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Blue v. Durham Public School District and the Campaign for School Equalization in North Carolina

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BLUE V. DURHAM PUBLIC SCHOOL DISTRICT AND THE CAMPAIGN FOR SCHOOL EQUALIZATION IN NORTH CAROLINA[*]

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Plessy v. Ferguson*'s separate but equal doctrine governed challenges to racial discrimination in public schools for nearly sixty years after 1896. That changed, of course, with the Supreme Court's landmark* Brown v. Board of Education *decision in 1954. But before* Brown*, there was* Blue v. Durham Public School District*, a 1951 case decided within* Plessy*'s framework.* Blue *held that black schools in Durham, North Carolina, though certainly separate, were demonstrably unequal to the city's white schools. In response, local officials allocated more than one million dollars—worth roughly ten million dollars today—to "equalize" the parallel systems.*

Such equalization suits are an important yet understudied phenomenon of the decade that preceded Brown*. Seeking to enforce* Plessy*'s purported equality mandate, black lawyers across the country—often buoyed by the NAACP—sued local school districts. Yet by the time the* Blue *plaintiffs filed their complaint in 1949, many lawyers had grown discontent with that strategy; they preferred attacking segregation directly. Indeed, lawyers launched a wave of desegregation lawsuits just months after the Durham attorneys argued* Blue*. This Article analyzes why* Blue *sought equalization when others sought desegregation. After detailing the* Blue *litigation, I conclude that the local lawyers requested equalization in part because they were from Durham—a city where African Americans believed they could compete if afforded an equal opportunity. Emphasis on Durham does not undermine* Blue*'s national significance. The decision also illustrates the flaws in* Plessy*'s doctrine: If schools were unequal even in Durham, the nation's "Capital of the Black Middle Class," then* Plessy*'s failure was inevitable.*

[**] Duke Law School, J.D. 2020; Centenary College of Louisiana, B.A. 2017. I am indebted to Brandon K. Winford for generously sharing access to primary sources, to Joseph Blocher for helpful comments and guidance, to Amos Jones for his critical feedback, to Margaret Edds for her granular review, and to Kenneth Mack for his insight and encouragement. I also thank Don O'Toole for first pointing me to the *Blue* decision and the editors of the *North Carolina Civil Rights Law Review* for their thoughtful suggestions.

TABLE OF CONTENTS

INTRODUCTION

In May 1949, the parents of sixty African American students attending public schools in Durham, North Carolina, sued the local school district and the state board of education. The twenty-six parents filed their complaint in federal district court in Durham, challenging a long pattern of racial discrimination in the city's public schools.[1] Their suit, *Blue v. Durham Public School District*,[2] marked a turning point in North Carolina's struggle for racial equality. After two years of litigation, the plaintiffs and their lawyers secured the "first clear legal victory" for public school equalization in North Carolina.[3] The federal court ruled that Durham's segregated school system unconstitutionally discriminated against black students by denying them

[1] BRANDON K. WINFORD, JOHN HERVEY WHEELER, BLACK BANKING, AND THE ECONOMIC STRUGGLE FOR CIVIL RIGHTS 91 (2020).

[2] Blue v. Durham Pub. Sch. Dist., 95 F. Supp. 441 (M.D.N.C. 1951).

[3] SARAH CAROLINE THUESEN, GREATER THAN EQUAL: AFRICAN AMERICAN STRUGGLES FOR SCHOOL AND CITIZENSHIP IN NORTH CAROLINA, 1919–1965, at 189 (2013).

equal access to the opportunities afforded white students.[4] That decision became the "opening gun" for North Carolina's legal campaign against school discrimination.[5] It was also the country's last successful school equalization lawsuit before the NAACP shifted its focus to school desegregation in 1950.[6]

Blue's status as the first school discrimination victory for black North Carolinians and the nation's last successful school equalization victory alone makes it worthy of study. But the *Blue* lawyers' decision to focus on equalization, as opposed to integration, also merits attention. Most school discrimination narratives emphasize integration efforts, embodied by the Supreme Court's landmark *Brown v. Board of Education* decision.[7] *Brown* held that segregating public schools by race created a system that was "inherently unequal."[8] The Court thereby overruled its precedent from *Plessy v. Ferguson*,[9] which accepted the constitutionality of state-sponsored segregation so long as African Americans were afforded equal opportunities as white residents.[10] In short, *Plessy* enshrined the infamous "separate but equal" doctrine in American law. That doctrine stood for nearly sixty years until *Brown* invalidated it in 1954.

But before *Brown*, there was *Blue*.[11] Unlike *Brown*, the *Blue* plaintiffs and their lawyers sought school equalization rather than desegregation. In

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[4] *Blue*, 95 F. Supp. at 445.

[5] THUESEN, *supra* note 3, at 189 (quoting Kelly Alexander, President of the North Carolina state NAACP Conference, 1948–1984).

[6] *See* MARK TUSHNET, THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925–1950, at 198–99 n.28 (1987) (listing the NAACP's known school equalization lawsuits).

[7] Brown v. Bd. of Educ. of Topeka, 347 U.S. 483 (1954).

[8] *Id.* at 495.

[9] Plessy v. Ferguson, 163 U.S. 537 (1896).

[10] *Id.* at 551. For an overview of *Plessy*, see MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 8–28 (2004).

[11] Durham City Councilman and local historian Eddie Davis led a series of lectures given under the title "Before *Brown*, there was *Blue*" in 2011 and 2012 to celebrate the sixty year anniversary of the plaintiffs' victory. *See* Samiha Khanna, Past Winner: Eddie Davis, Class

other words, *Blue* did not seek to overturn *Plessy* or force Durham's public schools to integrate. Instead, the lawsuit took *Plessy*'s holding at face value. The lawyers claimed that even within the confines of *Plessy*'s separate but equal framework, Durham's schools unconstitutionally discriminated against black children because white students were afforded a superior education. The federal district court agreed, declaring that the "burdens inherent in segregation must be met by the state which maintains the practice."[12]

Yet *Blue*, like most school equalization cases, was long forgotten in the legal and historical literature. Recent years have seen renewed interest in the case. Led by Professor Brandon K. Winford, scholars have begun the work of bringing *Blue* to light.[13] This Article contributes to that effort by uncovering the lengthy litigation and trial behind the decision. It thus offers a detailed exploration of school equalization litigation from which broader lessons about the legal theory can be derived. The Article also considers litigation strategy. Namely, it questions why the plaintiffs and their lawyers

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of '85, INDY WEEK (Jan. 18, 2012), https://indyweek.com/guides/archives/past-winner-eddie-davis-class-85.

[12] Blue v. Durham Pub. Sch. Dist., 95 F. Supp. 441, 445 (M.D.N.C. 1951).

[13] WINFORD, *supra* note 1, at 91–101. In addition to Professor Winford's biography of John Hervey Wheeler, a few works have devoted several pages to *Blue*. *See, e.g.*, JERRY GERSHENHORN, LOUIS AUSTIN AND THE CAROLINA TIMES: A LIFE IN THE LONG BLACK FREEDOM STRUGGLE 91–94 (2018); Ana Mariana Apostoleris, *The Effects of Integration in Durham City High Schools*, 25 J. S. LEGAL HIST. 139, 145–47 (2017); Ashely F. Adams, "From Marathon, to a Victory Lap": The Battle for Equal Education in North Carolina, 1920–1954, at 43–57 (2019) (unpublished master's thesis, North Carolina Central University). However, most authors only mention the decision in passing. *See, e.g.*, JOHN E. BATCHELOR, RACE AND EDUCATION IN NORTH CAROLINA: FROM SEGREGATION TO DESEGREGATION 19 (2015) ("With regard to the separate but equal doctrine in North Carolina, therefore, the schools were separate, but they were never equal. A North Carolina court finally recognized this inequality in 1951, in *Blue v. Durham Public School District*."); MARGARET EDDS, WE FACE THE DAWN: OLIVER HILL, SPOTTSWOOD ROBINSON, AND THE LEGAL TEAM THAT DISMANTLED JIM CROW 191 (2018) (referencing Oliver Hill and Martin A. Martin's work on "a school case in Durham, North Carolina" in 1950); THUESEN, *supra* note 3, at 189–90 (summarizing the decision); OLIVER HILL, THE BIG BANG, BROWN VS. BOARD OF EDUCATION, AND BEYOND: THE AUTOBIOGRAPHY OF OLIVER W. HILL, SR. 158 (2000) (recalling that *Blue* "involved a suit to equalize school facilities between Negro and white students").

sought school equalization rather than integration at a time when either strategy was possibly on the table.

Durham's unique history provides a partial answer. Before *Blue*, Durham was already well known for its thriving "Black Wall Street," the core of a prosperous black middle class.[14] Economic success may have primed Durham's black community to expect that separate but equal facilities could become a reality in the city.[15] Thus, the *Blue* lawyers may have sought equalization because, as Durham residents, they were confident that they could succeed in a separate system that was truly equal. Moreover, African Americans in Durham were known for their racial moderation—favoring negotiations with white leaders rather than resorting to litigation or protest to secure their rights—and school desegregation was arguably a radical step for the city's black community. Although local considerations often go ignored in civil rights narratives, prominent legal historians today recognize that adopting a "local perspective is crucial" to fully understand the civil rights movement.[16]

Other forces also influenced the lawyers' litigation strategy. Chief among them was a shifting focus of the NAACP's Legal Defense and Educational Fund at the midcentury mark. The NAACP did not officially endorse school desegregation suits until June 1950, while the *Blue* trial was already underway.[17] But that alone cannot explain why the *Blue* lawyers sought equalization, as it did not stop lawyers elsewhere from challenging segregation on its face before the NAACP's strategy change. Durham's history fills that gap.

This Article proceeds in four parts. The first part briefly provides context to *Blue* by explaining how the separate but equal framework operated in Durham. It describes Durham's successful black community and introduces Durham's dual system of public education. The second part chronicles *Blue*,

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[14] *See* Amos N. Jones, *The Old Black Corporate Bar: Durham's Wall Street, 1898–1971*, 92 N.C. L. REV. 1831, 1840–49 (2014).

[15] Apostoleris, *supra* note 13, at 147.

[16] TOMIKO BROWN-NAGIN, COURAGE TO DISSENT: ATLANTA AND THE LONG HISTORY OF THE CIVIL RIGHTS MOVEMENT 8 (2011).

[17] *See infra* notes 280–87 and accompanying text.

drawing on previously unused primary documents from the litigation. The part begins by describing the key figures in the case. It then documents the lengthy pretrial litigation and discovery process before analyzing the *Blue* trial and the plaintiffs' ultimate victory. Together, these sections illustrate the unique role that litigation played in the segregated South, as courtrooms inhabited by black lawyers were one of the few public spaces where African Americans appeared to stand as equals to their white peers. Part three then considers the *Blue* lawyers' litigation strategy and situates the case within local history and the long civil rights movement, particularly as *Blue* animated *Brown*. The last part concludes that the *Blue* victory maintains an important legacy in legal and civil rights history.

I. "SEPARATE BUT EQUAL": DURHAM'S DUAL SYSTEM

Durham was segregated well before the Supreme Court decided *Plessy v. Ferguson* in 1896. Beginning in the late 1870s, Durham's formerly enslaved black residents began developing their own permanent settlement southeast of the city.[18] From their settlement, eventually known as Hayti, the formerly enslaved served white Durham's tobacco factories and related industries while also maintaining racial separation.[19] But as Durham's black community grew with the emerging tobacco town, it became increasingly self-sufficient.[20] Historian Jean Bradley Anderson observes that Durham's black residents held their own in a tense racial climate, "making progress in their now separate but parallel culture."[21] As the broader Durham community grew into an economic powerhouse, so did Durham's black community.

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[18] JEAN BRADLEY ANDERSON, DURHAM COUNTY: A HISTORY OF DURHAM COUNTY, NORTH CAROLINA 132 (2d ed. 2011).

[19] *Id.*

[20] *See* LESLIE BROWN, UPBUILDING BLACK DURHAM: GENDER, CLASS, AND BLACK COMMUNITY DEVELOPMENT IN THE JIM CROW SOUTH 31 (2008) (explaining that African Americans who settled in Hayti after the Civil War grew into "a flourishing liberation community of homes and institutions" despite predictions from white civic leaders that "they [would] be dead in fifty years").

[21] ANDERSON, *supra* note 18, at 138.

By the beginning of the nineteenth century, Durham's successful tobacco and textile industries made the municipality the richest in North Carolina.[22] African Americans capitalized on that success. Lured by jobs in tobacco factories, black people migrated from across the South to the city.[23] Many eventually became entrepreneurs and professionals who joined Durham's black middle class, which had an epicenter in Hayti.[24] The black middle class grew into Durham's own "Black Wall Street," similar to the black business center in Tulsa, Oklahoma.[25] As the late historian Leslie Brown wrote, Durham provided African Americans across the country with "a black city on a hill" that exemplified their "triumphant climb out of slavery."[26]

At the heart of Durham's Black Wall Street were businesses like North Carolina Mutual Life Insurance Company (NC Mutual), founded in 1898, and Mechanics and Farmers Bank (M&F Bank), founded in 1907.[27] NC Mutual quickly grew into "the largest and most successful African American-owned business in the country, with approximately $1.6 million in revenue" before 1919.[28] M&F Bank became the "largest bank in the world operated by Negroes."[29] There were also dozens of other black-owned stores, factories, and mills, along with a black-operated college, hospital, library, and

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[22] BROWN, *supra* note 20, at 32.

[23] *See id.* ("Industries like tobacco manufacturing linked traditional agrarian economies to a modern industrialized world, attracting large numbers of black workers, who moved [to Durham] from rural to urban areas and who supported both white employers and black businesses.").

[24] Jones, *supra* note 14, at 1842; *see also* BROWN, *supra* note 20, at 22 (observing that Durham's black middle class was "a diverse assemblage of African American aspirants and strivers" that included "the children of tobacco workers who became teachers, tobacco workers who by income and thrift managed to purchase property," and "a petit bourgeoisie of entrepreneurs who owned small shops and stores," among many others).

[25] Jones, *supra* note 14, at 1843; *see also* BROWN, *supra* note 20, at 14 (explaining that African American leaders looked to Durham as "a new beacon of hope" after white citizens destroyed Tulsa's Black Wall Street in 1921).

[26] BROWN, *supra* note 20, at 14.

[27] Jones, *supra* note 14, at 1845–46.

[28] *Id.* at 1844–45.

[29] *Id.* at 1844 (quoting *Thousands Attend Opening of Branch of Durham Bank*, CAROLINA TIMES (Durham), Jan. 23, 1954, at 1).

scores of churches.[30] When W.E.B. Du Bois journeyed to Durham in the 1920s, he dubbed the city the "Negro business mecca of the South."[31] He added that the "group of five thousand or more colored people" was characterized by "social and economic development . . . perhaps more striking than that of any similar group in the nation."[32] Sociologist E. Franklin Frazier christened Durham the "Capital of the Black Middle Class" when he visited in 1925.[33] Likewise, Booker T. Washington hailed Durham as a "national model for the black middle class" a decade earlier.[34]

But while black Durham's private sector prospered, its state-funded schools languished. Those early black schools, the first of which was built in 1893, were erected by white leaders to placate black citizens.[35] Many white citizens believed that providing public schools to black students allowed white society to "control the alleged beast in the black man" while also limiting black discontent.[36] Such motivations were evident in the condition of black schools. As Jerry Gershenhorn writes, "Durham's black public schools were overcrowded, poorly financed, staffed by underpaid teachers, and suffered greatly from discriminatory spending by the state."[37] By 1929, Durham's white public schools held "six times as many books" as the city's

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[30] BROWN, *supra* note 20, at 12.

[31] ANDRE D. VANN & BEVERLY WASHINGTON JONES, DURHAM'S HAYTI 7 (1999).

[32] *Id*.

[33] BROWN, *supra* note 20, at 14.

[34] Jones, *supra* note 14, at 1845. Of course, not all of black Durham shared in this prosperity. *See, e.g.*, BROWN, *supra* note 20, at 16 (describing wealth disparities between black men and black women); GERSHENHORN, *supra* note 13, at 17 (noting high rates of infant mortality and substandard housing in black Durham). But even Durham's black poor fared relatively well compared to similar communities across the South. Booker T. Washington wrote that in Durham's poor black communities, "[n]eat cottages stood where in many cities still stands the tubercular shack, and well cared for children in clean yards, many of which were adorned with flower beds, everywhere greeted me." Booker T. Washington, *Durham, North Carolina: A City of Negro Enterprises*, 70 THE INDEPENDENT 642, 646 (1911). He added that even in poorer areas "[t]here were windows with clean curtains and clean shades and substantial furniture devoid of the cheap shimmer of the installment house." *Id.*

[35] *See* ANDERSON, *supra* note 18, at 196–97.

