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EDITORS' FORWARD

We could not publish this inaugural issue of the *North Carolina Civil Rights Law Review* without first sharing some prefatory remarks. It is not every day that we launch a new venture. And while we cannot predict precisely this journal's future course, there seems no more appropriate time or place to reflect on this publication's origins and vision.

This journal was conceived by students at the University of North Carolina School of Law who recognize that civil rights form the core of the American political and legal experiment. We also recognize that the law is an imperfect instrument for its lofty aims. Too often, rather than preserve our individual and collective freedom, dignity, and opportunity, the law is instead bent toward stagnation, the maximization of commercial profit, and even outright violence and harm. It calcifies as often as it liberates. It regularly replicates the mistakes of our past, nodding toward history not to learn its lessons but to justify the status quo. We believe the law must be continuously examined, critiqued, prodded, and reassessed to ensure that it operates for good, for ourselves and for our communities.

If these themes are national—even universal—in scope, they are also intimate and local. The University of North Carolina has itself wavered between progress and retrogression, between service to the public and the raw pursuit of power and private gain. This is the oldest public university in the country. Yet its leaders have frequently failed to honor the civic nature of the school's mission or reckon honestly with its unsavory past. Recent debates over funding and advocacy training programs at the law school are merely part of a larger trend. The people of this state are diverse in their experiences, their dreams, and their needs. We believe that the law school should serve all of them, and has a duty to train lawyers and advocates who will do the same.

The *North Carolina Civil Rights Law Review* is our humble, hopeful response. We hope this journal will contribute to a continued, vigorous, creative wrestling with the law in order to make it a more perfect instrument for justice, liberty, and dignity for the people of this state and this country.

For light and liberty—lux libertas,

THE VOLUME 1 BOARD OF EDITORS

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

DONOVAN J. STONE[**]

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.

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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").

THE IMPOSSIBILITY OF SEPARATING RACE AND POLITICS IN A WHITE PEOPLE'S PARTY*

GENE R. NICHOL**

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INTRODUCTION

North Carolina has been ground zero for much of the United States Supreme Court's redistricting work. *Thornburg v. Gingles*,[1] a 1986 challenge to various North Carolina state electoral districts, famously determined when the Voting Rights Act requires a majority-minority district to prevent vote dilution.[2] *Shaw v. Reno*,[3] the high court's landmark 1993 constitutional ruling, also originated in North Carolina. *Shaw* and its successor *Shaw II* (1996)[4] held that a state legislature's use of race as "the predominant factor" in drawing an electoral district violates the Equal Protection clause—even, oddly, if no vote dilution occurs.[5] *Hunt v. Cromartie* and *Easley v. Cromartie*,[6] decided several years later, again examined Tar Heel districts as

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[1] 478 U.S. 30 (1986).

[2] *Id.* at 69.

[3] 509 U.S. 630, 633–34 (1993).

[4] 517 U.S. 899 (1996).

[5] *See id.* at 905–18.

[6] Hunt v. Cromartie, 526 U.S. 541 (1999); Easley v. Cromartie, 532 U.S. 234 (2001).

the Court further outlined its unfolding and controversial standards for reviewing race-based discrimination claims.[7] More recently, *Cooper v. Harris*[8] sought to synthesize earlier Voting Rights Act rulings with the now more substantially honed constitutional standards announced in *Shaw v. Reno*.[9] *Cooper* made clear that North Carolina legislators could neither use the purported standards of the Voting Rights Act nor alleged assertions of partisan motivation to draw lines "predominantly" employing "the use of race" to set electoral boundaries.[10] And most notably, in *Rucho v. Common Cause*,[11] the United States Supreme Court concluded in 2019:

> Partisan gerrymandering claims present political questions beyond the reach of the federal courts . . . federal judges have no license to reallocate political power between the two major political parties, with no plausible grant of authority in the Constitution, and no legal standards to limit and direct their decisions.[12]

Partisan gerrymandering, Chief Justice Roberts also concluded for the *Rucho* majority, should not be equated with presumptively illegitimate racial line drawing. A "permissible intent—securing partisan advantage—does not become constitutionally impermissible, like racial discrimination, when that permissible intent 'predominates.'"[13] *Rucho*, too, was a North Carolina venture. The state has been busy. Even if unhelpful.

North Carolina has, then, provided the factual fodder for the development of much of modern statutory and constitutional gerrymandering jurisprudence. It has also, apparently, often operated at the purported axis between racial and political claims. It has occupied the landscape inhabited by both enthusiastically embraced racial gerrymandering actions and

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[7] *See Easley*, 532 U.S. at 258.

[8] 137 S. Ct. 1455 (2017).

[9] *Id.* at 1468–72.

[10] *Id.*

[11] 139 S. Ct. 2484 (2019).

[12] *Id.*at 2506–07.

[13] *Id.* at 2503.

judicially rejected political gerrymandering suits. The repeated, decades-long undertakings of the North Carolina General Assembly have, surely, helped convince the federal justices that the consequence-laden distinction between political and racial work is not only defining, but ascertainable. The distinction marks the boundary, it is claimed, between legitimate—even essential—constitutionally derived judicial review and devastating, usurping "government by judiciary."[14]

There is much to quibble with, or worse, in this account—the ready acceptance of racial gerrymandering cases under the civil war amendments, on the one hand, and the allegedly high-minded repudiation of politically driven bias suits on the other. But even if one accepts the proffered theoretical distinctions between political and racial gerrymanders, North Carolina, again, on the ground, presents conditions and circumstance that mock such theoretical demarcations. Political life in the Tar Heel State laughs robustly when the Chief Justice of the United States explains the boundaries of appropriate and, perhaps, genteel judicial intervention—much like North Carolina legislators celebrated gleefully, and then acted to aggressively discriminate against black voters, when John Roberts proclaimed that "the south has changed" in the Shelby County case,[15] as the Court gutted the Voting Rights Act.[16]

In this essay, I question what the line between racial and political gerrymandering can conceivably look like when a state is effectively and unashamedly governed by a White people's party. What judicial deference is, or ought be, assured, when Republican caucuses repair to their closed-door deliberations, with no person of color present, despite almost a quarter of the state population being Black,[17] and intentionally and repeatedly pass statutes that court after reviewing court determines burden, penalize, and restrict the electoral, participatory, adjudicatory and dignitary rights of African-

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[14] See RAOUL BERGER, GOVERNMENT BY JUDICIARY (1997), for an argument on how the Supreme Court has used judicial activism to usurp the authority of the American people to govern themselves.

[15] Shelby Cnty. v. Holder, 570 U.S. 529 (2013).

[16] *See id.*

[17] *See* U.S. CENSUS BUREAU, QUICK FACTS (2020), https://www.census.gov/quickfacts/NC (showing that the percentage of black residents in North Carolina is 22.2%).

Americans? Are the political feints, dodges, and maneuvers of a White person's party racial or merely partisan? A century and a half after the passage of the Civil War Amendments, should a federal court deem the strategic political tools of a White people's caucus beyond the reach, or interest, of constitutional law? Is constitutional law, yet again, to be rendered a meaningless and—given the stakes—vile façade? Ultimately, *Rucho* may make sense, somewhere. That's possible. But in North Carolina, from whence it arises, the decision is grotesque. No one here could honestly conclude that our legislative decisions separate politics and race. *Rucho* becomes, therefore, merely an exquisite cover for racism. Yet again.

I. NORTH CAROLINA'S INTENSE RACIAL DISPARITIES

It is helpful, in probing North Carolina's racialized governance, to begin with a word of perspective. In 2020, the state remains, as it has been from its founding, riven by massive and literally debilitating racial disparities. Twice as many African Americans live in poverty as White people do.[18] The gulf is even worse for kids. Almost three times as many Black children are poor as White ones.[19] The disparity is even larger for kids five and under.[20] Much higher rates of hunger and lack of health insurance appear in the Black community. [21] African American North Carolinians are twice as likely as

[18] *See* Rob Schofield, *New Census Data: High Poverty Rates Persist in NC Despite Modest Growth*, N.C. POL'Y WATCH (Sept. 14, 2018), http://pulse.ncpolicywatch.org/2018/09/14/new-census-data-high-poverty-rates-persist-in-nc-despite-modest-growth/. *See also* GENE R. NICHOL, THE FACES OF POVERTY IN NORTH CAROLINA: STORIES FROM OUR INVISIBLE CITIZENS 143 (2018); GENE R. NICHOL, INDECENT ASSEMBLY: THE NORTH CAROLINA LEGISLATURE'S BLUEPRINT FOR THE WAR ON DEMOCRACY AND EQUALITY 13–14 (2020).

[19] *See* Brian Kennedy, *North Carolina Ranked 11th in the Nation in Childhood Poverty*, NORTH CAROLINA JUSTICE CENTER (Sept. 24, 2018), https://www.ncjustice.org/publications/north-carolina-ranked-11th-in-the-nation-in-childhood-poverty/.

[20] *Id.*

[21] NICHOL, FACES OF POVERTY, *supra* note 18, at 143. Black North Carolinians suffer hunger at a much higher rate than White North Carolinians. Gene Nichol, Opinion, *Gene Nichol: Numbers Don't Lie. There is Systemic Racial Subordination in North Carolina*, GREENSBORO NEWS & REC., (Apr. 22, 2018), https://greensboro.com/opinion/columns/gene-nichol-numbers-dont-lie-there-is-systemic-racial-subordination-in-north-

White North Carolinians to be unemployed, much higher percentages are uninsured, and three times as many Black families report a negative net worth.[22] Black households possess, on average, only about 6% of the wealth held by White households.[23] Most of North Carolina's counties experiencing daunting child poverty rates (approaching or surpassing 50%)—Northampton, Chowan, Scotland, Vance and Edgecombe—have high percentages of African-Americans.[24]

Black kids disproportionately attend North Carolina's high poverty public schools.[25] Under the state's controversial A-F public school grading system, almost all high poverty schools receive exceedingly poor grades and almost all high wealth institutions excel.[26] A university-based study concluded that Black students make up 26% of the state's public school attendees but receive over half of all suspensions.[27] In Chapel Hill, where I live and this article is published, Black students make up 12% of the

carolina/article_2a6e657d-a207-5ed1-a36b-8a3cf8a053ce.html. There are also significant gaps in the number of Black and White North Carolinians who reported not seeing a doctor when sick due to the associated cost. Sydney Price, *NC Ranks Below Average in Racial Economic Equality*, CHARLOTTE BUS. J. (Jan. 31, 2019), https://www.bizjournals.com/charlotte/news/2019/01/31/north-carolina-ranks-below-average-in-racial.html.

[22] NICHOL, FACES OF POVERTY, *supra* note 18, at 143.

[23] *Id.* at 143–44; *cf. also* CTR. ON POVERTY, WORK AND OPPORTUNITY, UNIV. N.C., RACIAL WEALTH DISPARITY IN NORTH CAROLINA ii (2010) (suggesting the wealth disparity is even worse, with African American households in North Carolina claiming "about 4 percent of the net worth of white households.").

[24] NICHOL, INDECENT ASSEMBLY, *supra* note 18, at 14.

[25] *See Facts on Child Poverty*, PUBLIC SCHOOLS FIRST N.C., (Aug. 30, 2020), https://www.publicschoolsfirstnc.org/resources/fact-sheets/facts-on-child-poverty/.

[26] Lynn Bonner, *NC Public School Letter Grades Reflect Wealth of Students' Families*, NEWS & OBSERVER (Raleigh) (Feb. 5, 2015), https://www.newsobserver.com/news/local/article10255961.html.

[27] NICHOL, FACES OF POVERTY, *supra* note 18, at 143.

enrollment, but get 53% of the school suspensions.[28] Twice as many White Tar Heels have a college degree as do Black ones. [29]

Racial disparities are replicated in state institutions and in every aspect of modern life, as well. Over half of the prisoners in the North Carolina Department of Correction are African-American, though they constitute 22% of the state's population.[30] The state incarcerates Black individuals at over four times the rate of White individuals.[31] And an unending cascade of empirical studies demonstrate massive and unexplainable racial disparities in policing, employment, housing, and health care.[32] North Carolina reflects,

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[28] Edward J. Smith & Shaun R. Harper, *Disproportionate Impact of K-12 School Suspensions and Expulsion on Black Students in Southern States*, CTR. FOR RACE AND EQUITY IN EDUC. (2015), https://race.usc.edu/wp-content/uploads/2020/08/Pub-14-Smith-and-Harper.pdf; T. Keung Hui, *Report Finds NC Black Students Disproportionately Suspended*, NEWS & OBSERVER (Raleigh) (Aug. 25, 2015), http:// www.newsobserver.com/news/politics-government/politics-columns-blogs /under-the-dome/article32310816.html.

[29] NICHOL, FACES OF POVERTY, *supra* note 18, at 143.

[30] NORTH CAROLINA PRISON POPULATION FIGURES AND DEMOGRAPHICS, fig. 2-3, https://infogram.com/north-carolina-prison-population-figures-and-demographics-1g6qo2q93o1wm78 (last visited Oct. 19, 2020). *See also* INCARCERATED POPULATIONS BY RACE/ETHNICITY AND GENDER FOR EACH STATE, PRISON POL'Y INITIATIVE (updated March 2019), https://www.prisonpolicy.org/data/race_ethnicity_gender_2010.xlsx; Joseph E. Kennedy & Mika W. Chance, *Collateral Damage: How Mass Incarceration Increases Poverty and Crime in North Carolina's Poorest African American Communities*, TRIAL BRIEFS (Aug. 2011); ASHLEY NELLIS, SENTENCING PROJECT, THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITY IN STATE PRISONS 16 (2016), https://www.sentencingproject.org/wp-content/uploads/2016/06/The-Color-of-Justice-Racial-and-Ethnic-Disparity-in-State-Prisons.pdf.

[31] NORTH CAROLINA PRISON POPULATION FIGURES AND DEMOGRAPHICS, *supra* note 30, fig. 1 (noting that Black North Carolinians are incarcerated at 4.5 times the incarceration rate of White North Carolinians); NELLIS, *supra* note 30, at 5 (listing rate as 4.3 times higher for Black North Carolinians).

[32] *See* NICHOL, FACES OF POVERTY, *supra* note 18, at 143–47. *See also* Nicole Flatow, *North Carolina Police Three Times More Likely to Arrest Blacks after Seat Belt Violation, Study Finds*, THINKPROGRESS (Sept. 30, 2013), https://archive.thinkprogress.org/north-carolina-police-3-times-more-likely-to-arrest-blacks-after-seat-belt-violation-study-finds-f9e67221e784/. The data, which N.C. Central University's Scott Holmes called evidence that "as an empirical fact . . . we have a culture in our law enforcement for unconscious institutional racism," comes as the Department of Justice is filing a lawsuit alleging the state's new restrictive voting law is discriminatory and will disenfranchise minority voters.

and notably amplifies, national trends documented by the Pew Research Center:

> America remains two societies—one white and one black—as measured by key demographic indicators of social and economic well-being. [. . .] [B]lacks on average are at least twice as likely as whites to be poor or unemployed. Households headed by a black person earn on average little more than half of what the average white households earns. And in terms of their median net worth, white households are about 13 times as wealthy as black households—a gap that has grown wider since the Great Recession.[33]

Flatow, *supra* this note. For additional context, consider also Sharon Lafraniere & Andrew W. Lehren, *The Disproportionate Risks of Driving While Black*, N.Y. TIMES (Oct. 24, 2015), https://www.nytimes.com/2015/10/25/us/racial-disparity-traffic-stops-driving-black.html. In North Carolina's third largest city, officers pulled over Black drivers for traffic violations at a rate far out of proportion to their share of the local driving population. *See* WILLIAM R. SMITH ET AL., THE NORTH CAROLINA HIGHWAY TRAFFIC STUDY (Jan. 2004), https://www.ojp.gov/pdffiles1/nij/grants/204021.pdf. Police used their discretion to search Black drivers or their cars more than twice as often as White motorists—even though they found drugs and weapons significantly more often when the driver was White. *Id.* These disparities extend beyond the context of policing. *See* Matt Shipman, *Study Shows That, In Restaurants, Race Matters*, NC STATE UNIV. NEWS (Apr. 23, 2012), https://news.ncsu.edu/2012/04/wms-rusche-restaurants (describing evidence that one third of servers in restaurants admit to "varying their quality of service based on customers' race, often giving African-Americans inferior service"); COLETTE HOLT & ASSOCS., NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, RACIAL DISPARITY STUDY, 10 (2014), https://www.ncdot.gov/about-us/board-offices/offices/civil-rights/Documents/2014-disparity-study.pdf (describing disparities in Black business formation, access to consumer credit, and other factors necessary for entrepreneurial success); George Gonzalez*, Racial and Ethnic Minorities Face More Subtle Housing Discrimination: HUD Study Finds Decline in Blatant Discrimination While Unequal Treatment Persists*, U.S. DEP'T OF HOUS. AND URB. DEV. (June 11, 2013), https://archives.hud.gov/news/2013/pr13-091.cfm; PAUL A. BUESCHER & JACK LEISS, N.C. DEP'T OF HEALTH AND HUM. SERVS., RACE, EDUCATION, AND MORTALITY IN NORTH CAROLINA, (Apr. 1994), https://archive.org/details/raceeducationmor00bues.

[33] PEW RESEARCH CTR., DEMOGRAPHIC TRENDS AND ECONOMIC WELL-BEING (June 27, 2016), https://www.pewsocialtrends.org/2016/06/27/1-demographic-trends-and-economic-well-being/.

I begin with these indications of crushing disparity to make the irrefutable point that, unless the terms are to be drained of all ascertainable meaning, North Carolina today experiences an intense, debilitating, and *systemic* (of, or relating to, the entire body of an organism)[34] regime of racial subordination. No thoughtful and fair-minded person familiar with our present circumstance could believe that we are done with the challenges of equality, justice, and meaningful integration. Still, as the following two sections will reveal, the governing party of the North Carolina legislature for the past decade has both abandoned aspirations of equality and deployed the power of the state to burden and penalize African-American Tar Heels.

II. GOVERNING THROUGH WHITE PERSONS' CAUCUSES

The Republican Party has controlled both houses of the North Carolina General Assembly since 2011.[35] It has often done so through very large majorities. From 2011 until January 2019, Republicans enjoyed veto-proof supermajorities in both chambers.[36] The margins were reduced in the 2018 elections.[37] But they remain large in 2020—ten seats in the House and eight in the smaller Senate.[38]

All Republican legislators in North Carolina, in both houses, are White. As the candid Republican Representative Holly Grange put it in 2019: "On my side there's not a lot of diversity; it's a middle-aged white man's club."[39]

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[34] *See Systemic*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/systemic ("of, relating to, or common to a system;" "affecting the body generally"); *Systemic*, Cambridge Dictionary Online, https://dictionary.cambridge.org/us/dictionary/english/systemic ("relating to or involving a whole system;" "relating to or affecting the whole system, organization, etc., rather than just some parts of it").

[35] NICHOL, INDECENT ASSEMBLY, *supra* note 18, at 26.

[36] *See id.*

[37] *Id.*

[38] *See id.* at 27; *see also North Carolina Representatives 2019-2020 Session*, N.C. GEN. ASSEMBLY, https://www.ncleg.gov/Members/MemberList/H; *North Carolina Senators, 2019-2020 Session*, N.C. GEN. ASSEMBLY, https://www.ncleg.gov/Members/MemberList/S.

[39] Paul Woolverton, *How Much Does N.C.'s New Legislature Look Like You?*, COURIER-TRIBUNE (Asheboro, NC) (Jan. 9, 2019), https://www.courier-tribune.com/article/20190108/NEWS/190108604.

In 2020, there are twenty-six African American representatives in the state House.[40] There are 10 Black senators.[41] One Native American and two Indian Americans serve in the General Assembly.[42] No people of Latinx descent do.[43]

The overall numbers, scant as they are, are still deceptive. In the House, the twenty-six African Americans and one Native American are all Democrats.[44] All sixty-five Republicans are White.[45] In the Senate, the ten African Americans and two Indian Americans are Democrats.[46] Every Republican (twenty-nine) is White.[47] Similar Republican tallies appeared in the 2011–12, 2013–14, 2015–16, and 2017–18 sessions.[48] So when the majority caucuses in each chamber retire to their private deliberations to craft the laws of North Carolina, only White people attend. That's the case even though the state's population is over 22% African American and about forty percent persons of color.[49] One hundred and fifty years after the adoption of the 14th Amendment, North Carolina is effectively ruled by a White People's Caucus.

Let that sink in for a minute.

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[40] Gene Nichol, Opinion, *In NC, All Diversity Sits on One Side of the Aisle*, NEWS & OBSERVER (Raleigh) (Jan. 20, 2019), https://www.newsobserver.com/opinion/article224507140.html.

[41] *Id.*

[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] *Id.*

[49] *See* U.S. CENSUS BUREAU, *Quick Facts North Carolina* (July 1, 2019), https://www.census.gov/quickfacts/NC (stating that the percentage of Black residents in North Carolina is 22.2% and the percentage of white residents who are not Hispanic or Latino is 62.6%).

III. THE LEGACY OF THE MODERN NORTH CAROLINA WHITE PEOPLE'S PARTY

Over the last decade, what legacy has this White people's caucus delivered? In a sentence, North Carolina Republican lawmakers have repeatedly, pervasively, intentionally, and invidiously used the power of government to diminish the electoral, representational, legal, educational, and dignitary rights of African Americans. The Republican caucuses of the North Carolina General Assembly not only look like White conclaves, they govern like them.

Upon assuming control of both houses of the legislature in 2011, Republican supermajorities immediately turned to securing their favorable control of the electoral process. New districting maps, state and federal, were enacted.[50] Each set was eventually ruled unconstitutional by federal courts for diluting the voting rights of African Americans.[51] The United States House of Representatives' districts, judges ruled, were not designed to comply with the Voting Rights Act, as lawmakers claimed, but to discriminate against Black voters.[52] African-Americans had been packed into contorted districts to minimize their electoral power.[53] The U.S. Supreme Court agreed, after a six-year saga.[54]

Republican state lawmakers were even more ambitious with their own districts. On that front, another federal court ruled that the General Assembly had "unjustifiably, and therefore unconstitutionally, predominantly relied on

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[50] *See* Gary Robertson, *Court Upholds N.C. District Maps*, N.C. PUB. RADIO (Jul. 8, 2013), https://www.wunc.org/post/court-upholds-nc-district-maps.

[51] *See* Covington v. North Carolina, 316 F.R.D. 117, 124 (M.D.N.C. 2016), *aff'd*, 137 S. Ct. 2211 (2017) (mem.) ("[T]he twenty-eight challenged districts in North Carolina's 2011 State House and Senate redistricting plans constitute[d] racial gerrymanders in violation of the Equal Protection Clause of the United States Constitution."); Cooper v. Harris, 137 S. Ct. 1455, 1481-82 (2017) (affirming that racial considerations predominated in the creation of the two congressional districts at issue).

[52] *See Covington*, 316 F.R.D. 117, at 124.

[53] *See Cooper*, 137 S. Ct. at 1469.

[54] *See id.*

race" in drawing district lines.[55] The "overriding priority of the redistricting plan was to draw a pre-determined, race-based number of districts."[56] Federal District Court Judge James Wynn was frank to say the scheme to discriminate was a "widespread, serious, and longstanding . . . constitutional violation."[57] It was, Wynn added, "among the largest racial gerrymanders ever encountered by a federal court."[58] As a result, it deprived an ample percentage of North Carolinians of "a constitutionally adequate voice in the State's legislature," defeating foundational ties of popular sovereignty.[59]

Despite the powerful judicial chastisement, Republican lawmakers continued to drag their feet—appealing every ruling and delaying implementation of a meaningful remedy.[60] Eventually, on the congressional side, a three-judge panel declared in exasperation:

> We continue to lament that North Carolina voters have now been deprived of a constitutional congressional districting plan—and, therefore, constitutional representation in Congress—for six years and three election cycles.[61]

The massive state-based gerrymander, federal courts concluded, had:

> [So] unjustifiably rel[ied] on race to distort dozens of legislative district lines, and thereby potentially distort the outcome of elections and the composition and responsiveness of the legislature, the districting plans [under which the General Assembly had been elected] interfered with the very mechanism by which people confer

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[55] Covington v. North Carolina, 283 F. Supp. 3d 410, 416 (M.D.N.C.), *aff'd in part, rev'd in part*, 138 S. Ct. 2548 (2018).

