a new state university called the Agriculture and Mechanical College. The older city leaders did not look upon the Reconstruction legislature with favor, since it had adhered to a policy of desegregation in public institutions during the postwar years. Unwilling to share their facilities with the Agriculture and Mechanical College, the city's leaders delighted when the legislature consolidated the college with LSU and moved it to Baton Rouge in 1877.

By 1878, however, the administrators of the University of Louisiana had tired of battling in the legislature for financial support and soliciting donations from the city's elite for maintenance of the academic and law departments. That year they agreed to support a constitutional amendment proposed by David F. Boyd, President of LSU, that would consolidate the two universities and move the New Orleans institution to Baton Rouge. New Orleanians fought to keep the university in the city and defeated the amendment in the November election. But they failed to support adequately their institution; the University of Louisiana barely managed to keep its doors open the

following years. The Medical Department managed to sustain itself through private support, but the academic and law departments deteriorated. "Like the South, the university was poor, and until its poverty was alleviated it suffered the diseases associated not only with physical infirmities but with cultural malnutrition."[7] The University of Louisiana graduated its last class in 1884.

The city's elite did not have to despair. In the making was a deal--a contract--between an aging, wealthy, one-time New Orleanian who was disposing of his estate and the state of Louisiana which wanted out from under the onus of the university. The contract, finalized in 1884, consummated the desires of both parties. It also did more: it created a unique and precarious partnership between two parties--the Tulane Educational Fund (TEF) and the state--bestowing on both privileges and powers to run this "new" university. Although never seriously challenged before 1961, it was this unique relationship that gave Nelson grounds for a Fourteenth Amendment suit.

The first contact had been made in March 1881 between two of Paul Tulane's closest friends, his attorney George O. Vanderbilt and Senator Theodore F. Randolph of New Jersey, on one hand, and Representative Randall Lee Gibson of New Orleans, on the other. The two Jerseyites told Gibson about Tulane's willingness to donate a

great portion of his wealth to private, higher education in New Orleans; Gibson expressed the eagerness of New Orleanians like himself for a college in New Orleans. With little else said the three set a meeting date for Gibson and Tulane the very next month at Tulane's home outside of Princeton.

A year of conferences and letter writing between Tulane and Gibson followed before Tulane made his first donation. Having left most of the particulars to Gibson, Tulane agreed to donate all of the property he still held in New Orleans and large sums of cash to a seventeen-member, self-perpetuating board composed of leading New Orleanians with instructions to promote "intellectual, moral and industrial education among the white young persons in the city of New Orleans."[8] The board's charter, adopted on May 23, 1882, allowed this board, now called the Administrators of the Tulane Educational Fund (TEF), the freedom to either establish a new institution or foster an existing one. Tulane stipulated in his first donation that the institution they selected be "unfettered by sectarianism," free of politics, and tax-exempt by the state of Louisiana.[9] On June 12, the TEF formally accepted the first of what disappointingly proved only eight donations from Tulane--property in downtown New Orleans with a market value in excess of half a million dollars--and immediately formed a Committee on Education to determine the best place to in-

vest their gift.

In November 1882, the Committee, having met with the administrators of the University of Louisiana, recommended that the TEF would best meet Paul Tulane's recommendations and ensure future donations from their benefactor by taking over the operation of the near-defunct University of Louisiana. The TEF adopted the recommendation by a vote of nine to seven only to be overruled by Tulane the following year. The TEF, bound by his veto and dependent on his donations, created a private university, the Tulane University of Louisiana.[10] The TEF named LSU President William Preston Johnston president and accepted a donation of $125,000 in cash from Tulane to start construction.

The TEF and Johnston, in 1883, were still at odds with Tulane over what type of education the university was to provide. Tulane's vacillation during the two years over exactly what kind of institution he wanted--academic or technological--had proved trying to the TEF. But in 1883, after he vetoed the TEF's recommendation to adopt the state university, Tulane finally expressed a preference for technological education, a preference inconsistent with the educational philosophy of the TEF and the new president.

Johnston worked hard to win Tulane over to their philosophy; he even met with the curmudgeon throughout the winter of 1883 to defend

the TEF's original recommendation. What finally won Tulane over, however, was the state Supreme Court's decision in May of that year that tax-exempt status could not be granted to the newly-proposed private school.[11] Averse to seeing his gifts eaten up in taxes to the state, he submitted to the TEF's original proposal to adopt the public university.

Providing the technological training that Tulane desired would have been a relatively simple task, but meeting his request that the institution, a state university, be free of political control required some bargaining with the state. And thus Act 43, the Tulane Act, was born.

Act 43, passed by the legislature on June 5, 1884, and signed by Governor S. O. McEnery, relieved the state of its responsibility for the maintenance of its stepchild institution and, at the same time, gave to the TEF an already established and somewhat reputable institution, intact with buildings in downtown New Orleans, in addition to a faculty and a student body. It saved them from having to establish a new institution which would have had to compete with the city's already existing state university. And it did more. It provided that the operation of the university be a joint venture between the TEF and the state.

Act 43 provided that the TEF replace the administrators of the

University of Louisiana and accept as ex officio members the Governor, the State Superintendent of Education, and the Mayor of the city of New Orleans, The new board was given control of all property used by the University of Louisiana but was to seek legislative sanction before selling any of it. In the event the new board violated this contract, however, the state was given the right to resume control of its property. The institution was granted tax exemption; in return, the board was to waive all claim to state appropriation. The board was also required to grant free tuition to one student in every state legislative district. Finally, the contract was to be submitted to the people of Louisiana for approval in the form of a constitutional amendment.

In 1885, the TEF filed suit in state court testing its tax-exempt status and this time won.[12] And, in 1888, the people of Louisiana adopted the necessary amendment, making Act 43, now Article 269, part of the organic law of the state. In the meantime, the state had turned over to the TEF buildings, equipment, and cash totaling $177,343.60. The TEF had continued to receive donations from Tulane which by 1887 totaled approximately $1.1 million. They were bitterly disappointed, however, when news reached the administrators that Paul Tulane, then 86, had died on March 27, 1887, of pulmonary complications. He had left no will and therefore effectively cut the

university out of his three million dollar estate.

Although the university ended its direct contact with its benefactor, his original demands had a lasting effect on Tulane University. The university remained a strange hybrid creation in Louisiana. Much of its success rested not only on private gifts but also on those privileges and gifts that the state had bestowed upon the TEF in 1884. Ironically, it was those very privileges and gifts awarded by Act 43 that, in 1961, seventy-seven years later, opened the university to an imaginative integration suit by John Nelson.

Nelson and Katherine Wright set out to convince a judge friendly to civil rights plaintiffs that the nineteenth-century statute had not created a new, private university but had simply transferred a state institution to a corporation. Their suit required great resourcefulness. To demonstrate that the state retained enough influence over the university to make it "state affected" and therefore amenable to the Fourteenth Amendment, at least in its admissions policy, would not be easy. But Nelson was a driven man.

His experiences with his fellow white Southerners caused him to question the sincerity of the Tulane board. Both he and Katherine Wright doubted that a majority supported desegregation, and they questioned whether a cy pres proceeding in state court would ensure the subsequent voluntary action the board had promised in April 1961.

His decision, then, to file the federal suit--equivalent, some charged, of killing a mouse with a cannon--was more than a legal alternative; it was his way of putting all the pressure of the legal system on a university board that he believed averse to change.[13] He was delighted, then, in what he had discovered about the university's history and was determined to make the most of it in seeking the desegregation of Tulane University.[14]

CHAPTER IV

J. SKELLY WRIGHT AND THE FOURTEENTH AMENDMENT

> At the outset, one may question whether any school or college can ever be so "private" as to escape the reach of the Fourteenth Amendment. In a country dedicated to the creed that education is the only "sure foundation of freedom," . . . institutions of learning are not things of purely private concern.
>
> J. Skelly Wright

On September 1, 1961, Nelson put Tulane University under the federal gun by naming the board collectively and individually as defendants to a class-action suit; he also added Governor Jimmie H. Davis, State Superintendent of Education Shelby M. Jackson, and New Orleans Mayor Victor Shiro, who sat as ex officio members, as well as the President of Tulane, Herbert Eugene Longenecker. His complaint charged these defendants with violating the constitutional rights of Mrs. Elloie and Miss Guillory and all persons whom they represented. The relief that he sought was a permanent injunction to restrain the Tulane officials from complying with state statute, Act 43 of 1884, and all policies promulgated by the board pursuant to that statute. He also pleaded that those portions of the statute that kept blacks out of

Tulane be declared unconstitutional. To gain such relief, Nelson had to demonstrate that Tulane was significantly affected by the state of Louisiana to make it amenable to the Fourteenth Amendment.

He had precedents. Other quasi-public educational institutions had already been required by the United States Supreme Court to comply with the Fourteenth Amendment. In 1958, Governor Orval Faubus, in a last-ditch effort to circumvent Brown, had turned over the state's public schools in Little Rock to The Little Rock Private School Corporation, a bogus operation Faubus presumed immune to federal government decree. His designs had been thwarted, however, when the Supreme Court upheld the Eighth Circuit's relief to black plaintiff, John Aaron, by holding that "State support of segregated schools through any arrangement, management, funds, or property cannot be squared with the (Fourteenth) amendment's command that no State shall deny to any person within its jurisdiction the equal protection of the laws."[1] The same year, to avoid being forced to admit blacks into an all-white, orphanage-college founded by Stephen Girard in 1830, the elected officials of Philadelphia had to remove themselves as trustees of Girard in order to prevent the Supreme Court from ruling Girard to be significantly affected by the state of Pennsylvania and therefore amenable to the Fourteenth Amendment.

The federal courts had issued a host of other decisions that held

state reverter clauses in corporate charters and municipal leases as evidence of significant "state action." True, many of these rulings affected enterprises that had at one time been public but had obviously feigned private status in order to avoid compliance with civil rights legislation. Others were aimed at institutions whose relationship to their states was readily, if not glaringly, discernible. Tulane's relationship with the state of Louisiana, however, was more subtle and its benefits fewer than those of most institutions deemed "state affected." State action was surely there. A racial restriction was embedded both in a seventy-nine year old charter and in a seventy-seven year old contract with the state. A private corporation chartered by the state had administered the university since 1884; and three public officials had held seats on the board since 1884. But, on the other hand, none of the public officials had ever played a significant role, nor had the university ever received a state allowance. To the layman, Tulane University was and had been since the 1880s a bona fide private institution; Nelson's contention seemed fantastic. But the layman, in all probability, did not know the history of the university. Nelson and the board did.