[36] *Id.* at 196.

[37] Jerry Gershenhorn, Hocutt v. Wilson *and Race Relations in Durham, North Carolina, during the 1930s*, 78 N.C. HIST. REV. 275, 277 (2001).

black schools.[38] And in 1937, "Durham County spent seven times more on improving white school facilities than those of black schools."[39]

To be sure, some progress had been made by the time the *Blue* plaintiffs filed their suit in 1949. Following World War II, state officials "aggressively" leveled expenditure and teacher pay gaps between black and white schools "as rapidly as possible."[40] That "desperate though belated" effort was motivated by fears that *Plessy*'s separate but equal doctrine would not survive without at least a nominal commitment to racial equality.[41] Accordingly, some black teachers in the Durham area received higher wages than even some white teachers with more years of graduate education.[42] And although Durham's black schools maintained higher numbers of students per class than their white counterparts, that gap also decreased "from a 5.1 pupil-per-class gap between black teachers and white teachers in 1930–31, to a 1.3 pupil-per-class gap in 1950–1951."[43]

Yet persistent inequalities remained.[44] In 1941, Durham's Committee on Negro Affairs (DCNA)[45] produced a report that documented disparities between Durham's black and white schools. The report, written by the

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[38] *Id.*

[39] *Id.* at 277, 279.

[40] Apostoleris, *supra* note 13, at 147 (quotation omitted).

[41] Paul R. Ervin, *Civil Rights in North Carolina*, 42 N.C. L. REV. 30, 37 (1963).

[42] Apostoleris, *supra* note 13, at 147. North Carolina's efforts to level teacher salaries reflected a broader movement to equalize teacher pay. Between 1939 and 1947, the national NAACP filed thirty-one lawsuits across the South seeking to equalize teacher salaries under *Plessy*'s supposed equality mandate; it won twenty-seven of them. John A. Kirk, *The NAACP Campaign for Teachers' Salary Equalization: African American Women Educators and the Early Civil Rights Struggle*, 94 J. AFR. AM. HIST. 529, 532–33 (2009). Although a teacher pay equalization suit was never filed in North Carolina, this context pushed the state toward pay equity. *See* GERSHENHORN, *supra* note 13, at 46–47.

[43] Apostoleris, *supra* note 13, at 147.

[44] *See, e.g.*, Ervin, *supra* note 41, at 37–38 ("Despite these efforts, and despite the fact that colored school teachers were paid on the same salary level as white teachers, the student attainment level of colored students was definitely below that of white students.").

[45] Formed during the Great Depression, the DCNA provided community leadership on critical issues facing African Americans in Durham. WINFORD, *supra* note 1, at 4–5; *see also* ANDERSON, *supra* note 18, at 314–16 (describing the formation and influence of the DCNA).

DCNA's Citizens' Committee, detailed Durham's continued failure to provide adequate black schools.[46] For example, the report complained that the school board provided separate elementary, junior high, and high schools for white students. In contrast, the school board merged the elementary and junior high grades in black schools.[47] The report also emphasized "the major inequities" that existed between Hillside High School, the city's only black high school, and Durham High School, its primary white high school.[48]

These concerns were well known to Durham's black citizens. A 1937 editorial published in the *Carolina Times*—Durham's leading black newspaper—detailed "deplorable facts existing" in local schools.[49] The editorial found conditions particularly appalling in one black school in East Durham.[50] After weeks of investigation, the *Times* "failed to find one single commendable point that could be given as an excuse for calling the East Durham Negro school an educational institution."[51] The editorial added that school officials clearly believed that "anything [was] good enough for the East Durham Negro school" and closed by "hurling a challenge at Durham to rid itself of this most terrible disgrace."[52]

Similarly, John Hervey Wheeler, who later served as local counsel in *Blue* and as the chair of the DCNA's Education Committee, pressed local officials to remedy inequalities in Durham's schools throughout the early 1940s. Wheeler regularly reminded the school board that the black community had been promised representation on the board on multiple occasions, but there were still no black board members.[53] He also explained

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[46] Transcript of Record at 18–19, Blue v. Durham Pub. Sch. Dist., 95 F. Supp. 441 (M.D.N.C. 1951) (No. 136) (on file at Durham County Library, North Carolina Collection [hereinafter NCC]).

[47] Adams, *supra* note 13, at 46.

[48] *Id.* For a time, Hillside High School was one of only two public black high schools in North Carolina. BROWN, *supra* note 20, at 14.

[49] *Editorially Speaking: The East Durham School*, CAROLINA TIMES (Durham), Sept. 18, 1937 at 1, http://newspapers.digitalnc.org/lccn/sn83045120/1937-09-18/ed-1/seq-1/.

[50] *Id.*

[51] *Id.*

[52] *Id.* at 8.

[53] WINFORD, *supra* note 1, at 87–88.

that inequalities between black and white schools had "widened to such proportions" that Durham "should be greatly embarrassed by the present differentials."[54] Those inequalities, he warned, produced "such fertile ground for litigation which would be embarrassing to Durham and the entire South."[55] Although the DCNA's and Wheeler's efforts failed to spur immediate change, their work ultimately laid the groundwork for *Blue*, which followed just a few years later.

II. *BLUE V. DURHAM PUBLIC SCHOOL DISTRICT*

A. The Decision to Sue

Turning to litigation was a difficult decision despite the glaring inequalities between black and white schools. By filing their complaint, the *Blue* plaintiffs began a process that would take years to complete. Extended litigation posed serious risks. Black litigants challenging state-sponsored racism in the Jim Crow South faced threats of violence and economic repercussions.[56] That was particularly true for African Americans employed by white-owned businesses, who risked losing their jobs due to retaliation.[57] Thus, many of the *Blue* plaintiffs were from families of black entrepreneurs. Such families were better insulated from white business and faced less risk of economic backlash. Enterprising individuals like Shag Stewart, DCNA chairman and secretary-treasurer for the black-owned real estate company Mutual Building and Loan Association (MBLA), were plaintiffs.[58] So were NC Mutual executives and employees like Davis B. "Dan" Martin, James J.

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[54] *Id.*

[55] *Id.*

[56] *See, e.g.*, CLIVE WEBB, MASSIVE RESISTANCE: SOUTHERN OPPOSITION TO THE SECOND RECONSTRUCTION 4–5 (Clive Webb, ed., 2005) ("African Americans who attempted to register as voters or enroll their children at all white schools suffered financial reprisals. Some were fired from their jobs; others had their names removed from the welfare rolls. Loans were called in and further credit refused."); HARVARD SITKOFF, THE STRUGGLE FOR BLACK EQUALITY 20 (2008) (noting that black plaintiffs who challenged school discrimination risked their lives and jobs).

[57] *See* WINFORD, *supra* note 1, at 92 (writing that working-class plaintiffs in *Blue* "risked possible economic sanctions from their white employers by participating in the case").

[58] *Id.*

"Babe" Henderson, and William A. Clement, along with the successful funeral home owner J.C. Scarborough II.[59]

But the *Blue* plaintiffs also "represented a cross section" of black Durham.[60] Although many of the twenty-six parents and sixty students came from the city's robust black middle class, others were from working class families that simply "wanted better educational and economic opportunities" for their children.[61] This group included Margaret Blue, a DCNA member.[62] It also included Arthur Stanley, an American Tobacco Company employee who served as president of the Tobacco Workers International Union's local black chapter, and John Lawrence Curtis, who worked at the Liggett and Myers Tobacco Company.[63]

Shepherding the litigation were a host of eminent black lawyers. Durham-based lawyers John Hervey Wheeler and M. Hugh Thompson led the charge. Wheeler was a prominent black banker, lawyer, and activist known for his behind-the-scenes powerbroking in North Carolina.[64] A graduate of Morehouse College, Wheeler eventually became president of M&F Bank and was among the first graduates, in 1947, of what is today North Carolina Central University School of Law.[65] As Professor Winford describes in his biography of Wheeler, the powerful banker and lawyer was a staunch advocate for racial equality, which he believed was a prerequisite to black economic advancement.[66]

Though Wheeler was a newly minted attorney when he initiated *Blue* in 1949, his co-counsel, M. Hugh Thompson, was more experienced. Thompson was admitted to the North Carolina bar in 1923 and was the first civil rights lawyer to practice in Durham.[67] A native of Goldsboro, North Carolina,

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[59] *Id*.

[60] *Id*. at 91.

[61] *Id*.

[62] *Id*.

[63] *Id*.

[64] *Id*. at 1.

[65] *Id*. at 3–5.

[66] *Id*. at 2.

[67] Jones, *supra* note 14, at 1863.

Thompson received an undergraduate degree from Syracuse University and his law degree from Howard University.[68] In the decades preceding *Blue*, Thompson earned a reputation for both his elite civil and criminal practice. Most of Durham's premier black-owned businesses, including NC Mutual, M&F Bank, and MBLA, retained Thompson as counsel.[69] Thompson was thus an established member of what Amos Jones has coined Durham's "old black corporate bar."[70] But his work was not merely transactional. In 1933, Thompson narrowly escaped death for his work in a racially charged criminal case. That year, a mob in rural North Carolina fired gunshots at Thompson's car because he was representing a sixteen-year-old black defendant charged with raping a white teenager.[71]

Wheeler and Thompson filed *Blue* when disparities between Durham's black and white schools were poised to widen despite the DCNA's 1941 report. In 1947, local school officials proposed a $3 million bond issue to establish two new vocational schools in Durham—one for black students and one for white students.[72] The school board would not stipulate how much of that sum was earmarked for black schools. Even so, the DCNA supported the bond issue, hoping that the school board would appropriate sufficient funds.[73] The bond passed, but in late 1948 the school board held a series of secret meetings to discuss remaining funding deficits.[74] To observers in black Durham, it was obvious that funding for white schools would be prioritized over funding for black schools. Recognizing the danger, Wheeler and Thompson threatened legal action in December of that year.[75] The lawyers

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[68] WINFORD, *supra* note 1, at 92.

[69] *Id*.

[70] *See* Jones, *supra* note 14. The "old black corporate bar" is distinct from the "new black corporate bar." *Id.* The latter refers to the recent emergence of black lawyers employed to service elite corporate clients. *Id.* at 1874–77. The former refers to the black lawyers who serviced the elite businesses of Durham's Black Wall Street in the mid-twentieth century. *Id*. at 1840–49.

[71] *Id.* at 1871.

[72] WINFORD, *supra* note 1, at 88.

[73] *Id.*

[74] *Id.*

[75] *Id*.

followed through with that threat in 1949 when construction of a new vocational building and gymnasium commenced at the white Durham High School before work began at the black Hillside High School.[76]

Although the Durham lawyers initially resisted outside help from state and national NAACP offices—perhaps because they feared NAACP priorities would differ from local ones—Wheeler and Thompson were eventually joined by NAACP lawyers from Virginia.[77] A copy of the plaintiffs' complaint addressed to Thurgood Marshall in New York listed Richmond-based attorneys Martin A. Martin, Oliver W. Hill, and Spottswood W. Robinson, III, as counsel for the plaintiffs along with Wheeler and Thompson.[78] There were no better lawyers to marshal a school equalization suit. The Virginia lawyers "filed, or oversaw the filing of, more lawsuits demanding equal schools than any other grassroots legal team in the nation," writes their biographer, Margaret Edds.[79] Martin took a lead role in the *Blue* trial, handling roughly half of all courtroom examinations. Hill conducted a fifth of the examinations while the Durham lawyers rounded out the rest.

The defendants—the Durham Public School District and the State Board of Education—retained their own teams of prominent North Carolina lawyers. In response to the plaintiffs' May 18 complaint, the local school board called a special meeting on May 20 to hire defense counsel in what it called "a law suit instituted against the Board and school officials by certain Negroes of the City of Durham, alleging differences in school facilities

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[76] *Id.* at 92–93.

[77] *Id.* at 94.

[78] Letter from M. Hugh Thompson to Thurgood Marshall (June 3, 1949) (on file at Records of the National Association for the Advancement of Colored People, Library of Congress, Manuscript Division, Box 185).

[79] EDDS, *supra* note 13, at 6. Hill and Robinson both went on to have storied careers as civil rights lawyers. Soon after arguing *Blue*, the duo initiated *Davis v. County School Board of Prince Edward County*, 103 F. Supp. 337 (E.D. Va. 1952), which the Supreme Court later decided with *Brown v. Board of Education* in 1954. Moreover, Robinson eventually joined the federal bench himself. He was the first African American to serve on the U.S. District Court for the District of Columbia and later became the first to serve on the U.S. Court of Appeals for the District of Columbia.

furnished for whites and negroes."[80] The board chose William B. Umstead and R. Percy Reade as its lawyers.[81] Umstead was a former U.S. senator who went on to become North Carolina's only governor from Durham.[82] Reade later served as the attorney for Durham County. Both lawyers were members of Durham's premier law firm, Fuller, Reade, Umstead & Fuller.[83] So too was Frank L. Fuller, Jr., a member of the school board who may have referred Umstead and Reade to the board.[84] The board retained Umstead and Reade for $3,500, subject to a final fee to be determined after the case concluded.[85]

Representing the state were Attorney General Harry M. McMullan and Assistant Attorney General Ralph Moody, along with W.F. Brinkley.[86] State officials, however, played only a minor role in the trial. They insisted throughout that the state should not have been named a party to the lawsuit.[87] Umstead filled the void left by the state's absence, conducting nearly all of the defendants' courtroom examinations.

Finally, the enigmatic federal district judge, Johnson J. Hayes, was key to the proceedings.[88] Appointed to the bench in 1927 by President Calvin

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[80] Application to Register Hillside Park High School as a National Historic Place, U.S. Dep't of the Interior Nat'l Park Serv. § 8, at 12 (Nov. 13, 2013), https://www.nps.gov/nr/feature/places/pdfs/13001026.pdf [hereinafter *Hillside High School Historic Register Application*] (quoting Durham City Board of Education Minutes, May 20, 1949).

[81] *Id.*

[82] ANDERSON, *supra* note 18, at 333.

[83] *See* WINFORD, *supra* note 1, at 100 (noting that the law firm of "Fuller, Reade, Umstead, and Fuller, represented the board in the school equalization case without any grumblings about conflict of interest").

[84] *See* Durham City Board of Education Minutes, July 17, 1950 (on file at NCC).

[85] *Id.*

[86] Transcript of Record, *supra* note 46, at 1.

[87] *See id.* at 3, 1319, 1334.

[88] Judge Hayes was born in 1886 in rural Purlear, North Carolina, to a farm family. As one scholar wrote about the jurist, "There are probably few lives that share the lore of localism, the romanticism of another time and the color of the life of Johnson J. Hayes." Joseph R. Aicher, Jr., *A Biographical and Behavioral Portrait of Judge Johnson J. Hayes*, 4 N.C. CENT. L.J. 17, 18 (1972). One of Judge Hayes's strongest commitments in life was to education,

Coolidge, Judge Hayes eventually earned a reputation for "tempering justice with mercy."[89] Although the judge heard only five civil rights cases during his judicial career, he notably ruled in favor of black plaintiffs in four of them.[90] But that would not have solaced the *Blue* plaintiffs, as Judge Hayes' later decisions in favor of black plaintiffs in civil rights cases began with *Blue*. Judge Hayes's first civil rights decision instead delivered a blow to Durham's black activists. One year before Judge Hayes decided *Blue*, he decided *Epps v. Carmichael*, which rejected an attempt to integrate the law school at the University of North Carolina.[91] *Epps* held that black students could not enroll at the University of North Carolina because they could obtain a legal education from what is now North Carolina Central University.[92] That ruling surely affected how the *Blue* plaintiffs and lawyers perceived the judge. An editorial in the *Raleigh News & Observer* recognized as much. The author described Judge Hayes as "a native North Carolina judge who is regarded as a most conservative jurist. He is, indeed, the same judge who ruled that no discrimination existed in the separate law school for Negroes maintained by the State at North Carolina College in Durham."[93] From that perspective, it seems unlikely that Durham's black community could have

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which may have influenced his decision-making in *Blue* and other school discrimination cases. *See id.* at 20 (noting "[f]our themes" of Hayes's life: "religion, government, education, and farming"). Indeed, one of the most significant experiences in Judge Hayes' early life occurred in 1902 when he heard Governor Charles Brantley Aycock give a speech on education reform. Judge Hayes later wrote of that speech, "I came away with a hunger for education. As a heart panteth for the water brooks, so my heart longed for an education." *Id.* at 22 (quoting JOHNSON J. HAYES, AUTOBIOGRAPHY 8 (1968)).

[89] *Id.* Judge Hayes earned that reputation primarily from his decisions related to alcohol. Although the judge himself was a prohibitionist, he "disposed of more whiskey tax cases than any other Federal Judge in the United States." *Id.*

[90] *Id.* at 42.

