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# MOVEMENT LAWYERS: HENRY L. MARSH'S LONG STRUGGLE FOR EDUCATIONAL JUSTICE

*Danielle Wingfield-Smith* \*

## INTRODUCTION

Born in 1933 in Richmond, Virginia, Henry Marsh was a protégé of legendary Virginia civil rights attorney Oliver Hill, who was a member of a civil rights legal team with Spotswood Robinson and commissioned by Charles Hamilton Houston to investigate school inequalities and prepare a legal strategy for dismantling segregationist laws.<sup>1</sup> Growing up in Virginia during the 1930s, 40s, and 50s, Marsh was reared in the apartheid culture of Jim Crow society.<sup>2</sup> Later, under Oliver Hill and Samuel W. Tucker's mentorship, Marsh studied Virginia's legal and educational systems and learned how to navigate Virginia's seemingly tranquil Jim Crow politics called "the Virginia Way."<sup>3</sup> Marsh is an ideal figure for

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1. HENRY L. MARSH, III, MEMOIRS OF HON. HENRY L. MARSH, III: CIVIL RIGHTS CHAMPION, PUBLIC SERVANT, LAWYER 5, 19 (Jonathan Stubbs & Danielle Wingfield-Smith eds., 2018); see also MARGARET EDDS, WE FACE THE DAWN: OLIVER HILL, SPOTTSWOOD ROBINSON, AND THE LEGAL TEAM THAT DISMANTLED JIM CROW (2018) (arguing that no one contributed more to the school desegregation efforts in Virginia than Oliver Hill and Spotswood Robinson).

2. See Gabriel J. Chin, Roger Hartley, Kevin Bates, Rona Nichols, Ira Schiflett & Salmon Shomade, *Still on the Books: Jim Crow and Segregation Laws Fifty Years After Brown v. Board of Education*, 2006 MICH. ST. L. REV. 457, 457 (2006) ("Also, following *Brown* in 1954, legislatures in some former Confederate states responded with a flood of legislation designed to delay or prevent implementation of the integration of public schools.").

3. See JILL OGLINE TITUS, *BROWN'S BATTLEGROUND: STUDENTS, SEGREGATIONISTS, AND THE STRUGGLE FOR JUSTICE IN PRINCE EDWARD COUNTY, VIRGINIA* 11 (2011). "The Virginia Way" is a phrase coined by a noted historian and segregationist, Douglas Southall

offering insight into how a movement lawyer and politician navigated the Virginia Way because his career intersected law, politics, and Black leadership in Virginia from the 1950s into the early years of the twenty-first century.

Marsh navigated systems of educational injustice and the laws that influenced those systems in Virginia. Therefore, it is worth noting that Virginia was a significant battleground in the fight for educational equality in the United States.<sup>4</sup> Several factors make Virginia's education and civil rights history essential to understanding movement lawyering during the national Civil Rights Movement ("CRM").<sup>5</sup> Not only was it one of the battlegrounds for

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Freeman, that breaks down the powerful meaning that lies behind the commonly used description of Virginia White politics. *Id.* Resistance ingrained into the fabric of Richmond's politics by those like Governor Stanley and Harry Byrd was the Virginia Way. *Id.* at 17–19. The Virginia Way is marked by the persuasive tactics that White elites and leaders at the helm of it who "allowed Blacks a semblance of autonomy so long as they remained within the lines circumscribed by their white neighbors." *Id.* at 11, 17–19.

4. See *id.* at 15; see also BRIAN DAUGHERITY, KEEP ON KEEPING ON: THE NAACP AND THE IMPLEMENTATION OF *BROWN V. BOARD OF EDUCATION* IN VIRGINIA (Deborah E. McDowell ed., 2016); Robert A. Pratt, *New Directions in Virginia's Civil Rights History*, 104 VA. MAG. HIST. & BIOGRAPHY 149, 149, 154 (1996); Brian J. Daugherity & Charles C. Bolton, *Introduction*, in WITH ALL DELIBERATE SPEED: IMPLEMENTING *BROWN V. BOARD OF EDUCATION* xiii (Brian J. Daugherity & Charles C. Bolton eds., 2008).

5. Virginia's historic role in the CRM is essential because it is where the monumental case *Brown v. Board of Education* began in April 1951 after a group of students led a strike under Barbara John's leadership, protesting all-Black Moton High School's unacceptable school conditions. See JAMES T. PATTERSON, *BROWN V. BOARD OF EDUCATION: A CIVIL RIGHTS MILESTONE AND ITS TROUBLED HISTORY* 27–28 (2001). One of the five cases heard by the Supreme Court that together is comprised *Brown v. Board of Education* (1954) included plaintiffs from Prince Edward County in Virginia. See *Brown v. Bd. of Educ.* (Brown I), 347 U.S. 483 (1954); *Davis v. Cnty. Sch. Bd.*, 103 F. Supp. 337 (E.D. Va. 1952). Barbara Johns and other students at the all-Black Moton High School sparked the school desegregation efforts in Virginia. *Black Students on Strike! Farmville, Virginia, Separate is not Equal: Brown v. Board of Education*, SMITHSONIAN NAT'L MUSEUM OF AM. HIST., <https://americanhistory.si.edu/brown/history/4-five/farmville-virginia-1.html> [<https://perma.cc/3WX5-ZC U8>]. Moton High was in Prince Edward County. *Id.* The student protests led to *Davis v. County School Board of Prince Edward County*, which legally challenged school desegregation. 103 F. Supp. 337. On May 23, 1951, attorneys Oliver Hill and Spottswood Robinson sued Prince Edward County for the abolition of segregation on behalf of the parents of Prince Edward students in the suit *Davis v. County School Board of Prince Edward*. See *Va. Case Was One of 5 Originals*, N.Y. AMSTERDAM NEWS, Sept. 8, 1962, at 27; Louis Lautier, *Capital Spotlight: Five Blunders in a Year Too Many*, AFRO-AM., Aug. 30, 1958, at 4; Louis Lautier, *Are Virginia Pupils Going in Circles?*, AFRO-AM., Sept. 28, 1957, at 20. There would eventually be three additional state cases grouped with the *Davis* case that would all comprise the landmark *Brown v. Board of Education* case; in addition, there was a federal case arising in the District of Columbia, *Bolling v. Sharpe*. See *Brown I*, 347 U.S. 483. On May 17, 1954, the Supreme Court handed down a unanimous ruling that racial segregation in public education was unconstitutional. *Id.* Although the ruling was groundbreaking, the Supreme Court failed to delineate any details for districts related to the requisite speed and manner of desegregating their schools. *Id.* The Court's ruling in *Brown II* on May 31, 1955, attempted to set these parameters. *Brown v. Bd. of Educ.* (Brown II), 349 U.S. 294 (1955). The Court once again offered a vague qualifier, stating that desegregation was to occur "with all

*Brown v. Board of Education*, but in its aftermath, civil rights plaintiffs in Virginia filed more lawsuits than in any other state with many cases leading to landmark decisions.<sup>6</sup> Ten years before *Brown*, a Virginian woman named Irene Morgan filed the first lawsuit to desegregate bus transportation systems.<sup>7</sup> Irene Morgan was a native of Gloucester, Virginia.<sup>8</sup> Morgan was on her way to Baltimore, Maryland, on a Greyhound bus in 1944 when she was asked to give up her seat to a White person.<sup>9</sup> Morgan refused to do so because she was feeling poorly having just had a miscarriage.<sup>10</sup> She was arrested after a confrontation with the sheriff and convicted for resisting arrest.<sup>11</sup> In *Morgan v. Virginia*, decided in 1946, the Supreme Court of the United States struck down the Virginia law that required segregation on commercial interstate buses.<sup>12</sup> Also ten years before *Brown*, the 1944 Supreme Court case *Tunstall v. Brotherhood of Locomotive Firemen and Enginemen* originated out of Virginia.<sup>13</sup> It was a companion case to the *Steele v. Louisville & Nashville Railroad Co.* case also decided in 1944.<sup>14</sup> The *Tunstall* case involved collective bargaining rights and colluded against Black workers rendering them ineligible for membership of the union or “brotherhood.”<sup>15</sup> The Court reaffirmed its opinion in *Steele*, which held that the railway had a “duty to exercise fairly the power conferred upon it in [sic] behalf of all those for whom it acts, without hostile discrimination against them.”<sup>16</sup> These are just two examples of cases coming out of Virginia that laid the groundwork

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deliberate speed.” *Id.*; see also James Hershman, *The Origins of Massive Resistance*, ENCYC. VA., <https://encyclopediavirginia.org/entries/massive-resistance> [https://perma.cc/Y 8PB-RV8Q]. The Court essentially permitted locales to move at their own pace, therefore freeing Virginia’s segregationist leaders and school districts to engage in a movement to thwart the mandate that *Brown* had enunciated, and that was equal educational opportunity. To achieve that objective the segregationists engaged in activities commonly referred to as “Massive Resistance.”

6. *Jim Crow to Civil Rights in Virginia*, VA. MUSEUM HIST. & CULTURE, <https://virginiahistory.org/learn/jim-crow-civil-rights-virginia> [https://perma.cc/S432-VBAW].

7. Lea Setegn, *Irene Morgan*, RICH. TIMES-DISPATCH, [https://richmond.com/irene-morgan/article\\_d7873b66-e5ae-5f42-a399-38aa5548c8f0.html](https://richmond.com/irene-morgan/article_d7873b66-e5ae-5f42-a399-38aa5548c8f0.html) [https://perma.cc/NAA8-VS QP] (Sept. 19, 2019).

8. *Id.*

9. *Id.*

10. *Maryland Women’s Hall of Fame: Irene Morgan Kirkaldy*, MD. COMM’N FOR WOMEN (2010), <https://msa.maryland.gov/msa/educ/exhibits/womenshall/html/kirkaldy.html> [https://perma.cc/BTU8-XHZP].

11. Setegen, *supra* note 7.

12. 328 U.S. 373, 386 (1946).

13. 323 U.S. 210 (1944).

14. 323 U.S. 192 (1944).

15. *Tunstall*, 323 U.S. at 211–12.

16. *Steele*, 323 U.S. at 203.

for *Brown*. In the *Tunstall* case, Oliver Hill was on the brief with Charles Hamilton Houston.<sup>17</sup> Some of the best legal minds in the Movement came to combat Virginia's subtle yet impactful discriminatory system. This work created Virginia's social milieu of the time and subsequently created space for Marsh's work amidst massive resistance just over a decade later.

Even with Virginia's critical importance to the national CRM, there remains a paucity of legal scholarship on humanist social histories of Virginia civil rights lawyers' everyday lives.<sup>18</sup> The scholarship on civil rights, education, and Massive Resistance in Virginia has focused on state-level political developments and judicial rulings, and several well-known legal figures.<sup>19</sup> As such, historians have studied Virginia's legal approach to desegregation and several key leaders, but few have examined the social history of Black Virginia lawyers' everyday lives and their strategies to fight Massive Resistance.<sup>20</sup>

The lack of success of recent litigation efforts and the resegregation of many public schools have led to increased questioning of *Brown*'s practical impact. As it relates to desegregation, the *Brown* decision was the center of many legal scholars' focus.<sup>21</sup> Those in favor of a court-centric approach to social change considered *Brown* to be "the most important political, social, and legal event in America's twentieth-century history."<sup>22</sup> However, in the years since *Brown*, scholars, advocates, and members of the general public alike often consider what real effect judicial rulings and review has

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17. See ERIC ARNESEN, BROTHERHOODS OF COLOR: BLACK RAILROAD WORKERS AND THE STRUGGLE FOR EQUALITY 206 (2002).

18. See Kenneth Walter Mack, *A Social History of Everyday Practice: Sadie T.M. Alexander and the Incorporation of Black Women into the American Legal Profession, 1925–1960*, 87 CORNELL L. REV. 1405, 1405 (2002) (contending that "finely-detailed analysis of quotidian law practice reveals the methodological limitations of the reigning interpretations of the history of the American bar . . .").

19. See generally Mark Golub, *Remembering Massive Resistance to School Desegregation*, 31 L. & HIST. REV. 491 (2013); Carl Tobias, *Public School Desegregation in Virginia During the Post-Brown Decade*, 37 WM. & MARY L. REV. 1261, 1266 (1996).

20. See generally MATTHEW D. LASSITER & ANDREW B. LEWIS, THE MODERATES' DILEMMA: MASSIVE RESISTANCE TO SCHOOL DESEGREGATION IN VIRGINIA (1998); see also DAUGHERITY, *supra* note 4.

21. See TOMIKO BROWN-NAGIN, COURAGE TO DISSENT: ATLANTA AND THE LONG HISTORY OF THE CIVIL RIGHTS MOVEMENT 307–441 (2011) for a discussion of types of reform efforts that emerged after decades of advocacy emanating from the CRM's strategy to pursue federal and state lawsuits to achieve desegregation and equitable funding.

22. J. HARVIE WILKINSON III, FROM *BROWN* TO *BAKKE*: THE SUPREME COURT AND SCHOOL INTEGRATION: 1954–1978 (1979).

on social issues.<sup>23</sup> Given this consideration, this Article explores Marsh's life's work and ultimately posits that using a combination of litigation, legislation, and on-the-ground activism is required to ensure educational justice.

Scholars have explored several theoretical and practical approaches to this phenomenon.<sup>24</sup> A more conventional analysis involves evaluating prominent education and related cases like *Plessy v. Ferguson*,<sup>25</sup> *Gong Lum v. Rice*,<sup>26</sup> *Brown v. Board of Education*,<sup>27</sup> *Bolling v. Sharpe*,<sup>28</sup> and *Milliken v. Bradley*.<sup>29</sup> Often, the discussion of school desegregation cases encompasses scrutiny of

23. See Erwin Chemerinsky, *Losing Faith: America Without Judicial Review?*, 98 MICH. L. REV. 1416, 1416 (2000) (“[I]t has become increasingly trendy to question whether the Supreme Court and constitutional judicial review really can make a difference.”); see also David Rhinesmith, *District Court Opinions as Evidence of Influence: Green v. School Board and the Supreme Court’s Role in Local School Desegregation*, 96 VA. L. REV. 1137, 1138 (2010); Stephen C. Yeazell, *Brown, the Civil Rights Movement, and the Silent Litigation Revolution*, 57 VAND. L. REV. 1975, 1976 (2004) (“First, *Brown* and the civil rights litigation movement helped create a renewed belief, not just in the law, but more specifically in litigation as a noble calling and as an avenue for social change. That belief lies open to challenge, and it can leave students and lawyers frustrated at the distance between the aspirations that brought them to law school and the world of practice as they perceive it. But whether or not it is well-founded, this belief, with roots traceable to *Brown* and civil rights litigation, has endured for several generations. Thus, *Brown* reshaped the aspirations of lawyers in ways that are still important.”); Jack Greenberg, *Evolving Strategies in Civil Rights*, 25 SUFFOLK U. L. REV. 117, 118 (1991) (arguing that from *Plessy* onward, “the courts were not available as forums in which to achieve the right to equality; and Congress was not available at all.”).

24. See Kimberly Jenkins Robinson, *The Case for a Collaborative Enforcement Model for a Federal Right to Education*, 40 U.C. DAVIS L. REV. 1653, 1659–60 (2007) (arguing that “Congress should recognize a federal right to education through spending legislation that the federal and state governments collaboratively enforce”); see also Tomiko Brown-Nagin, “Broad Ownership” of the Public Schools: An Analysis of the “T-Formation” Process Model for Achieving Educational Adequacy and Its Implications for Contemporary School Reform Efforts, 27 J.L. & EDUC. 343 (1998). Scholars now posit that nonadjudicative approaches rather than impact litigation are more likely to produce real systemic change when it comes to public school reform efforts. See *id.* These nonadjudicative approaches can include both legislation and litigation. See Tomiko Brown-Nagin, *Just Schools: A Holistic Approach to the Education of Impoverished Students*, 49 U. MEM. L. REV. 185, 198 (2018). Brown-Nagin suggests “[a] [h]olistic [a]pproach to the [e]ducation of [c]hildren in [p]overty” includes using legislation and litigation to effectuate school-culture based reforms like trauma informed interventions. *Id.* at 194, 199, 201.

25. 163 U.S. 537 (1896), overruled by *Brown v. Bd. of Educ.* (Brown I), 347 U.S. 483 (1954).

26. 275 U.S. 78 (1927) (upholding racial segregation in education with no dissenting opinions based on the *Plessy* doctrine).

27. 347 U.S. 483 (1954), supplemented, *Brown v. Bd. of Ed.*, 349 U.S. 294 (1955) (consolidating four school segregation cases: *Brown v. Board of Education*, *Briggs v. Elliott*, *Davis v. County School Board*, and *Gebhart v. Belton*).

28. 347 U.S. 497, 500 (1954) (holding that the Constitution prohibits segregated public schools in the District of Columbia).

29. 418 U.S. 717 (1974).

judicial decision-making.<sup>30</sup> Attention to this issue also frequently embraces an evaluation of education equity advocacy groups' goals and legal strategy.<sup>31</sup> For instance, scholarship has often explored renowned National Association for the Advancement of Colored People ("NAACP") and civil rights lawyers like Charles Hamilton Houston and Thurgood Marshall.<sup>32</sup> However, traditional legal histories rarely explore these public figures' daily lives and personal approaches to law and society.<sup>33</sup>

Missing from the historical record is an entire cadre of lesser-known movement lawyers who have had a significant and underappreciated impact upon educational equity in the United States. Their insights, experiences, strategies, and accomplishments merit exploration, particularly because there are substantial limitations on a litigation-based approach, especially considering increasingly unreceptive courts staffed by judges who are hostile to interpreting the law to promote equal educational opportunity.<sup>34</sup> Because of this, a new broader approach to redressing education inequity is necessary.

In short, to unearth possible novel insights and strategies, historical archives and oral histories<sup>35</sup> are useful supplements to legal theories emerging through case analysis.<sup>36</sup> The voices of lawyers, politicians, organizers, and other leaders in these movements

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30. See Wendy Parker, *The Decline of Judicial Decisionmaking: School Desegregation and District Court Judges*, 81 N.C. L. REV. 1623, 1626 (2003).

31. See, e.g., *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 808 (2007) (Breyer, J., dissenting) (explaining the NAACP's race-based transfer policy).

32. See J. Clay Smith, Jr., *Thurgood Marshall: An Heir of Charles Hamilton Houston*, 20 HASTINGS CONST. L.Q. 503 (1993); Genna Rae McNeil, *Charles Hamilton Houston: 1895-1950*, 32 HOW. L.J. 469 (1989); GENNA RAE MCNEIL, *GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS* 72-74 (1983); Stephen Higginson, *Thurgood Marshall: Cases in Controversy*, 15 GEO. MASON L. REV. 741 (2008).

33. See generally Mack, *supra* note 18.

34. *Id.*

35. I have access to over fifty interviews that I personally conducted with Henry Marsh. In addition, I coedited his memoirs and have access to his papers and other oral history interviews. This is a rare opportunity to be able to speak directly to and explore his life while he is alive and able to tell his story.

36. See Cynthia Nicoletti, *Writing the Social History of Legal Doctrine*, 64 BUFF. L. REV. 121, 122-23 (2016) (providing a useful synthesis of various ways legal historians use appellate legal doctrine, ultimately arguing that legal historians seeking to understand how previous generations reconciled law and doctrine might be called the study of social history of doctrine, which Nicoletti describes as an exploration of "the ways in which historical actors (both lawyers and non-lawyers) understood the constraints and possibilities of doctrine"). While I draw attention to Virginia's desegregation litigation, I do so as a way to show Marsh's work and also provide evidence of the possible limitations of litigation as a tool in and of itself.

reveals a deeper understanding of the sociopolitical climate that led to establishing laws, policies, and resulting resistance.

Henry Marsh worked on the CRM's frontlines as a civil rights attorney and later transitioned his efforts to politics and legislation. His work illuminates lessons that offer a framework to better evaluate the advantages and disadvantages of the various approaches to achieving equal educational opportunity.<sup>37</sup> Leaders like Marsh, who organized and led the CRM, were on the ground in communities registering voters and electing Black leaders to reinforce any progress in the courts.<sup>38</sup>

This Article's primary purpose is to document more of the lawyers' stories left out of the traditional scholarship on *Brown* and CRM litigation in Virginia. Scholarship dealing with the NAACP's and civil rights lawyers' school litigation campaign is not novel. However, what is less explored is what this looked like in these lawyers' everyday practice, the implications of their methodology, and why it matters today. Marsh's professional and personal life is a rich site for historical inquiry. This work offers a careful and nuanced analysis of Marsh's professional and personal activities. Marsh litigated cases to enforce federal laws and statutes mandating desegregation and thereby deter segregationists' efforts to circumvent them. He realized the limitations of this litigation-based approach. To expand the reach of his social justice efforts, Marsh transitioned into a political system that had historically disenfranchised Black political leadership.

Part I considers Marsh's early life and education, tracing how his educational journey and rearing in the Jim Crow South framed his future educational equity work. Part II discusses the history leading up to and through Virginia's Massive Resistance post-*Brown*. The Part further explores Massive Resistance in Virginia and details Henry Marsh's involvement in fighting against it as a civil rights attorney. Part III examines Marsh's tools in his long struggle for educational justice, which took the forms of litigation and legislation. In telling Marsh's story, the Article discusses more than forty school cases that Marsh litigated himself or as part of the legal team. These cases significantly impacted the speed of desegregation throughout the South and the rest of the nation. The

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37. See generally Ronald E. Carrington, *Henry L. Marsh III Elementary School*, RICH. FREE PRESS (Sept. 23, 2020, 6:00 PM), <https://richmondfreepress.com/news/2020/sep/03/henry-l-marsh-iii-elementary-school> [<https://perma.cc/JE9M-DJW3>].

38. See MARSH, *supra* note 1, at 50–52.



Part also offers Marsh's strategic shift from lawyer to state legislator in his fight for civil rights justice. Part IV and the conclusion offer the implications of Marsh's story. The Part concludes with a reflection of the takeaways of the story told in this Article and a synthesis of Marsh's overall strategy related to the broader Movement's goals. In addition, the author suggests how these strategies can frame the way advocates might address current education issues as well as other civil rights issues that remain at the core of emerging social movements.

