

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

INDIA LYNCH, by her parent, SHAWN KING **
LYNCH, et al., individually and on behalf of *
others similarly situated, *

Plaintiffs, *

v. *

Civil Action No.
CV-08-S-0450-NE

THE STATE OF ALABAMA; BOB RILEY, in his *
official capacity as Governor of Alabama; and *
TIM RUSSELL, in his official capacity as *
Commissioner of Revenue, *

Defendants. *

EXHIBIT 13
PLAINTIFFS' OPPOSITION TO
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Declaration of Dr. Henry M. McKiven, Jr.

I, Henry M. McKiven, Jr., Associate Professor of History at the University of South Alabama, declare under penalty of perjury, pursuant to 28 U.S.C. 1746, as follows:

When Governor Brewer called a special session to deal with educational funding in April, 1969, it was still not clear what the courts would do about freedom of choice plans. Since the 1950s, freedom of choice had become the favored means of limiting racial desegregation across the South. White citizens, and their leaders, argued that the very limited integration that took place under freedom of choice plans reflected the individual decisions of all citizens regardless of race. Ignoring abundant evidence of intimidation of blacks to prevent them from choosing white schools, political leaders and average citizens insisted that freedom of choice was consistent with the intent of the *Brown* decision in that the state no longer mandated racial segregation.¹

Between 1966 and 1968, black citizens in some counties challenged freedom of choice plans as nothing more than a ruse designed to maintain Jim Crow segregation. They presented in courts evidence of the use of violence to discourage blacks from going to traditionally white schools. Then the U.S. Supreme Court May, 1968 handed down its decision in *Green v. New Kent County* which questioned the motives behind freedom of choice but did not rule the plans unconstitutional. *Green* did, however,

¹ This argument that freedom of choice plans were part of the resistance to the integration of schools is well established in the historiography of the period. See for examples Earl and Merle Black, *Politics and Society in the South* (Cambridge and London: Harvard University Press, 1987), pp. 94-96; Jason Sokol, *There Goes My Everything: White Southerners in the Age of Civil Rights, 1945-1975* (New York: Vintage Books, 2006), p. 124; Kevin Kruse, *White Flight: Atlanta and the Making of Modern Conservatism* (Princeton: Princeton University Press, 2005), pp. 160-65; Joseph Crespino, *In Search of Another Country: Mississippi and the Conservative Counterrevolution* (Princeton: Princeton University Press, 2007), p. 173; Davison M. Douglas, *Reading, Writing and Race: The Desegregation of the Charlotte Schools* (Chapel Hill and London: University of North Carolina Press, 1995), p. 81, 130; Anders Walker, *The Ghost of Jim Crow: How Southern Moderates Used Brown v. Board of Education to Stall Civil Rights* (New York: Oxford University Press, 2009), p. 124.

initiate a new round of court examination of the pace of desegregation and the effectiveness of freedom of choice as a way to create unitary school systems in Alabama and the South. Though, for the time being, courts in Alabama did not strike down freedom of choice plans, whites in Alabama and their representatives feared that freedom of choice plans and other incremental changes might not be enough to preserve largely segregated schools. State and local leaders were not certain, however, that the *Green* decision necessarily meant the end of freedom of choice, since the court held that such plans must achieve desegregation but left the meaning of desegregation undefined. The court also emphasized evidence of good faith on the part of county boards in determining whether a desegregation plan might be acceptable or not.² In September, 1968, U.S. District Court Judge Virgil Pittman issued an order in the Choctaw County school desegregation case upholding the freedom of choice plan in effect there. The U.S. Justice Department had filed a motion after the *Green* decision asking the court to end freedom of choice in Choctaw. Judge Pittman rejected the plaintiff's interpretation of *Green*, arguing that the freedom of choice plan had not had a chance to work because of actions taken by the defendants and the plaintiffs.³ Then Judge Daniel Thomas issued an order in April, 1969 allowing schools in Mobile to open with a combination of attendance zone-freedom of choice plan in the fall of 1969, it appeared to many that freedom of choice and only token desegregation might continue, under the right circumstances.⁴

² *Green v. School Board of New Kent County*, 391 U.S. 430 (1968).

³ *U.S. v. Choctaw County Board of Education*, 292 F. Supp. 701 (1968)

⁴ *Mobile Register*, April 9, 1969.