[91] Epps v. Carmichael, 93 F. Supp. 327 (M.D.N.C. 1950).

[92] *See id.* at 331; *see also* Donna L. Nixon, *The Integration of UNC–Chapel Hill—Law School First*, 97 N.C. L. REV. 1741, 1761–62 (2019) (describing Judge Hayes's *Epps* decision).

[93] *See Warning From A Friend*, NEWS & OBSERVER (Raleigh), Jan. 27, 1951, at 4; *see also Durham Verdict Known This Week*, THE CAROLINIAN (Raleigh), Jan. 27, 1951, http://newspapers.digitalnc.org/lccn/sn80008926/1951-01-27/ed-1/seq-1.pdf.

predicted with certainty that the judge would have decided their case favorably.

B. The Road Toward Trial

Although the school board's attorneys predicted *Blue* would be an "open and shut" case, it was anything but.[94] True, the legal issues in *Blue* were straightforward—*Plessy* mandated that separate schools also be equal. But determining whether Durham's black schools equaled the city's white ones required detailed and time-consuming factual analyses. It thus took two years of litigation and a seven-day trial for the case to close. That process began when the plaintiffs filed their complaint on May 18, 1949, and continued through motions to dismiss and discovery until the trial began in June 1950.

The plaintiffs' complaint sought a declaration that the state and the local school board's discriminatory practices unconstitutionally denied them equal protection of the laws.[95] The plaintiffs therefore requested an injunction "forever restraining and enjoining the defendants" from maintaining unequal schools, though they did not seek an end to segregation itself.[96] That strategic decision placed *Blue*, as a school equalization suit, firmly within *Plessy's* separate but equal framework.

In the complaint, the plaintiffs' lawyers pointed to obvious inequities between Durham's segregated school systems, particularly at Durham's two main high schools. They noted that the high school for white students, Durham High, enrolled 917 students while the high school for black students, Hillside High, enrolled 1,421.[97] Yet Durham High had "twice the acreage, personnel, [and] facilities" as Hillside.[98] Students at Durham High also enjoyed "a well-equipped science laboratory, sufficient vocational equipment, [and] adequate space and facilities" including a "gymnasium,

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[94] Adams, *supra* note 13, at 50–51 (quoting *Umstead and Reade to Represent Local Education Officers*, DURHAM MORNING HERALD, May 29, 1949).

[95] Complaint at 4, Blue v. Durham Pub. Sch. Dist., 95 F. Supp. 441 (M.D.N.C. 1951) (on file at NCC).

[96] *Id.*

[97] *Id.* at 3.

[98] *Id.*

swimming pool, football field, cafeteria, four tennis courts, outdoor tract and a home economics cottage."[99] In contrast, "[p]ractically none of these advantages [were] offered to or provided for Negro Children."[100] The lawyers added that Hillside High's "vocational shop equipment [was] completely inadequate" while its science laboratory was "so negligible as to be entirely unfit for effective teaching."[101] Moreover, Hillside had "no outdoor tract, football field, gymnasium, tennis court, or swimming pool."[102] Instead, the black high school had "an inadequate dingy home economics cottage, an inadequate cafeteria, and an auditorium" that seated just "four hundred of the school's 1,421 students."[103]

Similar disparities permeated Durham's dual school system, beyond its high schools. As the lawyers wrote, "[t]hroughout the school system the classrooms for the Negro schools [were] over-crowded and the classroom space [was] totally inadequate for effective use."[104] The libraries in black schools were also "totally inadequate, uncatalogued, and unclassified and entirely unequal to the libraries provided for the white students."[105] And the "furniture and equipment provided in the schools for Negro[] children [were] old and dilapidated and in most instances replacements brought from the white schools while new equipment and furniture were installed in the schools for white children."[106]

In its answer, the Durham school board expressly denied that black children were "discriminated against on account of their race and color" or that they were prevented from "receiving instruction in public schools . . . comparable in all respects" to the schools maintained "for the exclusive use

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[99] *Id.*

[100] *Id.*

[101] *Id.*

[102] *Id.*

[103] *Id.*

[104] *Id.*

[105] *Id.*

[106] *Id.*

of white children."[107] Though it admitted that there was insufficient space for vocational training at Hillside High, the school board claimed that this was also true of Durham High.[108] Moreover, the board contended that any deficiencies in Hillside's vocational program would be remedied by an upcoming building program, which was to go under contract shortly.[109]

The state defendants, in contrast, immediately filed a motion to dismiss themselves from the litigation. These defendants first argued that the federal court could not rule against them because the Eleventh Amendment to the U.S. Constitution granted them immunity from suit.[110] Second, the defendants theorized that even if they were not immune, the plaintiffs' complaint failed to state a valid cause of action against them because local officials, not the state, exercised primary responsibility over school funding decisions.[111]

With trial initially slated to begin in September 1949, the state defendants' motion to dismiss forced Judge Hayes to delay courtroom proceedings. Citing the high volume of court filings, the judge admitted that he did not have time to review the briefs before the fall term began on September 26.[112] By late October, Judge Hayes had studied the documents and concluded that the state defendants should not be dismissed before trial. In his order denying the motion to dismiss, the judge noted that the plaintiffs' allegations, accepted as true, "show[ed] that the State Officials, in conjunction with the local officials, [were] discriminating against the plaintiffs by reason of their race or color and in favor of white children," in violation of state law.[113] Because the state officials were allegedly acting

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[107] Answer of Durham Public School District at 1, Blue v. Durham Pub. Sch. Dist., 95 F. Supp. 441 (M.D.N.C. 1951) (on file at NCC).

[108] *Id.* at 4.

[109] *See id.*

[110] Order Denying the State Defendants' Motion to Dismiss at 1, Blue v. Durham Pub. Sch. Dist. (M.D.N.C. Oct. 28, 1949) (on file at NCC).

[111] *See id.*

[112] *School Suit Action Delayed: Dismissal Motion Judgment Held Up For Further Study*, CAROLINA TIMES (Durham), Sept. 17, 1949, at 1, http://newspapers.digitalnc.org/lccn/sn83045120/1949-09-17/ed-1/seq-1.pdf.

[113] Order Denying the State Defendants' Motion to Dismiss, *supra* note 110, at 2.

contrary to state law, the Eleventh Amendment did not bar the suit.[114] Although Judge Hayes did not consider in detail whether the plaintiffs had stated a meritorious claim against the state, he believed the complaint "at least call[ed] for an answer."[115]

With the motion to dismiss denied, the parties entered the lengthy process of discovery. The plaintiffs' attorneys submitted a set of interrogatories to the defendants. The sheer volume of those interrogatories, consisting of seventy-two questions for the defendants to answer, caused Judge Hayes to grant another thirty day extension to the defendants.[116] The plaintiffs' questions focused on the adequacy of school facilities, including the number of schools and classrooms provided for black and white students, and the value of individual school buildings and the furniture housed inside.[117] Others questioned whether schools had auditoriums, gymnasiums, cafeterias, swimming pools, and facilities for science and vocational classes. Many delved into the minutiae of Durham's public schools. For example, one asked, "What is the number of square feet of floor space provided for libraries at each of the schools?"[118] Another asked, "How many lineal feet of cyclone steel fencing is used to enclose the various [school] plots?"[119] As a *Carolina Times* article describing the interrogatories reported, the plaintiffs asked for "such detailed information" that the defendants would have to conduct "inventories of school equipment in every city school. Local officials have indicated that the answers will be voluminous."[120] Indeed, the defendants'

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[114] *See id.* at 2–4. This holding is inconsistent with later Supreme Court precedent holding that the Eleventh Amendment bars federal courts from ordering state officials to conform their conduct to state laws. *Pennhurst State Sch. v. Halderman*, 465 U.S. 89 (1984).

[115] Order Denying the State Defendants' Motion to Dismiss, *supra* note 110, at 4; *see also Judge Refuses State Motion to Stop Case: Durham Negroes Assert Schools are Inadequate*, DAILY TAR HEEL (Chapel Hill), Oct. 30, 1949, at 4, http://newspapers.digitalnc.org/lccn/sn92073228/1949-10-30/ed-1/seq-4.pdf (reporting the judge's order).

[116] *School Suit Action Delayed*, *supra* note 112, at 1.

[117] Interrogatories to Defendants, Blue v. Durham Pub. Sch. Dist., 95 F. Supp. 441 (M.D.N.C. 1951) (on file at NCC).

[118] *Id.* at 5.

[119] *Id.*

[120] *School Suit Action Delayed*, *supra* note 112, at 1.

response filled seventeen pages.[121] The answers paint a detailed portrait of Durham's public schools in the mid-twentieth century.

Much of the information is replicated in the tables below. Tables 1 and 2 show that Durham's oldest running public school at the time, E.K. Powe Junior High School, was built for white students and opened in 1906. In contrast, the city's oldest operating black school, Walltown Graded School, opened twelve years later in 1918. By 1949, the total value of Durham's school buildings for its 5,741 white students was $3,926,360; the value was just $1,295,020 for the buildings servicing the city's 4,794 black students—a $2,631,340 disparity. White schools accounted for more than 75 percent of building value but housed just 54.5 percent of Durham's student population. Tables 5 and 6 make clear that Durham's white schools had nearly double the number of library books—27,844—than did the city's black schools—just 15,413. Tables 3 and 4 taken together show that the disparity between the average number of classrooms in white schools and the average number in black schools was relatively slight. On average, white schools had only two more classrooms per school than did black ones. But aggregating the disparity across all of Durham's schools shows a more striking trend. Together, the data in Tables 3 and 4 shows that the city provided ninety-eight more classrooms for white students than it did for their African American peers.

Although many factors affect property valuations, and classroom statistics do not conclusively establish discrimination unless considered in conjunction with student population, this data powerfully illustrates a core feature of the plaintiffs' strategy. To establish inequality among black and white schools, the *Blue* lawyers quantified the lived experience of unequal schools for black and white students. Later, decisions mandating desegregation instead emphasized "those qualities which are incapable of objective measurement" and other "intangible considerations" that rendered even physically equal schools unconstitutional if segregated.[122] But in *Blue*,

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[121] *See generally* Answers to Interrogatories, Blue v. Durham Pub. Sch. Dist., 95 F. Supp. 441 (M.D.N.C. 1951) (on file at NCC).

[122] Brown v. Bd. of Educ. of Topeka, 347 U.S. 483, 493 (1954) (quoting Sweatt v. Painter, 339 U.S. 629, 634 (1950)); *see also* McLaurin v. Okla. State Regents for Higher Educ., 339 U.S. 637, 641 (1950) (focusing on a black graduate student's "ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession").

still operating under the equalization framework, the lawyers effectively demonstrated that those intangible factors often dovetailed with tangible ones in the Jim Crow South.

Table 1: Answer to Interrogatory One ("What are the age, kind of construction and value of each school building?")			
Schools:	Date of Construction	Kind of Construction	Value of Building
White Schools			
Durham High school	1921	Brick	$795,480
Home Economics Cottage	1937	Brick Veneer	$23,040
Carr Jr. High School	1928	AAA (Fireproof)	$782,600
East Durham Jr. High School	1939	AAA (Fireproof)	$513,000
E.K. Powe Jr. High School (Old)	1906	Brick	$94,470
E.K. Powe Jr. High School (New)	1926	AAA and Brick	$221,760
Y.E. Smith School	1906	Brick	$234,500
Southside School	1921	Brick	$116,250
Morehead School	1917	Brick	$137,560
Fuller School	1937	AAA (Fireproof)	$209,000
George W. Watts School	1919	AAA and Brick	$176,000
North Durham School (Old)	1905	Brick	$46,900
North Durham School (New)	1928	Brick	$144,000
Edgemont School	1901	Brick	$191,000
Lakewood School	1918	Brick (some frame)	$70,000
Holloway Street School	1928	Brick	$171,000

Table 2: Answer to Interrogatory One ("What are the age, kind of construction and value of each school building?")			
Schools:	Date of Construction	Kind of Construction	Value of Building
Black Schools			
Hillside High School	1921	AAA (Fireproof)	$340,000
W.G. Pearson School	1928	AAA (Fireproof)	$325,600
James A. Whitted School	1935	AAA (Fireproof)	$209,000
East End School	1928	Brick	$132,000
Lyon Park School	1928	Brick	$125,840
Burton School	1939	Brick (some frame)	$86,480
Walltown School	1918	Frame	$61,000
Hickstown School	1922	Frame	$15,000

Table 3: Answer to Interrogatory Four ("How many classrooms are there in each of the schools designated for white pupils?")	
School	Number of Classrooms
Durham High School	32
Home Economics Cottage	4
Carr Junior High School	31
East Durham Junior High School	22
E.K. Powe School	24
Y.E. Smith School	23
Morehead School	13
North Durham School	16
Holloway Street School	8
George Watts School	15
Fuller School	9
Lakewood School	8
Southside School	12
Edgemont School	17

Table 4: Answer to Interrogatory Five ("How many classrooms are there in each of the schools designated for Negro pupils?")	
School	Number of Classrooms
Hillside High School	36
Home Economics Cottage	2
W.G. Pearson School	31
James A. Whitted School	19
Lyon Park School	13
Burton School	8
Walltown School	6
Hickstown School	4
East End School	17

Table 5: Answer to Interrogatory Sixty ("What are the number and value of the volumes contained in the library for each school?")	
Name of School:	Library Volumes Owned
White Schools	
Durham High school	5133
Carr Jr. High School	3884
East Durham Jr. High School	1850
E.K. Powe Jr. High School	3950
Y.E. Smith School	2013
Southside School	1076
Morehead School	1493
Fuller School	1480
George W. Watts School	1512
North Durham School	1535
Edgemont School	1768
Lakewood School	1070
Holloway Street School	1080

Table 6: Answer to Interrogatory Sixty ("What are the number and value of the volumes contained in the library for each school?")	
Name of School:	Library Volumes Owned
Black Schools	
Hillside High School	4405
W.G. Pearson School	3219
James A. Whitted School	1830
East End School	1781
Lyon Park School	1692
Burton School	875
Walltown School	1015
Hickstown School	596

C. A "Trunk Full" of Evidence: The Blue *Trial*

Early on the morning of Monday, June 26, 1950, the lawyers for the plaintiffs and the defendants gathered before Judge Hayes in a packed courthouse in Durham. The *Blue* trial was finally commencing more than one year after the plaintiffs filed their complaint. As the morning session convened, an interracial audience squeezed into the courtroom to watch the arguments.[123] The state defendants, represented by Ralph Moody, began the proceedings with a general objection. Moody reminded the court that the state, despite denial of its motion to dismiss, maintained it was an inappropriate party to sue.[124] Consequently, although the plaintiffs and the local defendants planned to offer evidence and witnesses, the state was "not concerned with that."[125] Instead, Moody objected generally to all oral

[123] *See Durham Suit in Top Court Seeks One Rule*, THE CAROLINIAN (Raleigh), July 1, 1950, at 1, 8, http://newspapers.digitalnc.org/lccn/sn80008926/1950-07-01/ed-1/seq-8/ (reporting that "the morning session of the trial was about half white people").

[124] Transcript of Record, *supra* note 46, at 3.

[125] *Id.*

testimony "concerned with the facilities or comparison of the facilities of the public schools" on the ground that "it [was] not applicable to the defendant State Board of Education."[126] The state's lawyers therefore relied solely on their briefs and remained almost completely silent until the final day of trial, when they renewed their motion to dismiss.[127] With the state taking a backseat in the proceedings, the *Blue* trial was underway.

Recognizing the challenges they faced "to convince a white judge in the South that school conditions in Durham were indisputably unequal, and to rule accordingly," the plaintiffs' lawyers sought to introduce evidence that "would speak for itself."[128] They hired famed photographers Charles R. Stanback and Alex M. Rivera[129] to produce more than five hundred photographs depicting inequities in Durham's public schools.[130] Additionally, the lawyers submitted "thousands of documents comprising fifty years of official reports generated by the Durham school board, superintendents, school principals, and other school administrators."[131] As John H. Wheeler stated to the court, they had a "trunk full" of reports from 1904 until 1944.[132]

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[126] *Id.* at 4–5.

[127] *See id.* at 1319 ("I would like to have the record show that we do not offer any evidence; that we rest and renew the motion which Your Honor stated you would pass upon later on.").

[128] WINFORD, *supra* note 1, at 95.

[129] Together, Stanback and Rivera had more than thirty years of experience as professional photographers. Stanback learned his craft at the Tuskegee Institute in Alabama. Transcript of Record, *supra* note 46, at 5–6. Rivera was a nationally acclaimed photojournalist who had spent the last nineteen years reporting on the burgeoning civil rights movement. *Id.* at 13. He photographed some of the last lynchings in the south and later became a leading figure covering legal challenges to segregated schools. ANDERSON, *supra* note 18, at 436; *see also Alex Rivera, Photojournalist of Civil Rights Movement, Dies at 95*, N.Y. TIMES (Oct. 25, 2008), https://www.nytimes.com/2008/10/26/us/26rivera.html.

