Tribute to Justice Thurgood Marshall

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I could not resist Dean Kelly's invitation to join you on this important day for the law school. The dedication of any library in our country is a significant event because libraries are very close to the core of our freedoms. That is particularly true of law libraries, the repositories of the record that evidences whether judges have justified Madison's faith that "independent tribunals of justice will consider themselves in a peculiar manner the guardians of the great rights of mankind secured under the Constitution."

The naming of your new library in honor of my colleague Mr. Justice Thurgood Marshall adds a very special meaning to this occasion, for it presents a uniquely appropriate opportunity for reflection upon and assessment of his enormous impact upon American jurisprudence. Perhaps no advocate of our time has more profoundly altered the course of our national development. His accomplishments in the school desegregation litigation "removed our society from its collision course with the disaster of institutional racism in our public institutions and committed us to the process of seeking, however haltingly, the elusive goal of human equality." Particularly momentous for our constitutional jurisprudence, one effect of his work was to change the manner in which issues of constitutional doctrine are litigated and adjudicated within the American judicial system. Of course, it has always been true that important aspects of the most fundamental issues confronting our democracy ultimately end up in the courts, particularly the Supreme Court, for judicial determination. It has been correctly observed that they are the issues upon which our society, consciously or unconsciously, is most deeply divided. They arouse the deepest emotions. Their resolution — whatever it be — often writes our future history. The phenomenon of the last half century is this: constitutional doctrine has changed from a primary concern with contests between state and federal authority, and definitions of the powers of the federal executive and legislative branches, to a distinct emphasis upon the interpretation and

* Associate Justice, United States Supreme Court. This address was delivered at the dedication of the Thurgood Marshall Law Library, University of Maryland School of Law, Baltimore, Maryland on October 9, 1980.
1. 1 Cong. Deb. 439 (1834).
application of the constitutional limitations upon governmental power — embodied primarily in the Bill of Rights — that secure the blessings of liberty for the individual citizen. Thurgood Marshall's advocacy was a major influence furthering this change.

None of us in the law, whether teacher, practitioner or judge, can deny that until fifty years ago law often gave cause for complaint that it had isolated itself from the boiling and difficult currents of life as life is lived. This was not so before the nineteenth century. When the common law flourished greatly, law was merged, perhaps too thoroughly, with the other disciplines and sources of human value. Custom, for example, was the cherished source of the common law. And what was declared custom but the accumulated wisdom on social problems of society itself? The function of law was to formalize and preserve this wisdom — law certainly could not purport to originate it. However, under the influence of legal thinkers who dominated legal thought in the nineteenth century, the vogue of isolating law from the other disciplines, particularly from philosophy that was not expressly legal philosophy, had its day. This was admittedly a notion of law wholly unconcerned with the broader extralegal values pursued by society at large or by individuals. Law lived in a heaven of abstract technicalities and legal forms, and found its answers to human problems in an aggregation of already existing rules, or found no answers at all. The substantive problems of human living were left for adjustment to the psychologists, sociologists, educators, economists, bankers and other specialists. But Thurgood Marshall's brand of advocacy taught, and very effectively taught, that law must be a living process responsive to changing human needs. The shift must be away from fine-spun technicalities and abstract rules. He helped persuade us that the vogue for positivism in jurisprudence — the obsession with what the law is, which leaves no room for a choice between equally acceptable alternatives — must be replaced by a jurisprudence that recognizes human beings as the most distinctive and important feature of the universe which confronts our senses, and that recognizes the function of law as the historic means of guaranteeing that pre-eminence. In a scientific age this jurisprudence must ask, in effect, what is the nature of the universe with which human beings are confronted: why are human beings important?; what gives them dignity?; what limits their freedom to do whatever they like?; what are their essential needs?; whence comes their sense of injustice?

Perhaps you may detect, as I think I do, something of the philosophy of St. Thomas Aquinas in this view of jurisprudence. Call it a resurgence, if you will, of concepts of natural law. But no matter. St. Thomas, you will remember, was in complete agreement with the Greek tradition, both in its Aristotelian and Platonic modes, that law must be
concerned with seeing things whole, that law is but a part of the whole human situation and draws its validity from its position in the entire scheme of things. It is folly to think that law, any more than religion or education, should serve only its own symmetry rather than ends defined by other disciplines.

Law teaching too has come to emphasize the knowledge and experience of the other disciplines, in particular those disciplines that examine or explain the functioning and nature of our society, and the aspirations and needs of the individuals who compose that society. For law to be effective, Thurgood Marshall has insisted, it must conform to the world in which it finds itself. That world is given; law does not make it. This brand of jurisprudence does not confine men of the law to lawsuits and courts. It calls for their involvement, personal commitment and participation in the everyday job of providing skills to assist in the solution of the extralegal problems of human beings who have been denied their fair share of the rewards of our society.

The shift from emphasis upon abstract rules has had profound importance for judicial decision making. A shift in the basic philosophy of law results in an epoch-making difference in the way a concrete case is decided. Clearly, cases alone, or even cases together with the Bill of Rights and the legislative statutes, are not enough; the philosophy of law which the judge brings to the cases, the Constitution, the Bill of Rights, and the legislative statutes is equally important. In fact, that philosophy is all-important since it determines the interpretation that is put upon the Bill of Rights, the legislative statutes, and the cases. Now I do not mean that the judge is at large to decide according to his personal predilections. Cardozo spoke for all judges when he observed that

... the range of free activity is relatively small. We may easily seem to exaggerate it through excess of emphasis ... complete freedom — unfettered and undirected — there never is. A thousand limitations — the product some of statute, some of precedent, some of tradition or of an immemorial technique — encompasses [sic] and hedge us even when we think of ourselves as ranging freely and at large.\(^3\)

Thurgood Marshall, too,

despite his deep interest in seeing constitutional doctrine reflect the realities of American life, has recognized, for the most part, the limitations of the judicial process. His deep feelings for the rights of

minorities rarely impede his adopting "a reasoned approach to Constitutional problem-solving." In his address to the Conference on World Peace Through Law, he noted that the legitimacy of the judicial process is grounded in the tradition that "unlike the other branches of government, judges are required to give reasons for their decisions and to justify those decisions by reference to some broader principle."\(^4\)

Yet, for Thurgood Marshall, ultimately in those cases where Constitution or statute does not clearly decide the case, the judge perforce makes a value judgment, deciding according to his own intellect, experience and conscience. For him the complex phenomenon which lawyers know as law is an always unfinished product. It may be compared to a tapestry the weaving of which is never done, which repeats many of the patterns of the past but which constantly adds new patterns and variations of old patterns.

However, we must keep in mind that although the words of the Constitution are binding, their application to specific problems rarely has been easy. The founding fathers knew better than to pin down their descendants too closely. They sought to write down enduring principles rather than petty details. Thus it is that the Constitution does not take the form of a litany of specifics. There are therefore very few cases in which the constitutional answers are clear, all one way or all the other. Particularly difficult are the cases that raise conflicts between the individual and governmental power — the area which has particularly felt the impact of Thurgood Marshall's advocacy, and which today primarily absorbs the Court's attention. The conflicts of competing interests in these cases account for the great bulk of today's cases and controversies. This proves over and over again that, in a real sense, the calendar of the Supreme Court at any time is a fairly reliable mirror of the issues with which our society is struggling. Certainly we may expect not lesser but greater implication of the various constitutional guarantees designed to protect individual freedom from repressive governmental action, federal and state. Of course, the federal system's diffusion of governmental power has the purpose of securing individual freedom. But this is not all the Constitution provides to secure that end. There are also explicit provisions to prevent government, state or federal, from frustrating the great design. It is basic to our way of life that the ultimate protection of individual freedom is found in judicial enforcement of these constitutional guarantees. The reapportionment cases are a good illustration. Freedom of a state's citizens to experiment with

\(^4\) Ripple, \textit{supra} note 2, at 483.
their own economic and social programs is hardly meaningful if the political processes by which such programs must be achieved are controlled by only some of the people. The ideal is government of all the people, by all the people, and for all the people.

Similarly, decisions in the gender and racial discrimination cases have applied the equal protection clause to prevent states from discriminating against citizens on the basis of their sex or the color of their skins. Equal protection of the laws means equal protection today, whatever else the phrase may have meant in other times. Judges simply cannot escape their responsibility for the ultimate definition and application of that constitutional guarantee. In the same area of responsibility falls, I suggest, the series of decisions extending many of the guarantees of the first eight amendments to the states. The Bill of Rights is the primary source of expressed information as to what is meant by constitutional liberty. Its safeguards secure the climate which the law of freedom needs in order to exist. It is true that the first ten amendments were added to the Constitution to operate solely against federal power. But the fourteenth amendment was added in 1868 in response to a demand for national protection against abuses of state power, and it has been the channel for extending the protection of the safeguards of the Bill of Rights against the states.

The common thread of these holdings — most arrived at after Thurgood Marshall had helped so prodigiously to awaken the Court to the reality that the protections were honored not by their enforcement but by their neglect — had been the conclusion that the enforcement of the constitutional guarantees is essential to the preservation and furtherance of our free society. Some of these decisions have indeed aroused concern, particularly those that affect the processes of state criminal prosecutions. It cannot be denied that some decisions do restrict the latitude of choice open to the states in this area. But that is a price which must be paid for guarantees deemed to have a place among those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions. The genius of the Constitution resides not in any static meaning that it had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs.

We have learned that what our constitutional fundamentals meant to the wisdom of other times cannot be their measure to the vision of our time. Our descendants will learn that what those fundamentals mean for us cannot be the measure to the vision of their time. The constant for Americans, for our ancestors, for ourselves, and we hope for future generations, is our commitment to the constitutional ideal of
libertarian dignity protected through law. Crises in prospect are creating, and will create, more and more threats to the achievement of that ideal — more and more collisions of the individual with his government. The need for judicial vigilance in the service of that ideal will not lessen. It will remain the business of judges to protect fundamental constitutional rights which will be threatened in ways not possibly envisioned by the Framers. Justices yet to sit, like their predecessors, are destined to labor earnestly in that endeavor — we hope with wisdom — to reconcile the complex realities of their times with the principles which mark a free people. As the nation moves ever forward towards its goals of liberty and freedom, and as new and different constitutional stresses and strains emerge, the role of the courts will be ever the same — to justify, I repeat, Madison’s faith that “independent tribunals of justice will consider themselves in a peculiar manner the guardians of constitutional rights.”

Judges, like other human beings responsible for other human institutions, are of course on the dubious waves of error tossed. Yet, as has been said, the soul of a government of laws is the judicial function, and that function can only exist if adjudication is understood by our people to be, as it is, the essentially disinterested, rational and deliberate element of our society.

This library houses Thurgood Marshall’s monumental contributions to the jurisprudence that has breathed new life into the constitutional protections for all individuals, including the disadvantaged, the poor, the oppressed minorities. That contribution is embedded in decisions of cases in which he prevailed as advocate and in decisions of cases in which his role was that of judge and justice.

As advocate, he argued alone in the Supreme Court for the NAACP Legal Defense and Education Fund the fourteen trail-blazing cases that started this nation on the road to the end of racial discrimination. He was on the prevailing side in all but three of those cases. He also participated on the brief in another fourteen significant racial discrimination cases whose decisions reinforced the same progress to that end.