Wilcox County and other Alabama systems continued to operate with freedom of choice in the 1968-69 school year.⁵

Freedom of choice plans in Alabama survived into 1969, but political leaders throughout the state understood the need to show progress toward achieving desegregation under the plans. Since what the court might consider progress remained uncertain, state and local officials continued to make incremental adjustments so that only token integration took place. In addition, they increased funding for black schools, hoping improvements in black schools would demonstrate good faith to courts and provide blacks with good reasons to “choose” their own schools.⁶ Whites in Wilcox and throughout Alabama believed that anything other than token integration of the schools would cause a massive white withdrawal from the schools. Under such circumstances, whites would be reluctant to financially support schools they no longer considered theirs. Hoping to limit integration, ease pressure from the courts, and prevent complete white abandonment of public schools, the Wilcox County Board of Education in 1967 increased funding for black schools voluntarily. An article in a publication of the White Citizens Council explained the strategy. Suggesting ways to prevent desegregation, the author wrote, “Institute separate and equally well equipped schools for black and white wherever feasible. This would clearly not be workable—nor necessary—in Vermont or the Dakotas but

⁵ Clinton McCarty, *The Reins of Power: Racial Change and Challenge in a Southern County* (Tallahassee: Sentry Press, 1999), pp. 166-67.

⁶ For examples of this idea that blacks did not want integration see Southern Education Foundation (SEF), “A Decade of Frustrations: Black Belt Schools of Georgia and Alabama in the 1970’s,” (1980), p2 and *Wilcox Progressive Era*, March 9, 23, 1972.

would be in Alabama.” The author applauded the spread of this separate but equal strategy and assured his readers that a majority of blacks would be satisfied with truly separate but equal facilities.⁷ When Judge Thomas issued an order requiring the county to improve black schools in April, 1967, the county did not complain.⁸

State officials also saw merit in demonstrating a willingness to improve schools for both races and in April, 1969 Governor Brewer called a special session of the legislature to address chronic underfunding of all Alabama schools. In his address opening the session, Governor Brewer emphasized the need to increase funding for the education of black and white students in the state. The Governor’s statement has been interpreted by some as evidence of his desire to end segregation in Alabama, but it should be viewed in light of his larger commitment to maintaining freedom of choice and a mostly segregated system. In a speech to the black Alabama State Teachers Association just two weeks before the special session began, the Governor made his position clear when he denounced the intervention of federal courts as a design to “destroy or ideas of quality education by experimenting with social theories and objectives.” According to the *Alabama Journal*, the speech was a “warning” to black educators.⁹ Moreover, Roland Cooper, Alton Turner, and Farm Bureau led the fight for Brewer’s revenue package. George Lewis Bailes of Jefferson County, who opposed the revenue plan because it did not provide for property tax equalization as had been recommended earlier by an Education Study Commission, said the plan had

⁷ Henry E. Garrett, “Violent Insanity: Public Education, *The Citizen* (February, 1969): 9; SEF, “A Decade of Frustrations,” pp. 2-4.

⁸ McCarty, *The Reins of Power*, p. 167.

⁹ *Alabama Journal*, March 13, 1969.

been “hatched up in a Wilcox County gin mill, nurtured in a Crenshaw County pig sty and promoted on the floor of this body by the Alabama Farm Bureau.”¹⁰ While Bailes did not mention the problem of integration, few at the time thought that Roland Cooper and Alton Turner were leading a fight for an end to racial segregation in their counties. The Wilcox County Board of Education, fully supported by Cooper and other county political leaders, was still engaged in its contentious struggle in the courts to limit integration, as was Crenshaw County.

Funding for the planned increase in spending was to come from an array of taxes that would primarily affect urban counties and an increase in the income tax voters would have to approve. Urban representatives attempted to secure property tax equalization as a way to limit increased taxes in cities and reduce the flow of revenue from cities to rural counties. Black belt representatives opposed equalization because they wanted to protect landowners in their counties, the vast majority of whom were white. In places like Wilcox, the majority of blacks would not be paying property taxes, but many of them might have to pay an income tax. The urban challenge to the funding plan failed, thanks in large part to black belt opposition. Urban representatives did manage, however, to secure a local effort requirement included in the final bill, which passed in early May, 1969.

