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LEAD ARTICLE

Setting the Stage for Brown: The Development and Implementation of the NAACP’s School Desegregation Campaign, 1930-1950

by Leland B. Ware*

I. INTRODUCTION

The protest against segregation began early in the twentieth century, not long after the Supreme Court's 1896 decision in Plessy v. Ferguson. The fight was led by the National Association for the Advancement of Colored Persons ("NAACP"), which was founded in 1909 by a group of black activists and white progressives. After years of lobbying,

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1. 163 U.S. 537 (1896).
organizing local chapters, and engaging in other activities, the NAACP shifted its direction. In the early 1930s, the organization embarked on a long-range, carefully coordinated litigation campaign that challenged the laws that enforced segregation. During the years that followed, a legal revolution was set into motion that altered the foundations of American jurisprudence. The NAACP's litigation campaign is not as well remembered as the grassroots demonstrations of the 1960s, but the culminating event of that phase of the Civil Rights movement, *Brown v. Board of Education of Topeka*, is celebrated as the most significant Supreme Court decision of modern legal history. The decision in *Brown* was the first of a series of decisions that struck down Jim Crow laws and paved the way for the federal Civil Rights legislation of the 1960s.

Much of the existing literature leaves the impression that the transition from *Plessy* to *Brown* emanated from an enlightened judiciary. Contrary to these suggestions, the judges who occupied federal courts in the 1930s and 1940s were conservatives who would have preferred to avoid confrontations with the complex social, political, and legal issues that segregation raised. In reality, the NAACP's litigation strategy compelled a reluctant judiciary to address the many contradictions that segregation posed. The actual visionary in this process was Charles Houston, an African-American Civil Rights lawyer, who was the architect of the NAACP's legal strategy. Houston foresaw a means of eliminating formal segregation at a time when most Americans accepted it as a permanent way of life. It was Houston's insight, together with his ability to orchestrate a coordinated campaign over a several-year period, that resulted in the elimination of segregation laws.

The significance of the decision in *Brown* is well-documented, but it cannot be fully appreciated without an examination of the cases that led to it. This Article explores the evolution of the legal strategy that was used in the graduate and professional school cases that set the stage for *Brown*. Part II examines Charles Houston's tenure at Howard Law School. During those years Houston transformed that institution from a marginal night school to a fully accredited, first-rate institution. Under Houston's leadership, students at Howard were trained to structure the test cases that challenged the laws that provided the basis for segregation. Part III examines the significance of the *Margold Report*, a study that was commissioned by the NAACP's Board of Directors in the early 1930s. The report contained a detailed examination of the "separate but equal doctrine" of *Plessy v. Ferguson* and suggested ways in which the policy might be challenged in the courts.

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After Houston was selected to head the NAACP’s litigation campaign in 1935, he modified the Margold Report’s recommendations and developed what became the “equalization strategy.” This approach involved filing cases in Southern states, demanding that the educational resources made available for African-American students be upgraded to make them equal to those provided for whites. Carefully remaining within the confines of Plessy, the “equalization” cases were premised on the theory that the states that practiced segregation could not afford the expense of maintaining separate educational systems that were actually equal. As Part IV of this Article explains, these early cases focused on graduate and professional schools, the area in which the Southern states were most vulnerable. In a series of cases in Maryland, Missouri, Texas, and Oklahoma, the NAACP’s lawyers were able to chip away the foundation of segregation. By the early 1950s the Plessy rationale had been completely undermined. This Article demonstrates that, without these efforts, the decision in Brown would not have been possible.

II. CHARLES HAMILTON HOUSTON: THE ARCHITECT OF THE LEGAL STRATEGY

A. Background

Beginning in the early 1930s, Howard University Law School served as the West Point for a generation of Civil Rights lawyers. During this period, the institution was transformed from an unaccredited evening program to a laboratory for Civil Rights litigation. Howard’s evolution occurred largely through the efforts of Charles Houston, who also developed the legal strategy that was used to eliminate segregation.