I so well remember that my former colleagues, Hugo Black and Felix Frankfurter, who did not often agree, were in complete agreement that the submissions of Thurgood Marshall as advocate were among the best presented to the Court in their time.

As Solicitor General of the United States Thurgood Marshall personally argued eighteen cases and prevailed in fourteen. The range of issues was extraordinarily wide and his success again attested to his high skill in advocacy. The high quality of his advocacy richly earned

5. 1 CONG. DEB. 439 (1834).
him his reputation as one of the great advocates in the history of the Court.

Only recently I read this: because of the sensitive and skilled way that Thurgood Marshall structured the desegregation litigation it is now clear that the school desegregation cases have had a very great influence on the manner in which American courts perform their task. Consequently, this impact will significantly affect the future ability of other Americans to find the same protection in the law that Brown provided for this now-famous nine-year-old girl from Topeka, Kansas.6

In a similar vein, then Chief Judge Irving R. Kaufman, a colleague of Justice Marshall on the Court of Appeals for the Second Circuit, recalled:

My most abiding memory of Thurgood on this court was his ability to infuse his judicial product with the elements of the advocate’s craft. As an attorney Thurgood stressed “the human side” of the case. As a judge he wrote for the people. (And would not we all be enriched if more judges exhibited this concern for the consumer?) He possessed an instinct for the critical fact, the gut issue, born of his exquisite sense of the practical. This gift was often cloaked in a witty aside: “There’s a very practical way to find out whether a confession has been coerced: ask, how big was the cop?” But behind this jovial veneer is a precise and brilliant legal tactician who, to quote his 1966 Law Day speech in Miami, was able “to shake free of the 19th century moorings and view the law not as a set of abstract and socially unrelated commands of the sovereign, but as an effective instrument of social policy.” Thurgood was able to sear the nation’s conscience and move hearts formerly strangled by hoary intransigence. And, because of him, we are all more free.7

And I can personally attest that, as has been said, on the Supreme Court Marshall seems to be consciously attempting to assist his brethren in understanding those facets of American life upon which their decisions impact but about which some have little first hand knowledge. In United States v. Kras,8 for example, the Court held that

6. Ripple, supra note 2, at 472.
an indigent could be required to pay a fee to file a voluntary petition in bankruptcy. Dissenting, Justice Marshall wrote:

It may be easy for some people to think that weekly savings of less than $2 are no burden. But no one who has had close contact with poor people can fail to understand how close to the margin of survival many of them are. A sudden illness, for example, may destroy whatever savings they may have accumulated, and by eliminating a sense of security may destroy the incentive to save in the future. A pack or two of cigarettes may be, for them, not a routine purchase but a luxury indulged in only rarely. The desperately poor almost never go to see a movie, which the majority seems to believe is an almost weekly activity. They have more important things to do with what little money they have — like attempting to provide some comforts for a gravely ill child, as Kras must do.

It is perfectly proper for judges to disagree about what the Constitution requires. But it is disgraceful for an interpretation of the Constitution to be premised upon unfounded assumptions about how people live.9

Thurgood Marshall as Supreme Court Justice continues to give bench and bar a further lesson in the art of making the constitutional decision — making process reflective of societal values.

Marshall remains very much the same person he was as a litigator. He retains an ability to gauge instinctively the pragmatic limits of judicial power. He insists that constitutional doctrine be based on reality. This daily insistence on attention to the basics of constitutional litigation makes him a model for those who now bring to the courts the causes of the unborn, the physically handicapped, the mentally ill and others for whom sterile constitutional analysis of the plessy variety remains a formidable barrier.10

If his judicial philosophy insists that law be gauged to current realities confronting people, it is also a response to the lessons of the past.

The university and the law school truly honor themselves in dedicating this magnificent library in honor of a great American.

9. Id. at 460.
10. Ripple, supra note 2, at 484.
Thurgood Marshall played an important role in my judicial education. When I was appointed to the federal bench in Louisiana in 1949, I was only dimly aware of the attacks being mounted against the edifice of segregation. Although I believed that segregation was wrong, I had little sense of the role the courts might play in confronting this injustice. But when Thurgood Marshall, who was then general counsel for the NAACP, appeared in my courtroom to try the Louisiana State University Law School case, my education began. Pursuant to state law, Louisiana maintained L.S.U. Law School for whites, and Southern University Law School for blacks. Brown v. Board of Education had not yet been decided, so the case was being tried under the "separate but equal" doctrine of Plessy v. Ferguson. Marshall soon convinced me that Southern University was not only separate from, but also unequal to, L.S.U. Law School. I crossed the Rubicon when I decided that case.

I vividly remember Marshall's cross-examination of one of the deans of Southern Law School. Earlier in the trial, counsel for the State had emphasized that Southern Law School, unlike L.S.U. Law School, was air-conditioned, clearly an advantage in sultry Louisiana. Marshall asked the Dean to describe in detail the building in which Southern was housed. The Dean testified that it was a large wooden frame structure with five floors housing several parts of the University, and that the Law School was on the fifth floor. Marshall then asked the witness to describe what was on each of the other floors, which he did. Marshall then asked the witness whether each of the first four floors was air-conditioned like the fifth. The answer as to each floor was "No." Feigning surprise at the Dean's answers, Marshall then asked the witness what was immediately above the fifth floor. His answer: "The roof." Marshall then suggested to the Dean that the Law School was really housed in the attic of the building. The Dean readily agreed, saying, "That's why it is air-conditioned."

Marshall's cross-examination of the Southern Law School dean was typical of his courtroom performances: he was always straight-forward, good-humored, and incisive. During my years as a district judge, I encountered few lawyers as skilled in their craft. He had an uncanny

* Judge, United States Court of Appeals for the District of Columbia Circuit.
3. 163 U.S. 537 (1896).
ability to identify the crucial facts in a case, and to describe legal issues in clear, commonsense terms. And he was able to do this in a way that conveyed, often quite dramatically, the realities of segregation — how it affected the daily lives of black Americans. His efforts in the Law School case, as well as in the other cases he tried in my courtroom, helped persuade me that if the law did not prohibit racial discrimination, then the law was wrong. Two years after the Louisiana law school case the Supreme Court issued its historic decision in *Brown v. Board of Education*.

I was not the only judge who was introduced to the harsh realities of racism by Thurgood Marshall. As the NAACP's general counsel, he orchestrated the long campaign to end segregation in the schools. That campaign was brilliant, a masterpiece of litigation strategy. Beginning with an attack on segregation in professional schools, then moving on to confront segregation in elementary schools, Marshall carefully laid the foundation for reversal of *Plessy v. Ferguson*. Apparently tireless, he traveled among dozens of states, discussing tactics with local lawyers, encouraging frightened parents, trying cases. Marshall lost many of these preliminary skirmishes. But, ultimately, he won the war. As counsel in *Brown v. Board of Education*, he convinced the Supreme Court that "separate but equal" could never really be equal, and that segregated education must end.

The significance of Marshall's victory in *Brown v. Board of Education* cannot be overstated. As a matter of constitutional law, *Brown* may be the most important decision of our time. It breathed new life into the equal protection clause, and demonstrated to lawyers and judges that the law could be a powerful tool for social reform. But by helping to secure a victory in *Brown*, Marshall did more than contribute to the development of constitutional jurisprudence. The message of *Brown*, that segregation of public institutions must end, affected the lives of all Americans. We were reminded that our nation had its origin in a commitment to individual equality. And we learned that, because of that commitment, racism would no longer be tolerated. It is true that some have been less receptive to this lesson than others; discrimination continues to flourish. But after *Brown*, even diehard segregationists must realize they are battling against the force of law.

The list of Thurgood Marshall's achievements does not end with his victory in *Brown*. It is difficult to imagine a more spectacular legal career. After *Brown* was decided, Marshall spent several years fighting to ensure that its mandate was enforced. In 1961 he was appointed to the United States Court of Appeals for the Second Circuit. Later, he became Solicitor General under President Johnson. Finally, in 1967, he
moved to the Supreme Court. Throughout, he has remained firm in his belief that the law, used effectively, can achieve a more just society.

If, as I have always believed, one measure of a judge's work is his compassion, then Thurgood Marshall is a great judge. His judicial product reflects not only a fine legal mind, but the same sensitivity to human needs and social realities that characterized his work for the NAACP. He is a steadfast opponent of legal abstractions that fail to recognize the facts of life: that the poor really do live on the brink of financial disaster, that the poor as defendants in criminal cases do not receive equal justice with the rich, that minorities really do lack power, that, considering the influence of money in the political process, the one man-one vote principle on which this democracy was founded is a pious fraud. Because he is only one of nine Justices, and because he wants to push the law further than some of the other Justices would like it to go, he often speaks in concurrence or dissent. Even so, his insistence that the Court consider the real impact of its decisions has had a powerful and beneficial impact on the work of that institution.

Thurgood Marshall, as much as any man of our time, has served the nation. Throughout his career, as a lawyer and as a judge, he has acted to ensure that law serves the ends of justice and goodness. I am certain he would say that he has not been as successful as he would like. But the fact remains that he has achieved at least a large part of what he set out to achieve. As a result, he has helped make our society a better, more decent, place in which to live.
Growing up is a process of having one's heroes rendered less inspiring. For me, Thurgood Marshall was the exception.

A little over twenty-five years ago I made the familiar high school trip to Washington, D.C. My classmates and I took in all the monuments. We even managed to catch a few minutes of the Supreme Court in session. We entered in the middle of an oral argument, and though we did not fully understand what was transpiring in the courtroom, no one could miss the sense of drama. A tall black lawyer was addressing the Court, and all eyes — set in a sea of white — were fixed on him.

The lawyer spoke with a very special eloquence. He was dignified and proper, but his words were accessible to all. The formalisms that so often mask the law and make it forbidding were gone. The case was put in simple, clear, powerful words. These words were uttered with patience, with a steel, almost icy serenity, yet beneath them was an urgency, a longing, that could not help but move the Justices and the audience. The moment was electrifying — it infused me with a spirit and determination that helped shape my life, it captured the nation. Afterward I learned that the case was called *Brown v. Board of Education* and the lawyer Thurgood Marshall.

A decade later we met again, this time on a somewhat more direct basis. The lawyer had recently become a judge, of the Court of Appeals for the Second Circuit, and I became his law clerk. I was given a chance that was both extraordinary and risky, to work for a hero of my youth — though, until now, I never dared to tell him how much he meant to me. He is not that kind of person — he is open, always joking, and warm, but with little tolerance for explicit displays of sentiment ("knucklehead" is his favorite word of endearment).

The qualities I saw in the courtroom in the 1950s filled his chambers in the 1960s, and there was more. There were his stories — that conveyed to me the terror, the sacrifice, and, once in a while, even the joy of being a civil rights lawyer in the 1930s and 1940s, still a time of the most crude and brutal racism. There were the daring moments on the bench — when he "overruled" some Supreme Court precedents, those, he said, of an earlier age and likely to be repudiated by the

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Supreme Court itself whenever it got around to the task;\(^1\) or when he questioned a decision of an even higher authority for the Second Circuit — L. Hand.\(^2\) There were also our disagreements over the cases — extraordinary arguments, in which his vision of the Constitution and my recently acquired education at the Harvard Law School — a place then consumed by Wechsler’s "neutral principles" — did not exactly mesh. In time I learned, I learned a lot, about the law and about him.