[56] *See* Covington v. North Carolina, 316 F.R.D. 117, 135 (M.D.N.C. 2016), *aff'd*, 137 S. Ct. 2211 (2017) (mem.).

[57] Covington v. North Carolina, 270 F. Supp. 3d 881, 884 (M.D.N.C. 2017).

[58] *Id.*

[59] Covington v. North Carolina, No. 1:15CV399, 2017 WL 44840, at *2 (M.D.N.C. Jan. 4, 2017). *See also* Lynn Bonner, *Federal Judges Find NC Legislative Districts Unconstitutional*, NEWS & OBSERVER (Raleigh) (Aug. 11, 2016), https://www.newsobserver.com/news/politics-government/state-politics/article95080647.html.

[60] NICHOL, INDECENT ASSEMBLY, *supra* note 18, at 132–36.

[61] Common Cause v. Rucho, 318 F. Supp. 3d 777, 943 (M.D.N.C. 2018).

> their sovereignty on the General Assembly and hold the General Assembly accountable.[62]

The racial transgression was so dramatic and persistent that, in 2019, a Wake County state judge ruled that two electorally adopted amendments to the North Carolina constitution were invalid because the legislature had forfeited the authority, under Article XIII of the state charter, to place proposed amendments on the ballot for adoption by the citizenry.[63] The state constitution, the court reasoned, requires a 3/5 vote of the General Assembly for electoral consideration.[64] However:

> [T]he unconstitutional racial gerrymander tainted the three-fifths majority required by the state constitution before an amendment proposed can be submitted for a vote, breaking the appropriate chain of popular sovereignty between North Carolina citizens and their representatives. [. . .] An illegally constituted General Assembly does not represent the people of North Carolina and therefore is not empowered to pass legislation that would amend the state constitution.[65]

Republican lawmakers were again called on the carpet, in 2017, for trying to crush the representational and voting rights of Black candidates and voters. Unhappy with the outcome of Greensboro City Council elections, which produced a Democratic majority and four African American councilors, the General Assembly used a truncated process, pushed by Republican Senator Trudy Wade, to simply overturn the unseemly results by creating new districts double-bunking incumbents.[66] Wade claimed legislative immunity in the lawsuit brought to challenge the racial sore-loser

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[62] Covington v. North Carolina, 270 F. Supp. 3d 881, 897 (M.D.N.C. 2017).

[63] *See* Order at 10–11 N.C. State Conf. of the NAACP v. Moore, 18 CVS 9806 (Wake Cnty. Super. Ct. Feb. 22, 2019) (citing N.C. CONST. art. XIII, § 4).

[64] *See id.*

[65] *Id.* at 11. The *NAACP v. Moore* decision was subsequently reversed, on other grounds, by the North Carolina Court of Appeals. *See* No. COA19-384, 2020 WL 5521358 (NC. App. Sept. 15, 2020).

[66] *See generally* Anne Blythe, *Federal Judge Overturns North Carolina Legislative Attempt to Change Greensboro's City Election System*, NEWS & OBSERVER (Raleigh) (Apr. 3, 2017), https://www-newsobserver-com.libproxy.lib.unc.edu/article142454699.html.

law to avoid having to explain, or answer for, her discriminatory motives.[67] Federal District Court Judge Catherine Eagles saw through the ruse, however, and held it to be yet another move by the General Assembly to disenfranchise Black Tar Heels.[68]

The North Carolina General Assembly's (all-White) Republican caucuses didn't limit their electoral efforts to re-drawing district lines. In 2013, lawmakers passed a massive voter identification and election regulation law characterized by national scholars as the most restrictive electoral measure passed by a state government in a half-century.[69] It, too, was largely invalidated by the federal courts.[70] The reviewing judges extensively explored the motivation and methods behind the statute's enactment.[71] They concluded that Republicans had studied every voting provision or mechanism that elevated Black turn-out and then eliminated or restricted each practice "with almost surgical precision."[72] The law reflected intentional, targeted racial suppression. Its impacts could not sensibly be regarded as accidental or based on permissible justifications, the court ruled.[73] The claimed interest in ballot integrity was held to be a mere ruse.[74] No evidence of in-person voter fraud could be provided.[75] "Indeed," the three-judge panel wrote, "neither this legislature—nor, as far as we can tell,

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[67] *Id.*; *see also* NICHOL, INDECENT ASSEMBLY, *supra* note 18, at 133–36 (describing "sore loser" laws).

[68] *See* Blythe, *supra* note 66.

[69] Ari Berman, *North Carolina Passes the Country's Worst Voter Suppression Law*, THE NATION (July 26, 2013), https://www.thenation.com/article/north-carolina-passes-countrys-worst-voter-suppression-law.

[70] *See* N.C. State Conf. of the NAACP v. McCrory, 831 F.3d 204, 207 (4th Cir. 2016).

[71] *Id.* at 214, 235–38.

[72] *Id.* at 214.

[73] *Id.*

[74] *Id.* at 238.

[75] *See id.* at 235.

any other legislature in the country—has ever done so much, so fast, to restrict access to the franchise."[76]

The General Assembly also moved to diminish the rights of African Americans in the criminal justice system. In 2009, North Carolina (then under Democratic control) had enacted the groundbreaking Racial Justice Act, which required courts to vacate a death sentence when it was proven to have been "sought or obtained on the basis of race."[77] The goal of the statute was to ensure that if North Carolina were to continue to enforce a death penalty, racial bias would play no role in its implementation.[78] The statute was aimed particularly at racially discriminatory practices in death cases, including bias in jury selection.[79] In 2012, Cumberland County Superior Court Judge Gregory A. Weeks cited the Act in overturning Marcus Robinson's death sentence after concluding that highly reliable evidence showed prosecutors intentionally discriminated against Black defendants in selecting juries in capital cases.[80] A few months later, three other previously convicted individuals proved that prosecutors had also blocked African Americans from jury service.[81] Their death sentences (not the underlying convictions) were vacated.[82]

In 2013, the Republican General Assembly decided it had seen enough and repealed the Racial Justice Act.[83] Rather than addressing the injustices

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[76] *Id.* at 228. Another federal court ruled, again in 2019, that the General Assembly's second attempt to pass this law did not do enough to purge the taint of racially discriminatory purpose of the original bill. *See* NAACP v. Cooper, 430 F. Supp. 3d 15, 35 (M.D.N.C. 2019).

[77] 2009 N.C. Sess. Law 464 (originally codified at N.C. GEN. STAT. § 15A-2010 (2009)) (repealed 2013).

[78] *See id.*

[79] *Id.*

[80] State v. Robinson, No. 91 CRS 23143 (N.C. Super. Ct. Apr. 20, 2012) (order granting motion for appropriate relief).

[81] State v. Golphin, No. 97 CRS 47314-15, 98 CRS 34832, 35044, 01 CRS 65079 (N.C. Super. Ct. Dec. 13, 2012) (order granting motions for appropriate relief).

[82] *Id.*

[83] 2013 N.C. Sess. Law 154 § 5(a) (effective June 19, 2013); *see also* Michael Stone, *North Carolina Repeals Racial Justice Act*, NAT'L COAL. TO ABOLISH THE DEATH PENALTY (July 1, 2013), http://www.ncadp.org/blog/entry/north-carolina-repeals-the-racial-justice-act.

revealed in the early racial justice cases, lawmakers chose, in effect, to kill the messenger. A freshman (Democratic) legislator who opposed the repeal said:

> Even though I'm new here, I understand that there was evidence of racial bias when the legislature adopted the Racial Justice Act. Subsequent court cases confirmed this bias. So why are we reversing the law now given all of this evidence?[84]

Democratic Sen. Martin Nesbitt asked even more pointedly, "If we have somebody on death row because they're black, wouldn't we want to find that out?"[85] Republican legislators seemingly disagreed.

In public education, perhaps unsurprisingly, the Republican General Assembly embraced steps leading to greater racial segregation. A state law opening the doors to charter schools enacted in 1996 had included a numerical cap on such institutions (100) and required schools to reflect the racial and ethnic composition of the districts in which they were located.[86] In 2013, lawmakers eliminated the ceiling and repealed the diversity requirement, demanding only that charter schools "make efforts" to achieve integration.[87] The results were predictable. A 2017 study by the Raleigh *News & Observer* concluded that "charter schools in North Carolina are more segregated than traditional public schools and have more affluent students."[88] A 2018 study by the North Carolina Justice Center traced the segregating

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[84] Stone, *supra* note 83.

[85] Bob Geary, *The Injustice of Repealing the Racial Justice Act*, INDY WEEK (Nov. 30, 2011), https://indyweek.com/news/northcarolina/injustice-repealing-racial-justice-act.

[86] Lynn Bonner, *Why NC Charter Schools Are Richer and Whiter*, NEWS & OBSERVER (Raleigh) (Oct. 10, 2017), https://www.newsobserver.com/news/local/education/article178022436.html.

[87] *Id. See also* Valerie Strauss, *North Carolina Passes Charter School Law That Critics Say Is Meant to Promote Segregation*, WASH. POST (June 14, 2018), https://www.washingtonpost.com/news/answer-sheet/wp/2018/06/14/north-carolina-passes-charter-school-law-that-critics-say-is-intended-to-promote-segregation.

[88] Bonner, *supra* note 86.

impact of charters on the traditional school system.[89] The proliferation of charter schools "exacerbates racial segregation," it concluded.[90] Charter schools "tend to skew whiter than other schools in the same county."[91]

In 2018 Republican lawmakers broke new ground by enacting a measure permitting four suburban towns in Mecklenburg County, with mostly White populations, to create their own charter schools and limit enrollments to students from within their borders.[92] This effectively allowed the small enclaves to withdraw from the broad and racially and economically diverse Charlotte-Mecklenburg school district. The experiment also allowed the municipalities—Cornelius, Huntersville, Matthews, and Mint Hill—to spend property tax dollars on the charters.[93] The North Carolina NAACP's Irv Joyner described the move as "an effort to go back to the 1900s with Jim Crow where these enclaves for whites are being allowed to be set up."[94] James Ford, a North Carolina teacher of the year, wrote that the bill was "a design for racial and economic segregation. . . . We've seen this before. Only this time it is not white flight, it's building a 'white fence.'"[95]

There's more, of course, though I know the listing grows tedious. As the Black Lives Matter movement swept the nation in 2013 and 2014, fueled by police brutality caught on ever pervasive cameras, North Carolina legislators bucked the national trend by making it more difficult, legally, to obtain or

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[89] *See* T. Keung Hui, *NC Should Close Charter Schools That Aren't Diverse, New Report Says*, NEWS & OBSERVER (Raleigh) (March 16, 2018), https://www.news observer.com/article205190044.html.

[90] *Id.*

[91] *Id. See also* T. Keung Hui, *Report Looked at Racial Impact of NC Charter Schools. That Section Is Being Removed.,* NEWS & OBSERVER (Raleigh) (Jan. 3, 2020), https://www.newsobserver.com/news/local/education /article238936383.html.

[92] Valerie Strauss, *North Carolina Passes Charter School Law That Critics Say Is Meant to Promote Segregation*, WASH. POST (June 14, 2018), https:// www.washingtonpost.com/news/answer-sheet/wp/2018/06/14/north-carolina-passes-charter-school-law-that-critics-say-is-intended-to-promote-segregation.

[93] *Id.*

[94] *Id.*

[95] James Ford, Editorial, *Matthews v. CMS: Yes, The Fight About Charter Schools Is About Race*, CHARLOTTE OBSERVER (updated Apr. 27, 2018, 7:44 AM), https://www.charlotte observer.com/opinion/op-ed/article209884959.html.

publish police video camera footage.[96] More famously, at least in North Carolina, in 2015 the General Assembly passed General Statute 100-2.1, which requires the approval of the state historical commission before any confederate monument can be moved or taken down, even temporarily.[97] The law was principally designed to prevent the removal of the "Silent Sam" statue at the gateway of the University of North Carolina-Chapel Hill campus.[98] After the horrifying killing of an anti-racist protester in Charlottesville, Virginia, the governor of North Carolina asked that the monuments law be repealed, saying "[w]e cannot continue to glorify a war against the United States of America fought in the defense of slavery."[99] The White caucuses of the Republican General Assembly refused. One of the monument bill's principal authors, Senator Tommy Tucker, explained that the Civil War had nothing to do with slavery: "It was caused by the North and their tariffs over southern goods."[100] Nice touch.

IV. POLITICS VS. RACE IN A WHITE PEOPLE'S PARTY

So now we arrive, finally, back at the original question. What is the appropriate line to be drawn between racial and political gerrymandering

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[96] *See* N.C. Sess. Law 2016-88; Lauren Horsch, *It's Now Up to Judges to Release Police Body Cam Footage - Here's How That's Going*, NEWS & OBSERVER (Raleigh) (Mar. 9, 2018), https://www.newsobserver.com/news/politicsgovernment/state-politics/article204290209.html; *see also Gov. McCrory Signs Bill That Keeps Police Camera Footage*, AM. CIVIL LIBERTIES UNION OF N.C. (July 11, 2016), https://www.acluofnorthcarolina.org/en/press-releases/gov-mccrory-signs-bill-keeps-police-camera-footage-secret; Elaina Athans, *New Law Makes Police Cam Footage Off Limits to Public*, ABC 11 (July 12, 2016), https://abc11.com/1422569/.

[97] N.C. GEN. STAT. §100-2; *see also* Joe Killian, *The Confederate Monuments Controversy: What the Law Says, What Historians Say*, N.C. POL'Y WATCH (Aug. 23, 2017), http://www.ncpolicywatch.com/2017/08/23/confederate-monuments-controversy-law-says-historians-say/.

[98] The statue of a Confederate soldier, erected in 1913 as a tribute to UNC students who fought for the South during the Civil War, has drawn controversy for decades. Killian, *supra* note 97.

[99] *Id.*

[100] Lynn Bonner, *Why NC Gov. Roy Cooper Wants Confederate Statues Removed from State Grounds*, THE STATE (Columbia, SC) (Aug. 16, 2017), https://www.thestate.com/news/local/article167485447.html.

when reviewing the handiwork of the all-White, heavily racialized, discrimination-driven, Republican house and senate caucuses of a state General Assembly? How much judicial deference is to be proffered for the political stratagems developed to foster and enhance this unseemly work? Are the political moves of a White People's party non-justiciable? Are they racial or (merely) partisan?

Shaw v. Reno,[101] *Shaw v. Hunt*,[102] *Easley v. Cromartie*,[103] and *Cooper v. Harris*,[104] it will be recalled, determined that the use of race as the predominant factor in legislative districting is presumptively unconstitutional.[105] The Equal Protection Clause's "central mandate is racial neutrality in governmental decisionmaking,"[106] so efforts to "separate voters into different districts on the basis of race" must satisfy the rigors of strict scrutiny.[107]

Rucho v. Common Cause[108] nevertheless proclaimed that racial and political gerrymandering are categorically distinct creatures.[109] Political gerrymander might be unseemly, but it is not constitutionally forbidden.[110] Securing "partisan advantage . . . does not become constitutionally impermissible, like race discrimination, when [it] 'predominates.'"[111] Partisan gerrymandering claims trigger "no legal standards to limit and direct" judicial decision-making.[112] Echoing Justice Anthony Kennedy's sentiments from an earlier case, Chief Justice Roberts theorized that "[a]ny

[101] 509 U.S. 630 (1993).

[102] 517 U.S. 899 (1996).

[103] 532 U.S. 234 (2001).

[104] 137 S. Ct. 1455 (2017).

[105] See *supra* notes 4–10 and accompanying text.

[106] Miller v. Johnson, 515 U.S. 900, 904 (1995).

[107] *Shaw v. Reno*, 509 U.S. at 649, 653.

[108] 139 S. Ct. 2484 (2019).

[109] *See id.* at 2496–97.

[110] *Id.* at 2497.

[111] *Id*. at 2503; *cf. supra* note 10 and accompanying text (noting that racial gerrymanders are unconstitutional).

[112] *Id*. at 2507.

standard for resolving [political gerrymandering] claims must be grounded in a 'limited and precise rationale' and be 'clear, manageable, and politically neutral.'"[113] He was not able to find such standards, apparently. While race-based decision-making "is inherently suspect," "lines . . . drawn on the basis of partisanship" are therefore not.[114] Partisanship objection is inevitably a question of degree—"how much partisan dominance is too much."[115] The Court insisted that such a lament should be directed to the legislatures (ironically), not to the federal courts.[116]

There is much that can be said about the Chief Justice's line of judicial demarcation. The Federal Courts professor in me would note Roberts' near-obliteration of the previously somewhat manageable political question doctrine.[117] The minimalist and reasonably precise requirements of the jurisdictional standard were stretched, or altered, notably. The "textual commitment" standard, before *Rucho*, marked the heart of the political question determination.[118] But *Rucho* highlights no precise "textually demonstrable commitment" separating population and racial gerrymandering cases, on the one hand, and political gerrymandering actions on the other. Now no one knows what the standard means or if it remains the central requisite of the jurisdictional determination.

Nor, I'm guessing, would voting rights scholars agree that the Supreme Court's track record in racial gerrymandering cases—looking at the "predominance of race" and the strength of justification flowing from Voting Rights Act's integrative compliance obligations—reflects a "limited and

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[113] *Id.* at 2498 (citing Vieth v. Jubelirer, 541 U.S. 267, 306–08 (2004) (Kennedy, J., concurring)).

[114] *Id.* at 2502–03.

[115] *Id*. at 2498.

[116] *See id*. at 2508.

[117] *See Vieth*, 541 U.S. at 277 (explaining that cases presenting a political question are those that lack "judicially discoverable and manageable standards for resolving [them].") *See also* Zivotofsky v. Clinton, 566 U.S. 189, 195 (2012); Baker v. Carr, 369 U.S. 186, 210 (1962); Powell v. McCormack, 395 U.S. 486, 518–21 (1969).

[118] *Compare Zivotofsky*, 566 U.S. at 191–201, *with Rucho*, 139 S. Ct. at 2491–508, for two opinions, both written by Chief Justice Roberts, about the political question doctrine. *See also Baker*, 369 U.S. at 210–11; *Powell*, 395 U.S. at 518–21.

precise rationale" deploying "clear, manageable and politically neutral" standards. Roberts' portrait of precision in the race cases is dream work.[119]

But these traditionally picked nits are not my focus here. My question is whether the partisan gyrations of a White people's governing legislative caucus can meaningfully be deemed non-racial. If an all-White governing caucus, repeatedly demonstrated to be carrying out a race-based substantive legislative agenda, deploys politically biased strategies to further its governing power, are courts to defer to such choices in the name of protected democratic decision-making? When the all-White caucuses of the North Carolina Republican legislature engaged in the most politically distorted district drawing in American history in order to secure and expand their racialized proclivities, can it actually be that the Fourteenth and Fifteenth amendments are untroubled? Is constitutional law, in fact, an ass?

Is the phantom race versus politics distinction capable of moving beyond lodging place in re-districting cases? Is it literally permissible, as Republican leaders claim in North Carolina,[120] to impose debilitating voter ID requirements upon Black voters so long as the burden is purportedly levied because the potential voters are Democrats, not because they are Black? African-Americans have been offered a dizzying array of justifications for their abuse at the hands of a White majority in North Carolina over the centuries. Is "I'm not after you because you're Black, I'm after you because you're a Democrat" yet one more of them?

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[119] *Compare* Holder v. Hall, 512 U.S. 874, 880–89 (1994), *with id.* at 891 (Thomas, J., concurring), *and* Shaw v. Reno, 509 U.S. 630 (1993) (showing courts struggling with what the benchmark in racial gerrymandering cases should be under an acceptable districting system).

[120] German Lopez, *Longtime Republican Consultant: If Black People Voted Republican, Voter ID Laws Wouldn't Happen*, VOX (Sept. 2, 2016), https://www.vox.com/2016/9/2/12774066/voter-id-laws-racist ("'Look, if African Americans voted overwhelmingly Republican, they would have kept early voting right where it was,' . . . . 'It wasn't about discriminating against African Americans. They just ended up in the middle of it because they vote Democrat.'").

Does the cloak of "mere" partisanship extend further? The state of North Carolina has a broad and impressive public university system.[121] It is overseen by a legislatively selected Board of Governors.[122] It now seems to be the case that the Board of Governors, and its benefactors in the all-White Republican legislative caucuses, will allow only a Republican to become the president of the university system.[123] The theory, I suppose, is that the legislative majority demands one of its own. Can the White person's caucus also, in solidarity, demand only a White president? No, you say, that would be overt race discrimination. But the reed is thin. Thinner than piss on a rock.

And does the *Shaw*/*Rucho*, racial/political line offer an odd benefit or incentive to White people's parties? In *Cooper v. Harris*, the United States Supreme Court invalidated yet another North Carolina racial gerrymander.[124] The state, unsurprisingly, claimed as a defense that the line-drawing was merely partisan in nature, not racial.[125] The Justices rejected the political gerrymandering justification, as had the trial court below.[126] The *Cooper* majority, though, conceded that "racial identification is [often] highly correlated with political affiliation."[127] As a result, a federal trial court must make "a sensitive inquiry" into all "circumstantial and direct evidence of intent" to assess whether the "plaintiffs have managed to disentangle race from politics and prove that the former drove a district's lines."[128]

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[121] *See* N.C. GEN. STAT. § 116-1(b) (2019); *Institutions and Affiliates*, UNIV. N.C. SYS., https://www.northcarolina.edu/institutions/ (listing seventeen public higher-education institutions affiliated with the state as of 2020).

[122] N.C. GEN. STAT. §§ 116-3, 116-6 (2019).

[123] *See* Editorial, *More Proof That the Firing of Tom Ross Was Purely Partisan*, CHARLOTTE OBSERVER, https://www.charlotteobserver.com/opinion/article67472332.html (covering the UNC Board of Governor's decision to fire UNC President Tom Ross because he was associated with Democrats).

[124] Cooper v. Harris, 137 S. Ct. 1455, 1481–82 (2017).

[125] *Id.* at 1473.

[126] *Id.* at 1474.

[127] *Id.* at 1473 (quoting Easley v. Cromartie, 532 U.S. 234, 243 (2001)).

[128] *Id.* (quoting Hunt v. Cromartie, 526 U.S. 541, 546 (1999)).

In dissent, Justice Alito emphasized an even more robust presumption that state legislators had acted permissibly:

> We have stressed, however, that courts are obligated to "exercise extraordinary caution in adjudicating claims that a State has drawn district lines on the basis of race." . . . "Federal-court review of districting legislation represents a serious intrusion on the most vital of local functions," and "the good faith of a state legislature must be presumed." . . . A legislature will "almost always be aware of racial demographics" during redistricting, but evidence of such awareness does not show that the legislature violated equal protection. . . . Instead, the Court has held, "race must not simply have been *a* motivation for the drawing of a majority-minority district, but the *predominant* factor motivating the legislature's districting decision." . . . This evidentiary burden "is a demanding one." . . . We have warned that courts must be very cautious about imputing a racial motive to a State's redistricting plan.[129]

It stands to reason, perhaps, that separating the political and racial motivations of a White person's government, aiming to carry out a heavily racialized, programmatic, substantive platform, will be a tough and demanding—if not impossible—duty. The admixture of intentions will become all the more successfully intertwined as the segregation advances, becoming increasingly complete. The "Whiter" the party, the more feasible the claim of purportedly benign partisan service. And it is nasty business, of course, for a federal court to rule that a state legislature has acted on the basis of race.[130] A presumption against such a determination must be afforded.[131] Leeway must be given, lest we accuse legislators of being brutes. Thus, a White people's caucus is afforded an assumption of justifiability that simply doesn't arise in the run-of-the-mill re-districting case. An incentive, in effect, is offered to the all-White caucus like North Carolina's. Federal judges must

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[129] *Id.* at 1487–88 (Alito, J., concurring in part) (capitalization cleaned up) (emphasis original) (citations omitted).

[130] *See id.* at 1490 ("When a federal court says that race was a legislature's predominant purpose in drawing a district, it accuses the legislature of 'offensive and demeaning' conduct.").