## I. MARSH'S EARLY LIFE AND EDUCATION

### A. *Courting Educational Justice*

*"I went to a school that was set aside for African Americans, and that school was five miles from my home, and there was no bus transportation, so I walked to school every day, leaving at 6:00 o'clock in the morning and I got home around dark every evening from first grade to . . . when I left the county."*

—Henry L. Marsh, III<sup>39</sup>

While Marsh inherited an education litigation campaign from his NAACP predecessors in the 1960s, his familiarity with inequitable education began as a child attending school in the small hamlet of Rescue in Isle of Wight County, Virginia.<sup>40</sup> Marsh was a child of the Jim Crow South.<sup>41</sup> His life spans from the years the NAACP initiated its desegregation campaign through today's continued struggle for educational rights for the disenfranchised.<sup>42</sup> His educational journey through segregated schools, his career as a civil rights attorney in the South, his public service as the first Black mayor of the former capital of the Confederacy, and later his

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39. *See Voices of Freedom: Interview with Sen. Henry L. Marsh, III*, VCU LIBRS. DIGIT. COLLECTION (March 20, 2003), <https://digital.library.vcu.edu/islandora/object/vcu:6153> [https://perma.cc/68UW-TUZQ].

40. *The Honorable Henry L. Marsh, III Talks About his Role in the Desegregation of Public Schools in Isle of Wight County, Virginia*, <https://www.thehistorymakers.org/biography/honorable-henry-l-marsh-iii> [https://perma.cc/X9YB-Q8BU].

41. *See id.*

42. *History: We Are the Country's First and Foremost Civil and Human Rights Law Firm*, NAACP LEGAL DEF. & EDUC. FUND, <https://www.naacpldf.org/about-us/history> [https://perma.cc/6Q7G-K3X8].

position as a state senator all allow one to peer into the daily lives of the CRM's front line.<sup>43</sup>

In 1935, two years after Marsh was born, NAACP leaders met to determine the best strategy for overturning the *Plessy* doctrine and initiating a desegregation campaign.<sup>44</sup> From this meeting came two strategic moves: first, narrowing the NAACP's focus to the Southern region; and second, attacking structural racism upheld by the legal system.<sup>45</sup>

The very systematic racism that marginalized Black people was reflected in the inequitable educational system that marked Marsh's early life in Southeastern Virginia. He attended elementary school in Rescue, Virginia, during the Great Depression and World War II eras.<sup>46</sup> Many of his experiences shaped his thought about educational justice as a civil rights attorney and politician.<sup>47</sup> Marsh describes his early segregated schooling as separate and unequal as far as being under-resourced and unfair, but not related to receiving a lesser quality of instruction.<sup>48</sup> These early school

43. See Robert C. Scott, *Foreword*, in MARSH, *supra* note 1, at x–xi.

44. The NAACP's legal campaign against educational inequality began in 1930; however, 1935 marked the year that Charles Houston left his position as the Vice Dean of Howard Law School and joined the NAACP as special counsel and leader of the legal campaign. The meeting, in part, was to determine how to spend a \$10,000 grant known as the Garland Fund, which was originally a \$100,000 award given to the NAACP to study and determine a strategy for the legal status of Black people. See MCNEIL, *supra* note 32, at 71–72; Larissa M. Smith, *A Civil Rights Vanguard: Black Attorneys and the NAACP in Virginia*, in FROM THE GRASSROOTS TO THE SUPREME COURT: *BROWN V. BOARD OF EDUCATION* AND AMERICAN DEMOCRACY 130–31 (Peter F. Lau ed., 2004).

45. Patricia Sullivan, *Prelude to Brown: Education and the Struggle for Racial Justice during the NAACP's Formative Decades, 1909–1934*, in FROM THE GRASSROOTS TO THE SUPREME COURT: *BROWN V. BOARD OF EDUCATION* AND AMERICAN DEMOCRACY, *supra* note 44, at 166–68.

46. See Ariana Westbrook, *Henry L. Marsh III, (1933– )*, BLACK PAST (Apr. 13, 2009), <https://www.blackpast.org/african-american-history/marsh-henry-l-iii-1933> [https://perma.cc/BH4Z-5EJ9].

47. See *id.*

48. See MARSH, *supra* note 1, at 167–68 (discussing the inequities of separate schooling, explaining “[i]t dawned on me that there was something unfair about the way the educational system was set up”); *id.* at 21 (discussing how Ms. Jordan, who taught Marsh in a one-room, segregated schoolhouse with seventy-five students, did an “outstanding job” and “attempted to ensure that we got a sound, basic education about American life and history”); *id.* at 30–31 (“I found that African-American teachers seemed to intuitively know that their black students would have to be better prepared to succeed in life. Frequently, we would have to be twice as good to get half as far as our white counterparts. Accordingly, when they pushed us to work harder to succeed I sincerely believed . . . [t]hey simply wanted us to excel. One of the positive things that I learned about the segregated system was that we had many black educators in leadership positions who really cared about us. They worked hard to make sure we got the best education possible under the circumstances. While, of course, I support school desegregation, I still wonder whether some of the white teachers would have taken the same interest in me.”).

years were Marsh's first encounter with segregation, the very same segregation that NAACP attorneys Houston, Marshall, and others strategized how to defeat in the courts at the time.

Marsh ultimately determined that his segregated schooling was unequal and unfair based on several experiences. From first to fifth grade, he watched White children being bussed to school. In contrast, because there were no public-school buses to transport Black students, Marsh woke up as early as 6:00 a.m., walked three to five miles to school, and often did not return home until around dusk.<sup>49</sup> Marsh felt it was unjust for him to walk by the school closest to him because it was for White students only.

In fact, Marsh trekked to a one-room schoolhouse in all weather conditions while his White counterparts had the comparative luxury of riding a bus. The educational inequality continued beyond bussing, and Marsh remembers learning in a one-room school with approximately seventy-five students of all grade levels.<sup>50</sup> It was not until later that Marsh discovered that the law required such discrimination.<sup>51</sup>

Students were not the only ones who suffered from segregated conditions. Ms. Jordan, Marsh's teacher, commuted by bus from many miles away. Teachers like Marsh's walked two or more miles from the closest bus stop to get to work because the bus would not take the teachers the entire way to the school.<sup>52</sup> Marsh and other students met Ms. Jordan at the bus stop to help her carry her bags to the school. She would lodge nearby during the week and travel by bus back home on the weekends.<sup>53</sup> These same teachers were also paid substantially less and worked in schools without books, plumbing, or glass in their windows.<sup>54</sup>

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49. *Id.* at 20–21.

50. *Id.* at 21.

51. *Id.* at 35 (reflecting on his early childhood experiences, Marsh states “there wasn’t anything all that unique about my early childhood. My involvement with segregation through high school and college was typical of African Americans. We didn’t like it. We resented it. We were disgusted by it. But we accepted it because it was the law”); *see also* VA. CONST. art. II, § 19 (1902).

52. MARSH, *supra* note 1, at 21.

53. *Id.* at 21–22 (“Ms. Jordan commuted to Isle of Wight from Newport News. On Monday mornings some students would go to the bus stop at an intersection on Route 10 to meet her. We carried her bags to the Moonfield Elementary School which was about a one mile walk. During the school week, she would stay with someone who lived near the school. On Fridays, we would walk her back to the bus stop where she would catch the bus to Newport News. The following Monday, she would return to Isle of Wight.”).

54. *See generally* ADAM FAIRCLOUGH, A CLASS OF THEIR OWN: BLACK TEACHERS IN THE SEGREGATED SOUTH (2007). Black students and teachers at Four Holes School in South

In addition to the unequal and under-resourced schools, social ills negatively affected children's education. Poverty precluded some Black students from attending school altogether because they had to stay home to support their families.<sup>55</sup> In the fifth grade Marsh left Rescue, Virginia, and moved back to Richmond, Virginia, to reside with his father.<sup>56</sup> He and his siblings attended Richmond's segregated schools. Marsh enrolled in the all-Black George Mason Elementary School, now named after Henry Marsh.<sup>57</sup> Schools remained segregated, and some of the conditions mirrored what he had experienced in Rescue, Virginia.<sup>58</sup>

While the segregation he experienced in Rescue, Virginia, somewhat carried over to some of his segregated schooling experiences in Richmond, Virginia, it was less harsh. For instance, Marsh did not have to walk very far to school in Richmond, Virginia. The White children who lived in his neighborhood, closest to the Black school, were bussed to an all-White school. Another distinction from his schooling in Rescue was that each grade had its own classroom or designated place in the school.<sup>59</sup>

Marsh went directly from elementary school to Maggie Walker High School, one of the two schools that Black children could attend, because there were no middle schools at the time.<sup>60</sup> The differences in the academic opportunities between races were even more apparent during Marsh's middle and high school years.

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Carolina lacked "adequate materials or books," "functional plumbing," "[w]indows in the school [were] broken out, and the bathrooms [were] not fit to use." Luci Vaden, *Before the Corridor of Shame: The African American Fight for Equal Education After Jim Crow* 64, 87, 173, 222 (2014) (Ph.D. dissertation, University of South Carolina) (on file with the University of South Carolina Scholar Commons).

55. See generally Richard Rothstein, *For Public Schools, Segregation Then, Segregation Since: Education and the Unfinished March*, ECON. POL'Y INST. (Aug. 27, 2013), <https://www.epi.org/publication/unfinished-march-public-school-segregation/> [https://perma.cc/Y7RT-R6U7].

56. See MARSH, *supra* note 1, at 27. Marsh's mother passed away when he was a young boy, leaving his father a widower of four children all below the age of seven, including a small infant. *Id.* at 19. In these circumstances, including being in the Great Depression, his father reluctantly felt compelled to send his children to live with relatives in Rescue and Newport News, Virginia. *Id.*

57. The Richmond School Board voted in February 2020 to rename George Mason Elementary to Henry L. Marsh Elementary School. See Samuel Northrop, *Richmond's George Mason Elementary Will Be Renamed for Henry Marsh, City's First Black Mayor*, RICH. TIMES-DISPATCH (Feb. 19, 2020), [https://richmond.com/news/local/government-politics/re-naming-richmonds-george-mason-elementary-for-henry-marsh-draws-support-at-public-hearing/article\\_c58b77f7-df60-55fb-b153-affbc2bf27c5.html](https://richmond.com/news/local/government-politics/re-naming-richmonds-george-mason-elementary-for-henry-marsh-draws-support-at-public-hearing/article_c58b77f7-df60-55fb-b153-affbc2bf27c5.html) [https://perma.cc/M6NJ-XXQ8].

58. MARSH, *supra* note 1, at 27–29.

59. *Id.* at 167–68 (comparing schooling experiences in Isle of Wight County, Virginia (Rescue) and Richmond, Virginia).

60. *Id.* at 31–32.

Advanced subjects, like math, science, and foreign languages, were limited in the Black schools.<sup>61</sup> Teachers still taught students of multiple age groups in one classroom.

While segregated schools' conditions were less than ideal, Black teachers were resourceful, capable, and community-oriented. They took pride in their profession and cared for their students.<sup>62</sup> During this period, Marsh began to see school as more than a place of segregation and unfair practices. He began to see it as a place of opportunity. His teachers taught skills transferrable beyond the classroom and into a society that still treated people differently because of their skin color. Marsh learned from teachers who expected their students to challenge systems and overcome these obstacles.<sup>63</sup>

Marsh attended the historically Black Virginia Union University and was there when the Court rendered its decision in *Brown*. Marsh recalls in his memoirs the excitement students felt as they learned of the Court's unanimous decision.<sup>64</sup> At that moment, Marsh believed that it would take no more than a couple of years for Richmond and the rest of the nation to implement policies that would honor the Court's ruling.<sup>65</sup> Marsh, fully aware of the extent of segregation in Richmond, still thought that employment and public accommodations discrimination and segregation would begin to dissolve along the same timeline as school desegregation. Marsh believed that four or five years would be a realistic timeframe to achieve full equality.<sup>66</sup> The CRM became divisive in a way that had not existed before *Brown*, and Union students felt the difference.<sup>67</sup> There were many interracial gatherings to discuss race relations before the *Brown* decision. These types of discussions became irregular after the decision.<sup>68</sup>

When *Brown* was decided, Marsh was president of the Virginia Union student body and more generally engaged in politics.<sup>69</sup> Many students were engaged in activism at the time.<sup>70</sup> The local

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61. *See id.* at 167–68.

62. *Id.* at 30–31.

63. *Id.*

64. *Id.* at 3.

65. *Id.*

66. *Id.*

67. *Voices of Freedom: Interview with Sen. Henry L. Marsh, III, supra* note 39.

68. *Id.*

69. MARSH, *supra* note 1, at 1, 4.

70. *See generally* JON N. HALE, THE FREEDOM SCHOOLS: STUDENT ACTIVISTS IN THE

newspaper released a notice that the General Assembly had scheduled a joint session to change a law to divert public funds to both sectarian and nonsectarian private schools to thwart *Brown's* mandate requiring desegregation to achieve equal educational opportunity.<sup>71</sup> If the law passed, this would functionally be a means by which public funds would support segregation.<sup>72</sup> As the president of the Virginia Union student body, he decided to attend the session and testify against the plan. He was the only student of approximately thirty-eight speakers.<sup>73</sup> To his surprise, his picture landed in the newspaper.<sup>74</sup>

While at the General Assembly session, Marsh met his future mentor, Attorney Oliver Hill. There were about one hundred forty people in attendance.<sup>75</sup> He remembered that more than thirty persons were speaking out to urge legislators not to change the law. Marsh remembered being “inspired by Mr. Hill’s presentation.”<sup>76</sup>

Hill spoke as a representative of the NAACP legal staff. Marsh recalls how powerfully Hill made his case and expressed his anger at the General Assembly for considering such a proposal.<sup>77</sup> Hill was at the height of his career and made a great impression on Marsh, who was just a youngster in undergraduate school.<sup>78</sup> After the meeting was over, Hill went over to Marsh to tell him he had done a good job on his speech. Marsh responded, saying that Oliver Hill, too, had done a good job.<sup>79</sup> Hill asked Marsh what he wanted to be when he grew up, and Marsh told him that he would be a lawyer just like Hill. Right there in that conversation, Hill offered Marsh a job to work with him in his law firm after Marsh finished law school.<sup>80</sup> Marsh remembers this as one of the greatest moments of his life. He had inadvertently auditioned for, and received an offer for, a job as a civil rights lawyer before even going to law school. In

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MISSISSIPPI CIVIL RIGHTS MOVEMENT (2016); see also Kabria Baumgartner, “*Be Your Own Man*”: Student Activism and the Birth of Black Studies at Amherst College, 1965–1972, 89 *NEW ENG. Q.* 286, 287 (2016).

71. MARSH, *supra* note 1, at 4.

72. *Id.* at 5.

73. *Id.* at 4 (“I was one of about 38 speakers and the only student who testified.”).

74. See MARSH, *supra* note 1, at 4.

75. *Sharp Debate Held on Referendum*, *RICH. TIMES-DISPATCH*, Dec. 1, 1955.

76. MARSH, *supra* note 1, at 5.

77. *Id.* at 5–6.

78. *Id.*

79. *Id.* at 7.

80. *Id.*

addition, Marsh was astonished that a Black man would stand up to such powerful White men.<sup>81</sup>

Hill was at the ground level of “courting educational justice” and challenging Jim Crow laws within the system. Hill’s mentor was Charles Hamilton Houston, the chief strategist behind the NAACP’s plan to use litigation to protect Black people’s civil rights.<sup>82</sup> Hill is also associated with Jesse Tinsley, the second president of the Virginia chapter of the NAACP.<sup>83</sup>

In 1940, years before the *Brown* decision, Hill, Thurgood Marshall, William Hastie, and Leon Ransom won a significant case towards securing educational equality. In *Alston v. School Board of Norfolk, Virginia*,<sup>84</sup> Hill and his colleagues secured a ruling in favor of equal pay for Black teachers.<sup>85</sup> In his early practice, Hill litigated various educational rights issues. For instance, Hill fought for the equalization of school facilities and bus transportation for Black students.<sup>86</sup> These efforts aligned with the NAACP’s original goal of challenging school inequality in courts through cases involving teacher salaries.<sup>87</sup> However, educational inequality cases became more challenging to win with time. It was difficult to prove that the plaintiffs’ experiences of inequity in these educational settings existed based on subjective proof of race discrimination.<sup>88</sup> The NAACP and other civil rights attorneys would continue to engage courts, but the tactic would shift related to determining which types of cases to litigate.

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81. *Id.* at 5–6 (Marsh stating, “I had never heard any black person speak to white folks like that”).

82. *NAACP Civil Rights Leaders: Charles Hamilton Houston*, <https://www.naacp.org/naacp-history-charles-hamilton-houston/> [<https://perma.cc/3W5J-S3UA>]; see OLIVER W. HILL, SR., *THE BIG BANG: BROWN V. BOARD OF EDUCATION AND BEYOND: THE AUTOBIOGRAPHY OF OLIVER W. HILL, SR.* 87 (2000) (“When I was in law school, we used to call Dean Charlie Houston ‘Iron Pants.’ Charlie mentored both Thurgood Marshall and me and was the one who took us to our first National Bar Association meeting.”); MCNEIL, *supra* note 32, at 82.

83. *A Civil Rights Champion*, RICH. L. MAG. (July 9, 2018), <https://lawmagazine.richmond.edu/features/article/-/15499/a-civil-rights-champion.html> [<https://perma.cc/QA7D-JZVY>].

84. *See generally* 112 F.2d 992 (4th Cir. 1940), *cert. denied*, *Einson-Freeman Co. v. Corwin*, 311 U.S. 693 (1940).

85. *See* HILL, *supra* note 82, at 17.

86. *See* Larissa Smith Ferguson, *Oliver W. Hill (1907–2007)*, ENCYC. VA., [https://www.encyclopediavirginia.org/Hill\\_Oliver\\_W\\_1907-2007#start\\_entry](https://www.encyclopediavirginia.org/Hill_Oliver_W_1907-2007#start_entry) [<https://perma.cc/BK5A-6239>].

87. *See id.*

88. *See id.*

Going to the General Assembly as a Union student was Marsh's way of confronting segregation on behalf of himself and his fellow students. Marsh and his student peers grew up with segregation, and they did not like it.<sup>89</sup> In fact, they resented it; they were disgusted by it.<sup>90</sup> Marsh often notes in his interviews that he and his contemporaries had accepted these discriminatory practices because it was the law.<sup>91</sup> However, Marsh decided that since he believed in following the law, the only way for him to help achieve any justice would be to challenge discriminatory laws and set a new precedent. Marsh graduated from Virginia Union University in 1956, cum laude.<sup>92</sup> He then attended Howard Law School, where he became a legal architect, protecting and fighting for civil rights.<sup>93</sup>

### B. *Choosing the Movement*

*“Mr. Hill then asked, ‘What are you going to do when you grow up?’ I said, ‘Well, I want to be a lawyer.’ He said ‘Well, why don’t you come and work with me? I need some help.’ I was a college student. I said okay, and we shook hands on the agreement. Little did I know that Mr. Hill would also be my future law partner.”*

—Henry L. Marsh, III<sup>94</sup>

It was time to end the 1896 *Plessy* precedent that embedded the “separate but equal” legal principle into society’s fabric.<sup>95</sup> The idea that the inherently inferior Black facilities could ever be equal to

89. MARSH, *supra* note 1, at 35.

90. *Id.*

91. *See generally id.*

92. *Howard University Alumni Association Celebrates Senator Henry L Marsh III with “Trust and Service Award,”* BELLE REP. (Mar. 5, 2018), [https://thebellereport.com/2018/03/howard-university-alumni-association-celebrates-senator-henry-l-marsh-iii-with-truth-and-service-award/](https://thebellereport.com/2018/03/howard-university-alumni-association-celebrates-senator-henry-l-marsh-iii-with-trust-and-service-award/) [<https://perma.cc/FZ3P-ACSJ>].

93. *Id.* Marsh’s class produced “several of the early staff attorneys for the U.S. Commission on Civil Rights, the first African American governor in the United States, the first woman prosecutor in Kentucky, and one of the first black members of the UCLA law faculty . . . [and] [t]wo retired justices who served on the Supreme Courts of New Jersey and Florida.” Howard University School of Law, *The Jurist: Our 140th Year*, 19 NEWS J. 13, 13 (2009–2010). Even with this impressive group of attorneys coming into the field in the 1960s, there was a severe shortage of Black attorneys in law school during this time. *Shortage of Lawyers, Va. Bar Group Told: Every Howard Law Grad Has Pick of Six Jobs*, NEW J. & GUIDE (1916–), May 23, 1964.

94. MARSH, *supra* note 1, at 7; *see also* Interview by Julian Bond with Henry L. Marsh, III, U.S. Senator, in Charlottesville, Va. (Sept. 13, 2000), <https://blackleadership.virginia.edu/interview/marsh-henry> [<https://perma.cc/LB7Q-TTKF>].

95. *See generally* Michael J. Klarman, *The Plessy Era*, 1998 SUP. CT. REV. 303.



White facilities was very distant from reality, especially concerning education.<sup>96</sup> In the 1930s, guided by the legal strategies of Attorney Nathan Margold, the NAACP began to address the issue by commissioning a study, the *Margold Report*.<sup>97</sup> Attorney Charles Hamilton Houston used the findings and suggestions outlined in the *Margold Report* to form the NAACP's "Equalization Strategy."<sup>98</sup> Houston surmised that the White schools would not financially support Black schools at the same level as they supported White schools; thus, the strategy was aimed at forcing integration through "equalization of conditions rather than immediate desegregation of public facilities."<sup>99</sup>

The NAACP chose litigation as its primary tool for wielding educational justice. School cases had a profound and extensive history dating back to the NAACP's early litigation victories like the 1938 decision in *Missouri ex rel. Gaines v. Canada*,<sup>100</sup> where the Supreme Court refused to uphold the "separate but equal" doctrine, allowing a Black man admittance to the all-White University of Missouri Law School.<sup>101</sup> In 1950, Thurgood Marshall decided to shift the NAACP and the Legal Defense Fund's ("LDF") focus from supporting these equalization suits in Virginia and other states to attacking de jure segregation.<sup>102</sup> Margold would go on to mentor Thurgood Marshall, who would take the reins from Houston as Special Counsel for the NAACP.<sup>103</sup> The strategic savvy of the NAACP's legal team of the 1930s and 1940s helped pave the way for attorneys like Marsh who had to craft cunning strategies to dismantle segregation among other racist policies.