Thurgood Marshall has probably had the most stunning legal career of the twentieth century — the lawyer in Brown, a turning point in American jurisprudence; a judge of the Second Circuit; later the Solicitor General of the United States; and still later a Supreme Court justice. Clearly he was on the side of history (though that was not apparent to all — his grandmother greeted his decision to study law with an insistence that he learn to cook, so that he could be sure of a job). But there was a cause more personal to the man, a vision of American society that sees law as the central instrument of reform and protection of human rights as the highest purpose of the Constitution. This was the vision that led him to the NAACP and sustained him through the harassment and defeats of his career. This was the vision that found expression in his work as a civil rights lawyer and also as a judge.

Thurgood Marshall’s commitment to that vision was not shared by all his colleagues on the Second Circuit. Now and then a civil rights case came before that court in the 1964-65 term, the year of my clerkship, and the judge took his stand — in dissent.\(^3\) A more frequent

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3. People v. Galamison, 342 F.2d 255, 275 (2d Cir. 1965), cert. denied, 380 U.S. 977 (1965) (Marshall, J., dissenting) (arguing that demonstrators who disrupted traffic to N.Y. World’s Fair should be given opportunity to amend removal petitions and have district court conduct full hearings); Ephraim v. Safeway Trails, Inc., 341 F.2d 815, 820 (2d Cir. 1965) (Marshall, J., dissenting) (arguing that a bus company that picked up passengers in the New York Port Authority should be held liable for damages suffered by a black woman
area of disagreement centered on the rights of the individual in the criminal process — *Mapp v. Ohio*, 4 *Gideon v. Wainwright*, 5 *Fay v. Noia*, 6 and *Escobedo v. Illinois* 7 (the stepping stone to *Miranda v. Arizona*). 8 Some of the judges on the Second Circuit, particularly those in positions of leadership in the bar and the academy, received these decisions of the Warren Court only in the most grudging fashion. Thurgood Marshall, on the other hand, insisted that these decisions be taken at their full value — not in obedience to a higher authority, but because they embodied the right principles of our constitutional order. He took these stands repeatedly, and courageously, at some discomfort — was no fun for a new judge, one whose appointment took the Senate almost a year to confirm, one with no ties to Wall Street, then the spiritual center of the Second Circuit, repeatedly to raise his voice in protest, against the prominent, the established, the recognized. He spoke on behalf of the Supreme Court, true, but in the early 1960s that institution was at the center of controversy and criticism — it needed support and had little to confer. As it turned out, history was once again on Thurgood Marshall’s side — he moved on to be Solicitor General at the end of the year, giving up the tenure of his judgeship because he too could not say “no” to LBJ.

Not long ago I took my daughters to Washington, D.C. We made a stop at the Supreme Court, and I introduced them to Thurgood Marshall, not in the courtroom, but now in his chambers. He was his usual jovial self, yet beneath the surface, beneath the joking and the stories (which were retold for my daughters), one could see the grandeur of the man who had stood in the courtroom twenty-five years ago, with that same sense of struggle and determination, now resisting the efforts of the Burger Court to undo many achievements of *Brown* and the Warren Court era. One could also see, and marvel at, his continued capacity and effort to recharge a new generation, even though the present state of the law could not have been for him a source of satisfaction or optimism — so much that he stands for is in jeopardy.

That is why it is so fitting to honor Thurgood Marshall at this time. Not because we are at another anniversary — he could not care less about things like that (it pained him to sit for the sculpture Baltimore

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erected for him, and not simply because it is so near the one the city erected for its other justice, Taney). Rather, because we are at a time when there is a need to celebrate the personal qualities that Thurgood Marshall exemplifies — courage sustained by a vision of the centrality of human rights to our constitutional order. In honoring him we express the hope that his vision will once again be triumphant. We renew his spirit and ours, and thus do what we can to make certain that Thurgood Marshall will once again be on the side of history.
THURGOOD MARSHALL: LAWYER AND JUSTICE

LOUIS H. POLLAK*

I.

De Tocqueville's most celebrated observation about the role of law in the life of the new republic — that it was customary for American lawyers to bring great issues of public policy to court — was not a report of a new phenomenon: In 1734, long before Americans had become a nation, Philadelphia's Andrew Hamilton had journeyed to New York to conduct the successful defense of John Peter Zenger, printer-publisher of the New York Weekly Journal, against charges of seditious libel, and had thereby "first established in English and American law the freedom of the press." By the mid-1830's, when de Tocqueville's great work was published, the process which had been tentative and sporadic in the eighteenth century was a major ingredient of the American system of government. Thus, Daniel Webster, the archetypical American lawyer, had already brought to the Supreme Court the momentous public issues embodied in The Dartmouth College Case, McCulloch v. Maryland, Gibbons v. Ogden, and Charles River Bridge, and he was to follow these with, inter alia, Swift v. Tyson, Vidal v. Philadelphia [the Girard Case], and Luther v. Borden.

Since Webster's death, no courtroom lawyer has attained his unchallenged dominion. But two later masters of the courtroom —

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* United States District Judge for the Eastern District of Pennsylvania.

1. Inscription in the garden in Independence Mall which the American Bar Association dedicated to Andrew Hamilton's memory in 1976, as part of the bicentennial exercises.


7. 43 U.S. (2 How.) 127 (1844).


9. Able as he was, Webster may have been an iota less transcendent an advocate than he believed himself to be: After the decision in Gibbons v. Ogden, in which he and Attorney General William Wirt were victorious counsel, Webster observed that "The opinion of the Court, as rendered by the Chief Justice, was little else than a recital of my argument. The Chief Justice told me that he had little to do but to repeat that argument, as that covered the whole ground. And, which was a little curious, he never referred to the fact that Mr. Wirt had made an argument. He did not speak of it once. . . . That was very singular. It was an accident, I think — Mr. Wirt was a great lawyer, and a great man. But sometimes a man gets a kink and doesn't hit right. That was one of the occasions. But that
while not on a par with Webster — achieved a deserved public preeminence not accorded any other member of the bar. One was Clarence Darrow. The other was and is Thurgood Marshall.

The most significant of Clarence Darrow's extraordinary roster of cases was his defense of a Tennessee school teacher, John T. Scopes, against the charge that he had violated Tennessee law by teaching about evolution. The prosecution of Scopes, in the small town of Dayton in July of 1925, was at the time widely regarded as "The World's Most Famous Court Trial." Darrow's principal adversary was the foremost orator of his time — a former Secretary of State and Democratic Presidential nominee — William Jennings Bryan.

Thurgood Marshall's greatest triumph — assuredly the most important litigation of any kind in any court since the Civil War — was *Brown v. Board of Education*. Marshall's principal adversary was the foremost appellate lawyer of his time — a former Ambassador to the Court of St. James and Democratic Presidential nominee — John W. Davis.

One suspects that neither Bryan nor Davis really understood — that is to say, fully understood in historic and philosophic terms — the lawsuit he had in charge. Yet Bryan won, whereas Davis, of course,

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was nothing against Mr. Wirt." 1 *Warren, The Supreme Court in United States History* 610–11 (1922). Another view of Chief Justice Marshall's opinion in *Gibbons v. Ogden* is that Webster overstated his own contribution, understated Wirt's and ignored the independent contribution of the Chief Justice.

10. This was the title of the verbatim record, commercially published by the National Book Company. The public thronged the trial. Among the huge cohort of journalists covering this event which commanded international interest were such veterans as Mencken and such neophytes as Adlai Stevenson.


*Brown v. Board of Education* is the celebrated caption for four distinct lawsuits — each testing a state school segregation statute (the four states were Delaware, Kansas, Virginia and South Carolina) — consolidated in the Supreme Court for argument in 1952, reargument in 1953, and further argument as to remedy in 1954. Marshall was commander-in-chief of plaintiffs' counsel in all four lawsuits, but of course the burden of arguing these consolidated appeals was shared with able co-counsel. In the crucial 1953 reargument, Marshall and Spottswood W. Robinson, III (now Chief Judge Robinson of the Court of Appeals for the District of Columbia) shared the arguments in *Briggs v. Elliott*, from South Carolina, and *Davis v. County School Board of Prince Edward County*, from Virginia.

12. At the 1952 argument, Davis defended the South Carolina school segregation statute, and at the 1953 reargument, Davis' brief was extended to cover the Virginia statute as well, putting him in direct confrontation, as to both appeals, with Marshall and Spottswood W. Robinson, III. See note 11 *supra*. It seems a fair surmise that the most influential moving spirit behind Davis' retainer was the Governor of South Carolina,
lost. But fuller understanding would not have availed Davis. To what Marshall said in his Supreme Court peroration there was no response:

They can't take race out of this case. From the day this case was filed until this moment, nobody has in any form or fashion, despite the fact I made it clear in the opening argument that I was relying on it, done anything to distinguish this statute from the Black Codes, which they must admit, because nobody can dispute, say anything anybody wants to say, one way or the other, the Fourteenth Amendment was intended to deprive the states of power to enforce Black Codes or anything else like it.

We charge that they are Black Codes. They obviously are Black Codes if you read them. They haven't denied that they are Black Codes, so if the Court wants to very narrowly decide this case, they can decide it on that point.

So whichever way it is done, the only way that this Court can decide this case in opposition to our position, is that there must be

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James F. Byrnes — former Senator, "Assistant President", Secretary of State, and Justice of the Supreme Court.

Richard Kluger, in Simple Justice, has described the closing minutes of Davis' 1953 reargument, which was to be his last appearance ever in the Supreme Court:

As he [Davis] neared the end of his argument, the drain on him became apparent to Chief Justice Warren, who looked down on the great old advocate from the distance of just a few feet. "Mr. Davis was quite emotional," Warren recalled later. "In fact, he seemed to me to break down a few times during the hearing." With deep conviction, Davis wound up pleading for the integrity of states' rights and the good intentions of his client. "Your honors do not sit, and cannot sit, as a glorified board of education for the state of South Carolina or any other state," he declared. South Carolina had not come before the Court "as Thad Stevens would have wished — in sack cloth and ashes. . . . It is confident of its good faith and intention to produce equality for all of its children of whatever race or color," as it had done in equalizing the schools of Clarendon County. So much had been gained in race relations, he said, adding.

I am reminded — and I hope it won't be treated as a reflection on anybody — of Aesop's fable of the dog and the meat: The dog, with a fine piece of meat in his mouth, crossed a bridge and saw [his] shadow in the stream and plunged in for it and lost both substance and shadow.

Here is equal education, not promised, not prophesied, but present. Shall it be thrown away on some fancied question of racial prestige?

Thurgood Marshall remembered seeing tears on the cheeks of John W. Davis as he turned away from the Court for the final time in his life. Attorney General Lindsay Almond of Virginia, sitting at the counsel table with him, recalls that Davis was emotionally overwrought at the end. He had stated the South's case as effectively as it could be done. But his day was past. "He thought the case could be viewed as a strictly legal matter," reflects Robert Figg, who had argued Briggs in Charleston. "I don't think he ever realized the swirl of social and political events affecting it."