[131] *Id.* at 1502.

be "very cautious" lest they appear rude and accusatory by casting racial aspersions. It is, after all, 2020, not 1953. So political deference, the theory seems to go, must be extended to a White people's government's claims of partisan dedication. Otherwise, we might be seen as suggesting that the (all-White) lawmakers are behaving in ways that are reprehensible, even as they carry out schemes that are, in fact, reprehensible. There is nothing more infuriating to a White people's party than being called racist, after all. They are to be sure deploying government power to subjugate on the basis of race. Still, it is better for Black Tar Heels to continue to suffer than for White ones to be made to feel bad about themselves.

Rucho, of course, was a political question decision—a jurisdictional ruling—not technically a judgment on the merits of the equality claims proffered.[132] That, when added to the fact that state courts are free to read their own constitutions as more protective of individual rights than the federal charter,[133] left open the possibility that state tribunals would come to the opposite conclusion about the legality of extreme partisan gerrymandering under the provisions of the North Carolina Constitution. That is precisely what happened in *Common Cause v. Lewis* in September 2019.[134] There, a unanimous three-judge state court (with both Republican and Democratic judges) explained:

> The issue before the Court is distilled to simply this: whether the constitutional rights of North Carolina citizens are infringed when the General Assembly, for purposes of retaining power, draws district maps with a predominant intent to favor voters aligned with one political party at the expense of other voters, and in fact achieves results that manifest this intent and cannot be explained by other non-partisan considerations.[135]

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[132] *See* Rucho v. Common Cause, 139 S. Ct. 2484, 2499 (2019).

[133] *See* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977) ("State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law.").

[134] Common Cause v. Lewis, No. 18 CVS 014001 (Wake Cnty. Super. Ct. Sept. 3, 2019).

[135] *Id*. at 6.

The judges found that North Carolina's 2017 state legislative maps had been drawn by the General Assembly with the partisan goal of perpetuating Republican control, that state lawmakers had deployed that intention "with surgical precision," and that their efforts reflected "extreme outliers" of partisanship.[136] Accordingly, "it [was] the carefully crafted maps, not the will of the voters, that dictated the election outcomes in a significant number of legislative districts and, ultimately, (determined) the majority control of the General Assembly."[137] Such purposeful and pervasive cheating, the judges held, violated the central tenets of the North Carolina Constitution.[138]

Several weeks later, a North Carolina state court held that the state's federal congressional districts represented unconstitutional political gerrymanders as well—taking the explicit step the United States Supreme Court had avoided in *Rucho*.[139] Eric Holder, former United States Attorney General, said that "[f]or nearly a decade, Republicans have forced the people of North Carolina to vote in districts that were manipulated for their own partisan advantage . . . . Now—finally—the era of Republican gerrymandering in the state is coming to an end."[140]

No doubt Common *Cause v. Lewis* is a direct political gerrymandering decision—saying, explicitly, that what the United States Supreme Court taught, enthusiastically, for seven decades, to be the demands of the equal protection clause in population and racial gerrymandering cases does not mysteriously disappear in partisanship cases. I'm convinced that no small part of the impetus for such a determination for judges actually witnessing political life in North Carolina was that concluding that the actions of an all-White legislative assembly, protecting its continuing efforts to carry forward an intensely racialized substantive legislative agenda, had little to do with race discrimination seemed too absurd. Simply a bridge too far. It might

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[136] *Id*. at 7.

[137] *Id.*

[138] *Id*. at 10.

[139] Harper v. Lewis, No. 19 CVS 012667 (Wake Cnty. Super. Ct. Oct. 28, 2019). *See also* Will Doran, *New Maps Ordered for NC 2020 Congressional Races, in Win for Democrats*, NEWS & OBSERVER (Raleigh) (Oct. 28, 2019), https://www.newsobserver.com/news/politics-government/article236752543.html.

[140] *Id.*

provide exquisite cover for Chief Justice Roberts and his *Rucho* colleagues—cover well and intentionally wrought. On race matters, after all, they seem to delight in exalting form over substance.[141] On the ground in North Carolina, though, no one believes it. No one.

[141] *See* Shelby Cnty. v. Holder, 570 U.S. 529 (2013) (invalidating essential enforcement mechanisms of the Voting Rights Act without realistic assessment of the impact on voting rights); Parents Involved in Cmty. Schools v. Seattle School District, 551 U.S. 701 (2007) (invalidating school integration steps undertaken by school districts without meaningful assessment of actual impact on opportunities for equal education).

THE NAZI ANALOGY IN JAPANESE AMERICAN CIVIL RIGHTS DISCOURSE*

ERIC L. MULLER**

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INTRODUCTION

On Saturday, April 25, 1942, 852 people from the German city of Würzburg and its environs boarded trains heading east under armed guard. The passengers had been forced from their homes because they were Jewish. They had already lost much of their property to rapacious neighbors. They had been allowed to take with them to the train station only what they could carry. At their destination they faced confinement.[1]

The next day, Sunday, April 26, 1942, almost 6,000 miles away, a group of 800 people from the American city of Santa Monica boarded buses heading east under armed guard.[2] They had been forced from their homes because they were of Japanese ancestry. They too had already lost much of their

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[1] This deportation is described and photographically depicted in STAATLICHE ARCHIVE BAYERNS, WEGE IN DIE VERNICHTUNG. DIE DEPORTATION DER JUDEN AUS MAINFRANKEN 1941-1943 (2003). It is also described in Eric L. Muller, *Of Nazis, Americans, and Educating Against Catastrophe*, 60 BUFF. L. REV. 323, 330–32 (2012).

[2] *Japanese Exodus from Los Angeles Goes Forward*, L.A. TIMES, April 28, 1942.

property to rapacious neighbors. They too had been allowed to take with them only what they could carry. At their destination they too faced confinement.

I am anxious as I draw this analogy between the World War II deportations of German Jews and Japanese Americans.[3] The enormity and mechanization of the Nazi genocide dwarf anything placed alongside it. The abjectness of Nazi evil and the scope of Jewish suffering eclipse everything in their shadows. To compare anything to the Holocaust invites the prompt and derisive accusation of *reductio ad Hitlerum* that is so effective at ending discussion.[4]

This anxiety has stalked academic and popular discussion of the wartime removal and imprisonment of Japanese Americans for decades. While community activists and scholars have succeeded in establishing this program as one of America's biggest civil rights violations rather than the justified military measure most Americans deemed it during and after the war,[5] one strategy has repeatedly encountered resistance. It is a linguistic strategy. During the war, many people in the United States referred to the government's ten confinement sites for Japanese Americans as "concentration camps." Today, for most Americans, the term "concentration camp" calls up images of Auschwitz.[6] Seeking to strip the Japanese American camps of any veneer of pleasantness, advocates and scholars have increasingly come to call them "concentration camps" rather than the euphemistic "assembly centers" and "relocation centers" of government

[3] In this Essay I will refer to the affected group as "Japanese Americans," even though that is technically an incorrect (or at least incomplete) description. Roughly one third of those affected were not American nationals; they were Japanese resident aliens. *See* WAR RELOCATION AUTHORITY, THE EVACUATED PEOPLE: A QUANTITATIVE DESCRIPTION 96 (1946).

[4] LEO STRAUSS, NATURAL RIGHT AND HISTORY 42 (1953).

[5] *Gallup Vault: WWII-Era Support for Japanese Internment*, GALLUP (Aug. 31, 2016), https://news.gallup.com/vault/195257/gallup-vault-wwii-era-support-japanese-internment.aspx.

[6] Auschwitz, in what is now southern Poland, operated between 1940 and 1945 as the largest of the German concentration camps and extermination centers. *See Auschwitz*, HOLOCAUST ENCYCLOPEDIA, https://encyclopedia.ushmm.org/content/en/article/auschwitz.

parlance.[7] And this effort to restore the common colloquial usage has triggered periodic waves of conflict with people who see it as an attempt to establish a false and insulting equivalence.

Today the conflict stands largely, even if still a bit uncomfortably, resolved. Those who call the Manzanar Relocation Center[8] or the Heart Mountain Relocation Center[9] a "concentration camp" typically make clear that they are not trying to invoke Nazism. They emphasize that the problem is one of semantic change over time, with the connotation of "death camp" replacing the original meaning of the term "concentration camp" as the world came to understand the horrors of Auschwitz.

These arguments about changed meaning have successfully resolved the conflict over the term "concentration camp." But they have had an unfortunate side-effect. They have masked the important fact that in the early 1940s there actually was a civil rights discourse that dared to compare American policies towards Japanese Americans with Germany's contemporaneous policies towards Jews. In judicial filings and in newspapers between 1942 and 1945, critics and observers of the mass removal and imprisonment of Japanese Americans invoked the tactics of the Nazis and the deprivations visited on German Jews. Not surprisingly, this rhetorical strategy ruffled official feathers, and did so even though the horrors of Auschwitz were not yet widely known.

This essay unearths the analogies to Nazi policies that advocates for Japanese American civil rights deployed even while the Nazi depredations were ongoing. It shows that what we now call the Holocaust was the stuff of civil rights conversation in the United States, not just years after the Holocaust ended but while it was happening. It also shows that Nazi policies

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[7] The "assembly centers" were the temporary camps in which Japanese Americans were placed for the summer of 1942; the "relocation centers" were the permanent camps to which they were removed in the late summer of 1942.

[8] Manzanar, located in California's Owens Valley, housed some 10,000 Japanese Americans between 1942 and 1945. *See Manzanar*, DENSHO ENCYCLOPEDIA, https://encyclopedia.densho.org/Manzanar/.

[9] Heart Mountain, located in northwest Wyoming, housed some 10,000 Japanese Americans between 1942 and 1945. *See Heart Mountain*, DENSHO ENCYCLOPEDIA, https://encyclopedia.densho.org/Heart%20Mountain.

and practices served as a touchstone for public discussion of the civil rights of Asian Americans, and not just African Americans. And in doing these things, it sheds new light on an enduring exceptionalism in America's understanding of its own civil rights history, one that insists the nation is immune from the repressive ills that afflict other countries.

I. THE PERSISTENT "CONCENTRATION CAMP" DEBATE

On February 19, 1942, President Franklin Roosevelt set aside Justice Department objections and signed an executive order giving the military the power to uproot any person from zones it might create in the United States.[10] The military designated the entire West Coast as such a zone and removed every person of Japanese ancestry, citizens and noncitizens alike.[11] A premise of racial disloyalty underlay the decision.[12] It is no longer seriously contended that this move was a military necessity. Rather, racism and war hysteria were the grounding for the whole program of mass curfew, removal, and detention.[13]

Without charges, proof, or hearings, some 120,000 people lost most of their worldly goods to forced sale or abandonment and spent upwards of three years in barbed wire enclosures the government euphemistically called "assembly" and "relocation" centers.[14] While none of the camps saw the cruelty and disregard for prisoners' wellbeing that marked even the most benign Nazi camp, they were uncomfortable, repressive confinement sites in

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[10] Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 25, 1942), 3 C.F.R. § 1092 (Cum. Supp. 1943). On the Justice Department's objections, see PETER IRONS, JUSTICE AT WAR: THE STORY OF THE JAPANESE AMERICAN INTERNMENT CASES 51–62 (1983).

[11] *See* JOHN DEWITT, FINAL REPORT: JAPANESE EVACUATION FROM THE WEST COAST, 1942 15, 36 (1943), https://archive.org/details/japaneseevacuati00dewi/

[12] In justifying the decision, Lieutenant General John DeWitt, the commander who ordered it, asserted that "[t]he Japanese race is an enemy race." *Id.* at 34.

[13] This was the conclusion of a blue-ribbon panel appointed by the United States Congress to investigate the episode and make recommendations about possible redress. *See* COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, PERSONAL JUSTICE DENIED: REPORT OF THE COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS 18 (1997).

[14] A comprehensive account is available in *id.* at 47–184.

barren and desolate places.[15] Japanese Americans lived lives of idleness and often despair under the eyes of armed sentries in guard towers. Tens of thousands of people shouldered the unjust stigma of guilt by ethnicity.

This enduring shame was among the factors that led most of those whom the government had unjustly imprisoned to say little in the years after their release about the places where they had been confined.[16] When the former prisoners referred to the sites at all, they simply called them "camp."[17] Their community understood what "camp" was. No modifier—"concentration" or any other—was needed.

In the ferment of the late 1960s, some in the Japanese American community wanted to step out from under the shadow of stigma and shake off the prevalent belief that their imprisonment had been a justified military necessity rather than a racist injustice.[18] One of their strategies was to reclaim the historically authentic term "concentration camp" in speaking and writing about their sites of confinement.[19] This opened a controversy about terminology that would flare up repeatedly for decades.

The first of these conflicts arose early in 1972. Two Japanese American groups applied to the California State Parks and Recreation Department to designate the site of the Manzanar Relocation Center as a state historic landmark.[20] They asked for the installation of a bronze plaque at the site

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[15] An outstanding visual depiction of one of the camps is the collection of photographs by prisoner Bill Manbo in COLORS OF CONFINEMENT: RARE KODACHROME PHOTOGRAPHS OF JAPANESE AMERICAN INCARCERATION IN WORLD WAR II (Eric L. Muller ed., 2012).

[16] *See* Donna K. Nagata, Jackie H.J. Kim and Teresa U. Nguyen, *Processing Cultural Trauma: Intergenerational Effects of the Japanese American Incarceration*, 71 J. SOC. ISSUES 356, 360, 363, 365 (2015).

[17] Sue Konitomo Embrey, *From Manzanar to the Present: A Personal Journey*, in LAST WITNESS: REFLECTIONS ON THE WARTIME INTERNMENT OF JAPANESE AMERICANS 177 (Erica Harth ed., 2001).

[18] *See id.* at 176.

[19] *See* Aiko Herzig-Yoshinaga, *Words Can Lie or Clarify: Terminology of the World War II Incarceration of Japanese Americans*, NAT'L PARK SERV. HISTORY ELECTRONIC LIBRARY 2–4 (2009), http://npshistory.com/publications/incarceration/words-can-lie-or-clarify.pdf.

[20] ALICE YANG MURRAY, HISTORICAL MEMORIES OF THE JAPANESE AMERICAN INTERNMENT AND THE STRUGGLE FOR REDRESS 268 (2008) (describing the conflict to designate Manzanar as a state historic landmark).

reciting that "[f]rom war hysteria, racism, and economic greed one hundred ten thousand persons of Japanese ancestry were directed by Presidential Order on February 19, 1942 to leave their homes and to relocate to America's concentration camps."[21] The State Advisory Committee to the Department of Parks and Recreation approved the landmark designation but objected to the language of the plaque—in particular, to the words "concentration camps."[22] According to Sue Konitomo Embrey, a leader of one of the Japanese American groups seeking the designation, the advisory committee maintained that the term "conjures up the horrible memories of Hitler and his countrymen" and should "refer only to the camps in Europe."[23] The committee counter-proposed language for the plaque that, among other things, removed "racism" and "economic greed" entirely and replaced "concentration camps" with "relocation centers," the euphemism used by the agency that ran the camps, the War Relocation Authority (WRA).[24] This was unacceptable to the Japanese American groups. Only in response to intervention from state legislators did the Parks and Recreation Department relent and agree to a compromise on the language.[25] In 1973, the department installed a plaque using both terms—"relocation centers" and "concentration camps"—at Manzanar.[26]

Manzanar became the site of another skirmish in the "concentration camp" battle in 1996, when the National Park Service began planning for

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[21] *Id.* at 268.

[22] *Id.*

[23] Sue Kunitomi Embrey, *From Manzanar to the Present*, *in* LAST WITNESSES: REFLECTIONS ON THE WARTIME INTERNMENT OF JAPANESE AMERICANS 167, 178 (Erica Harth ed., 2003).

[24] MURRAY, *supra* note 20, at 269.

[25] *Id.* at 270, 273.

[26] *Id.* at 275. The final language read as follows: "In the early part of World War II, 110,000 persons of Japanese ancestry were interned in relocation centers by Executive Order 9066, issued on February 19, 1942. Manzanar, the first of ten such concentration camps, was bounded by barbed wire and guard towers, confining 10,000 persons, the majority being American citizens. May the injustices and humiliation suffered here as a result of hysteria, racism, and economic exploitation never emerge again." *Id.* at 274–75. Precisely the same conflict arose a few years later at the site of the Tule Lake camp in far northern California, with essentially the same resolution. *See* Charles Hillinger, *What Makes a Concentration Camp?*, L.A. TIMES, July 23, 1979.

interpretive facilities there.[27] Local residents flooded newspapers with letters accusing the government of "America-bashing,"—so many letters on both sides of the question that the local newspaper stopped printing them.[28] Much of the energy centered on the historical plaque placed in 1973 and its use of the term "concentration camp." Vandals hacked and stained the plaque and ground off the first "c" in the term.[29] A World War II veteran phoned the site superintendent to inform him "that he had driven 200 miles to urinate on the historical marker."[30]

Perhaps the saddest of the disputes over the term "concentration camp" arose two years later. National Park Service officials decided to bring to Ellis Island an exhibit on Japanese American removal and imprisonment that the Japanese American National Museum (JANM) in Los Angeles had created and displayed for a year in the mid-1990s.[31] The exhibit, entitled "America's Concentration Camps: Remembering the Japanese-American Experience," triggered no controversy in Los Angeles, but the reaction in New York in 1998 was more turbulent.[32] Anticipating controversy, the superintendent of the Ellis Island site wrote to the exhibit's curators at JANM that "because 'concentration camps' today connotes death camps, the 'very large Jewish community' in New York City 'could be offended by or misunderstand' the title."[33] She followed that letter with another two weeks later in which she explained that Ellis Island would not host the exhibit unless the words "concentration camp" were removed from its title.[34]

The exhibit's curators objected to this demand. "We need to call [the camps] what they were," the senior curator, Karen Ishizuka, was quoted as

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[27] *See* Martin Forstenzer, *Bitter Feelings Still Run Deep at Camp*, L. A. TIMES, Apr. 4, 1996 at A3, https://www.latimes.com/archives/la-xpm-1996-04-04-mn-54883-story.html.

[28] *See id.*

[29] *See id.*

[30] *Id.*

[31] *See* Somini Sengupta, *What Is a Concentration Camp? Ellis Island Exhibit Prompts a Debate*, N.Y. TIMES (Mar. 8, 1998), https://www.nytimes.com/1998/03/08/nyregion/what-is-a-concentration-camp-ellis-island-exhibit-prompts-a-debate.html.

[32] *See id.*

[33] *Id.*

[34] *See id.*

saying.[35] While the exhibit betrayed "no intent to compare or mitigate the absolute horror of the Holocaust," the term "concentration camp" was historically accurate and authentic.[36] "This happens to be our experience," Ishizuka said, "and it is our responsibility to tell it the way we experienced it."[37] Jewish voices then joined the debate. While not demanding the removal of the term outright, the executive director of the American Jewish Committee in New York opined that the title "dilutes what we have come to understand as the meaning of concentration camps."[38] "Since the Second World War," he maintained, the term had "taken on a specificity and a new level of meaning that deserves protection."[39]

The issue was resolved only after a meeting between Jewish and Japanese American groups produced a compromise.[40] The term "concentration camp" would remain in the exhibit's title, but an explanatory footnote would appear in the lobby of the exhibit and in its brochure that disclaimed any analogy to the Nazi experience. A commentator in the *New York Times* noted the sadness and complexity of the dispute, taking it as evidence that "[o]ne by one, emotion-laden words that Jews have thought of as special to them are slipping from their grasp."[41]

And that was not the last battle. The controversy reared its head again in 2011, this time within the Japanese American community itself. The disagreement was triggered by an effort by Japanese American scholars and activists to persuade the leading Japanese American civil rights group, the Japanese American Citizens League (JACL), to adopt a resolution endorsing a number of replacements for World-War-II-era euphemisms as preferred terms.[42] Among the euphemisms to be replaced was "relocation center," and

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[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *Id.* (internal quotations omitted).

[39] *Id.*

[40] *See* Somini Sengupta, *Accord on Term "Concentration Camp,"* N.Y. TIMES, Mar. 10, 1998, at B4.

[41] Clyde Haberman, *Defending Jews' Lexicon of Anguish*, N.Y. TIMES, Mar. 13, 1998, at B1.

[42] *See* THE POWER OF WORDS HANDBOOK, JAPANESE AMERICAN CITIZENS LEAGUE (2011), https://jaclpowerofwords.files.wordpress.com/2011/05/draft-power-of-words-hanbook.pdf.

one of its endorsed replacements was to be "American concentration camp."[43] At a 2010 meeting, the JACL's National Council approved the resolution by an 80-2 vote,[44] but that did not resolve the matter. The community continued to debate the matter for two years, with some expressing concern about possible insult to the Jewish community.[45] It was not until the JACL's 2012 National Convention that the organization managed a unanimous vote in support of the use of "concentration camp."[46]

This historical sketch of the "concentration camp" controversy makes clear that the contested term has touched deep feelings since the early 1970s.[47] What might explain the persistence of this controversy about language across some forty years?

For Japanese Americans, the renewed use of the term "concentration camp" in the early 1970s was one rhetorical piece of a larger effort to educate an ignorant public about the true injustices in the US government's wartime program. A common narrative at that time, much as it had been since the war, was that the government relocated the ethnic Japanese population to inland accommodations as a justified military necessity after the Japanese attack at

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[43] This proposal derived from the influential 2009 paper by Aiko Herzig-Yoshinaga, *supra* note 19, at 12–13.

[44] *See* POWER OF WORDS, *supra* note 42.

[45] *See, e.g.*, George Yoshinaga, *Horse's Mouth: The Richest Countries in the World*, RAFU SHIMPO (Sept. 16, 2010), https://web.archive.org/web/20160808024238/http://www.rafu.com/2010/09/horse-5/. Also very helpful in characterizing the controversy is Edward Schumacher-Matos and Lori Grisham, Opinion, *Euphemisms, Concentration Camps and the Japanese Internment*, NPR PUB. EDITOR (updated Feb. 14, 2012, 1:35 PM), http://www.npr.org/sections/ombudsman/2012/02/10/146691773/euphemisms-concentration-camps-and-the-japanese-internment.

[46] *See* Andy Noguchi, *JACL Ratifies Power of Words Handbook: What Are the Next Steps?* (July 15, 2012), http://blog.manzanarcommittee.org/2012/07/15/jacl-ratifies-power-of-words-handbook-what-are-the-next-steps/.

[47] *See, e.g.*, Jan Cleveland, *Area Man Remembers Manzanar*, SAN BERNARDINO SUN-TELEGRAM, Feb. 13, 1977, at A1; Dexter Waugh, *Semantic Debate on War Camps*, SAN FRANCISCO EXAMINER, May 7, 1976, at 6; Ann Reed, *History Board Rejects "Concentration Camp,"* SACRAMENTO BEE, May 7, 1976, at 28.

Pearl Harbor.[48] Particularly to a generation that had come of age during the ferment of the 1960s civil rights movement and the inception of the field of ethnic studies, this standard story was painfully ignorant of the truth of what they and their parents and grandparents had endured. It was also a story told by white rather than Japanese Americans. To restore the historically authentic term "concentration camp" to the discourse was to assert Japanese American agency in the telling of their story.

Restoring the term to the discourse also worked to undermine the argument that the camps were justified and pleasant.[49] Linguist Deborah Schiffrin writes perceptively about this aspect of the rhetorical strategy. She notes that decades after the war, the term "concentration camp" had become embedded in a well-known story—the Holocaust—whose horror and injustice nobody could contest.[50] The firm entrenchment of the term in "another's story had some perceived or unperceived advantages" for those working to establish the injustice of Japanese American removal and imprisonment.[51] "Using language that already had a place in a general American national schema about a well-known historical tragedy," Schiffrin argues, supplied a point of reference, "compensat[ing] for Americans' misinformation (or ignorance) of [the Japanese American] … tragedy by lexically embedding" the Japanese American story "in a larger, more familiar, symbolic domain."[52] John Modell, who in 1973 edited and published the camp diary of Charles Kikuchi, an important resistance figure,

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[48] A 1967 public opinion poll revealed that almost one in two Californians continued to approve of the wartime removal of Japanese Americans. *See* WILLIAM HOSOKAWA, NISEI: THE QUIET AMERICANS 497 (1973).