[130] *See Durham Suit in Top Court Seeks One Rule*, *supra* note 123, at 1, 8, http://newspapers.digitalnc.org/lccn/sn80008926/1950-07-01/ed-1/seq-8/ ("More than 550 exhibits, mostly pictures of various schools of the city, were produced by counsel for the plaintiffs during the first day of trial."); *see also* WINFORD, *supra* note 1, at 95 (observing that the photographers were commissioned to "produce more than six hundred photographs indicating educational inequality" in public schools).

[131] WINFORD, *supra* note 1, at 96.

[132] Transcript of Record, *supra* note 46, at 319.

The attorneys also submitted the DCNA's 1941 study on Durham's public schools. Two witnesses—Ms. C.F. Scarborough, a teacher at Hillside High and DCNA member, and John S. Stewart, chairman of the DCNA—corroborated the report and described the black community's persistent requests between 1941 and 1947 that the school board equalize school facilities.[133] Stewart testified that the DCNA ran a full-page ad in the *Durham Morning Herald* entitled "An Appeal to the Fair-Minded Citizens of Durham" in which the organization "set out the inequalities as we saw them."[134] Nonetheless, when Martin A. Martin asked Stewart what results, if any, the DCNA had obtained from the board after the organization's efforts, Stewart replied flatly, "We haven't been able to get anything."[135]

The plaintiffs' lawyers also relied on student and teacher testimony to personalize the inequalities in Durham's segregated schools. Winfred Martin, a tenth grade student at Hillside High and the son of Davis B. Martin, a local civic leader, described the conditions in Hillside.[136] He explained that some Hillside students were forced to study math in the school's woodworking shop, were relegated to studying in the basement, or were taught in a "tin-top house" heated only by a woodfire stove.[137] Other students including Wilfred Kennedy, Joseph Carl Bell, and Lanzer Jule McCall similarly described how, unlike Durham High students, students at Hillside High were unable to take upper level classes such as Latin, solid geometry, Spanish, and trigonometry.[138] Betty Smith, a ten year old and sixth grader at Walltown School, testified that Walltown had only one bathroom for girls, which lacked any partitions between stools and had no doors for maintaining privacy.[139]

Teachers and administrators reinforced the students' testimony. H.A. Hill explained that he served simultaneously as principal, teacher, and janitor

[133] *Id.* at 17–31.

[134] *Id.* at 30–31.

[135] *Id.* at 30.

[136] *Id.* at 36–38.

[137] *Id.* at 39–45.

[138] *Id.* at 1321–26.

[139] *Id.* at 51, 56.

at Hickstown School, an elementary school for black students.[140] Including Hill, there were four teachers and four classrooms at Hickstown serving one hundred-nine enrolled students. Echoing Betty Smith, Hill testified that both the boys' and girls' bathrooms at Hickstown were unpartitioned and unenclosed.[141] Additionally, F.B. Marshall, principal of East End Graded School, testified that his school regularly held class in the basement when traditional classrooms were full.[142] Wilson B. Higgins, Jr., athletics director at Hillside High, testified that the black high school's athletic facilities were vastly inferior to Durham High's. For example, Durham High had a football field and a gymnasium; Hillside had neither. Instead, Hillside's football team trained in a city park next to the school.[143] Finally, the dean of women's education at Durham High, Margaret S. Richardson, testified that Durham High had a student-run newspaper and an annual yearbook staff, both of which were supported by school administrators. Students at Hillside were afforded neither opportunity.[144]

After establishing the disparities in Durham's black and white schools, the plaintiffs' lawyers sought to undermine the defendants' evidence. They began by examining L. Stacey Weaver, the local school superintendent.[145] As superintendent, Weaver was individually named a defendant and, with staff help, answered the plaintiffs' interrogatories. Martin questioned Weaver about discrepancies between Weaver's interrogatory answers and other information available to the plaintiffs.[146] For example, Weaver's answers stated that Walltown School would soon receive a new auditorium.[147] But as Martin pointed out, the planned auditorium was being built in the school's basement and would also serve as a library and cafeteria.[148] In contrast, one of the white junior high schools, East Durham, had an above ground

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[140] *Id.* at 57.

[141] *Id.* at 58.

[142] *Id.* at 69.

[143] *Id.* at 89–94.

[144] *Id.* at 98–103.

[145] *See id.* at 110.

[146] *See id.*

[147] *Id.*

[148] *Id.*

auditorium with "a balcony, stationary seats and a stage."[149] Judge Hayes also questioned Weaver.[150] He pointed out that Weaver's written responses valuating Durham's public schools failed to account for recent renovations at Edgemont School, a white elementary school. Those renovations were worth roughly $75,000 in 1950.[151]

Martin further questioned Weaver about deficiencies at Walltown School as compared to white schools. In particular, Martin asked Weaver about the school district's plans to construct a new white elementary school at Club Boulevard.[152] The Club Boulevard school was projected to educate roughly 450 students and would have a separate cafeteria, an auditorium, and a library.[153] It would also have an enclosed bathroom in every classroom.[154] Martin drilled Weaver on this point:

> Well, Mr. Weaver, why did you start building last year a white school with a separate auditorium, gymnasium, cafeteria, library, class rooms with toilets and washstands in each room . . . and, at the same time, build a negro school with a combination auditorium, cafeteria and library in the basement that you can only get into by going through the kitchen and you can only get out of by going back through the kitchen; why would you do such a thing as that?[155]

Weaver responded that the students at Walltown simply had other needs than those of the students expected to attend Club Boulevard.[156]

Clyde A. Erwin, North Carolina's Superintendent of Public Instruction, offered similar testimony. Martin questioned Erwin about the state's failure to adequately fund black schools while financing the construction of new

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[149] *Id.* at 119.

[150] *See id.* at 167–68.

[151] *Id.*

[152] *Id.* at 190.

[153] *Id.*

[154] *Id.*

[155] *Id.* at 191.

[156] *Id.*

white schools, like the planned Club Boulevard School.[157] But it was Judge Hayes who posed some of the most incisive questions to Erwin. The judge asked Erwin to explain how state money was appropriated to local schools and whether it was done discriminatorily.[158] Attempting to minimize any appearance of discrimination, Erwin explained that funding was distributed based on need and that "a substantially larger percentage" of state money would go "into the construction of negro buildings in North Carolina."[159] At that point, however, Judge Hayes interrupted Erwin and asked whether black schools received more money due to preexisting inequalities: "In other words, you don't mean to say that you are [pursuing] a policy of discrimination against [white students] in the use of that money?"[160] Erwin answered that the money was allocated based on what local authorities requested, but Judge Hayes continued to press him: "Doesn't that come right back to what the Court asked you a moment ago; that it is due to the fact that they didn't have sufficient facilities for the Negroes?" Erwin's response: "Perhaps so."[161]

Judge Hayes then made a statement that foreshadowed *Blue*'s result. He explained that, at a minimum, some agency was responsible for ensuring that school facilities available to black students complied with both the state and federal constitutions.[162] The outcome of the case thus turned on which agency, either the local school board or the state, held that responsibility. That, Judge Hayes thought, was a factual determination. As he saw it, "There is not much room for any controversy about the law, because the law is very plain on its face, it seems to me. The question is about the facts."[163]

Facts, not law, dictated *Blue*'s outcome because it was clear under *Plessy v. Ferguson* that the plaintiffs were entitled to equal school facilities. Recent precedent had put *Plessy*'s continued vitality in question, however. Just

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[157] *Id.* at 235–37.

[158] *Id.* at 241–42.

[159] *Id.*

[160] *Id.* at 242.

[161] *Id.*

[162] *Id.* at 243.

[163] *Id.*

weeks before the *Blue* trial began, the Supreme Court decided *Sweatt v. Painter*, which held that a black law school applicant could not receive the same legal education at a separate law school than the one offered by the state.[164] *Sweatt* cast serious doubt on the constitutionality of separate but equal public schools and was a driving force behind the NAACP's decision to attack segregation directly in *Brown*.[165] But unlike *Brown*, the *Blue* lawyers did not challenge segregation itself. Their case, like all school equalization suits, hinged on local conditions in individual schools, where disparate funding, facilities, or learning opportunities could demonstrate inequality.

Although the plaintiffs' lawyers used lay witness testimony to personalize school inequalities in Durham, they used expert testimony to prove that inequality. They hired J. Rupert Picott, an educational doctor and the Executive Secretary of the Virginia Teachers Association, to prepare an exhaustive study highlighting disparities between Durham's black and white schools.[166] Two other African American scholars, Ellis O. Knox of Howard University and Stephen J. Wright of the Hampton Institute, also contributed to the study.[167] But Picott was the primary author, and the plaintiffs' lawyers

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[164] Sweatt v. Painter, 339 U.S. 629, 635–36 (1950).

[165] EDDS, *supra* note 13, at 187–92. *Sweat* also affected the *Blue* lawyers. The decision made John H. Wheeler "more determined than ever to pursue equal education." WINFORD, *supra* note 1, at 94–95. Wheeler believed that *Sweatt* proved "conclusively that Negroes must, by their own bootstraps, lift themselves to the level of total citizenship and that to depend on their so-called friends in other groups for that purpose [was] futile." *Id.* at 95 (quoting John H. Wheeler).

[166] Transcript of Record, *supra* note 46, at 327–28.

[167] Ellis Knox had been an education professor at Howard for twenty years. *See* Transcript of Record, *supra* note 46, at 444. He was primarily responsible for studying library facilities offered in Durham's school. *Id.* at 445. At trial, Knox testified that he "went very thoroughly and carefully into the financial reports of the Durham City schools, school library reports, superintendents' statistical reports, replies to the interrogatories and the exhibits accompanying those replies, and I studied the facts and figures there presented." *Id.* at 446. Knox added that he was "very much interested in the expenditures for library service" because he "felt that above all else the library is a most essential part of any educational program." *Id.* Stephen Wright obtained a master's degree from Howard and his doctoral degree from NYU. *Id.* at 491–92. Wright was the Dean of Faculty at the Hampton Institute, and he was primarily responsible for studying the availability of vocational and special needs classes in Durham's schools. *Id.* at 492–96.

relied heavily on his testimony at trial.[168] Picott was an expert on public education and school equalization suits. He studied at Virginia University at Richmond, Hampton Institute, Temple University, New York University, and Virginia Union University.[169] Moreover, the Virginia lawyers Martin, Hill, and Robinson previously retained Picott to testify in a school equalization suit in their state.[170] Picott's testimony, along with that of the plaintiffs' other experts, inspired eager attention among the local black community. The *Carolina Times* reported that the trial swelled to "sensational proportions" as "evidence of gross inequalities" was presented.[171] Another account observed that "a predominantly Negro audience packed the steaming courtroom" to watch the experts testify.[172]

Led by Picott, the experts evaluated Durham's dual school system on a "room-by-room basis."[173] They focused on each school's curriculum, personnel, resources, and facilities, with the goal of "looking at this thing from every possible angle, as objectively as possible."[174] Picott reiterated this point, noting that "[e]very reasonable effort has been made throughout this

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[168] WINFORD, *supra* note 1, at 96. Before Picott took the stand, Jesse B. Blayton testified as an "expert in statistics and accounting." Transcript of Record, *supra* note 46, at 321. He verified that the plaintiffs' expert report was credible and statistically accurate. *Id.* at 320–25.

[169] Transcript of Record, *supra* note 46, at 327.

[170] *See* EDDS, *supra* note 13, at 181–82 (describing Picott and the lawyers' joint efforts in King George County).

[171] *$$$ Taken From Negro School Pupils*, CAROLINA TIMES (Durham), June 24, 1950, at 1, http://newspapers.digitalnc.org/lccn/sn83045120/1950-07-01/ed-1/seq-1.pdf.

[172] THUESEN, *supra* note 3, at 189 (quotation omitted). The excitement surrounding the trial resembled the scene of a failed school discrimination suit argued in Durham a decade earlier. In 1933, NAACP lawyer William Hastie joined local attorneys to challenge segregation at the University of North Carolina's pharmacy school in *Hocutt v. Wilson*. Hastie, who was later appointed both the first African American to serve on a federal district court and the first to serve on a federal appellate court, led oral argument. Recalling the scene, Hastie wrote that the courtroom was "packed like a sardine box" with local black residents interested in seeing a black lawyer in court. KENNETH W. MACK, REPRESENTING THE RACE: THE CREATION OF THE CIVIL RIGHTS LAWYER 87 (2012).

[173] Transcript of Record, *supra* note 46, at 404.

[174] WINFORD, *supra* note 1, at 96 (quoting Transcript of Record).

Study to assure thoroughness, accuracy, and objectivity."[175] The report documented decades of discrimination. In 1928, the city spent $454,937.58 on white schools but only $123,505.56 on schools for black students.[176] In 1948, Durham spent $901,914.44 on white schools but only $575,326.13 on black schools.[177] So although black schools gradually received more funding over two decades, the gap between black and white schools remained relatively constant, hovering close to $330,000.[178] At the same time, the population in Durham's white schools had decreased by 611 students, while Durham's black school population increased by 1,386 students.[179]

Based on these and a slew of other findings, Picott found the evidence conclusive. He reported that "[i]n each of the . . . major elements involved in the operation of a school system, those in the schools provided for negro children are unequal to those provided for white children."[180] His final conclusion, captured in the last paragraph of his report, was particularly damning:

> "For Negro children and for America, the educational significance of this inequality is measureless. But at least this much is known: The human values, talents and economic potential which atrophy in Negro children for lack of proper opportunity for cultivation and development, constitute a loss which even our country with all its wealth and power cannot afford."[181]

The plaintiffs' lawyers presented Picott's report to Basil M. Watkins, chairman of the Durham school board, who strongly denied any allegations of discrimination in the city's public schools. Indeed, Watkins testified that before John H. Wheeler and M. Hugh Thompson notified him of a pending

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[175] Transcript of Record, *supra* note 46, at 404.

[176] WINFORD, *supra* note 1, at 96.

[177] *Id.*

[178] *Id.*

[179] *See id.*

[180] Transcript of Record, *supra* note 46, at 405.

[181] *Id.* In addition to the above-mentioned witnesses, the plaintiffs also called Henry Davis on the second day of trial. John H. Wheeler examined Davis, who was a teacher at Carr Junior High School, one of the white schools in Durham. *Id.* at 209–14.

school equalization suit, the school board already planned to construct a new black high school.[182] On May 7, 1949, the plaintiffs' lawyers mailed a letter to Watkins advising him that they were suing to secure the plaintiffs' constitutional rights and to remedy "flagrant discrimination" existing in Durham's black schools.[183] In a reply sent on May 13, Watkins noted that the school district had made substantial additions and renovations in black schools.[184] Moreover, Watkins stated that Wheeler and Thompson were well aware of the board's plans to build a new black high school that "all the people of Durham would be proud of."[185] Watkins cautioned that the lawyers, not the school board, would be at fault for derailing those plans if the suit continued and advised the duo to reconsider. He wrote that "if the Negro pupils of Durham are delayed in their enjoyment, or ultimately deprived of their enjoyment, of the Negro high school building and other school facilities," then it would be "the fault of some—not all, by any means—of the Negro citizens of Durham."[186]

Other school administrators attempted to rationalize, rather than deny, the disparities in Durham. Local superintendent L. Stacey Weaver observed, for example, that white school facilities in the city varied by a "considerable range."[187] Although some benefited from "reasonably modern buildings," other white schools had stood for fifty years.[188] Moreover, shifting populations had caused some white schools, like Durham High, to become overcrowded while others had surplus space.[189] In contrast, Durham's black schools were relatively homogenous. Weaver explained that "[t]he Negro school buildings, largely, had been built more recently and were consequently of a better construction than the older [white] schools."[190] The superintendent conceded that a 30 percent increase in black student enrollment combined

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[182] *Id.* at 610.

[183] *Id.* at 611.

[184] *Id.* at 612–14.

[185] *Id.* at 615.

[186] *Id.* at 615–16.

[187] *Id.* at 718.

[188] *Id.*

[189] *Id.* at 718–19.

[190] *Id.* at 720.

with a concurrent decline in white enrollment necessarily produced "a more concentrated and crowded situation in the Negro schools than in the white."[191] But due to World War II, the school board had been unable to address those issues until then.[192]

State superintendent Clyde Erwin also disclaimed responsibility for Durham's deplorable black schools. He explained that the state did not produce existing inequalities in local schools during a rare moment of the trial when the state's lawyers examined a witness. Ralph Moody questioned Erwin on the division of authority between state and local school boards.[193] Erwin described the immense discretion local officials exercised to allocate state and local funds.[194] Although the plaintiffs' complaint cited many advantages afforded white students, "such as gymnasiums, swimming pools, football fields, cafeterias, tennis courts, [and] tracks," the state did not earmark funds for any of those items.[195] Further, though the plaintiffs complained that white schools offered more academic courses than black schools, Erwin explained that the state prescribed only a "minimum curriculum" for North Carolina schools.[196] Local communities provided additional coursework subject to their "own wishes and ability to pay."[197] Following Erwin and Weaver's testimony, the trial adjourned for two weeks.