At the very heart of Nelson's thesis was the state statute, Act 43, that facilitated the transfer of the University of Louisiana to the Administrators of the Tulane Educational Fund (TEF). Act 43 had,

Nelson argued, served two purposes when passed in 1884: it had provided an aging, wealthy bachelor of New Orleans a beneficiary for his fortune and, at the same time, relieved the state of a nagging, financial burden. That statute, Nelson insisted, facilitated more than a transfer. At the same time that it granted to the TEF many privileges generally reserved for public institutions, it also retained considerable governmental influence over the operation of the university. The evidence that Nelson presented against Tulane proved more than enough for an already sympathetic judge.

Nelson argued that Section 1 of Act 43, requiring the Tulane Education Fund (TEF) to recognize three public officials on the board, actually created a new and separate board--separate from but inclusive of the TEF--which he called the Administrators of Tulane University. This new board, because of its public makeup, was answerable to the United States Constitution, as were the city officials of Philadelphia on the Girard College board in 1957. In addition, Nelson tried to establish that Act 43 had not been written to end the University of Louisiana but to transfer the maintenance of a state university to a new body of administrators. Even if time had diminished Tulane's public character since the Louisiana State Supreme Court labeled it public in 1886, Nelson wanted to establish that it was public for the purposes of the Fourteenth Amendment.

There is no evidence that prior to the 1950s the TEF felt that its relationship with the state would affect the board's control of admission policies. Quite the contrary. Not only had the board cherished its protection under the wing of the state through lean years, but Tulane officials had on more than one occasion tried to take advantage of their relationship with the state to win legislative subsidies. Although Section 6 of the Act 43 had removed the state's financial responsibility for Tulane, the TEF and two of the university's presidents had made several direct requests for state appropriation throughout the 1880s and 1890s.

The expense of moving the campus from its original buildings in downtown New Orleans to the St. Charles Avenue site had, in part, prompted these early pleas by Presidents Johnston and Edwin Anderson Alderman. But it was Edwin Boone Craighead, the third president of Tulane University, who, in his inaugural address in 1904, pronounced Tulane a state university and as deserving of a fair share of state funding as LSU. He came to Tulane "with his fighting clothes on, " and made securing state support his primary objective. [2]

Craighead's pronouncements and subsequent efforts triggered what became known in Louisiana as the "Battle of the Colleges, " pitting the Tulanians against the Boyds of LSU in one of the most rancorous battles ever staged on the floor of the state legislature. [3] Ironic-

ally, it was then Tulane, led by President Craighead, who, in 1906, styled the university "a public institution, entitled to state aid."[4] Their own propaganda had purported the following:

> No one can read the Constitution of the State, the Legislative Acts, and the judicial decisions bearing on the subject without perceiving that the Tulane University of Louisiana is nothing more or less that the University of Louisiana established by the State in 1847, continued under a slight change of name and control of Administrators appointed in a different way from that formerly pursued, but deriving their authority directly from the State.[5]

The Tulanians cited the gifts of property and equipment from the state, the tax exemption, the obligation of granting free tuition to state-selected recipients, and Tulane's recognition in the state constitution as a part of the Public Education System as proof that Tulane was controlled by the state and, therefore, entitled to a state subsidy.[6] But the Tulanians, despite support by the appropriations committee of the legislature and Governor Newton C. Blanchard, were overcome in the final vote by their opponents' chicaneries.[7] True, Tulane never received a direct appropriation from the legislature, but the arguments used by the original board's members and three university presidents to secure such aid gave considerable support to Nelson's thesis and, in the end, proved suasive with Judge Wright.

To advance his theory that Act 43 provided for the "continuation" of the state university, Nelson introduced a wide assortment of

documents as evidence that Tulane was in many significant ways nothing more than an off-spring of the University of Louisiana. Tulane's attorneys pleaded that the 1888 constitutional amendment officially dissolved the University of Louisiana and established a new, private institution, the Tulane University of Louisiana. Nelson's evidence, however, reduced Tulane's rebuttal, in the words of Judge Wright, to "patent nonsense."[8]

Letters written by some of Tulane's early officials, such as Gibson, Fenner, and Craighead, purporting "continuation" were all submitted to Judge Wright. Of particular value were twentieth century documents published by Tulane that boasted of the university as the oldest in the state and having the first medical school in the Southwest, whose origin, during the presidency of Andrew Jackson, made it the fourth medical school founded outside the thirteen colonies.

Nelson exploited this claim and Tulane's use of a logo which bore 1834 as the date of its inception; the university used it on all sorts of paraphernalia from football and commencement programs to catalogs and Domino Sugar packets used in the University Center. True, such evidence hardly provided constitutional grounds for rendering Tulane public, but it did suggest that the TEF was fashioning a reversal of its own position for the court. Most of Nelson's evidence was admitted, despite the objection of Tulane's attorneys, who called

it "rank hearsay;" and it undoubtedly weakened Tulane's claim that the university's private status had been conferred in 1888 by constitutional amendment.[9]

To undermine the TEF's claim that Tulane University was a private institution independent of the state, Nelson introduced Louisiana State Supreme Court decisions showing that neither Act 43 nor the constitutional amendment totally divorced the state from the management of the university. For example, in 1883, the newly-chartered TEF, at the behest of Paul Tulane, had filed suit in state court to maintain its tax exemption under Louisiana law.

In The Administrators of the TEF v. Board of Assessors (35 La. Ann. 664, 1883), the state Supreme Court at first denied the TEF tax exemption because its income was private, corporate income. In 1885, however, after contracting with the state for the transfer of the University of Louisiana, the TEF again filed suit and this time won (Adms. of TEF v. Bd. of Assessors 38 La. Ann. 292, 1886). Of particular significance to Nelson was the Supreme Court's reason for granting the exemption. In a unanimous decision, the court had determined that the legislators had not intended in 1884 to "denude of its powers and privileges an institution which the Constitution commanded them (legislators) to maintain."[10] Rather, the court added, the legislature "expressly included its maintenance in the objects of its legis-

lation . . . . The legislative purpose to preserve the University of Louisiana is unequivocally and constantly manifested in every part of the Act of 1884. The title mentions it, the preamble gives prominence to it, and the enacting clauses confirm it. The University cannot be taxed. The Constitution created it. Its property is public property within the intendment of the Constitution."[11] The court declared the University of Louisiana, a public institution, the usufructuary of all TEF property and granted all TEF property exemption.

Here, then, was a decree by the state Supreme Court, a decree never challenged by the TEF or overturned by later court decisions, which stated that the TEF operated a public institution. In fact, subsequent court decisions, Nelson argued, supported this holding. In a series of cases known collectively as the Succession of Hutchinson (112 La 656, 1902), the state Supreme Court declared the Tulane University of Louisiana a corporation and a continuation of the University of Louisiana, although on broader lines. To Nelson, then, any institution public enough for tax exemption was certainly public enough for the purposes of the Fourteenth Amendment.

Although Tulane's attorneys charged that the TEF, a private corporation, was not a proper defendant and repeatedly moved for dismissal, Nelson countered that the suit was not aimed at the TEF corporation but at the Tulane University of Louisiana and the Admin-

istrators of Tulane University, a board that included the TEF and three public officials. In their capacity as administrators of the university, he argued, the TEF was violating the constitutional rights of the plaintiffs.

The TEF had apparently recognized their legal liability in 1957 when, in the same year, the United States Supreme Court handed down its Girard College decision. At that time the TEF changed the name of the body that had conferred diplomas for seventy years from the Administrators of Tulane University of Louisiana to the Administrators of the Tulane Educational Fund to avoid, Nelson charged, the fate dealt Girard.

To refute the charge by his opposing attorneys that the university was an improper defendant, Nelson cited numerous examples when the TEF had allowed the university to pose as a corporate body --once in 1930 in the Succession of Hutchinson (131 So 838, 1930) and again in 1960 in Farrell v. Farnsworth & Chambers Co. and Tulane University of Louisiana (143 So. 2nd 100, 1962). In addition, the TEF had often applied for loans and grants in the corporate name Tulane University of Louisiana. And in 1960, the university was named as legatee to a gift of $1.5 million from the estate of Dr. Rudolph Matas. Nelson cited all of these actions because under Louisiana law, unincorporated bodies could not receive donations. Whereas the Tulane

Educational Fund, as a legal entity, had defenses against government invasion because it was a private corporation, those same defenses, Nelson charged, were not available to the university. Tulane University was administered by a public board created by the state; it was a continuation of a public institution founded by the state. It was, Nelson averred, public for the purpose of the Fourteenth Amendment.

The most persuasive argument that Nelson introduced against Tulane was his use of Supreme Court decisions. In Cooper v. Aaron the court ruled that "the Fourteenth Amendment forbids states to use their governmental powers to bar children on racial grounds from attending schools where there is state participation through any arrangement, management, funds or property." And in 1961, in Burton v. Wilmington Parking Authority (365 U.S. 715, 1961), in response to a suit brought against a state agency for leasing space to a restaurant that refused to serve blacks, the Supreme Court ordered lower federal courts to "sift facts and weigh circumstances" of non-obvious or indirect state involvement in determining whether a body was state affected and therefore amenable to the Fourteenth Amendment.

Nelson had to demonstrate that the state of Louisiana participated, in direct as well as indirect ways, in the arrangement, management, and financial support of Tulane. He also had to establish that the state law, Act 43, which required the TEF to carry out the inten-

tions and wishes of Paul Tulane, with regard to race, was unconstitutional.

Tulane University, Nelson argued, was arranged or designed by the state in 1884. Unlike Dartmouth College, with whose plight the TEF identified, Tulane had never been wholly private. The authority to establish the entity had not been conferred by Paul Tulane or the TEF but by the state legislature which stipulated by statute how the university was to be arranged. With the purpose of the legislature stated in its preamble--"to foster, maintain and develop the University of Louisiana"--the act demonstrated the state's participation.

In Section 1 of Act 43, the state designed the board that would administer the university. The legislators permitted the seventeen-member TEF to replace the old board of the University of Louisiana on the condition that the TEF recognize the governor, the state superintendent of education, and the mayor of New Orleans as ex officio members of the board.

Section 2 arranged for the transfer of all property used by the University of Louisiana to this new board. It also limited the TEF's use of state property to educational purposes. To further retain state control over what had been the state's university, the legislature required the TEF to seek legislative sanction before selling, renting, or in any way disposing of it. In addition, the state, Nelson insisted,

maintained its interest by retaining the right to resume control of its property in the event the TEF breached the contract or got out of the education business.