[49] The most prolific advocate of the position that the camps were justified and pleasant was author Lillian Baker. *See, e.g.*, LILLIAN BAKER, CONCENTRATION CAMP CONSPIRACY: A SECOND PEARL HARBOR (1981). For a perspective on Baker's claims, see David Ibata, *History Her Way*, CHI. TRIBUNE (Dec. 23, 1993), https://www.chicagotribune.com/news/ct-xpm-1993-12-23-9312230141-story.html; Robert Ito, *Concentration Camp or Summer Camp?*, MOTHER JONES (Sept. 15, 1998), https://www.motherjones.com/politics/1998/09/concentration-camp-or-summer-camp/.

[50] Deborah Schiffrin, *Language and Public Memorial: 'America's Concentration Camps'*, 12 DISCOURSE AND SOC. 505, 525 (2001).

[51] *Id.*

[52] *Id.*

makes a similar point, but more bluntly. He admits that his subtitle for the edited diary, "Chronicle from an American Concentration Camp," was "meant to shock."[53] This "shock" surely came, at least in part, from the term's Nazi connotation in the public mind.

The effort by and on behalf of Japanese Americans to reclaim the term "concentration camp" touched a mounting anxiety among Jews. By 1998—the time of the Ellis Island controversy—the Holocaust was already more than fifty years in the past. The number of people able to speak of the episode from personal memory was beginning to dwindle.[54] Distress about the disappearance of the Holocaust into the fog of history was palpable. President Bill Clinton, speaking at a 50th anniversary commemoration of the Holocaust in New York in 1995, noted that soon "the living memory of the Holocaust w[ould] pass."[55] A newspaper article on that event reported that "[a]s they face their own mortality, the biggest fear for many survivors is that their memories will be buried with them."[56] In a similar vein, a letter to the editor of the New York Times in 1997 emphasized the importance of filling an endowed chair in Holocaust history at Harvard because "the window of memory is closing rapidly[;] [t]he eyewitnesses are dying, and all attempts to chronicle the survivors' experiences will not remove the march of time."[57] Pervasive news coverage of the genocides in Bosnia[58] and Rwanda[59] in the mid-1990s surely did not ease Jewish fears. Not only were current events proving that the Holocaust was failing as a lesson, but that it increasingly risked becoming "just another genocide" rather than a singular event in human history. Seen in this context, the hesitations of some Jews about

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[53] John Modell, *Preface* in THE KIKUCHI DIARY: CHRONICLE FROM AN AMERICAN CONCENTRATION CAMP xi (John Modell ed., 1993).

[54] Assuming many people might be able to remember things that happened when they were five years old, the youngest survivor with articulable memories in 1998 would have been about 60 years old.

[55] Doreen Carvajal, *Lighting Candles to Keep the Flame of the Holocaust Alive*, N.Y. TIMES, May 1, 1995 (internal quotation omitted).

[56] *Id.*

[57] Steven A. Ludsin, *Letter to the Editor*, N.Y. TIMES, July 25, 1997.

[58] *See* Mike O'Connor, *One by One, Bosnia Tallies the Missing*, N.Y. TIMES, Jan. 27, 1996, at 5.

[59] *See* Milton Leitenberg, *Anatomy of a Massacre*, N.Y. TIMES, July 31, 1994, at 15.

Japanese Americans' use of the term "concentration camp" should not be surprising.

Neither should be the objections to the use of the term from non-Jewish Americans more generally. Even in 1943, while World War II was still raging, Arthur Koestler was able to perceive the stubborn refusal of Americans to compare Allied and Axis racial policies. He saw Americans as "liv[ing] in a climate of half-truths … fight[ing] against racialism" while "racial discrimination is far from abolished in the Anglo-Saxon countries."[60] "[E]ven to mention these facts," Koestler observed, "undeniable though they are, has the effect of a provocation."[61] This resistance to analogy is surely part of what explains the outrage when a scientist likens some American practice of human research or genetic experimentation to Nazi eugenics or experimentation,[62] or when an historian compares American plantation slavery to Nazi concentration camps.[63] It helps explain why for some, the term "concentration camp" should be off limits in narrating the wartime experience of Japanese Americans.

As of 2021, the "concentration camp" debate stands largely settled in the Japanese American, Jewish American, and scholarly communities. It is now common to see and hear the term in discussions of the Japanese American camps, and rare to see or hear an objection.[64] But two terms of the settlement are important. One is about clarity: Those who use the term "concentration

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[60] Arthur Koestler, *We Need a Fraternity of Pessimists*, N.Y. TIMES, Nov. 7, 1943.

[61] *Id*.

[62] *See, e.g.*, William H. Warren, *Is a Psychologist Always a Psychologist, Ethically? Some Observations Through a Wide Lens*, *in* ETHICAL PRACTICE IN PSYCHOLOGY: REFLECTIONS FROM THE CREATORS OF THE APS CODE OF ETHICS 57 (Alfred Allan & Anthony Love eds., 2010).

[63] *See* KIRSTEN FERMAGLICH, AMERICAN DREAMS AND NAZI NIGHTMARES: EARLY HOLOCAUST CONSCIOUSNESS AND LIBERAL AMERICA, 1957-1965 at 56 (2006).

[64] It bears mentioning that controversy over the use of the term "concentration camp" in an American context reared its head again—though not between Japanese and Jewish Americans—in the context of the controversy over the Trump Administration's detention of migrants. *See* Sheryl Gay Stolberg, *Ocasio-Cortez Calls Migrant Detention Centers 'Concentration Camps,' Eliciting Backlash*, N.Y. TIMES (June 18, 2019), https://www.nytimes.com/2019/06/18/us/politics/ocasio-cortez-cheney-detention-centers.html.

camp" typically either insert the modifier "American" before it or otherwise signal that they do not mean to compare a camp like Manzanar to a camp like Auschwitz.[65] The other is about the impact of changed meanings over time. Those who use the term emphasize how the post-war public's growing understanding of the horrors of Auschwitz after the war changed the ordinary meaning of "concentration camp" from its usage before and during the war, making it synonymous with "death camp."[66] The implication here is that the term would not have been troubling or controversial before the shift in its public meaning.

II. THE NAZI ANALOGY IN WARTIME DISCOURSE ON JAPANESE AMERICAN RIGHTS

Backing away from an analogy to Nazi Germany has proved a successful way to relieve tension over use of the term "concentration camp." It has done a disservice, though, to the history of American civil rights discourse. Whatever trepidations we may feel today about comparing the American treatment of Japanese Americans with the National Socialist government's treatment of German Jews, advocates for the rights of Japanese Americans felt no such qualms in the 1940s. The truth is that the concurrent example of Nazi Germany hung like a shadow over discussions of what the United States government was doing to people of Japanese ancestry. It is important to excavate this forgotten discourse from the historical record and document both its pervasiveness and its capacity to unnerve those who defended the government's actions.

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[65] As an example, the Korematsu Institute's policy on terminology instructs that "the complete term American Concentration Camp should be used to distinguish the [Japanese American] concentration camps from those in Europe." *Power of Words* Terminology, FRED T. KOREMATSU INSTITUTE, https://www.korematsuinstitute.org/terminology-1.

[66] *See, e.g.*, Roger Daniels, *Words Do Matter: A Note on Inappropriate Terminology and the Incarceration of Japanese Americans*, in NIKKEI IN THE PACIFIC NORTHWEST: JAPANESE AMERICANS AND JAPANESE CANADIANS IN THE TWENTIETH CENTURY 201 (Louis Fiset & Gail Nomura eds., 2005); MURRAY, *supra* note 20, at 6–7; Lane Hirabayashi, *A Note on Transcription and Terminology*, *in* INSIDE AN AMERICAN CONCENTRATION CAMP: JAPANESE AMERICAN RESISTANCE AT POSTON, ARIZONA xxi (Lane Hirabayashi ed. 1995); EILEEN H. TAMURA, IN DEFENSE OF JUSTICE: JOSEPH KURIHARA AND THE JAPANESE AMERICAN STRUGGLE FOR EQUALITY 6–7 (2013).

On April 30, 1942, as the government was accelerating the mass removal of Japanese Americans from their West Coast homes, a group called the "Post War World Council" sent a letter on the subject to President Roosevelt.[67] The letter had some two hundred signatories, many of them quite prominent.[68] The letter expressed the "deep desire" that the president rescind his executive order "which is so at variance with democracy and the American tradition."[69] To this distinguished group the German example was plain. Enforcing the executive order "on the Japanese alone," the signatories asserted, "approximates the totalitarian theory of justice practiced by the Nazis in their treatment of the Jews."[70]

Over a year later, in a very different setting, a WRA lawyer stationed at the Heart Mountain Relocation Center in Wyoming wrote a letter to his boss in Washington, DC.[71] He had been trying to help a Heart Mountain inmate hold on to some real property left in the hands of a real estate agency.[72] The lawyer could not even get the agency to respond to his letters. He was indignant over what he saw as a shameless attempt to fleece the Japanese American owner. "The methods being employed are so high-handed as to indicate that the Jews in Germany had due process of law as compared to this affair," he wrote, comparing the situation to the so-called "aryanization" of Jewish property in Nazi Germany.[73]

These two vignettes are revealing. They show that the depredations visited on the Jews of Germany were anything but off-limits in discussions and debates about the treatment of Japanese Americans in the United States.

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[67] Letter from Mary W. Hillyer, Exec. Dir., Post War World Council, to Franklin D. Roosevelt, U.S. President, Apr. 30, 1942, digitalassets.lib.berkeley.edu/jarda/ucb/text/reduced/cubanc6714_b013a16_0214.pdf.

[68] *See id.*

[69] *Id.*

[70] *Id.*

[71] Letter from John McGowen, Project Att'y, to Philip M. Glick, Solic., War Relocation Auth. (Oct. 29, 1943) (on file with Univ. of Ark. Special Collections in Robert Leflar Papers).

[72] *See id.*

[73] *Id.*

Rather, they were a point of analogy that struck many as obvious and that many tried to use to rhetorical advantage.

Certainly, the most obvious point of comparison was between the Nazi and American confinement sites. Writing to the *Los Angeles Times* in May of 1942, one A.E. Bruce scored the government for sending American citizens of Japanese ancestry into camps while leaving citizens of German and Italian ancestry at large. "[T]o have them herded into concentration camps and surrounded by barbed wire savors all too much of the Gestapo," he argued, compromising "the very thing for which we claim to fight."[74] At a New York meeting of the Post War World Council in June of 1942, C. Read Cary of the American Friends Service Committee made a similar point. After describing the conditions in the so-called "assembly centers" to which Japanese Americans were being initially sent, Cary "said they differ only slightly from the concentration camps abroad."[75] "We are doing exactly the same thing as in Germany," argued the Quaker leader.[76] To much the same effect was the assertion by Mitsuye Endo's lawyers in a U.S. Supreme Court brief, that the only modern parallels to the military's power under Executive Order 9066 are "the concentration camps of Germany and Russia, into which are herded all those who are *persona non grata* to Hitler or Stalin."[77]

It was not only the fact of the camps that drew analogies to Nazism, but also their rationales. One of the justifications that the U.S. government offered for the mass incarceration of Japanese Americans was the supposed need to protect them from vigilante violence.[78] This was obviously pretextual, as it would have been possible to beef up police protection for Japanese Americans in their home communities rather than imprisoning them. Some, however, pointed out a darker context for this so-called "protective custody." In a 1944 brief to the United States Supreme Court in a case challenging the lawfulness of a Japanese American's detention at the Topaz Relocation Center in Utah, the American Civil Liberties Union argued that the

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[74] A.E. Bruce, *Letter to the Editor*, L.A. TIMES, May 21, 1942, at A4.

[75] *Japanese Decries Mass Evacuation*, N.Y. TIMES, June 19, 1942, at 8.

[76] *Id.*

[77] Brief for Appellant at 35–36, Endo v. Eisenhower, 323 U.S. 283 (1944) (No. 70).

[78] See IRONS, *supra* note 10, at 126.

government's theory was "the outrageous doctrine of 'protective custody' invented by the Nazis in their persecution of the Jews."[79] "It has no place in American life," the brief maintained.[80]

Advocates for Japanese Americans also often pointed out that both the American and the German systems of oppression were grounded in similarly mistaken and offensive understandings of race. In an *amicus curiae* brief in the United States Supreme Court, the Northern California branch of the ACLU argued that the government's program "scatters, disinherits, and deprives" its victims "of the privileges of national and of state citizenship simply because their crime is that they are not of pure-blood white stock."[81] Was this not "akin," the brief asked rhetorically, "to the legend of a Nordic master-race utilized by Messrs. Hitler, Goering and Goebbels of Nazi ill-fame…?"[82] Critics took the government to task for refusing to accept the Japanese American community's assertions of their loyalty to the United States,[83] an act they cast as "a vivid demonstration to the world that America … could think of nothing better to do than to fall back upon the Nazi method of dealing with people, on the basis of ancestry."[84] One *amicus curiae* brief in the Supreme Court charged that by rejecting the idea of Japanese American loyalty, the government was "imply[ing] the Nazi doctrine that race and physical type determine loyalty and 'ethnic affiliations.'"[85]

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[79] Brief of the American Civil Liberties Union as Amicus Curiae in Support of Appellant at 6, Endo v. Eisenhower, 323 U.S. 283 (1944) (No. 70).

[80] *Id.*

[81] Brief of the Northern California Branch of the American Civil Liberties Union as Amicus Curiae in Support of Appellant at 35–36, Hirabayashi v. United States, 320 U.S. 81 (1943) (No. 870).

[82] *Id*.

[83] The community's position was well captured by Mike Masaoka, the National Secretary of the Japanese American Citizens League, when he testified to a congressional committee in 1942 that Japanese "think, feel, and act like Americans." *National Defense Migration: Hearing on H.R. 113 Before the Select Comm. Investigating Nat'l Def. Migration*, 77th Cong. 11138 (1942) (statement of Mike Masaoka, National Security and Field Executive, Japanese Am. Citizens League).

[84] Brief of Japanese American Citizens League (JACL) as Amicus Curiae in Support of Appellant at 54, Korematsu v. United States, 323 U.S. 214 (1944) (No. 22).

[85] *Id.* at 178.

Moreover, advocates noted that these mistaken views about race sprang from the same kinds of illogical thinking in the United States and Germany. "We talk a great deal about the irrationality and anti-intellectualism of the Nazis and Fascists, or their appeal to violent prejudice and emotion instead of to knowledge," observed the Japanese American Citizens League in their *amicus curiae* brief in *Korematsu v. United States*.[86] But this was not just a foreign phenomenon, according to the brief. "The Nazi pattern was never better exemplified" than in the case of Japanese Americans, where "decisions were made on misinformation, assumptions, prejudices, half-truths, when excellent, scientifically accurate material was available."[87] It was this sort of irrationality that led to the most absurd of the rationales the military offered for deeming Japanese Americans a military threat: their *law-abidingness*. In depicting the danger Japanese Americans posed to the West Coast, John DeWitt, the general who ordered their removal, asserted in 1942 that the fact that Japanese Americans had until then committed no acts of sabotage was "a disturbing and confirming indication that such action will be taken."[88] Fred Korematsu's lawyers lampooned this position in their Supreme Court brief: "We do not hesitate to state that never did a Nazi official in Germany draw more unjust conclusions than General DeWitt who would punish these people not for harboring dangerous thoughts but for thoughts he would impute to them or project into their minds."[89]

Critics of Japanese American removal and imprisonment also picked up on certain similarities in the German political landscape that led to the persecution of the Jews. One Supreme Court brief noted that, whereas "no modern civilized country [would] dare[] to transport millions of its inhabitants into exile" because of the "political repercussions" of doing so, "[a]n unorganized minority is always the object of oppression."[90] "In Germany it was Jews," said the brief; "Here it is Americans whose ancestors were Japanese subjects."[91] This observation led to another point of political

[86] *Id.* at 176.

[87] *Id.* (internal quotations omitted).

[88] DeWitt, *supra* note 11, at 34.

[89] Brief for Appellant at 64, Korematsu v. United States, 323 U.S. 214 (1944) (No. 22).

[90] *Id.*

[91] *Id.*

comparison between the United States and Nazi Germany: both nations' discriminatory programs effaced the distinction between aliens and citizens. "In her hours of greatest travail and direst peril England interned alien enemies but did not stoop to interning her own citizens who were of alien enemy ancestry," noted the Northern California branch of the American Civil Liberties Union in its *amicus curiae* brief supporting Gordon Hirabayashi's challenge to the government's program.[92] "It was reserved for Nazi Germany and her satellites to penalize their citizens whose ancestors were Jews."[93] The brief added that it was "unbelievable" that the United States would wish to imitate the vicious example of her enemies.[94]

Even high-ranking officials in the federal government saw and spoke of parallels between the plight of Japanese Americans and the Jews of Germany. In 1945, as Japanese Americans released from the camps began making their way back to the West Coast communities from which they had been removed, they encountered a wave of vigilante violence. In one representative incident, a Japanese American who returned to his Newcastle, California farm was greeted by a gang of armed men in cars who fired several shots and tried to blow up a farm building with dynamite.[95] The perpetrators were acquitted by an all-white jury that summer after their lawyer argued to the jurors that "this is a white man's country; let's keep it so."[96] By June of 1945, twenty shooting attacks and three arsons had been confirmed, as well as many ominous and threatening visits.[97] The violence led to condemnatory editorials in national newspapers; the *Washington Post* opined in May of 1945 that Japanese Americans were being persecuted "in the same way and for just the same reasons that prompted the Nazi persecution of racial minorities."[98] The *Post* gave its readership a bit of a lecture, suggesting that

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[92] Brief of the Northern California Branch of the American Civil Liberties Union in Support of Appellant at 93–94, Hirabayashi v. United States, 320 U.S. 81 (1943) (No. 870).

[93] *Id.*

[94] *Id.*

[95] *Gunmen Menace Jap-Americans on Return Home*, CHI. DAILY TRIB., Jan. 21, 1945, at 8.

[96] *Nisei Rights*, WASH. POST, Aug. 31, 1945.

[97] *The Plight of Japanese-Americans*, CHI. DEF., June 9, 1945.

[98] *West Coast Terror*, WASH. POST, May 7, 1945.

"[w]hen we gape at German atrocities, we might cast a backward glance at these atrocities of our own."[99]

But this message was coming not just in newspaper editorials and citizen letters. It was also coming from a member of the Cabinet—Secretary of the Interior Harold L. Ickes. In a statement on May 13, 1945, Ickes denounced what he called "planned terrorism" against Japanese Americans returning to their homes.[100] He made clear that this wave of vigilantism was not just isolated assaults by private attackers, but a pattern enabled by "the absence of vigorous local law enforcement."[101] Remarkably, Ickes invoked the example of Germany, labelling the hooliganism as the work of a "lawless minority" that "seems determined to employ ... Nazi-storm-trooper tactics against loyal Japanese-Americans and law-abiding Japanese aliens."[102] This was stern and even stunning rhetoric from a Cabinet-level official.

Justices on the United States Supreme Court did not shy away from the analogy to Nazi Germany either. In *Hirabayashi v. United States*,[103] the Court unanimously concluded that the dusk-to-dawn curfew that the military imposed in the spring of 1942 on Americans of Japanese (but not German or Italian) ancestry did not violate the due process rights of Japanese Americans.[104] Justice Frank Murphy filed a concurring opinion to make clear that he believed the curfew went "to the very brink of constitutional power."[105] He noted that "[u]nder the curfew order … no less than 70,000 American citizens have been placed under a special ban and deprived of their liberty because of their particular racial inheritance."[106] "In this sense," Murphy continued, "it bears a melancholy resemblance to the treatment

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[99] *Id.*

[100] *Ickes Assails Anti-Niseism*, BALT. SUN, May 14, 1945.

[101] *Id.*

[102] *Id.*

[103] 320 U.S. 81 (1943).

[104] *Id.* at 100–05.

[105] *Id.* at 111 (Murphy, J., concurring).

[106] *Id.*

accorded to members of the Jewish race in Germany and in other parts of Europe."[107]

Justice Owen Roberts drew the parallel a bit more indirectly a year later when he dissented in *Korematsu v. United States*,[108] in which a six-Justice majority upheld the constitutionality of the mass removal of Japanese Americans from the West Coast. Roberts characterized the military's orders governing the movements of Japanese Americans in March of 1942 as "nothing but a cleverly devised trap to accomplish the real purpose of the military authority, which was to lock him up in a concentration camp."[109] As if to put a finer point on his use of that freighted term, Roberts addressed the semantic issue directly. He acknowledged that the War Relocation Authority designated its confinement sites as "relocation centers," but in his view they were "*so-called*" relocation centers, which was nothing but "a euphemism for concentration camps."[110]

This was more than the justices in the majority could bear. Justice Hugo Black, writing the Court's opinion, tried to refute Justice Roberts's use of the term "concentration camp" and the thinly veiled analogy it drew to Nazi Germany. "It is said that we are dealing here with the case of imprisonment of a citizen in a concentration camp solely because of his ancestry," wrote Justice Black.[111] He responded to Justice Roberts directly: "[W]e deem it unjustifiable to call them concentration camps with all the ugly connotations that term implies."[112] This was December of 1944, when the extent of the horrors of the death camps was only beginning to filter into the public consciousness,[113] so the "ugly connotations" were plainly not the connotations of a death camp.

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[107] *Id.*

[108] 323 U.S. 214 (1944).

[109] *Id.* at 232 (Roberts, J., dissenting).

[110] *Id.* at 230 (emphasis added).

[111] *Id.* at 223 (majority opinion).

[112] *Id.*

[113] The first mention of any of the Nazi death camps in the *New York Times* was on August 30, 1944. *See* W.H. Lawrence, *Nazi Mass Killing Laid Bare in Camp*, N.Y. TIMES, Aug. 30, 1944, at 1. The camp was Majdanek. The first mention of Auschwitz came in October of that

In fact, the American military had objected to the Nazi analogy earlier and more forcefully. On September 17, 1942, the Chief of Staff to General John DeWitt issued a policy statement about the use of military police at the WRA's ten brand-new camps.[114] While focused on such crucial matters as suppressing possible riots, controlling traffic into and out of the camps, and inspecting all incoming and outgoing parcels and packages, the statement paused to take up the matter of language. "The War Relocation Project area . . . includes one or more 'Relocation Centers,'" which, it noted, "are not 'concentration camps . . . . *The use of this term is considered objectionable.*"[115] Thus, even in 1942, long before news of the then-unfolding Nazi genocide had reached American shores,[116] the analogy to Nazi Germany was on the lips of those discussing and debating the American camps—and offending those whom the analogy made uncomfortable.

III. THE HOLOCAUST, CIVIL RIGHTS, AND AMERICAN EXCEPTIONALISM

By now it should be clear that the détente reached over the appropriateness of the term "concentration camp" for a place like Manzanar is founded on errors. It remains unthinkable to some today to compare American and German racial policies and persecutions,[117] but it was not

year. *See Germans Kill 346 of 350 Women in Auswitz Concentration Camp*, N.Y. TIMES, Oct. 12, 1944, at 30.

[114] Memorandum of Understanding as to Functions of Military Police Units at the Relocation Centers and Areas Administered by the War Relocation Authority (Sept. 17, 1942), https://calisphere.org/item/0479bb063a62424d9219fd871645d48a/.

[115] *Id.* (emphasis added) (capitalization cleaned up).

[116] The first report of the murders of millions to appear in American newspapers came in December of 1942. *See Roosevelt Told Nazis Killed 2 Million Jews*, BALT. EVENING SUN, Dec. 8, 1942, at 2.

[117] *See* Jarrett Stepman, *Comparing the US to Nazi Germany Makes Us Incapable of Recognizing Truly Evil Regimes*, DAILY SIGNAL (Aug. 26, 2020), https://www.dailysignal.com/2020/08/26/comparing-the-us-to-nazi-germany-makes-us-incapable-of-recognizing-truly-evil-regimes/; Daniella Greenbaum, *It's Offensive and Inaccurate to Compare the US Border Tragedy to the Holocaust*, BUS. INSIDER (June 21, 2018), https://www.businessinsider.com/family-separation-zero-tolerance-border-policy-holocaust-comparisons-2018-6; Abraham H. Miller, *Trafficking in False Comparisons to the Holocaust*, AM. SPECTATOR (July 5, 2018), https://spectator.org/trafficking-in-false-comparisons-to-the-holocaust/.

unthinkable to those who lived while they were ongoing. Not only was it thinkable, but it was a common rhetorical strategy.[118] Neither is it true that the horrors of the death camps are what rendered the Nazi analogy discomfiting. Designers of U.S. government policy found the analogy objectionable as early as September of 1942, long before Americans knew of the death camps that had started operating earlier that year.[119]

Documenting this link informs us about more than just the propriety of the usage of a term; it tells us several broader things about the Holocaust and American civil rights discourse. The first may be the most obvious: The analogy to Nazism played a role in the critique of American racial policies not only in retrospect but *in the moment*. Because we commonly think of the transformative civil rights advocacy in America as occurring in the 1950s and especially the 1960s, it is tempting to assume that the Holocaust entered the vocabulary of civil rights only in those decades, as in 1958 when Martin Luther King, Jr., told an American Jewish group that "[t]here are Hitlers loose in America today, both in high and low places," who would join "history['s] scapegoats, the Jews," with "new scapegoats, the Negroes."[120]

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[118] As James Q. Whitman has recently reminded us, the Nazis from their earliest days looked to American race laws as favorable examples. *See* JAMES Q. WHITMAN, HITLER'S AMERICAN MODEL: THE UNITED STATES AND THE MAKING OF NAZI RACE LAW 16 (2017).