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96. See *id.* at 385–86.

97. See University Publications of America, Inc., *Margold Report 1930*, in PAPERS OF THE NAACP PART 3. THE CAMPAIGN FOR EDUCATIONAL EQUALITY: LEGAL DEPARTMENT AND CENTRAL OFFICE RECORDS, 1913–1950: SERIES A: LEGAL DEPARTMENT AND CENTRAL OFFICE RECORDS, 1913–1940 214 (1986), [https://www.lexisnexis.com/documents/academic/upa\\_cis/1510\\_PapersNAACPPart3SerA.pdf](https://www.lexisnexis.com/documents/academic/upa_cis/1510_PapersNAACPPart3SerA.pdf) [<https://perma.cc/R4ST-F5KP>].

98. 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, 529–31 (2009).

99. *Id.* at 531.

100. 305 U.S. 337, 337 (1938).

101. See MCNEIL, *supra* note 32, at 150–51, 199.

102. MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936–1961 151–53, 155 (1994). De jure segregation is racial segregation practices that are enforced by law.

103. See RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 136 (1975); LARRY S. GIBSON, YOUNG THURGOOD: THE MAKING OF A SUPREME COURT JUSTICE 177, 308, 334 (2012).

*Brown* was another major “win” of litigation in the 1950s, which overruled the landmark *Plessy v. Ferguson* case.<sup>104</sup> This ongoing civil rights campaign relied on litigation for social change, an idea that many other campaigns would follow after witnessing the Movement’s major victory with the *Brown* decision.<sup>105</sup> As seen in the example of Attorney Hill, however, there were various legal means available to confront educational inequality. Choosing the most efficient way was an essential part of the Movement’s approach.

Before Charles Hamilton Houston joined the NAACP’s leadership team, W.E.B. Du Bois warned the group that segregated education was not the best way to attack educational inequity.<sup>106</sup> Du Bois acknowledges that all things being equal, a broader desegregated education is better.<sup>107</sup> He concludes, however, that things are rarely equal and that if we are in a situation where the choice is between hostile teachers that are going to lie to Black students and supportive teachers who will tell children the truth, then it is best to choose truth and support.<sup>108</sup> Therefore, he contends that separate schools should be viewed in a more positive light and as a “new . . . effort at human education.”<sup>109</sup> Du Bois further contended that real educational reform efforts should rest in Black people’s

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104. See Mark Tushnet, Essay, *Some Legacies of Brown v. Board of Education*, 90 VA. L. REV. 1693, 1720 (2004).

105. There are many studies focused on school litigation campaigns used to challenge the status quo. See, e.g., *id.* at 1693–94; see also Smith, *supra* note 44, at 147 (highlighting that the litigation strategy preceding *Brown* became a blueprint for civil rights cases across the country); TUSHNET, *supra* note 102, at 12–15 (explaining how the NAACP chose schools as its litigatory target); MCNEIL, *supra* note 32, at 134–36 (providing the specific strategy and considerations underlying the school litigation campaign); KLUGER, *supra* note 103, at 255 (highlighting the results of the successful litigation campaign to end judicial enforcement of racially restrictive covenants). The CRM is not the only movement to use litigation in this way; the Gender Equality Movement of the 1970s and 1980s leveraged litigation to help its efforts. See, e.g., SERENA MAYERI, REASONING FROM RACE: FEMINISM, LAW, AND THE CIVIL RIGHTS REVOLUTION 58, 200 (2011); MICHAEL W. MCCANN, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION 50–53 (1994). This is also evidenced through the Women’s Rights Movement, prison reform, abolition of capital punishment, protection of property rights, and the undermining of affirmative action.

106. KLUGER, *supra* note 103, at 165–66. In 1895, Du Bois was the first Black person to receive a Ph.D. from Harvard University. *W.E.B. Du Bois (1868–1963) AB 1890, PhD 1895*, HARV. UNIV. ARCHIVES: RSCH. GUIDES, <https://guides.library.harvard.edu/hua/dubois> [<https://perma.cc/78U8-YN4X>]. He was a founding member of the NAACP and known for being one of the most prolific Black intellectuals of his time. *Civil Rights Leaders: W.E.B. Du Bois*, NAACP, <https://naacp.org/find-resources/history-explained/civil-rights-leaders/web-du-bois> [<https://perma.cc/P9YT-3EHL>].

107. W.E.B. Du Bois, *Does the Negro Need Separate Schools?*, 4 J. NEGRO EDUC. 328, 335 (1935).

108. *Id.*

109. *Id.* at 334–35.

insistence on controlling their separate schools in their administrative approach, hiring choices, and selecting textbooks.<sup>110</sup> The NAACP, however, was secure in its strategy and refused to waiver on its “anti-segregation campaign.”<sup>111</sup>

Du Bois’s and other leaders’ debate about the strategy for attacking the inequality harkens back to Marsh’s explanation of the excellent education he received from his teachers in segregated schools.<sup>112</sup> The educational system for Black people encouraged children to believe they indeed could be as good as their White counterparts.<sup>113</sup> This belief was partly because of a social order that focused on manners, pride in dress, athleticism, and cultural enrichment through competition and music.<sup>114</sup> In many schools, opportunities were not readily available, yet alumni of such schools tend to speak fondly of those days, noting that they made the best of what little they had.<sup>115</sup> If they had one dress, they kept it clean. They may not have had much food, but their mothers took time to provide a filling lunch, even if it was just hoecakes and jelly. All this was despite the fact that segregation in and of itself was an oppressive system.

Marsh’s stories of his segregated schooling provide context for the way the NAACP attacked school issues. Scholars have given attention to the NAACP’s strategies.<sup>116</sup> Less often, however, are there personal accounts or narratives that bring the equalization cases to life. This is one instance where Marsh’s personal

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110. *Id.* at 335; *see also* Sullivan, *supra* note 45, at 166.

111. NAT’L HIST. LANDMARKS PROGRAM, U.S. NAT’L PARKS SERV., RACIAL DESEGREGATION IN PUBLIC EDUCATION IN THE UNITED STATES: THEME STUDY 56 (Aug. 2000), [https://www.nps.gov/subjects/tellingallamericansstories/upload/CivilRights\\_DesegPublicEd.pdf](https://www.nps.gov/subjects/tellingallamericansstories/upload/CivilRights_DesegPublicEd.pdf) [<https://perma.cc/BBG8-HDG3>].

112. *See generally* Du Bois, *supra* note 107 (suggesting desegregation may not be the solution to educational inequality in Black schools); Charles Hamilton Houston, *Don’t Shout Too Soon*, 43 CRISIS 79 (1936) (arguing that a sustained fight against exclusion from White-only institutions is the only way to achieve educational equality).

113. *See generally* Derrick P. Alridge, *Teachers in the Movement: Pedagogy, Activism, and Freedom*, 60 HIST. EDUC. Q. 1 (2020) (highlighting the various methods employed by Black teachers at this time of rapid social change); *see also* TCHRS. IN THE MOVEMENT, <https://teachersinthemovement.com> [<https://perma.cc/7UKG-NRLC>] (“Teachers in the Movement explores teachers’ ideas and pedagogy inside and outside the classroom during the U.S. Civil Rights Movement. From teachers themselves, we learn how their pedagogy, curricula, and community work were instrumental forms of activism that influenced the movement.”).

114. *See generally* Alridge, *supra* note 113 (discussing the role of teachers as civil rights activists while operating within this social order).

115. *See id.*

116. *See generally* MARK TUSHNET, *THE NAACP’S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION: 1925–1950* (1987); *see also* Tushnet, *supra* note 104.

experiences fuel his litigation strategy. For example, there was nothing equal about attending a one-room school with a teacher who commuted from miles away. Marsh went on to focus part of his litigation strategy on the equalization of teacher salaries. Furthermore, it is striking that segregated schooling conditions, like Marsh experienced in the 1940s and 1950s, are not far removed from the current state of education in the United States nearly eighty years later.<sup>117</sup>

The NAACP's first course of action was strategically engaging courts on school equity issues, like teachers' salaries.<sup>118</sup> Tackling equity in teachers' wages proved to be a challenging route.<sup>119</sup> On occasion, litigation was easy, and schools conceded to the notion that they paid teachers different salaries based on race.<sup>120</sup> However, the reasoning shifted, and schools argued that race was not the determining factor for unequal wages and that qualifications determined pay.<sup>121</sup> Challenging the material differences between school conditions by race also became difficult for civil rights attorneys, especially when rural White schools were just as run down physically as Black schools, but had better books, microscopes, labs, and other resources; or, if Black schools had newer facilities, but still lacked resources.<sup>122</sup>

The NAACP quickly realized that they had to hone their efforts and be more efficient in their tactics.<sup>123</sup> They shifted to a litigation

117. See *supra* notes 53–63 and accompanying text.

118. See *Voices of Freedom: Interview with Sen. Henry L. Marsh, III, supra* note 39.

119. See *id.*

120. Mark V. Tushnet, *Litigation Campaigns and the Search for Constitutional Rules*, 6 J. APP. PRAC. & PROCESS 101, 102 (2004).

121. See *id.* Black teachers were limited in choices for continuing their education and teacher preparatory programs. However, it is important to note that Black teachers were often more qualified, carrying themselves as professionals and taking their jobs seriously. See, e.g., Vanessa Siddle Walker, *African American Teaching in the South: 1940–1960*, 38 AM. EDUC. RSCH. J. 751, 773 (2001) (“African American teachers [in the South] worked in dismal, unfair, discriminatory positions, but did not allow themselves to become victims of their environments. Rather, they viewed themselves as trained professionals who embraced a series of ideas about how to teach African American children that were consistent with their professional discussions and their understanding of the African American community.”); see also TCHRS. IN THE MOVEMENT, *supra* note 113 (memorializing a national oral history project that interviews teachers who taught in the 1950s–1970s and has an archive of oral history interviews that challenges the notion that Black teachers were underqualified).

122. Tushnet, *supra* note 120, at 102.

123. It is important to note that litigation was not the only efforts taken towards effectuating the goals of the CRM. At the same time as desegregation cases, there was some other important progress being made. First, work was being done to build up to the Civil Rights Act of 1964 and the Voting Rights Act of 1965. The year of 1963 was a big year for the movement with the March on Washington occurring in August of that year, which arguably

approach, which required fewer resources and yielded more meaningful legal victories.<sup>124</sup> However, litigation could not occur without independent attorneys who took on cases given by the NAACP or the LDF. Marsh was one of the attorneys that handled these NAACP and LDF cases. Marsh's story and many other of the Movement's strategists are often left out of the legal record.

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created a foundation for Congress to accept the Civil Rights Act of 1964. A tool that leaders like Hill argued was important in the passage of this legislation and others that would protect the rights for all citizens was increased political participation for Black people.

124. See Tushnet, *supra* note 120, at 103–04.

## II. MARSH, MOVEMENT LAWYERING, AND MASSIVE RESISTANCE: 1954–1969

### A. *Lawyering in the Movement*<sup>125</sup>

*“The fight for human rights is unending. We must never stop fighting for freedom and equality for all.”*

—Henry L. Marsh, III<sup>126</sup>

Marsh’s journey in law, politics, and community leadership spawned out of that single interaction with attorney Oliver Hill.<sup>127</sup> Hill had helped begin the fight against laws that guaranteed the segregation of educational and other facilities.<sup>128</sup> Though the fight had begun, it was a fight not yet won. Resistance to schools’ desegregation persisted long after the *Brown* ruling deeming state-sanctioned segregation of public schools unconstitutional. Thus, Hill and other NAACP leaders passed the fight for equality to Tucker, and Tucker to the young Marsh.<sup>129</sup>

Representation mattered and seeing Black lawyers, like Hill and Tucker, motivated Marsh to engage in law to fight for civil and educational rights more broadly. Marsh never forgot the job offer he received from Oliver Hill after meeting him at the General Assembly after his speech against unjust policies that undermined the *Brown* decision.<sup>130</sup> Marsh also never forgot Hill’s zealous advocacy for civil rights.

125. Scott L. Cummings, *Movement Lawyering*, 2017 U. ILL. L. REV. 1645, 1645 (defining “movement lawyering” as “an alternate model of public interest advocacy focused on building the power of nonelite constituencies through integrated legal and political strategies”). This Article subscribes to that definition.

126. MARSH, *supra* note 1, at 7, 180 (stating that Mr. Hill offered Marsh, a college student at the time, the opportunity to work with him. “Little did I know that Mr. Hill would also be my future law partner”); *id.* at 16 (discussing factors that influenced Marsh’s decision to pursue a career of law and public service, stating, “It was Mr. Hill who brought us together. It was Mr. Hill’s firm: Hill, Tucker, and Marsh”).

127. *Id.* at 7.

128. *See generally* HILL, *supra* note 82.

129. *See* DAUGHERITY, *supra* note 4, at 89 (“Throughout the 1960s and 1970s, Tucker’s principal cocounsel was Henry L. Marsh III. Marsh, a native of Isle of Wight County, alumnus of Virginia Union University, and graduate of Howard Law School, had joined Tucker and Hill’s law firm in the spring of 1961. Before he took the job, Tucker warned Marsh: ‘Look, I’m a target. If you want to disassociate yourself from me, it will be okay.’ Marsh refused, and spent much of the next two decades handling civil rights cases throughout the state, even as he entered Virginia politics.”).

130. MARSH, *supra* note 1, at 7.

Marsh's experiences as a Black man who lived through segregation in the Jim Crow South fueled his passion. Marsh went to college when it was common practice to disallow Black people from using restrooms or eating in restaurants while traveling.<sup>131</sup> Marsh remembers stopping at a gas station for gas and attempting to use the restroom only to hear that he knew better than to use "that room" because he was Black.<sup>132</sup> Even though he was aware of the time's political and social climate, Marsh met every personal experience of discrimination with shock and disbelief. He was especially aware of this when he traveled to parts of the deeper South where racism was more blatant. It was a startling reminder of the challenges faced by Black people in general. It was these experiences that strengthened his desire to practice as a civil rights lawyer.<sup>133</sup>

Marsh and Hill remained in contact during and after Marsh's time in law school. Before Marsh returned to Richmond, he worked for the Labor Department in Washington D.C.<sup>134</sup> During this time, Hill was campaigning for Jack Kennedy. Once Kennedy was elected, Hill would soon take an appointment in the Kennedy Administration.<sup>135</sup> For this reason, Hill had to suspend his practice for a while, so he pulled together Samuel W. Tucker from Emporia and Marsh from Washington to form the Hill, Tucker, and Marsh Law Firm.<sup>136</sup> When Hill told Marsh the office was ready for him to come, Marsh quit work in Washington immediately and returned to Richmond.<sup>137</sup> Hill's goal in pulling in Tucker and Marsh was to keep the Richmond, Virginia office going while he was away working in the public sector.<sup>138</sup> After five years working in the Kennedy Administration, Hill resigned from his governmental job to rejoin the firm.<sup>139</sup> He continued to practice actively with Hill, Tucker, and

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131. Interview by Julian Bond with Henry L. Marsh, *supra* note 94; *see also* MARSH, *supra* note 1, at 35.

132. *See* MARSH, *supra* note 1, at 49.

133. *Id.* ("I had never traveled from north to south before: so to be forced to go into the woods to use the bathroom was my own personal experience. Just coming face-to-face with it. I think the experience of being forced to relieve myself in the woods was one of the things that reinforced my desire to be a civil rights lawyer.")

134. *Id.* at 14.

135. *Id.* at 15.

136. *Id.* at 14–15; *see also* *Voices of Freedom: Interview with Sen. Henry L. Marsh, III*, *supra* note 39.

137. *See* MARSH, *supra* note 1, at 14.

138. *Id.* at 15.

139. *See id.* at 14–16.

Marsh Law Firm from the time he returned in 1966 until retiring in 1998 at the age of ninety-one.<sup>140</sup>

Hill chose Marsh and Tucker to keep things going in Richmond, the epicenter of Massive Resistance, for a reason.<sup>141</sup> Hill knew that it was essential to raise young lawyers like Marsh to carry on Virginia's desegregation efforts. Tucker was an ideal candidate for the firm because Hill and other legal trailblazers recognized Tucker for being a master strategist.<sup>142</sup> Taking on segregation in Virginia would require both Marsh's strength as a newly minted lawyer and Tucker's seasoned savviness.

Tucker became Marsh's mentor, law partner, and friend. You cannot tell Marsh's story without incorporating Tucker's role in his life and the Virginia CRM. Tucker is significant because he shaped Marsh's approach to law and desegregation. Tucker's creative strategies influenced how Marsh navigated Virginia's legal and political terrain.<sup>143</sup> Tucker and his family were huge proponents of education as a means for endless life possibilities; therefore, it was no surprise that Tucker zealously advocated for educational opportunity for the marginalized.<sup>144</sup>

Tucker and Marsh worked well together. Having practiced law for many years, Tucker took Marsh under his wing as a son and mentee. When Marsh arrived at the firm, the first order of business was to come up with a way for Marsh to get paid.<sup>145</sup> Marsh was new

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140. Interview by Ronald E. Carrington with Oliver W. Hill, Sr., in Richmond, Va. (Nov. 13, 2002), <https://digital.library.vcu.edu/islandora/object/vcu%3A37861> [<https://perma.cc/5RFF-FA23>]; Interview by Julian Bond with Oliver Hill, in Charlottesville, Va. (Oct. 11, 2000), <https://blackleadership.virginia.edu/interview/hill-oliver> [<https://perma.cc/2H6V-LMRE>].

141. See MARSH, *supra* note 1, at 15.

142. Until recently, when historian Nancy Silcox and a group of historians out of Alexandria, Virginia, published histories on Tucker, there were few documented sources about his life and work. This lack of history on Tucker's role in the movement is striking considering he organized the earliest known sit-in for civil rights in Alexandria, Virginia, when he was refused a library card at the local library. See CHAR MCCARGO BAH, CHRISTA WATTERS, AUDREY P. DAVIS, GWENDOLYN BROWN-HENDERSON & JAMES E. HENSON, SR., *AFRICAN AMERICANS OF ALEXANDRIA VIRGINIA: BEACONS OF LIGHT IN THE TWENTIETH CENTURY* (2013); NANCY NOYES SILCOX, *SAMUEL WILBERT TUCKER: THE STORY OF A CIVIL RIGHTS TRAILBLAZER AND THE 1939 ALEXANDRIA LIBRARY SIT-IN* (2013) for similar arguments of Tucker as an unsung hero.

143. See MARSH, *supra* note 1, at 119, 121 ("Working with Tucker was quite an experience. He had an extraordinary analytical mind. He would cut to the quick of any issue. He was particularly effective in appellant arguments. He got right to the issue, focused upon it and stayed on it until he could get it resolved. . . . Being extraordinarily quick on his feet helped to make him a superb litigator.")

144. See generally SILCOX, *supra* note 142.

145. MARSH, *supra* note 1, at 15.



to practicing law, and Hill would no longer bring in income to support the firm because he was leaving to work with the Kennedy Administration in the District of Columbia. Tucker's concern moved Marsh because it demonstrated genuine care for him and his family. The fact that one of Tucker's top priorities was that he be able to support his family, even though the two had only just met, touched Marsh.<sup>146</sup>

From the beginning, Marsh's goal was to use any money that he earned to reinvest back into the firm. Marsh had hoped that this would leverage his position, helping him establish himself as a partner. Since the LDF was not paying them, Marsh proposed they just split everything in half so that Tucker would not have to pay him out of his pocket.<sup>147</sup> They both agreed to these terms, and Marsh was immediately promoted to partner for his generous contribution to the team. He went without pay for a while, putting everything into the firm to show he was serious about contributing as a partner.<sup>148</sup>

Research is sparse on Tucker's role as a movement lawyer. Tucker's role in the CRM generally, and as a significant challenger to segregationist laws in Virginia, is not typically the headline in scholarly discourse. Therefore, it is no surprise that there are many stories of lawyers and community leaders whose work has gone undocumented.<sup>149</sup> This is another value of Marsh's social history because he often discusses the impact that attorney Tucker had on his life.<sup>150</sup> As aforementioned, Tucker was there to guide Marsh in his early stages in practice. Marsh states in an interview: "[Tucker's] life was consumed with protecting the rights of everyone and ensuring equal protection of the law. I had dreamed about being a civil rights attorney and Tucker was the perfect answer for me."<sup>151</sup>

Marsh appreciated and learned from how Tucker could simplify the most complicated cases, breaking down a complex set of facts

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146. *Id.*

147. *Id.*

148. *Id.*

149. *See id.* at 125 (discussing "unsung heroes" of the CRM). Some lawyers and political leaders whose stories are lesser known include Rueben Lawson, civil rights leader in Roanoke and lawyer on one of Lynchburg's main school desegregation cases; M.W. (Teedy) Thornhill, who was a city councilman and first Black mayor of Lynchburg; Hermanze Faunteroy, city councilman the first Black mayor of Petersburg; and Noel C. Taylor, the first Black mayor of Roanoke, Virginia.

150. *Id.* at 119; *see also* Interview by Julian Bond with Henry L. Marsh, *supra* note 94.

151. MARSH, *supra* note 1, at 119.

to find the legal issue quickly.<sup>152</sup> Not only that, but he was not easily intimidated and would not back down in a legal argument until the other attorney was utterly demoralized.<sup>153</sup> An example of Tucker's prowess was a letter he sent to the Alexandria Librarian after she denied him a library card. Instead of approving him for a library card at his preferred library, she offered him a library card to a library that did not yet exist.<sup>154</sup> Tucker's response to Miss Scoggin stated:

I refuse and will always refuse to accept a card to be used at the library to be constructed and operated at Alfred and Wythe Streets in lieu of [a] card to be used at the existing library on Queen Street for which I have made application. Continued delay—beyon[d] the close of this month—in issuing to me a card for use at the library on Queen Street will be taken as a refusal to do so, whereupon I will feel justified in seeking the aid of court to enforce my right.<sup>155</sup>

Marsh remembered Tucker for being energetic, a hard worker, and a close friend who was more like a father.<sup>156</sup> However, Marsh's mentor was a target, as Tucker was almost disbarred twice because of laws set in place to try to discourage lawyers from taking NAACP cases.<sup>157</sup>

The shortage of Black lawyers<sup>158</sup> was a factor that greatly exacerbated the challenges that civil rights attorneys like Marsh faced. Their work as attorneys required collaboration and mutual respect of the opposing attorneys and judges. These lawyers argued for justice for Black people in segregated courtrooms. Black attorneys advocated for their clients' rights after the lawyers had to sit on segregated busses themselves. W.E.B. Du Bois suggests that "while the work of a physician is largely private, depending on individual skill, a lawyer must have co-operation from fellow lawyers and

152. *Id.* at 121.