The legislature, in Section 5, devised the $5 million tax exemption but required that board money be used for the "public purposes of developing and maintaining the University of Louisiana." Section 6 required that in consideration of the transfer of $177,343.60's worth of state property and the tax exemption, the board create and maintain a university, to be known as the Tulane University of Louisiana after the adoption of the constitutional amendment. Also, in consideration of the state's generosity, the legislators required the board to waive all legal claim for state appropriation and give free tuition to one student from each legislator's district. The legislature retained the right to choose the recipients.

Section 7 declared the act a contract irrevocably binding on the administrators of the TEF to develop, foster, and maintain the university in New Orleans in accordance with the terms of the act. Sections 8, 9, 11, and 12 prescribed the conditions by which the constitutional amendment was to be put before the electorate of the state.

Nelson did more than demonstrate that the state established the university in 1884; he showed that the state never wholly withdrew from the operation of it. The TEF was, in 1961, still bound by pro-

visions of the act aside from the property restrictions: 1) it could not use state revenues to finance deficits 2) it could not require higher academic standards of legislators' scholarship recipients 3) it had to recognize three public officials as full-voting members of the board 4) it could not violate any part of the act without risking breach of contract and loss of its charter and the state property.

The act, Nelson adduced, made the TEF and the state partners in the operation of the university. True, the act provided only broad outlines within which the board was free to make policy decisions such as hiring, firing, expanding, investing, and budgeting; but the board, free as it was to make such decisions, still had to accept state participation in those policy decisions.

In summary, Nelson observed, the state still partially controlled and supported the university. Paul Tulane may have furnished the inspiration for an expanded university in New Orleans and some initial funds, but the state clearly conferred to a public board the privileges and powers to operate it. Further, nothing in the history of the university or the state suggested that the state ever withdrew from that arrangement.

To demonstrate state management of Tulane, Nelson again focused on the board the state had created. True, the state's influence was limited. The will of the seventeen-man TEF could always

outweigh the will of the three ex officio state appointees. Tulane's attorneys argued that the state officials on the board had never, in seventy-seven years, tried to restrain the will of the TEF. Only twice in the last fifty years had the state officials even attended board meetings--Governor Alvin King on May 10, 1932, and Mayor DeLesseps S. Morrison on November 22, 1960. But Nelson continued that their place on the board as a condition of the contract put the power and prestige of their offices and of the state behind the discrimination. Tulane's discrimination was state discrimination and, therefore, unconstitutional.

Nelson also drew upon the case of Terry v. Adams (345 U. S. 461, 1953), a decision handed down by the Supreme Court in 1953 against the Texas Democratic Party's attempt to disfranchise blacks by excluding them from the primaries. In Terry, the court ruled that a state or its agents were not absolved of their constitutional duties simply because they fail to discharge them or choose to ignore them. As Nelson reasoned, the state's participation in the management of Tulane was not diminished by the public officials' lack of enthusiasm for attending meetings. As long as public officials were required to sit on the board, then the board was an agency of the state. As long as the state contract required their position on the board, the state participated in the management of the university.

Nelson also cited the numerous statutes that granted the board permission to dispose of state property as evidence of state management. For example, in 1890, the legislature passed Act 94 which allowed the board to sell state property with the governor's approval. Again, in 1903, the board, with state approval, sold the old Mechanics Institute Building to Theodore Grunewald. In 1939, the board, with the governor's consent, sold a portion of the state's Common Street property to the city of New Orleans. In 1942 the state granted permission to the board to use proceeds from state property to purchase securities and bonds. And two years later, the state exhibited its influence over the university when it designated that the legislators' scholarships be awarded without regard to the sex of the recipient.

The only state property still held by Tulane in 1961 was the old Shell Building property, then leased to the Westminster Corporation. Before selling or releasing it, the board was still bound by the contract to seek the state's permission. All of these directives, Nelson claimed, demonstrated that the state continued to participate in the operation of Tulane; indeed, they appeared, as Judge Wright noted, directives "more appropriately addressed to a public institution than one wholly independent of the state."[12] Act 43 was nothing more than an executory contract between the TEF and the state, and nothing in the legislative record supported Tulane's claim that the state withdrew

after the 1888 constitutional amendment.

To support his thesis that these directives amounted to state management, Nelson drew from two landmark decisions recently handed down by the federal courts. For years, the federal courts had scrupulously analyzed contracts between states and so-called private corporations that discriminated. Those contracts that provided for state donations of land and property or contained reverter clauses came under greater suspicion after 1959 when the United States Court of Appeals for the Fourth Circuit handed down its decision in Eaton v. Board of Managers of James Walker Memorial Hospital (164 F. Supp. 191, 1959).

The case was brought by three black physicians seeking courtesy staff privileges in the hospital. The court had painstakingly analyzed North Carolina's long relationship with the hospital in three areas: the history of the public hospital built in 1881 and replaced by the private one in 1901, the reverter clause on state-donated property, and the money the board received from public funds for care of the indigent. In this case, the court found the evidence of state involvement in the hospital insufficient to warrant the hospital a state agency. But the court warned that "the origin of state participation, the state's motive, and the function to be effectuated" as a result of a contract were relevant facts in showing present state control.[13] Certainly, Nelson adduced, Tulane's origin, the state's retention of prerogatives,

and the state's mandate to the TEF to develop the University of Louisiana placed Tulane and its board within the scope of the Eaton holding.

In 1961, the Supreme Court, in Burton v. Wilmington Park Authority (81 S. Ct. 856, 1961), warned that states that lease to private facilities that discriminated would be violating the Fourteenth Amendment. Especially significant to Nelson's case, the court had refrained from fashioning a precise formula for determining state participation but instead freed the lower courts to "sift facts and weigh circumstances of the non-obvious involvement of the State in private conduct" as well as the obvious.

The Burton case allowed Nelson to use past and present state control, direct and indirect participation as evidence of state management; it allowed Judge Wright considerable freedom to assess the state's involvement. The holding in Burton made Nelson's case argument that much stronger. But to give greater support to his position and to undermine Tulane's claim that the 1888 amendment divorced the university from the state, Nelson referred Judge Wright to a state Supreme Court decision of 1910.

The case came to court years after the TEF had cut a fantastic and profitable deal with Thomas Nicholson. In 1897, the TEF, with Governor Murphy J. Foster's sanction, leased to Nicholson for ninety-

nine years state property on Common Street for $10,000 yearly rent, payable in advance, with the property reverting back to the TEF upon expiration of the lease. Difficulty arose when Nicholson, unable to keep up the payments, turned successfully to two members of the TEF, Judge Charles E. Fenner and Mayor Walter C. Flower, for financial help. "Then there developed a situation pregnant with ugly possibilities."[14] TEF members and their families owned stock and held bonds in an enterprise that, in turn, was lessee to the TEF.

Following the New Orleans Daily-States' allegations of fraud and accusations of whitewashing against the TEF, the board sued the paper for libel. The upstate Boyd forces in the legislature, having just shattered the TEF's hope for a state appropriation and, in all probability, eager for another victory, filed suit to annul the lease on grounds of fraud. After Fenner had resigned in 1906, the TEF won its suit against the Daily-States. It also successfully defended its lease with Nicholson against the legislative assault, as the state Supreme Court held that Act 43 prevented the state from annuling leases of state property made by the TEF.

Tulane's attorneys claimed that this Supreme Court decision proved that Tulane was independent of the legislature. Nelson, on the other hand, insisted that the court had found Tulane immune from state annulment only because the lease was not fraudulent. The court,

Nelson contended, had actually reaffirmed the state's prerogative--the state's right to intervene in cases of breach of contract. The evidence, then, of state involvement in Tulane University was not diminished by this decision; rather, it was exalted. The amount of state involvement in the arrangement and management of Tulane did not simply meet the standards spelled out in Eaton and Burton; it surpassed them.

Demonstrating that Tulane enjoyed significant financial support from the state proved one of the stronger elements of Nelson's brief. In citing specific examples of state participation through funds and property he made state participation in management that much more obvious. In 1884, the state granted to the Tulane board a usufruct--the enjoyment and use of property valued at $177,343.60. The state also granted to the board a unique, $5 million tax exemption that amounted to an annual savings, in 1961, of almost $200,000. The TEF, by 1961, had sold most of the state property--the Mechanics Institute in 1903 for $65,000 and 18 feet of Common Street in 1939 for $50,000--and invested the proceeds in the development of the St. Charles Avenue campus. Still in the board's possession was the old Shell Building property which, in 1961, was valued at $3.5 million and whose lease to the Westminster Corporation brought to the TEF $160,000 annually.

The 1890 statute granted the board permission to sell these properties but required the board to reinvest the proceeds in property in New Orleans, to devote the property to educational purposes, and give a first mortgage to the state in the amount reflecting the value of appreciation. By legislative order, then, the state had allowed the board the benefits of the sale of state property but required the board to account for the property's increase in value.

In 1942, when the legislature authorized the board to invest proceeds from state property in securities and bonds, it dropped the mortgage requirement but did not negate the provision on property sold before 1942, pursuant to Act 43 of 1884 and Act 94 of 1890. Nelson argued that, since the state could still, in 1961, require a mortgage on the university for $115,000, such a prerogative demonstrated not only considerable state support but also continuing participation in management.

In defense, Tulane's attorneys cited yet another state Supreme Court decision that had redefined and, in a way, limited the state's right to intervene in the TEF's disposal of state property. In 1939, Robert S. Maestri, then mayor of New Orleans, negotiated the purchase of eighteen feet on Common Street from the TEF and polled the legislature for state permission. The TEF tried to back out of the sale at the last minute because of the mortgage requirement against

them. As an excuse, the TEF declared the poll of the legislature insufficient sanction as required by Act 43 and refused to sell the property. The city sued the TEF (City of New Orleans v. Administrators of the TEF, 190 So. 560, 1939) and won the judgment. The Tulane attorneys used the decision to show that the legislature had, at best, only limited control over the property. Nelson countered with his plea that the court merely ruled the poll sufficient legislative sanction within the intent of Act 43. The court, Nelson charged, did not recognize the TEF as title holder of the property; nor did it rule that the 1888 amendment, in any way, altered the state's control over its property. The decision only reaffirmed the state's right to sanction the TEF's disposal of state property.