Houston was born in Washington, D.C. on September 3, 1895. His father, William Houston, was a lawyer who obtained his degree while working for the federal government and attending Howard University at night.3

Charles Houston attended the Garrison Elementary School and M Street High School in Washington, D.C. Houston’s academic record at M Street provided the foundation for admission to Amherst College in Massachusetts, where he enrolled in 1911. At Amherst Houston excelled in his studies, and he was elected to Phi Beta Kappa during his senior year. After graduating in 1915, Houston returned to Washington, D.C., but he did not have any specific plans for a career.4

4. Id. at 26-31.
After America’s entry into World War I, Houston decided to enter the military. He obtained a position in the black officers’ training corps at Des Moines, Iowa. In October 1917, Houston was among the 440 African-Americans who received commissions as officers in the United States Army. During World War I, black soldiers were the victims of racism. In a 1940 article, Houston recalled a particularly dangerous encounter that occurred when he and a companion stumbled on a confrontation between a black serviceman and a group of white soldiers. One of the white soldiers became angry after he learned that some female companions had abandoned him for a black soldier. Houston and his friend found themselves surrounded by an angry mob. The tense episode ended after a military police officer intervened. Houston never forgot the incident. Years later he recalled: “I made up my mind that I would never get caught again without knowing something about my rights; that if luck was with me, and I got through this war, I would study law and use my time fighting for men who could not strike back.” After his tour of duty, Houston returned to Washington.

On September 18, 1919, Houston enrolled in Harvard Law School. During his first year, Houston was selected to serve on the staff of the Harvard Law Review, an honor accorded to students who receive the highest grades. Houston’s academic record during his second year and his performance on the law review resulted in his election to the law review’s Editorial Board. He was the first African-American to serve in this capacity. In 1922 he graduated cum laude, finishing in the top five percent of his class. In the following fall, Houston became a candidate for the advanced degree of Doctor of Juridical Science (“S.J.D.”). He was awarded the degree in 1923. After receiving the S.J.D. degree, he received a Sheldon Traveling Fellowship, which he used to study law at the University of Madrid during 1923 and 1924.

B. Howard University: A Laboratory for Civil Rights Litigation

In 1924 Houston returned to Washington, D.C. and was admitted to practice before the District of Columbia Bar. He joined his father’s law firm, which was renamed Houston & Houston. A few months later
Houston joined the faculty at Howard Law School. During his time as a junior faculty member, Houston taught various subjects and was highly regarded by his students and colleagues. In 1927 Houston prepared "A Survey of the Status and Activities of Negro Lawyers in the United States." To conduct the research, he traveled to several cities and eventually completed three studies: "Negro Law Schools," "The Negro Lawyer," and "The Negro and His Contact With the Administration of the Law." During the same period, he developed a separate study for the law school: "Survey of Howard University Law Students." In May 1929, Houston prepared another study titled "Personal Observations on the Summary of Studies in Legal Education as applied to Howard University School of Law." In this twenty-page document, Houston discussed the status of legal education at Howard, the objectives of the school, the curriculum, the instruction methods, and proposed research goals. Houston also outlined his vision of Howard's role in legal education. Houston believed that institutional racism could be effectively challenged through innovative litigation. To accomplish this vision, a group of well-trained lawyers would be needed to handle the lawsuits that would make the Constitution's promise of Equal Protection a reality.

Shortly before Houston joined the law faculty, the university's administration became concerned about the law school's academic standing. In 1920 the Board of Trustees voted "that steps be taken to so advance the School of Law that it may become eligible for membership in the American Association of Law Schools." A bout with tuberculosis forced Houston to take a leave of absence during the 1928-29 academic year. When Houston returned, the dean was appointed Chief Judge of the United States Court of Claims. Not long afterward, "the Board appointed Charles H[amilton] Houston Resident Vice-Dean in charge of the three-year Day School along with general supervision of the Law School Library, beginning July 1, 1929."