153. *See id.*

154. *See 1939 Alexandria Library Sit-In*, ALEXANDRIA LIBR., <https://alexlibraryva.org/1939-sit-in> [<https://perma.cc/SQZ7-C2JT>] (Oct. 2021).

155. Samuel Wilbert Tucker, *Letter from Samuel W. Tucker to Alexandria Library, February 13, 1940*, ALEXANDRIA LIBR.—SPECIAL COLLECTIONS (Feb. 2004), <https://alexandria.ent.sirsi.net/custom/web/lhsc/sitin/tuckerletter/letter.html> [<https://perma.cc/QG37-JSRD>].

156. MARSH, *supra* note 1, at 121–22 ("He was extremely energetic. Sometimes we would stay up all night working on cases and go to work the next day."). When Tucker would stay up working through the night and could not drive back to his home in Emporia, he would often stay with Marsh and his family. *Id.*

157. *Id.* at 37.

158. *Shortage of Lawyers, Va. Bar Group Told: Every Howard Law Grad Has Pick of Six Jobs*, *supra* note 93.

respect and influence in court; thus prejudice or discrimination of any kind is especially felt in this profession.”<sup>159</sup>

Sadly, many of the Du Boisian era conditions were still prevalent for lawyers in Marsh’s day. Whereas other Black lawyers in the country may have struggled to make a name for themselves in the legal profession, Marsh could benefit from the mentorship and tutelage of lawyers already steeped in the Movement. Hill served as the chairman of the legal staff of Virginia’s NAACP branch and Tucker later served in that same capacity; Tucker also worked on the landmark Martinsville Seven and Swansboro cases.<sup>160</sup> Tucker would establish a firm in Emporia and also consult on cases with Hill.<sup>161</sup> By the time Marsh and Tucker began their collaboration, Tucker had been practicing for nearly twenty years.<sup>162</sup>

Marsh recalled that one of the most challenging aspects of practicing the law during this period was keeping pace with the very demanding caseload.<sup>163</sup> Many of his cases required him to oppose parties represented by some of the largest law firms in the Commonwealth.<sup>164</sup> Because Marsh was fighting from a smaller firm with limited resources for clients with many odds against them, he handled these cases with great attention to detail.<sup>165</sup>

Civil rights attorneys were not getting paid much outside of the fifty dollars per diem offered by the NAACP.<sup>166</sup> Often, they did not even receive the promised per diem to take these cases.<sup>167</sup> In contrast, the opposing side paid their lawyers two hundred or more dollars to represent segregationist leaders who headed Massive Resistance against *Brown*.<sup>168</sup>

Marsh, along with his law partner Tucker, worked every day of the week, sometimes taking Sunday off. This work-life imbalance was common practice for many civil rights attorneys across the country.<sup>169</sup> For Marsh’s firm, a strong work ethic with very few

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159. W.E.B. DU BOIS, *THE PHILADELPHIA NEGRO: A SOCIAL STUDY* 114–15 (1996).

160. MARSH, *supra* note 1, at 13–14, 44.

161. *See id.* at 14. *See generally* SILCOX, *supra* note 142.

162. MARSH, *supra* note 1, at 15.

163. *Id.* at 58.

164. *Id.*

165. *Id.*

166. *Id.* at 16.

167. *Id.*

168. *Id.*

169. *See generally* KENNETH MACK, *REPRESENTING THE RACE: THE CREATION OF THE CIVIL RIGHTS LEADER* (2012). Marsh’s work ethic was in part due to his commitment to

breaks was required to keep up with the demands of litigation. The breaks they did receive on occasion came in the form of time off to attend conferences a couple of times of the year, which still involved work.<sup>170</sup> They took cases in other areas of practice outside of civil rights on occasion, but civil rights cases were prioritized.<sup>171</sup> No one was getting rich; but, the doors were able to stay open and the firm afloat. Marsh was proud that no matter what, they never failed to make payroll for their employees.<sup>172</sup> Finding ways to financially stay afloat during this era was a key component of movement lawyering.

### B. *Massive Resistance: The Virginia Way*

By the time Marsh arrived at the law firm Hill, Tucker, and Marsh in 1961 to begin a career in law, Virginia's Massive Resistance effort had become the national model for southern states to resist integration.<sup>173</sup> The segregationist sociopolitical environment that was so pervasive in the early 1960s was the direct result of a history of legally sanctioned race discrimination. Schools, juries, and buses were all still segregated. Marsh would go on to have a hand at fighting to integrate them all.<sup>174</sup>

Massive Resistance utilized the Court's parameters set in *Brown II* to move "with all deliberate speed" in opposition to integration.<sup>175</sup> The Court failed to specify timeframes or define an acceptable manner by which desegregation would happen, leaving the door open for districts to obstruct the Court's mandates.<sup>176</sup> This same

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representation in the Black community; however, at many junctures of Marsh's life (especially in his transition to politics) we see that he was expected of the community to be authentically Black and at the same time acquiesce to the standards of a White profession. Marsh's story is another example of Mack's thesis in *Representing the Race*. See *id.* One reason why Marsh's story is used to illustrate the point of this Article and not merely a review of the many cases that he worked, is that law and identity go hand in hand. See Kenneth W. Mack, Response, *Civil Rights History: The Old and the New*, 126 HARV. L. REV. F. 258, 260 (2013); see also Kim Forde-Mazrui, *Learning Law Through the Lens of Race*, 21 J.L. & POL'Y 1, 4 (2005) (arguing that "law can be more adequately understood and evaluated when examined through the lens of race, that is, when considered in view of the role race has had in the development, administration, or consequences of the law").

170. MARSH, *supra* note 1, at 58.

171. *Id.*

172. *Id.*

173. See *id.* at 16.

174. See generally *id.*

175. See *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294, 301 (1955) (deciding the issue of relief).

176. *Id.* at 300.

obstructionism would spill over into other parts of the CRM, and subsequently, it would take decades of fighting for the deliberate speed of justice for Black Americans.

The Commonwealth of Virginia systematically created laws and policies to delay the inevitable: no more Black schools, and no more White schools, but just “schools.”<sup>177</sup> Even still, Massive Resistance, headed by the Byrd machine and maintained by much of the day’s White leadership, proved to be a formidable opponent.<sup>178</sup> If Black children somehow managed to find a way into these all-White schools, Massive Resistance found a way to cut the schools’ funding. In four cases the schools shut down completely.<sup>179</sup>

The day after the ruling, the *Richmond Times-Dispatch* headlined the decision and Virginia’s political leaders’ responses.<sup>180</sup> At this moment, Marsh, a student at the historically Black Virginia Union University, first grasped the idea that his timeline for desegregation was inaccurate.<sup>181</sup> He knew then that Virginia would put up a fight by engaging in what is now known as Massive Resistance.<sup>182</sup> The newspaper quoted Senator Harry F. Byrd saying that “the court’s decision ‘will bring implications and dangers of the greatest consequence.’”<sup>183</sup> To Marsh, the talk of Massive Resistance and the rise of segregationist leaders all represented the making of a brutal fight ahead; this caused many to pause and think that the world they had hoped for would never be realized.<sup>184</sup>

Marsh explained Massive Resistance as the segregationists’ “various and nefarious attempts” to reverse any of *Brown*’s practical outcomes.<sup>185</sup> Marsh went to law school partly because he wanted to win against Massive Resistance, and this was precisely the first order of business at the newly established Hill, Tucker, and Marsh firm.<sup>186</sup>

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177. *Green v. Cnty. Sch. Bd.*, 391 U.S. 430, 442 (1968).

178. See MARSH, *supra* note 1, at 65–66.

179. See LASSITER & LEWIS, *supra* note 20, at 7–8, 16, 84–96, 104, 135 (stating schools were shut down in Charlottesville, Prince Edward, Norfolk, and Front Royal in Warren County).

180. *School Segregation Is Unconstitutional*, RICH. TIMES-DISPATCH, May 18, 1954, at 1.

181. See MARSH, *supra* note 1, at 3.

182. *Id.*

183. *School Segregation Is Unconstitutional*, *supra* note 180, at 1.

184. MARSH, *supra* note 1, at 3.

185. *Id.* at 41.

186. See *id.* at 5–7, 14–16.

During the height of Massive Resistance, the NAACP local branches functioned as a hub for churning out most of the civil rights agenda.<sup>187</sup> Marsh remembers nearly forty of the almost seventy chapters around the Commonwealth being very active.<sup>188</sup> These active branches initiated lawsuits to implement desegregation and public accommodations across the state.<sup>189</sup> The NAACP used litigation to agitate things.<sup>190</sup> Marsh took on many of these cases in his role fighting Massive Resistance.<sup>191</sup>

Marsh remembers a NAACP pioneer, W. Lester Banks, the NAACP's Executive Secretary, as the person who exemplified everything that the NAACP stood for during this period.<sup>192</sup> Banks led the NAACP's Virginia State Conference in Richmond, which was also the NAACP's state headquarters for Virginia.<sup>193</sup>

Some historians posit that the NAACP was a very important civil rights organization in Virginia during the Movement.<sup>194</sup> As such, the NAACP would use state conferences and annual meetings to create the synergy necessary to influence change.<sup>195</sup> Marsh's aunt would make sure he attended the youth chapter events at state conferences; she would even go as far as paying to rent a bus to fill with children to send to these NAACP meetings.<sup>196</sup> These conferences "stirred things up" and "kept the grassroots movement going."<sup>197</sup>

The CRM and its lawyers' efforts to desegregate schools caused an insurrection, or Massive Resistance, from segregationists in opposition. Virginia spearheaded the strategy of Massive Resistance and therefore is a state worthy of examination.<sup>198</sup> To comprehend

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187. *Id.* at 41; *see also* TUSHNET, *supra* note 102, at 247–56.

188. MARSH, *supra* note 1, at 41; *see also* HILL, *supra* note 82, at 179 ("[T]he Virginia State NAACP during the 1940s and 1950s was the strongest and most active conference in the country and had the most extensive program challenging unlawful racial discrimination.").

189. TUSHNET, *supra* note 102, at 247–48. Tushnet describes this period during which the NAACP utilized litigation to secure desegregation as a "legislative movement toward massive resistance." *Id.* at 248.

190. *Id.*

191. *See generally* MARSH, *supra* note 1; *see also* Interview by Julian Bond with Henry Marsh, *supra* note 94.

192. MARSH, *supra* note 1, at 41.

193. *Id.* at 41–42.

194. *See generally* DAUGHERITY, *supra* note 4.

195. MARSH, *supra* note 1, at 41.

196. *Id.*

197. *Id.*

198. Tobias, *supra* note 19, at 1266; *see also* BENJAMIN MUSE, VIRGINIA'S MASSIVE

how Virginia effectively avoided integrating public schools for almost a decade after the *Brown* decision is a multifaceted task that requires great perception.

Scholars still debate the extent to which *Brown* was successful because many school districts could avoid integration for at least a decade after the Court ordered schools to desegregate.<sup>199</sup> The Supreme Court's language of "all deliberate speed" in its ruling left integration a choice that was up to the southern circuit and district court judges to decide.<sup>200</sup> Another significant consideration that explains Virginia's evading of the law for years post-*Brown* is its unique political environment and southern mentality, known as "the Virginia Way."<sup>201</sup>

Historically, Virginia is part of this conversation because of several Supreme Court decisions that garnered national attention. Chief among them was *Brown v. Board of Education (Brown I)*.<sup>202</sup> However, many Virginia cases accompany litigation strategies that should be more broadly studied as they set a national precedent for schools' desegregation. Virginia was legally at the forefront of race debates throughout the CRM, with the NAACP filing more lawsuits in Virginia than any other state.<sup>203</sup>

As long as laws and policies institutionalized racism and discrimination against Black people, minimal tangible progress could be made. Richmond, the Confederacy's old capital, was almost as rigid and segregated as it could get in Virginia.<sup>204</sup> There was a

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RESISTANCE 21 (1961) (describing pledges made); CHARLES P. ROLAND, *THE IMPROBABLE ERA: THE SOUTH SINCE WORLD WAR II* 35 (1976) (detailing reactions to *Brown*).

199. See Jim Hilbert, *Restoring the Promise of Brown: Using State Constitutional Law to Challenge School Segregation*, 46 J.L. & EDUC. 1 (2017) (arguing that *Brown's* promise has yet to be realized and state and federal courts failed to adequately address inequalities and segregation in America's public schools).

200. See *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294, 301 (1955) (deciding the issue of relief); see also Tobias *supra* note 19, at 1301 ("If the Court failed to exhibit the clear, strong resolve, to exercise moral leadership and to afford the instructive guidance that might have led to *Brown's* rigorous effectuation, it is unclear why lower federal court judges would have insisted upon integration's vigorous implementation. After all, those circuit and district judges came out of, and lived and worked in, the same society that had perpetuated segregation for centuries.").

201. See *supra* note 3; see also Danielle Wingfield-Smith, *Pardon Me Please: Cyntoia Brown and the Justice System's Contempt for the Rights of Black People*, 35 HARV. BLACKLETTER L.J. 85, 87 (2019) (defining the "Virginia Way" as "a white supremacist regime cloaked in congeniality" that took the lead in Massive Resistance efforts).

202. 347 U.S. 483 (1954).

203. See *Jim Crow to Civil Rights in Virginia*, *supra* note 6.

204. See generally Robert R. Merhige, Jr., *A Judge Remembers Richmond in the Post-Brown Years*, 49 WASH. & LEE L. REV. 23 (1992).

difference between how change progressed in the Confederacy's capital versus how changes were taking place with civil rights work in the South generally. The Commonwealth of Virginia was a forerunner in the CRM in both driving the litigation strategy and in Massive Resistance. Therefore, Virginia set the tone for other states in both areas.<sup>205</sup>

One of Oliver Hill's most famous quotes came at a rally in Farmville, Virginia, in Prince Edward County following the *Brown* decision's backlash where he said, "the whole world is watching Prince Edward."<sup>206</sup> In law and politics, both White and Black leaders knew if they could defeat segregation in Prince Edward County, Virginia, it would be difficult for other states to maintain these types of segregationist laws in the future.<sup>207</sup> Moreover, Virginia's history is relevant because, arguably, Massive Resistance began in Virginia and spread throughout the South.<sup>208</sup>

In November 1955, not even six months after the *Brown II* ruling, Virginia state senator Garland Gray rolled out the "Gray Plan," which proposed to repeal the compulsory school attendance law to allow White students the ability to evade desegregation.<sup>209</sup> This was after appointing a board called the Gray Commission to analyze *Brown* and determine a proper response.<sup>210</sup> In February 1956, U.S. Senator Harry F. Byrd, Sr. created the "Massive Resistance" strategy, which empowered Richmond to resist *Brown*.<sup>211</sup> NAACP attorney Oliver Hill called this and the General Assembly's legislation that allowed the governor to close schools wherever courts ordered them desegregated "pervasive silliness."<sup>212</sup> Hill also attributed this "statewide mania" in part to "the backward leadership of people like Senator Harry Byrd, Sr., and the infamous Byrd political machine."<sup>213</sup>

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205. See *Jim Crow to Civil Rights in Virginia*, *supra* note 6.

206. *County Negroes*, FARMVILLE HERALD, June 19, 1959. See generally BOB SMITH, THEY CLOSED THEIR SCHOOLS: PRINCE EDWARD COUNTY, VIRGINIA 1951–1964 (1965).

207. See RAYMOND WOLTERS, RACE AND EDUCATION 1954–2007 103 (2008).

208. See Tobias, *supra* note 19, at 1265–66; see also ROBBINS L. GATES, THE MAKING OF MASSIVE RESISTANCE: VIRGINIA'S POLITICS OF PUBLIC SCHOOL DESEGREGATION, 1954–1956 xvii (1964); NUMAN V. BARTLEY, THE RISE OF MASSIVE RESISTANCE: RACE AND POLITICS IN THE SOUTH DURING THE 1950S 341 (1969).

209. See GATES, *supra* note 208, at 63.

210. See *id.* at 31.

211. See generally J. HARVIE WILKINSON III, HARRY BYRD AND THE CHANGING FACE OF VIRGINIA POLITICS 1945–1966 (1968).

212. See HILL, *supra* note 82, at 160.

213. See *id.* at 160–61.



On March 13, 1956, Harry F. Byrd and ninety-eight other members of the 84th United States Congress authored the “Southern Manifesto,” also known as the Declaration of Constitutional Principles.<sup>214</sup> The document laid out its opposition to court-mandated desegregation brought about by the *Brown* decision and the resulting goal of the CRM to overthrow the southern caste system known as Jim Crow.<sup>215</sup> The Southern Manifesto became the catalyst for “the [single] worst episode of racial demagoguery in modern American political history.”<sup>216</sup> Harry Byrd, Sr. of Virginia, and J. Strom of South Carolina would be its principal authors.<sup>217</sup>

In his autobiography, Oliver Hill offered his reaction to *Brown*, remembering how when Byrd came back in town to hear about the Court’s decision, Byrd “rallied segregationists to fight against the law of the land.”<sup>218</sup> Segregationists’ efforts continued past Byrd by those who vowed to maintain the Massive Resistance initiative. One example is Governor Thomas B. Stanley’s Massive Resistance legislation and the Stanley Plan, which was signed into law in 1956 by Virginia Governor J. Lindsey Almond.<sup>219</sup>

Almond<sup>220</sup> would later close Warren County High School, Lane High School and Venable Elementary in Charlottesville, and White Norfolk elementary schools to prevent desegregation.<sup>221</sup> In 1956 several victories in federal courts ordered the reopening of schools in Arlington and Charlottesville.<sup>222</sup>

Scholars well document the methods and strategies of the Massive Resistance movement. However, few comprehensive studies give voice to the unique role that the Commonwealth of Virginia

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214. JOHN KYLE DAY, *THE SOUTHERN MANIFESTO: MASSIVE RESISTANCE AND THE FIGHT TO PRESERVE SEGREGATION* 3 (2014).

215. *See generally id.*

216. *Id.* at 126.

217. BARTLEY, *supra* note 208, at 117 (stating that Byrd “originated the term ‘massive resistance’ and played a crucial role in its evolution in his home state and in the attempt to create a South-wide effort. No man did as much to move the front lines of opposition from the Deep South to Washington, D.C., and the Potomac River”).

218. *See HILL, supra* note 82, at 173.

219. *See DAUGHERITY, supra* note 4, at 53.

220. Most of the school battle during Almond’s and his successor’s administration took place in the federal courts. One of the primary issues regarding the federal courts’ primary position in the school battle was whether or not a state or federal court had the power to force a county to institute taxes to support public schools and also the state’s constitutional responsibility. *See SMITH, supra* note 206, at 152.

221. *See LASSITER & LEWIS, supra* note 20, at 84–96 (discussing the school closings at Warren County High School, Lane High School, Venable Elementary and other schools that closed).

222. *Id.*

and its key movement leaders played in the fight to dismantle this movement's very heart that sought to derail the progress of justice for Black people in the United States.

Some historians argue that there is much to learn from Virginia, a southern state situated further north, which still aggressively opposed equal education in the post-*Brown* era.<sup>223</sup> *The Washington Post* quoted Benjamin Muse in placing Virginia's unique position as being the forerunner in this struggle in context by saying: "Virginia, with its glorious role in the early history of the republic and again in the struggle for the great Lost Cause—also with its genteel and honored political leadership of the day—was surely indicated to carry the banner of the South in this latest conflict."<sup>224</sup>

In September of 1959, schools were still closing in Virginia. This time, it was Prince Edward County Schools where it all began. Prince Edward was closing even though Massive Resistance had lost steam.<sup>225</sup> When Hill's protégés, Samuel W. Tucker and Henry Marsh, emerged on the scene in the 1960s, a host of school cases would require litigation before meaningful school desegregation could occur in Virginia.<sup>226</sup>

By 1959 and into 1960, new legislation included mechanisms like the pupil placement board and tuition grant laws, which effectively favored White parents who desired to maintain segregated schools.<sup>227</sup> The new legislation purposefully created a way to tie up the desegregation process in the federal courts. After this new legislation passed, litigation became more of an uphill battle for NAACP and civil rights attorneys because the state and localities

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223. See generally DAY, *supra* note 214; see also Brian J. Daugherty, "Keeping on Keeping On": African Americans and the Implementation of *Brown v. Board of Education* in Virginia, in WITH ALL DELIBERATE SPEED: IMPLEMENTING *BROWN V. BOARD OF EDUCATION*, *supra* note 4. Richmond historian, Brian Daugherty, makes a case for this, pointing out Sarah Boyle's statement that Virginia "was the backbone of the South, which was the backbone of the nation, which was the backbone of the world," and Senator Harry Byrd's statement, "If Virginia surrenders, if Virginia's line is broken, the rest of the South will go down, too." *Id.* at 267 n.20.

224. *Id.* (citing BENJAMIN MUSE, VIRGINIA'S MASSIVE RESISTANCE 159 (1961)).

225. Massive Resistance was losing steam because when resistance originally ensued in 1959, segregationist's strategy was to get a win in Prince Edward County as it related to the privatization of schools. They believed that this would create a ripple effect throughout the "black belt." The black belt was comprised of thirty or more Virginia counties with a dense Black population. See, e.g., SMITH, *supra* note 206, at 161 (stating the Prince Edward case persuaded other rural counties to establish private schools without abandoning public schools); see also *Court Refuses U.S. Entry into Prince Edward Suit*, S. SCH. NEWS, July, 1961, at 1.