Nelson also assessed the amount of funding Tulane enjoyed annually from the state, an amount far greater than the value of the property transferred in 1884. The state's participation in funding included the tax exemption, the interest from the proceeds on the sales of state property, and the Westminster lease. The state, in 1959-60, contributed $320, 400 or nearly 20% of Tulane's $1, 729, 436 endowment income, compared to the $32, 000 or 1. 85% generated by the restricted endowment.[15] State support of Tulane exceeded the standards set by the federal courts.

In Burton, a case brought by a black plaintiff denied service in a

coffee shop located in a public parking facility, the court found the lease to be worth 15% of the parking facility's operating costs. The court held the lease "a physical and financially integral part of the plan by which the parking authority maintained itself." The state built the parking facility and expected the facility to sustain itself on the leases. The court ruled the state of Delaware a participant in the operation of the coffee shop and, therefore, a participant in the discrimination.

Millions of dollars, Nelson concluded, from the state over the years assisted in the development of Tulane. Part came in the form of the tax exemption; part in the usufruct granted in 1884. This latter part included real property as well as intangibles that put the university years ahead of an entirely new university.

The state did not withdraw from the development of the university in 1884 or 1888 for the university had since used proceeds from the sale of state property and savings from the tax exemption to develop the university, albeit under a new name and on a new site. The university was a joint expenditure shared by the state and the TEF. The plan to develop a university in New Orleans, as expressed in Section 4 of Act 43, had been realized through the state's support. The university, therefore, was, Nelson insisted, an agency of the state for the purposes of the Fourteenth Amendment and legally obli-

gated to admit the plaintiffs.

In February 1962 Nelson and Tulane's lawyers submitted their final pleadings to Judge Wright. The case had demanded exhaustive research by both parties. Judge Wright twice granted the Tulane attorneys thirty-day extensions which dashed Nelson's hopes of getting his plaintiffs into Tulane for the second semester. And as late as February 19, the defendants' attorneys were filing petitions for abstention and dismissal, hoping to get the case maneuvered into the state courts. Nelson feared that the case would lie there for years, and he doubted that his pleadings would be favorably heard by Louisiana judges. He, therefore, spent as much effort in keeping the case before Judge Wright as he did developing his thesis.

On January 31, Nelson had requested that Judge Wright grant relief by summary judgment. He asked that the court hold Tulane a state agency and enjoin and restrain by injunction the officials from enforcing or executing state law or university policy that defied the Fourteenth Amendment. On the morning of March 29 he learned that his efforts had paid off. That morning, Judge Wright delivered his opinion in favor of the plaintiffs.

In the opening paragraphs Judge Wright mowed down Tulane's defense by declaring Act 43 inconsistent with Brown and, therefore, unconstitutional. He dismissed the board's use of racially-restricted

donations as an excuse for their policy by ruling them juridically unenforceable.[16] His decision, however, was more than a juridical decree; it was a moral diatribe--a polemic decrying the state's disregard for the equal protection clause of the Constitution and a bitter condemnation of the board's racist conduct and contrivances.

The board had stated, in April 1961, that it would admit blacks if legally permissible. The board could have sought the legal remedy itself, as urged by Jones, if Paul Tulane's will had been the sole reason for its restrictive admissions policy. Instead, the board had balked. Once sued in court by Nelson, the board retreated from its position, denied that legal complications constrained it, feigned privacy and immunity, and tried to seek refuge in the state courts.

The angry judge accepted Nelson's plea; he declared Tulane University public for the purposes of the Fourteenth Amendment and ordered the board to admit the plaintiffs. In defense attorney Wood Brown's words, Wright "stuck integration in Tulane's ear."[17]

In an obiter dictum, Wright questioned any private institution's right to discriminate in providing as vital a service to the nation's welfare as education. He stopped just short of issuing a decree on such grounds. Instead, he applied the case law dealing with private ownership of facilities impressed with a public interest, such as bus services, company towns, political parties, and street cars, and

pronounced Tulane a public institution.

Using the guidelines set down by his brethren in Eaton and Burton, Wright recited the history of the university, searching for a specific legislative act or court decree that severed Tulane's connection with the state. He found none because, as Nelson had convincingly demonstrated, none existed. He called the defense counselors' claim that the constitutional amendment of 1888 severed the connection "patent nonsense." Passage of time alone had not worked the change. Neither had the relocation of the campus. Indeed, Wright ruled, the university "operates under a special legislative franchise" and "continues to enjoy a very substantial state subsidy in the form of a unique tax exemption for commercially-leased property." It continues to receive revenues from lands the state has not altogether relinquished and continues to be administered by a public board.[18] He held Tulane's relationship with the state within the intent of the Supreme Court in Cooper v. Aaron and ruled it could not discriminate in admissions on the basis of race.

In his closing statement he chastised the Tulane board with a polemic: "The bitter fruit of the Board's segregation policy of the past should not be visited on the young men and women of the future, of all races, who seek admission to the University."[19] On April 9 he issued the restraining order against the board.

The Tulane forces, if not surprised, were aghast at the decision. Nelson's suit had made the stakes for which they played dangerously high; Wright's decision made the board's fears a reality. Aside from the affront of being enjoined and restrained by order of a federal court, especially the court of J. Skelly Wright, the Tulane board had other concerns about the ruling.

In just the previous year, a special state legislative committee, the Unamerican Activities Committee (UAAC), had investigated subversive activities on state and tax-supported campuses. UAAC had singled out and levied a steady barrage of fire against LSU professor Waldo McNeir for publicly condemning the state's segregation laws; the UAAC attack eventually forced McNeir to resign in 1961.[20] Wright's ruling, then, threatened to place Tulane within the legislature's range. In one fell swoop, they claimed, Wright had threatened to strip them of their shield of academic freedom and jeopardize the very purpose for which the university was created. The board's fear was that a ruling holding Tulane amenable to the Fourteenth Amendment for the purpose of admissions invited legislative assault in other areas of university policy. And academic freedom was not the only area assaulted at that time.

The growth of the student rights movement hardly went unnoticed by school administrators across the country. Of particular concern

to the Tulane board, especially Tulane attorney Edmund McIlhenny, was a decision rendered by the United States Court of Appeals for the Fifth Circuit in August 1961.[21] In that decision, the court overturned the Alabama State Board of Education's expulsion of six students from Alabama State College. What had begun as a sit-in in the Montgomery courthouse to protest discrimination in public restaurants grew into a series of demonstrations at the state capital and marches between the Capitol and the campus. Fearful that the demonstrators would disrupt the campus and boycott classes, the university identified twenty-nine "ring leaders" and then expelled six of them. In overturning the expulsions, Justice Richard Taylor wrote that the Fourteenth Amendment guaranteed to every student in a tax-supported school the due process of the law. "Only private institutions can obtain a waiver of notice and hearing," he said, "before depriving a student of a valuable right."[22] Tulane, once insulated from such decrees, now feared menaced by them.[23]

An editorial from the Shreveport Times no doubt echoed many state leaders' condemnation of the Wright decision. Calling it "a final gesture of arrogance," the Times found the decision sweeping and illogical, "an end -- by federal judicial edict -- of private, endowed, tuition educational institutions in the United States."[24] And reiterating an editorial in the Richmond News Leader, the Times

labeled Wright's comparison of privately endowed educational institutions to street cars and company towns "judicial arrogance."[25]

Criticism was not levied at Judge Wright alone. The Tulane school newspaper, the Hullabaloo, on April 13, four days after Wright enjoined the board, blamed the board for putting the university within the reach of the federal courts. The board's spinelessness, the article charged, made them "reluctant to make any blatant shift in admissions policy without having a fall guy upon whom to pin the blame." The article characterized Wright as the perfect flunky--a man fearlessly opposed to segregation and "used to being spat upon in public for his unpopular decisions." The suit allowed the board an easy way out, the article stated; it could pacify New Orleanians by appearing to be forced by a "scalawag" to admit blacks and, at the same time, court the foundations. The author castigated the Tulane board for selling out to the popular whims of the foundations and queried if Ford decided to promote the theory that the earth is flat, whether the Tulane board would "crawl to Ford and agree to teach world flatness in exchange for another set of bowling alleys."[26]

The decision, on the other hand, won for Nelson many accolades including letters of praise from the Harvard and Columbia Law Schools. But his elation over winning admission for the plaintiffs proved short-lived. Judge Wright, just days after he restrained the board, left New

Orleans to assume his seat on the Second Circuit Court in Washington, D. C., a promotion arranged by Southern Congressmen to get him out of New Orleans. Just before Wright issued the injunction against the board, Joseph Jones, on April 6, expressed in the Times-Picayune, the board's unanimous decision to appeal Wright's ruling to the Fifth Circuit Court.[27] That decision did not particularly surprise Nelson nor alarm him; he was confident the Fifth Circuit would uphold Wright.[28] What did alarm him was the board's change in strategy after Wright's departure.

On April 13, the board filed a motion in federal district court for a new trial on the grounds that Wright erred in granting relief by summary judgment. Now Nelson faced trying the case again and this time, not before a trailblazer in civil rights, but before a conservative newcomer to the federal bench, Frank B. Ellis. On May 8, Nelson's fears became a reality. Ellis granted Tulane a new trial.

CHAPTER V

FRANK B. ELLIS AND THE FOURTEENTH AMENDMENT

> The most that need be said to state the question in this case is that a "university" is an activity rather than a thing in the legal sense . . . . It is, of course, significant that education as an activity, when engaged in by a private institution has long been held to be fundamentally private.
>
> Frank B. Ellis

Throughout the proceedings Tulane's attorneys, John P. "Pat" Little and Wood Brown III, had defended against overwhelming evidence of state involvement, including an 1886 state Supreme Court decision that declared Tulane a public institution (Adms. of TEF v. Bd. of Assessors, 38 La. Ann. 292, 1886). Frightened by Judge Wright and anticipating a brow beating in federal court, they persistently pleaded that the suit belonged in state court. The state, Little claimed, was a party to the contract in question, and the Eleventh Amendment ordered that suits against a state be tried in state courts.

Little had also pleaded that "the Administrators of Tulane University," a party Nelson added as a defendant in October 1961, was

not a legal entity and, therefore, not a proper defendant. He insisted that a hearing on the question belonged in state court. He retreated from the board's earlier stand that Act 43 required the racial restriction, i. e. obligated the Tulane board to honor Paul Tulane's requests, and instead claimed that the donations to the TEF, a private corporation immune from the Fourteenth Amendment, required the racial restriction. The suit, therefore, should more properly be filed in state court.