When the trial resumed on July 10, local superintendent L. Stacey Weaver again took the stand, supplementing his earlier testimony with a description of school curricula and facilities.[198] It was not until the next day that the defendants' lawyers took the lead, offering their own witnesses to rebut those of the plaintiffs.[199] Like the plaintiffs, the defendants relied heavily on expert testimony. Their star expert was Arthur M. Proctor of Duke

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[191] *Id.* at 720–21.

[192] *Id.* at 721.

[193] *Id.* at 785–86.

[194] *Id.* at 786.

[195] *Id.*

[196] *Id.* at 788.

[197] *Id.*

[198] *Id.* at 812.

[199] *Id.* at 971.

University. Along with D.B. Bryan of Wake Forest College, Proctor produced a report rebutting J. Rupert Picott's study of Durham schools.[200] Proctor, the chair of Duke's Department of Education, testified that he had meticulously evaluated each school, ranking them according to structural efficiency, operation, maintenance, classroom location, and functionality.[201] Remarkably, Proctor's study showed that school "buildings as a whole score[d] fairly uniformly" across racial lines.[202] Although the three poorest buildings were black schools, with Hickstown scoring the worst of all schools, many of the top schools served black students.[203] Proctor ranked the Burton School, an African American graded school built in 1939, as Durham's best school.[204] The Duke professor also echoed Basil Watkins's earlier testimony, stating that any inequalities in Durham's black schools would be alleviated by the city's planned construction projects.[205] When the new high school was constructed, Proctor predicted, its facilities would be "superior to anything that [was] available to white children."[206]

On Wednesday, July 12, 1950, the lawyers met for the seventh and final day of the *Blue* trial. The defense called D.B. Bryan, the Dean of Wake Forest, to bolster Proctor's earlier testimony. Explaining the report he produced with Proctor, Bryan testified that the conceded differences between Durham's black and white schools were the product of external forces, not intentional discrimination.[207] School systems across North Carolina, and in Durham particularly, experienced dramatic increases in black student attendance in the preceding twenty years.[208] During the first half of that period, the Depression made it "very difficult to get money to provide

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[200] Defendants' Expert Report on the Durham City Schools at 1, Blue v. Durham Pub. Sch. Dist., 95 F. Supp. 441 (M.D.N.C. 1951) (on file at NCC); *see also* Transcript of Record, *supra* note 46, at 972.

[201] Transcript of Record, *supra* note 46, at 993.

[202] *Id.* at 994.

[203] *Id.*

[204] *Id.* at 981.

[205] *Id.* at 996–97.

[206] *Id.* at 999.

[207] *Id.* at 1185.

[208] *See id.*

buildings," and during the latter half, wartime restrictions made it "impossible to construct school buildings."[209] According to Bryan, this reflected broader trends in the nation's public schools, which were marked by "an acute and deplorable condition" after the War.[210] Moreover, the experts' report noted that the sharp increase in enrollment at Hillside High compared to the concurrent decline in enrollment at Durham High "reveal[ed] again the effectiveness of the work being done" at Hillside.[211] Thus, although there were material differences between Durham's black and white schools, Bryan concluded that, "under the circumstances, the administrators were doing a reasonable thing."[212]

Finally, J. Rupert Picott offered rebuttal testimony making clear that planned improvements to Durham's black schools would not make them equal to their white counterparts.[213] In an addendum to his earlier report, Picott declared it "clearly obvious . . . that the current [projects] . . . will not eliminate the inequalities in the school facilities for the races."[214] With that, the trial concluded after seven full days of testimony.

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[209] *Id.*; *see also* Defendants' Expert Report on the Durham City Schools at 3–4, Blue v. Durham Pub. Sch. Dist., 95 F. Supp. 441 (M.D.N.C. 1951) (on file at NCC) ("During the last ten-year period building has been impossible. The war struck just when a building program was being projected. The continuing increase in Negro School population of course accentuated an already over-crowded situation.").

[210] Transcript of Record, *supra* note 46, at 1184. Bryan referenced a *New York Times* report that described conditions in public schools across the country. According to Bryan, that report found "that buildings and equipment were far behind and that teachers were overloaded, and other unfortunate circumstances, making . . . the public school system at the lowest ebb that it had been in many, many years." *Id.* Thus, Bryan concluded that "this situation in the city of Durham is not unlike what prevails generally." *Id.*

[211] Defendants' Expert Report on the Durham City Schools: Pupil Personnel at 3–4, Blue v. Durham Pub. Sch. Dist., 95 F. Supp. 441 (M.D.N.C. 1951) (on file at NCC).

[212] Transcript of Record, *supra* note 46, at 1188. In addition to Bryan, the defense called H.K. Collins, Director of Vocational and Adult Education for Durham schools; Jane B. Wilson, library supervisor for Durham schools; and John L. Woodward, Business Manager for Durham schools. *Id.* at 1239, 1272, 1282.

[213] *See id.* at 1332.

[214] *Id.*

D. Reactions to the Blue *Trial and Decision*

From its filing in May 1949 until Judge Hayes issued his final ruling two years later, *Blue* was one of North Carolina's most important civil rights issues. Residents from across the state poured into Durham's federal courthouse to watch the lawyers argue *Blue* firsthand. So did prominent black figures from across the country. The acclaimed novelist Chester Himes, who visited Durham in June 1950 to teach a creative writing seminar, spent several mornings in court watching the lawyers argue *Blue*.[215] That experience left a lasting impression on the author and helped change the trajectory of his writing going forward.[216] Thurgood Marshall also visited Durham to watch the trial. Although Marshall was not directly involved with the litigation, the NAACP leader "had stopped by to give advice and moral support to the two young Negro attorneys from Virginia under his supervision."[217]

Figure 1. "Attorneys for the Plaintiffs and star witnesses in the local school discrimination suit now being heard in the United States Middle District Court by Judge Johnson J. Hayes are shown above. Left to right are Dr. Stephen J. Wright, dean of the faculty, Hampton Institute, Virginia; Attorneys Martin A. Martin, Oliver W. Hill, Spottswood Robinson, Richmond, Va.; Attorney J.H. Wheeler; Dr. J. Rupert Picott, Executive Secretary of the

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[215] Margaret Hunt Gram, *Chester Himes and the Capacities of State*, 39 STUD. IN AM. FICTION 243, 252–53 (2012).

[216] *See id.*

[217] *Id.* at 252 (quoting CHESTER HIMES, THE QUALITY OF HURT: THE AUTOBIOGRAPHY OF CHESTER HIMES 122 (1972)).

Virginia Teachers Association; and attorney M. Hugh Thompson." CAROLINA TIMES (Durham), July 8, 1950, at 1.

For those who could not attend the trial, the black press provided a window into the proceedings. For example, multiple newspapers documented the "unprecedented and long-awaited" *Blue* trial's first week.[218] As the *Carolina Times* reported, "Glaring inequalities that have robbed Negro school children of millions of dollars in educational facilities here for the past 50 years were disclosed in the long awaited equalization suit brought by a group of Negro parents on behalf of their children Monday."[219] The paper emphasized the testimony and reports of the plaintiffs' experts,[220] observing that the "[c]orroborated testimony of a parade of expert witnesses told the court that flagrant examples of rank discrimination existed in all areas of the entire Durham school system."[221] The *Carolinian*, the leading black-owned newspaper in neighboring Raleigh, reported that "[e]very effort is being made by the plaintiffs to have the matter which exists in Durham declared unconstitutional."[222]

Reactions to the first week of trial were not exclusively positive, however. The *Carolina Times* reported that local residents, calling themselves the "Better Government League," mailed an anonymous letter to Judge Hayes offering a "rebuke of the jurist" and warning that "Negroes

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[218] *$$$ Taken From Negro School Pupils*, *supra* note 171, at 1; *see also Lawyers Gird For Battle In Long-Awaited School Case*, CAROLINA TIMES (Durham), June 24, 1950, at 1, http://newspapers.digitalnc.org/lccn/sn83045120/1950-06-24/ed-1/seq-1.pdf (reporting on the trial in the weeks before it began).

[219] *$$$ Taken From Negro School Pupils*, *supra* note 171, at 1.

[220] The paper quoted the experts at length. For example, it reported that one expert testified:

> The immediate reason for the evident inequality is obvious to any qualified, objective student of education. That reason is that the City of Durham has invested a grossly disproportionate amount of money in its Negro schools and consequently has not purchased for the Negro children of the city educational opportunities equal to those provided for its white children. Even the most cursory inspection reveals that this inequality is both cumulative and current.

Id. at 8.

[221] *Id.*

[222] *Durham Suit in Top Court Seeks One Rule*, *supra* note 123, at 8.

[should] be left to provide their own education with their own funds."[223] Judge Hayes rejected that request in a public statement shortly before the trial adjourned.[224] The judge affirmed that he "had taken an oath to uphold the Constitution of the United States" and "that the case would be decided solely on the evidence."[225] Judge Hayes also commended lawyers on both sides for their "splendid conduct" during the trial.[226] He then warned that any similar letters he received would be forwarded to the Federal Bureau of Investigation and that the authors would be imprisoned.[227] Finally, he implored all "cool and calm-headed and intelligent people to prevent" any future disturbances, emphasizing that the case "should be tried without any passion."[228] "It is not like a political contest, and it can't be made a political contest, and it won't be made one," he said.[229]

Similar responses followed the close of the *Blue* trial one month later. In Durham, the *Carolina Times* again praised the effort, recognizing Wheeler and Thompson for their "act of profound service in bringing public notice to disparities between the Negro and white schools of this community."[230] The paper honored the duo with its inaugural "Page One" award on August 28, 1950.[231] Louis Austin, publisher of the *Carolina Times* and a key figure in Durham's civil rights movement, publicly announced the new award.[232]

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[223] *Judge Attacks Anonymous Letter: Will Call FBI If More Are Received*, CAROLINA TIMES (Durham), July 8, 1950, at 1, http://newspapers.digitalnc.org/lccn/sn83045120/1950-07-08/ed-1/seq-1.pdf.

[224] *Id.*; *see also* Transcript of Record, *supra* note 46, at 765–69.

[225] *Judge Attacks Anonymous Letter*, *supra* note 223, at 1; Transcript of Record, *supra* note 46, at 767.

[226] *Judge Attacks Anonymous Letter*, *supra* note 223, at 1; Transcript of Record, *supra* note 46, at 765.

[227] Transcript of Record, *supra* note 46, at 767.

[228] *Id.* at 766, 67.

[229] *Id.* at 766.

[230] *Faces of the Times*, CAROLINA TIMES (Durham), July 22, 1950, at 1, http://newspapers.digitalnc.org/lccn/sn83045120/1950-07-22/ed-1/seq-1.pdf.

[231] *Citizens Honor Lawyers In Equal Schools Case*, CAROLINA TIMES (Durham), Sept. 2, 1950, at 1, http://newspapers.digitalnc.org/lccn/sn83045120/1950-09-02/ed-1/seq-1/; WINFORD, *supra* note 1, at 90.

[232] *Citizens Honor Lawyers*, *supra* note 231, at 1.

Austin strongly supported the *Blue* suit, having publicized it throughout the litigation.[233] In his announcement, Austin remarked that Wheeler and Thompson's service to Durham "transcends whatever immediate reforms which the suit itself may accomplish."[234] He explained that *Blue*'s ultimate result was to inform white leaders that "Negro citizens of this community not only know their responsibilities but that they know how to use democratic processes to obtain the right to realize their responsibilities."[235]

For its part, the school board lauded local administrators for their work defending the board in court. On July 17, 1950, board members passed a resolution commemorating Basil M. Watkins, L. Stacey Weaver, and the board's business manager, John L. Woodward, for their "hard, unselfish, unremitting work" and for "the courage and intelligence" they displayed while testifying at trial.[236] Members added, "Their unflagging devotion to their cause, their courage, self-imposition, and good sense displayed at all times will not be forgotten by the members of this board."[237]

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[233] *See* GERSHENHORN, *supra* note 13, at 91–94.

[234] *Attorneys Thompson And Wheeler To Get First Annual Press Club Award*, CAROLINA TIMES (Durham), July 22, 1950, at 1, http://newspapers.digitalnc.org/lccn/sn83045120/1950-07-22/ed-1/seq-1.pdf.

[235] *Id.*

[236] Durham City Board of Education Minutes, July 17, 1950 (on file at NCC).

[237] *Id.*

Figure 2. "Durham citizens joined the Durham Press Club in honoring Attorneys M. Hugh Thompson and J.H. Wheeler at the Press Club's first annual 'Page One Awards' program held Monday night at the local W.D. Hill Community Center . . . . Winifred [sic] Martin, one of the plaintiffs in the case, and also a son of civic leader D.B. Martin, is shown above reading the citation to the two Attorneys, Wheeler at left and Thompson at right." CAROLINA TIMES *(Durham), Sept. 2, 1950, at 1.*

It took the court six months to issue a ruling in *Blue*, but, for the plaintiffs, it was worth the wait. On January 26, 1951, Judge Hayes published his opinion that "the plaintiffs have been, and are, discriminated against on account of their race and that they are entitled to injunctive relief."[238] Although local officials blamed school inequities on changing circumstances and funding freezes, Judge Hayes found no "justification for not furnishing the negro school children substantially equal educational facilities to those furnished white children."[239] Judge Hayes observed that there were "three excellent Junior high schools well distributed over the city for the convenience of . . . white children and none for the negroes."[240] In most white schools, there were "cafeterias, gymnasium, music, art, home economics, laboratories and equipment, and playgrounds for the white children," while similar facilities were absent in black schools.[241] Moreover, due to the "abundant building space for white children and the crowded conditions in

[238] Blue v. Durham Pub. Sch. Dist., 95 F. Supp. 441, 445 (M.D.N.C. 1951).

[239] *Id.* at 444.

[240] *Id.*

[241] *Id.*

the negro schools, white children enjoy[ed] many superior advantages to those available to the negro children."[242] Those advantages included "[m]ore and better supervision, greater extra curricular opportunities, better laboratory equipment and facilities, in music and art, lighter teacher load, better recreational facilities and better accommodations."[243] These were conditions that Judge Hayes had by then seen firsthand. On July 13, the morning after the trial adjourned, Judge Hayes toured several Durham schools, accompanied by counsel for both sides, to personally inform his decision-making.[244]

In Judge Hayes calculation, "the net result" of the school board's policies left "the negro school children at many disadvantages" that had to "be overcome before substantially equal facilities [were] made available to the negro children."[245] Accordingly, differences between Durham's black and white schools were "not merely unimportant variations incident to the maintenance of separate establishments, but constitute[d] unlawful discriminations against pupils of the colored race." It was "no defense" that the discrimination flowed "in part from variations in the size of the respective student bodies or locations of the buildings. The burdens inherent in segregation must be met by the state which maintains the practice."[246]

However, Judge Hayes did finally dismiss the state defendants. He noted that sovereign immunity and the Eleventh Amendment did not insulate the state defendants from suit: Because the constitution and laws of North Carolina prohibited racial discrimination in segregated schools, any official who "permitted or practiced" discrimination acted contrary to state law.[247] Utilizing the pre-*Pennhurst* framework still applicable at the time, Hayes reasoned that the state officer acted in his individual, rather than official,

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[242] *Id.*

[243] *Id.*

[244] Transcript of Record, *supra* note 46, at 1334; *see also id.* at 901 ("I plan to visit all these schools before I make any decision in it.").

[245] *Blue*, 95 F. Supp. at 444.

[246] *Id.* at 445 (quoting *Carter v. Sch. Bd. of Arlington Cnty.*, 182 F.2d 531, 535–36 (4th Cir. 1950)).

[247] *Id.* at 443.

capacity, such that sovereign immunity did not apply.[248] Even so, he did not hold the state defendants liable. Judge Hayes ruled that the plaintiffs' evidence against the state did "not show that the state officials denied plaintiffs any right by reason of their race or color."[249]

Notably, despite Judge Hayes's prediction that his decision "might go to another court, and may go on even to another one," the school board did not appeal.[250] The board decided against further action at a special meeting called on February 6, where William Umstead "explained the recent court decision . . . in which the Board and other defendants were held guilty of discrimination against the Negro race in the furnishing of school facilities."[251] Umstead "thought it useless to appeal" to the U.S. Court of Appeals for the Fourth Circuit because he believed Judge Hayes's ruling was based on "a recent finding of the Circuit Court in a similar case in Virginia."[252] He

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[248] *See id.* ("This is not a suit against the State of North Carolina . . . . If discriminations are permitted or practiced, the officials are not executing the laws of the state: therefore a suit against the officials is not a suit against the state."). This holding is inconsistent with the Supreme Court's later decision in *Pennhurst State Sch. v. Halderman*, 465 U.S. 89 (1984), making clear that the Eleventh Amendment prevents federal courts from ordering state officials to conform their conduct to state laws.