[119] From this it does not follow that Manzanar should be called a "concentration camp" without any qualification or explanation. Linguist Deborah Shiffrin is right that calling Manzanar a "concentration camp" without adding context and clarification "creates referential ambiguity that complicates the implicational scale." Schiffrin, *supra* note 50, at 518. Doing so can confuse those in whose minds the term calls up images of crematoria, and who are therefore unsure of just what the speaker actually intends to communicate.

[120] Martin Luther King, Jr., *Address Delivered at the National Biennial Convention of the American Jewish Congress*, May 14, 1958, http://okra.stanford.edu/transcription/document_images/Vol04Scans/406_14-May-1958_Address%20Delivered-Natl%20Biennial%20Conv.pdf. *See also* Randall Kennedy, *Martin Luther King's Constitution: A Legal History of the Montgomery Bus Boycott*, 98 YALE L.J. 999, 1012 (1989) ("By 1955, . . . the cumulative weight of Supreme Court precedent had combined with other important trends and developments, such as a general revulsion against racism in the aftermath of the Holocaust . . . to shift white public opinion, putting proponents of segregation squarely on the defensive."). In actuality, the Nazi analogy entered the discourse of the African American civil rights struggle earlier, in the writings of Langston Hughes. *See* Langston Hughes, LANGSTON HUGHES AND THE CHICAGO DEFENDER:

Plainly, however, the Nazi analogy did not emerge in civil rights discourse only with the benefit of hindsight. Within weeks of the announcement of the government's plans for Japanese Americans, prominent and articulate critics publicly compared the mass eviction and confinement of Japanese Americans to the persecution of the Jews then ongoing in Europe. Litigators in the United States Supreme Court sought to leverage the still-unfolding Nazi policies towards the Jews as arguments against American policies towards Japanese Americans. The Holocaust thus entered American civil rights argument earlier than we might suppose.

The rhetoric documented in this essay adds to our understanding of the Holocaust's place in American civil rights history in a second way. Scholars have long noted that civil rights discourse has unfolded in the United States under the influence of a black/white paradigm, "the misleading notion that the United States' racial palette historically has contained only two colors."[121] This paradigm was particularly dominant in mid-twentieth century conversation about race and civil rights, a time after white ethnicities merged into a unified category and Jim Crow was at its height.[122] It was only late in the century that "legal, demographic, and cultural changes challenged the … legitimacy" of the paradigm.[123]

Now we can see that even at the time when civil rights discourse was most pervasively understood as being about the rights of Black people, an important strand of Holocaust-inflected civil rights argument focused on the rights of Asian Americans rather than African Americans. This is a significant reminder that conversations about racial discrimination in the United States invoking analogies to Nazi Germany not only began before

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ESSAYS ON RACE, POLITICS, AND CULTURE, 1942-1962 at 78–80 (Christopher C. DeSantis ed., 1995).

[121] John W. Wertheimer, Jessica Bradshaw, Allyson Cobb & Harper Addison, *The Law Recognizes Racial Instinct:* Tucker v. Blease *and the Black-White Paradigm in the Jim Crow South*, 29 LAW & HIST. REV. 471, 472 (2011).

[122] *See* Janine Young Kim, Note, *Are Asians Black?: The Asian-American Civil Rights Agenda and the Contemporary Significance of the Black/White Paradigm*, 108 YALE L. J. 2385, 2387, 2400 (1999).

[123] Wertheimer et al., *supra* note 121, at 474.

what we often think of as the beginning of the American civil rights movement but strayed from the black/white paradigm of the day.

The Nazi analogy in civil rights talk about Japanese American removal and imprisonment suggests one final thing to us, something about American civil rights discourse more generally. Recall that the resolution of the disagreement about proper use of the term "concentration camp" in the late twentieth and early twenty-first century depended in part on an assumption about the passage of time: it was Auschwitz that made the comparison of American to German policies objectionable. The evidence in this essay shows that this was not quite so. From the very outset of the American program, a comparison to Nazi Germany was distasteful to some in the United States even though the death camps were then unknown. The term "concentration camp" rankled the U.S. military as early as 1942, when it carried no connotation of industrialized mass murder. Justices of the United States Supreme Court took offense at the perception of a "melancholy resemblance" between the treatment of the ethnic Japanese in the United States and the treatment of Jews in Germany in 1944, before they knew of the routine extinctions carried out at Auschwitz.

What explains this resistance to the analogy? Part of the explanation undoubtedly lies in important differences between the language Americans and Germans used to present their policies and the brutality of their implementation. From the moment the Nazis took power in January of 1933, the Party and the government spoke of Jews with a menacing contempt never seen in official American discourse.[124] As well, by the time of the *Kristallnacht* pogroms in 1938, it was clear that the Nazis were implementing their policies of segregation and exclusion with a kind of cruelty that American officials never used.[125] For these reasons, loose comparisons to Nazi Germany understandably rankled, and still do.

But the comparisons documented in this essay were not especially loose. They zeroed in on specific features of American policy for analogy to comparable German policies. They saw the principle of "protective custody"

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[124] *See* Engelbert Huber, *The Anti-Semitism of the NSDAP*, in THE THIRD REICH SOURCEBOOK 320 (Anson Rabinbach & Sander L. Gilman, eds., 2013).

[125] *See id.* at 338–39.

on both sides. They found similarity in the theories of biological racism. They noted the political ease of mistreating small and powerless minorities. They saw connections between the fleecing of assets of both Jews and Japanese Americans. And yes, they looked at the bleak landscapes, the rows of barracks, the barbed wire and guard towers and search lights, the patrolling sentries, and they saw concentration camps.

To refuse to acknowledge these substantial similarities, in the midst of differences, is to practice a form of self-deception—one that rejects the very idea that the United States has the capacity for the sort of injustice it readily condemns in other nations. It was an understandable tendency during World War II and the Cold War that followed it. These were eras in which it was politically and culturally imperative for the United States to distinguish itself from first its fascist and then its communist enemies. This meant crafting and polishing a narrative of exemplary American racial progress that left no room for unflattering comparisons to repressive racial policies abroad.[126] It also may be an artifact of a more enduring American exceptionalism on matters of civil and human rights, one grounded in "the notion that America's canonical commitments to liberty, equality, individualism, populism, and laissez-faire somehow exempt it from the historical forces that have led to the corruption of other societies."[127] On this view, any stain on the American civil rights record will seem but a blemish alongside the truly malign practices of nations that lack the distinctive commitment to justice of the shining American city on the hill.

For a brief moment, a more honest look inward seemed possible. Kerstin Fermaglich has documented how, in the late 1950s and the early 1960s, Nazi Germany became a lens through which Americans allowed themselves to look critically at their own society.[128] The concentration camp became a legitimate (if hotly contested) analogy for the slave plantation in the work of

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[126] *See* MARY DUDZIAK, COLD WAR CIVIL RIGHTS 13 (2001) (noting the importance to the United States of presenting a narrative of racial progress and of the superiority of democratic solutions to dictatorially imposed solutions).

[127] Harold Hongju Koh, *Foreword: On American Exceptionalism*, 55 STAN. L. REV. 1479, 1481 n.4 (2003).

[128] *See* FERMAGLICH, *supra* note 63.

Stanley Elkins[129] and the American home in the work of Betty Friedan;[130] Stanley Milgram's famous electroshock experiments revealed a bit of the concentration camp guard in the American Everyman.[131] That window closed later in the 1960s and remained tightly shut in the decades that followed, as Nazi Germany came to be seen as a singular, analogy-defying regime in the history of human evil.[132]

Jewish and Japanese Americans were able to settle the debate over the term "concentration camp" only by agreeing that the window should remain closed. Analysis of the wartime civil rights of Japanese Americans more generally has had to proceed under the assumption of an exceptional America. The result is an impoverished historical account that flinches from comparisons that the historical actors themselves were not afraid to draw.

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[129] *See* STANLEY M. ELKINS, SLAVERY: A PROBLEM IN AMERICAN INSTITUTIONAL AND INTELLECTUAL LIFE 87 (1959).

[130] *See* BETTY FRIEDAN, THE FEMININE MYSTIQUE 294 (1964).

[131] *See* STANLEY MILGRAM, OBEDIENCE TO AUTHORITY 1–4 (1974).

[132] *See* FERMAGLICH, *supra* note 63, at 159–61.

A NATION JOINS IN TEARS: IMPLICATIONS OF THE DOMESTIC DEPLOYMENT OF FEDERAL TROOPS IN PORTLAND, OREGON*

MARISSA COHEN & JACQUELINE STEVENS**

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INTRODUCTION & CULTURAL CONTEXT

On May 25, 2020, a teenage employee of a Minneapolis food store called 911 alleging that George Floyd had attempted to purchase cigarettes with what appeared to be a fake twenty dollar bill.[1] Police found Floyd around the

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corner from the store, unarmed and sitting with friends in his car.[2] An officer approached, pulled out his gun, and ordered Floyd to show his hands.[3] Floyd was initially uncooperative, but after the officer explained that Floyd was being arrested for "passing counterfeit currency," Floyd complied with the officers' requests.[4] Court transcripts of recordings from police body cameras showed Floyd was "co-operative at the beginning of the arrest, repeatedly apologizing to the officers after they approach[ed] his parked car."[5]

A white police officer, Derek Chauvin, then arrived on the scene.[6] He attempted to pull Floyd from his car and place him in a police car; in the process, Floyd fell to the ground and "lay there, face down, still in handcuffs."[7] As other officers restrained Floyd, for nine minutes and twenty nine seconds, Chauvin kept his knee on Floyd's neck.[8] During that period Floyd said more than twenty times that he could not breathe.[9] His last words

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[1] *George Floyd: What Happened in the Final Moments of His Life*, BBC NEWS (July 16, 2020), https://www.bbc.com/news/world-us-canada-52861726; *What We Know About the Death of George Floyd in Minneapolis*, N.Y. TIMES (Dec. 9, 2020), https://www.nytimes.com/article/george-floyd.html; Elliott C. McLaughlin, *Three Videos Piece Together the Final Moments of George Floyd's Life*, CNN.COM (updated June 23, 2020, 9:14 AM), https://www.cnn.com/2020/06/01/us/george-floyd-three-videos-minneapolis/index.html.

[2] *George Floyd: What Happened*, *supra* note 1; *What We Know*, *supra* note 1; McLaughlin, *supra* note 1.

[3] *George Floyd: What Happened*, *supra* note 1; McLaughlin, *supra* note 1.

[4] *George Floyd: What Happened*, *supra* note 1; *What We Know*, *supra* note 1.

[5] *George Floyd: What Happened*, *supra* note 1.

[6] *Id.*; McLaughlin, *supra* note 1.

[7] *George Floyd: What Happened*, *supra* note 1. The probable cause statement prepared by police describes Floyd "stiffen[ing] up, [falling] to the ground and [telling] the officers he was claustrophobic." McLaughlin, *supra* note 1. "[H]e went to the ground face down and still handcuffed," the statement continues. *Id.*

[8] *George Floyd: What Happened*, *supra* note 1; Eric Levenson, *Former Officer Knelt on George Floyd for 9 Minutes and 29 Seconds - Not the Infamous 8:46*, CNN.COM (Mar. 30, 2021, 6:27 AM), https://www.cnn.com/2021/03/29/us/george-floyd-timing-929-846/index.html.

[9] *George Floyd: What Happened*, *supra* note 1. *Cf. also* McLaughlin, *supra* note 1 ("Floyd also says, 'I'm through,' and repeatedly cries out in anguish, the video shows. . . . He tells the witnesses, 'They're going to kill me, man,' and then to the officers, 'Don't kill me.' . . .

were a chilling recognition of his fate: "Can't believe this, man. Mom, love you. Love you. Tell my kids I love them. I'm dead."[10]

Officer Chauvin kept his knee on Floyd's neck for at least another minute, although another officer could not detect a pulse.[11] When Chauvin did get up, Floyd's motionless body "was rolled on to a gurney" and taken to the Hennepin County Medical Center in an ambulance.[12] He was pronounced dead about an hour later.[13] A video of the incident went viral, stirring a nationwide reckoning with twenty-first century racial injustice and the extrajudicial police killings of Black Americans.[14]

That reckoning involved widespread protests. In the days and weeks following Floyd's death, Americans in more than 1,700 cities flooded the streets to challenge police brutality against Black people in the United States.[15] In some cities with sizable, lasting protests, then-President Donald Trump responded by sending federal troops.[16] Although nominally meant to

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[W]hen [another officer] asked if they should roll Floyd on his side, Chauvin said he was staying put.").

[10] *George Floyd: What Happened*, *supra* note 1.

[11] *Id.*; McLaughlin, *supra* note 1.

[12] *George Floyd: What Happened*, *supra* note 1.

[13] *Id.*; *see also* Lorenzo Reyes, Trevor Hughes & Mark Emmert, *Medical Examiner and Family-Commissioned Autopsy Agree: George Floyd's Death Was a Homicide*, USA TODAY (updated June 1, 2020, 8:46 PM), https://www.usatoday.com/story/news/nation/2020/06/01/george-floyd-independent-autopsy-findings-released-monday/5307185002/.

[14] *See What We Know*, *supra* note 1; *George Floyd: What Happened*, *supra* note 1.

[15] Janie Haseman, Karina Zaiets, Mitchell Thorson, Carlie Procell, George Petras & Shawn J. Sullivan, *Tracking Protests Across the USA in the Wake of George Floyd's Death*, USA TODAY (updated June 18, 2020, 6:48 PM), https://www.usatoday.com/in-depth/graphics/2020/06/03/map-protests-wake-george-floyds-death/5310149002/.

[16] *See* Shane Dixon Kavanaugh, *Trump Sent the Feds to Quash Portland's Protests: What We Know Amid the Nightly Turmoil*, OREGONIAN (July 25, 2020), https://www.oregonlive.com/news/2020/07/trump-sent-the-feds-to-quash-portlands-protests-what-we-know-amid-the-nightly-turmoil.html; Kevin Liptak, *Trump Announces 'Surge' of Federal Officers to Chicago As He Campaigns on 'Law and Order' Mantle*, CNN.COM (updated July 22, 2020, 6:45 PM), https://www.cnn.com/2020/07/22/politics/donald-trump-federal-law-enforcement-chicago-albuquerque/index.html (describing orders to send federal officers to Chicago, Kansas City,

quell civil unrest, these troops frequently resorted to physical violence and largely failed to bring any peace to cities where they were deployed.[17] In Portland, Oregon—the epicenter of Trump's federal response—local police reported 6,283 uses of force during protests between May and the end of September 2020.[18] Federal troops "cleared Portland city streets alongside Portland police" and participated in the pervasive violence.[19] Among other actions, federal units deployed in Portland fired canisters of military-style Maximum Smoke HC Grenades at crowds of civilians.[20] Smoke produced by the canisters causes "nausea, vomiting, central nervous system depression, and kidney and liver damage."[21] The HC grenades also

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and Albuquerque); *Trump Says U.S. Will Crack Down on Anti-Racism Protests in Democratic-led U.S. Cities*, CBC (July 20, 2020, 10:46 AM), https://www.cbc.ca/news/world/portland-protest-us-crackdown-anti-racism-1.5655893 (reporting Trump's stated plans to send law enforcement to cities in light of "anti-racism protests," including New York, Chicago, Philadelphia, Detroit, Baltimore, and Oakland).

[17] *See* Kavanaugh, *supra* note 16 ("Weeks of raucous demonstrations had nearly wound down in Portland . . . . Then President Donald Trump sent in federal forces. The protests against police violence and systemic racism quickly grew bigger and louder."); Trevor Hughes & Lindsay Schnell, *'This is Not a Dictatorship': Portland Protestors Push Back Harder Against Trump, Federal Agents*, USA TODAY (updated July 23, 2020, 5:04 PM), https://www.usatoday.com/story/news/nation/2020/07/22/portland-protests-grow-larger-after-trump-sends-feds/5483028002/; *see also* Robert Evans, *Opinion: Portland is Living in America's Terrifying Future*, BUS. INSIDER (Oct. 28, 2020, 8:27 AM), https://www.businessinsider.com/portland-america-trump-future-police-fbi-riots-border-patrol-protests-2020-10 ("Federal law enforcement entered the picture in July . . . . Shortly after arriving, one of the Marshals shot activist Donovan Labella in the face with a rubber bullet, shattering his skull and nearly killing him.").

[18] Maxine Bernstein, *Portland Police Report 6,283 Uses of Force During Protests in 2020, But Data Has Significant Gaps*, OREGONIAN (updated Nov. 17, 2020), https://www.oregonlive.com/crime/2020/11/portland-police-report-6283-uses-of-force-during-protests-in-2020-yet-consultant-found-significant-gaps-in-force-reports.html.

[19] Conrad Wilson & Jonathan Levinson, *Federal Law Enforcement Agencies Deployed to Portland Protests*, OR. PUB. BROAD. (updated July 7, 2020, 9:53 AM), https://www.opb.org/news/article/federal-law-enforcement-agencies-deployed-to-portland-protests-federal-buildings-personnel/.

[20] Sharon Lerner, *Federal Agents Used Toxic Chemical Smoke Grenades in Portland*, INTERCEPT (Oct. 10, 2020, 8:00 AM), https://theintercept.com/2020/10/10/portland-tear-gas-chemical-grenades-protests/.

[21] *Id.*

released zinc chloride, which can cause "fever, chest pain, and liver damage, and is associated with anorexia, fatigue, and weight loss."[22]

Despite these military-like tactics by federal agents in the city, the protests remained remarkably peaceful. One example was the "Wall of Moms," organized by Bev Barnum,[23] who responded to Floyd's last words as a call to his own mother.[24] Concerned by the federal government's sudden presence in Portland, Barnum was adamant: "Let's make it clear that we will protect protesters without the use of violence, we will shine a light of the unjust narrative being thrown around."[25] Initially, nearly 40 mothers—mostly "upper-middle-class white women" who had previously stood on the sidelines—responded to Barnum's call, educating themselves about racial injustice and lining up on the front lines of protests in Portland to chant "Feds stay clear, moms are here."[26] Larger numbers of mothers gathered the following evening. Within a week, hundreds of moms joined to make their stand, many dressed in yellow and carrying sunflowers.[27]

A wall of concerned mothers offered "little protection once the federal officers started firing teargas and flash-bangs and charging with batons," however.[28] On July 11, protester Donavan La Bella was shot in the forehead with an impact munition, leaving him with a fractured skull.[29] On July 21, a reporter "watched as blood streamed down Andre Miller's face after he was

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[22] *Id.*

[23] Chris McGreal, *'I Wanted to Take Action': Behind the 'Wall of Moms' Protecting Portland's Protesters*, GUARDIAN (July 21, 2020, 2:53 PM), www.theguardian.com/us-news/2020/jul/21/trump-federal-agents-portland-protests-moms.

[24] Lonnae O'Neal, *George Floyd's Mother Was Not There, But He Used Her as a Sacred Invocation*, NAT'L GEOGRAPHIC (MAY 30, 2020), https://www.nationalgeographic.com/history/2020/05/george-floyds-mother-not-there-he-used-her-as-sacred-invocation.

[25] *Id.*; McGreal, *supra* note 23.

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] Sarah Jeong, *The Battle of Portland*, NEW REPUBLIC (Sept. 3, 2020), https://newrepublic.com/article/159169/battle-portland-protests-federal-agents-racist-police-violence.

struck in the head right below his helmet."[30] On July 25, Kristen Jessie-Uyanik, a woman standing with the Wall of Moms, was struck in the forehead just above her left eye.[31] "Trump's troops," as some protesters took to calling the federal agents facing them in Portland's streets,[32] reappeared night after night. For four continuous weeks, the "federal occupation" of Portland became "an all-consuming vortex of conflict."[33]

President Trump's decision to deploy federal troops, the manner in which he determined to do so, and the actions those troops took once on the ground in Portland raise numerous legal questions. Their importance to our constitutional democracy is hard to overstate. This Article attempts to address those concerns in three parts. Part I provides background on the federal Executive Branch and President Trump's use of an Executive Order to deploy troops in Portland. Part II analyzes the growing powers of the Executive, specifically under the Insurrection Act of 1807, which last summer's historic events confirm includes the power to deploy federal troops domestically without the consent of either Congress or State or local governments. Part III addresses the civil liberties at stake in such a scheme, as well as the likely results of judicial intervention should similar issues arise in the future. Our hope in writing this essay is to inspire Americans to get or stay involved in protecting their unalienable rights. Democracy cannot be allowed to decrescendo.

I. THE EXECUTIVE BRANCH: SCOPE OF POWERS & DEPARTMENTAL ACTION

Federal troops arrived in Portland after President Trump issued an Executive Order on June 26, 2020, authorizing the Attorney General and the Secretaries of Defense and Homeland Security to send federal personnel to "assist with the protection of Federal monuments, memorials, statues, or

[30] *Id.*

[31] *Id.*

[32] *See* McGreal, *supra* note 23.

[33] Jeong, *supra* note 29.

property."[34] The nature of that Order, and the President's power to proclaim it, are the subject of this first part.

A. *The President, the Balance of Powers, and Executive Orders*

The Constitution provides for concurrent authority between the States and federal government, and at the federal level a basic tri-branch structure for the United States government. Each branch may exercise only the limited powers permitted by the Constitution.[35] Article I grants Congress "[a]ll legislative Powers" outlined in the federal charter.[36] Article II vests in the president "the executive Power."[37] Article III gives "judicial Power" to the United States Supreme Court and "such inferior Courts as Congress may from time to time ordain and establish."[38] The Founding Fathers intentionally chose this structure to create a system of checks and balances.[39] Each branch must share power with the others. Within the spheres of the federal government's purview, the United States is guaranteed independence "from any control by the respective States."[40] Meanwhile, any powers "not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[41] The distribution of powers among the federal branches and between the federal and state governments are the foundations of our federalist system.

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[34] Exec. Order No. 13933, *Protecting American Monuments, Memorials, and Statues and Combating Recent Criminal Violence*, 85 Fed. Reg. 40081, 40081–84 (issued June 26, 2020).

[35] *See* Marbury v. Madison, 1 Cranch 137, 176 (1803) ("The powers of [the branches] are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written."); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952) ("The Constitution limits [the President's] functions in the lawmaking process . . . [and] is neither silent nor equivocal about who shall make laws which the President is to execute.").

[36] U.S. CONST. art. I, § 1.

[37] *Id.* art. II, § 1.

[38] *Id.* art. III, § 1.

[39] *See, e.g.*, THE FEDERALIST NO. 51 (Alexander Hamilton or James Madison) ("[T]he greatest security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachment of the others.").

[40] Trump v. Vance, 140 S. Ct. 2412 (2020).

[41] U.S. Const. amend. X.

The limited authority of the federal Executive is among the most important features of this design. The President "occupies a unique position in the constitutional scheme."[42] Her duties "range from faithfully executing the laws to commanding the Armed Forces, [and] are of unrivaled gravity and breadth."[43] Today, in addition to commanding the "largest military establishment on earth," the President also controls a "colossal array of agencies" that form the modern administrative state.[44] Yet "[i]n contrast to a king, who is born to power and can 'do no wrong,' the President of the United States is 'of the people' and subject to the law."[45] Thus, even the President is subject to restrictions.