Nelson had masterfully countered the arguments of the Tulane lawyers and kept the proceedings in federal court, but his request for relief by summary judgment, a device reserved for cases without material questions of fact, afforded Tulane a way out from under Judge Wright's decree and the "public" label.

On April 13, Little and Brown, rather than expose their unfavorable judgment to the Fifth Circuit as originally announced, filed a motion for a new trial on the grounds that there were substantial questions of fact and that Judge Wright erred in dismissing them by summary judgment. On April 19, Judge Ellis stayed Judge Wright's April 9 injunction pending a hearing.

During the hearing before Judge Ellis on May 7, Little argued that the state's present involvement in Tulane was a disputable issue. The evidence presented to Judge Wright proved that there were indeed

many issues of fact to be determined, and the Federal Rules of Civil Procedure (FRCP) entitled the defendant to a "trial on the merits." He charged that the status of Tulane University as a legal entity--whether it was a public or private entity, or a legal entity at all--had not been established, nor had the assessments Judge Wright used in his summary judgment, such as "significant state action" and "substantial state subsidy," been soundly demonstrated or defined.

Nelson, suspicious of Tulane's change in strategy, argued that Tulane's attorneys were, themselves, in violation of the FRCP. The FRCP required that motions to dismiss summary judgments be filed within ten days of final dispensation from the court issuing the judgment. The Tulane attorneys, Nelson charged, should have filed their motion within ten days of the March 29 ruling.

On May 8, Judge Ellis vacated Wright's decision. In his recorded decision of May 15 he ruled that April 9, the date Judge Wright restrained the Tulane board by injunction, was the date of final judgment and that Tulane's motion for a new trial was timely.[1] He ruled the summary judgment inappropriate because "modifying adjectives of degree i. e. 'special,' 'substantial,' 'unique,' and 'considerable' are certainly in issue."[2] The Supreme Court's mandates in the Civil Rights Cases in 1883 and in Burton v. Wilmington Parking Authority in 1961 required the "degree" of state action to be soundly estab-

lished. Ellis felt the degree of state action in the affairs of Tulane University "ripe for determination after a trial on the merits" and ordered that a new trial begin on June 4.[3] For Nelson, Judge Ellis' decision was an unanticipated blow and the reality of trying the case again, this time in Ellis' court, a major setback.

Frank Burton Ellis, appointed to succeed Judge Wright by President Kennedy, was not a constitutional jurist. His experience as an attorney revolved more around politics and corporate law. Born in Covington, Louisiana, in 1907, Ellis took his law degree at LSU and was admitted to the Louisiana bar in 1930. In 1940 he was elected to the Louisiana Senate and served as president protempore in 1944. While a partner in the firm Ellis, Lancaster & King, the judge had served as general counsel for the Greater New Orleans Expressway Commission and the Interstate Oil Company.

A devout Democrat, he was rewarded in 1961 for heading up Kennedy's campaign in Louisiana and made Director of the Office of Civil Defense Mobilization in Washington, D. C. Found to be an inadequate administrator and a thorn in Kennedy's side, despite his loyalty, Ellis was moved back to Louisiana to succeed Judge Wright on the federal district bench in April 1962, a move some regarded as "the worst appointment of all" by Kennedy.[4]

Nelson dreaded trying his case before Ellis. A member of

many of New Orleans' elite clubs--the Plimsoll, the Southern Yacht, and the New Orleans Country Club--with no experience in constitutional law nor with Nelson's plaintiffs' cause, Ellis simply was not, in Nelson's opinion, suitable to be hearing a Fourteenth Amendment case.[5]

On May 24, Tulane's attorneys brought the eight Tulane and Newcomb heirs and Harry P. Gamble, a representative of those whose donations to the university were restricted by implication, into the proceedings as third-party defendants. Little requested a declaratory judgment on the rights and duties inter sese between the TEF and these defendants. The Tulane attorneys claimed they cited these defendants to protect the university in the event the plaintiffs prevailed at the trial on merits.[6] Ellis agreed to conduct the hearings for these defendants and moved the trial date from June 4 to August 4.

Nelson, on the other hand, saw Tulane's citing the third-party defendants, at this late stage, as a ploy--a way of, again, delaying the proceedings and making Nelson's case moot. He knew what angered the Tulane board the most about the Wright decision--not that Tulane was free to admit blacks but that the board was ordered to admit them and the university held public. Nelson recognized that the Wright decision had had a startling if not soul-searching effect on those of the board originally opposed to desegregation. He suspected

most of the board felt humiliated to be coerced into desegregation, and that even if Ellis restored Tulane's privacy, the board would voluntarily admit his plaintiffs.[7] Their introducing of the heirs, then, was a face-saving device for the board; it was "proof" that consideration for the heirs was, indeed, the reason for not voluntarily desegregating before 1961.[8]

There was more at stake than the Tulane board and his two clients, however. Compelled by his belief in racial justice and repelled by white southerners' racist ploys, Nelson remained committed to his case. He was driven, for the cause of the civil rights movement and for the sake of all black people who sought admission to so-called private institutions, to prove his theory in court. His success meant justice for many more people than the few blacks who applied to Tulane; it would thwart one more segregationist gimmick that white supremacists had used since the Supreme Court's 1938 ruling in Gaines v. Canada.

Nelson had more confidence in trying his theory before the Fifth Circuit than before Judge Ellis. And so he prepared an appeal to the Fifth requesting that they overturn Ellis' May 8 ruling that vacated Judge Wright's decision and instead rule that Tulane's proper course of action was not a trial on the merits in federal district court but an appellate review.

In his pleading to the Fifth Circuit, Nelson held that Ellis had erred in two ways. First, Nelson repeated his charge that the Tulane attorneys' motion for a new trial was not timely filed. Second, he claimed that Ellis' vacating a decision that conformed to Rule 56 of the FRCP was in error and that relief from summary judgment was a matter for appellate review.

Nelson's task was to convince the Fifth Circuit that those issues which Tulane's attorneys raised before Ellis on May 7 had not been properly raised or contested before Wright. Since the evidentiary facts were not disputed during the previous trial, the summary judgment was appropriate. To the charge that Judge Wright had erred by using such terms as unique, substantial and significant, Nelson held that those descriptions were "not issues of fact but legal designations . . . . The same," Nelson charged, "is true of all descriptive words used by Judge Wright."[9] Rather than issues of fact, Nelson continued, they were "issues of constitutional legal standards," and, therefore, appropriately used.[10]

Nelson claimed that Judge Wright purposely put aside the so-called conflicting issues, such as whether the state or the TEF held title to University of Louisiana property and whether two boards--the TEF and the administrators of Tulane University--existed. The summary judgment was based on the United States Supreme Court's

holding in Cooper v. Aaron and, therefore, within the requirements of Rule 56 of the FRCP. The so-called issues of fact were outside of and nonessential to the opinion rendered by Judge Wright.

As for Tulane's newly-advanced theory of privacy being an issue of fact, i. e. that the 1888 amendment made Tulane University a private institution, Nelson admitted he should have proceeded on the theory of estoppel before Judge Wright but argued that, in effect, Judge Wright had ruled on the university's status within the guidelines of the FRCP.[11] Wright, by calling Tulane's theory "patent nonsense," had not failed to address the issue; he simply disagreed with it. What Tulane objected to, then, were not issues of fact but the legal conclusions Judge Wright rendered. Relief for such objections, Nelson held, did not properly lie in a trial on the merits but in appellate review.

The Fifth Circuit now had to decide. The decision whether to uphold Wright or Ellis fell to Judges John Minor Wisdom, John Robert Brown, and Benjamin Franklin Cameron. Nelson presumed that two of the three--Judges Wisdom and Brown--had sympathy for his cause. Both were Eisenhower appointees, Brown, a Texan chosen in 1955, and Wisdom, a New Orleanian selected in 1957; and each was well acquainted with attempts to halt or delay desegregation. They had helped to thwart massive resistance during the Orleans public

school desegregation by upholding J. Skelly Wright's rulings throughout the critical years. In fact, the Fifth Circuit had become the leading force in the process of desegregation in the deep South.[12] Although Judge Cameron, a Mississippian nominated by James O. Eastland and appointed by Eisenhower in 1955, had a distaste for using the Fourteenth Amendment to invoke unpopular change, Nelson hoped that Brown and Wisdom would prevail.[13]

On July 19 the New Orleans States-Item covered the appeal hearing. The article repeated humorous remarks by Judges Cameron and Brown: Cameron had fancied that the state of Louisiana take over two of the nation's great medical schools; Brown had cracked, "And two football teams."[14] But on July 21, the panel upheld Ellis' decision.

Although the immediate decision went against Nelson and the case was remanded back to district court for a trial on the merits, the judges ordered Ellis to conduct an early trial without delay. The panel found the third-party pleadings filed by Tulane University "purely collateral and incidental to the main cause" and ordered Ellis to try the merits "expeditiously."[15] Now Nelson could only hope to win over Ellis as he had Wright and win a fall admission for his clients.

The Tulane attorneys felt more confident in defending their privacy before Judge Ellis than before Judge Wright and the Fifth Circuit.

Wood Brown called the appointment of Ellis "a break that we got."[16] Little, however, began the proceedings in Ellis' court as he had in Wright's, with a motion to abstain and dismiss. Three issues of fact, he argued, needed to be answered in state court before the constitutional issues Nelson raised could even be addressed: the effect of the contract between the TEF and the state, the validity of the white restrictions in the donations to the TEF, and the validity of the claim that the university, because of its so-called public board, was a state agency. Under a mandate from the Fifth Circuit to try the case without delay, Ellis denied Little's motion and ordered the trial to begin.

The trial, which began on August 3, was nothing more than a rehash of the arguments Little and Nelson had made to Judge Wright the year before. The only change was Tulane's citing the third-party defendants, but their presence had no real bearing on the proceedings. During the May and June hearings in Ellis' court, the attorneys for the Tulane heirs had testified to their clients' "lack of personal objection to the admission of Negroes into the university," and waived, on behalf of the heirs, any rights against the TEF arising by a violation of the terms of the original gift.[17] Ellis put those complaints aside and instructed both parties to speak to the main cause--the state involvement in the operation of Tulane University.

What the Ellis trial now meant for Nelson was the opportunity to

prove his theory in federal court and outlaw yet another device segregationists used to maintain lily-white institutions. What it meant for Little was not so much the opportunity to remove legal obstacles to a voluntary desegregation, but the last chance to win back the university's private status. It appeared, then, that if desegregation was to come to Tulane, the board preferred it come through a voluntary decision not a court order.