[249] *Blue*, 95 F. Supp. at 444.

[250] Transcript of Record, *supra* note 46, at 265.

[251] Durham City Board of Education Minutes, Feb. 6, 1951 (on file at NCC); *see also Hillside High School Historic Register Application*, *supra* note 80, at § 8 p. 13.

[252] Durham City Board of Education Minutes, Feb. 6, 1951, *supra* note 251. Umstead appears to have been referencing *Carter v. School Board of Arlington County, Virginia*, 182 F.2d 531 (4th Cir. 1950). Judge Hayes quoted *Carter* at length in *Blue*:

> It is established, however, that the right of the individual student to the privilege of public instruction equivalent to that given by the state to the individual student of another race, is a personal one and equivalency cannot be determined by weighing the respective advantages furnished to the two groups of which the individuals are members . . . . [T]he question cannot be decided by averaging the facilities provided for the two classes of pupils throughout the county and comparing one with the other, since the rights created by the Fourteenth Amendment are individual and personal and the prohibitions of the Amendment are observed only when the same or equivalent treatment is accorded to persons of different races similarly situated.

Blue, 95 F. Supp. at 445 (quoting *Carter*, 182 F.2d at 534–35). For a profile of *Carter*, *see* EDDS, *supra* note 13, at 185–86.

therefore thought it unlikely that the Fourth Circuit would reverse the judge's decision. Local lore, however, posits that political ambitions may have also influenced Umstead's advice. Durham residents have speculated that Umstead counseled the school board not to appeal because he hoped to free himself from the case. Umstead ran for governor the next year, so it is possible that he wanted to discharge any baggage attached to *Blue*. Whatever his true motives, Umstead also advised the board to terminate "any further contracts for school buildings until sufficient funds were at hand to do those things specifically discussed in the judgment."[253] Accordingly, the school board instructed its architect, H. Raymond Weeks, to close bidding for contractors interested in remodeling Durham High School, which was scheduled to open on February 27, 1951.[254]

North Carolina's black community welcomed the *Blue* decision. In Raleigh, the *Carolinian* celebrated the Durham lawyers' "winning battle" with the front-page headline "DURHAM PARENTS WIN VS. SCHOOLS."[255] It reported that *Blue* was "hailed as a great legal victory throughout the state and the South" and that the lawyers' performance "drew plaudits from every quarter, with the case having been termed one of the greatest civil rights fights ever waged."[256] Further west, the *High Point Enterprise* observed that "[t]he Durham case was the first of its kind ever instituted in North Carolina" and that many believed *Blue* would inspire similar litigation across the state.[257]

National papers also heralded *Blue*. The *Pittsburgh Courier*, a leading black weekly, detailed Judge Hayes's "surprise ruling" and the preceding litigation, which the paper called "one of the best prepared and best presented of the civil rights cases."[258] According to the *Courier*, "The high cost of segregation shown as bright throughout Tarheelia last week as the highly

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[253] Durham City Board of Education Minutes, Feb. 6, 1951, *supra* note 251.

[254] *Id.*

[255] *Durham Parents Win vs. Schools*, CAROLINIAN (Raleigh), Feb. 3, 1951, at 1, http://newspapers.digitalnc.org/lccn/sn80008926/1951-02-03/ed-1/seq-1.pdf.

[256] *Id.* at 8, http://newspapers.digitalnc.org/lccn/sn80008926/1951-02-03/ed-1/seq-8.pdf.

[257] *Judge Rules in Favor of Negroes*, HIGH POINT ENTERPRISE (High Point, NC), Jan. 27, 1951, at 1, https://newscomwc.newspapers.com/image/10789506.

[258] *Surprise Ruling Admits Inequality; Case Dismissed*, PITTSBURGH COURIER, Feb. 10, 1951, at 13, https://newscomwc.newspapers.com/image/40050140.

publicized Carolina moon" while the implications of Judge Hayes' decision "began to crystalize."[259] Moreover, the *Courier* recognized that *Blue* might have broader consequences. Because Durham was "the first major city" to secure a favorable judgment in a school equalization case, there was "much speculation" about *Blue*'s "effect on education throughout the South."[260]

The fanfare was surely warranted. *Blue* gave African Americans in Durham increased leverage against the local school board. With a court order secured, the plaintiffs' lawyers could seek contempt charges against officials who did not comply with Judge Hayes's ruling.[261] Moreover, the victory had clear symbolic value for black citizens committed to using the courts to attack racial discrimination. In that regard, *Blue* transcended Durham, as the decision inspired similar suits across North Carolina.[262] It gave the state's black citizens "the confidence to continue the battle for full citizenship by shifting to legal tactics, especially when it came to educational equality."[263] In Louis Austin's powerful words, the decision "dispelled forever the silly notion that Negroes cannot institute a lawsuit against white people without blood flowing in the streets."[264]

But the victory was incomplete. Judge Hayes's ruling left unresolved many vexing issues on the path toward equalization. Perhaps most important, the judge granted injunctive relief without prescribing a "concrete plan" for how that relief would be administered.[265] That omission enabled local officials to delay action aimed toward equalizing Durham's segregated schools. The decision also legitimized segregation by adhering to *Plessy*'s separate but equal doctrine, which the Supreme Court invalidated just a few years after *Blue*.

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[259] *Id.*

[260] *Id.*

[261] WINFORD, *supra* note 1, at 98–99.

[262] GERSHENHORN, *supra* note 13, at 92.

[263] WINFORD, *supra* note 1, at 99.

[264] *Attorneys Thompson And Wheeler To Get First Annual Press Club Award*, *supra* note 234, at 1.

[265] WINFORD, *supra* note 1, at 98.

III. SITUATING *BLUE* WITHIN THE CIVIL RIGHTS MOVEMENT

Uncovering the *Blue* litigation powerfully advances our understanding of Durham's history and the NAACP's national campaign to end school discrimination. Traditional civil rights narratives emphasize the latter, giving little attention to the local communities who implemented the national agenda. But recent scholarship recognizes the importance of taking what Tomiko Brown-Nagin describes as a "bottom up" approach to civil rights.[266] That approach shifts local perspectives "from the periphery to the center of the legal history of the civil rights era."[267] In that vein, the following pages consider the ways in which Durham's interests both diverged from and aligned with those of the NAACP. This local narrative also has broad implications. Studying *Blue*, a case representative of school equalization lawsuits, shows why the NAACP's decision to directly attack segregation made sense from a practical, resource-conserving perspective. That pragmatism dovetailed with the principles of equality later invoked in *Brown*.

A. Durham's Civil Rights Movement

Blue was a watershed moment for black North Carolinians. Yet only three years after the plaintiffs' victory in *Blue*, in 1954, the U.S. Supreme Court issued *Brown v. Board of Education*.[268] Decided with four other cases challenging segregation as per se unconstitutional, *Brown* rejected the separate but equal doctrine first endorsed in *Plessy v. Ferguson* and used as the framework for *Blue*. After *Brown*, equalizing schools was no longer enough; the Constitution required full integration of public schools across the country. *Brown* thus overshadowed *Blue*, one reason why the latter was long forgotten by legal historians.

Some scholars have minimized differences between *Brown* and *Blue*. They argue that, given slightly different circumstances, *Blue* could have replaced *Brown* as "the namesake for arguably the most significant court

[266] BROWN-NAGIN, *supra* note 16, at 7.

[267] *Id.* at 8.

[268] Brown v. Bd. of Educ. of Topeka, 347 U.S. 483 (1954).

case" in the twentieth century.[269] Had the school board sought appellate review, so the argument goes, then the *Blue* lawyers could have shifted their attention to attacking segregation directly. That could have resulted "in *Blue v. Durham* being combined into the other cases that went on to make up *Brown v. Board*."[270] Thus, "by virtue of being earlier in the alphabet," *Blue* "would have replaced *Brown* as the name of the landmark case" and therefore mandated integration in public schools across the nation.[271]

But *Blue* was not an integration suit. It was argued squarely within the confines of *Plessy*'s separate but equal framework, and the lawyers would have been powerless to change that on appeal, as arguments not raised at trial are generally waived in appellate courts.[272] *Blue* thus represented an earlier era of challenges to school discrimination. Fearful of inadvertently causing the Supreme Court to affirm *Plessy*, the lawyers of that era focused on ameliorating disparities between black and white schools, not integrating them.[273] For those lawyers, attacking unequal school spending might indirectly force states to integrate while also securing money to provide better schools. States tasked with equalizing schools might choose to desegregate instead if improving separate black schools came "at so great a cost as to

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[269] *See* Brandon K. Winford, "The Battle For Freedom Begins Every Morning": John Hervey Wheeler, Civil Rights, And New South Prosperity 214 (2014) (Carolina Digital Repository) (unpublished Ph.D. dissertation, University of North Carolina, Chapel Hill) (recognizing that others have made this argument).

[270] Adams, *supra* note 13, at 60.

[271] *Id.*

[272] *See* Singleton v. Wulff, 428 U.S. 106, 120 (1976) ("It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below."). In contrast, *Briggs v. Elliot*, 342 U.S. 350 (1952), one of the cases later consolidated with *Brown*, began as a school equalization case but then became a desegregation case when it was refiled *before* the case reached trial. EDDS, *supra* note 13, at 213–14; *see also* Wade Kolb III, Briggs v. Elliott *Revisited: A Study in Grassroots Activism and Trial Advocacy from the Early Civil Rights Era*, 19 J.S. LEGAL HIST. 123, 136–37 (2011).

[273] Gilbert Ware, Hocutt: *Genesis of* Brown, 52 J. NEGRO EDUC. 227, 230 (1983) ("Afraid that an attack on that doctrine would result in the Court's reaffirmation of it, the NAACP intended to skirt *Plessy* and instead try to force the South to honor the 'equal' part of the doctrine.").

make segregation a fiscally intolerable policy."[274] *Brown*, in contrast, advanced beyond that approach; its lawyers argued that separate schools could never produce equal schools even if equally resourced. In that sense, the two decisions are poles apart.

Still, the chronological proximity of the opinions is significant for other reasons. While the Durham lawyers sought equalization, lawyers across the South were bringing or contemplating school desegregation suits like *Brown*. Indeed, prominent NAACP members began gradually endorsing desegregation in the late 1940s.[275] As early as 1947, Thurgood Marshall publicly rejected equalizing segregated schools to achieve "Jim Crow DeLuxe."[276] In 1948, Marshall persuaded the NAACP's Charlotte branch to focus on public school desegregation rather than equalization.[277] He feared that demanding equalization "might legitimate the idea of 'adjustment through separate schools.'"[278] And by June 1949, many black leaders in North Carolina, including Kelly Alexander, president of the state NAACP conference, supported full desegregation.[279] This growing support for desegregation in North Carolina and nationally raises interesting questions: Why did the Durham lawyers seek equalization rather than desegregation? At a time when the push toward integration was gaining momentum, why not challenge *Plessy*'s separate but equal doctrine? Does the lawyers' chosen strategy say anything about broader trends in either Durham's legal history or that of the long civil rights movement?

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[274] TUSHNET, *supra* note 6, at 105; *see also* SITKOFF, *supra* note 56, at 19 (noting that the NAACP launched equalization suits with the goal of making "segregation so prohibitively expensive that the South would dismantle its biracial system because of the financial burden").

[275] *See* EDDS, *supra* note 13, at 178.

[276] *Id.* (quotation omitted).

[277] THUESEN, *supra* note 3, at 187.

[278] *Id.*

[279] *Id.* at 190. Alexander identified "no evidence that separate educational facilities will ever provide equal educational advantages." *Id.* (quotation omitted). Instead, North Carolina needed a "county by county campaign . . . to fight discrimination and segregation in the educational system." *Id.* (quotation omitted).

The simplest explanation is that the NAACP did not officially endorse desegregation suits until 1950. That June, while the *Blue* trial was ongoing, Thurgood Marshall convened a conference in New York to decide whether the NAACP would pursue desegregation suits.[280] Spottswood Robinson, who attended the conference while Martin A. Martin and Oliver Hill were in Durham arguing *Blue*,[281] later recalled that litigating equalization suits proved the strategy costly and ineffective.[282] In her biography of Robinson and Hill, historian-journalist Margaret Edds explains that "[s]chool boards hemmed, hawed, and lied. Officials had to be dragged, kicking and screaming, toward every major advance. The strategy simply consumed too much time, money, and effort with too little result."[283] Moreover, efforts to equalize schools risked normalizing segregation. Robinson observed that lawyers "were nailing the lid on our own coffin" by requesting "newer and costlier monuments to segregation" in the form of improved schools for black students.[284] Thus, Robinson and others swore off equalization suits even before the 1950 conference—"it was going to be segregation head on."[285]

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[280] EDDS, *supra* note 13, at 191. Coincidentally, the year 1950 also marked the death of Charles Hamilton Houston, chief counsel for the NAACP Legal Defense and Educational Fund before Thurgood Marshall. *See generally* GENNA RAE MCNEIL, GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS (1984). Houston was the architect of the NAACP's litigation strategy and a proponent of both school and teacher pay equalization lawsuits. *Id.*

[281] EDDS, *supra* note 13, at 191; *see also* HILL, *supra* note 13, at 158 (explaining that Hill did not attend the convention because he and Martin "were trying *Blue v. Durham Public School District*").

[282] *See* EDDS, *supra* note 13, at 189 ("We won legal victories without measurably increasing the Negro student's share in the educational wealth.").

[283] *Id*.

[284] *Id*. Oliver Hill expressed similar sentiments. He recalled that the "equalization method" of challenging discrimination "one case at time failed to produce enough results" and that NAACP lawyers "were just grinding our wheels with all these suits." RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 474 (First Vintage Books 2004) (1975); TUSHNET, *supra* note 6, at 109 (explaining that Thurgood Marshall "rejected equalization as the sole form of relief sought, because that would implicitly accept the position that segregated schools were legally tolerable and could be made equal in fact").

[285] EDDS, *supra* note 13, at 189.

Yet it was not until the June conference that the NAACP formally adopted that policy. *Blue*, commenced in 1949, therefore might have sought desegregation had it been filed a year or two later.[286] Indeed, the next school discrimination case that Martin, Hill, and Robinson filed was *Davis v. County School Board of Prince Edward County*—one of the desegregation cases that was consolidated with *Brown*.[287]

Timing, however, cannot alone explain the decision-making underlying *Blue*. Although the NAACP had not officially endorsed desegregation before 1950, the Durham lawyers could have nonetheless filed a desegregation suit. Lawyers east of Durham, for example, sought desegregation well before the NAACP conference. By February 1950, months before the NAACP's June conference, the U.S. Court of Appeals for the District of Columbia Circuit had already heard arguments in and decided *Carr v. Corning*.[288] *Carr* sought to desegregate public schools in the nation's capital and was filed in October 1947.[289] Similarly, *Briggs v. Elliott*,[290] one of the cases that was later consolidated with *Brown*, was initially filed in 1947.[291] And in 1948, Oliver Hill and Spottswood Robinson attempted to enroll twenty-nine Virginian schoolchildren in a white school after local officials failed to equalize the area's segregated schools.[292] Desegregation was not out of the question before 1950.

Moreover, lawyers were already suing to desegregate higher education in the Durham area around the time that *Blue* was filed. In October 1949,

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[286] *See* HILL, *supra* note 13, at 158 (noting that *Blue* was Hill and Martin's "last separate but equal case"); *see also* WINFORD, *supra* note 1, at 214 (observing that in late 1950, "just as the school equalization movement gained momentum in North Carolina, NAACP and LDF leaders changed their litigation policies and resolved to focus legal efforts on cases that directly challenged the Jim Crow system.").

[287] Davis v. Cnty. Sch. Bd. of Prince Edward Cnty., 103 F. Supp. 337 (E.D. Va. 1952).

[288] Carr v. Corning, 182 F.2d 14 (D.C. Cir. 1950).

[289] *Id.* at 15–16; *id.* at 22 (Edgerton, J., dissenting).

[290] Briggs v. Elliott, 342 U.S. 350 (1952).

[291] *Briggs* began as a school equalization case, but the suit shifted to attacking segregation directly through multiple refilings before the case reached trial. EDDS, *supra* note 13, at 213–14; *see also* Kolb, *supra* note 272, at 136–37.