Despite these limitations, President Trump acted unilaterally in sending federal troops to Portland. Officers were deployed by means of Executive Order commanding actions by various federal agencies.[46] The Order, entitled "Protecting American Monuments, Memorials, and Statues and Combating Recent Criminal Violence," among other things authorized the Attorney General and the Secretaries of Defense and Homeland Security to send federal personnel to "assist with the protection of Federal monuments, memorials, statues, or property."[47] This was necessary, the Order declared, to resist a weeks-long "sustained assault on the life and property of civilians, law enforcement officers, governmental property, and revered American monuments."[48] The President theorized that these acts were carried out by "rioters, arsonists, and left-wing extremists," many of whom he believed "explicitly identified themselves with ideologies—such as Marxism—that call for the destruction of the United States system of government." The President did not cite Portland in particular. Instead, he declared that "[a]narchists and left-wing extremists" were promoting a "fringe ideology

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[42] Nixon v. Fitzgerald, 457 U.S. 731, 749 (1982).

[43] *Vance*, 140 S. Ct. at 2425.

[44] Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1728 (1996).

[45] *Vance*, 140 S. Ct. at 2422.

[46] *See* Exec. Order No. 13933, 85 Fed. Reg. 40081, 40083 (ordering actions by the Attorney General, the Secretaries of the Interior, Homeland Security, and Defense, and "heads of all executive departments and agencies").

[47] *Id.* § 5.

[48] *Id.* § 1.

that paints the United States of America as fundamentally unjust and have sought to impose that ideology on Americans through violence and mob intimidation."[49] Citing protests surrounding federally-maintained monuments in San Francisco, Charlotte, and Boston, the Order surmised that "State and local governments appear to have lost the ability to distinguish between the lawful exercise of rights to free speech and assembly and unvarnished vandalism."[50] To the President's mind, that "abdication of . . . law enforcement responsibilities" by State and local governments meant Trump's own, federal administration needed to end the "violent assault" instead.[51]

Generally speaking, Executive Orders like Trump's No. 13933 are an exercise of the President's Article II authority under the "Take Care Clause," which grants the President power to ensure that the laws of the United States are "faithfully executed."[52] They are a regular feature of the modern presidency.[53] Executive Orders can be implemented quickly, have the force of law, and frequently require federal agencies to respond within their administrative capacities.[54] They often take the form of proclamations with broad, "profound" ramifications.[55] Presidents have historically taken "an

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[49] *Id.*

[50] *Id.*

[51] *Id.*

[52] *See* U.S. CONST. art. II, § 3, cl. 5; Melina T. Olivierio, *The Role of the Executive in Rulemaking*, 70 ADMIN. L. REV. 715, 716 (2018); *see also* Lorraine Boissoneault, *The Debate Over Executive Orders Began with Teddy Roosevelt's Mad Passion for Conservation*, SMITHSONIAN MAG. (Apr. 17, 2017), https://www.smithsonianmag.com/history/how-theodore-roosevelts-executive-orders-reshaped-countryand-presidency-180962908/ (describing the nature and several significant historical uses of the executive order).

[53] *See* Olivierio, *supra* note 52, at 717 (noting that every president except Harrison, who died after thirty-one days in office, has "exercised his right to use executive orders").

[54] *Id.* at 716. Although guidelines require that the President receive financial approval from the Office of Management and Budget and legal review from the Attorney General, there are no consequences for failure to follow that form. *Id.* Even when followed precisely, moreover, this arrangement is "still quicker" than almost any action conceivable by Congress. *Id.*

[55] Boissoneault, *supra* note 52. President Trump's Executive Order No. 13933 in particular contains sweeping statements about the "policies" of the federal government and the purpose

expansive view of their own power when it suits them, and use executive orders to expand the boundaries of their authority."[56]

In theory, these executive orders are subject to judicial review, consistent with the federal government's tri-branch structure and balance of powers.[57] Whether the judiciary assesses executive orders with true neutrality, however, is often either bolstered or stymied by who heads the Executive Branch.[58] Because a court that checks the power of the President must rely on the Executive Branch to then enforce the court's ruling, these are cases in which the courts are "most vulnerable."[59] The executive-judicial relationship thus substantially effects judicial decision making.[60] More often than not, courts uphold presidential directives, either on their merits or on jurisdictional grounds, such as that a plaintiff lacks standing or that the issue involves a nonjusticiable political question.[61] For instance, a study conducted in 1999 found that federal courts had struck down just fourteen executive orders, wholly overturning only two.[62] Courts typically avoid interference,

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and necessity for swift, far-reaching federal action. *See* Exec. Order No. 13933, 85 Fed. Reg. 40081, 40082–83 (June 26, 2020).

[56] Kenneth R. Mayer, *Executive Orders and Presidential Power*, 61 J. POL. 445, 448 (1999).

[57] *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

[58] *See* Gbemende Johnson, *Executive Power and Judicial Deference*, 68 POL. RSCH. Q. 128, 129 (2015) (demonstrating that "court institutional vulnerability," which varies between the federal and state governments as well as among states, "can constrain judicial decision making and affect whether courts uphold executive action").

[59] *Id.* at 130 (citing WILLIAM HOWELL, POWER WITHOUT PERSUASION: THE POLITICS OF DIRECT PRESIDENTIAL ACTION 139 (2003)).

[60] *See id.*

[61] Tara L. Branum, *President or King? The Use and Abuse of Executive Orders in Modern-Day America,* 28 J. LEGIS. 1, 60 (2002).

[62] *Id.* at 59. The two wholesale reversals were *Youngstown*, 343 U.S. at 579, better known as the Steel Seizure case, and Chamber of Commerce v. Reich, 74 F.3d 1322 (D.C. Cir. 1996), which struck down President Clinton's 1995 executive order that federal contracts not be awarded to employers who permanently replace employees who strike. *Id.*; Mayer, *supra* note 56.

even when an executive order is "of—at best—dubious constitutional authority or issued without specific statutory authority."[63]

B. *Protecting American Monuments, Memorials, and Statues and Combating Recent Criminal Violence - Authorization & Agency Action*

President Trump's Executive Order No. 13933 is an example of a president's "expansive view of [his] own power."[64] To start, the title of the Order does not match the content of the mandate nor the scope of the actions that officers within the Department of Homeland Security (DHS) took in Portland under its purported authority.[65] The full text of the Order moreover sheds light on the political reasons that motivated Executive intervention, namely, "rioters, arsonists, and left-wing extremists who . . . have explicitly identified themselves with ideologies—such as Marxism—that call for the destruction of the United States system of government."[66] Although nominally about protecting federal property, the Order lists no monuments, memorials, or statues in Portland specifically.[67] News sources indicate that federal officers were sent to Portland to protect three U.S. courthouses.[68] But protestors in Portland recorded videos and provided personal accounts of their detention by federal authorities, confirming that the President's troops were "not simply protecting federal property, and part of the reason for that

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[63] Mayer, *supra* note 56, at 448 (quoting Joel L. Fleishman & Arthur H. Aufses, *Law and Orders: The Problem of Presidential Legislation*, 40 LAW & CONTEMP. PROBS. 1, 5 (1976)) (alterations omitted).

[64] *See id.*

[65] *Compare* Exec. Order No. 13933, 85 Fed. Reg. 40081, 40081 (June 26, 2020) (entitling the order), *with, e.g.*, *supra* notes 17–22 (describing violent tactics employed by federal agents on the ground) and *infra* note 69 (same).

[66] Exec. Order No. 13933, 85 Fed. Reg. 40081, 40081.

[67] *See generally id.* at 40081–84.

[68] *See* Steve Vladeck, *Are the Trump Administration's Actions in Portland Legal? Are They Constitutional?*, WASH. POST (July 25, 2020, 5:00 AM), https://www.washingtonpost.com/politics/2020/07/25/are-trump-administrations-actions-portland-legal-are-they-constitutional/.

is the president himself and the high-ranking officials in DHS have not made [protecting federal property] the primary rationale."[69]

A more cautious president might have predicted that federal officers within DHS would fail to adhere to a more limited mandate.[70] The Department of Homeland Security is an agency within the Executive Branch that is charged with handling terrorist threats.[71] Created in 2002 by the Homeland Security Act,[72] DHS was "born from the commitment and resolve of Americans across the United States in the wake of the September 11th attacks."[73] Consistent with that origin, DHS's anti-terrorist efforts were initially focused on international threats such as Al Qaeda; however, the department's mission has expanded beyond foreign terrorist organizations and now addresses threats posed by domestic actors.[74] The Department's broadened agenda was outlined explicitly in its 2019 *Strategic Framework for Countering Terrorism and Targeted Violence*, which acknowledges the ongoing threat posed by foreign terrorist organizations but focuses instead on

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[69] Kristine Phillips, Kevin Johnson & Trevor Hughes, *'What a Disaster': Aggressive Federal Response in Portland Raises Legal Questions*, USA TODAY (July 21, 2020 5:03PM), https://www.usatoday.com/story/news/politics/2020/07/21/portland-protests-trump-administration-response-raises-legal-questions/5481418002/ (quoting the assessment of Michael Dorf, professor of constitutional law at Cornell University).

[70] *See* Evans, *supra* note 17 ("One of the most violent federal units sent to Portland were the men of the Border Patrol's elite Bortac unit. . . . 'They don't exist within the realm of civilian law enforcement. They view people they encounter in the military sense as enemy combatants, meaning they have virtually no rights,' [a former Border Patrol agent] told the Guardian. . . . They are soldiers, not cops, and the difference between the two was readily apparent.").

[71] *See* 6 U.S.C. § 111 (establishing the Department of Homeland Security as an "executive agency" charged with the "primary mission" of preventing, reducing, minimizing the damage of, and assisting the United States in the recovery of "terrorist attacks within the United States").

[72] Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135.

[73] *Mission*, DEP'T OF HOMELAND SEC. (July 3, 2019), https://www.dhs.gov/mission.

[74] *See* DEP'T OF HOMELAND SEC., STRATEGIC FRAMEWORK FOR COUNTERING TERRORISM AND TARGETED VIOLENCE 8–10 (Sept. 2019), https://www.dhs.gov/sites/default/files/publications/19_0920_plcy_strategic-framework-countering-terrorism-targeted-violence.pdf.

the "growing threat from domestic terrorism and other threats originating at home."[75]

DHS defines domestic terrorism extremely broadly. The 2019 *Strategic Framework* offers this definition: "an act of unlawful violence, or a threat of force or violence, that is dangerous to human life or potentially destructive of critical infrastructure or key resources, and is intended to effect societal, political, or other change, committed by a group or person based and operating entirely within the United States or its territories."[76] By contrast, Congress used a more precise definition when forming DHS in the Homeland Security Act, stating:

> The term "terrorism" means any activity that involves an act that is dangerous to human life or potentially destructive of critical infrastructure or key resources; and is a violation of [federal or state criminal law]; *and appears to be intended to intimidate or coerce a civilian population; to influence the policy of a government by intimidation or coercion; or to affect the conduct of a government by mass destruction, assassination, or kidnapping*.[77]

DHS's definition thus omits concepts of intimidation and coercion, substituting a general intention to effect change for Congress's more specific language. That has allowed DHS to maintain that anti-authority groups, rather than being contributors to the political debate over methods of governance, may be viewed as threats to national security.[78]

Combined with President Trump's Executive Order, DHS's lax definition of domestic terrorism gave DHS enormous leeway to address protests in America's cities. Within a week, Acting Secretary of Homeland Security Chad Wolf announced a task force to coordinate DHS law

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[75] *Id.* at ii.

[76] *Id.* at 4 n.6.

[77] 6 U.S.C. § 101(18) (emphasis added). This definition also tracks the definition of domestic terrorism used by Congress in the Patriot Act, now codified at 18 U.S.C. § 2331(5).

[78] *See DHS Announces New Task Force to Protect American Monuments, Memorials, and Statues*, DEP'T HOMELAND SEC. (July 1, 2020), https://www.dhs.gov/news/2020/07/01/dhs-announces-new-task-force-protect-american-monuments-memorials-and-statues (describing protestors as "violent anarchists").

enforcement agency assets in response to Trump's directives.[79] In a press release, Wolf indicated the task force—Protect American Monuments, Memorials, and Statues (PACT)—would conduct "ongoing assessments of potential civil unrest or destruction and allocate resources to protect people and property."[80] Those "resources" included Rapid Deployment Teams, which were "pre-positioned . . . across the country to respond to potential threats to facilities and property."[81]

In theory, the deployment of federal personnel was both consistent with President Trump's Order and statutorily authorized. Chapter 40 of the United States Code tasks the Secretary of Homeland Security with protecting the "buildings, grounds, and property that are owned, occupied, or secured by the Federal Government," as well as persons on those properties.[82] The statute permits the Secretary to designate "officers and agents for duty" who may carry firearms, make arrests without a warrant for offenses against the United States, serve warrants and subpoenas issued under the authority of the United States, investigate possible offenses against federally-owned or occupied properties, both "on and off the property in question," and "such other activities for the promotion of homeland security as the Secretary may prescribe."[83] Wolf was determined to use these vast, police-like powers to respond to the President's command. "We won't stand idly by while violent anarchists and rioters seek not only to vandalize and destroy the symbols of our nation, but to disrupt law and order and sow chaos in our communities," he said.[84]

As DHS officers and agents in Portland demonstrated, however, President Trump's Executive Order was interpreted by Acting DHS Secretary Wolf as authorizing aggressive anti-terrorist methods usually deployed to address violent threats to American society on ordinary American citizens. By equating foreign terrorist organizations and US citizens engaged in protests, even those who might subscribe to fringe ideology, DHS brought

[79] *Id.*

[80] *Id.*

[81] *Id.*

[82] 40 U.S.C. § 1315(a).

[83] *Id.* at § 1315(b)(2).

[84] *Id.*

their broad scope of tools originally meant to fight the "terrorism and targeted violence" of groups like al Qaeda to bear against citizens and other residents of the United States who espoused left-leaning ideologies.

Treating protestors like terrorists may have been precisely the point. Throughout the Portland protests, President Trump superimposed his own political messaging on DHS' deployment of officers and those officers' anti-terrorist tactics.[85] That influence worked within DHS, as well. A whistleblower complaint from within the Department reveals that the President and political appointees within DHS attempted to "modify" intelligence assessments about domestic terrorism to match President Trump's rhetoric.[86] President Trump and his political appointees, including Acting Homeland Security Secretary Wolf, tried to downplay the threat posed by White Supremacists and instead play up the "prominence of violent 'left-wing' groups."[87] Among other actions, Wolf specifically attempted to include information about the unrest in Portland within DHS's intelligence materials.[88] When the Principal Deputy Under Secretary in the Office of Intelligence and Analysis resisted that move, he was demoted, despite twenty

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[85] *See, e.g.*, @realDonaldTrump, TWITTER (Oct. 12, 2020, 7:30 AM), https://twitter.com/realDonaldTrump/status/1315615735612346369 ("The Radical Left fools in Portland don't want any help from real Law Enforcement which we will provide instantaneously."); @realDonaldTrump, TWITTER (Oct. 12, 2020, 7:34 AM), https://twitter.com/realDonaldTrump/status/1315616788986712065 ("Put these animals in jail, now!"); @realDonaldTrump, TWITTER (Oct. 12, 2020, 7:41 AM), https://twitter.com/realDonaldTrump/status/1315618688612159489 ("ANTIFA RADICALS. Get them FBI, and get them now!"); @realDonaldTrump, TWITTER (Oct. 12, 2020, 7:59 AM), https://twitter.com/realDonaldTrump/status/1315623184729858048 ("The FBI and Law Enforcement must focus their energy on ANTIFA and the Radical Left, those who have spent the summer trying to burn down poorly run Democrat Cities throughout the USA!"); *see also Judge in Portland Cites Trump Tweets in Restricting Feds at Protests*, SEATTLE TIMES (updated Nov. 1, 2020, 2:01 PM), seattletimes.com/seattle-news/northwest/judge-cites-trump-tweets-in-restricting-feds-at-protests/ (describing one judge's determination that the President's tweets "helped incite improper conduct by federal officers responding to racial justice demonstrations in Portland").

[86] Whistleblower Reprisal Complaint at 13, *In re: Murphy* (Dep't of Homeland Sec. Office of Inspector General Sept. 8, 2020), https://int.nyt.com/data/documenttools/homeland-security-whistleblower/0819ec9ee29306a5/full.pdf.

[87] *Id.*

[88] *Id.* at 14.

years of public service.[89] The President's insistence on first proposing and then investigating unsubstantiated classifications of domestic threats has extended to other federal agencies, as well. As recently as the autumn of 2020, the FBI confirmed that it was targeting for investigation the "extremist 'Antifa' demonstrators who engaged in recent violent protests."[90]

II. THE EXPANSIVE EXECUTIVE BRANCH

President Trump's politicization of domestic security threats, exemplified by his Executive Order, is just one example of growing Executive power in the United States. Despite the limitations on the President's powers in the Constitution and in the spheres of the several States, every presidential administration has expanded the President's role.

The push for broad Executive powers is not new. As president, Thomas Jefferson refused to enforce the Alien Sedition Acts of 1798 and ordered that prosecutions under the law be discontinued, as he "affirm[ed] that act to be no law, because in opposition to the Constitution."[91] His refusal to enforce legislation enacted by Congress rested on his own broad vision of his role as Chief Executive.[92] More than two hundred years later, President Barack Obama continued that tradition by openly denouncing the Defense of Marriage Act[93] and imploring the Supreme Court to issue an "authoritative ruling" of the act's unconstitutionality.[94] The Court agreed to hear the case,

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[89] *Id.*

[90] Mark Hosenball & Sarah N. Lynch, *FBI Chief Says U.S. 'Antifa' Demonstrators Are Targets of Multiple Probes*, REUTERS (Sept. 24, 2020), https://www.reuters.com/article/instant-article/idUKL2N2GL1FC.

[91] Letter from Thomas Jefferson to Edward Livingston (Nov. 1, 1801), *in* 8 THE WRITINGS OF THOMAS JEFFERSON 57–58 n.1 (Paul Leicester Ford ed., 1897) (regarding the nolle prosequi entered in the case brought against William Duane under the Sedition Act).

[92] *See id.* ("The President is to have the laws executed. He may order an offense then to be prosecuted. If he sees a prosecution put into a train which is not lawful, he may order it to be discontinued and so put into legal train. I found a prosecution going on against Duane . . . founded on the sedition act. . . . and I shall treat it as a nullity, wherever it comes in the way of my functions.").

[93] Pub. L. 104-199, 110 Stat. 2419.

[94] *See* Nat Stern, *Separation of Powers, Executive Authority, and Suspension of Disbelief*, 54 HOUS. L. REV. 125, 159–60 (2016).

greatly enhancing the Executive's authority and effectively permitting presidents to "direct the path of the law."[95]

Presidents have not only refused to implement enacted legislation, playing a form of presidential defense against laws with which they disagree. Presidents have also played offense by circumventing Congress entirely. The most disconcerting example is the expansion of the President's powers as Commander and Chief, where Congress and the States have essentially become powerless to check the President's authority. Although the Constitution makes the President the "Commander in Chief of the Army and Navy of the United States" and of the State militias "when called into the actual Service of the United States,"[96] the term "commander in chief" was not uniformly defined in eighteenth century law, and generally meant merely the highest person in a particular chain of command.[97] Some states used the term close in time to the ratification of the U.S. Constitution to refer to individuals "subordinate to another ultimate decision maker," such as Esek Hopkins of Rhode Island, who was named "commander-in-chief" of "the fleet" in 1776."[98] The President's powers as Commander in Chief are accordingly not necessarily so sweeping as to put the Executive above the other branches of the federal government in matters of war.

The structure of the Constitution confirms the point. "Consistent with a narrow understanding of 'Commander in Chief,' Article I gives Congress the power to 'raise and support Armies,' to make rules for 'the Government and Regulation of the land and naval Forces,' and to 'declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water.'"[99] Thus declarations of war, the raising and support of armies, and the regulation of those troops are all powers exclusively granted to the Legislative Branch, not the President. A former commander-in-chief "whose accomplishments were particularly well known to the framers" probably understood that Congress would play a large role in war; George Washington,

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[95] *Id.* at 160.

[96] U.S. CONST. art. II, § 2.

[97] Ingrid Brunk Wuerth, *International Law and Constitutional Interpretation: The Commander in Chief Clause Reconsidered*, 106 MICH. L. REV. 61, 83 (2007).

[98] *Id.*

[99] *Id.* at 84 (quoting U.S. CONST. art. I, § 8).

"acting under the title of commander in chief during the Revolutionary War, looked to Congress to manage many aspects of the conduct of war."[100] Use of the "same title in the Constitution" suggests the president was expected to enjoy approximately the same war powers as Washington had during the Revolutionary War, unless some other provision of the Constitution broadened his powers more explicitly.[101]

But the idea that Congress alone can dictate whether and how war will be waged no longer stands in the United States. When President Richard Nixon sought to invade Cambodia in 1970, William Rehnquist, then an Assistant Attorney General in the Office of Legal Counsel, authored a memo assuring Nixon that his actions were "authorized under even a narrow reading of his power as Commander in Chief."[102] Rehnquist urged that the President should have no concern taking military action without congressional permission, writing:

> It is too plain . . . to admit of denial that the Executive, under his power as Commander in Chief, is authorized to commit American forces in such a way as to seriously risk hostilities, and also to actually commit them to such hostilities, without prior congressional approval. . . . [The] constitutional practice must include executive resort to Congress in order to obtain its sanction for the conduct of hostilities which reach a certain scale. Constitutional practice also indicates, however, that congressional sanction need not be in the form of a declaration of war.[103]

Today, President Trump would no doubt find much agreeable in Rehnquist's memo. The President's power as Commander and Chief, whatever its original contours, has been validated as an expansive prerogative to deploy force at whim without authorization by any other branch of government. The violence in Portland moreover demonstrates a frightening aspect of this overbroad power, which is not limited to international conflicts.

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[100] *Id.* at 83.

[101] *See id.*

[102] William H. Rehnquist, Mem. Op. for Charles W. Colson, Special Counsel to the President, The President and the War Power: South Vietnam and the Cambodian Sanctuaries 321 (May 22, 1970), https://www.justice.gov/file/20826/download.

[103] *Id.* at 331–32.

Under the Insurrection Act of 1807,[104] Congress itself gave the Executive the ability to deploy troops on the American people in their own towns and neighborhoods.

A. *The Insurrection Act of 1807*

The Insurrection Act is a long-standing and often-invoked American law which President Trump has considered invoking to justify his use of federal troops in Portland.[105] Currently codified at 10 U.S.C. §§ 251–55, the law permits the President to use the armed forces to suppress "insurrection[s]," "rebellion[s]," and "domestic violence" that interfere with the execution of the laws of a State or of the United States.[106] Many Americans presently think the law prohibits the use of federal troops on American soil.[107] "They also believe that the President has to wait until a governor asks for help before he can send federal troops to help and even only to quell an insurrection. These beliefs are erroneous."[108] While a separate law in Title 18 of the United States Code criminalizes use of the armed forces "as a posse comitatus"—essentially prohibiting use of the U.S. military as a police force[109]—the Insurrection Act is a "statutory exception" to that law.[110] Today, "the Insurrection Act stands, and it permits the President to use federal troops to enforce the laws either at the request of a governor or on the initiative of the President."[111]

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[104] Originally enacted as Pub. L. 9-39, 2 Stat. 443.

[105] *See* Rebecca Kheel, *House Votes to Curtail Insurrection Act Powers*, THE HILL (July 20, 2020), 2020 WL 4059507.

[106] 10 U.S.C. §§ 251–253.

[107] John R. Brinkerhoff, *Understanding the Posse Comitatus Act and the Insurrection Act*, 4 STATE DEF. FORCE J. 3, 3 (2008).

[108] *Id.*

[109] Pub. L. 45-263, 20 Stat. 145, now codified as 18 U.S.C. § 1385.

[110] *See* Kelly Magsamen, *4 Ways Congress Can Amend the Insurrection Act*, CTR. FOR AM. PROGRESS (June 12, 2020), https://www.americanprogress.org/issues/security/news/2020/06/12/486261/4-ways-congress-can-amend-insurrection-act/.

[111] Brinkerhoff, *supra* note 107, at 4.