Nelson introduced the same evidence to support his thesis. Although Little objected to much of it on grounds of irrelevancy and hearsay, Ellis accepted it. Ellis obviously anticipated an appeal of any decision he rendered, and ensured, therefore, that "all of the merits" appear in the record if his decision reached the court of appeals.

Little's defense hinged upon two points: that Tulane University was a private "activity" of a private corporation immune to the Fourteenth Amendment and that the state involvement in the operation of the university was negligible. He pleaded that the TEF had obviously erred when it used the university's name to apply for loans and confer degrees; he also admitted the board had erred in stating that the contract with the state required the restriction in admissions. But the proof that Tulane University was private lay in the theory that Judge Wright had called "patent nonsense"--that the constitutional

amendment of 1888 terminated the University of Louisiana and created the new, private Tulane University.

According to Little the legislature, in 1884, anticipated the termination of the University of Louisiana but was under a constitutional mandate to support it. The contract, then, between the TEF and the state provided that the University of Louisiana be continued and administered by the board until the amendment was passed. The amendment, Little argued, served two purposes: it dissolved the public university and, at the same time, granted the tax exemption to a private one.

To support his theory Little cited the two tax exemption cases filed by the TEF in the 1880s. In the 1883 decision, the state Supreme Court denied tax exemption to the TEF; this decision supported the undisputed fact that the TEF was a private corporation. In 1886, however, the court recognized that the TEF had begun to administer a public educational institution, the University of Louisiana; on this basis it granted the exemption. The Supreme Court ruled that the legislature passed Act 43 with the intent to continue the University of Louisiana under the administration of the TEF. To do otherwise, the court said, would have been unconstitutional, for the university had been protected by the organic law of the state.

Such a pronouncement by the state's highest court initially

proved a great burden to Tulane's attorneys and a boon to Nelson. But, certain verbiage the justice used in writing that 1886 opinion caught Wood Brown's attention. And that verbiage became the crux of Little's defense. The court had gone on to state: "No doubt the Legislature had in mind the creation of a new University as a consequence or result of the Constitutional amendment."[18] In ambiguous language the court added that the public university was continued "and if it is not perpetuated, the Constitutional amendment alone will confer the power to replace it by another."[19]

Little used this passage to prove that the amendment, then, accomplished the two things the legislature was unable to: it relieved the legislature of its constitutional obligation to support the University of Louisiana, and granted the tax exemption to an otherwise taxliable corporation. Only during a brief interim, 1884 to 1888, did the TEF need the public institution to secure the exemption; only by constitutional amendment could the private corporation win the exemption. Act 43, Little argued, then, was a device that afforded the TEF the exemption for the four-year period prior to the constitutional grant in 1888.

Nelson found the theory a fantastic misinterpretation of the state Supreme Court's decision. He queried why the university's officials in the early years pleaded just the opposite when they sought

state support and why the TEF never advanced this theory before when threatened by state encroachment during its 1910 defense of the lease to Thomas Nicholson or during the Hutchinson litigation.

True, Little did not have a direct answer to Nelson's questions; the best he could do was to cite state court decisions, such as the Hutchinson cases, that showed the state had backed out of the affairs of the TEF if not precisely in 1888 then gradually thereafter.

The Succession of Hutchinson cases involved a twenty-five year period of attempts by brothers and sisters of Alexander Charles Hutchinson to set aside Hutchinson's 1897 will. Upon his death in 1902, Hutchinson had left the bulk of his estate to charitable organizations in the city, including $750,000 to Tulane's Medical Department to improve the medical school and provide clinics for the poor. In 1929, the TEF decided to use the money to build a new medical building in downtown New Orleans, Margaret Hutchinson sued the TEF on the grounds that the Medical Department, not the TEF, was the intended recipient of the donation and the TEF had violated the terms of the will by using the money for a building.

The civil district court and the state Supreme Court held for the TEF stating that Act 43 destroyed the separate departments of the University of Louisiana and replaced them with the TEF. The TEF was free, the courts said, to receive and dedicate money on

behalf of any of its departments. This decision, Little claimed, proved that the legislature had indeed intended to dissolve the public institution and replace it with another.

Where Nelson used the 1910 and 1939 suits against the TEF to demonstrate state control of the university, Little cited them to demonstrate the negligible influence the state retained over the TEF. The state Supreme Court in 1910, Little maintained, found Act 43 and the 1888 amendment to have left the state powerless to interfere in the TEF's transactions except in the case of a breach of contract. And again in 1939 the court found a mere legislative poll supporting the TEF's sale of property to the city of New Orleans sufficient to satisfy the terms of the 1884 contract. The state's own courts then, Little claimed, recognized only very limited state control over the TEF since the enactment of the 1884 contract and the amendment that followed it.

Little could not, however, rely on the amendment and state court decisions alone to attest to Tulane's privacy. Nelson had charged that, since the state supplied 20% of Tulane's endowment income in 1959 and controlled 30% of Tulane's income-producing property, the university was public for the purpose of the Fourteenth Amendment. Little's task, then, was to rearrange the figures. Somehow, Little had to disguise the $200,000 yearly savings from

the tax exemption and the $164,000 yearly income from the state property and put the value of these benefits below the standards established in the Eaton and Burton decisions.

Little admitted that the tax exemption was indeed generous; however, it was not unique. Both Northwestern University in Chicago, Illinois, and Washington University in St. Louis, Missouri, enjoyed tax exemptions and both had successfully defended their private status before the United States Supreme Court.[20] Furthermore, Little argued, the tax exemption was a quid pro quo arrangement with the state; the TEF got a tax exemption, the state received scholarships. The scholarships cost the TEF, over the last ten years, $455,000 or half of the savings from the exemption.

In the event the court failed to recognize the quid pro quo arrangement, Little arranged the figures to show that the benefit of the yearly exemption ($200,000) and the income from the Shell Building ($160,000) amounted to only $360,000 or 2% of the university's $18 million operating costs for 1961. He further damaged Nelson's figures by comparing the market value of the Shell Building ($3.5 million), not to the value of the TEF's income producing property ($12 million), but to the value of the university's total endowment, $49 million. State controlled property, Little maintained, accounted for a mere 7% of the value of the university. The TEF, Little claimed,

received only $2 million from the state over the last ten years (after the scholarships); LSU received $185.5 million. The contention that Tulane was public because of so-called sizeable state funding, Little charged, was a gross misinterpretation of the facts.

Although hopeful that his arrangement of the figures of state funding had mitigated Nelson's case, Little still had to defend the board's private status against the United States Supreme Court mandate in the Girard College Cases and contend with the reverter clause in the 1884 contract. The former proved an easier task.

In Girard, every member of the board was a public official of the city of Philadelphia; only three on the Tulane board were public officials. The ratio of 3 to 17, plus the fact that the three attended only two meetings in the last fifty years, Little argued, put the question of the TEF's "public" nature well outside the holding in Girard. Tulane was no more public, Little held, than Yale, Dartmouth, Princeton, or the University of Pittsburgh--all private institutions whose boards included state officials.

The reverter clause, on the other hand, was more difficult to defend. Recently, in May of 1962, a case involving a reverter clause had come before the Fifth Circuit Court and that court recognized it as evidence of state action. In 1958 several blacks sued the city of Jacksonville, Florida, in federal court, for operating segre-

gated golf courses. Before relief could be granted the city sold the golf courses to a private concern but required that the golf courses remain golf courses. The plaintiffs filed suit again in federal court and charged that the city, because of the reverter clause, was a participant in the discrimination by the new owners. The district court ruled against the plaintiffs but the Fifth Circuit reversed. The strong reverter clause, it held, amounted to "complete, present control" and therefore state action for the purpose of the Fourteenth Amendment. (Hampton v. City of Jacksonville 304 F2d 320, 1962).

True, Act 43 did contain a reverter clause; but Little maintained that only if the TEF violated its contract or voluntarily got out of the business of education, could the state retrieve its property. The reverter was not as restricting as that in the Hampton case; indeed, the TEF could lease or sell the property to any concern it wished. And the reverter was not a mandate; it was optional--the state had the option of retrieving its property in the event the terms of the contract were not carried out.

Tulane University, Little concluded, was a private activity of a private corporation. The TEF was, therefore, immune to the amendment and free to discriminate because the United States Supreme Court's 1883 mandate in the Civil Rights Cases (109 U.S. 3, 1883) placed private concerns beyond the reach of the Fourteenth

Amendment.

Before delivering the final oral arguments Little requested yet another postponement of proceedings until September 14. Wood Brown's army obligations conflicted with the date Ellis set; and, although Brown's role up to that time had been the legal researcher not the trial lawyer, Little wanted him in court for the final summation. Nelson suspected the board was once again delaying the inevitable and postponing the case to deny a fall admission to his plaintiffs and therefore objected. Ellis ruled in Nelson's favor; the judge heard the oral arguments on August 17. But to Nelson's great disappointment Ellis allowed Little three more weeks after the arguments to file final memoranda noting that he hoped to announce his final decision in October.

On August 7, the Times-Picayune had reproduced on its editorial page the full text of a Shreveport Times' editorial that had verbally flayed Judge Wright for his decision and nearly canonized Judge Ellis for vacating it.[21] After that comment, however, the city's press said nothing in its editorials until Ellis made his decision. On the other hand, as early as September, the Tulane student newspaper, the Hullabaloo, carried the main arguments of both attorneys and, by October, began reflecting the growing student restlessness and impatience with the board and Judge Ellis.[22]

Throughout the month of September a small number of Tulane students, supported by the ACLU, invited black guests to the campus and staged sit-ins in the University Center. The sit-ins, staged in the evening, attracted little attention and only a mild reaction. Their efforts, however, reflected impatience with the board that had not yet taken a position on desegregation. As reported in the October 12 issue of the Hullabaloo, the demonstrations were staged, in part, to express disappointment with the board for not voluntarily desegregating in the first place; with the integration of the university so imminent, these activist students felt they had to push the board into making new policy for it. [23]

The editorial staff on October 12 called the board "fence-straddlers" and on October 26 conducted a poll that echoed the demonstrators' despair. Of the 650 polled, 38% admitted that they did not know where the board stood on desegregation and only 29% felt the board favored it. Although only 48% favored desegregation, an overwhelming majority, 68%, felt Ellis would rule against Tulane and order it. "The tenor reflected by this poll," the article concluded, "seems to be a general acceptance of the fact that Tulane will eventually be desegregated."[24] When and how remained the questions.