226. See generally MARSH, *supra* note 1.

227. *Id.* at 44–45.

interested in preserving segregated schools had the requisite resources, including staff and finances, to defend school boards. Segregationists, however, weren't prepared for civil rights attorneys like Marsh to have "staying power" and play the long game until schools were held fully accountable for serving the educational needs of Brown and Black students.<sup>228</sup>

At this point, litigation as the most efficient strategy for school desegregation began to wane. Virginia's ability to continuously prevent its schools from integration exemplified the idea that the courts were unable to desegregate Virginia's schools in and of itself.<sup>229</sup> Judges in Virginia's courts would rule that Black people should be allowed to attend all-White schools; however, they also held that school systems were only required to prohibit discrimination and not ordered to integrate its schools.<sup>230</sup>

### III. LITIGATION AND LEGISLATION: MARSH'S TOOLS FOR EDUCATIONAL JUSTICE

The era following World War II seemed to be a season of hopefulness. The fact that many Black communities in southern cities during the early 1950s were mobilized with the help of Negro Voters' Leagues aroused hope.<sup>231</sup> Further, civil rights litigation during this era garnered some significant wins. By 1950, the NAACP had won well over ninety percent of its cases in the Supreme Court.<sup>232</sup> Dating back to 1938, the Supreme Court overturned several pro-segregation precedents, including changing rulings on restrictive covenants and White primaries' rules.<sup>233</sup> Over time they also desegregated law schools,<sup>234</sup> required states to offer Black people access to in-state graduate and professional programs,<sup>235</sup> and

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228. *Id.* at 58.

229. *Id.* at 44–45.

230. *Id.*

231. DAVID R. GOLDFIELD, *BLACK, WHITE, AND SOUTHERN: RACE RELATIONS AND SOUTHERN CULTURE, 1940 TO THE PRESENT* 45–46 (1990).

232. MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* 173 (2004).

233. *See id.* at 172–73

234. *See Sweatt v. Painter*, 339 U.S. 629, 636 (1950).

235. *See Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 351 (1938) (holding that if a state provides an in-state law school for White students, it must provide a substantially equivalent in-state law school for Black students), *abrogated by McLaurin v. Okla. State Regents for Higher Educ.*, 339 U.S. 637 (1950) (holding Oklahoma must provide qualified Black people with in-state legal education that is not segregated).

required the desegregation of libraries and classroom facilities.<sup>236</sup> Segregation was tackled in other areas, also including housing, transportation, and criminal procedure.<sup>237</sup> The courts addressed many cases involving race by unanimously overturning legal precedents set in the 1930s that established segregation.<sup>238</sup>

The Court decided these cases against a social and political backdrop that appeared to be open to racial reform.<sup>239</sup> While the good times were rolling for some in the 1950s, the reality for many Black people, however, was that segregation was still a daily barrier generally, and in Richmond, Virginia, particularly. During this period in its fight against segregation in *Brown's* aftermath, the NAACP pushed forward, much of its work remaining untold.<sup>240</sup>

#### A. *Litigating Educational Justice in Virginia: 1961–2006*

*“[Those in power] are trying to build a Wall of China around Virginia while segregation is breaking down outside the state.”*

—*Oliver W. Hill*<sup>241</sup>

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236. See TUSHNET, *supra* note 102, at 146.

237. *Id.* at 56, 86, 301–03.

238. See *Gaines*, 305 U.S. at 351; see also KLARMAN, *supra* note 232, at 173 (“Many of these civil rights decisions were unanimous—a noteworthy accomplishment for a Court that rarely managed to avoid dissent. Only in criminal cases, which were no longer as obviously about race, was the Court’s record mixed. In other contexts, the justices seemed willing to vindicate nearly any claim for progressive racial reform, even if doing so required considerable legal creativity.”).

239. See GOLDFIELD, *supra* note 231, at 45, 55.

240. The 1950 NAACP National Convention in Boston decided as an organization to challenge legal segregation wherever it persisted. See HILL, *supra* note 82, at 160; *Separate Is Not Equal: Brown v. Board of Education: A Turning Point in 1950*, SMITHSONIAN NAT’L MUSEUM AM. HIST., <https://americanhistory.si.edu/brown/history/3-organized/turning-point.html> [<https://perma.cc/69VG-UYVY>]; see also Tushnet, *supra* note 104, at 1693. Five desegregation suits were launched throughout different states in 1950s. See *Timeline of Events Leading to the Brown v. Board of Education Decision of 1954*, NAT’L ARCHIVES (Aug. 15, 2016), <https://www.archives.gov/education/lessons/brown-v-board/timeline.html> [<https://perma.cc/C59L-ZX3C>]. See generally Charles W. Eagles, *Toward New Histories of the Civil Rights Era*, 66 J.S. HIST. 815 (2000). See also Greenberg, *supra* note 23, at 119 (mentioning a meeting with “W.E.B. Du Bois, Ralph Bunche, E. Franklin Frazier, Charles Thompson, and others, at a 1935 meeting of black leaders and intellectuals, considered such possibilities as armed revolution, politics and courts” as grounds for social change; they ruled out insurrection as a possibility because it was “self-destructive” and politics as a possibility because “southern racists dominated national politics,” but thought courts a sound option, more specifically the goal of integration in education (rather than challenging *Plessy* head-on)).

241. “*Wall Will Crumble*”, BALT. AFRO-AM., Sept. 22, 1956, at 7.

Hill, Spotswood Robinson, Marsh, and others would start to penetrate this wall.<sup>242</sup> However, there was still much work to be done; by the time Marsh began litigating in the early 1960s there were laws put in place to support a white supremacist agenda to keep Black people from voting, and state legislatures were proportioned to help rural Whites.<sup>243</sup> The battles waged by the Black Richmond leaders continued for years.<sup>244</sup>

Marsh worked on more than fifty school cases as part of his fight for educational equity.<sup>245</sup> Many of his cases came from members of the NAACP, making him part of a broader scheme of utilizing litigation to wield social change. Many of these cases were school cases occurring during the height of Massive Resistance.<sup>246</sup> Marsh had a hand in cases that were critical to Virginia's progress against this resistance.<sup>247</sup> As segregationists' Massive Resistance efforts continued, Marsh's caseload would substantially increase between 1963 and the early 1970s.<sup>248</sup> These years represented the height of the modern civil rights era, and Marsh's load of cases in federal courts all around Virginia was reflective of this fact. The cases

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242. See MARSH, *supra* note 1, at 5.

243. KLARMAN, *supra* note 232, at 192.

244. See generally EDDS, *supra* note 1.

245. Henry Marsh, III (1933– ), CHANGEMAKERS, LIBR. VA., <https://edu.lva.virginia.gov/changemakers/items/show/28> [<https://perma.cc/W67E-RVFW>].

246. See generally Bell v. Sch. Bd. of Powhatan Cnty., 321 F.2d 494 (4th Cir. 1963); Beckett v. Sch. Bd. of Norfolk, 269 F. Supp. 118 (E.D. Va. 1967); Beckett v. Sch. Bd. of Norfolk, 302 F. Supp. 18 (E.D. Va. 1969); Beckett v. Sch. Bd. of Norfolk, 308 F. Supp. 1274 (E.D. Va. 1969); Betts v. Cnty. Sch. Bd. of Halifax, 269 F. Supp. 593 (W.D. Va. 1967); Bowman v. Cnty. Sch. Bd. of Charles City, 382 F.2d 326 (4th Cir. 1967); CHRISTOPHER SILVER & JOHN V. MOESER, THE SEPARATE CITY: BLACK COMMUNITIES IN THE URBAN SOUTH, 1940–1968 82 (1995) (noting that in *Bradley v. School Board of City of Richmond*, “the parents of ten black children who had been denied admission to white schools filed a class action suit in U.S. district court.”).

247. See *Desegregation of Virginia (DOVE): Timeline*, OLD DOMINION UNIV., <https://www.odu.edu/library/special-collections/dove/timeline> [<https://perma.cc/65KJ-7YLS>] (explaining the timeline generally: in 1963, the Surry all-White public school converted to a White-only private school and Surry County's Black schools remained open; resistance to desegregation lasted for the next decade; in 1964, the Supreme Court ordered Prince Edward County schools to reopen, the landmark 1964 Civil Rights Act passed, and public schools are opened to Native Americans; by 1968, all public colleges admitted both Black and White students, private colleges would follow, and the Supreme Court ended Greene County's “freedom of choice” plans; in 1969, Court ended state tuition grants, which cost taxpayers about \$20 million, to children attending segregation academies; in 1970, Governor Holton made a huge political statement by enrolling his children into previously all Black schools in Richmond, VA and bussing initiatives began; in 1974, the Supreme Court limited bussing in Richmond, VA. In 1986, Norfolk became the first city in the country to end bussing for “racial balance;” in 1988, desegregation of U.S. public schools generally peaked and schools in many cities became more segregated).

248. MARSH, *supra* note 1, at 54, 69.

expanded from school cases to include employment,<sup>249</sup> public accommodations, and voting rights cases also—however, this section is limited to Marsh’s school cases. Even with the diverse types of cases Marsh accepted, the caseload was low in his first two years of practice, although meaningful.<sup>250</sup>

## 1. Marsh’s School Cases: 1961–1964

### a. Overview

The years between 1959 and 1964 proved to yield the greatest success for civil rights and NAACP lawyers. Some of the greatest successes were in the United States Court of Appeals for the Fourth Circuit.<sup>251</sup> In many of these early cases, district court judges upheld school plans that on its face were not discriminatory but rather propagated “token integration” or kept racial integration at a minimum.<sup>252</sup> Marsh later challenged these rulings and often won on appeal to the Fourth Circuit court, which forced school boards to go back and create desegregation plans to integrate classrooms.<sup>253</sup> There is a legal record of these lesser-known, although significant, school cases that Marsh or his colleagues worked on during this period.<sup>254</sup> The first of these cases occurred

249. *See id.* at 54; *Henry Marsh, III (1933–), supra* note 245. Outside of school cases, Marsh also worked on employment and housing discrimination cases. Two of those cases—*Quarles v. Philip Morris* (1967), an equal employment for minorities case, and *Gravelly v. Robb* (1981), which established single-member districts for the General Assembly—would put Marsh on the map for being “one of the leading trial and appellate attorneys in Virginia.” *Id.*

250. *See* MARSH, *supra* note 1, at 54. *See generally* Interview by Julian Bond with Henry L. Marsh, III, *supra* note 94.

251. *See* MARSH, *supra* note 1, at 122–24.

252. J. KENNETH MORLAND, *TOKEN DESEGREGATION AND BEYOND* vi (1963).

253. MARSH, *supra* note 1, at 63.

254. *See generally* *Bradley v. Richmond Sch. Bd.*, 416 U.S. 696, (1974); *Gilliam v. Sch. Bd. of Hopewell*, 382 U.S. 103 (1965); *Bradley v. Sch. Bd. of Richmond*, 345 F.2d 310 (4th Cir. 1965); *Brown v. Bd. of Educ. (Brown I)*, 347 U.S. 483 (1954); *Brewer v. Sch. Bd. of Norfolk*, 397 F.2d 37 (4th Cir. 1968); *Brewer v. Sch. Bd. of Norfolk*, 434 F.2d 408 (4th Cir. 1970); *Brewer v. Sch. Bd. of Norfolk*, 456 F.2d 943 (4th Cir. 1972); *Brewer v. Sch. Bd. of Norfolk*, 500 F.2d 1129 (4th Cir. 1974); *Buckner v. Cnty. Sch. Bd. of Greene Cnty.*, 332 F.2d 452 (4th Cir. 1964); *Calhoun v. Cook*, 487 F.2d 680 (5th Cir. 1973); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Copeland v. Sch. Bd. of Portsmouth*, 464 F.2d 932 (4th Cir. 1972); *Dillard v. Sch. Bd. of Charlottesville*, 308 F.2d 920 (4th Cir. 1962); *Downing v. Sch. Bd. of Chesapeake*, 455 F.2d 1153 (4th Cir. 1972); *Franklin v. Cnty. Sch. Bd. of Giles Cnty.*, 242 F. Supp. 371 (W.D. Va. 1965); *Gilliam v. Sch. Bd. of Hopewell*, 345 F.2d 325 (4th Cir. 1965); *Griffin v. Bd. of Supervisors of Prince Edward Cnty.*, 322 F.2d 332 (4th Cir. 1963); *Griffin v. Bd. of Supervisors of Prince Edward Cnty.*, 339 F.2d 486 (4th Cir. 1964); *Griffin v. State Bd. of Educ.*, 239 F. Supp. 560 (E.D. Va. 1965); *Green v. Sch. Bd. of Roanoke*, 428 F.2d 811 (4th Cir. 1970); *Greene v. Sch. Bd. of Alexandria*, 494 F. Supp. 467 (E.D. Va. 1979);

immediately following *Brown*, and many were related to tuition grants.

b. Attacking Freedom of Choice Plans

In the early 1960s, the NAACP did not retreat from the resistance of the segregationists, and the organization continued its crusade to desegregate schools.<sup>255</sup> The *Allen v. School Board of Prince Edward County* (1961) case involved a class suit against a county school board to proceed with the county's desegregation.<sup>256</sup> Marsh took this case a couple of years after the *Brown* decision. The District Court gave the board seven years to put a desegregation plan in place, and the plaintiffs appealed.<sup>257</sup> On appeal, the court held that it was unacceptable to allow this inaction from the school board. The court instead remanded the case to the District Court to order the school board to immediately accept Black students' applications.<sup>258</sup> This order applied to elementary and high schools.

This case demonstrates that while laws can change instantly, it does not necessitate that ideologies also instantaneously shift. The school board refused to operate public schools where Black and White children learned together. When that did not work, they refused to levy school taxes and schools did not open that fall. Desegregation was supposed to be an immediate occurrence; however, it

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Hart v. Cnty. Sch. Bd. of Arlington, 329 F. Supp. 953 (E.D. Va. 1971); McLaurin v. Okla. State Regents for Higher Educ., 339 U.S. 637 (1950); Medley v. Sch. Bd. of City of Danville, 350 F. Supp. 34 (W.D. Va. 1972); Medley v. Sch. Bd. of City of Danville, 482 F.2d 1061 (4th Cir. 1973); Morgan v. Virginia, 328 U.S. 373 (1946); Norris v. State Council of Higher Educ., 327 F. Supp. 1368 (E.D. Va. 1971); Pettaway v. Cnty. Sch. Bd. of Surry, 230 F. Supp. 480 (E.D. Va. 1964); Riddick v. Sch. Bd. of Norfolk, 627 F. Supp. 814 (E.D. Va. 1984); Riddick v. Sch. Bd. of Norfolk, 784 F.2d 521 (4th Cir. 1986); Shelley v. Kraemer, 334 U.S. 1 (1948); Smith v. Allwright, 321 U.S. 649 (1944); Sweatt v. Painter, 339 U.S. 629 (1950); Thompson v. Cnty. Sch. Bd. of Hanover, 252 F. Supp. 546 (E.D. Va. 1966); Thompson v. Sch. Bd. of Newport News, 465 F.2d 83 (4th Cir. 1972); Thompson v. Sch. Bd. of Newport News, 363 F. Supp. 458 (E.D. Va. 1973); Thompson v. Sch. Bd. of Newport News, 498 F.2d 195 (4th Cir. 1974); Turner v. Cnty. Sch. Bd. of Goochland, 252 F. Supp. 578 (E.D. Va. 1966); United States v. Nansemond Cnty. Sch. Bd., 351 F. Supp. 196 (E.D. Va. 1972); Walston v. Cnty. Sch. Bd. of Nansemond, 492 F.2d 919 (4th Cir. 1974); Walston v. Sch. Bd. of Suffolk, 566 F.2d 1201 (4th Cir. 1977); Wilder v. Johnson Pub. Co., 551 F. Supp. 622 (E.D. Va. 1982); Wright v. Cnty. Sch. Bd. of Greensville, 252 F. Supp. 378 (E.D. Va. 1966); Wright v. Cnty. Sch. Bd. of Greensville, 309 F. Supp. 671 (E.D. Va. 1970).

255. See DAUGHERITY, *supra* note 4, at 138 ("Focusing on its strengths, the Virginia NAACP also accelerated its efforts to bring about public school desegregation in the early 1960s.")

256. 207 F. Supp. 349 (E.D. Va. 1962).

257. *Allen v. Cnty. Sch. Bd. of Prince Edward*, 266 F.2d 507, 508, 510 (4th Cir. 1959).

258. *Id.* at 511.

took longer than expected, and when it did, it often happened on White citizens' terms.

In *Allen v. County School Board of Prince Edward County* (1962), there was an action seeking admission to public schools based on a nondiscriminatory basis.<sup>259</sup> The court ruled in Marsh's favor that the public schools in Prince Edward County should not be closed to avoid integration; these school closures were yet another resistance to school desegregation.

### c. Attacking Pupil Placement Laws

Pupil placement laws were established in a special session of the Virginia legislature in 1956.<sup>260</sup> The act allowed a three-member board to be formed that had the power to determine which students or pupils could attend or transfer to specific schools.<sup>261</sup> This was one of many ways that segregationists would try to thwart integration. The conduct of segregationist school boards trying to evade the law was often so outrageous that Marsh and other attorneys would argue that the court should award civil rights lawyers appropriate attorneys' fees.<sup>262</sup> Marsh helped establish this precedent in one of the first cases on the issue occurring in 1963 in *Bell v. School Board of Powhatan County*.<sup>263</sup> In *Bell* the school board hid the pupil assignment forms to make the process for Black parents wishing to register for a school where their student would not have been able to register pre-*Brown* nearly impossible. The Fourth Circuit ruled in *Bell* that the school board would have to pay the plaintiff's attorney fees because of the board's blatant refusal to comply with state law.<sup>264</sup>

The very idea that the General Assembly would require Black parents to "make an application" for their children to attend an all-White school rather than allowing them to register just like all the

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259. 207 F. Supp. at 350.

260. See William G. Thomas, III, *Television News of the Civil Rights Era 1950–1970: Pupil Placement Board*, UNIV. OF VA. (2005), <https://www2.vcdh.virginia.edu/civilrights/tv/glossary/topic-017.html> [<https://perma.cc/J5M9-2ZJS>].

261. *Id.*

262. MARSH, *supra* note 1, at 46.

263. 321 F.2d 494, 497, 500 (4th Cir. 1963). A class suit was instituted on behalf of children denied admission to a school because of their race. The court ordered that the children should be admitted, and the board should submit a desegregation plan. The court agreed on appeal and held that the school board was actively engaged in segregation because of students' assignment by race. *Id.* The fight against segregation continued, and the school board failed to implement the *Brown* decision principles. *Id.*

264. *Id.*



other students was proof positive of the entire systems' insolence toward desegregation. Often this Pupil Placement Board decided which "Negro students" could attend the previously all-White schools and would usually deny the Black students' application altogether.<sup>265</sup>

The *Bell* case is another example of case law that does not get the same attention that the well-known sit-ins or bus boycotts have in discussing civil rights activism. However, this case was responsible for the precedent that implemented a punitive consequence for the school board's participation in this type of behavior.<sup>266</sup> Like many others in Virginia and across the country, this school district was still actively keeping Black students from attending schools with White students nine years after the law mandated integration.<sup>267</sup> Students' perceptions of desegregation confirm that this legal schism caused distress to real children.<sup>268</sup>

This precedent set by *Bell* not only was the federal common law standard, but subsequently spawned Congress to enact a statutory provision in 1972 applying the *Bell* standard by authorizing discretionary awards of attorneys' fees in similar school desegregation cases.<sup>269</sup> Virginia lawyers and other movement leaders' purposeful legal strategy was to attack Jim Crow in a place not reached by other demonstrations that the CRM had implemented.<sup>270</sup> Civil rights attorneys like Hill, Robinson, Tucker, and Marsh were charged with the task of taking Jim Crow down one case at a time.

Pupil placement forms were at issue in another significant case, *Bradley v. School Board of Richmond* (1963), which mandated that the school board create a policy that would erase discrimination

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265. Thomas, *supra* note 260.

266. *Bell*, 321 F.2d 494.

267. See MARSH, *supra* note 1, at 46 (discussing how the school board hid pupil placement forms preventing schools in Powhatan from integrating. This occurred up until the case was decided in 1963, nine years from *Brown*).

268. Sandra Morris Kemp, the first Black graduate of Powhatan High School, took the time to study Massive Resistance. She "doesn't remember experiencing a lot of overt racism or hostility. However, . . . being the only black student in a class of 19 wasn't easy." Emily Darrell, *Former Students Look Back on Struggle to Integrate Schools*, RICH. TIMES-DISPATCH (Feb. 26, 2013), [https://richmond.com/news/local/central-virginia/powhatan/powhatan-today/former-students-look-back-on-struggle-to-integrate-schools/article\\_c4efc4e2-805d-11e2-9ba4-001a4bcf6878.html](https://richmond.com/news/local/central-virginia/powhatan/powhatan-today/former-students-look-back-on-struggle-to-integrate-schools/article_c4efc4e2-805d-11e2-9ba4-001a4bcf6878.html) [<https://perma.cc/DWL8-CQWM>]. She remembers it being socially isolating as a result of "benign neglect." *Id.* She hopes that these types of first-hand accounts of Virginia's desegregation will not be lost in history. *Id.*

269. See Joan C. Koven, Note, *Awarding of Attorneys' Fees in School Desegregation Cases: Demise of the Bad-Faith Standard*, 39 BROOK. L. REV. 371 (1972).

270. See Darrell, *supra* note 268.

patterns often involved in these school cases.<sup>271</sup> The “freedom of choice” policy was one that school boards used to appear as if they complied with the law.<sup>272</sup> However, the “freedom of choice” principle was discriminatory and overturned by one of Marsh’s most significant cases, the *Green v. New Kent County* case.<sup>273</sup>

#### d. Attacking Tuition Grants

There were a series of important rulings that came from Marsh’s work on the *Griffin* cases.<sup>274</sup> In *Griffin v. Board of Supervisors of Prince Edward County* (1962), Marsh and the legal team filed a petition to compel the Board of Supervisors to make available to the school board sufficient funds for free public schools.<sup>275</sup> The court held that the Constitution did not allow for the school board to raise taxes.<sup>276</sup> The legislative branch of the government has the power to maintain public free schools.<sup>277</sup> This petition, if granted, would be an invasion of the powers of the legislative branch.<sup>278</sup> This levying of taxes was a reaction to desegregation.<sup>279</sup> This case shows how far the resistance to desegregation could go.<sup>280</sup>

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271. 317 F.2d 429, 438 (4th Cir. 1963).

272. *Id.* at 436–38.

273. 391 U.S. 430 (1968); see Larry M. Storm, Comment, *Desegregation—The Times They Are A-Changin’*, 3 FORDHAM URB. L.J. 245, 254 (1975).