The Act is rooted in the earliest history of the United States during George Washington's presidency. It was first inspired by the Calling Forth Act of 1792, which gave Washington authority "to call forth the militia when in his judgment they were needed to repel invasions, suppress insurrections, or enforce the laws."[112] Ever hesitant of the power of kings, the second Congress was reluctant to give this power to a president, and so specified that "before using the troops, the President would have to issue a proclamation calling on the insurgents to disperse in a limited time."[113] The Calling Forth Act further specified that domestic insurrections could be quelled with federal forces only upon approval "by an associate justice, or the district judge."[114] The powers delegated to the Executive to employ military force in domestic emergencies were thus "circumscribed in many ways," requiring cooperation from state authorities and the federal judiciary.[115]

In practice, the 1792 Act proved flawed. Already that year Washington was faced with protests over the federal government's first domestic product tax, known today as the Whisky Rebellion.[116] The civil unrest concerned Washington; he feared the protests in Pennsylvania in particular would lead the newly formed nation back into a revolutionary war.[117] The situation on the American frontier did not precisely fit the requirements of the Calling Forth Act, however.[118] Washington's cabinet accordingly asked Congress to

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[112] Brinkerhoff, *supra* note 107, at 5. *See also* An Act to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions, Pub. L. 2-28, 1 Stat. 264 (1792).

[113] Brinkerhoff, *supra* note 107, at 5.

[114] *See* ROBERT W. COAKLEY, THE ROLE OF FEDERAL MILITARY FORCES IN DOMESTIC DISORDERS 1789-1878, at 20 (1988).

[115] *Id.* at 22.

[116] *See* THOMAS P. SLAUGHTER, THE WHISKEY REBELLION: FRONTIER EPILOGUE TO THE AMERICAN REVOLUTION 120–22 (1986).

[117] *Id.* at 192, 194.

[118] *See id.* at 192–93. In particular, the 1792 Act "required certification by a Supreme Court justice that the situation was beyond the control of civil authority before troops could be called to the central government's aid." *Id.* Taking advantage of this limitation on the President's authority, representatives from Pennsylvania "uncooperatively asserted that the judicial power was equal to the task of quelling and punishing the riots," thereby suggesting that federal intervention was neither necessary nor justified. *Id.* at 193. Washington's

grant the President more discretion. Congress complied in 1795, passing an updated law that gave the President "specific authority to call forth the militia upon the request of a governor or state legislature, if the governor were unable to apply for the assistance," eliminating both the necessity of judicial determination that federal intervention was warranted and the sunset date on the original 1792 law.[119] Though broad, the President's powers under the updated law, today known as the Militia Act of 1795, still did not allow the Executive to use federal troops on domestic soil at will. The President was permitted to employ the "militia" but not "federal troops," for one.[120]

The Act was next expanded at the request of President Thomas Jefferson in response to the threat posed by Aaron Burr. Following his tenure as Jefferson's Vice President, Burr had apparently begun plotting to raise an army and establish his own dynasty in either the Louisiana Territory or Mexico."[121] Jefferson consulted his Secretary of State, James Madison, to determine whether the Constitution gave him the ability to send federal troops to quash Burr's plans.[122] Madison responded in a letter quoting the Calling Forth Acts of 1792 and 1795.[123] His analysis was succinct: "It does not appear that regular Troops can be employed, under any legal provision [against] insurrections—but only [against] expeditions having foreign Countries for the object[.]"[124] In search of a legitimate, constitutional source of authority to send the federal armed forces to quell Burr's plot, Jefferson asked Congress

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administration was ultimately able to satisfy the 1792 Act's requirements, but were plagued by the administrative and negotiations setbacks. *See id.* at 196.

[119] Thaddeus Hoffmeister, *An Insurrection Act for the Twenty-First Century*, 39 STETSON L. REV. 861, 879-80 (2010); Brinkerhoff, *supra* note 107, at 5; An Act to provide for calling forth the Militia to execute the laws of the Union, suppress insurrections, and repel invasions; and to repeal the Act now in force for those purposes, Pub. L. 3-36, 1 Stat. 424 (1795).

[120] *See* Hoffmeister, *supra* note 119, at 880.

[121] *See* Hoffmeister, *supra* note 119, at 881; BUCKNER F. MELTON, JR., AARON BURR: CONSPIRACY TO TREASON 1–2, 64–66 (2002). For a useful overview of Burr's conspiracy and Jefferson's response, *see also* Dave Roos, *Thomas Jefferson Signed the Insurrection Act in 1807 to Foil a Plot by Aaron Burr*, HISTORY.COM (June 3, 2020), https://www.history.com/news/insurrection-act-thomas-jefferson-aaron-burr.

[122] Hoffmeister, *supra* note 119, at 881.

[123] Letter from James Madison to Thomas Jefferson (Oct. 30, 1806), https://founders.archives.gov/documents/Madison/99-01-02-1021.

[124] *Id. See also* Hoffmeister, *supra* note 119, at 881.

in December of 1806 to pass a bill authorizing the employment of the land and Naval forces of the United States in cases of insurrection.[125] Congress responded with the Insurrection Act of 1807, granting the President the power to call forth both federal and state forces in cases of insurrection.[126] The Insurrection Act apparently retained several of the earlier limitations on the President's powers included in the Calling Forth Act of 1792 and the Militia Act of 1795, however. The language of the 1807 law permitted the Executive to employ the United States military only "where it [would be] lawful for the President . . . to call forth the militia."[127]

The Insurrection Act was not, in the end, used against Burr.[128] President Jefferson first invoked the law in 1808 in response to information that "sundry persons" were "confederating together on Lake Champlain . . . for the purposes of forming insurrections against the authority of the United States."[129] The conspiracy involved a group of American merchant ships determined to avoid Jefferson's trade embargo with the British.[130] Enterprising, rebellious Americans had built "[i]mmense rafts of lumber," one of which was "near half a mile long [and] carried a ball-proof fort, and was manned by five or six hundred armed men prepared to defy the custom-house officers."[131]

The Act has been used and amended extensively since these early years. In 1861 at the request of President Abraham Lincoln, the law was again modified to increase Presidential authority to use the militia and federal armed forces to suppress domestic insurrections.[132] Passed as part of the

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[125] Roos, *supra* note 121.

[126] An Act authorizing the employment of the land and naval forces of the United States, in cases of insurrection, Pub. L. 9-41, 2 Stat. 443 (1807); Hoffmeister, *supra* note 119, at 881–82.

[127] 2 Stat. at 443; Hoffmeister, *supra* note 119, at 881.

[128] *See* Roos, *supra* note 121.

[129] Thomas Jefferson, *Proclamation of April 19, 1808*, in 1 COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 438–39 (James D. Richardson ed., 1897).

[130] Roos, *supra* note 121.

[131] HENRY ADAMS, 3 HISTORY OF THE UNITED STATES OF AMERICA DURING THE ADMINISTRATION OF THOMAS JEFFERSON 249 (Albert & Charles Boni 1930).

[132] Brinkerhoff, *supra* note 107, at 5; Hoffmeister, *supra* note 119, at 887.

larger Suppression of the Rebellion Act,[133] the law gave the President unfettered discretion to determine when it was "impracticable to enforce the laws by the ordinary course of judicial procedures," greatly strengthening the Executive's power and providing Lincoln with a legal basis for deploying troops against the rebellious South during the Civil War.[134] The amendment allowed Lincoln to deploy federal troops on his own initiative and act on his own judgment without waiting for a request from a governor or a certification that judicial authorities were insufficient.[135] The amendment also added "rebellion against the authority of the government of the United States" to the list of contingencies under which the President could act.[136]

The law was amended again during Reconstruction, this time at the request of President Ulysses S. Grant.[137] The former Union general, now the elected Commander in Chief of the United States' military forces, approached Congress in 1870 to urge the necessity of "reimposing military rule . . . in those sections of the readmitted states where the [Ku Klux] Klan enjoyed virtual hegemony" after the formal end of military conflict during the Civil War.[138] Congress responded in 1871 by granting the President authority to use federal troops or the militia to respond to "insurrection, domestic violence, unlawful combinations, or conspiracies" in the States that would "deprive any portion or class of the people of [the States] any of the rights, privileges, or immunities, or protection, named in the Constitution and secured by [the law]" whenever state authorities "fail in or refuse protection of the people in such rights."[139] Along with the original grants of authority under the Insurrection Act, these provisions were famously invoked by

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[133] 12 Stat. 281, 281–83 (1861).

[134] Hoffmeister, *supra* note 119, at 887.

[135] Brinkerhoff, *supra* note 107, at 5. *Cf. also* SLAUGHTER, *supra* note 116, at 196 (suggesting that certification by a Court might also serve as justification to employ the militia or federal troops under earlier versions of the Act).

[136] Hoffmeister, *supra* note 119, at 888.

[137] COAKLEY, *supra* note 114, at 309; Brinkerhoff, *supra* note 107, at 5.

[138] COAKLEY, *supra* note 114, at 309.

[139] Ku Klux Klan Act, 17 Stat. 13, 14 (1871) (codified as amended at 18 U.S.C. § 241 and 42 U.S.C. §§ 1983, 1985(3), 1988). An excerpted passage of the relevant section of the Act is reprinted in Hoffmeister, *supra* note 119, at 888. The relevant portion of the law is today codified as amended at 10 U.S.C. § 253(a).

President Dwight Eisenhower in 1957 when he sent the 101st Airborne Division to enforce the desegregation of public schools in Little Rock, Arkansas.[140]

More recently, the Insurrection Act has changed from Eisenhower's usage. Instead of enforcing civil rights, Presidents have invoked the Act to quell civil rights protesters—specifically, protests against police violence. In 1992, when violence erupted in Los Angeles following the acquittal of four police officers charged in the beating of Rodney King, President George H.W. Bush invoked the Act in response to the governor of California's request for federal assistance quelling the widespread riots.[141] In many ways, the civil unrest in 1992 mirrors the 2020 protests in Portland. In both circumstances, the President's invocation of the Insurrection Act departed from the Act's original purpose of preventing the violent overthrow of the government and instead effectively silenced citizens who reacted to the deaths of black persons at the hands of the police.

Yet important distinctions remain. President Bush employed the Insurrection Act only after receiving an explicit request from California's governor; President Trump instead circumvented the authority of Oregon's governor by deploying federal personnel that were neither requested nor desired.[142] Portland authorities repeatedly beseeched the federal government not to send any federal troops to their city.[143] Despite their pleas, Trump sent

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[140] *See* PAUL J. SCHEIPS, THE ROLE OF FEDERAL MILITARY FORCES IN DOMESTIC DISORDERS 1945-1992, at 37–38 (2005); *see also* Roos, *supra* note 121.

[141] *See* Hoffmeister, *supra* note 119, at 890; Roos, *supra* note 121.

[142] Emily Badger, *How Trump's Use of Federal Forces in Cities Differs from Past Presidents*, N.Y. TIMES (July 23, 2020), https://www.nytimes.com/2020/07/23/upshot/trump-portland.html; *see also* Madeleine Carlisle, *What Is the Insurrection Act and Does It Give Trump the Authority to Send Military Troops Into States? Here's What to Know*, TIME.COM (June 2, 2020, 4:10 PM), https://time.com/5846649/insurrection-act-1807-donald-trump/.

[143] *See* Erwin Chemerinsky, *Op-Ed: Trump's Troops in Portland are a Constitutional Outrage*, L.A. TIMES (July 24, 2020, 3:40 PM), https://www.latimes.com/opinion/story/2020-07-24/donald-trump-portland-border-patrol-constitution.

troops by the tank-load.[144] Whatever Congress's past intentions for the Insurrection Act, President Trump interpreted it as giving him the power to deploy federal military troops and militia based on his subjective belief that political activity had become violent civil unrest, and that local authorities were unable to handle the crisis. That invocation does not stray far from President Bush's use of the Act. And unless the law is amended, the only authority that might have invalidated his actions were the courts.[145]

B. *Congress's 2020 Proposed Amendment to the Insurrection Act of 1807*

Congress reacted quickly to Trump's unprecedented actions by exploring ways to amend the Insurrection Act. On July 20, 2020, the House approved language as part of a larger defense spending bill to amend the Act by requiring that the President consult with Congress "in every possible instance" before invoking the law.[146] The Amendment would also have required the President and the Secretary of Defense "certify to Congress that a State is unable or unwilling to suppress an insurrection or domestic violence, or that the State concerned is unable or unwilling to suppress an unlawful rebellion against the authority of the United States," in order to invoke the law.[147] That certification also would have required "demonstrable"

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[144] *See* Jemima McEvoy, *More Federal Forces Heading to Portland*, FORBES (July 28, 2020, 3:13 PM), https://www.forbes.com/sites/jemimamcevoy/2020/07/28/more-federal-forces-heading-to-portland/?sh=61cd69c835c9 (noting that, while it remains unclear how many federal officers were deployed to Portland, at least 114 were in the city in mid-July 2020, and 150 additional border patrol personnel and deputy U.S. Marshals were en-route to Portland by the end of that month). Some federal agencies have expressed dismay at use of the term "troops." *See, e.g.*, *Myth vs. Fact: 50+ Nights of Violence, Chaos, and Anarchy in Portland, Oregon*, DEP'T HOMELAND SEC. (July 27, 2020), https://www.dhs.gov/news/2020/07/27/myth-vs-fact-50-nights-violence-chaos-and-anarchy-portland-oregon (insisting that "DHS personnel sent to protect federal facilities in Portland are sworn civilian federal law enforcement officers, not active duty military personnel"). To Portland residents who experienced military-based tactics and weapons, the distinction is probably of little value.

[145] *See, e.g.*, Carlisle, *supra* note 142 (noting that, if challenged, the President would likely invoke the Insurrection Act, requiring interpretation of the law by the federal courts).

[146] H.R. Rep. No. 116-617, at 1756 (2020) (Conf. Rep.).

[147] *Id.*

evidence that the State is unable or unwilling to act.[148] Further suggested amendments included language which specified that federal military personnel deployed under the Act are prohibited from "direct participation" in search, seizure, arrest, or other similar activities, unless "expressly authorized by law."[149] Representative Veronica Escobar, a Democrat from Texas who sponsored the amendment, explained its necessity: "Today, if the president of the United States chooses to use military force abroad the president would have to consult with Congress," she explained. "Yet that same consultation is not required for use of military force on American soil."[150] Ultimately, the Senate's amendment contained no similar provision, and the House receded from the language in order to secure the other body's cooperation.[151] The defense appropriations bill was passed into law over the veto of President Trump on January 1, 2021, without any amendments to the Insurrection Act.[152]

Congress's inability to amend the Insurrection Act is disconcerting and disappointing for many reasons. First, as a conceptual matter, the House's proposed amendment was congruent with the intent of the legislature when the Act was initially ratified. As described above, the Sixth Congress passed the Insurrection Act to address the unique conflict created by Aaron Burr.[153] The Act retained specific limitations on the President's power included in the earlier Calling Forth Act of 1792 and Militia Act of 1795.[154] These statutes were forged in the fires of federalism and carefully attuned to the United States' government's balance of powers in order to purposefully prevent unfettered presidential use of federal troops within the United States. By reinvigorating checks and balances between the Executive and Legislative branches, the proposed amendment would have ensured the Insurrection Act reverted to its original intended, far more limited purposes, rather than serve

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[148] *Id.*

[149] *Id.*

[150] Rebecca Kheel, *In The News: The Hill – House Votes to Curtail Insurrection Act Powers* (July 20, 2020), https://escobar.house.gov/news/documentsingle.aspx?DocumentID=396.

[151] *See* H.R. Rep. No. 116-617, at 1756 (2020) (Conf. Rep.).

[152] *See* H.R. 6395, 116th Cong. (2020).

[153] *See supra* notes 121–27 and accompanying text.

[154] *See supra* notes 113–15, 120, 127 and accompanying text.

as an unchecked source of potential presidential authority to use the federal military as internal police in American neighborhoods and cities.

III. CIVIL LIBERTIES & JUDICIAL INTERVENTION

Without an amendment of the Insurrection Act from Congress, judicial intervention is the only check left to ensure the Executive branch's interloping presence is not limitless. Moreover, even under the current law, the mass arrests and use of violent force by federal agents in Portland evidenced pervasive constitutional violations. Many protestors fear that by exercising their unalienable constitutional rights they will face the same retaliation and combat tactics from federal personnel who are trained and equipped as a militarized national police force as the protesters in Portland.. The judiciary should not shy away from limiting the ever-expanding claims to war powers made by the President, particularly where those claims infringe on American's constitutional rights.

A. *Defining Insurrection in the Courts*

In related areas of federal law, the Supreme Court has been reluctant to expand the definition of such nebulous terms as "insurrection." The best example is *Herndon v. Lowry*,[155] a criminal case from 1937. In *Herndon*, the defendant was charged with a violation of a Georgia state law that prohibited the introduction, printing, or circulation of documents "for the purpose of inciting insurrection."[156] He was convicted for communist solicitations, specifically for "uniting, combining, and conspiring to incite riots and to embarrass and impede the orderly processes of the courts and offering combined resistance to, and, by force and violence, overthrowing and defeating the authority of the state . . . by speech and persuasion."[157] The defendant defended his actions by asserting that the cited statute was unconstitutionally vague and unwarrantably invaded his rights under the United States Constitution.[158] Finding for the defendant, the Court held that

[155] 301 U.S. 242 (1937).

[156] *Id.* at 253.

[157] *Id.* at 245.

[158] *Id.* at 247–48.

"the limitation upon individual liberty must have appropriate relation to the safety of the state. Legislation which goes beyond this need violates the principle of the Constitution."[159] The Court held that the Georgia statute must, as a matter of federal law, require that the defendant intend to use force and violence towards the state, or intend that others would do so at his bidding, before the state could criminalize the defendant's exercise of his constitutional rights.[160]

The Court's holding is significant beyond the specifics of Georgia statutory law because it makes clear the narrow scope of an "insurrection." The defendant's conviction for speaking his political beliefs, without proof that he was forcefully trying to overthrow the government, was not an insurrection. This case demonstrates the Court's recognition of the liberty that protesters are latching onto in Portland. Peaceful protests and movements for political organization, just as in *Herndon*, are not forms of insurrection but speech.

The Court has not always taken such a circumscribed view, however, particularly in cases interpreting the Insurrection Act itself. In *Laird v. Tatum*,[161] decided in 1972, the Justices deviated notably from the Court's earlier interpretation. The case concerned President Johnson's order that federal troops assist local authorities with the "civil disorders in Detroit, Michigan, in the summer of 1967 and during the disturbances that followed the assassination of Dr. Martin Luther King."[162] To assist the federal troops' coordination with local authorities, the federal government created a data-gathering system that would "permit the Army, when called upon to assist local authorities, to be able to respond effectively with a minimum of force."[163] The system involved extensive collection of information about public activities that the Army thought had "at least some potential for civil disorder," including notes from Army Intelligence agents who attended public political organizing meetings.[164] Though the recording system was

[159] *Id.* at 258.

[160] *Id.*

[161] 408 U.S. 1 (1972).

[162] *Id.* at 4–5.

[163] *Id.* at 5.

[164] *Id.* at 6.

extensive, the government contended that it was necessary, and that "reports concerning civil disturbances [would] be limited to matters of immediate concern to the Army—that is, reports concerning outbreaks of violence or incidents with a high potential for violence beyond the capability of state and local police and the National Guard to control."[165] Several individuals brought a class action for declaratory and injunctive relief, asking the courts end the government's "surveillance of lawful and peaceful civilian political activity."[166]

Importantly, the Court held that the individuals' associations and speech could be "chilled" without directly violating their First Amendment rights.[167] Writing for the Majority, Chief Justice Burger held that the petitioners' claim, "simply stated, is that they disagree with the judgments made by the Executive Branch with respect to the type and amount of information the Army needs and that the very existence of the Army's data-gathering system produces a constitutionally impermissible chilling effect upon the exercise of their First Amendment rights."[168] But discomfort caused by the data-gathering system was not an injury redressable by the judiciary, according to the Court.[169] It was "not the role of the judiciary, absent actual present or immediately threatened injury resulting from unlawful government action," to "probe the Army's intelligence-gathering activities" to determine "the extent to which those activities may or may not be appropriate to the Army's mission."[170] In a nod to the petitioners, Chief Justice Burger wrote that the petitioners' argument was congruent with the "philosophical underpinnings [which] explain our traditional insistence on limitations on military operations in peacetime."[171] But despite the "traditional and strong resistance of Americans to any military intrusion into civilian affairs," the *Laird* Court

[165] *Id.* at 7–8.

[166] *Id.* at 2.

[167] *See id.* at 13.

[168] *Id.*

[169] *See id.*

[170] *Id.* at 14, 15.

[171] *Id.* at 15.

did not find the federal government's operations in violation of any constitutionally guaranteed rights.[172]

In a strong dissent, Justice Douglas, joined by Justice Marshall, explained why the majority's holding was inconsistent with the liberties afforded to American citizens.[173] He was particularly disturbed by the majority's flippant allowance of the military into the civilian sector. "[A]larm was sounded in the Constitutional Convention about the dangers of the armed services," he noted, which exist "not only in bold acts of usurpation of power, but also in gradual encroachments."[174] He insisted that the American tradition accordingly "reflects a desire for civilian supremacy and subordination of military power."[175] Quoting the late Chief Justice Warren, Justice Douglas noted that while "the military serves the vital function of preserving the existence of the nation, . . . [i]n times of peace, the factors leading to an extraordinary deference to claims of military necessity have naturally not been as weighty."[176] Deployment of the military when the nation was not at war, particularly to surveil American citizens, was therefore "a cancer on our body politic."[177] While "[t]hose who already walk submissively will say there is no cause for alarm," he insisted, "submissiveness is not our heritage."[178] He accordingly would have enjoined the federal government's use of military intelligence against Americans at home, because the Constitution "was designed to allow rebellion to remain as [America's] heritage" and to "keep the precincts of belief and expression . . . [and] of political and social activities free from" government interference.[179] There could be "no influence more paralyzing" than military surveillance of American citizens, he concluded.[180]

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[172] *Id.*

[173] *See id.* at 16–29 (Douglas, J., dissenting).

[174] *Id.* at 18.

[175] *Id.* at 19.

[176] *Id.* at 19–20 (quoting Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 182, 193 (1962)).

[177] *Id.* at 28.

[178] *Id.*

[179] *Id.*

[180] *Id.*

Justice Douglas's dissent foreshadowed the present-day conflict in Portland. He insisted that "the exercise of military power, where the rights of the citizen are concerned, [should] never be pushed beyond what the exigency requires."[181] Otherwise, Douglas feared that "[t]he act of turning the military loose on civilians[,] even if sanctioned by an Act of Congress . . . would raise serious and profound constitutional questions. Standing as it does only on brute power and Pentagon policy, it must be repudiated as a usurpation dangerous to the civil liberties on which free men are dependent."[182] His words highlight the dangerous disconnect between the government's use of force and individuals' civil liberties, particularly when the U.S. military was employed to police American citizens at home.

B. *Due Process Guarantees*

Justice Douglas's dissent in *Laird* expressed repugnance for federal military intrusion on civilian lives.[183] His concern spanned many of the civil liberties included in the Bill of Rights, and he insisted that even exigent circumstances could not validate overbroad governmental action.

One of the civil rights implicated by the use domestically of federal military force is the due process guarantee of the Fifth Amendment.[184] The Supreme Court grappled with this issue in *Hamdi v. Rumsfeld*,[185] decided in the wake of the terrorist attacks of September 11, 2001.[186] The case involved the capture by U.S. military forces of an American citizen, alleged to be an enemy combatant, who was held without any formal charges or the initiation of any formal proceedings on a series of United States Navy brigs.[187] The citizen's father petitioned for a writ of habeas corpus.[188] The United States insisted that it was permitted to hold Hamdi "indefinitely" because "a series

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[181] *Id.* at 24.

[182] *Id.*

[183] *See generally id.* at 16–29.

[184] U.S. CONST. amend. V ("No person shall be . . . deprived of life, liberty, or property, without due process of law[.]").

[185] 542 U.S. 507 (2004).

[186] *See id.* at 510.