13. See Scopes v. State, 154 Tenn. 105, 289 S.W. 363 (1927), upholding the anti-evolution statute but setting aside Scopes' conviction on other grounds. The Tennessee Supreme Court's pronouncement that the teaching of evolution could be proscribed by law retained some modest vitality until Epperson v. Arkansas, 393 U.S. 97 (1968).
some reason which gives the state the right to make a classification that they can make in regard to nothing else in regard to Negroses, and we submit the only way to arrive at this decision is to find that for some reason Negroses are inferior to all other human beings.

Nobody will stand in the Court and urge that, and in order to arrive at the decision that they want us to arrive at, there would have to be some recognition of a reason why of all of the multitudinous groups of people in this country you have to single out Negroses and give them this separate treatment.

It can't be because of slavery in the past, because there are very few groups in this country that haven't had slavery some place back in the history of their groups. It can't be color because there are Negroses as white as the drifted snow, with blue eyes, and they are just as segregated as the colored man.

The only thing can be is an inherent determination that the people who were formerly in slavery, regardless of anything else, shall be kept as near that stage as is possible, and now is the time, we submit, that this Court should make it clear that this is not what our Constitution stands for.14

Agreeing, the Court restored the nation's — and the world's — faith in the sanctity and supremacy of the principles of equality and liberty protected by the Constitution.

II.

Of the handful of larger-than-life courtroom lawyers from Webster onward, only Thurgood Marshall has become a Justice of the Supreme Court. As a Justice, he has been no less vigilant than as a lawyer in policing assertions of state interest that appear to be in tension with the national liberties enshrined in the Constitution. Not infrequently, a majority of the Court has found a saving measure of legitimacy in state policies which are for Justice Marshall masks for unredeemed parochialism. And occasionally (occasions which the Justice has been quick to identify) there has been substantial state court precedent — sometimes rooted in state constitutions as well as, or in lieu of, the federal Constitution — for Justice Marshall's dissenting view of the constraints constitutional norms put on state policy. Such was the case in San Antonio Independent School District v. Rodriguez, where the majority of the Court found no constitutional infirmity in "substantial interdistrict disparities in [Texas public] school expenditures," which disparities were chiefly a function of large variations in the property-tax base from

district to district. Justice Marshall was at pains to emphasize that the "majority's decision represents an abrupt departure from the main-stream of state and federal court decisions . . . "15

Full-circle vindication of Justice Marshall's neo-Brandeisian enthusiasm for forward-looking state court constitutional adjudication came a year ago in *Pruneyard Shopping Center v. Robins.*16 There the Court reviewed a California Supreme Court decision which interpreted the free speech-and-assembly provisions of the California Constitution as prohibiting proprietors of a shopping center from interfering with high school students who gathered in a courtyard of the shopping center to engage in peaceful solicitation of signatures on petitions addressed to the President and Congress and expressing opposition to a United Nations resolution. In *Pruneyard* the California Supreme Court had read its own constitution in much the same way that the United States Supreme Court, through Justice Marshall, had in 1968 read the First Amendment in *Amalgamated Food Employees Union v. Logan Valley Plaza.*17 But in decisions handed down in 197218 and 197619 — between *Logan Valley* and *Pruneyard* — the United States Supreme Court had jettisoned *Logan Valley.* So the question posed in *Pruneyard* was whether California's fashioning of a *Logan Valley*-like rule of California constitutional law constituted a curtailment of the property rights of the shopping-center proprietors forbidden by the due process and/or just compensation clauses of the federal Constitution. That question was properly answered in the negative, in Justice Rehnquist's opinion for the Court. Joining in the judgment and opinion of the Court, Justice Marshall filed a concurrence in which he observed:

In the litigation now before the Court, the Supreme Court of California construed the California Constitution to protect precisely those rights of communication and expression that were at stake in *Logan Valley, Lloyd,* and *Hudgens.* The California court concluded that its state "constitution broadly proclaims speech and petition rights. Shopping centers to which the public is invited can provide an essential and invaluable forum for exercising those rights." 23 Cal. 3d 899, 910, 153 Cal. Rptr. 854, 860, 592 P.2d 341, 347 (1979). Like the Court in *Logan Valley,* the California court found that access to shopping centers was crucial to the exercise of rights of free expression. And like the Court in *Logan Valley,* the California

court rejected the suggestion that the Fourteenth Amendment barred the intrusion on the property rights of the shopping center owners. I applaud the court’s decision, which is a part of a very healthy trend of affording state constitutional provisions a more expansive interpretation than this Court has given to the Federal Constitution. See Brennan, State Constitutions and the Protection of Individual Rights, 90 Harv. L. Rev. 489 (1977).20

III.

Lawyer Marshall restored the supremacy and integrity of the democratic principles which are at the core of the federal Constitution. Justice Marshall has labored long and effectively to strengthen these principles. In the face of occasional setbacks, Justice Marshall has recognized that a proper line of retreat may lead to terrain he would not in his lawyer years have expected to find hospitable — the constitutions of the several states.21 It is a recognition that attests to the vision and enterprise of the Justice — and to the health of our federalism.22

20. 447 U.S. at 79.

21. As is suggested by Justice Marshall’s laconic Pruneyard citation to "Brennan, State Constitutions and the Protection of Individual Rights, 90 Harv. L. Rev. 489 (1977)," Justice Marshall’s awareness of broader constitutional terrain than that his own Court patrols draws, as it should, on the comparable insights of Justice Brennan, who is on so many issues Justice Marshall’s strong partner in constitutional principle.

22. The salutary renascence of state constitutional law derives from the increasingly widespread recognition by state courts that they occupy a genuinely dual role: (1) all state courts are obliged — by the supremacy clause and as surrogates of the United States Supreme Court — to enforce the guarantees contained in the federal Constitution and federal statutes; (2) each state court system is the principal and ultimate architect and custodian of that state’s own homegrown constitutional jurisprudence. Responsible exercise by a state court of that dual responsibility has methodological implications which have been thoughtfully explicated in recent opinions of the Oregon Supreme Court. See, e.g., Sterling v. Cupp, 625 P.2d 123 (1981); State v. Scharf, 605 P.2d 690 (1980). Justice Linde of that court has put the matter well:

The proper sequence is to analyze the state’s law, including its constitutional law, before reaching a federal constitutional claim. This is required, not for the sake either of parochialism or of style, but because the state does not deny any right claimed under the federal constitution when the claim before the court is fully met by state law.


Pursuit of the analytic sequence described by Justice Linde is proper not only because a state constitutional guarantee closely comparable in wording to a federal constitutional guarantee may be accorded a different (and broader) scope, but also because, as Sterling v. Cupp itself illustrates, state constitutions frequently include detailed entitlements which have no analogue in the federal Constitution.
We all have some idea of the qualities a great judge has: wisdom, a sense of what is proper in the circumstances, an ability to explain how the law as it is supports a just result. When we think about great lawyers, though, the image is much more blurred. Wisdom and judgment matter, of course, but the lawyer's audience is narrower than the judge's, and so ability to communicate may be a less important quality of greatness in lawyers. Then too lawyers must directly conciliate, and the ability to persuade an adversary that a dispute should be settled on favorable terms, though it shares something with the ability to write a persuasive opinion, invokes skills that may not readily be captured on paper. Yet to make the ability to persuade one's adversaries a crucial element of greatness in lawyering would consign those whose adversaries are rigid in their positions to the second rank.

Thurgood Marshall was a great lawyer. His considerable courtroom skills, though they were not irrelevant to his greatness, were secondary. Those who know him understand his wisdom, the superb quality of his judgments about life and law. As general counsel in the NAACP's campaign against school segregation, he assembled a staff and a "kitchen cabinet" which presented him with the ingenious and innovative arguments that the litigation needed. Marshall then selected, almost always correctly and without hesitation, the set of arguments that would work best. But Marshall had another quality that contributed to — indeed, may have been the prerequisite to — his greatness. He was a great politician. Faced with conflicting demands from disparate elements in his constituency, Marshall was able to unite the constituency behind a program with which many had initially disagreed.

Marshall used his political skills with great effect between 1945 and 1950 in the struggle against school segregation.¹ Prior to 1945 the NAACP had been involved in two kinds of cases. Some sought to desegregate Southern graduate and professional schools. Others sought

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*© Mark V. Tushnet, 1981.
** Professor of Law, University of Wisconsin-Madison; A.B., Harvard University, 1967; J.D., M.A., Yale University, 1971.
1. This article is based on research supported by grants from the Rockefeller Foundation's program of Fellowships in the Humanities, the Legal History Project of the American Bar Foundation, and the Research Committee of the Graduate School of the University of Wisconsin-Madison.
to equalize the salaries of black and white teachers. With but a few exceptions, the NAACP had not been involved in efforts to desegregate elementary or secondary schools. Yet if segregation was to be destroyed — and that was always the NAACP’s goal — something had to be done about its foundations in the early education of Southern children. The NAACP could pursue either of two paths. Without directly challenging the "separate but equal" doctrine of Plessy v. Ferguson,² the NAACP could seek to equalize the expenditures on black and white schools. Or it could mount a direct attack on Plessy, seeking to force Southern school boards to educate black and white children in the same classrooms. Both paths led, it was hoped, to the same end, for the NAACP lawyers believed that equalization would be so costly as to make segregation a fiscally intolerable policy. But important strategic consequences flowed from the choice between equalization and the direct attack. Between 1945 and 1950 Marshall, with great political skill, laid the groundwork within the NAACP for the direct attack.

The issue of dealing with elementary and secondary schools did not come into focus until the mid-1940’s, though the NAACP had been litigating desegregation cases since the mid-1930’s. The reasons lie in the manner in which the NAACP had succeeded with its early cases. In late 1946 Robert Carter, a staff attorney, drafted a speech for Walter White, the NAACP’s executive secretary, in which he suggested that White say, ‘‘The teachers’ salary fight is now about over.’’³ Equalization had occurred in many of the South’s larger cities. But Southern school boards had developed strategies of evasion that were likely to be difficult to overcome.⁴ Even where blatantly discriminatory salary schedules remained in effect, the localities were likely to be small, and the return on the NAACP’s efforts would probably not have warranted a county-by-county mopping up operation. By 1945, then, a new direction for litigation below the university level had to be found if the NAACP was to sustain its pressure on segregated education on every level. But that direction could have been towards equalization of facilities or towards desegregation directly.

The national staff was reluctant to pursue an equalization strategy for both ideological and organizational reasons. The former were developed in detail in a series of increasingly bitter letters between Marshall and Carter Wesley. Wesley was an attorney and editor of an important black newspaper published in Houston. He was described as militant and as having strong will power and, as the exchange with Marshall makes clear, Wesley was not an easy person to get along with. The dispute in 1946 and 1947 over desegregation strategy revived an earlier one over strategy in challenging the Texas white primary; in
both, Wesley was concerned with questions of control by the national office as well as with questions of strategy. In 1946, Wesley set up the Texas Conference for the Equalization of Educational Opportunities. The Conference, which may well have existed almost exclusively on paper, was said to be concerned with "prosecution of such cases as do not come within the NAACP's non-segregation field." That is, it was to fight "on the segregated side" for equal though separate facilities. Marshall expressed concern that if the Conference did not necessarily duplicate the NAACP's efforts, it would "work . . . toward the establishment of segregated educational facilities" and therefore "compete[e] with the principles of the N.A.A.C.P." He said, "You just simply cannot have a little segregation; you cannot rationalize on the necessity of segregation at all." Marshall concluded:

Every segregated elementary school, every segregated high school and every segregated college unit is a monument to the perpetuation of segregation. It is one thing to "take" segregation that is forced upon you and it is another thing to ask for segregation. I still believe that if the opposition finds that there are representative and respectable Negroes who cannot be bought and who have standing, who are in favor of segregation, then they will consider that as a much better victory than any legal case that they can win against us.