Critical to the success of Brewer’s educational package was the income tax amendment which would go to the voters in November, 1970. Because of the local effort requirement, counties would also have to increase local funding or face a

¹⁰ Montgomery *Advertiser*, April 20, 1969.

reduction of state funding. County governments across the state approved referenda to increase local funding. For the most part those measures would be on the November ballot along with the income tax amendment.

Before any vote on taxes could take place, however, the situation in regard to freedom of choice changed dramatically. Between June, 1969 and the fall of 1970 it became clear that courts were not going to accept freedom of choice plans unless defendants could demonstrate that the plans accomplished more than token integration. In June, 1969, the Fifth Circuit Court of Appeals reversed Judge Pittman's 1968 ruling upholding freedom of choice in Choctaw County because under the plan segregation had remained in place. Judge John Minor Wisdom noted in his opinion that a number of counties had shown no progress toward eliminating dual school systems.¹¹ A few months later, in November, 1969, a federal court in Charlotte, North Carolina in *Swann v. Charlotte-Mecklenburg* accepted a desegregation plan that rejected freedom of choice as an adequate remedy for continued segregation and would, if upheld, require the busing of students. In February, 1970, Judge Thomas ordered the Department of Health, Education, and Welfare's (HEW) Office of Education to develop a plan for the desegregation of Wilcox County schools. In light of these and other decisions, it was becoming increasingly difficult for white citizens of Alabama to believe that federal courts would approve freedom of choice plans that had, after all, been more a means of perpetuating segregation than advancing real integration. McClean Pitts, the attorney for the school board, warned Judge Thomas that if the court went too far whites in Wilcox County would completely abandon the

¹¹ *U.S. v. Choctaw County Board of Education*, 417 F.2d 838 (1969).

public school system and that without white support the public school system would become re-segregated, with whites attending private schools and blacks attending public schools for which whites would no longer be willing to pay. HEW sent a plan to the court in March, 1970 that would create attendance zones and specified the schools in which blacks and whites would be combined.¹²

Wilcox County officials appealed the court order and joined officials across the state in mounting a last ditch defense of freedom of choice. They argued that the *Brown* decision only contemplated an end to forced segregation but did not require forced integration. Pitts of Wilcox County warned as well that the courts would guarantee the very result *Brown* was supposed to remedy—the segregation of schools. Whites, he argued again in a letter to Judge Thomas, would not remain in the school system if the HEW plan were ever implemented.

In an attempt to interpose state authority in the struggle with the federal judiciary, the legislature passed an anti-busing law, referred to by some as the freedom of choice law, in a February special session. Governor Brewer also appealed court decisions that ruled against freedom of choice while seeking relief from federal officials in Washington D.C. Brewer's moderate tactics found support in Wilcox County where many political leaders had come to believe that Governor Wallace's more radical resistance to the courts had done more harm to their cause than good. An editorial in the *Wilcox Progressive Era* argued that Brewer's more moderate approach might save freedom of choice and minimize integration of the schools. "Governor

¹² Clinton McCarty, *The Reins of Power*, pp. 170-72

Albert Brewer's moderate approach . . . proved fruitful," the paper editorialized. In a clear challenge to former Governor Wallace, the editorial continued, "Standing in the schoolhouse door doesn't do any good but responsible recognition of the problem and communication with those in authority does." A few weeks later the paper predicted Brewer would defeat Wallace in the May gubernatorial primary because his "idea that the school fight should be fought in the courts has caught on all over the state" By the end of March, however, Wallace, no doubt sensing the moderate mood of voters, had begun to take a more conciliatory approach to the issues as well. The *Progressive Era* , commended Wallace for abandoning his "inflammatory" tactics and adopting freedom of choice as the way to limit integration and concluded that Wallace's new found moderation would make Brewer's task in May more difficult.¹³

When Brewer led Wallace in the May primary, it appeared to be a validation of his defense of freedom of choice. During the run-off Wallace returned to racial appeals. He fostered and exploited fears among Alabama whites of black political domination and federal court intervention to force further integration of schools. He won the election. During the general election campaign, Wallace continued to attack the courts.

Wallace had plenty to denounce as it became increasingly clear by election day that freedom of choice was not likely to survive. In late-September, 1970 a federal court struck down a New York anti-busing law similar to Alabama's. On the same day that the Montgomery *Advertiser* reported the New York ruling, the Montgomery

¹³ *Wilcox Progressive Era* , February 10, 26, March 19, 1970.