274. See *Bd. of Supervisors v. Griffin*, 8 Race Rel. L. Rep. 94, 109–10 (Va. Cir. Ct. 1963); see also *Griffin v. Bd. of Supervisors of Prince Edward Cnty.*, 322 F.2d 332, 334–36 (4th Cir. 1963) (This was an action to compel the local and state officials to create an efficient system of schooling. On appeal, the order was vacated, and it was ruled that the county must reopen schools as long as the public schools in the rest of the state should remain open. They held that the district court should have waited on the state court determination of the validity of closing the public schools.). In *County School Board of Prince Edward County v. Griffin*, 204 Va. 650, 133 S.E. 2d 565 (1963), the court held that where the county board refused to allocate the funds needed for the maintenance of schools, it was not the General Assembly’s duty to take over the schools that had been closed and to operate them. The court also held that the state law that closed the public schools, granted state and county tuition grants for children who attend private schools, and made county’s tax concessions for those who make contributions to private schools was valid. The court held that each county had the option to operate or not to operate public schools. The *Griffin v. County School Board of Prince Edward County*, 377 U.S. 218 (1964), Court found that that the closing of public schools in the county to avoid desegregation while using public funds to assist Caucasian students in private segregated schools was a denial of Black student’s equal protection of the laws guaranteed by the Fourteenth Amendment.

275. 203 Va. 321, 322–23, 124 S.E.2d 227, 229 (1962).

276. *Id.* at 325–26, 124 S.E.2d at 231.

277. See *supra* note 24.

278. See *supra* note 24.

279. See *supra* note 221–22 and accompanying text.

280. In 1964, Marsh was involved with NAACP lawyers Frank D. Reeves and S.W. Tucker in Prince Edward school litigation. See MARSH, *supra* note 1, at 117 (“In the 1960s,

Meanwhile, by 1964 Prince Edward County's public schools had been closed for five years.<sup>281</sup> *Griffin v. County School Board of Prince Edward County*, another of Marsh's cases, constituted a significant win for Prince Edward students.<sup>282</sup> The Court ruled that the county must reopen its public school doors as it violated students' rights to an education.<sup>283</sup> In the same year, the United States Court of Appeals for the Fourth Circuit held in *Brown v. County School Board of Frederick County, Virginia* (1964) that districts must abandon zone map assignment practices.<sup>284</sup> Districts could no longer require Black high school students to attend school in a separate district so long as it created no serious administrative problems.<sup>285</sup>

In *Pettaway v. County School Board of Surry County* (1964), the Fourth Circuit ordered the school board to reopen its White school.<sup>286</sup> The court also held that the laws providing scholarships and transportation grants were administered unconstitutionally by the state and local officials.<sup>287</sup> The grants were administered in the county where White public schools were closed and the Black public schools remained open. A private school was organized, to which all White students were applying, but no Black pupils were admitted, and its students received scholarships and transportation grants to do so.<sup>288</sup>

Marsh saw the fruit of his labor in many cases in 1964, including in *Griffin v. County School Board of Prince Edward County* where the court made a significant ruling in Marsh and his team's favor when they asked for the prohibition of tuition grants.<sup>289</sup> The court

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one struggle sought to overcome Massive Resistance. After Oliver left the firm in May 1961, Tucker and I focused on that one. In Virginia, Tucker and I ended up carrying the ball on a great team of attorneys from or affiliated with the Legal Defense Fund including Bob Ming, Bob Carter, Connie Motley, Jim Nabrit, III, Jack Greenberg, Louis R. Lucas, Herb Reid, Frank Reeves, and many others.”).

281. *See id.* at 68.

282. 377 U.S. 218 (1964).

283. *Id.* at 225, 232–33 (stating that “closing the Prince Edward County schools while public schools in all the other counties of Virginia were being maintained denied the petitioners and the class of Negro students they represent the equal protection of the laws guaranteed by the Fourteenth Amendment”).

284. 327 F.2d 655, 655–56 (4th Cir. 1964).

285. *Id.*

286. 332 F.2d 457, 457–58 (4th Cir. 1964).

287. *Id.* at 458–59.

288. *Id.* at 458.

289. *See Griffin v. Cnty. Sch. Bd.*, 377 U.S. 218, 220–21, 224, 262 (1964); *Griffin v. State Bd. of Educ.*, 296 F. Supp. 1178, 1180 (E.D. Va. 1969); *see also* JEFFREY L. LITTLEJOHN & CHARLES H. FORD, *ELUSIVE EQUALITY: DESEGREGATION AND RESEGREGATION IN NORFOLK'S*

ordered retroactive tuition grants but not payments for the upcoming school year. They relied on the Supreme Court's failure to rule on tuition grants in *Griffin* as authority for his decision.<sup>290</sup> On appeal, the Court consolidated the Prince Edward and Surry County cases since they dealt with the same issues. In a separate case in 1964, the United States Court of Appeals for the Fourth Circuit ruled in *Buckner v. County School Board* (1964), that even though the group of Black children seeking admission to a particular school were placed in schools chosen by their parents or legal guardians, the District Court failed to consider prayers for injunction against the operation of an integrated school system throughout county.<sup>291</sup>

## 2. Marsh's School Cases: 1965–1969

### a. Overview

Civil rights efforts related to school equalization garnered several significant victories between 1965 and 1969, and they occurred in Virginia. The NAACP, beginning in 1965, shifted its attention to bringing federal court cases challenging school districts' failures to desegregate their schools.<sup>292</sup> Before initiating these cases, the NAACP was unsuccessful in convincing Virginia school boards to voluntarily create desegregation plans to allow Black students to attend all-White schools.

A shifting change in the overall nation's mood on racial matters accompanied these substantial legal victories for desegregation. Despite a national decline in civil rights enthusiasm, the federal government worked in tandem with the state's energetic NAACP in 1965 and 1966.<sup>293</sup> However, by 1967, the federal government's

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PUBLIC SCHOOLS 136–38 (2012) (discussing the progression of Marsh and teams' Prince Edward and Surry County cases through the courts leading to *Griffin v. State Board of Education* (1965), which held that while tuition grants were not unconstitutional on its face, that grants were impermissible if paid by the government knowing the funds would be used to provide all or most of the cost of operations for segregated schools then. In *Griffin v. State Board of Education* (1969), "the court held that recent decisions by the U.S. Supreme Court provided a more stringent tuition grant standard, which outlawed any state-sponsored assistance to racially segregated schools").

290. *Griffin v. Bd. of Supervisors*, 322 F.2d 332, 340 (4th Cir. 1963).

291. 332 F.2d 452, 453 (4th Cir. 1964).

292. DAUGHERITY, *supra* note 4, at 112.

293. Chinh Q. Le, *Racially Integrated Education and the Role of the Federal Government*, 88 N.C. L. REV. 725, 737 (2010) ("In just a few short years, primarily under the leadership of the Johnson administration, the combined enforcement efforts of [the Department of Health, Education, and Welfare ("HEW")] and the Civil Rights Division of [the Department

response to the deterioration in race relations was a less aggressive attack on segregation. Because of this, Black plaintiffs and the courts in Virginia had to take up the mantle of destroying segregation in the state's most resistant regions, the cities, and the Black belt.

In Virginia, the focus of the desegregation struggle was in Norfolk and Richmond. Judge Walter Hoffman faced difficult administrative problems in desegregating cities due to racial housing patterns.<sup>294</sup> Judge Hoffman believed that the law's requirements should be adjusted to the situation.<sup>295</sup> He also believed that desegregation would neutralize the effects of bussing. His position was favored in the state but overruled by the higher courts. On the one hand, to legal realists, this was a commonsense approach, but to the Black plaintiffs, this meant Black children would be denied desegregated education.

Marsh's work as a civil rights attorney fighting against Massive Resistance also meant that he would have to identify all the cunning ways the Byrd Machine and other segregationist leaders would try to skirt around school desegregation.<sup>296</sup> These indirect ways of evading the law would include "freedom of choice," pupil placement programs, and tuition grant programs.<sup>297</sup> The local Richmond community knew Marsh as a civil rights attorney who addressed these issues. On one case, Marsh argued to a federal panel that an appeals court's ban on tuition grants in two Virginia counties should be extended to the entire state's "freedom of choice" education program.<sup>298</sup> Marsh was a part of a team of NAACP lawyers who submitted papers to the Richmond U.S. District Court asking for tuition grant programs to be reviewed to determine whether the state program violated the Constitution.<sup>299</sup> The NAACP lawyers argued that Virginia's nine localities school boards and the State Board of Education violated the Fourteenth

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of Justice] transformed public education in the South. Between 1965 and 1970, HEW, initially independent, and later through its Office for Civil Rights ("OCR"), which was created in 1967, brought some 600 administrative proceedings against noncomplying school districts." (citation omitted).

294. LITTLEJOHN & FORD, *supra* note 289, at 64.

295. *Id.* at 64-65.

296. *See* MARSH, *supra* note 1, at 46.

297. *Id.* at 44-45.

298. *Court Asked to Ban All Tuition Grants*, NEW J. & GUIDE (1916-), Dec. 12, 1964, at B9; *see also* LITTLEJOHN & FORD, *supra* note 289, at 136-37; MARSH, *supra* note 1, at 46.

299. LITTLEJOHN & FORD, *supra* note 289, at 136-38.

Amendment because of state-sponsored acts of discrimination.<sup>300</sup> Marsh and Tucker, therefore, filed an injunction asking for the state to immediately cease and desist from paying tuition grants for the upcoming school year.<sup>301</sup> The three-judge panel consisting of Judge John Butzner, Jr., Judge Albert Bryan, and Judge Walter Hoffman all ruled in denial of the petition for injunction and instead scheduled a hearing for oral arguments for two months later in December.<sup>302</sup> Although Tucker made a solid case about why tuition grants that ensured children were not forced to attend integrated schools violated the Constitution and the Supreme Court's ruling in *Brown*, the Court was not convinced and in March ruled tuition grants were "not unconstitutional on their face."<sup>303</sup> It would take an additional four years before the same panel of judges would rule again on this principle.<sup>304</sup>

#### b. Attacking Freedom of Choice Plans

In March of 1965, movement lawyers petitioned the court to mandate school boards to desegregate their classrooms in eight lawsuits. These lawyers planned to file fifty or more suits in Virginia until school boards were held accountable and required to obey the spirit of *Brown*. At this point, the greatest threat to desegregation was the freedom of choice plan, which Marsh spent much of his time fighting during Massive Resistance.<sup>305</sup>

While the freedom of choice plans did allow students to enroll in their school of choice within a district, the burden of handling all related logistics and hurdles was unfairly placed on the Black student and their families. The onus was on Black people to desegregate and not the schools' districts. This was a problem for several reasons, including that it was a great deal of pressure on Black people to escape the harm of Jim Crow laws on their education.<sup>306</sup>

Several of Marsh's cases attacked the freedom of choice plans outside. The *Bradley* cases in both the Fourth Circuit and later the Supreme Court dealt with whether the school board's plan

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300. *Id.* at 137–38.

301. *Id.* at 137.

302. *Id.*

303. *Id.* at 137–38.

304. *Id.*

305. *See generally* MARSH, *supra* note 1.

306. *See generally id.* (describing the challenges faced by Black Americans during the litigation of school desegregation cases).

hindered desegregation efforts. The Fourth Circuit upheld the school board's plan that gave every student the right to attend a school of his or her choice, limited only by the time required for the school's transfers and the capacity to which the transfer was sought.<sup>307</sup> The Supreme Court granted certiorari, vacating and remanding the judgment, holding that parents and students were entitled to evidentiary hearings based on their contention that the faculty's allocation was racially biased, which affected the student assignment plans.<sup>308</sup> The final *Bradley* decision was made in 1972, the court ultimately held that school desegregation should be enforced, which would render all city schools racially identifiable.<sup>309</sup> The district court was forced to intervene to eliminate state-imposed segregation and eliminate the dual system to avoid a Fourteenth Amendment violation.<sup>310</sup>

Marsh brought an action on behalf of Black children to require their transfer from Black public schools to White public schools in *Bradley v. School Board of Richmond* (1965).<sup>311</sup> The district court ordered that the district transfer students to schools for which they applied.<sup>312</sup> On appeal, the Court held that the students were entitled to an injunction against the schools that maintained a discriminatory feeder system that allowed Black students to transfer to White schools if they met a standard that other students were not subjected to meet.<sup>313</sup>

Marsh was not as successful in *Gilliam v. School Board of Hopewell* (1965).<sup>314</sup> The Fourth Circuit held that the district court was correct in concluding that the school districts' boundaries were drawn based on geographic features and not on racial grounds.<sup>315</sup>

In *Turner v. County School Board of Goochland County*, the District Court in the Eastern District of Virginia held that a plan

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307. *Bradley v. Sch. Bd. of Richmond*, 345 F. 2d 310 (4th Cir. 1965); see also *Bradley v. School Board of Richmond*, 382 U.S. 103, 105 (1965), where the Court remanded the case to the district court for full evidentiary hearings on this issue of a faculty desegregation plan for Richmond which provided for recruitment and assignment policies aimed at desegregation.

308. *Bradley*, 382 U.S. at 105.

309. *Bradley v. Sch. Bd. of Richmond*, 338 F. Supp. 67, 114-15 (E.D. Va. 1972).

310. *Id.*

311. 382 U.S. 103.

312. *Gilliam v. Sch. Bd. of Hopewell*, 345 F.2d 325 (4th Cir. 1965), *vacated*, *Bradley*, 382 U.S. 103.

313. *See Bradley*, 382 U.S. at 103-05.

314. 345 F.2d 325, *vacated*, *Bradley*, 382 U.S. 103.

315. *Id.* at 327.

adopted by the Goochland County School Board to desegregate schools was invalid.<sup>316</sup> The plan's provisions for staff desegregation were too limited.<sup>317</sup>

In *Wright v. County School Board of Greensville County*, the District Court for the Eastern District of Virginia held that a plan which required mandatory choice to be made each year by both White and Black students contained sufficient provisions for a successful transition of the Greensville county school system.<sup>318</sup> Still, the plan's provisions for staff desegregation were too limited.<sup>319</sup> In *Thompson v. County School Board of Hanover County*, the District Court for the Eastern District of Virginia held that a desegregation plan which limited bus transportation to the nearest formerly Black school or the nearest formerly White school and which required students to determine which school they would choose for the new year by a cutoff date was invalid.<sup>320</sup>

In 1967, the District Court in the Western District of Virginia held in *Betts v. County School Board of Halifax County* that a freedom of choice elementary school desegregation plan, which was based on a policy of complete freedom of choice in assignments, was constitutionally sufficient with a few additions.<sup>321</sup> This plan included annual freedom of choice for all students, both Black and White, in every class in the entire county system.<sup>322</sup>

During this time, Marsh's most important case was the landmark *Green v. County School Board of New Kent County* case, which occurred in 1968 and ruled New Kent's "freedom of choice"<sup>323</sup> plan unconstitutional.<sup>324</sup>

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316. 252 F. Supp. 578, 579, 582 (E.D. Va. 1966).

317. *Id.* at 582.

318. 252 F. Supp. 378, 379–80, 383 (E.D. Va. 1966).

319. *Id.*

320. 252 F. Supp. 546, 548, 551 (E.D. Va. 1966).

321. 269 F. Supp. 593, 596, 601–02 (W.D. Va. 1967).

322. *Id.*

323. 391 U.S. 430, 431–32 (1968). "Freedom of choice" meant choosing which school they wanted to attend, often with the support of tuition grants. See *The Virginia "Freedom of Choice" School Plan*, AM. ARCHIVE PUB. BROAD., at 12:23, 14:34 (Apr. 10, 1961), [https://americanarchive.org/catalog/cpb-aacip\\_28-z60bv7bg13](https://americanarchive.org/catalog/cpb-aacip_28-z60bv7bg13) [<https://perma.cc/NZ3H-T8E8>].

324. *Green*, 391 U.S. at 441–42 ("The New Kent School Board's 'freedom-of-choice' plan cannot be accepted as a sufficient step to 'effectuate a transition' to a unitary system. In three years of operation, not a single white child has chosen to attend Watkins school, and, although 115 Negro children enrolled in New Kent school in 1967 (up from 35 in 1965 and 111 in 1966) 85% of the Negro children in the system still attend the all-Negro Watkins school. In other words, the school system remains a dual system. Rather than further the dismantling of the dual system, the plan has operated simply to burden children and their



Ultimately the Court held that school boards must create unitary school systems because they had an “affirmative duty” to do so.<sup>325</sup> This ruling was important because the Supreme Court put to rest the *Briggs v. Elliot* dictum. In *Briggs*, the court held that under *Brown* school boards only had a duty to prevent discrimination.<sup>326</sup> School boards were only required to take steps to destroy dual school systems. New Kent, a rural county in Eastern Virginia, was trying to evade the *Brown* ruling by using this “freedom-of-choice” plan wherein students could decide which of the two schools in the county they wished to attend.<sup>327</sup> Although the school district was not preventing the White students from enrolling in the all-Black school, and vice versa, this choice plan undermined the Court’s goal of desegregated schools. The NAACP attorneys on the petitioners’ case were Oliver W. Hill, Samuel W. Tucker, and Henry Marsh, with Tucker being the attorney who argued the case.<sup>328</sup>

This social history provides background to cases that is unavailable in traditional legal records. Regarding the backstory to the strategy behind *Green*, Marsh and the team sought out a case to use as a pilot to completely overhaul legal precedent and lessen the number of individual cases they would have to take.<sup>329</sup> Of the choices, including Charles City County and New Kent County, they chose New Kent because New Kent only had two schools, one on each end of the county, with children of both races represented.<sup>330</sup>

Marsh’s team chose New Kent because of the strict dichotomy represented with just two school choices. New Kent clearly showed that it bussed children past the schools they could otherwise have attended except the children attending the schools were of a different race.<sup>331</sup> By law and custom, the county had participated in

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parents with a responsibility which *Brown II* placed squarely on the School Board. The Board must be required to formulate a new plan and, in light of other courses which appear open to the Board, such as zoning, fashion steps which promise realistically to convert promptly to a system without a ‘white’ school and a ‘Negro’ school, but just schools.”)

325. *Id.* at 437–38.

326. *Briggs v. Elliott*, 132 F. Supp. 776, 777 (E.D.S.C. 1955).

327. *Green*, 391 U.S. at 432–34.

328. *Id.* at 430; Jody Allen & Brian J. Daugherty, *Green, Charles C. et al. v. County School Board of New Kent County, Virginia*, ENCYC. VA., <https://encyclopediavirginia.org/entries/green-charles-c-et-al-v-county-school-board-of-new-kent-county-virginia> [https://perma.cc/ZW3J-H925].

329. MARSH, *supra* note 1, at 59–60.

330. *Id.* at 59.

331. *Id.*

segregated schools for decades.<sup>332</sup> The district bussed White children to the White school and bussed Black children to the Black school.<sup>333</sup>

Oral historical accounts from persons active during the Movement help fill in parts of the historical narrative that are not easily ascertained by reading the court transcripts. For instance, in the *Green* case, through Marsh's account, it is learned that one reason why the NAACP lawyers were able to win the case involved the plaintiffs' display of courage and the way they articulated their position.<sup>334</sup> This case would become known in scholarship and the community as equally if not more important than the *Brown* decision.<sup>335</sup> Further, the case's litigation strategy was born from an all-night work session on other matters when Marsh and Tucker realized it might prove worthwhile to challenge racial segregation in the two New Kent schools.<sup>336</sup> The Department of Health, Education, and Welfare used the *Green* decision as a model, which Marsh suggests dramatically sped up desegregation in Virginia and the rest of the South.<sup>337</sup>

Another important part of Marsh's career as a civil rights lawyer in the fight against Massive Resistance involved work that he and Tucker did in Norfolk, Virginia. The NAACP requested that the Hill, Tucker, and Marsh firm assist with multiple cases across the

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332. *Id.*

333. *Id.* Marsh states, "These circumstances made New Kent the better litigation choice. We could more easily challenge so called 'freedom of choice' where you had a white school and a black school with forced bussing to maintain segregation. The Court couldn't duck the issue that freedom of choice did not lead to a desegregated school system with equal educational opportunities for all. . . . We filed suit in *Green v. New Kent County*. However, we didn't win it like we wanted to in the Fourth Circuit. The case went to the Supreme Court." *Id.* at 59–60.

334. *Id.*

335. See GERALD ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE* 45 (2d ed. 2008) (quoting *Green v. Cnty. Sch. Bd. of New Kent County*, 391 U.S. 430, 439 (1968)) (discussing the *Green* decision's vital role in the fight for desegregation with the Court for the first time since *Brown*, offering a detailed opinion on remedies and citing the *Green* opinion: "The burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work now"); see also David Rhinesmith, Note, *District Court Opinions as Evidence of Influence: Green v. School Board and the Supreme Court's Role in Local School Desegregation*, 96 VA. L. REV. 1137, 1141 (2010); G. Robb Cooper & James Prescott, *What Did Brown Do for You: Brown v. Board Fifty Years Later*, 14 LOY. PUB. INT. L. REP. 231, 232–33 (2009) (discussing *Brown's* narrow scope and how "[t]he Court in *Green* mandated that school districts had an affirmative duty to desegregate. A plan must not merely address the issue of desegregation but effectively resolve it").

336. MARSH, *supra* note 1, at 59–60.

337. *Id.* at 60.

Commonwealth.<sup>338</sup> Tucker decided that they should divide the cases by region, asking Marsh to take Norfolk, Virginia.<sup>339</sup> Marsh was far enough into practice that he eagerly said he could take on the Norfolk cases without issue, only expecting the caseload to last for a couple of years.<sup>340</sup> The work in Norfolk was much more substantial than Marsh realized at the time.<sup>341</sup> Beginning on January 3, 1966, Marsh and the NAACP's filed exceptions to the Norfolk desegregation plan.<sup>342</sup> This case was in response to the Norfolk School Board's desegregation plan filed with the U.S. District Court on December 1, 1965, which raised concerns because it provided no room for desegregating the school district's faculty.<sup>343</sup>

According to the plan, the district would integrate the school population, and students would no longer be assigned based on their race to either a White school or a Black school. Additionally, any Black children who elected to go to a White school would be allowed to do so. The plan sounded fair enough, but Marsh, who served as the lead attorney, took exception to the proposal arguing that it was unconstitutional because the faculty was not required to be racially diverse.<sup>344</sup> Further, under the school district's proposal, it was improbable that Whites would ever elect to go to a Black school, leaving the Black schools just as segregated as they had started.<sup>345</sup>

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338. *Id.* at 61.