Wesley presented his case in a long letter of October 8, 1947. He agreed that direct attacks on segregation were appropriate, but objected to "making this an exclusive remedy." Instead, equalization suits should be brought; it did not "invite the establishment of segregated schools . . . to insist that those schools already established be equalized." To

2. 163 U.S. 537 (1896).
7. Id.
8. Id.
9. Id.
11. Id.
Wesley, "the NAACP is fooling itself" in thinking that a direct attack will "knock down segregation at one fell swoop." Instead a series of cases would be needed. Wesley pointed to the salary equalization cases as models, and thought that Marshall could not simultaneously support those cases and attack facilities equalization suits. Wesley found no inconsistency between direct attacks in university cases and equalization suits elsewhere. The latter simply accepted the existing fact of segregation, without adopting it as a principle, and sought to make "separate but equal" a reality. He concluded by noting that the university suits had resulted, not in desegregation of existing facilities, but in creating "shameful makeshifts" separate programs, with no real equality. If such farces were to be avoided, equalization suits had to be brought.

In Mt. Pleasant, Texas the whites are taking most of the money and giving Negroes makeshifts in the form of inadequate buildings, short school terms, no bus service, and no lunches. You know as well as I that you aren't going to get a Negro with nerve enough, in that mean East, Texas town, to sue to have his child go to a white school. But you will get plaintiffs to sue to make their school equal, because that follows the pattern that the white man himself has set up.

Marshall's response came a week later: NAACP suits in elementary and secondary cases point "out the inequalities" and seek an order that would bar the school board from "denying to the Negro the equal facilities furnished to the white student." He contrasted Wesley's procedure as seeking a different form of relief, "the establishment of equal facilities by raising the Negro school to the level of the white school . . . ."

Our prayer for relief is to enjoin the Board from discriminating, which would be answered, it seems to me, by either the admission to the white school or the type of relief you request in your case. Under these circumstances, is it not true that in our proceedings we get either the type of relief in your case or the breaking down of segregation and that in this type of case it is impossible to get less

12. Id.
13. Id.
14. Id.
15. Letter from Thurgood Marshall to Carter Wesley (Oct. 16, 1947) (Box 213, Legal Files, supra note 3).
16. Id.
than we can get in your case, and at the same time, we would be constantly hitting at segregation. If you agree with this, it seems to me that we are then at the place where the only point of dispute on this type of action is a difference in opinion as to procedure.\textsuperscript{17}

He acknowledged that there had been changes in the NAACP's approach, a result of "a carefully worked out legal attack which we have been working on for several years; . . . a realization that the procedure formerly followed was not gaining the results we expected; and most important, the terrific support for an all-out attack on segregation through the people in Texas . . . ."\textsuperscript{18} The salary cases were not a precedent for Wesley's approach, for there the issue was "not the school but the race of the teacher," an issue applicable to mixed as well as segregated systems.\textsuperscript{19}

Marshall's position, then, was that relief in the form of equalization of facilities was subsumed under the request for an end to discrimination, and would be acceptable as a fall-back position. But he rejected equalization as the sole form of relief to be sought, because that would implicitly accept the position that segregated schools were legally tolerable and could be made equal in fact. Marshall seems to have had the better of the argument, and indeed it was later said that the basic desegregation cases were developed in ways that "left all options open," and that "some of these cases look suspiciously akin to the old equality approach with the direct challenge thrown in." But it was not just the contest with Wesley for leadership in the black community that led Marshall to tell the Texas Conference of Branches of the NAACP that "[i]t no longer takes courage to fight for mere equality in a separate school system,"\textsuperscript{20} and that the NAACP would not seek to enforce segregation statutes.\textsuperscript{21} The reality of the litigation process meant that the difference between equalization and the direct attack could not be blurred once the cases moved past the stage of pleading, and it was certain that, given a choice, school boards would equalize rather than desegregate.

These ideological concerns were augmented by organizational factors. Investigating inequalities, especially in systems where black

\textsuperscript{17} Id.
\textsuperscript{18} Id.
\textsuperscript{19} Id.
\textsuperscript{20} Marshall, Statement to Texas State Conference of Branches (Sept. 5, 1947) (Box 110, Legal Files, supra note 3).
schools might be as good as white ones in some respects — for example, by having been constructed more recently — but worse in others — for example, in lacking laboratory facilities — was likely to be time-consuming. The salary equalization cases had shown how serious a drain on the NAACP's limited resources could be occasioned by drawn out, heavily factual cases, and how difficult it was to use one fact-laden case as a lever in securing victories in other cases. Marshall explored these problems by arranging to pay a young Virginia lawyer, Spottswood Robinson, for a one-year effort to establish a litigation program for elementary and secondary schools. Most of Robinson's effort was devoted to "getting things lined up for court action" by investigating, petitioning school boards for general relief, and applying for admission to white schools. When the year ended Robinson had explored the situation in seventy-two districts, and had "active" cases at some stage in thirty-eight. But by October 1950, three years after the program began, Robinson reported that only three of fifty-one active cases were in court. The reasons were obvious: as Robinson reported to Marshall in a memorandum apparently solicited as part of Marshall's effort to persuade doubters that the direct attack was preferable to equalization litigation, the cost of a single equalization case in which only two schools were compared was $5,000. Investigation required substantial investments of attorney time and, as Robert Carter pointed out, while equalization cases had to proceed school district by school district, the direct attack would require only a single case for each jurisdiction. If, as Marshall desired, a concentrated attack leading to real progress was to occur, it would have to take the form of a direct attack; the NAACP lacked the resources for any other course.\footnote{22. Letter from Spottswood Robinson to J. M. Tinsley (Oct. 1, 1947) (LDF Papers, NAACP Legal Defense Fund, New York) [hereinafter cited as LDF Papers]; Letter from Robinson to Thurgood Marshall (Oct. 2, 1947) (id.); Report of Legal Staff (Oct. 2, 1948) (id.); Robinson, Report to Virginia Conference of Branches (Oct. 21, 1950) (id.); Letter from Spottswood Robinson to Thurgood Marshall (March 13, 1950) (id.); Carter to Robinson, (April 5, 1951) (id.); Thurgood Marshall to A. C. Croft (Nov. 14, 1947) (id.).}

The national staff had been expanded, but this, instead of making more attorneys available for the time-consuming equalization cases, actually increased the pressures for the direct attack. The staff at first consisted of Charles Hamilton Houston and Marshall. Houston resigned as Special Counsel in 1939 and became the most important member in a sort of "shadow" staff which conducted occasional investigations and litigation. Typically Marshall supervised the investigation and did the litigation himself. As he had before 1939, Marshall continued to handle most of the salary equalization cases after he succeeded Houston in that year. But for some time after 1939 Houston, though not formally on the
NAACP staff, litigated a number of important graduate school challenges. By the mid 1940's Houston's direct contributions to litigation had substantially diminished, but his place was taken by a number of salaried staff lawyers. The expansion of the staff, which included at various times Milton Konvitz, Edward Dudley, Robert Carter, Marian Wynn Perry, Franklin Williams, and Constance Baker Motley, allowed Marshall to claim that "we are now in a position to broaden out our legal program." The new attorneys, though, were all young Northerners, inclined to favor the direct attack because of enthusiasm and problems in appreciating fully the difficulties faced by blacks in the South. Some of their impatience can be glimpsed in a memorandum Carter wrote to Marshall in April 1948 after he had conferred with Robinson in Virginia. Carter said that the only problem was "the old [one] as to whether or not an all-out attack on segregation will be made or whether counsel will be satisfied with a settlement which provides for steps toward equalization." He had told Robinson that a settlement giving the schools time to equalize was probably inevitable; there were not enough resources to pursue a direct attack. But he questioned the typical request for relief, an order prohibiting further discrimination.

What this ultimately means is that a step by the school board to equalize the educational opportunities for Negroes in a separate school will normally be considered by the court as satisfaction of its order. I do not believe, nor does Spotts, that we can be parties to a consent to give the school board time to equalize. Our petition must be that they are under an obligation to equalize instantly. However, you realize, of course, that unless you attack these cases on the ground that segregation itself is unlawful — and unless you refuse to accept any settlement short of that — you are taking steps in these cases which . . . are short of the goals which you have set . . . . This has caused some confusion on Spotts part, but as I stated above, my own feeling was that we do not have sufficient funds to make the all-out attack on the elementary and high school level.

Hence, I think Spotts must be left to use his own discretion as to what compromise he will accept from the school board. I would hate, however, to have anybody other than Spotts have this much discretion. You and the national office will have to do some very careful thinking on this proposition by the time you hold your general education conference in order that there can be some clear-cut, well-defined policy in this regard.23

23. Letter from Thurgood Marshall to Walter White (Nov. 14, 1945) (Box 211, Legal Files, supra note 3); interview with Robert L. Carter (Feb. 25, 1980); Letter from Robert Carter to Thurgood Marshall (April 28, 1948) (Box 147, Legal Files, supra note 3).
Though the pressures to attack segregation directly were strong, they were partially offset by others. One was a diffuse sense that the direct attack was premature; the NAACP had not, after all, secured a major school decision from the Supreme Court since the *Gaines* case in 1938. More important, black teachers and principals, who had provided major support for the litigation until then, were extremely nervous about the direct attack strategy. Their sense of Southern mores and some painful experiences had shown them that the jobs of all black teachers, not just those of a few who took active part in litigation, were threatened by the direct attack. They knew that Southern whites would not tolerate a situation in which black teachers, especially men, taught white children, especially girls. The threats did not materialize until after the decision to pursue the direct attack was made, but by the end of 1951 it was clear that these fears were "one of the greatest factors contributing to opposition to integrating the public schools" within the black community. In 1953, the superintendent of the Topeka schools refused to renew the contract of a black teacher, because the Board believed that "the majority of people in Topeka will not want to employ negro teachers next year for white children." Earlier a branch member whose wife was a teacher expressed concern that "in Kansas when such cases are brought for integration of students . . . the Negro Teachers are cut adrift without any consideration."