County Board of Education submitted a report to Judge Johnson revealing continued problems meeting the court's order for the establishment of a unitary school system using a freedom of choice plan. The system, along with most, if not all, others in the state, remained largely segregated and faced more stringent court demands for progress toward full integration. Remedies could include the use of busing.¹⁴

The reaction of whites in the state was predictable and overwhelmingly negative. White citizens in cities across the state joined Concerned Parent Organizations to defend freedom of choice and "their schools." On October 2, 1970, a Concerned Parents organization in Mobile held a rally that attracted 4,000 people to protest court decisions contrary to freedom of choice. Led by Mayor Joe Bailey and other state and local government officials, the crowd marched to the federal courthouse carrying placards that read "We Want our Schools Back."¹⁵ These organizations held out hope that the *Swann* decision would be reversed, allowing freedom of choice, and largely segregated schools to continue. Other citizens, particularly in black majority counties of the Black Belt, continued to abandon the schools; "white flight" surged during this period. Whether they joined Concerned Parents in their battle for freedom of choice or protested by leaving public schools for private "academies," white Alabamians explicitly rejected the idea that "their" schools could exist if anything more than the most token integration occurred. In September, 1970, the Wilcox County Education Foundation opened Wilcox Academy.¹⁶

¹⁴ Montgomery *Advertiser*, October 1, 1970.

¹⁵ Montgomery *Advertiser*, October 2, 1970. For more on conditions in Mobile see my expert report.

¹⁶ McCarty, *The Reins of Power*, pp. 174-77.

White Alabamians' support for taxation for schools was inextricably linked to the survival of largely segregated public schools. Few in public life believed that integration would have no impact on the willingness of whites to pay taxes for schools. The White Citizens' Council, which actively promoted the privatization of education, argued that private academies and those who used them should receive a tax exemption as a non-profit organization. Accordingly, until the early 1970's, private segregation academies claimed tax exemption as non-profits. A column written by national Citizens' Council board member John Synon, and carried in the *Wilcox Progressive Era*, justified this and reduced taxation generally. In his February 16, 1970 column, Synon wrote, "Education has been misrepresented to the American people as an ever- more- expensive claim upon their purse." Those "taxpayers" who believed the government, he wrote, were being "rooked."¹⁷ Witnesses in the Wilcox County desegregation case and others testified to the effectiveness of such arguments and warned of the negative financial consequences of continued white flight in the county. In a July, 1974 order concerning the Wilcox County desegregation case, Judge Brevard Hand emphasized the difficulty of maintaining a well-financed public school system when whites completely withdrew. He wrote that the Wilcox County school system would eventually lose all white students and that a "side result of this is that the economics of the situation mandated by such a course dictate a further decline in the quality of education afforded to any student in the Wilcox County system. This is so because the white community has been shown by the evidence

¹⁷ *Wilcox Progressive Era*, February 26, 1970.

presented to this court to loose [*sic*] interest in the support of the schools in proportion to the decline of their involvement." ¹⁸

Given this climate of white public opinion, any attempt to secure voter approval of increased taxation for schools faced an uphill battle. Yet, thirty-eight school systems across the state faced severe reductions of state funding if they failed to raise their local contributions to the schools, so they had to try for increased local taxes. Superintendents who gathered for the meeting of the Alabama Association of School Boards were pessimistic about the chances of winning voter approval for property tax increases or sales tax increases. Bullock County was considering reducing the school year to a 7 month term rather than go to the voters with any tax increase proposal. Superintendent R.G. Cook explained that "As a result of the integration order the system lost almost all of its white students and the white voters don't feel that they have any obligation to public education." ¹⁹

Montgomery County faced a loss of \$12 million in state revenue if voters rejected a November referendum for a 5 mill *ad valorem* increase needed to raise \$1.5 million in local funding. The Board of Education waged a vigorous campaign for the measure. In letters sent home with students and in public meetings, it warned that rejection of the tax increase could bring the closing of schools. Despite the dire warnings and editorial support in the *Montgomery Advertiser*, opposition to the tax was widespread

¹⁸ One of the issues the White Citizen's Council emphasized in *The Citizen* during these years was its contention that whites who did not benefit directly from public schools should not be expected to pay the taxes for them. See for examples, "Yankee Author Praises Southern Private Schools, *The Citizen* (October, 1972): 25-31; Congressman John R. Rarick, "Double Tax Standard Hurts Private Schools, *The Citizen* (April, 1973): 23-24; Medford Evans, "School Taxation Without Education?, " *The Citizen* (April 1977): 11-12.