339. *Id.*

340. *See id.*

341. *Id.*

342. *Id.*

343. *See* LITTLEJOHN & FORD, *supra* note 289, at 139 ("The Norfolk School Board filed its modified desegregation plan with the U.S. District Court on December 1, 1965. . . . Despite the rosy picture presented by the school district, the NAACP filed exceptions to Norfolk's desegregation plan on January 3, 1966. Led by attorney Henry Marsh, the NAACP argued that Norfolk's plan was unconstitutional because it failed to provide any program from faculty desegregation. In addition, Marsh and his team cited specific problems with the city's pupil assignment plan. At the high school level, Maury, Granby, and Norview—the three predominately white schools—had discrete geographic attendance zones, while Booker T. Washington, the all-black school, drew students from the entire city. This attendance scheme made it unlikely that white students would ever transfer to Booker T. Washington, which was attended by all but 680 of the city's 2,994 black high school students. At the intermediate level, six of the city's eleven junior high schools remained entirely segregated, while four additional junior high schools had 222 African Americans enrolled in classes with 5,898 white students. And finally, at the elementary level, at least thirty-one of the city's fifty-three primary schools remained entirely segregated. In sixteen of the remaining twenty-two schools, racial minorities represented less than 5 percent of the total enrollment.").

344. *Id.* at 142 (discussing the "difficult issue of faculty desegregation").

345. *See* LITTLEJOHN & FORD, *supra* note 290.

Initially, a federal district judge, Walter Hoffman, had called for the desegregation of schools in Norfolk, and only a few Black students were admitted to the White school.<sup>346</sup> Despite the sparse implementation of the desegregation ruling, there was a massive outcry by Whites in the community.<sup>347</sup> When Marsh and his team tackled the issues regarding the integration of Black and White faculty members working in the same schools and further integrating the student population, Hoffman would rule against them.<sup>348</sup> But as it happened, there was a turn of events.

At one point, Judge Hoffman went out of town to try a case in Nevada.<sup>349</sup> As it happened, a case on desegregation came up on the docket.<sup>350</sup> Marsh persuaded the presiding judge who was sitting in for Hoffman, Judge John MacKenzie, to rule in favor of desegregation, “with a ratio of 58% black to 42% white throughout the school system for both teachers and students.”<sup>351</sup> This decision turned the tables for the entire school system, marking a significant rulings towards schools’ actual desegregation.

Litigation continued into 1969 with *Beckett v. School Board of Norfolk*.<sup>352</sup> The court held that implementing constitutional principles on good faith does not require racial balancing in each school.<sup>353</sup> In *Griffin* (1969), an iteration of the case mentioned above, the court ruled in Marsh’s favor that it is illegal and against students’ Fourteenth Amendment rights to have laws in place that preclude students from attending integrated schools.<sup>354</sup>

In *Nesbit v. Statesville City Board of Education*, the Court of Appeals for the Fourth Circuit held that school districts must eliminate schools’ racial characteristics.<sup>355</sup> The districts must do so through “pairing, zoning, consolidation, . . . or any other method that may most effectively provide a unitary school system.”<sup>356</sup> In addition, school districts must integrate faculty in schools so that

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346. MARSH, *supra* note 1, at 61.

347. *Id.*

348. *Id.* at 62.

349. *Id.*

350. *Id.* at 61, 63.

351. *Id.* at 63.

352. 308 F. Supp. 1274, 1276 (E.D. Va. 1969).

353. *Id.* at 1279.

354. *Griffin*, 296 F. Supp. at 1180–81; LITTLEJOHN & FORD, *supra* note 289, at 138. Marsh’s work on the *Griffin* case offers insight into an issue that held significant weight in Virginia’s school battle.

355. 418 F.2d 1040 (4th Cir. 1969).

356. *Id.* at 1042.

each school's ratio of Black and White faculty members reflects the school district's approximate ratio.<sup>357</sup> That same year in *Walker v. County School Board of Brunswick County*, the Court of Appeals for the Fourth Circuit held that school districts where Black students were the substantial majority were not entitled to utilize freedom of choice methods in integrating the schools.<sup>358</sup>

### c. Equalization of Teachers' Salaries

In *Franklin v. County School Board of Giles County*, Marsh sued the Board and the Division Superintendent of Schools of Giles County on behalf of seven Black teachers that the County School Board of Giles County fired.<sup>359</sup> These teachers were discharged when the Board had abandoned two Black schools and had integrated the students and their teachers' association.<sup>360</sup> The Court of Appeals for the Fourth Circuit held that these teachers were fired because of their race, as evidenced by the Board employing eight new White teachers in the county school system.<sup>361</sup> As a result, the Black teachers were entitled to a mandatory injunction requiring their reinstatement. They were also entitled to reemployment in any vacancy that they were qualified for in terms of certification or experience.<sup>362</sup>

## 3. Marsh's School Cases: 1970–2006

### a. Overview

As might be expected, Whites at high levels of leadership were conspicuously quiet when it came to the issue of desegregation. Possibly, they were afraid of the backlash, like in Judge Hoffman's case, if they dissented from the status quo on the issue.<sup>363</sup> This changed with Governor Linwood Holton, who served as Virginia's governor from 1970 to 1974.<sup>364</sup> Marsh had supported his election.<sup>365</sup>

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357. *Id.*

358. 413 F.2d 53 (4th Cir. 1969).

359. 360 F.2d 325, 325 (4th Cir. 1966).

360. *Id.* at 326.

361. *Id.* at 326–27.

362. *Id.* at 327.

363. See MARSH, *supra* note 1, at 62.

364. See *id.* at 67; Clay Risen, *Linwood Holton, 98, Virginia Governor Who Pushed for Racial Equality, Dies*, N.Y. TIMES (Nov. 1, 2021), <https://www.nytimes.com/2021/11/01/us/linwood-holton-dead.html> [<https://perma.cc/2EDH-ZESZ>].

365. MARSH, *supra* note 1, at 67.

After he was appointed Governor, Marsh requested Holton's help with advancing the cause of desegregation.<sup>366</sup> Holton did so by making an extraordinarily daring move; he enrolled his daughter, Tayloe, in the poorest school in the city.<sup>367</sup> It made the front page.<sup>368</sup>

#### b. Attacking Taxpayer Funding of Segregated Schools

Another example of the types of desegregation cases Marsh handled dealt with overturning taxpayer funding of segregated academies.<sup>369</sup> To force litigation against the public financing of private all-White academies in Surry County, which served to allow Whites to skirt the mandate to desegregate public schools, he purposely had Black students seek admission into the all-White academy.<sup>370</sup> Of course, these White schools denied the Black students' applications.<sup>371</sup> Marsh then brought individual lawsuits on behalf of those Black students.<sup>372</sup> He and his team also brought legal action against the State Board of Education to prevent tuition grants and Pupil Placement Boards from denying Black students' entrance to White schools on fallacious grounds.<sup>373</sup> Eventually, the pupil placement process was deemed invalid.<sup>374</sup>

#### c. Attacking Freedom of Choice Plans

Marsh's team brought additional *Bradley* cases before the courts in two separate cases, one known as *Bradley I* (1973) and the other *Bradley II* (1972 and 1974). The *Bradley* litigation first proposed a new plan to bring three Richmond districts together to force desegregation. However, the Court ruled that it did not have the authority to enact this plan.<sup>375</sup> In *Bradley II*, which made it to the Supreme Court, the ruling reversed the attorneys' fees awarded to the plaintiffs at the trial level.<sup>376</sup> Attorneys for the plaintiffs

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366. *See id.*

367. *Id.*

368. *Id.*

369. *Id.* at 45.

370. *Id.*

371. *Id.*

372. *See id.*

373. *See id.*; LITTLEJOHN & FORD, *supra* note 289, at 136–38.

374. MARSH, *supra* note 1, at 45–46.

375. *Bradley v. Sch. Bd. of Richmond*, 462 F.2d 1058, 1069 (4th Cir. 1972), *aff'd by an equally divided court*, *Sch. Bd. of Richmond v. State Bd. of Educ.*, 412 U.S. 92 (1973).

376. *Bradley v. Sch. Bd. of Richmond*, 53 F.R.D. 28 (E.D. Va. 1971), *rev'd*, *Bradley v. Sch. Bd. of Richmond*, 472 F.2d 318 (4th Cir. 1972), *vacated*, *Bradley v. Sch. Bd. of Richmond*,

involved in the earlier *Bradley* cases were Tucker and Marsh; the LDF took over the later appeals.<sup>377</sup>

The next year, in *Brewer v. School Board of Norfolk*, which was a continuation of the *Beckett* case, Marsh sued Norfolk to force them to integrate its schools truly.<sup>378</sup> The court held that the school desegregation plan that assigned Black students to all-Black schools, White students to an all-White school, and allowed segregated schools to remain open pending construction was constitutionally impermissible.<sup>379</sup> After this and subsequent decisions, many detailed below, Norfolk would begin to actually integrate.

In *Wright v. County School Board of Greensville County* (1970), the District Court in the Eastern District of Virginia held that districts must reject proposals where the approval of a city's proposal for a separate school system would have affected the entire county's desegregation plan.<sup>380</sup> Further, if the proposal created city schools with about equal numbers of Black and White students, but county schools with a ratio of seven Black students to three White students, then such a proposal must be rejected.<sup>381</sup>

Again, the Fourth Circuit ruled in favor of active desegregation in *Green v. School Board of City of Roanoke* (1970).<sup>382</sup> The court held that initially assigning children to schools on a segregated basis, requiring Black children to live nearer to White schools and to be well above the median of a White school to seek admission was a violation of Black students' Fourteenth Amendment rights.<sup>383</sup>

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416 U.S. 696 (1974).

377. MARSH, *supra* note 1, at 54, 56–57. Marsh attributed the loss in the Fourth Circuit on *Bradley II* to a weak argument in court. See Jim McElhatton, *Standing on the 'Shoulders of Bob Ming,'* WASH. TIMES (Dec. 7, 2008), <https://www.washingtontimes.com/news/2008/dec/7/standing-on-the-shoulders-of-bob-ming> [<https://perma.cc/SZ96-WFES>]. Bob Ming was the first Black professor at the University of Chicago School of Law and a partner in a private law firm. The NAACP honors lawyers with an award in Mr. Ming's name and describes Ming as one of the primary architects in the *Brown v. Board of Education* litigation. *Id.*; see also MARSH, *supra* note 1, at 117. The *Richmond Times Dispatch* and other papers often reported Marsh's civil rights work including his participation on the Prince Edward cases where Marsh called the budget for schools "inadequate." *Pr. Edward's Jimero Plans Back in Court*, NEW J. & GUIDE (1916–), July 4, 1964, at 1.

378. 434 F.2d 408 (4th Cir. 1970).

379. *Id.* at 410–11.

380. 309 F. Supp. 671, 680–81 (E.D. Va. 1970), *rev'd sub nom.*, *Wright v. Council of Emporia*, 442 F.2d 570 (4th Cir. 1971), *rev'd*, 407 U.S. 451 (1972).

381. See *id.* at 678–79, 681.

382. 428 F.2d 811 (4th Cir. 1970).

383. *Id.*

In 1972, the Fourth Circuit held in *Copeland v. School Board of Portsmouth* that when student assignments are made to special schools to benefit students with learning disabilities, these assignments are not scrutinized under equal protection strictly on the basis that these special schools are not racially balanced.<sup>384</sup> In *Hart v. County School Board of Arlington County*, the Fourth Circuit held that the proposed unitary school system plan was not discriminatory on the basis of race.<sup>385</sup> Fewer Black students were transported than White students. Black students faced greater travel time, and formerly all-Black elementary schools continued as special purpose schools to which predominantly White student populations would be transported.<sup>386</sup> The court ruled that this plan was not discriminatory on the theory that the burden of transfer and transportation fell more heavily on Black students.<sup>387</sup>

Also in 1972, the District Court for the Western District of Virginia held in *Medley v. School Board of Danville* that a school desegregation plan requiring hundreds of young children to cross a highly congested and hazardous passageway at its busiest time without proper bridges, sidewalks, and other safety provisions was a good enough reason to leave the one fifth and one sixth grade student from each side of city and kindergarten through fourth grades in neighborhood schools.<sup>388</sup> The facts made it impracticable to implement a program of bussing and cross bussing.

By 1973, the United States Court of Appeals for the Fifth Circuit in *Calhoun v. Cook* held that under the circumstances, the case could not be adjudicated on constitutional grounds and that a remand was required for further proceedings as to the right to intervene and the approval of the school desegregation plan.<sup>389</sup> The next year in 1974 in *Walston v. County School Board of Nansemond County*, the Fourth Circuit held a testing requirement discriminatory that had resulted in the elimination of more Black teachers than White teachers.<sup>390</sup> Further, the test did not purport to measure or predict classroom teaching skills; therefore, the court held

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384. 464 F.2d 932 (4th Cir. 1972), *supplemented sub nom*, *Thompson v. Sch. Bd. of Newport News*, 472 F.2d 177 (4th Cir. 1972).

385. 459 F.2d 981 (4th Cir. 1972).

386. *Id.* at 982.

387. *Id.*

388. 350 F. Supp. 34, 49–50 (W.D. Va. 1972).

389. 487 F.2d 680 (5th Cir. 1973).

390. 492 F.2d 919 (4th Cir. 1974).



the use of a cutoff score of five hundred was patently arbitrary and discriminatory.<sup>391</sup>

After eighteen years of litigation in the courts, Marsh made progress towards really desegregating Virginia's schools, but there was still much more work to do. In cities where bussing counted for the largest increase in desegregation, predominantly Black schools existed, and White flight threatened to increase their numbers. In Black belt counties and large cities, the future of integration was threatened by the present desegregation obstacles, despite rosy statistics.

In *Greene v. School Board of Alexandria* (1980), the District Court for the Eastern District of Virginia held that closing specific elementary schools was based on legitimate reasons and was not proven to have a racially discriminatory impact.<sup>392</sup> Despite a claim that school closings caused a burden on Black students, it required bussing to remaining schools.<sup>393</sup>

In 1986, the Fourth Circuit was still ruling on these school desegregation cases. In *Riddick by Riddick v. School Board of Norfolk*, Marsh represented parents of public school children and sued the school board in Norfolk, challenging the constitutionality of a new proposed student assignment plan that restricted elementary school children's crosstown bussing.<sup>394</sup> The U.S. District Court for the Eastern District of Virginia held that precedent in previous desegregation cases required plaintiffs to have the burden of proving intent to discriminate, and plaintiffs failed to sustain that burden.<sup>395</sup>

Marsh's cases carried over into the twenty-first century with *Walton v. School Board of Gloucester County*. In this case, Marsh, on behalf of Plaintiff Walton, filed an employment discrimination action against Gloucester County Public Schools for continuously denying her applications despite being a qualified teacher.<sup>396</sup> The U.S. District Court in the Eastern District of Virginia granted Gloucester's motion to dismiss this case. In the same year, the Fourth Circuit ruled on *Cuffee v. Tidewater Community College*

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391. *Id.* at 925–26.

392. 494 F. Supp. 467, 473 (E.D. Va. 1979), *aff'd sub nom.*, *In re Greene*, 634 F.2d 622 (4th Cir. 1980).

393. *Id.*

394. 627 F. Supp. 814, 816, 819 (E.D. Va. 1984), *aff'd*, 784 F.2d 521 (4th Cir. 1986).

395. *Id.* at 827.

396. No. 06cv75, 2006 U.S. Dist. LEXIS 87477, at \*2 (Dec. 4, 2006) (unpublished).

against a community college employee who sued Tidewater Community College for employment discrimination based on race and alleged retaliation for previous EEOC complaints.<sup>397</sup> The U.S. District Court in the Eastern District of Virginia dismissed Marsh's case on a motion for summary judgment and the Fourth Circuit affirmed.<sup>398</sup>

### B. *Legislating Educational Justice in Virginia: 1969–2014*

*“Without question, the increased activism of the 1950s and 1960s spilled over into politics as previously disengaged blacks, emboldened by courtroom legislative triumphs, began to believe that ‘black power’ could be translated into meaningful reform.”*

—*Roger Biles*<sup>399</sup>

Since he was a young boy, Marsh's career plan did not involve becoming a civil rights lawyer or politician. Instead, Marsh planned to become a truck driver.<sup>400</sup> Marsh, a young boy who walked several miles to school one way in a racially segregated southern town, saw only three career options: becoming an oysterman like his uncle, farming, or driving trucks like those that traveled up and down the country back roads of Isle of Wight County.<sup>401</sup> It was not until high school that Marsh would consider becoming a lawyer and not until later in his legal career that he considered politics.<sup>402</sup>

During the late 1960s, the approach to dismantling Jim Crow laws focused on changing the law and creating a legal precedent that would protect Black Americans' rights. This strategy took shape in many forms. By the election of President Kennedy in 1960, civil rights had become a central issue in American politics. Despite over seventy percent of Black votes, Kennedy was still hesitant to push a civil rights agenda, fearing he would alienate his southern base.<sup>403</sup> However, he still appointed record-breaking

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397. 194 F. App'x 127, 128 (4th Cir. 2006).

398. *Id.*; Cuffe v. Tidewater Cmty. Coll., 409 F. Supp. 2d 709, 721 (E.D. Va. 2006).

399. Roger Biles, *Black Mayors: A Historical Assessment*, 77 J. NEGRO HIST. 109, 114 (1992) (emphasis added).

400. MARSH, *supra* note 1, at 169.

401. *Id.*

402. *Id.*

403. *The Modern Civil Rights Movement and the Kennedy Administration*, JOHN F. KENNEDY PRESIDENTIAL LIBR. & MUSEUM, <https://www.jfklibrary.org/JFK/JFK-in-History/Civil-Rights-Movement.aspx> [<https://perma.cc/M2NZ-3W25>].

numbers of Blacks to high-level positions.<sup>404</sup> Further, Kennedy allocated resources to the Civil Rights Commission and pushed legislation, although he did not take the lead. Kennedy was a proponent of school desegregation and gave special attention to many social issues facing Black Americans like voting rights and employment discrimination.<sup>405</sup>

Although 1954 was a pivotal year in the CRM, 1963 ushered in an era of civil rights legislation. The March on Washington in 1963 helped lay the foundation for the Civil Rights Act of 1964, Voting Rights Act of 1965, and other demonstrations that took place all over the South.<sup>406</sup> Led by Dr. Martin Luther King, Jr., and the Southern Christian Leadership Conference (SCLC), Student Non-violent Coordinating Committee (SNCC), Congress of Racial Equality (CORE), and other organizations, the Movement had momentum.

It would not be until the mid to late 1970s that Blacks demonstrated or showed Richmond's political independence.<sup>407</sup> Research shows that the noticeable gains in Black public office-holding during this time were at the mayoral level,<sup>408</sup> which is significant because the mayoral position is arguably the highest degree of local empowerment that most often signals high degrees of organization and control over local decision making among Black elites. To add to this suggestion, on the alternative, when there is a lack of Black representation in public office, there is often a heightened distrust of the local government, which creates unrest.<sup>409</sup>

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404. *Id.*

405. *Id.*

406. See generally Rebecca E. Zietlow, *To Secure These Rights: Congress, Courts and the 1964 Civil Rights Act*, 57 RUTGERS L. REV. 945, 946 (2005) (arguing that “[t]he 1964 Act provides an excellent example of congressional construction of constitutional norms, and it is a landmark statute that effected constitutional change”). The Civil Rights Act of 1964 was pivotal to the CRM's agenda and for outlawing segregation. See *id.* It is also important to note, however, that while it is tempting to look at the Act as an end of an era of the old Southern racial caste system, it actually served as the impetus for the renewal of a movement for race and equity. See Kenneth W. Mack, *Foreword: A Short Biography of the Civil Rights Act of 1964*, 67 SMU L. REV. 229, 229–30 (2014). Mack also reminds us that the Act was the result of a long history of protest and civic engagement, the broader movement having played a significant role. See *id.* If we are not careful, however, the United States government can undermine the “principle jurisprudential foundations” of the Act. See Jonathan K. Stubbs, *Modern “Sappers and Miners”: The Rehnquist and Roberts Courts and the Civil Rights Act of 1964*, 18 RICH. J.L. & PUB. INT. 461, 462 (2015).

407. CHRISTOPHER SILVER & JOHN V. MOESER, *THE SEPARATE CITY: BLACK COMMUNITIES IN THE URBAN SOUTH, 1940–1968* 12–13, 76–77 (2015).

408. *Id.* at 11.

409. See F. Glenn Abney & John D. Hutcheson, Jr., *Race, Representation, and Trust:*

The Voting Rights Act in 1965 would come full circle twelve years after its ratification when Richmond would break all records by voting in a city council that was majority Black.<sup>410</sup> 1965 was also the same year that marked a historically significant moment of what some called “Black political independence.”<sup>411</sup> After the Voting Rights Act was passed, Blacks were able to mobilize politically and freely exercise their rights to vote in large numbers once legal barriers at the state and local level impeding this Fifteenth Amendment right were removed. Within a few years of the Act’s passage, in the South, the number of Blacks registered to vote increased exponentially.<sup>412</sup> The Voting Rights Act, which Virginia was part of, was important because it provided a golden opportunity for more people to participate in politics. The result was greater participation of Blacks in the June 14, 1966 election when Marsh ran for and was elected to city council.<sup>413</sup>

Marsh’s decision to become a civil servant is another area where his personal life impacted his professional behavior. Marsh initially got involved in politics and legislation because no one else would do so. Marsh was actively seeking several of his peers to run for city council because he felt there was a great need for better representation in Richmond’s local politics.<sup>414</sup> Marsh could not persuade L. Douglas Wilder or any of his contemporaries at the time to run for city council, and Marsh was running up against deadlines.<sup>415</sup> So, he decided to do it himself. He was disgusted at the Black council members already holding seats whose position was that everything was fine in Richmond’s Black communities and went along with the White power structure.<sup>416</sup> Marsh knew that everything was not fine in the local Black community. From

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*Changes in Attitudes after the Election of a Black Mayor*, 45 PUB. OP. Q. 91, 91–92 (1981).