The most extensive discussions of threats to the jobs of black teachers came in connection with a decision by white authorities to close the black Louisville Municipal College when desegregation was ordered in 1951. Many black teachers would be fired. The NAACP took a "very avid interest" in the situation, because "we cannot hope to secure the full-hearted support of the teaching faculty of Negro institutions in our fight against segregation in education if the successful results of such a fight will be the loss of jobs." The staff tried to allay fears by pointing to experiences in New Jersey and Indiana, where no wholesale firings occurred, and by developing legal strategies to challenge as discriminatory the firing of black teachers in the course of desegregation. Dean Charles Thompson of the Howard School of Education argued that there would be no "wholesale dismissal" because there were not enough white teachers to serve the combined school populations and because residential segregation would permit the continued employment of black teachers in black neighborhood schools. But those associated with the

25. June Shagaloff to Marshall and Carter (Dec. 18, 1951) (LDF Papers, supra note 3); Wendell Godwin to Darla Buchanan (March 13, 1953) (id.); Earl T. Reynolds to Carter (Sept. 25, 1951) (id.); McKinley Burnett to Carter (Sept. 30, 1951) (id.).
campaign knew that remedies after dismissal were, in a practical sense, of limited value, and that the threat of dismissal would be realized in some places. Dean Thompson concluded that black teachers should accept the sacrifices entailed by desegregation: "the elimination of legally-enforced segregated schools should out-weigh in importance the loss of teaching positions even by a majority of the 75,000 Negro teachers who might conceivably be affected." 26

That response was available, though, only after the decision had been made to seek desegregation rather than equalization. Because black teachers as a class were not threatened with loss of jobs until that decision was made, there is little indication in the documents that actual threats affected the NAACP's decisions. But the members' knowledge of the white South and the staff's understanding of the role of black teachers in providing community leadership in the campaign to that point made it inevitable that these problems would weigh heavily against a direct attack decision. 27 Marshall sometimes advocated a "leave it to the defendants" strategy. But the same sophistication of members and staff led them to understand that such a strategy was only a fig-leaf for an underlying decision in favor of the equalization approach.

These countervailing pressures could have resulted in organizational paralysis. It is true that the choice between equalization and direct attack was postponed from 1945, when the issue surfaced, to 1950. But the period was not one of paralysis. Rather, it gave Marshall the time to use his skills with as much brilliance as the entire campaign saw. He combined a consistent rhetorical commitment to the direct attack with a conscious strategy of temporizing. The delays were used to prepare the organization for the direct attack decision that Marshall preferred all along.

In late 1945, Marshall expressed concern to Walter White about "our inability to get cases started on the equalization of educational opportunities in the South." 28 The lawyers were available, the cases were important, and they were easy to win. He suggested that a

27. See also Nabrit, supra note 9, at 467 (noting "a considerable difference of opinion" about the merits of the choice).
planning conference be held. The lawyers met in Atlanta in late April 1946, for an informal review of procedures. Although much of the discussion focussed on the university cases, it did explore the general theoretical problems entailed by seeking a general injunction rather than the elimination of specific inequalities. By the end of the year Marshall was able to write Carl Murphy, publisher of the Baltimore Afro-American, a letter that combined support for the direct attack with reasons for delay: "Frankly, and confidentially, and just between the two of us, there is serious doubt in the minds of most of us as to the timing of an all-out attack on segregation per se in the present United States Supreme Court. We are now working on the problem of having a complete study made of the evil of segregation to demonstrate that there is no such thing as 'separate but equal' in any governmental agency... When this is complete, it might then be possible to make an all-out attack. However I do not know how long it will take to complete this study..." The letter shows how Marshall dealt with pressure for the direct attack.

A long memorandum from Marshall to Roy Wilkins in 1947 demonstrates Marshall's personal commitment to the direct attack, and shows that his hesitancy served the purpose of balancing pressures within the NAACP:

I had assumed that the NAACP really meant business about an all-out attack against segregation, especially in the public school system. I had assumed that we not only realized that segregation was an evil but had come to the conclusion that nothing can be gained under the doctrine of "separate but equal." I had assumed that the Board of Directors, as well as the branches and branch officers, were in agreement on this. I had assumed that the resolutions adopted at the Annual Conference and the beautiful statements made at Board and staff meetings meant exactly what they said. On this basis, we have proceeded to develop the legal techniques for this all-out attack on segregation.

... We propose to file these cases on the theory that facilities are unequal and to request an injunction by the court to enjoin the maintenance of the policy of discrimination. This will bring about either equal facilities or the breaking down of segregation. All of

29. Letter from Thurgood Marshall to office (April 8, 1946) (Box 146, Legal Files, supra note 3).
30. Digest of proceedings (Box 146, Legal Files, supra note 3).
31. Letter from Thurgood Marshall to Carl Murphy (Dec. 20, 1946) (Box 114, Legal Files id., supra note 3).
this was explained in the memorandum on policy, which concludes with the following . . . paragraph . . . :
Finally it must be pointed out that because of the reasons set out above, the N.A.A.C.P. cannot take part in any legal proceeding which seeks to enforce segregation statutes, which condones segregation in public schools, or which admits the validity of these statutes.

. . .

You will note from this procedure that the real difference is that we do not any any place admit the validity of segregation statutes and we do not call for the enforcement of these illegal statutes.

. . . I am beginning to doubt that our branch officers are fully indoctrinated on the policy of the NAACP in being opposed to segregation. It is therefore obvious that we need to educate our branch officers and in turn the membership, and finally, the people in the need for complete support in this all-out attack on segregation because it will be impossible for our branch officers to do a good job unless we first sell them.\textsuperscript{32}

The Board of Directors and the Annual Conference of the NAACP endorsed Marshall's position in 1948. The Board stated, "it is our policy that the N.A.A.C.P. will not undertake any case or cooperate in any case which recognizes or purports to recognize the validity of segregation statutes or ordinances; the N.A.A.C.P. will likewise not participate in any case which has as its direct purpose the establishment of segregated public facilities."\textsuperscript{33} The Conference "urge[d] the National Office and the Branches to engage in a campaign to remove narrow thinking within the ranks and eliminate any internal opposition to the elimination of segregation."\textsuperscript{34} Spottswood Robinson reported on his activities in Virginia to the lawyers' conference held in conjunction with the 1948 Annual Conference. He noted uncertainty in the community about "what they want . . . There were many, he stated, who had gone no further than the question of a new Negro high school or accredited elementary schools for Negroes."\textsuperscript{35} The complaints used the "leave it to the defendant" form for relief. It was clear, though, that Robinson preferred the direct attack. The next year the lawyers went to the Annual Conference firmly supporting the direct attack. The National Office had called the lawyers together to discuss how "to have all

\textsuperscript{32} Letter from Thurgood Marshall to Roy Wilkins (Oct. 28, 1947) (Box 110, Legal Files id., supra note 3).

\textsuperscript{33} Statement of Board of Directors (June 7, 1948) (Box 110, Legal Files, supra note 3).

\textsuperscript{34} \textit{Id.}

\textsuperscript{35} \textit{Id.}
governmental enforced segregation declared invalid. ..."36 The lawyers agreed that the cases should seek injunctions against discrimination and admission of blacks to white schools. They recommended that the cases "in each instance should make a direct challenge of the segregation statutes involved."37

The staff had thus become committed to the direct attack rather quickly. But no action followed from that commitment; the lawyers rejected equalization as a remedy the NAACP should seek, but accepted the practical equivalent of a "leave it to the defendants" relief in cases that were actually filed.38 This would of course eliminate the pressures from those who feared a direct attack. But it left the staff vulnerable to attacks from two other directions. Those who like Carter Wesley positively preferred equalization litigation saw nothing happening. To them Marshall offered Robinson's exploratory survey as a reason for the staff's failure to act. First the survey had to be completed, and its results then showed how expensive the strategy would be. The other source of pressure was the constituency that desired an immediate direct attack. Marshall's letter to Carl Murphy gave one response, but far more common were references to the pending university cases in Texas and Oklahoma. For example, the Topeka branch of the NAACP expressed interest in 1948 in starting a direct attack on segregation there, believing that the schools were "physically substantially equal."39 Marian Wynn Perry replied that the national staff would not handle the case until the university cases reached the Supreme Court, "presenting a picture from which it could be argued that inequality inevitably results from segregation."40 The most elaborate explanation was given to the President of the North Carolina State Conference of Branches by Edward Dudley:

[I]t is my impression that we would not be able to undertake any additional university cases from this office until such time as some of those presently pending are finally determined. I am sure you realize that we must eventually reach the Supreme Court of the United States on the question of segregation per se before we can hope to fully break down this type of discrimination. One case can do it, or even two, and, therefore, we do not feel that a large number

36. Resume of NAACP Legal Conference (June 21, 1948) (Box II–42).
37. Id.
38. Report to Conference of NAACP Lawyers held in conjunction with the 40th Annual Conference, New York City (June 23–25, 1949) (Box II–44,).
40. Perry to Benedict Wolf (Sept. 10, 1948 (id.).
of cases should be taken to the Supreme Court at this time, primarily because it is both financially and physically impossible for this office to supervise these cases in all stages of appeal properly. In spite of this, if the State Conference, through its Legal Committee, desires to go forward with a case of its own in the lower courts, particularly in jurisdictions wherein no facilities are available for Negroes, we have no objections and if the attorneys will cooperate with this office by sending us a draft of their pleadings before they are filed and other papers, we will be very happy to check over same and advise them in accordance with procedures being used throughout the country in similar cases.

As you know, our ultimate objective is to break down segregation as we feel that there can be no equality in a segregated set-up. We are, therefore, pitching our fight primarily on this issue. If the Supreme Court of the United States, when our cases arrive there, is unable to agree with us at this time, we can then fall back and rely upon the "separate but equal" theory and file as many suits as we are financially able to do so seeking to equalize every single facility offered to the public by virtue of state monies. As stated above, this does not close the door to action by the State Conference in continuous cooperation with this office but it does suggest that when certain cases are lost in the lower courts we may not be able to take them up on appeal because of the number of cases presently pending and the further fact that it only takes one good case to set a precedent.41

Marshall and the staff had thus bought time, during which they could work out the the problems associated with the direct attack strategy that they wanted to pursue, and persuade their constituency that the course the staff preferred was the correct one to follow. They were also able to take advantage of changes in the political climate between 1945 and 1950. Blacks, North and South, formed an important part of the New Deal coalition that was falling apart after the war. Liberal Democrats, and Harry Truman, needed to solidify the support of the black community. Truman established a Committee on Civil Rights, whose 1947 report To Secure These Rights forthrightly called for "the elimination of segregation . . . from American life." International policy joined with domestic politics in the new atmosphere. In addition to moral and economic reasons for eliminating discrimination, the Committee gave an "international reason." Discrimination was "a serious obstacle" to making the country "an enormous, positive influence for peace and progress throughout the world."

41. Dudley to Kelly Alexander (Aug. 4, 1948) (Box 151, Legal Files, supra note 3).
Those with competing philosophies have stressed—and shamelessly distorted—our shortcomings.... They have tried to prove our democracy an empty fraud, and our nation a consistent oppressor of underprivileged people.... The United States is not so strong, the final triumph of the democratic ideal is not so inevitable that we can ignore what the world thinks of us or our record.42

Shortly after To Secure These Rights was issued, Truman's Attorney-General Tom Clark decided to file a brief supporting the NAACP's position in cases then pending that challenged judicial enforcement of racially restrictive housing covenants.43 Opponents of the direct attack had been able to couple the fear of mass firings with a sense that the direct attack was unlikely to succeed. By reducing the risk of failure, these changes in the general political climate strengthened the position of Marshall and the staff. The direct attack strategy, they could now say, was not only right, it was likely to succeed.