¹⁹ *Montgomery Advertiser*, October 6, 1970.

as election day approached. An editorial in the *Advertiser* urging voters to support the referendum acknowledged that people were suffering from inflation but concluded that the primary source of hostility toward the tax proposal was anger about “federal interference with control of the schools.” A candidate for statewide office when responding to a League of Women Voters survey that asked what the most important issue of the day was said “the school issue involving the race issue and taxes.”²⁰ Ads that ran in the paper urged the voters to reject a tax for “schools to be run by federal courts.”²¹ The Dothan *Eagle* thought voters should vote against the tax to demonstrate their opposition to federal intervention in the schools.²²

Though no one specifically used racist terminology, such as references to blacks, negroes etc., there is no doubt that when commentators linked federal court decisions concerning racial integration and opposition to increased taxes for education they were writing about race issues. And when the state press, state, and local officials, analyzed the failure of the income tax amendment and local referenda, there was a consensus that the majority white electorate rejected the funding proposals as a protest against the clear intent of the federal courts to force increased racial integration of the schools. The Montgomery *Advertiser* acknowledged that some voters simply did not want their taxes increased, but rejected the idea that the vote on the income tax and local tax measures was part of a national anti-tax movement. In its comment on the vote the *Advertiser* concluded that “the

²⁰ Montgomery *Advertiser*, October 29, 1970.

²¹ Montgomery *Advertiser*, November 2, 1970.

²² Dothan *Eagle*, October 27, 1970.

federalization of the schools was a major factor”²³ The “federalization” referred to was the intervention of courts to force increased racial integration of the schools.

Governor Brewer publicly argued that such commentary was incorrect, because the vote was more about taxes than “school integration problems.”²⁴ While, as the *Advertiser* acknowledged more than once, some voters were no doubt moved by opposition to increased taxes alone, the Governor’s comments are not consistent with the evidence currently available. Not only did all major newspapers in the state see the matter quite differently, but the Governor’s own actions over the previous year or so belied his public comments. As I indicated in my expert report, before the special session of April, 1969, Governor Brewer had expressed his view that whites would not support increased taxes for schools if the courts challenged freedom of choice plans that limited racial integration. Given that position, his decision to go forward with the session was either cynical or reflected a belief that the status quo would remain in place long enough to secure the funding needed to implement his plan. The changed circumstances documented above between the fall of 1969 and 1970 created conditions that the Governor himself had said would lead to white abandonment of public education and resistance to paying for schools whites no longer believed were “theirs.”

²³ Montgomery *Advertiser*, November 5, 1970. My expert report includes references to similar commentary in Mobile and Birmingham.

²⁴ Montgomery *Advertiser*, November 5, 1970.

And as I documented in my expert report, for whites defending largely segregated schools from the courts, the situation only became worse in 1971 and 1972, when the legislature was addressing the *Weissinger* decision. Consider the comments of the *Wilcox Progressive* on March 9, 1972 in the wake of a series of court orders since the fall of 1971 mandating substantial integration of faculty and students in Wilcox. Under the headline "It's all over," an editorial began, "Public education, as Wilcox County has known it for more than one hundred years died Tuesday." Next to that column was an article under the headline "Schools Destroyed by Order; teachers protest; students quit." According to this report, recent orders had "quite effectively destroyed the entire school system. White students left Wilcox County High in mass Monday and none have returned. Some parents are already setting up classes in their homes and churches. Others have sent their children to private school." The article did indicate that some blacks were not attending, but the white withdrawal was complete.²⁵

Governor Wallace understood the connection between the way people reacted to tax proposals for schools and their hostility toward federal court orders mandating racial integration. He therefore framed the *Weissinger* decision as an attempt by the federal courts to go through the "back door" in order to frustrate the will of the people who voted against increased taxes for education in November, 1970. The message got through. A letter to the *Advertiser* charged that Martha Hornbeak and the Alabama Committed for Property Tax Reform were not really interested in