[187] *Id.*

[188] *Id.* at 511.

of U.S. military screening teams [had] determined that Hamdi met the criteria for enemy combatants, and a subsequent interview of Hamdi . . . supports his classification as an enemy combatant."[189]

Justice O'Connor's plurality opinion made clear that a United States citizen—even one detained as an enemy combatant—must be given a meaningful opportunity to contest the factual basis for his detention and exercise due process rights.[190] Justice O'Connor maintained that while the law under which Hamdi had been detained "provided procedures for executive detention, during times of emergency, of individuals deemed likely to engage in espionage or sabotage,"[191] the "serious competing interests" at stake required as a bare constitutional minimum that the government provide notice of the factual basis for its detention and an opportunity to rebut those assertions before an impartial authority.[192] Citizens who are classified as enemy combatants are no less American citizens, after all.[193] Justice O'Connor was furthermore swayed by Congress's own concern with preventing a "reprise [of] the Japanese-American internment camps of World War II."[194] The "concentration camp implications" of permitting the U.S. military to detain U.S. citizens without recourse to their constitutional rights is "abhorrent," as Congress recognized.[195] Justice O'Connor therefore reminded the Executive branch that American citizens cannot be deprived of their due process rights, even in an emergency, merely to serve military interests.[196] The petitioner's request for a writ of habeas corpus was ultimately granted and his case was remanded so that the lower courts could provide constitutionally-due process of the law.[197]

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[189] *Id.* at 510, 513.

[190] *See id.* at 533.

[191] *Id.* at 517.

[192] *Id.* at 529, 533.

[193] *See id.* at 535 ("[T]he threats to military operations posed by a basic system of independent review are not so weighty as to [prevail over] a citizen's core rights to challenge meaningfully the Government's case and to be heard by an impartial adjudicator.").

[194] *Id.* at 517.

[195] *Id.* (internal quotation omitted).

[196] *See id.* at 532–35.

[197] *Id.* at 539.

Hamdi, though only a plurality opinion, displayed the Court's awareness of the dangers of regression into the federal government's untrammeled military control over civilian lives that the Court had so wrongly approved in *Korematsu v. United States* during the height of World War II.[198] At the core of this danger is the historically-evident likelihood that the federal government will arbitrarily punish citizens and strip them of their fundamental liberties in its zeal to secure domestic tranquility. That Justice O'Connor's opinion in *Hamdi* was written at the height of the George H.W. Bush administration's War on Terror serves as a particularly strong warning against relying on political prejudice or the contemporary fears of American society to create substantive policies that trammel individual, fundamental rights. However, the Court's inability to come to a conscientious in *Hamdi* leaves citizen's due process rights in flux. Though the plurality understands the need to preserve Fifth Amendment protections , the Court did not create binding limits on the Executive branch's ever expanding war powers.

Due process concerns are not only implicated by the federal government's military detention of American citizens, of course. Constitutional violations are just as often hidden under the guise of even-handed law. Accordingly, although no reports indicate that federal personnel deployed by President Trump in Portland arrested American citizens and held them in military custody, their actions included the arrest of numerous civilians, not always clearly related to matters of federal concern.[199]

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[198] Korematsu v. United States, 323 U.S. 214 (1944), infamously affirmed the exclusion of American citizens of Japanese ancestry from areas of the United States deemed important to the military, and their imprisonment instead in "relocation centers," based on the opinion of "properly constituted military authorities" that the West Coast of the United States might be invaded during the war with Japan. *See id.* at 223–24. In 2018, the Supreme Court recognized that "*Korematsu* was gravely wrong the day it was decided, and has been overruled in the court of history, and . . . has no place in law under the Constitution." Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018) (internal quotation omitted).

[199] *See, e.g.*, Amir Vera, Konstantin Toropin & Josh Campbell, *US Attorney Requests DHS Investigation After Video Shows Masked, Camouflaged Federal Authorities Arresting Protestors in Portland*, CNN.COM (updated July 20, 2020, 2:26 PM), https://www.cnn.com/2020/07/18/us/portland-arrests-federal-authorities/index.html; Katie Shepherd & Mark Berman, *'It Was Like Being Preyed Upon': Portland Protesters Say Federal Officers in Unmarked Vans are Detaining Them*, WASH. POST (July 17, 2020, 8:24 PM), https://www.washingtonpost.com/nation/2020/07/17/portland-protests-federal-

The idea that authorities might be overly vigilant about enforcing vaguely defined laws is not new to the courts, and also implicates due process concerns. In some instances, laws are too broad and allow for law enforcement to be the arbitrators of the law's application. One example is *City of Chicago v. Morales*,[200] in which the Supreme Court invalidated a Chicago ordinance as unconstitutionally vague.[201] The ordinance provided that police who observed "a person whom [police] reasonably believes to be a criminal street gang member loitering in any public place with one or more persons" must "order all such persons to disperse and remove themselves from the area."[202] Anyone who did not "promptly obey" was guilty of a criminal offense.[203] Because the ordinance did not proscribe in any particular activity, giving police officers little guidance to determine who they would cite under the law, the Court determined the statute wrongfully "entrusts lawmaking to the moment-to-moment judgment of the policeman on his beat."[204] The Court was particularly concerned with giving the police the power "to decide arbitrarily which members of the public they will order to disperse" because the ordinance prevented a "substantial amount of innocent conduct."[205] The "right to remove from one place to another according to inclination," for example, is "an attribute of personal liberty protected by the Constitution."[206] Therefore, if "the loitering is in fact harmless and innocent, the dispersal order itself [would be] an unjustified impairment of liberty."[207]

The overly vague ordinance in *Morales* is reminiscent of the lack of procedure present in *Hamdi*, as well as the actions of federal authorities in

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arrests/. *Cf. also* Ryan Lucas, *Review of Federal Charges in Portland Unrest Shows Most Are Misdemeanors*, NPR.ORG (Sept. 5, 2020, 7:00 AM), https://www.npr.org/2020/09/05/909245646/review-of-federal-charges-in-portland-unrest-show-most-are-misdemeanors.

[200] 527 U.S. 41 (1999).

[201] *Id.* at 51.

[202] *Id.* at 65 (O'Connor, J., concurring in part and concurring in the judgment) (quoting CHIC. MUN. CODE § 8-4-015 (1992)).

[203] *Id.*

[204] *Id.* at 60, 64 (quoting Kolender v. Lawson, 461 U.S. 352, 360 (1983)).

[205] *Id.* at 58, 60.

[206] *Id.* at 53 (quoting Williams v. Fears, 179 U.S. 270, 274 (1900)).

[207] *Id.* at 58.

Portland during the Summer of 2020. Whether by arbitrarily enforcing laws so vague that individuals cannot understand in advance what conduct is prohibited, as in *Morales*, or detaining individuals indefinitely without any evidentiary or judicial proceedings, as in *Hamdi*, or arresting Americans for petty misdemeanors outside the scope of the President's Executive Order,[208] as in Portland in 2020, the government violates Americans' due process rights and abdicates the rule of law.

The fear that the government might harm innocent individuals, and that due process is necessary to safeguard the American people, is in the very DNA of the United States. William Blackstone, the foremost authority on the common law at the time of the ratification of the United States Constitution, wrote that it was "better that ten guilty persons escape, than that one innocent suffer."[209] America's Benjamin Franklin went further, suggesting it better that "a hundred guilty persons should escape than one innocent person should suffer."[210]

C. *The Fourth Amendment, Warrants, and the Use of Force against Civilians*

The deployment of federal troops in Portland also implicates rights guaranteed to the people under the Fourth Amendment to the Constitution. One of those rights is the protection against warrantless arrests.[211] After reports surfaced that federal officers were using "unmarked vehicles to drive around Portland, detain protesters, and place them into the officers' unmarked

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[208] *Compare* Lucas, *supra* note 199 (noting that the vast majority of citations issued by federal authorities in Portland were for "what could be considered minor offenses," mostly citations and misdemeanors), *with* Exec. Order No. 13933, 85 Fed. Reg. 40081, 40082–83 (ordering the Attorney General to "take all appropriate enforcement action" against individuals who violate federal laws including 18 U.S.C. §§ 247, 1369, 1952, 2101, 2339A, all of which are felonies).

[209] Alexander Volokh, *Aside:* n *Guilty Men*, 146 U. PENN. L. REV. 173, 174 (1997) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *352).

[210] *Id.* (quoting Letter from Benjamin Franklin to Benjamin Vaughn (Mar. 14, 1785), *in* 11 THE WORKS OF BENJAMIN FRANKLIN 11, 13 (John Bigelow ed., fed. ed. 1904)).

[211] *See* U.S. CONST. amend. XIV. Federal statutory law also makes clear that "no citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." 18 U.S.C. § 4001(a).

vehicles, removing them from public without either [formally] arresting them or stating the basis for an arrest," Oregon Attorney General Ellen Rosenblum filed a complaint against the Department of Homeland Security and other federal agencies, alleging unlawful detainment of demonstrators without probable cause.[212] Rosenblum sought a restraining order to prevent agents employed by several Executive agencies from making any further warrantless arrests.[213]

The federal courts have denounced warrantless arrests and other unreasonable searches and seizures in countless cases.[214] Significantly for the situation in Portland, the Supreme Court has also held that the use of deadly force can constitute a seizure, such that unreasonable use of deadly force by law enforcement can violate the Fourth Amendment.[215] In *Tennessee v. Garner*,[216] for example, the Court held that law enforcement's use of deadly force against an unarmed burglar violated the Fourth Amendment, regardless of whether police had probable cause to believe that the individual was engaged in criminal activity.[217] The Court was "not convinced that the use of deadly force is a sufficiently productive means of accomplishing [the police's goal of encouraging peaceful submission by suspects] to justify the killing of nonviolent suspects."[218] Unfortunately, stories of Portland protesters like Nat West and his 16-year-old daughter prove that neither innocence nor nonviolence was a factor for the federal troops who arrived in American cities following President Trump's Executive Order.[219] Both West and his daughter

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[212] Lauren Egan, *Oregon Attorney General Sues DHS Amid Reports of Unlawful Detainment of Portland Protesters*, NBC NEWS (July 18, 2020, 4:26 PM), https://www.nbcnews.com/politics/politics-news/oregon-attorney-general-sues-dhs-amid-reports-unlawful-detainment-portland-n1234297.

[213] *Id.*

[214] *See generally* 68 AM. JUR. 2D *Searches and Seizures* §§ 1, 12, Westlaw (database updated Feb. 2021).

[215] Tennessee v. Garner, 471 U.S. 1, 7 (1985).

[216] *Id.*

[217] *Id.* at 9–10.

[218] *Id.* at 10.

[219] *See* Jemima McEvoy, *Moms, Children Among Portland Protestors Sustaining Gruesome Injuries*, FORBES (July 29, 2020, 4:29 PM),

were peacefully protesting when federal troops engaged the crowd with tear gas, "less-than-lethal munition," and flash bangs.[220] West's daughter "partially lost hearing after a device exploded next to [her] left ear;" preliminary tests showed her hearing loss was "moderate to severe" and effected ninety percent of her hearing in her left ear.[221]

Courts have been particularly hesitant about excessive use of force that amounts to an unreasonable seizure by military personnel engaged in domestic law-enforcement activities.[222] In *Bissonette v. Haig*,[223] the Eighth Circuit considered a case brought by residents of Pine Ridge Indian Reservation against federal officials and military personnel, in which the plaintiffs sought damages for the military's use of force to seize and confine them within an "armed perimeter."[224] Plaintiffs contended that agents of the federal government violated the Fourth Amendment by deploying federal military forces without lawful authority.[225] The court agreed that the plaintiffs had stated a valid cause of action because federal military forces "directly restrained [the] plaintiffs' freedom of movement," apparently exceeding any statutory grant of authority by Congress.[226]

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https://www.forbes.com/sites/jemimamcevoy/2020/07/29/moms-children-among-portland-protesters-sustaining-gruesome-injuries.

[220] *Id.*

[221] *Id.*

[222] *See* Bissonette v. Haig, 776 F.2d 1384, 1389 (8th Cir. 1985).

[223] *Id.*

[224] *Id.* at 1385. In a particularly twisted turn of history, these events took place in the village of Wounded Knee, South Dakota, *id.*, the same approximate location of the Wounded Knee Massacre nearly eighty years before, where a brutal exchange between the United States Army and a group of Lakota people resulted in more than 250 deaths and at least 51 serious injuries in December 1890. *See* John E. Carter, *Wounded Knee Massacre*, ENCYCLOPEDIA OF THE GREAT PLAINS (David J. Wishart ed.), http://plainshumanities.unl.edu/encyclopedia/doc/egp.war.056.

[225] *Bissonette*, 776 F.2d at 1385.

[226] *Id.* at 1391. In particular, the Court held that the plaintiffs had stated a cause of action under the Fourth Amendment because, as use of military forces in violation of the Posse Comitatus Act, 18 U.S.C. § 1385, the use of force was necessarily unreasonable. *Bissonette*, 776 F.2d 1392.

Bissonette is an important acknowledgment of the "special threats to constitutional government inherent in military enforcement of civilian law."[227] The Eighth Circuit clearly laid out country's "long tradition" of limiting military involvement in civilian affairs "beginning with the Declaration of Independence and continued in the Constitution."[228] Delegates to the Constitutional Convention, for instance, had recognized that "when a government wishes to deprive its citizens of freedom, and reduce them to slavery, it generally makes use of a standing army."[229] The Eight Circuit accordingly held that "if the use of military personnel is both unauthorized by statute, and contrary to a specific criminal prohibition, and if citizens are seized or searched by military means in such a case . . . such searches and seizures are constitutionally 'unreasonable.'"[230] There are "limits established by Congress on the use of the military for civilian law enforcement," and those limits cannot be flippantly disregarded consistent with the Fourth Amendment.[231] These observations are especially relevant in the context Portland's protests, where unbridled violence by federal agents was pervasive.

Despite this recognition of the particular danger of military policing of civilians, the federal courts have repeatedly upheld state-sponsored violence. Recently, in *Hernandez v. Mesa*,[232] the Supreme Court declined to recognize a federal cause of action for Mexican parents whose child was fatally shot by a United States Border Patrol Agent.[233] The case involved two Mexican children who were "playing a game, running across the [U.S.-Mexico border], touching the fence on the U.S. side, and then running back across the border" to Mexico.[234] A Border Patrol Agent detained one of the kids and

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[227] *Id.* at 1387.

[228] *Id.* at 1387, 1388.

[229] *Id.* at 1387 (quoting 3 M. FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787, at 209 (1911)).

[230] *Id.* at 1389.

[231] *Id.*

[232] 140 S. Ct. 735 (2020).

[233] *Id.* at 740, 749.

[234] *Id.* at 740.

fired two shots at the second boy's back as he ran away.[235] One of the bullets struck and killed him on the Mexican side of the border.[236] The Court held that no existing constitutional remedy applied to the case, and declined to "fashion" one to address the situation.[237] Even more disturbingly, the majority wrote that it "presume[d] that Border Patrol policy and training incorporate both the Executive's understanding of the Fourth Amendment's prohibition of unreasonable seizures and the Executive's assessment of circumstances at the border."[238] Because the Executive had thus decided the Border Patrol Agent's behavior was "reasonable conduct . . . under the circumstances," the Court not only abdicated its duty to determine when actions by federal officials violate the Constitution, it affirmatively suggested that "respect for the separation of powers" counseled against its weighing in at all.[239]

These judicial decisions demonstrate that while courts have in theory recognized that military policing of civilian matters is a grave threat to civil liberties, some lives are valued over others. While the use of excessive force and violence to control nonviolent citizens is unreasonable,[240] and the use of the military for civilian law enforcement poses special problems for Americans' civil liberties,[241] a federal agent's use of deadly force against an unarmed Mexican child remains unassailable in the highest court of the United States.[242] That blatant inequality which plagues the justice system is the foundation of movements like Black Lives Matter and the widespread Portland protests of 2020, which seek to call attention to the ways in which the government, including both courts and law enforcement, consistently and apply constitutional protections unequally based on the biases of people in

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[235] *Id.*

[236] *Id.*

[237] *Id.* at 749.

[238] *Id.* at 744.

[239] *Id.* at 744, 749.

[240] *See supra* notes 215–18 and accompanying text (discussing Tennessee v. Garner, 471 U.S. 1 (1985)).

[241] *See supra* notes 222–31 and accompanying text (discussing Bissonette v. Haig, 776 F.2d 1384 (8th Cir. 1985)).

[242] *See supra* notes 232–39 and accompanying text (discussing *Hernandez*, 140 S. Ct. at 735).

positions of power and privilege. The inequality should be self-evident. The United States' failure to recognize it is the reason that protesters use their voices to fight for equality in the form of protests and demonstrations. As the next section demonstrates, however, freedom of speech is no longer free for those who wish to speak against the state.

D. *Deterioration of the First Amendment*

Ultimately, regardless of President Trump's reasoning for sending troops to Portland, their presence effectively quashed protesters' First Amendment rights to speak, peacefully organize, and demonstrate in the name of political change. In addition to threats to individuals' Fourth and Fifth Amendment rights, protestors and journalists in Portland were subject to federal government actions that limited their exercising of protected free speech.

The Free Speech Clause of the First Amendment[243] exists "principally to protect discourse on public matters."[244] It reflects "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[245] It is "[p]remised on mistrust of governmental power," including against governmental attempts to "disfavor certain subjects or viewpoints."[246] It is also "essential to our democratic form of government" and "furthers the search for truth."[247] By protecting the "free discussion of governmental affairs," the First Amendment "ensure[s] that . . . individual citizen[s] can effectively participate in and contribute to our republican system of self-government."[248]

Despite these platitudes from the Supreme Court, federal agents acting under the Executive's control engaged in violent and suppressive tactics that threatened Americans' First Amendment rights throughout the protests of

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[243] U.S. CONST. amend. I.

[244] Brown v. Ent. Merch. Ass'n, 564 U.S. 786, 790 (2011).

[245] N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

[246] Citizens United v. FEC, 558 U.S. 310, 340 (2010).

[247] Janus v. Am. Fed'n State, Cnty., & Mun. Emps., 138 S. Ct. 2448, 2464 (2018).

[248] Globe Newspaper Co. v. Super. Ct., 457 U.S. 596, 604 (1982).

2020. Many violent acts targeted journalists, including those who wore press badges to distinguish themselves within crowds as observers committed to reporting the news as it unfolded.[249] Others were arrested, apparently without probable cause.[250] Some journalists sought judicial intervention, securing a temporary restraining order from a federal court in Oregon that blocked federal agents from using physical force or detaining clearly marked journalists in Portland.[251] The order was based in part on video documenting federal officers shooting and macing reporters and legal observers.[252]

Protestors were also targeted. After resisting demonstrations of violence that enflamed rather than calmed the demonstrations in Portland's streets,[253] many who were arrested were faced with a choice between continued detainment or abandoning their First Amendment right to protest.[254] After several protestors were charged with committing relatively minor federal offenses for "failure to obey a lawful order" or "disorderly conduct," they were released only when a federal Magistrate Judge added, as a condition of

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[249] *See* Zoe Tillman, *Videos Appear to Show Federal Officers Shooting and Macing Reporters and Legal Observers, Despite a Judge's Order*, BUZZFEED NEWS (July 28, 2020, 4:31 PM), https://www.buzzfeednews.com/article/zoetillman/federal-officers-shoot-mace-reporters-portland-lawsuit. *See also* Ed Pilkington, *US homeland security surveilling journalists covering Portland protests*, GUARDIAN (July 31, 2020, 10:53 AM), https://www.theguardian.com/us-news/2020/jul/31/dhs-intelligence-reports-journalists-portland-protests.

[250] *See, e.g.*, *Black CNN Reporter Arrested On Air at Protests Over George Floyd Killing*, GUARDIAN (May 29, 2020, 10:34 AM), https://www.theguardian.com/us-news/2020/may/29/black-cnn-reporter-arrested-on-air-minneapolis-protests-george-floyd-killing.

[251] Temporary Restraining Order Enjoining Federal Defendants, Index Newspapers LLC v. City of Portland, No. 3:20-cv-1035-SI (D. Or. July 23, 2020). *See also* Tillman, *supra* note 249.

[252] *Tillman*, *supra* note 249.

[253] *See* Kavanaugh, *supra* note 16 (describing how, just when "raucous demonstrations had nearly wound down in Portland . . . President Donald Trump sent in federal forces. The protests against police violence and systemic racism quickly grew bigger and louder.").

[254] Dara Lind, *"Defendant Shall Not Attend Protests": In Portland, Getting Out of Jail Requires Relinquishing Constitutional Rights*, PROPUBLICA (July 28, 2020, 4:13 PM), https://www.propublica.org/article/defendant-shall-not-attend-protests-in-portland-getting-out-of-jail-requires- relinquishing-constitutional-rights.

release, terms under which protestors forfeited their constitutional rights.[255] The conditional release orders have included indefinite permeations of First Amendment limitations. One release order mandated that the defendant "not attend any other protests, rallies, assemblies or public gathering in the state of Oregon."[256] Another release order contained a similar term, handwritten by United States Magistrate Judge V. Acosta on a pre-typed document, which prohibited a protestor from attending protests, assemblies, demonstrations, or public gatherings in the state of Oregon.[257] Ramya Krishnan, an attorney at Columbia University's Knight First Amendment Institute, had no difficulty concluded that the conditions were likely unconstitutional infringements of the protestors' constitutional right to free assembly, because the "blanket ban on attending future protests" seriously infringed the individuals' rights without being "reasonably related to any legitimate goal of pretrial release."[258] This is a sad state for Americans' most cherished civil rights, as the Supreme Court has historically given great deference to the protections of the First Amendment.

CONCLUSION

President Trump's decision to unilaterally deploy federal troops to police the political protests in Portland raises several constitutional issues of monumental import. His use of Executive power demonstrated an unchecked, expansive view of Article II that threatens principles of both federalism and the separation of powers. Additionally, by openly considering invoking the Insurrection Act, President Trump once again drew attention to a too powerful tool in the Executive's toolkit—one that has been expanded over the course of American History and increasingly seems to have no meaningful limits. While amendments to the Insurrection Act were brought to the floor of the House of Representatives, Congress failed to meet the urgency of the moment, and has left the President's powers almost

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[255] Rachel Treisman, *For Some Arrested at Portland Protests, Release is Conditioned on Not Attending More*, KPBS.ORG (July 29, 2020), https://www.kpbs.org/news/2020/jul/29/for-some-arrested-at-portland-protests-release-is/.

[256] Lind, *supra* note 254.

[257] *Id.*

[258] Treisman, *supra* note 255.

completely unchecked. That leaves only the courts to protect Americans' civil rights and liberties. Yet the courts, too, have a checkered record of reining in the Executive, particularly when the individuals affected are minorities—including people like George Floyd whose untimely death spurred the protests of Summer 2020, as well as President Trump's belligerent response. The Executive's power to deploy the militia, armed forces, and other federal agents to act as police in American neighborhoods cannot remain an unlimited power. If such unilateral actions remain unchecked, the civil rights guaranteed to Americans by the U.S. Constitution lie in jeopardy.

Political ambivalence, evidenced by less than half of the eligible voting population casting a vote in the 2016 general election, is also part of the problem. Despite the change in leadership caused by the 2020 election of Joe Biden to the Presidency, issues plaguing the nation cannot be solved merely by voting into power a different political party. Instead, "We the People" must decide if giving the federal government unfettered power to deploy military troops on American soil to put down protests is consistent with our American identity and values. Recall that at the conclusion of the Constitutional Convention in 1787, a group of citizens asked Benjamin Franklin what type of government the Founders had proposed; his response was "a republic, *if you can keep it*."[259] Franklin's statement made clear that it is the people's duty—our duty—to uphold our system of government, not just our representatives'. Chief Justice Roberts echoed this sentiment not long before the first impeachment of President Trump, writing that "each generation . . . has an obligation to pass on to the next, not only a fully functioning government responsive to the needs of the people, but the tools to understand and improve it."[260]

President Trump's use of military force to respond to the protests in Portland made clear that all of our unalienable rights can still be encroached

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[259] Richard R. Beeman, *Perspectives on the Constitution: A Republic, If You Can Keep It*, NAT'L CONSTITUTION CTR., https://constitutioncenter.org/learn/educational-resources/historical-documents/perspectives-on-the-constitution-a-republic-if-you-can-keep-it (emphasis added).

[260] Adam J. White, *A Republic, If We Can Keep It*, THE ATLANTIC (Feb. 4, 2020), https://www.theatlantic.com/ideas/archive/2020/02/a-republic-if-we-can-keep-it/605887/

upon. Our ambivalence could mean the extinction of our democracy. To prevent the Constitution becoming an evanescent memory we must actively preserve the values we hold dear and heal the lacerations of division across this nation in tears.