The brief of the United States in the restrictive covenant cases had another significant facet. Its legal argument was prefaced by a detailed analysis of the implications of restrictive covenants as a matter of public policy. While the policy analysis formally functioned to provide the reasons for the government's participation in a lawsuit between private parties,44 it also signalled the impact of Legal Realism on the process of constitutional decision-making. One strand in the Realist movement in the 1930's emphasized the importance for legal decisions of understanding the actual operation of legal rules, and of selecting rules on the basis of the social policies they promoted.45 Howard Law School had been in one sense a center for Realist thinking, but it existed outside the intellectual core of academic law. During the New Deal, Realism became a major intellectual movement in law. Recent graduates of law schools brought to the post-war NAACP and Department of Justice the conviction that the constitutional argument against segregation could be keyed to facts and policy. Though analytical distinctions could be drawn between, on the one hand, factual and policy analysis to inform legislative choice or to uphold legislation as constitutional, and, on the other, similar arguments to support a decision finding a practice unconstitutional, intellectual currents do not always follow the lines

42. President's Committee on Civil Rights, To Secure These Rights (Washington, 1947) at 166, 146–48.
43. See Kellogg, Civil Rights Consciousness in the 1940s, 42 The Historian 19 (1979); R. Kluger, Simple Justice 253 (1975).
44. T. Clark & P. Perlman, Prejudice and Property 38 (1969) (reprinting the brief).
45. For an introduction, see Schlegel, American Legal Realism and Empirical Social Science: From the Yale Experience, 28 Buffalo L. Rev. 459 (1979).
that rational analysis would lay down. What came to be called the sociological argument against segregation gained at least some of its force as a legacy of Realism.

The NAACP had its first opportunity to use the sociological argument in 1946. Mexican-American parents in Orange County, California, had filed a lawsuit in March 1945, challenging the local practice of segregating their children from those of whites. Neither they nor their attorneys informed the NAACP of the original proceedings. Although the NAACP "did not anticipate" the case, when the staff learned of it they understood the opportunities it gave them. The trial judge found the practice unconstitutional, and the school boards appealed. The NAACP and other organizations filed briefs supporting the parents. The NAACP relied heavily on the sociological argument, drawing on published material detailing the harms caused by segregation per se. William Hastie, still serving as a counsellor to Marshall, read the brief and wrote him that the argument must be developed "fully with as little delay as possible. . . . The point is clearly developed, but I believe we will be able to sustain it only when we make an exhaustive investigation." He suggested using "people in the field of education" to "assembl[e] and organiz[e] practically the entire body of available material." He closed by noting that "there may come some other case sooner than we anticipate in which we will have to make a decisive fight upon this issue."46 Because the NAACP was not a party to the California case, it was able to experiment with the sociological argument at no cost whatever. Though the appeals court agreed that the practices were unconstitutional, it neither adopted nor rejected the sociological argument. The NAACP staff thus began to put the argument into shape, suffered no defeat with implications for its own cases, and expressed its commitment to the direct attack without threatening its own constituency in the South.

As Hastie guessed, the sociological argument had to be put to work sooner than Marshall expected. In early 1946 the NAACP prepared to bring cases seeking the admission of black students to the state law schools in Oklahoma and Texas, where no law schools for blacks had been established. The authorities in Oklahoma were sufficiently antediluvian that though the NAACP won its first education case in the Supreme Court since Gaines, nothing came of the victory. The Texas authorities, though, were surprisingly agile, and their maneuvers forced Marshall to work out the details of the sociological argument under some pressure.

From the beginning Marshall believed that he could have won the Oklahoma case "in Mississippi." Ada Lois Sipuel, the plaintiff, was a strong-willed young woman who, though married, continued to use her own name through most of the litigation. The case was attended at the start with the usual delays, but the suit was filed in April 1946. In July the state trial court dismissed the action, holding that a plaintiff could not use mandamus to challenge the constitutionality of a statute, Sipuel appealed, and one year after the lawsuit started, the state Supreme Court affirmed the decision. It discovered some ambiguities in the NAACP's complaint, briefs, and oral arguments, which led it to conclude that Sipuel did not clearly seek admission to the white law school but might be satisfied if the state established a separate but equal black school. However, the court said, a demand on the state was required before it was compelled to set up a black school. Although the NAACP sought review in the Supreme Court, Marshall was not entirely happy when the Court agreed to hear the case. Because the case had been disposed of without any evidence having been heard, the record was so thin that a reversal of the state courts might simply but, Marshall feared, openly reaffirm the "separate but equal" doctrine. He therefore took care to mount a direct attack on *Plessy* in his brief to the Supreme Court; the Court might then treat the case as a simple one but be scared away from relying directly on or reaffirming the "separate but equal" rule.

On January 12, 1948, four days after argument, the Supreme Court reversed the state courts. Its opinion consisted of three paragraphs, and relied exclusively on *Gaines*. The NAACP's lawyers thought it significant, though, that the court had decided the case so quickly and had directed that its mandate, the document directing the lower courts to act on the case, issue forthwith. Registration at the white law school was scheduled for January 29, and the lawyers assumed that the Court wanted Sipuel admitted. However, the state Supreme Court, in an opinion issued on January 17, took the escape route that *Gaines* seemed to permit, and directed the university authorities to open a "substantially equal" black law school. Because of the Court's mandate, it seemed to the NAACP lawyers that the black school had to open by January 29 too. That was manifestly impossible, which meant, the lawyers decided, that the state Supreme Court had blatantly defied the United States Supreme Court.

47. See generally Roscoe Dunjee to Marshall (Jan. 15, 1946) (Box 201, Legal Files, supra note 3) for how the Oklahoma case was brought to Mr. Marshall's attention.
Invoking the standard but rarely-employed procedure for challenging
directing evasions of the Court's mandates, they therefore filed a motion
for permission to file a petition for an order directing the Oklahoma
courts to comply with the original decision by ordering Sipuel's
admission to the white law school. But Marshall's earlier strategy now
turned back on him. The Court was unwilling to face challenges to the
"separate but equal" doctrine. It could avoid the issue if Sipuel had in
fact indicated her willingness to attend a separate school, for then the
issue of substantial equality would properly be explored by the state
court trial. Over two dissents, the Court rejected the NAACP's motion
on the ground that Marshall had not attacked "separate but equal" in
the state court nor, the opinion said, was that "an issue here" as the
case was submitted to it. Oklahoma did open a law school for blacks,
and a trial on substantial equality was held later in 1948. In the
eighteen months the black school operated, one student attended. Sipuel
was admitted to the previously white school in August 1949.

Meanwhile the Texas law school case had moved to the center of the
NAACP's attention. At the end of January 1946, local NAACP officials
had located Heman Sweatt, a letter carrier who wanted to attend law
school. Although Sweatt had been graduated from an unaccredited
school, Marshall decided that it was worth proceeding on the chance
that the authorities would deny Sweatt's application on the ground of
race rather than qualifications. Theophilus Painter, the President of
the University of Texas, did just that, and the lawsuit was filed in
May, one month after Sipuel's case had been filed.

The development of the NAACP's litigation strategy in *Sweatt v. Painter*
can be understood only in light of the complex procedural
history of the case. Painter's letter denying admission to the white law
school in Austin informed Sweatt that he could demand that a black law
school be established. The trial judge agreed. Although he held that
the existing situation, in which blacks had no separate law school and

52. Letter from W. J. Durham to Thurgood Marshall (Jan., 29, 1946) (Box 204, Legal Files, supra note 3).
54. Letter from Painter to Herman Sweat (March 16, 1946) (Box 204, Legal Files, supra note 3).
56. Letter from Painter to Sweatt (March 16, 1946) (Box 204, Legal Files, supra note 3).
could not attend the white one, violated the Constitution, he gave the state six months to establish a black law school.\textsuperscript{57} Just before that period expired, the state moved to dismiss Sweatt's complaint, presenting a resolution by the state's Board of Regents vowing to set up a school in Houston. The trial judge held that the resolution satisfied the Constitution, even though the school consisted at that time of two rooms and one part-time instructor.\textsuperscript{58} The NAACP appealed, and the state recognized how weak its position was. Instead of continuing to rely on the obviously inadequate Houston school, the state shifted the school's location and organization. Pending the creation of a full law school in Houston, the black law school would be located in Austin.\textsuperscript{59} Three rooms, sufficient to accommodate an expected enrollment of ten blacks, were rented in a building across the street from the state Capitol. The students, like other citizens of Texas, would have access to the state law library in the Capitol. Several members of the faculty of the white law school were to be the faculty of the black school, teaching there while continuing their work up-town.\textsuperscript{60} The state and the NAACP agreed that these changes, instituted in February and March 1947, changed the facts on which the decision about substantial equality was to be based. On March 26 the appeals court therefore reversed the judgment of the trial court and sent the case down to be tried fully.\textsuperscript{61}

The NAACP had six weeks to prepare for the trial. This time constraint and the new factual posture of the case affected Marshall's strategic decisions. At the outset the case seemed almost as straightforward as Sipuel's, and even the creation of the Houston makeshift school injected only a simple element of proving the obvious physical inequality between the black and white schools. The move to Austin complicated the factual case and provided a real opportunity to use the case for the broader purpose of attacking "separate but equal." Conceptually, there were two stages in the NAACP's decisions. First, Marshall had to decide how much to focus on the physical aspects of inequality. As he developed the record, an honest but, fairly speaking, rather weak case of physical inequality could be presented. The black school was small, but on a per capita basis it provided equivalent floor space to that given in the white school. Of course, the comparisons were

\textsuperscript{57} 339 U.S. at 631-32.
\textsuperscript{58} Id. at 632.
\textsuperscript{59} Letter from Durham to Thurgood Marshall (Nov. 30, 1946) (Box 204, Legal Files).
\textsuperscript{60} Letter from E. J. Mathews to Sweatt (March 3, 1947) (id.).
\textsuperscript{61} 339 U.S. at 632. While the NAACP's appeal to the United States Supreme Court was pending, the black law school was moved back to Houston, where its facilities and program satisfied the preliminary accreditation standards of the American Association of Law Schools.
based on the assumption that ten blacks would enroll, and because of deep opposition in the black community to the state's strategy, only one black actually enrolled.\(^{62}\) But that could hardly be attributed to the state's failure to provide adequate physical facilities. The state law library was not designed to accommodate use by students, but it had essentially the same contents as the library at the white school. The instructors in the black school did not teach full-time there, but they were not part-time teachers. The undeniable differences between the schools lay in their extracurricular, intangible aspects. These included the absence of a law review and a moot court program at the black school, and the inability of a school with a projected enrollment of ten to support such activities. But once the attention shifted from physical facilities and the formal program, it was easy to broaden the argument to include all sorts of non-curricular differences between the schools: reputation, opportunity for developing professional contacts, and so on. And once those differences became relevant, the sociological argument could be deployed fully. Thus, the manner in which \textit{Sweatt} developed made it seem easy and indeed perhaps necessary to attack \textit{Plessy}. The flaws the Court had found in the attempt to do so in \textit{Sipuel} were eliminated because \textit{Sweatt} was in some ways a harder case, in which all relevant arguments seemed appropriate and possibly essential.