The month of November passed, however, and Ellis had not yet

made a decision. On November 30, the Hullabaloo, in an editorial, expressed impatience with both the board and the court and despaired over the damage that the delay was causing the university. The National Science Foundation and other foundations, the paper reported, had issued an ultimatum to the TEF and threatened to cut off grants if Tulane was not integrated by year's end. [25]

At last, on December 5, Ellis announced his decision. To the Tulane students' surprise and Nelson's disappointment, the defendants had prevailed. In Nelson's opinion Judge Wright had seen the suit as an occasion to strike down one more device used to maintain segregation; Ellis rendered an opinion that sanctified the private institution's immunity to desegregation. Ellis' decision conformed to Little's entire line of defense.

Ellis ruled that the university was not a res, that is a legal entity, but an "activity" supported by a private corporation. Neither the university's incorporation by state law nor its dedication to education made the activity public. That, Ellis said, had been the law of the land since 1819 when the United States Supreme Court heard Dartmouth College v. Woodward (17 J. S. (4 Wheat.) 517, 1819).

Although Judge Wright had used Louisiana court decisions to support his holding, Ellis found them "wholly foreign to the rights urged by the plaintiffs" and therefore having "no effect" on the issues

at bar.[26] Instead, Ellis recognized the 1888 constitutional amendment as the device that terminated the University of Louisiana and made Tulane University private. Then he compared the state's participation in the private university to the standards established by the federal courts in Girard, Burton, and Hampton.

"Were the Tulane Board made up solely of state officers, without doubt there would be state action," Ellis admitted.[27] But, since this was not the case, he concluded: "This court cannot fairly say that the Tulane Board's action is the action of the State of Louisiana because a small minority of its members are state officers who do not attend the meetings and disavow any purpose to influence the Board."[28]

Ellis upheld Little's assessment of state funding and found the figures "all below the amounts in Burton which the Supreme Court admitted were persuasive against a finding of state action."[29] As for the plaintiffs' contention that Act 43 and the Supreme Court in 1886 granted tax exemption to a public institution, Ellis ruled the amendment changed the nature of the institution as well as the basis upon which the exemption was granted. The 1888 amendment, he declared, "put it (the exemption) on the 'simple tax immunity' basis which this court finds is inefficient for state action . . . . This court is unable to hold that a simple tax benefit evokes state action. Were that the

law then every citizen of the United States . . . would be within the proscription of the Fourteenth Amendment."[30]

Ellis distinguished the reverter clause in Act 43 from the one in Hampton; the 1888 amendment weakened the reverter's effect. After 1888, Ellis ruled, the TEF no longer sponsored a state activity, as in the case of Hampton, but created a new one. Because "the reverter refers only to a small portion of the Tulane Board's property rather than, as in Hampton, the totality of the property in the hands of the private individual , . . . the reversionary clause of Act 43 does not create state action."[31]

In the end, then, Ellis ruled: "It is the conclusion of this court that the state action or involvement in the affairs of the Tulane Board is not so significant that it may fairly be said that the actions of the Tulane Board are the actions of the state of Louisiana. To this extent the plaintiffs are not entitled to relief and this court so finds."[32] To the relief of Nelson, however, Ellis declared Act 43 unconstitutional to the extent that it restrained the board and required the racial restriction in admissions. Ellis also cited the Tulane heirs' waiver of any right or intention to enforce the racial restriction and found the board "free to act as it wishes since no court may enforce racial restrictions in private covenants."[33]

The matter was not closed: on December 6, Nelson filed an

appeal to the Fifth Circuit. Desegregation had been a problem for the board for over ten years. Pressures to change the admissions policy had become almost unbearable by 1961. The foundations and liberal, progressive community with which Tulane's faculty and administrative officers identified had questioned the board's integrity. And yet the board had balked and nearly let Judge Wright take Tulane's private status from it. Judge Ellis, in the end, left Tulane in an enviable position: he restored its private status and afforded the TEF the option of admitting black students voluntarily. But the ordeal of resisting desegregation and the lawsuit had taken its toll on the university and the board, and "the board member came out a wiser person as a result of having gone through it," one of them later admitted.[34] On December 12, the TEF voted unanimously to admit black students into the university in February 1963.

The process also allowed Tulane to save face: it created the illusion that "Tulane people did this on their own volition."[35] True, the court may have ended a controversy, as Tulane authorities wished, but John Nelson, not the Tulane board, brought desegregation to the university.

Not all New Orleanians were grateful. The Hullabaloo, on December 12, praised the university for showing courage and leadership and recognized the board's decision as one that would "raise the

level of respect of the university in the eyes of the nation," but the best the Times Picayune could offer was condolence to the board for the position in which the foundations had placed the university.[36] Calling the foundations' policy "regrettable" but a "circumstance which must be faced and lived with," the paper praised the board for making "the best of a difficult situation.[37]

As February drew closer and eleven black students prepared to enter the university, the willingness that the "unlikely heroes" had given to Nelson's appeal had waned. Nelson wanted to continue the litigation. He thought Ellis' decision not only legally indefensible but also dangerous; it offered to white supremacists a refuge, he thought. And Nelson was angry. He was angry that the board had not desegregated in 1961, angry that the board had dragged the court proceedings out over fifteen months, and angry with Ellis for putting him and the plaintiffs "right back where we started."[38]

Although he praised the Ellis decision for at least bringing the case and seventy-eight years of segregation to an end, he thought a "deal was cut."[39] Nelson had sensed the board's desperation after Judge Wright's ruling. The board was finally willing, Nelson surmised, to desegregate and was eager to find a way out of the dilemma in which the lawsuit had placed the university. The board feared, Nelson thought, that the Fifth Circuit would never have allowed Tul-

ane the right to segregate; the board was looking for "a decision it could live with."[40] Nelson was also convinced that Judge Ellis was made aware of a board decision to open the university's doors before he rendered his opinion. The final decision by Ellis, Nelson reflected, was nicely and neatly packaged"--a Solomon-like decision delivered by a man who already knew that desegregation would follow in its wake.[41]

To Nelson, then, the civil rights movement had been sacrificed for an expedient end to a controversy; but to Rosa Keller, Henry Mason, and John Furey, their mission had been accomplished. Tulane had opened its doors; in their view, the appeal served no further purpose. The decision, then, was made for Nelson: the appeal was dropped--"the biggest favor," Nelson claimed, "anybody ever gave to Tulane University."[42]

CONCLUSION

> The coercive force of a court order will never be a substitute for a voluntary recognition of the rights of others.
>
> John Nelson

With little fanfare, eleven black students broke Tulane University's 129-year-old color bar in February 1963. Eight, including Pearlie Hardin Elloie and Barbara Guillory, enrolled in the Graduate School; three, in University College. Mrs. Elloie graduated with a Master's in Social Work and, today, is the Director for Children, Youth, and Families for Total Community Action in the city of New Orleans. Miss Guillory completed her doctorate in sociology in 1974 and is a Professor at Dillard University.

Desegregation came quietly to Tulane University. In their decision to open the university's doors--and they opened all of the university's facilities, including the undergraduate departments, the dormitories, the University Center, and the recreational areas--the board determined that the transition would be a smooth one. It was, in part, because the administrative officials, the faculty, and the student body supported desegregation. Since Mrs. Keller feared that press coverage would attract and provoke those New Orleanians

unfriendly to desegregation, she persuaded the local press to "give us a chance."[1] In contrast to the Mississippi newspapers which encouraged resistance to James Meredith's entry into Ole Miss the same year, the New Orleans press "played down the story" and helped, then, to make the transition unheralded.[2]

Desegregation also brought numerous benefits to the university. Tulane won the Ford Foundation's $6 million matching-grant in 1964. Although some alumni changed their wills and refused to support the university after the board altered the admissions policy, the university's permanent losses proved minimal. In 1963-64, the New Orleans alumni, alone, gave $500,000.[3]

The smooth transition allowed many even to boast about the posture of the Tulane board. Many credit the board's policy statement of April 1961 for setting the stages and inviting litigation.[4] Many describe the board's decision to desegregate as a "now-famous, nationally-hailed decision."[5] Some even suggest that members of the board had a clandestine hand in arranging a friendly lawsuit with Mrs. Keller.[6] The account that many of the Tulane board now expound is that they desegregated of their own volition, a view that Mrs. Keller still maintains does not contain "a particle of truth."[7]

The facts demonstrate that Mrs. Keller and others compelled the Tulane board to accept desegregation. Of these essential movers,

perhaps no one deserves as much credit as John Nelson. Today he continues to practice law in New Orleans. Driven still by a determination to correct the racial injustices of the South, he even tried to attack some of the last bastions of white supremacy--private clubs. In 1975, he, again, challenged the local establishment when he filed suit against the New Orleans Athletic Club, an exclusive, all-white athletic club in downtown New Orleans that refused to entertain a black visitor with reciprocal privileges from the Harvard Club of Boston. [8]

Nelson lost that suit but once more exposed that the battle for racial justice did not end with the desegregation of public facilities and that many well educated, privileged leaders in the city have refused to accommodate to racial equality. John Nelson has often fought alone, against overwhelming odds and formidable opponents, with only modest financial reward. And many of these battles he has won. Tulane University and New Orleans are better places because of him.

NOTES

CHAPTER I

[1]John P. Dyer, Tulane, The Biography of a University, 1834-1965 (New York: Harper & Row, 1966), p. 239.

[2]Ibid, p. 240.

[3]Ibid, p. 255.

[4]Ibid, p. 245.

[5]Ibid, p. 285.

[6]Ibid, p. 286.

[7]Ibid.

[8]By 1962, the faculties of the College of Arts and Sciences and Newcomb College had unanimously and openly supported voluntary desegregation.

[9]Henry L. Mason, interview, 22 September 1981.

[10]Katherine S. Wright to John P. Nelson, Jr., 30 June 1961, John P. Nelson, Jr., Papers, Box 8, File 1, Amistad Research Center, New Orleans.

[11]Mason, interview.

[12]Dyer, p. 267

[13]Dyer, p. 285.

[14]Clarence Scheps, Vice President, Tulane University, telephone interview, 25 October 1982.

[15]Financial Report for 1960-61, John P. Nelson, Jr. Papers, Box 11, File 9, Amistad Research Center, New Orleans.

[16]Tulane Hullabaloo, 27 October 1961; Dyer, p. 285.

[17]Financial Report for 1960-61, John P. Nelson, Jr. Papers.

[18]Dyer, p. 285.

[19]John P. Nelson, Jr., interview, 4 May 1981.