Although Booth retained the title of Acting Dean until 1930, Houston immediately assumed responsibility for the day-to-day operations of the school. After his appointment he began almost immediately to upgrade the quality of

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11. Id. at 263 n.25.
12. Id. at 263 n.27.
13. Id. at 68.
14. Id. at 70.
15. Id.
17. Id. at 267.
instruction. Admission standards were raised; personnel changes were undertaken; and significant improvements were made to the law library. By October 1930, the law school employed four full-time professors and one full-time librarian. It had a library of 10,000 volumes and an adequate facility on Fifth Street.

The accrediting authorities reacted favorably to these accomplishments. Following a 1930 inspection, the law school was accredited by the American Bar Association, and on December 28, 1931, it was elected to the American Association of Law Schools "without qualification." Several years later, William H. Hastie, a federal judge who served as Dean of the law school in the 1940s, stated that from 1929-1935 Houston "carried the institution from the status of an unaccredited and little known—though undoubtedly useful—institution to a fully accredited nationally known and respected law school taking its place with the ranking schools of the nation."

Houston's goal involved more than upgrading Howard's academic standing. He intended to train a generation of African-American lawyers who would lead the fight against discrimination. Years later Judge Robert Carter explained:

The overriding theory of legal education at Howard during those years was that the United States Constitution—in particular, the Civil War Amendments—was a powerful force heretofore virtually untapped, that should be used for social engineering in race relations . . . . A principal objective of the faculty at Howard was to produce lawyers capable of structuring and litigating test cases that would provide effective implementation of these guarantees on behalf of the black community.

The legal campaign was developed and implemented almost entirely by African-American lawyers. This was no accident. In a 1935 article, Houston explained that African-Americans could not rely on white lawyers to protect their rights. White lawyers, he explained, were the beneficiaries of the discriminatory practices that Houston intended

to eliminate. Houston also stated his views about the role of black lawyers and described the legal training that these lawyers would need. Houston wrote: "The social justification for the Negro lawyer as such in the United States today is the service he can render the race as an interpreter and proponent of its rights and aspiration[s]." After describing the dearth of African-American lawyers who were active in the 1930s, Houston illuminated his statistics with the following observation:

The census reports [four] Negro lawyers to the 944,834 Negroes in Alabama; [one] Negro lawyer to every 236,208 Alabama Negroes. The State of Alabama has an area of 51,998 square miles. If the [four] Negro lawyers were given cars and told to patrol the state like policemen, each lawyer would have a beat of 12,999 square miles.

Houston also described the hostile environments that existed in the Southern states and explained the financial sacrifices that black lawyers could expect. Despite these obstacles he went on to urge that "it is where the pressure is greatest and racial antagonisms most acute that the services of the Negro lawyer as a social engineer are needed." Finally, he explained:

If a Negro law school is to make its full contribution to the social system it must train its students and send them into just such situations. This does not necessarily mean a different course of instruction from that in other standard law schools. But it does mean a difference in emphasis . . . .

In their published recollections, Houston's students remembered him as an exacting taskmaster who did not tolerate mediocre performance. During the early weeks of each school term he admonished first-year students with the now familiar warning: "Look to your left and look to your right . . . next year one of you won't be here." As William Hastie explained, "In serious pursuits he was tough, combative and unsentimental, demanding excellence of himself and of his students and professional

24. Id. at 49.
25. Id.
26. Id.
27. Id. at 51. Houston frequently used the term "Social Engineer" to express his concept of a lawyer's obligation to society. This term was meant to convey a special sense of mission that went beyond the traditional functions lawyers served. See, e.g., Michael Wilson Reed, The Contribution of Charles Hamilton Houston to American Jurisprudence, 30 HOW. L.J. 1095, 1097 (1987).
30. McNEIL, supra note 3, at 82.
colleagues, though in social relations he was warm, always approachable and held in great affection.” Houston’s dedication to unremitting hard work was made clear in his favorite expression, “[n]o tea for the feeble no crepe for the dead.” Thurgood Marshall recalled that “Houston’s drive earned for him the ‘affectionate’ nickname ‘Iron Shoes.’” Houston’s demands on his students were based on more than a desire to train competent professionals. He was preparing a generation of lawyers to engage in a legal revolution. This was the “difference in emphasis” to which Houston referred.