The second stage in \textit{Sweatt} followed almost inexorably once the case had been broadened. If "separate but equal" was to be attacked using the sociological argument, it made sense to attack it across the board, not just for law schools or graduate education. Here the points about reputation and professional contacts would serve only as specific examples of the general harms that segregation imposed. Thus, Marshall's approach in \textit{Sweatt} would give the Supreme Court a choice. It could follow the physical inequality route, for which there was some evidence. If it did so, the NAACP would have lost nothing and gained a little. But if the Court faced the record more honestly, and wanted to rule in Sweatt's favor, it would have to recognize the significance of the intangible aspects of education. Having done so, Marshall hoped, the Court would be committed to moving further down the path that the sociological argument provided.

But six weeks was an extremely short period in which to develop all this. Marshall was not entirely happy about the prospects of a "wide open" trial, although he understood the opportunity he was given. On April 3, 1947, he wrote William Hastie and several other members of an informal group of advisors seeking their help "in view of the fact that all

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\(^{62}\) Letter from J. H. Morton to Thurgood Marshall (Sept. 26, 1947) (Box 205, Legal Files, \textit{supra} note 3).
of the Negroes in the State of Texas, with the exception of Carter Wesley, are determined to hit segregation . . . .”

So, whether we want it or not, we are now faced with the proposition of going into the question of segregation as such. I think we should do so because even if we don’t take the case far, we at least should experiment on the type of evidence which we may be able to produce on this question. For example, we want to produce experts such as Charlie Thompson to testify as to the inevitable effects of segregation in per capita expenditures, etc. We are also contemplating putting up Otto Kleinberg to testify as to the racial characteristics not being present and other evils of segregation. We are also contemplating putting on anthropologists to show that there is no difference between folks.63

Hastie urged Marshall to be cautious. He apparently believed that the issue of substantial equality would turn on physical and curricular matters, where the NAACP’s case was weakest:

While evidence on the consequences of segregation is made as comprehensive as possible, I think it should lead to the narrower point that at the graduate and professional level limited demand for training and high per capita cost make discrimination in fact inevitable. Certainly we cannot argue that segregation at the lower levels is permissible. We should, however, give the court a basis for distinguishing the general public school situation from the case at hand. In that way at least an infinitesimal chance of winning the law suit can be preserved.64

He also agreed that the NAACP might not take Sweatt to the Supreme Court, but noted that “public pressure to carry the case as far as possible will be tremendous. You might warn NAACP speakers against uncautious predictions of what will be done in this litigation.”65

But, consistent with his preference for the direct attack on segregation, Marshall’s enthusiasm was not to be dampened. After the 1948 trial on substantial equality in Sipuel, for example, he wrote Erwin Griswold, Dean of Harvard Law School and a witness for the NAACP at that trial, “Frankly, I am seriously worried that the Judge will go off on the point of physical inequality and will completely dodge

63. Letter from Thurgood Marshall to William Hastie (April 3, 1947) (Box 204, Legal Files, supra note 3).
64. Letter from William Hastie to Thurgood Marshall (April 9, 1947) (Box 204, Legal Files, supra note 3).
65. Id.
the segregation issue." Griswold replied, "Of course I understand your great desire to carry on the legal battle and to win a complete victory in very short order." But, Griswold said, Sipuel was a good case on inequality and a bad one on segregation, and he hoped that the judge would indeed do what Marshall feared. "The thing to do with this case, as I see it, is to win it. That will be a very great step forward. It will, indeed, be one of the most important steps yet taken on the segregation problem."

The time limitations in *Sweatt* led Marshall to pursue a dual strategy. Because it was a law school case, he relied on experts in legal education to testify in court about what substantial equality would be and how it could not be reached in separate schools. The more general points were made by presenting one witness, Robert Redfield, an anthropologist, and by invoking social science research like Gunnar Myrdal's *American Dilemma*, surveys published in the *Journal of Negro Education*, and the Report of the President's Committee on Civil Rights. This made it possible to press the specifics on the court through direct testimony and, perhaps more important, to coordinate the presentation of the sociological argument in the limited time available.

The strategy succeeded, not in the Texas courts, which unsurprisingly rejected Sweatt's claim, but in the United States Supreme Court. *Sweatt* was accompanied by two other cases. In *McLaurin v. Oklahoma State Regents*, a sixty-eight year old black educator seeking a doctorate was admitted to the program at the white university but was required to sit in a roped-off part of the classrooms and at special tables in the library and cafeteria. *Henderson v. United States* involved segregated dining car service on a railroad regulated by the Interstate Commerce Commission. In *Sweatt* and *McLaurin* the NAACP coupled the attack on "separate but equal" with straight-forward inequality arguments. By this time the sociological argument had been worked over repeatedly, and the NAACP brief, though quite polished, contained little that was new. *Henderson* was a different matter. In the lower courts the government had argued that segregated service was not illegal under the relevant statutes and not unconstitutional either. When the case reached the Supreme Court, responsibility for representing the United States shifted to Philip Perlman, the Solicitor General. Perlman had

67. Letter from Erwin Griswold to Thurgood Marshall (June 10, 1948) (*id.*).
68. *Id.*
signed the *amicus* brief in the restrictive covenant cases, and now concluded that the government's position in *Henderson* was wrong. His brief confessed error on the statutory issue and then urged that *Plessy* be overruled. The arguments were the familiar ones, not significantly different from those made by the NAACP. But they carried added weight when the Solicitor General made them.

The Supreme Court was receptive to the attack on *Plessy*, though outsiders other than Marshall would have been surprised to see what the Justices were thinking about while the three cases were under consideration. Justice Harold Burton's law clerks sent him a long memorandum, with a cover note saying, "We think this is a good time and a good case for reconsidering *Plessy v. Ferguson.*" A later memorandum to him in *Sweatt* relied centrally on the sociological argument and referred, not to the NAACP's briefs, but to the Solicitor General's brief in *Henderson*. Tom Clark, a Texan who had only recently taken a seat on the Court, circulated a memorandum to the entire Court in which he outlined his position. He thought that *Plessy* had to be confronted, and would hold it inapplicable to graduate schools. Established white schools had intangible assets like reputation, alumni to provide professional contacts, better professors, and "a cross section of the entire State . . . and, in the combat of ideas, . . . a greater variety of minds, backgrounds and opinions. . . ." Chief Justice Fred Vinson was skeptical about the Court's ability to draw a constitutional line between graduate and elementary schools. Ultimately Vinson wrote the opinions in *Sweatt* and *McLaurin*. Both held that the actual conditions in Texas and Oklahoma did not provide blacks with an education substantially equivalent to that available to whites. Thus the Court did not directly face the questions of overruling *Plessy* or openly denying its applicability to graduate education.\(^7^1\)

But the opinions laid the ground for future developments, of which the Justices were acutely conscious. In describing the inequalities in *Sweatt* the Court's opinion listed both the physical aspects and the intangibles on which Clark and the NAACP had so heavily relied. Given the discussions within the Court, invoking the intangibles committed the Justices as much as any doctrine can to the position that equality could not be achieved in separate graduate and professional schools. And recognition of the relevance of intangibles opened the way to adoption of the sociological argument. Judges concerned about precedent could have drawn distinctions had they wanted to, but as the nine men who made the decisions grappled with *Sweatt* and *McLaurin*, they became convinced as individuals that, once they decided or were

\(^7^1\) For all the details, see Hutchinson, *supra* note 51.
forced to face the issue, they would overrule *Plessy*. As Clark had concluded in his memorandum, "If some say this undermines *Plessy* then let it fall, as have many Nineteenth Century oracles."\(^{72}\)

Marshall had lived with the attack on segregated education all his professional life. When he read the opinions in *Sweatt* and *McLaurin* he understood what the Justices had done when they chose to rely on intangibles. One week after the decisions were announced, he wrote one of his law school expert witnesses, "All three of the decisions [including *Henderson*] are replete with road markings telling us where to go next."\(^{73}\) He believed that the law had reached a turn in the road. But though the decision turned out to be relatively painless, it was not inevitable that the NAACP would follow the logic of the Court’s opinions to the direct attack. *Sweatt* and *McLaurin* did not affect the prospective costs and gains to the organization in any obvious way. Having pursued the cases and having won on extraordinarily far-reaching grounds, the NAACP might have been embarrassed had it gone back to an equalization approach in elementary and secondary education. Yet the increased prospects for success in a direct attack also signalled increased threats to black teachers. In cost-benefit terms *Sweatt* and *McLaurin* ought not to have affected the calculus greatly. But it is important to remember that the staff had always preferred the direct attack. The strategy of temporizing mattered for two reasons. Again to use the terms of cost-benefit analysis, an organization’s expected gains and losses from a decision must be estimated before the decision is made. Delaying a decision may improve the ability to make an accurate estimate, as more resources are invested in the process of estimation. Marshall had spent five years educating his constituency on the issues of equalization versus direct attack, and almost certainly made the membership more aware of exactly what was at stake. When, at the end, *Sweatt* and *McLaurin* were decided, the staff could also use the increased likelihood of success as a method of focusing attention on a careful assessment of costs and benefits. In 1945 uncertainties in the evaluation of costs and benefits made it unclear to the NAACP’s membership that the direct attack promised a positive payoff; in 1950 greater precision developed in the interim showed that the payoff would be positive. The direct attack had crossed a threshold because of the time spent in educating the NAACP’s membership.

Three weeks after *Sweatt* and *McLaurin* were decided, Marshall convened a conference of lawyers to map "the legal machinery for

\(^{72}\) Id. at 22.

\(^{73}\) Letter from Thurgood Marshall to Charles Bunn (June 12, 1950) (Box 206, Legal Files, \textit{supra} note 3).
dealing the last blow to segregation.” The conference developed a resolution, adopted in July 1950 by the NAACP Board of Directors, stating that all future education cases would seek “education on a non-segregated basis and that no relief other than that will be acceptable . . . .” Recently some have suggested that Marshall remained cautious even in 1950. There is no documentary evidence for that suggestion. Marshall’s caution ran from 1945 to June 5, 1950, when Sweatt and McLaurin were decided. “Caution” was, it seems fair to conclude, not based on Marshall’s assessment of what changes in the law could reasonably be expected during that period, but on his assessment of the needs of the NAACP and its various constituencies. Marshall preferred the direct attack from the start. But he put off the decision from a time when it would have seriously split the NAACP to a time when the external environment, in politics and legal doctrine, and the internal politics of the organization made it easier for others to agree that what Marshall wanted was in their interest too.

During this phase of the campaign against school segregation, Marshall’s various skills as a lawyer were employed to great effect. His judgment enabled the NAACP to develop the sociological argument in appropriate contexts, and it informed his understanding of the meaning of the way in which the opinions in Sweatt and McLaurin were written. But in my view Marshall’s greatest skill was political: by strategies of delay ranging from the commission to Spottswood Robinson to the reference to the pending university cases, he was able to reconcile internal differences among his and the NAACP’s diverse constituencies. By 1950 the decision to attack segregation in elementary and secondary schools directly, which five years earlier would have been controversial and divisive, was, from the constituencies’ point of view, inevitable and unifying. It is hard to identify anyone in the NAACP during that period other than Thurgood Marshall who could have pulled it off.

74. Letter from Thurgood Marshall to Lem Graves (July 5, 1950) (Box 206, Legal Files).
75. R. Kluger, supra note 43 at 290–94.