[292] EDDS, *supra* note 13, at 1–3.

NAACP lawyers Thurgood Marshall and Spottswood Robinson, along with a Durham-based lawyer, Conrad O. Pearson, sued the University of North Carolina, requesting that it desegregate its law school.[293] That suit, *Epps v. Carmichael*,[294] was also argued before Judge Hayes but resulted in a victory for the state. In *Epps*, Judge Hayes ruled that black students were not entitled to attend UNC Law because they had an equal opportunity to study law at the North Carolina College for Negroes in Durham.[295] That decision was reversed on appeal.[296]

Epps differed from *Blue* in that the former involved integrating a law school, and undermining *Plessy* in that context had long been an NAACP priority.[297] Further, the NAACP played a larger role in *Epps* than in *Blue*. Whereas Durham-based lawyers Wheeler and Thompson rejected claims that the NAACP was pulling strings in *Blue*, there were no doubts that *Epps* was an NAACP case.[298] Even Conrad Pearson, local counsel in *Epps*, was a state NAACP member who "had gained a reputation as a radical and pioneer for

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[293] Complaint, Epps v. Carmichael, 93 F. Supp. 327 (M.D.N.C. 1950) (Civ. A. No. 144), https://integration.law.unc.edu/files/2019/01/Epps-v-Carmichael-Complaint-Bond-and-Summons-Signed-Notarized.pdf.

[294] Epps v. Carmichael, 93 F. Supp. 327 (M.D.N.C. 1950).

[295] *Id.* at 331.

[296] McKissick v. Carmichael, 187 F.2d 949, 954 (4th Cir. 1951); *see also* Nixon, *supra* note 92, at 1761–63; Wendy B. Scott, *McKissick v. Carmichael Revisited: Legal Education in North Carolina through the Lens of Desegregation Jurisprudence*, 34 N.C. CENT. L. REV. 38, 58–61 (2011).

[297] *See* EDDS, *supra* note 13, at 178–79 (explaining that the NAACP employed a "two-pronged approach" in which it sought desegregation at the collegiate and professional levels and equalization at the high school and elementary levels); TUSHNET, *supra* note 6, at 70–81 (describing efforts to secure favorable precedents undermining the separate but equal doctrine as applied to law schools). The professional school context also changed the court's analysis, permitting Judge Hayes to consider law school graduates' "standing" with "Judges, and lawyers, and litigants, and jurors and witnesses," for instance. *Epps*, 93 F. Supp. at 330. These context-dependent and fact-specific analyses in *Epps* and *Blue* limit the extent to which those cases can be usefully compared, even in the context of Durham equalization and desegregation suits.

[298] *See* WINFORD, *supra* note 1, at 94.

his legal attacks aimed at Jim Crow."[299] Pearson was also "a member of [Thurgood] Marshall's inner circle," according to NAACP lawyer Constance Baker Motley.[300] Similarly, Marshall himself played a leading role in *Epps*.[301] The NAACP became aware of the case after students at North Carolina College wrote to the national office offering to challenge segregation at UNC.[302] Earlier, the students had picketed the state legislature to protest inequities between their law school and UNC Law.[303] But despite these important differences, *Epps* demonstrates that desegregation was at least on the table for the Durham lawyers in *Blue* even before the NAACP's 1950 conference. For that reason, the timing explanation is incomplete.

Durham's unique history fills that gap and explains why *Blue* centered on school equalization rather than desegregation. The *Blue* plaintiffs and their lawyers were primed to seek equalization because they were from Durham—a community where African Americans believed they could compete if given an equal opportunity. Durham's black economic success, the heart of which was the city's Black Wall Street, gave the litigants and lawyers faith in the possibility that separate institutions could be equal. For example, James E. Shepard, president of North Carolina College and a leader in Durham's black community, argued in favor of maintaining segregation in the 1930s.[304] He believed that integrating schools in North Carolina "would not provide the best education for African Americans," at least in higher education. Shepard

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[299] *Id.*; *see also* Jones, *supra* note 14, at 1864 ("Pearson was among the younger generation of black professionals in Durham who called themselves the 'Radical Young Negroes,' which included colleague Cecil McCoy and the owner and editor of the confrontational Carolina Times, Louis Austin.") (quoting BROWN, *supra* note 20, at 289).

[300] CONSTANCE BAKER MOTLEY, EQUAL JUSTICE UNDER LAW: AN AUTOBIOGRAPHY 113 (1998).

[301] *See* Scott, *supra* note 296, at 58–59 (describing Marshall's role in the case).

[302] CHRISTINA GREENE, OUR SEPARATE WAYS: WOMEN AND THE BLACK FREEDOM MOVEMENT IN DURHAM, NORTH CAROLINA 25 (2005).

[303] WINFORD, *supra* note 1, at 94.

[304] *See* Gershenhorn, *supra* note 37, at 287–88.

instead preferred adequately funding black institutions, like his college in Durham, to advance black interests.[305]

Though Shepard's faith in black institutions was arguably self-interested,[306] a similar belief in the potential of black schools and teachers likely guided the decision-making in *Blue*. Professor Winford observes parallel sentiments held by John H. Wheeler, one of the two Durham lawyers who led the litigation.[307] Wheeler was proud of the accomplishments that black North Carolinians "made with inadequate resources" and believed that, "if given equal opportunities, they could achieve much more."[308] Although Wheeler supported improving black opportunities wholesale, he was particularly focused on public education, which led to his involvement in *Blue*.[309]

Wheeler understood that black Durham had been working toward equality within *Plessy*'s segregationist framework for more than a half century. Because of their success, "by the time *Blue* was decided, the expectation of 'separate but equal' was actually becoming somewhat of a reality in Durham."[310] Similarly, a Raleigh newspaper observed in 1951 that African Americans in Durham "had a better chance of fairness than in any other county" in North Carolina or the South.[311] In that regard, Durham was clearly unique, and that uniqueness is reflected in the *Blue* lawyers' decision to file an equalization suit. Wheeler and Thompson sought equalization rather than desegregation because, as black Durham residents, they believed that

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[305] *Id.* at 287–88; *see also* Ware, *supra* note 273, at 228 (observing that Shepard "believed that Blacks preferred separate education, provided that it was indeed equal").

[306] *See, e.g.*, ANDERSON, *supra* note 18, at 310 ("Behind Shepard's reluctance to cooperate with Pearson [in desegregating UNC] was a long struggle to keep his institution afloat.").

[307] *See* WINFORD, *supra* note 1, at 75.

[308] *Id.*

[309] *See id.* at 75–76.

[310] Apostoleris, *supra* note 13, at 147.

[311] *Warning From A Friend*, *supra* note 93.

their community could receive a fair shake and because they were confident in the ability of their own teachers and schools.[312]

But *Blue* was not North Carolina's first or only school equalization lawsuit. The first such suit targeted schools in Lumberton and was filed by Herman L. Taylor in 1947.[313] Taylor served as Wheeler's law professor at North Carolina College just months before the Lumberton suit, but he left the academy to more actively campaign for civil rights "unconstrained by Dr. [James] Shepard's views on school litigation."[314] Taylor dropped the suit in 1949 due to legal obstacles and waning support from the NAACP, which was beginning to coalesce around direct attacks on segregation by that time.[315] Similarly, in January 1950, eight months after *Blue*'s filing, Wheeler and Thompson filed another equalization suit in Wilson County, eighty miles east of Durham.[316] Before filing that suit, Wheeler advised the plaintiffs to seek equalization rather than desegregation because he believed the former approach had a greater likelihood of success.[317] Suing for equalization would give black residents "political space to simultaneously demand modern facilities and navigate the increasingly complex issue of segregated

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[312] *Cf.* Kara Miles Turner, *Both Victors and Victims: Prince Edward County, Virginia, the NAACP, and* Brown, 90 VA. L. REV. 1667, 1679 (2004) (noting that some African Americans saw segregated schools "as vital spaces where black children could realize their highest potential under caring black teachers") (quotation omitted).

[313] *See* THUESEN, *supra* note 3, at 181.

[314] WINFORD, *supra* note 1, at 88–89; *see also* THUESEN, *supra* note 3, at 180 (noting that Taylor "chafed against James Shepard's expectations of deference"). For an overview of the Lumberton litigation, see Adams, *supra* note 13, at 17–31 and THUESEN, *supra* note 3, at 179–83.

[315] WINFORD, *supra* note 1, at 89; *see also* THUESEN, *supra* note 3, at 182 (explaining that the NAACP and local organizers in Lumberton were "falling out of sync" because "[i]ntegration with white schools, rather than the construction of new black schools, was quickly emerging as the national NAACP's chief goal").

[316] *Another School Suit Filed: Wilson Citizens Sue in Equal School Fight*, CAROLINA TIMES (Durham), Jan. 28, 1950, at 1, http://newspapers.digitalnc.org/lccn/sn83045120/1950-01-28/ed-1/seq-1.pdf. For an overview of the Wilson suit, see CHARLES W. MCKINNEY, JR., GREATER FREEDOM: THE EVOLUTION OF THE CIVIL RIGHTS STRUGGLE IN WILSON, NORTH CAROLINA 38–40 (2010).

[317] MCKINNEY, *supra* note 316, at 39; WINFORD, *supra* note 1, at 89.

education."[318] The Wilson lawsuit ended when the county agreed to build two new black high schools in the area in an out of court settlement.[319]

These non-Durham equalization suits do not undermine the impact of Durham's history in shaping *Blue*. To begin, Taylor filed the Lumberton suit years before most civil rights lawyers began earnestly contemplating desegregation suits, so it is doubtful that any strategy other than equalization was seriously considered. The Wilson suit, in contrast, was filed by Wheeler and Thompson at a time when momentum toward desegregation was reaching its zenith. Nonetheless, that suit does not decrease the likelihood that the Durham lawyers were influenced by local history when contemplating *Blue*'s legal strategy. Indeed, pretrial success in *Blue* may have confirmed the lawyers' belief in the efficacy of school equalization efforts elsewhere. Further, Wilson's own black citizens stated that they were not interested in pursuing desegregation, which was likely dispositive.[320] And the Durham lawyers would not have shed their experiences as longtime residents simply because they were in Wilson. Durham's unique history thus still has a role to play in the *Blue* narrative.

Durham-specific economic interests complement that history. Professor Winford has explained that Wheeler was "a staunch critic of the negative economic consequences of the public education laws political leaders passed" after World War II.[321] Thus, he and M. Hugh Thompson argued *Blue* on "economic grounds."[322] For example, the lawyers emphasized relative opportunities for vocational training at black and white schools "because ignoring vocational education meant delaying crucial job training for blacks."[323] Further, many of the student-plaintiffs in *Blue* were juniors and seniors at Hillside High who were "only a few years away from graduating

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[318] MCKINNEY, *supra* note 316, at 39.

[319] *Id.* at 40.

[320] *See* Adams, *supra* note 13, at 38 ("Black citizens of Wilson stated that they did not desire to desegregate schools—they simply wanted their children to have the opportunity for an equal education, which they understood to be within their rights according to the United States Constitution.").

[321] WINFORD, *supra* note 1, at 76.

[322] *Id.* at 93.

[323] *Id.*

and entering the workforce."[324] Assuming some of those students would find work in Durham's black businesses, their education was crucial to black Durham's future success.[325] Wheeler's interest in "economic justice" was closely related to Durham's history as a beacon of black economic achievement.

Finally, the leaders of Durham's black community were historically racially moderate, which made them reluctant to seek desegregation.[326] National NAACP leaders decried "the timidity of Durham's black elite" and their unwillingness to support the NAACP well into the 1940s.[327] Thurgood Marshall, for example, rebuked "certain Negroes" and "certain Negro groups in North Carolina who believe the only way to handle the problem is to handle it in North Carolina 'without outside influence.'"[328] "One of these days," Marshall added, "North Carolina will realize that none of us can handle our problems alone."[329]

Marshall also recalled that Durham's old black leadership had "sabotaged" efforts to integrate higher education in the area two decades before *Blue* and *Epps* were filed.[330] In 1933, James Shepard and Charles C. Spaulding, president of NC Mutual, undermined *Hocutt v. Wilson*, an NAACP suit that sought to desegregate UNC's pharmacy school.[331]

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[324] *Id.*

[325] *See id.* ("Wheeler and Thompson argued the case on economic grounds because ignoring vocational education meant delaying crucial job training for blacks, many of whom were unlikely to attend college or obtain advanced training beyond high school.").

[326] *See* BROWN, *supra* note 20, at 19 ("Considered conservative for their cautious strategy of civil rights, Durham's black leaders were accused of accommodating segregation. And they did—but not as a capitulation to racism. Rather they viewed upbuilding in the segregated South as a tactic of resistance and as a strategy to outwit Jim Crow.").

[327] GREENE, *supra* note 302, at 21; *see also* WINFORD, *supra* note 1, at 60 (noting that the national NAACP office "tried desperately on several occasions to entice the Durham arm to become more active on racial injustice in the city").

[328] GREENE, *supra* note 302, at 21.

[329] *Id.*

[330] *Id.*

[331] *Hocutt* made history as the first attempt to desegregate higher education in the country. *See generally* Gershenhorn, *supra* note 37 (providing an overview of the case); *see also*

Although Spaulding initially supported the suit, pressure from white leaders and threats of violence forced him to change his position.[332] Spaulding met with the *Hocutt* lawyers at his NC Mutual office and implored them to drop the case.[333] Similarly, Shepard "actively endeavor[ed]" to prevent the plaintiff, Thomas Hocutt, from enrolling at UNC.[334] As part of that effort, Shepard refused to provide Hocutt with a copy of his transcript from North Carolina College to complete his application to UNC.[335] Pressure from Durham's black elite also led the city's NAACP branch to vote against supporting the case.[336] Even *Blue* attorney M. Hugh Thompson recommended dropping the suit.[337] This pressure led Conrad Pearson and Cecil McCoy, the Durham lawyers who filed *Hocutt* with the help of the NAACP's William Hastie, to complain that "[t]hose upon whom we had counted for our staunchest moral support have been found leading the attack against us and a few loyal supporters."[338] Pearson and McCoy expressed the same sentiment years later when generational divisions in Durham's black community again prevented the NAACP from litigating in North Carolina.[339]

Some members of this older generation of black leaders were still operating in the background when Wheeler and Thompson litigated *Blue*. As late as 1951, some considered C.C. Spaulding a viable candidate to become Durham's first black school board member.[340] Spaulding served as the

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ANDERSON, *supra* note 18, at 310–12. For that reason, some have dubbed *Hocutt* the "Genesis of *Brown*." *See, e.g.*, Ware, *supra* note 273, at 227, 229, 233.

[332] Gershenhorn, *supra* note 37, at 294–95.

[333] *Id.*

[334] *Id.* at 296; *see also* WINFORD, *supra* note 1, at 61 ("Like C.C. Spaulding, . . . president Dr. James E. Shepard refused to publicly support the *Hocutt* case, and like Spaulding, he pushed his own behind-the-scenes crusade.").

[335] WINFORD, *supra* note 1, at 63; Gershenhorn, *supra* note 37, at 300.

[336] TUSHNET, *supra* note 6, at 52–53.

[337] Jones, *supra* note 14, at 1870.

[338] TUSHNET, *supra* note 6, at 52. For a description of Hastie's role in *Hocutt*, see MACK, *supra* note 172, at 86–87.

[339] TUSHNET, *supra* note 6, at 58 (describing the NAACP's failed efforts to file a lawsuit to equalize teacher salaries in Durham after "petty local politics" frustrated *Hocutt*).

[340] WINFORD, *supra* note 1, at 100.

president of both M&F Bank and NC Mutual at the time.[341] He surely would have discussed the lawsuit with Wheeler at some point because Wheeler had served as M&F Bank's executive vice president since 1944.[342] Spaulding thus may have advised Wheeler to exercise caution when dealing with Durham's white leadership, even as they took "bold, resolute action" by filing a lawsuit.[343] Although that lawsuit signaled "a departure from the Spaulding-Shepard style of quiet, behind-the-scenes negotiations,"[344] the older generation's views likely influenced the younger generation of more assertive black leaders. That influence reinforced the historical factors underlying the *Blue* lawyers' decision to seek equalization.

B. Blue *and the NAACP's March Toward* Brown

Emphasis on Durham does not undermine *Blue*'s national significance. Although *Blue* was clearly a case about Durham, illustrating many unique aspects of Durham's legal and civil rights history, it was also much more. *Blue* teaches lessons about larger trends in the campaign to end racial discrimination in public schools.

To start, *Blue* illustrates the singular role of courtrooms during the long civil rights movement. This role is easily overlooked, but in proper perspective it is the most striking theme to emerge from the *Blue* trial and preceding litigation. For seven days, black men who were constantly dehumanized by a segregated society were afforded some sense of human

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[341] Although Spaulding nominally held those titles, he had by that time ceded control of daily operations and most business matters. *Id.* at 101.