III. THE MARGOLD REPORT

Not long after it was organized, the NAACP established a steering committee that supported legal actions on behalf of African-Americans who were victimized by discrimination. Over the years, several cases were brought on behalf of various plaintiffs, but litigation was not the focus of the organization's efforts. An event that would alter the NAACP's direction occurred in 1922 when Charles Garland, the son of a Boston millionaire, donated $800,000 to establish a fund to support radical causes. The Garland Fund was administered by a group of liberal activists that included James Weldon Johnson, the Executive Secretary of the NAACP; Roger Baldwin, the founder of the American Civil Liberties Union; Morris Ernst; Lewis Gannett; and Norman Thomas. As Johnson explained in his autobiography,

the American Fund for Public Service was organized and chartered, mainly through the efforts of Roger N. Baldwin, who was a friend of Mr. Garland, for the express purpose of taking over and administering this money... [Garland] turned his inheritance over merely with the request that it be given away as quickly as possible, and to “unpopular” causes, without regard to race, creed or color.

In 1929, Johnson, Gannett, and Ernst established a Committee on Negro Work to focus on the problems of black Americans. The commit-

31. Spottswood W. Robinson III, No Tea For the Feeble: Two Perspectives of Charles Hamilton Houston, 20 How. L.J. 1, 3 (1977). These remarks were delivered at a 1976 ceremony in which William Hastie was posthumously awarded the Charles Hamilton Houston Medallion of Merit by the Washington Bar Association. The first half of this Article consists of Hastie’s unfinished draft speech.
32. Id. at 7.
34. Houston, supra note 23, at 51.
tee drafted a proposal recommending that the Fund award a grant to the NAACP to carry out large-scale legal campaigns to enforce the Constitutional rights of African-Americans in the South.

After the Fund approved the grant, a special committee was established to administer the appropriation. The grant was announced with an explanation that it was intended to assist in areas such as unequal apportionment of school funds, barring negroes from juries, residential segregation, disenfranchisement, and civil liberties defense. The NAACP stated that it would find a “very able lawyer” to review the relevant legal authorities, develop an overall strategy, and supervise the cases that would be filed. After the grant was approved, Walter White, who became the NAACP's Executive Secretary after Johnson's retirement, began to search for a candidate to fill the position. After reviewing several candidates, White narrowed the search to William Hastie, a recent graduate of Harvard Law School, and Nathan Margold, another Harvard graduate who had served on the Harvard Law Review with Charles Houston. Because of Hastie's relative youth and inexperience, White settled on Margold, who was hired on October 4, 1930.

Nathan Margold prepared a comprehensive report that analyzed the Constitutional foundations of Plessy's separate-but-equal doctrine and recommended a strategy to attack segregation. Margold's report was submitted in three separate installments. The Margold Report, which consisted of 218 typed pages, would have a profound effect on the NAACP's activities for the next several years. It contained a comprehensive analysis of laws and applicable legal precedents beginning with Plessy. After analyzing the turn-of-the-century decisions, the report worked its way through the laws governing segregation up to 1931. Despite the weight of legal authority supporting segregation, Margold suggested a means by which the legal obstacles might be overcome.

His analysis included a number of significant conclusions that would eventually become critical to the NAACP's legal strategy. As the NAACP had determined in earlier surveys, Margold confirmed that the separate—but—equal doctrine as practiced was always separate but never equal. In public schools, there were obvious inequities in the resources allocated to white schools as compared to those provided to schools that served black students. Yet, there were cases that found that absolute equality in funding was not required as long as some provision was

37. Id. at Frame 365.
made for both races. There was also a long-standing judicial policy of deferring to local authorities in matters involving the administration of educational systems. Margold also found that numerous defenses were available to the local school boards.