410. See Julian Maxwell Hayter, *From Intent to Effect: Richmond, Virginia, and the Protracted Struggle for Voting Rights, 1965–1977*, 26 J. POL’Y HIST. 534, 554 (2014).

411. See SNCC: *What We Did*, STUDENT NONVIOLENT COORDINATING COMM. (SNCC) LEGACY PROJECT, <https://www.sncclegacyproject.org/we-were-sncc/what-we-did> [<https://perma.cc/XZ7P-6C3E>].

412. *Id.* at 539.

413. *New Council*, RICH. TIMES-DISPATCH, July 2, 1966, at 4; see also *City Councilmanic Campaign Draws Readers Comments*, RICH. TIMES-DISPATCH, June 10, 1966, at 22 (“Henry L. Marsh, III is an independent candidate who will bring to a deliberative body new, progressive and provocative ideas which will inure to the great benefit of the people and, if he finds himself on a ‘team’, will make the plays which are called for him by the people.”). This was the tone with which Marsh began his political career. Years later some would point to his inability to work on a “team” as one possible reason his term as mayor ended.

414. MARSH, *supra* note 1, at 84–85.

415. *Id.*

416. *Id.*

personal experience, Marsh could see what was coming next, and often integrated this insight into his litigation strategy. He saw the need for independent confident voices in policy making so he became one. He patterned himself after Hill, and therefore did not necessarily return to Richmond for politics, but he was willing to fill the void for the voice he thought necessary to help Richmond's Black communities.<sup>417</sup> Marsh ran for City Council thinking that he would only serve for two years, but ended up staying in some form of public office for twenty-five years.<sup>418</sup>

One of Marsh's motivations for being dogmatically uncompromising on some social issues was his belief that Black people were serving on the City Council who claimed they were for the Black community but held positions counter to their Black constituency.<sup>419</sup> One example Marsh recounts is Dr. Martin Luther King, Jr.'s assassination on April 4, 1968, in Memphis, Tennessee. Marsh asked City Council to allow the school children to view and hear Dr. King's televised funeral based on the assertion that King's assassination not only significantly affected Black children but all children country-wide.<sup>420</sup> City Council, including the other two Black Council members, voted down the proposal to allow students to watch King's funeral in the schools.<sup>421</sup> The board denied the request because King was a Baptist, and watching the funeral would violate the separation of church and state.<sup>422</sup> Their logic confounded Marsh since John Kennedy was a Catholic, and students were allowed to watch his funeral after his assassination.<sup>423</sup> Marsh felt that the other Black council members were not willing to push back against double standards and the White majority's oppressive views.

In his new seat on City Council, Marsh began to fight against the system created by those like Mr. Byrd and Mr. Robertson, who "fanatically opposed [the] progress of the colored man throughout their political lives."<sup>424</sup> Though only one of a number of his goals for social change, Marsh was purposeful in his focus to destroy the

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417. *Id.* at 85–88.

418. *Id.* at 85, 87–88.

419. *Id.* at 84–85.

420. *Id.* at 89.

421. *Id.*; see also James Woodson, *Council Backs Open Housing*, RICH. TIMES-DISPATCH, Apr. 9, 1968, at 1.

422. MARSH, *supra* note 1, at 89.

423. *Id.*

424. *Let's Vote as Citizens—Not as Whites or Negroes*, RICH. TIMES-DISPATCH, July 8, 1966, at 24.

Byrd Machine. Marsh learned while working at the Department of Labor that there were checks to see if the federal government was indeed discriminating against Blacks following Kennedy's election.<sup>425</sup> Marsh made note that there were no such checks under the leadership of Kennedy's predecessor, President Eisenhower.<sup>426</sup> This observation made clear to Marsh the realization that "who wins an election does matter."<sup>427</sup> On the other hand, soon after taking his seat on Council, Marsh addressed those in the crowd who were under fifty years old at the dedication of the Bill Robinson Playground, stating, "just because we are able to put people on City Council doesn't mean our problems are over."<sup>428</sup>

Marsh was elected again in the 1968 elections and chosen for Vice-Mayor in 1970.<sup>429</sup> In 1977 Marsh became the first Black mayor of Richmond.<sup>430</sup> Marsh was elected, in part, because the nine-member city council in 1977 was majority Black for the first time in Richmond's history.<sup>431</sup> In 1970, Tom Bliley became the mayor and recommended Marsh for Vice-Mayor; it was their practice that at-large City Council members elected the mayor and vice-mayor from those already selected.<sup>432</sup> As Vice-Mayor, Marsh represented the City at the state and national levels by serving as a board member for the National League of Cities. After becoming Mayor, Marsh also chaired the Arts and Cultural Committee, one of the four standing committees for the United States Conference of Mayors.<sup>433</sup>

This racial shift in Richmond politics resulted from the city's growing Black population, higher Black voter turnout and registration, and legal remedies that handcuffed the hands of Jim Crow. With a Black majority and Marsh at the wheel, the power shift signaled to the business and White elite that things were about to change.<sup>434</sup>

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425. Oliver Hill later campaigned for President Kennedy's brother, Jack Kennedy. MARSH, *supra* note 1, at 12, 14.

426. *Id.* at 12.

427. *Id.*

428. *Civic Involvement Urged by Councilman*, RICH. TIMES-DISPATCH, July 29, 1966, at 2.

429. MARSH, *supra* note 1, at 90.

430. *Id.* at 104.

431. *Marsh Seen as Choice to Become New Mayor*, RICH. TIMES-DISPATCH, Mar. 2, 1977, at 1.

432. MARSH, *supra* note 1, at 90.

433. *Id.* at 91.

434. *See id.* at 95–96.

When Marsh first started practicing law in 1961, Blacks had few opportunities to participate in politics.<sup>435</sup> Marsh was first introduced to the idea after his former classmate at Howard Law, Vernon Jordan, connected Marsh to the Southern Regional Council, based in Atlanta.<sup>436</sup> Jordan's idea was to have Blacks in some form of leadership on the Council.<sup>437</sup> The Southern Regional Council was a group of segregationist leaders who advocated for disenfranchised persons of color.<sup>438</sup> Therefore, after being oriented into law with Tucker in Richmond, one of Marsh's first orders of business was to go to Atlanta to begin networking. Little did he know, this would pave his path into politics.

Marsh also participated as a Board member of the Voter Education Project under Jordan, Wylie Branton's predecessor.<sup>439</sup> During Marsh's terms as a Councilman, he championed educational progress proposals, including opposing a school budget cut and instead allocated two million dollars to build the city's educational program.<sup>440</sup> Marsh and B. Addison Cephas Jr. pushed for an increase in pay for school custodial personnel, where wages started at less than \$2,500 per year.<sup>441</sup> During Marsh's terms on Council, he practiced law, taking school cases in many parts of Virginia.<sup>442</sup> The number of school cases began to come at an increasingly slower pace.<sup>443</sup> Marsh served as a member of the city council for eleven years, was appointed Vice-Mayor in 1970, and became the first Black mayor of Richmond in 1977.<sup>444</sup> His mayorship was a pinnacle of local and state politics. It represented a shift in politics for a city that had formerly served as the Confederacy's capital.<sup>445</sup>

After reflecting on his time in office, Marsh realized that navigating Virginia's racial politics and political arenas, in general, requires a thoughtful approach. Marsh was an accommodationist leader because he was not afraid of working with all sides to meet

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435. Biles, *supra* note 399, at 109.

436. MARSH, *supra* note 1, at 83.

437. *Id.*

438. *Id.*

439. *Id.*

440. *City Budget May Draw Fire at Hearing Tomorrow Night*, RICH. TIMES-DISPATCH, May 3, 1967, at 16.

441. *Id.*

442. MARSH, *supra* note 1, at 84.

443. *Id.*

444. *Id.* at 90, 104; *see also* Interview by Julian Bond with Henry L. Marsh, III, *supra* note 94.

445. *Capital Cities of the Confederacy*, AM. BATTLEFIELD TR., <https://www.battlefields.org/learn/articles/capital-cities-confederacy> [<https://perma.cc/D62Q-YFZX>].

his objectives. Occasionally, Marsh would find that his perceived “enemies” were not enemies at all; other times, he would find that there was no room for agreement.<sup>446</sup> In those cases, he had them close enough to monitor their behavior to inform preemptive counterattacks. It was not unusual to find Mayor Marsh playing tennis with White politicians to gain their support while at the same time rallying Black support to pass legislation that would move his agenda for social progress forward.<sup>447</sup> It was also often the case that Marsh found his way into affluent inner circles to increase his political reach.<sup>448</sup>

This strategy of using a second prong, legislation, to effect social change was necessary. Massive Resistance occurred after civil rights lawyers went through the effort to educate the public and the judiciary about the problems of discriminatory laws that perpetrated inequity in education and the blatant way school districts and other entities ignored new segregation laws. Marsh realized this and shifted from movement lawyering to legislating laws. Marsh committed himself fully as a civil rights lawyer, elected official, and leader of the Movement to change the law, reform the law, and promote educational equity.

#### IV. IMPLICATIONS

Marsh’s story as a Movement Lawyer is now told. In this Part, I conclude by offering the implications of this story, drawing lessons for those working for educational equity and those interested in contributing to social movements more broadly. The Part further answers why movement lawyering is important not just theoretically but practically. Marsh’s story offers insight about lawyering and the legal profession. It also speaks to legal and political interventions related to effectuating just educational practices.

##### A. *Strategies of Movement Lawyering*

This Article tracks Marsh’s school cases litigated from 1959 to 1975, a great majority being in the Fourth Circuit. Marsh’s first-hand account of his strategies related to enforcing integration laws required offer meaningful insights. These strategic notes and

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446. MARSH, *supra* note 1, at 33.

447. *Id.* at 93.

448. *Id.* at 92–94.



backstories that were not prevalent in the case law itself reveals how school districts often side-stepped integration through school closures and the presence of administrative red tape. Marsh's personal accounts are useful for understanding how to think about lawyering as a process.

Movement lawyering is different from other types of law practice, often using legal and political strategies to advance public interest advocacy.<sup>449</sup> Litigation brought about by movement lawyers as well as the strategies that they employ have, out of necessity, unique features.<sup>450</sup> This narrative demonstrates that Marsh did not see himself as a savior, but rather as a member of a greater community. There were also heroic elements that motivated the zeal that encompassed the heart of Marsh as a movement lawyer. Marsh revered the practice of law and considered it an esteemed privilege to wield his status as an attorney to help his people advance beyond the strongholds of systemic oppression. This is an important point for contemporary lawyers interested in this work.

In the case of achieving educational equity for Black Americans in the Commonwealth of Virginia in the face of massive resistance, the source of oppression included segregationist policy makers and individual school systems in Virginia's localities. Marsh's work highlighted these strategies, which included freedom of choice plans that were used to deny the full implementation of desegregation rulings by purposefully encumbering the admission processes for Black children.<sup>451</sup> Thus, only a token few were admitted to White schools. Tuition grants were another tool used to deny the implementation of laws calling for integration. These grants allowed for the use of public funding to pay for private schools for White children.<sup>452</sup> Another key strategy of segregationists was the use of pupil placement laws, which divested local school boards of the power to assign children to schools. This function was transferred to the State Board of Education. This tool was used to facilitate an extremely slow process. If left unchecked, this process would have taken as much as "four thousand years" to achieve complete integration.<sup>453</sup>

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449. See Susan D. Carle & Scott L. Cummings, *A Reflection on the Ethics of Movement Lawyering*, 31 GEO. J. LEGAL ETHICS 447 (2018).

450. See Cummings, *supra* note 125, at 1690.

451. See *supra* sections III(A)(2)(b), III(A)(3)(c).

452. See *supra* section III(A)(1)(d).

453. Ralph Lee Smith, *The South's Pupil Placement Laws: Newest Weapon Against Integration*, COMMENT. MAG. (Oct. 1960), <https://www.commentary.org/articles/ralph-smith/>

Litigation was the primary means by which the NAACP would counter these segregationists' strategies. The struggle for civil rights is long. While slavery was formally abolished in 1865, Jim Crow laws were enacted immediately thereafter and operated as a legal form of keeping freed Black people from participating as equal members of society.<sup>454</sup> Thus, Black people had never known what it was like to have equality in mainstream America. It may be surmised that Black people at-large held little hope for the achievement of true freedom. This bit of historical context helps one to understand that the cases brought against the educational establishment by movement lawyers like Marsh were part of a greater effort to enact change for the greater good. This desire kept these underpaid and overworked movement lawyers motivated. The desire in contemporary movement lawyers for social justice is not useless, but can be harnessed to develop the requisite "staying power" necessary to see small manifestations of social change.<sup>455</sup>

### B. *Staying Power*

Marsh also recalled how one edge they had over the opposition was "staying power," meaning Marsh and Tucker could outlast the defendants in these cases.<sup>456</sup> One of Marsh's Norfolk multi-year cases lasted almost twenty years, starting in 1963 and ending in 1982.<sup>457</sup> Marsh's strategy for agitating injustice was securing rights by winning cases and creating new legal precedents. Scholars debate whether litigation is an effective strategy for effectuating change before the 1970s. Some scholars suggest that using litigation to secure rights is a "myth of rights" because even if the courts mandate social equality, it may not be carried out by other government branches.<sup>458</sup>

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the-souths-pupil-placement-lawsnewest-weapon-against-integration [https://perma.cc/AB27-SE45].

454. See generally Katie R. Eyer, *The New Jim Crow Is the Old Jim Crow*, 128 YALE L.J. 1002 (2019); Chin et al., *supra* note 2; Gabriel J. Chin, *Jim Crow's Long Goodbye*, 21 CONST. COMMENT. 107 (2004).

455. MARSH, *supra* note 1, at 58.

456. *Id.*

457. *Id.*

458. See STUART A. SCHEINGOLD, THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE 6–7 (Univ. of Mich. 2d ed. 2004) (1974) ("The political approach . . . prompts us to approach rights as skeptics. Instead of thinking of judicially asserted rights as accomplished social facts or as moral imperatives, they must be thought of, on the one hand, as authoritatively articulated goals of public policy and, on the other, as political resources of unknown value in the hands of those who want to alter the course of public policy. The direct linking of rights, remedies, and change that characterizes the *myth of rights*

On the other hand, scholars show how litigation can ignite social change, stating how litigation can spark movements once the community understands that their actual plight is incongruent with the rights mandated by the court.<sup>459</sup> This type of mobilization can lead to political action, which can lead to real social justice.<sup>460</sup> Marsh, however, was not naive to the system's boundaries. Marsh used his commitment to the law and bar membership to spark change; he later turned to public office to legislatively enforce much of his early work as a civil rights attorney.

Litigation campaigns may have been a more fitting strategy for the classical civil rights period than it might be as a single tool for today's struggle. Marsh utilized a strategy was called "the lawyer-controlled litigation campaign" strategy where he would choose his plaintiffs.<sup>461</sup> The purpose of this was to identify the case with facts that would paint the claims in the most attractive light and facts that best frame the legal claim being made.<sup>462</sup> This strategy made the precedent setting *Green v. New Kent County* case a success. While this may not be the best strategy for today, the courage, self-sacrifice, and the will to outlast the opposition that was required then also remains today.

Movement lawyers then were facing nearly impossible odds. This was evidenced in Marsh's battle in Norfolk to integrate schools that took over twenty years. The NAACP had shifted its focus toward dismantling the resistance to segregation. Marsh was taking cases in Norfolk, Virginia, where he had a positive ruling from a local judge. The judge, succumbing to pressure, began to rule against Marsh in subsequent cases.<sup>463</sup> One such case was rooted in a bussing issue that hindered the integration of Norfolk schools. Marsh used the appeal as a strategic tool to move the case forward. It would take a substitute judge for Marsh to succeed in

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must, in sum, be exchanged for a more complex framework, the *politics of rights*, which takes into account the contingent character of rights in the American system."). Scholars also pushed back on this simplistic view of movement lawyers as not understanding the lack of correlation between litigation and change.

459. See, e.g., Ann Southworth, *Lawyers and the "Myth of Rights" in Civil Rights and Poverty Practice*, 8 B.U. PUB. INT. L.J. 469, 469 (1999) (asserting that the use of empirical research on civil rights and poverty lawyers shows that this characterization of civil rights and poverty lawyers is accurate).

460. See generally STEVEN C. TAUBER, *NAVIGATING THE JUNGLE: LAW, POLITICS, AND THE ANIMAL ADVOCACY MOVEMENT* (2016).

461. Mark Tushnet, *Some Legacies of Brown v. Board of Education*, 90 VA. L. REV. 1693, 1697 (2004).

462. *Id.*

463. See *supra* section III.A.2.b.

his Norfolk cases. Movement lawyers today face a similar uphill battle.

### C. *By Any Means Necessary*

Not all cases take twenty years to reach satisfactory conclusions. Nevertheless, as it relates to movement lawyering and equity in education, the levels of justice that have been reached so far have come as a result of attitudes that say the work must be done by any means necessary. This tenacious spirit has wrought systemic changes as movement lawyers have filled a number of rolls in the fight for justice. They have served on the front lines of activism, in churches, on boards and committees, and members of clubs and associations, acting as the glue holding the fight for freedom together.

The second Part of the Article follows Marsh's journey into city council, when he became Vice-Mayor, and when he became the first Black Mayor of the former capital of the Confederacy and then later a State Senator. As a legislator, he continued to work for educational opportunity and equity. He worked on the same issues from different positions of influence.

The career and activism of Marsh demonstrate how multipronged approaches have helped to establish a greater equity for all people, which becomes a part of the foundations of justice. As Marsh's contributions to a better society are assessed, a case can be made that the lawyers seeking to do this work today must take a multipronged approach using litigation and legislation is necessary to continue to make progress.

### D. *Lawyers Roles in Advancing Movements*

The lived experiences of accomplished leaders often serve as templates for those who were mentored by them, others who would follow behind them, and those of us who would study them. As an aside, hearing the colorful depictions of how to blaze trails from those who blazed them, rather than by the secondhand interpretations of scholars, especially those with no communal connection, is invaluable. When the story is told by the person who lived it, anecdotal and cultural nuances are preserved. The spirit behind motives can be discerned and a more realistic assessment of the price that was paid can be made.

Marsh identified with the challenges of the common man, as did many movement lawyers who were often underpaid and overworked, even though they were among the great minds of their day. They introduced the innovative strategies that helped Black people see advancements many would not dare to imagine. Marsh tells the story of the feeling of injustice he experienced as he was required to walk for miles to get to school while his White counterparts rode busses. Marsh speaks of the indignation that rested in his belly, leading him to become a person of courage and to visualize a life of destiny. Marsh would become a protégé of Oliver Hill, subsequently serving as one of the lawyers on the *Brown* case that would set a precedent for equality in education that would endure until this day. From there, he would go on to advance the cause of equality as a member of Virginia's legislature.

As one man, Marsh served as a community leader, legal advocate, and political representative. The truth of the matter is that there are a broad range of roles that must be filled to advance a cause that would address the plight of the approximately 22.6 million Black people that existed in 1970.<sup>464</sup> The movement for equality was advanced by influencers, financiers, teachers, pastors, common people, and the like. That said, Marsh's life demonstrates the duality between the voiceless and those who have a voice and the boots on the ground frontline activists and policy makers. This is demonstrative of the idea that lawyers can and should leverage the many avenues for engaging with and taking leadership in justice for the underserved.

#### CONCLUSION: THE POWER OF STRATEGY

Marsh's life encompasses several themes: the importance of choosing a strategy, facing resistance, and leveraging power. Henry Marsh represents the courage and intellectual preeminence of a movement lawyer who fought on the front lines for the desegregation of public schools and civil rights at-large. During the 1950s, the NAACP made sweeping strides for equality through overwhelming success in legal cases that would advance the causes of oppressed Black people. Some major wins included: reversing restrictive covenants, changing rules for White primaries, equal treatment in the judicial system, desegregating law schools and

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464. *WE THE AMERICANS: BLACKS*, U.S. DEPT OF COM. (Sept. 1993), <https://www.census.gov/prod/cen1990/wepeople/we-1.pdf> [<https://perma.cc/PFV4-3MRS>].

other higher learning institutions, and integrating public facilities including libraries and dining halls, housing, and transportation. Despite these advances, educational inequality remained a challenge for Black people. On May 17, 1954, the Supreme Court deemed the segregation of public schools unconstitutional.<sup>465</sup> Proponents of the ruling braced for a relatively slow transition of possibly two to five years to see real changes implemented after the verdict; they never dreamed that segregationists would defy the court's ruling to the extent that they did.

Marsh and other civil rights attorneys bravely took up the cause, fighting within the court system for more than a decade. In doing so, Marsh and others took center stage and placed Virginia in the middle of what would be one of the most divisive issues to face the southern states since the civil war. Rulings made in favor of enforcing desegregation and other victories came at a cost that only those on the front lines could ever know. But it was their sacrifice that provided a shift to more equal treatment under the law and vastly improved opportunities for Black people, particularly as it relates to equality in education.

The NAACP's and their movement lawyers' litigation strategy was a valid option because it could realize specific goals. Then, Marsh's and other NAACP lawyers' objectives included educating the public and judges about the educational inequities that existed related to Black people. Many White Justices and leaders feigned ignorance, and civil rights lawyers made compelling cases for equality, which resulted in new legal precedent against segregation. Today, the issue is more about a blatant disregard for the knowledge that previous generations of lawyers and scholars have posited about educational injustice and the maintenance of fundamental human rights for the disenfranchised. The resistance that ensued after the Court's rulings in favor of desegregation is evidence that social and educational movements must shift from a primary focus on the judicial regulation of equity to including a legislative regulation of equity and other social justice work.

Though there is still much work to be done, movement lawyers' legal and political advocacy has played a significant historic role in Black people's educational opportunities. During political independence, the strategy turned to Black leaders' election to office, hoping to legislatively sustain any educational progress and fully

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465. *See* *Brown v. Bd. of Educ.* (Brown I), 347 U.S. 483, 495 (1954).

actualize *Brown's* promise. All these activities occurred within a broader social movement. Today, lawyers must step up as advocates of civil rights more than ever. Representation in legislature is critical. Leaders on the frontlines of the Movement can strategically continue the struggle for educational justice, especially if armed with a historical understanding of the shoulders on whom they stand.