[20]Mary-Hart Bartley to Cheryl Cunningham, 15 July 1981. Ms. Bartley is Executive Assistant in the Division of Education and Public Policy, Ford Foundation. Letter is in author's possession.

[21]Tulane received the $6 million matching grant in 1964. "The Foundation's 1964 matching grant of $6 million to Tulane was made under a Trustee-determined policy which limited such grants to institutions with racially integrated student bodies, that is, those which enrolled American Blacks. We received such assurances from Tulane that it was a desegregated institution." Mary-Hart Bartley to Cheryl Cunningham, 15 July 1981.

[22]John Bass, Unlikely Heroes (New York: Simon & Schuster, 1981), p. 116.

[23]Morton Inger, Politics and Reality in an American City: The New Orleans School Crisis of 1960, U. S. Dept. of H. E. W., Office of Education (New York: Center for Urban Education, 1969), p. 5.

[24]Inger, p. 60; see also Mary Muller's M. A. thesis, "The Orleans Parish School Board and Negro Education," University of New Orleans, 1975.

[25]Scheps, interview, 28 May 1981.

[26]Dyer, p. 247.

[27]Fifteenth Annual Report of Alumni Contributions, John P. Nelson, Jr. Papers, Box 11, File 9, Amistad Research Center, New Orleans.

[28]Scheps, interview, 28 May 1981; Wood Brown III, interview, 2 May 1981.

[29]Edgar B. Stern, Jr. to Cheryl Cunningham, 24 June 1981.

[30]Dyer, p. 287.

[31]Keller Memoirs, p. 40, Amistad Research Center, New Orleans.

[32]Dyer, p. 287.

[33]Scheps, interview, 28 May 1981.

[34]WDSU, editorial, 19 April 1961. Nelson Papers, Box 12, File 23.

[35]Ibid.

[36]Times-Picayune, 14 April 1961.

[37]New Radical, 13 April 1961, John P. Nelson, Jr. Papers, Box 12, File 23, Amistad Research Center, New Orleans.

[38]Ibid.

[39]Edmund McIlhenny, telephone interview, 9 June 1982.

[40]Ibid.

[41]Wood Brown, III, interview, 2 May 1981.

CHAPTER II

[1]Walter L. Kindelsperger to Pearlie Hardin Elloie, 19 April 1961, Nelson Papers, Box 8, File 1.

[2]Pearlie H. Elloie to A. P. Tureaud, 19 April 1961, Nelson Papers, Box 8, File 1.

[3]Keller Memoirs, p. 37.

[4]Bill Monroe to Cheryl Cunningham, 9 July 1982, in author's possession.

[5]Rosa Keller, interview, 8 May 1981.

[6]Ibid.

[7]Mrs. Keller frequently spoke with Walter L. Kindelsperger, Dean of the School of Social Work, Robert M. Lumiansky, Dean of the Graduate School, and John H. Stibbs, Dean of Students, about faculty restlessness.

[8]Keller Memoirs, p. 37-40.

[9]Mason, interview.

[10]John B. Furey, interview, 23 September 1981.

[11]Ibid.

[12]Walter L. Kindelsperger to Pearlie Hardin Elloie, 19 April 1961, and Robert M. Lumiansky to Barbara Guillory, 23 June 1961, Nelson Papers, Box 8, File 1.

[13]Ibid.

[14]Keller Memoirs, p. 39.

[15]Ibid, p. 40.

[16]Keller, interview.

[17]Edmund McIlhenny, telephone interview.

[18]McIlhenny, telephone interview; Nelson, interview.

[19]Keller Memoirs, p. 38.

[20]Lombard v. Louisiana, 373 U. S. 267 (1963).

[21]John P. Nelson to Katherine S. Wright, 11 July 1961, Nelson Papers, Box 8, File 1.

[22]The cy pres doctrine, up to that time, had been used only in testamentary proceedings, not donation proceedings, in Louisiana courts.

[23]Nelson, interview.

[24]Administrators of TEF v. Bd. of Assessors 38 La. Ann. 292 (1886).

[25]Katherine S. Wright to John P. Nelson, 30 June 1961, Nelson Papers, Box 8, File 1.

[26]John P. Nelson, Jr., to Katherine S. Wright, 11 July 1961, Nelson Papers, Box 8, File 1.

[27]Brown, interview.

[28]Katherine S. Wright to John P. Nelson, Jr., 30 June 1961, Nelson Papers, Box 8, File 1; Reed Sarratt, The Ordeal of Desegregation (New York: Harper & Row, 1966), p. 141.

[29]Brown, interview.

[30]Keller Memoirs, p. 41.

[31]Ibid.

[32]Brown, interview.

[33]Ibid.

[34]Bass, p. 116; J. W. Peltason, Fifty-eight Lonely Men: Southern Judges and School Desegregation (New York: Harcourt, Brace & World, 1961), Ch. 8; Inger, Ch. 2.

[35]Brown, interview.

CHAPTER III

Kathy Martensen, "Region, Religion, and Social Action: The Catholic Committee of the South," Unpublished M. A. thesis, University of New Orleans, 1978; See also her subsequent article, "Region, Religion, and Social Action: The Catholic Committee of the South," The Catholic Historical Review (April 1982): p. 253.

[2]Ibid, p. 267.

[3]Nelson, telephone interview, 27 October 1982.

[4]Nelson, interview, 4 May 1981.

[5]Nelson, telephone interview, 27 October 1982.

[6]Dyer, p. 28.

[7]Dyer, p. 37.

[8]Dyer, p. 12.

[9]Dyer, p. 13.

[10]The TEF had agreed before the vote to honor Paul Tulane's decision.

[11]Administrators of TEF v. Board of Assessors, 35 La. Ann. 664 (1883).

[12]Administrators of TEF v. Board of Assessors, 38 La. Ann. 292 (1886).

[13]Nelson, interview, 4 May 1981.

[14]Ibid.

CHAPTER IV

[1]Cooper v. Aaron, 358 U.S. 4 (1958).

[2]Dyer, p. 120.

[3]Ibid, p. 121.

[4]Ibid.

[5]Ibid.

[6]Ibid.

[7]Ibid, p. 123; Someone in the Louisiana House of Representatives inserted a provision--that the subsidy be given only in return for free tuition for all Louisiana students enrolled in the academic departments--between the time the bill left the committee and was presented on the House floor. In addition, one of the Boyd forces read a telegram from former TEF member, U. S. Supreme Court Justice Edward Douglass White, stating that, in his opinion, Tulane was a private institution and not entitled to state appropriations.

[8]Guillory v. Administrators of Tulane University, 203 F. Supp. 862 (1962).

[9]Brown, interview.

[10]TEF v. Bd. of Assessors, 38 La. Ann. 294 (1886).

[11]Ibid, p. 295.

[12]Guillory v. Administrators of Tulane University, 203 F. Supp. 863 (1962).

[13]Eaton v. Board of Managers of James Walker Memorial Hospital, 164 F. Supp. 191 (1959).

[14]Dyer, p. 124.

[15]"Statement of the Case," Nelson Papers, Box 8, File 28.

[16]Guillory v. Administrators of Tulane University, 203 F. Supp. 857 (1962)

[17]Brown, interview.

[18]Guillory v. Administrators of Tulane University, 203 F. Supp. 863 (1962).

[19]Ibid, p. 864

[20]Sarratt, p. 141.

[21]McIlhenny, telephone interview.

[22]Dixon v. Alabama, 294 F. 2d. 150 (1961).

[23]McIlhenny, interview; Scheps, interview.

[24]"The Federal Courts and Tulane," Shreveport Times, Nelson Papers, Box 12, File 23.

[25]Ibid.

[26]Hullabaloo, 13 April 1962.

[27]Times-Picayune, 6 April 1962.

[28]Nelson, interview.

CHAPTER V

[1]Guillory v. Administrators of Tulane University, 207 F. Supp. 554 (1962).

[2]Ibid, p. 556.

[3]Ibid.

[4]Bass, p. 170.

[5]Nelson, interview.

[6]Brown, interview.

[7]Nelson, interview.

[8]Ibid.

[9]"Brief for Appellants," Nelson Papers, Box 9, File 18.

[10]Ibid.

[11]Ibid.

[12]Bass, p. 20.

[13]Ibid, p. 96.

[14]States-Item, 19 July 1962.

[15]Guillory v. Administrators of Tulane University, 306 F. 2d. 490 (1962).

[16]Brown, interview.

[17]Nelson Papers, Box 9, File 19.

[18]Administrators of TEF v. Bd. of Assessors, 38 La. Ann. 295 (1886).

[19]Ibid.

[20]Northwestern University v. People 99 U. S. (9 Otto) 309, 25 L. Ed. 387 (1874); The Washington University v. Rouse, 75 U. S. (8 Wall) 430, 19 L. Ed. 495 (1868).

[21]Times-Picayune, 7 August 1962.

[22]Hullabaloo, 14 September 1962.

[23]Ibid, 12 October 1962.

[24]Ibid, 12 October and 26 October 1962.

[25]Ibid, 30 November 1962.

[26]Guillory v. Administrators of Tulane University, 212 F. Supp. 682 (1962).

[27]Ibid, p. 683.

[28]Ibid, p. 684.

[29]Ibid.

[30]Ibid, p. 685.

[31]Ibid, p. 686.

[32]Ibid, p. 687.

[33]Ibid.

[34]Gerald L. Andrus, interview, 19 June 1981.

[35]Keller, interview.

[36]Times-Picayune, 15 December 1962; Hullabaloo, 12 December 1962.

[37]Ibid.

[38]Nelson, interview.

[39]Ibid.

[40]Ibid.

[41]Ibid.

[42]Ibid.

CONCLUSION

[1]Keller, interview; Keller Memoirs, Keller Papers.

[2]New York Times, 11 February 1963.

[3]Scheps, interview. See also Mary-Hart Bartley to Cheryl Cunningham, 15 July 1981, and Dyer, p. 286.

[4]Scheps, interview; Andrus, interview.

[5]Jambalaya, 1963, Special Collections, Howard-Tilton Library, Tulane University, New Orleans.

[6]New York Times, 11 February 1963; Sarratt, p. 148.

[7]Keller, interview.

[8]To avoid having to allow Perkins and other black members of athletic clubs use of the NOAC facilities, the NOAC cancelled its reciprocal agreements with all athletic clubs. See Perkins v. NOAC 429 F. Supp. 661 (1976); Alvin B. Rubin, U.S. Fifth Circuit Judge, interview, 12 October 1981.

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November 12, 1982