[342] *See* MCKINNEY, *supra* note 316, at 38–39 (2010) ("When it came to equalization litigation, Wheeler faced considerable opposition in the form of C.C. Spaulding, the de facto leader of Durham's black political elite . . . . Wary of running afoul of his benefactor and mentor, Wheeler refrained from publicly supporting litigation."); WINFORD, *supra* note 1, at 81 (noting Wheeler's tenure as bank VP); *id.* at 89 (noting that "C.C. Spaulding had continuously dissuaded Durham's next line of defense from using legal pressure in the battle for educational equality").

[343] WINFORD, *supra* note 1*,* at 91.

[344] GREENE, *supra* note 302, at 25; *see also* ANDERSON, *supra* note 18, at 311 ("The more conservative North Carolina Mutual leadership chose traditional channels and personal appeals to state and local leaders where their own prestige would count, while younger men . . . used the courts and other direct challenges.").

dignity. Throughout the trial, Judge Hayes and the state's lawyers and witnesses referred to the plaintiffs' lawyers individually as "sir" or "mister," or collectively as "gentlemen."[345] The use of honorifics might seem unremarkable to modern observers, but such niceties of etiquette from white residents had heightened significance in the Jim Crow South, where African Americans were regularly excluded from public life.[346] Moreover, the lawyers appeared to stand as equals to their white counterparts—one of whom was a former U.S. senator and a future governor—in court. The lawyers also questioned powerful state and local officials and brought attention to years of neglect in Durham's black schools. *Blue* thus demonstrates both the "unique place" courtrooms occupied in segregated America and the importance of the black lawyers who operated in them.[347] As Kenneth W. Mack writes, "courtrooms remained open to the crossing of racial boundaries in a way that most other public places were not."[348] Black lawyers in that environment "seemed to personify the aspirations of African Americans all over the South."[349] In that sense, the lawyers' performance in *Blue* represented a social victory for black Durham, even before the plaintiffs' triumph on the merits.

Second, *Blue* illustrates the challenges civil rights lawyers faced when bringing school equalization lawsuits. Prominent scholars have dismissed equalization cases as being "relatively straightforward," but that view belies the experience of the lawyers who litigated them.[350] Equalization suits were resource-intensive, fact-specific endeavors and required that lawyers produce expensive expert testimony to prove that segregated school systems did not provide equal opportunities to black and white students.

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[345] *See, e.g.*, Transcript of Record, *supra* note 46, at 3–5.

[346] MACK, *supra* note 172, at 63; *see also id.* at 64 (explaining that "[c]ourts were important places for the reimagining of racial identity" because black lawyers in courtrooms "inhabited a public space where words and actions often conformed to a social script. In court, they experienced a world in which forms of address, patterns of deference, and professional acts crossed racial lines, within some limits at least").

[347] *Id.* at 62.

[348] *Id.*

[349] *Id.* at 84.

[350] TUSHNET, *supra* note 6, at 152.

The expense of equalization litigation is one of the primary reasons that NAACP lawyers rejected the approach in 1950. At midcentury, lawyers debating whether to endorse a direct attack on segregation or to continue pursuing equalization would have found either strategy at least reasonable.[351] There were sensible arguments for staying the course. After all, equalization litigation had produced significant tangible benefits. The NAACP's Virginia equalization campaign, for instance, secured "$50 million in higher teacher salaries, new buses, and improved schools for Negroes," which made the strategy appealing to many black parents.[352] Further, a successful press for equalization might have achieved more biracial support than did the NAACP's desegregation campaign.[353] Accordingly, equalization arguably could have produced greater economic benefits and educational outcomes for African Americans than the more aggressive push to end segregation.[354] This is particularly possible given the decades of backlash and massive resistance that *Brown* inspired.[355] Mark Tushnet observes that "[a]ll things considered, though the direct attack on segregation made sense in light of the wider social and political environment, a decision to pursue an equalization strategy would also have made sense."[356]

Desegregation prevailed in the end both because it invoked basic notions of equality and because opting for equalization "would have placed enormous strains on the resources available" for NAACP litigation.[357] Challenging school inequality was exhausting. As *Blue* shows, the lawyers litigating these cases faced months of discovery and pretrial litigation followed by trials that

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[351] TUSHNET, *supra* note 6, at 159.

[352] KLUGER, *supra* note 284, at 474.

[353] TUSHNET, *supra* note 6, at 159.

[354] *Id.* at 160.

[355] *Cf.* Derrick A. Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976) (questioning whether black students in urban schools would be better served by efforts to equalize schools in light of sustained white resistance to the NAACP's desegregation litigation); Turner, *supra* note 312, at 1675 (summarizing the argument that black students would have benefited more from the construction of state-of-the-art high schools than from the closure of public schools, which followed some desegregation orders).

[356] TUSHNET, *supra* note 6, at 159.

[357] *Id.*

could last for weeks. They also personally inspected school facilities and secured dozens of witnesses, photographers, experts, and others to establish school inequality.

Moreover, even when lawyers won school equalization suits, victory was often limited. Because equalization challenges were brought on a school-by-school, city-by-city, and county-by-county basis, a favorable decision in one jurisdiction meant little in the next.[358] After each success, lawyers interested in continuing the fight had to file another complaint in another jurisdiction "where a whole new set of facts had to be presented and argued to establish inequality."[359] Further, local officials frequently skirted equalization orders even in the face of contempt charges.[360] After one lawsuit in Virginia, for example, school officials responded to an equalization order by simply dumping two thousand books on the floor of a principal's office in a local black school.[361] Conditions were not much better in Durham.[362]

Third, *Blue* shows that *Plessy v. Ferguson*'s separate but equal doctrine was gasping its last breaths even before *Brown*. The landmark decision ordering desegregation "did not materialize out of thin air" in 1954.[363] Rather, it resulted from two decades of NAACP litigation aimed at undermining *Plessy*.[364] Demonstrating the impossibility of truly equalizing segregated schools was integral to that goal, and school equalization litigation made that

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[358] Turner, *supra* note 312, at 1675; *see also* KLUGER, *supra* note 284, at 133 ("There were thousands upon thousands of school districts in the South, and a suit that proved Negroes received less than equal funds and facilities in one district would have no governing effect on the neighboring one unless the state laws themselves were challenged in the process.").

[359] KLUGER, *supra* note 284, at 524.

[360] *See, e.g.*, EDDS, *supra* note 13, at 180–83 (recounting Virginia NAACP lawyers' efforts to hold local officials in contempt after they failed to comply with an equalization order).

[361] *Id.* at 181.

[362] *See infra* notes 380–386 and accompanying text.

[363] EDDS, *supra* note 13, at 5.

[364] KLUGER, *supra* note 284, at 524; *see also* EDDS, *supra* note 13, at 5 ("Before integration could occur, 'separate but equal' education had to be unmasked as a fraud.").

impossibility readily apparent.[365] As Hill and Robinson's example demonstrates, the implementation of the equalization orders they secured in Virginia was a "travesty."[366] Blatant failures to equalize parallel school systems—both in rural counties and in nominally progressive cities—meant that it was "only a matter of time" before *Plessy* fell.[367]

More so than any other equalization lawsuit, *Blue* made clear that the disparity between *Plessy*'s equality mandate and the lived experience of African Americans in the South was insurmountable. When the *Blue* plaintiffs filed their suit in 1949, African Americans in Durham had a better shot at justice than in anywhere else in the country.[368] Black Durham was thriving economically, and it was historically well-represented to white city leaders through the influence of individuals like James E. Shepard and C.C. Spaulding. African Americans also wielded significant political and legal clout through organizations like the DCNA and Durham's multiracial political coalition, Voters for Better Government, which formed in 1947 and was "[t]he most influential political coalition in the city."[369] If segregated schools were unequal even in Durham, then the notion that separate could be equal anywhere was seriously flawed.[370]

Some individuals understood this as the clear upshot of Judge Hayes's ruling in *Blue*. Just days after the *Blue* decision was announced, the *Raleigh News & Observer* published an editorial entitled a "Warning From A

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[365] *See* Goodwin Liu, *State Courts and Constitutional Structure*, 128 YALE L.J. 1304, 1352 (2019) (explaining that, under the NAACP's strategy, "lawsuits directed at separate and unequal educational opportunities would highlight the difficult and often impractical task of equalization within a system of segregation").

[366] EDDS, *supra* note 13, at 13.

[367] *Id.*

[368] *See Warning From A Friend*, *supra* note 93 (stating that Durham was a "city in which Negroes have had a better chance of fairness than in any other county in this or any other Southern state"); *see also* BROWN, *supra* note 20, at 14 ("Nationally, black Durham was viewed as a symbol of what African Americans could do on their own when left alone by whites.").

[369] GERSHENHORN, *supra* note 13, at 105–06; WINFORD, *supra* note 1, at 84.

[370] *Cf.* THUESEN, *supra* note 3, at 189 (noting that *Blue* "exposed serious discrimination in the South's 'Capital of the Black Middle Class'").

Friend"[371] cautioning that if Judge Hayes, "a native North Carolinian, never accused of radical views on race or anything else," found for the plaintiffs in Durham, then the end to segregation was imminent unless "real equality" was quickly established.[372] The author explained that *Blue* was particularly damning for other parts of the state:

> Clearly, if this decision represents the fact and the law so far as Durham is concerned, it applies with even greater force to some other counties. This means that no pretended equality, however plausible, will be permitted by the courts as a substitute for true and actual equality in educational opportunity for all the people.

The editorial concluded that Judge Hayes's decision was a "final warning that Southerners, and particularly North Carolinians, who wish[ed] to preserve their 'separate but equal' school system must act without discrimination in that 'separate but equal' faith."[373]

V. CONCLUSION

The *News & Observer* warning proved prophetic. *Brown* rendered the separate but equal system unconstitutional just three years after the Durham plaintiffs' victory in *Blue*. Yet neither decision was alone capable of producing lasting results in the Bull City. Desegregation after *Brown* was delayed by state and local efforts to "continue a system of segregation while maintaining the public image of progress."[374] Officials implemented a steady stream of desegregation plans designed to take symbolic steps toward integration without substantively changing the status quo.[375] Progress was thus "excruciatingly, and deliberately, slow."[376] It would take additional

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[371] *Warning From A Friend*, *supra* note 93.

[372] *Id*.

[373] *Id.*

[374] Apostoleris, *supra* note 13, at 153.

[375] *Id.*; *see also* ANDERSON, *supra* note 18, at 363 (writing that North Carolina's governor "pursue[d] a careful middle course by taking the first halting steps toward compliance without inflaming white passions to rebellion").

[376] Apostoleris, *supra* note 13, at 151.

litigation and several years before Durham began desegregating its public schools in 1959.[377]

In contrast, *Blue* produced a relatively swift response from the Durham school board. On March 5, 1951, two months after Judge Hayes issued his decision, school board members inspected Hillside High and earmarked funds to complete renovations to the school's auditorium and cafeteria.[378] On April 9, 1951, the school board approved plans to spend more than $1.1 million—worth roughly $10 million today[379]—to renovate existing facilities and to construct a new elementary school for black students.[380]

Yet the effort was not sustained. As time passed, the board increasingly delayed its efforts to level disparities between the city's black and white schools.[381] In some cases, rather than improve black schools, local administrators sought to close them. For example, city officials voted to abandon the Hickstown School rather than make "respectable improvement[s]" to its campus.[382] In an editorial arguing against the plan, the *Carolina Times* predicted that closing the school would force African Americans living near Hickstown to relocate "in order that their children may have decent schools."[383]

The school board paired its inaction with secrecy, producing further disdain for the board among the black community. A school bond issue in

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[377] *See* ANDERSON, *supra* note 18, at 362–65; Apostoleris, *supra* note 13, at 154–56.

[378] Durham City Board of Education Minutes, Mar. 5, 1951 (on file at NCC).

[379] *See Inflation Calculator*, CPI INFLATION CALCULATOR, https://www.in2013dollars.com/us/inflation/1951?amount=1000000.

[380] *Hillside High School Historic Register Application*, *supra* note 80, at § 8 p.13; *see also* City of Durham & Durham County, Landmark Designation Report for James A. Whitted School 3 (June 22, 2017) (on file with author) (stating that *Blue* redirected "over one million dollars in funding from the renovation of all-white Durham High School to the renovations of Durham's African American schools").

[381] *See* GERSHENHORN, *supra* note 13, at 92 ("Indeed, despite the victory in *Blue*, little was done to remedy the inequitable conditions in Durham's black schools, which remained overcrowded, with substandard facilities.").

[382] *The Hickstown School Problem*, CAROLINA TIMES (Durham), Oct. 18, 1952, at 2, http://newspapers.digitalnc.org/lccn/sn83045120/1952-10-18/ed-1/seq-2.pdf.

[383] *Id.*

1952 purported to include funding for Durham's black schools, but local officials did not disclose how much money was designated for that purpose.[384] For that reason, Louis Austin of the *Carolina Times* opposed the bond, noting that "all too often Negroes in Durham and elsewhere have thrown their support behind such programs only to find in the end that they were left out in the cold when the actual expenditure of the money was being made."[385] Austin's *Times* editorial referenced the school board's continued delay post-*Blue*, adding that "in spite of a federal court order to equalize the white and Negro schools of the city, the school board defiantly continues to dilly-dally on the matter of compliance with that order. Certainly a board that has no respect for a federal court will have less for Negro citizens."[386]

The slow pace of change after *Blue* does not undermine its legacy in North Carolina. *Blue* is again becoming a source of pride in Durham. Many current residents, some of whom unknowingly served as plaintiffs in the suit when they were children, today appreciate *Blue* as "an integral part of Durham's history."[387] The case has inspired important scholarly contributions. It has also prompted Congressional action. In 2018, Congressman G.K. Butterfield, whose district covers Durham and who is an alumnus of North Carolina Central University School of Law, introduced a bill to rename the federal courthouse in downtown Durham where *Blue* was argued.[388] Butterfield's bill—now a law—renamed the courthouse as the "John Hervey Wheeler United States Courthouse."[389] In his remarks in support of the bill on the House floor, Congressman Butterfield reflected on Wheeler and Thompson's impressive victory in *Blue*, which "prov[ed] that the Durham Public School District was violating the 14th Amendment of the

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[384] *See The School Bond Issue*, CAROLINA TIMES (Durham), Oct. 18, 1952, at 2, http://newspapers.digitalnc.org/lccn/sn83045120/1952-10-18/ed-1/seq-2.pdf.

[385] *Id.*; *see also* GERSHENHORN, *supra* note 13, at 93 (noting that "Austin urged black voters to reject the bond issue unless" they were "guaranteed that black schools would receive an equitable share of the proceeds and that black leaders would be consulted").

[386] *The School Bond Issue*, *supra* note 384, at 2.

[387] Adams, *supra* note 13, at 55–56; *see also* Samiha Khanna, Past Winner: Eddie Davis, Class of '85, INDY WEEK (Jan. 18, 2012, 4:00 A.M.), https://indyweek.com/guides/archives/past-winner-eddie-davis-class-85.

[388] WINFORD, *supra* note 1, at 251.

[389] H.R. 3460, 115th Cong. (2018).

United States Constitution."[390] Congressman Butterfield also quoted Judge Hayes's opinion granting the plaintiffs relief.[391]

In the end, *Blue v. Durham Public School District* has rightly earned its place in the annals of legal history and the civil rights movement. African Americans in Durham wed the law to their unique experience in a prosperous black community to challenge the status quo and fight for a more just future for their children. As modern school desegregation efforts continually fail to improve educational opportunities for students of color across the country, *Blue* offers a compelling reminder that desegregation is neither the only nor necessarily the most effective method for remedying school inequality. The plaintiffs' victory teaches that policymakers and school officials must commit to both desegregating *and* simultaneously equalizing America's racially divided school districts.[392] *Blue* further demonstrates the inherent limitations of the separate but equal doctrine that tainted the Supreme Court's Fourteenth Amendment jurisprudence for more than half a century. The decision thus has much to teach students of history, civil rights, and law.

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[390] 164 CONG. REC. H6222–23 (2018); *see also* WINFORD, *supra* note 1, at 251 ("Amid controversies around the country surrounding public historical memory, the courthouse stands as a testament to John Hervey Wheeler's struggle for racial and economic justice.").

[391] Congressman Butterfield stated that he need only "read one sentence: 'The net result of what has been done leaves Negro school children at many disadvantages which must be overcome.'" 164 CONG. REC. 6223 (quoting Blue v. Durham Pub. Sch. Dist., 95 F. Supp. 441, 444 (M.D.N.C. 1951)).

[392] *See* Bell, *supra* note 355, at 479 (noting that myopic focus on desegregation has resulted in "too little attention [being] given to making black schools educationally effective").