²⁵ Racial tensions in Wilcox were high during this entire period. See for evidence of this the *Wilcox Progressive Era*, March 9, 16, 20, July 20, 27, 1972 and McCarty, *The Reins of Power*, chs. 10-14.

property tax reform but were using “the federal court suit as a way of circumventing the legitimate voice of the taxpayers of this state. . . .” In a reference to the November, 1970 vote on taxes and other local efforts to increase revenue, the writer stated, “Voters have been vetoing bond issues and other school tax demands, as they have a right to do.”²⁶ Legislators, particularly in the Black Belt where few whites attended public schools any longer, were understandably reluctant to sign on to any measure that could be viewed as a tax increase for education. An editorial from the *Atlanta Journal*, reprinted in the *Montgomery Advertiser* on December 23, 1971, captured the prevailing attitude toward taxes for schools as integration proceeded. It argued that public schools no longer were held in high esteem because “Integration and busing have brought a decline of public affection. Bond issues for new schools and school improvements are defeated. Tax raises to improve quality and even to keep the schools open have a hard time.” The unnamed writer goes on to link the rise in private school attendance to the decline in public support in Georgia, but could have been writing about Alabama, as the editors of the *Advertiser* no doubt recognized when they decided to reprint the piece.

Some people in Wilcox County certainly believed that racial integration was linked to tax policy there. Charles McCarthy told a representative of the Southern Education Foundation who was conducting a study of education in Wilcox that Roland Cooper, one of the authors of the Alabama Senate’s majority report that endorsed the classification plan in question, had placed in the amendment a provision that allowed a reduced assessment on Class B property (commercial property, cars, boats) in

²⁶ *Montgomery Advertiser*, December 5, 1971.

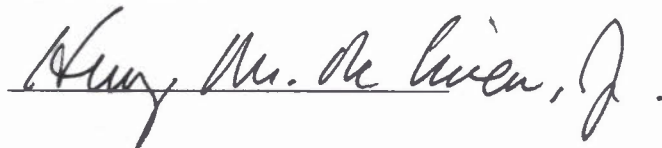
Wilcox County. The effect of what McCarthy called a tax “loophole” reduced school revenue in Wilcox by \$40, 000.00. McCarthy cited Cooper’s work on behalf of the classification plan as evidence of white’s determination to limit to the greatest extent they could how much they would pay for public schools. In 1979, the still all-white Wilcox County Board of Commissioners, according to the SEF report, refused to raise the property tax rate one mill as recommended by Probate Judge Reginald Albritton. The county needed the money for schools and other public services, Albritton argued, and if the millage rate was not changed that year, it would be fixed at the inadequate lower rate for a number of years more. Concerned with increasing black political success in the county, the Board rejected the proposal, which would have allowed a future Board, probably one that included blacks, to raise millage rates. Fears of the tax consequences of growing black political power, a member of the Board of Commissioners told state senator Gordie Taylor that he had to stop a legislative attempt to raise minimum local support for schools from 7 mills to 10 mills. The author of the report found that “Black people in Wilcox County view such official postures as aimed directly at them and what is now the ‘nigger’ school system.”²⁷

In sum, after courts began to mandate racial integration of schools that went beyond the token integration that had taken place under freedom of choice plans, the majority of whites in Alabama, especially those who lived in the Black Belt counties where few whites attended public schools by 1972-73, turned against taxation dedicated to supporting public schools. This resentment about taxation for schools whites considered no longer “theirs” accounts for the rejection in November, 1970 of

²⁷ SEF, “A Decade of Frustration,” pp. 8-9.

proposals for increased taxation for public schools. Hostility toward these measures was so intense that voters rejected them even when faced with the possibility of having to limit school terms or even close schools. After the *Weissinger* decision, Governor Wallace exploited the resentment expressed in November by telling the public that the decision was a “back door” way for federal courts to frustrate the “will of the people.” He was joined in this campaign by Black Belt legislators and the Alabama Farm Bureau. The Governor and his allies framed both Amendments 325 and 373 as reflections of the “public’s” determination to block the court’s attempt to force them to do something they had rejected at the polls.

March 26, 2010.

A handwritten signature in cursive script that reads "Henry M. McKiven, Jr." The signature is written in dark ink and is positioned above a horizontal line.

Henry M. McKiven, Jr.

Associate Professor of History