The NAACP's original proposal suggested the simultaneous filing of several suits in various districts across the South. Rejecting this approach, Margold believed "[i]t would be a great mistake to fritter away our limited funds on sporadic attempts to force the making of equal divisions of school funds in the few instances where such attempts might be expected to succeed." Margold's main conclusion was that segregation as practiced was unconstitutional even if the Plessy rationale were accepted. The system was, in reality, "segregation coupled with discrimination." Margold recommended that a series of lawsuits seeking declaratory judgments would be preferable to actions seeking to require the school authorities to pursue a specific course of action. Margold argued that "if we boldly challenge the constitutional validity of segregation if and when accompanied irremediably by discrimination, we can strike directly at the most prolific sources of discrimination." Finally, in what was the key conclusion of his report, Margold argued that "segregation coupled with discrimination resulting from administrative action . . . is just as much a denial of equal protection of the laws as is segregation coupled with discrimination required by express statutory enactment."

The Margold Report became the foundation of the NAACP's strategy against segregation. Its central thesis was one that the NAACP had already documented. Segregation was a crude fiction in which the facilities provided for African-Americans were patently inferior to those reserved for whites. Using the Plessy doctrine, Southern states established facilities for blacks that were demonstrably inferior to those provided for whites. Despite the obvious inequities, the desirability of segregation was not seriously questioned by the vast majority of white Americans. It was accepted as the natural order in the South and was widely practiced in Northern states. As Margold suggested, an evidentiary demonstration of inequality in a particular school district was unlikely to result in any lasting changes even if the NAACP

39. See, e.g., Cumming v. Richmond County Bd. of Educ., 175 U.S. 528 (1899). Ironically the decision in Cumming was authored by Justice Harlan, who had written the dissent in Plessy arguing that the Constitution was "color-blind."
40. See supra note 38, at Frame 647.
41. Id. at Frame 648.
42. Id. at Frame 647.
43. Id. at Frame 648.
prevailed. Margold argued for a more dramatic approach—a direct legal challenge to the entire system.

Margold submitted his report to the NAACP's Board of Directors in 1931. Although the findings and recommendations were what the NAACP hoped to receive, nearly four years passed before the organization could act on Margold's suggestions. By the time the NAACP was prepared to take action, the prospects of receiving the $100,000 originally promised had evaporated in the stock market crash of 1929 and the depression of the 1930s.

IV. THE EQUALIZATION STRATEGY

After submitting his report, Margold accepted a full-time position as an Assistant Solicitor at the Department of Interior. This change left vacant the anticipated position for a full-time attorney to direct the litigation campaign. Walter White settled on Charles Houston as the ideal person for the position. Prior to joining the NAACP's staff, Houston prepared a memorandum for a Joint Committee of the Garland Fund and the NAACP in which he outlined what became the equalization strategy. With a budget of $10,000, Houston undertook the task of formulating plans for an unprecedented campaign of long-range litigation.

Because of the diminished grant, the Joint Committee lowered its sights to legal challenges against discrimination in education and public transportation. After considering what a campaign like this would entail, Houston recommended a still narrower focus. Despite the limited resources, Houston predicted that carefully targeted suits would stimulate public interest and encourage the affected communities to continue the fight after the NAACP led the way with test cases. In a memorandum to the Joint Committee, Houston wrote:

On a budget of $10,000.00 it is exceedingly difficult to execute an effective program on a national scale on two issues as large as discrimination in education and discrimination in transportation. Isolated suits mean little unless the communities and persons affected believe there is an unexpended reserve available to sustain a persistent struggle. This calls for concentration of effort.

Houston's memorandum presented two separate proposals. One was based on an assumption that the entire effort would focus on education cases. The second budget proposed an equal division of the funds

44. McNeil, supra note 3, at 116.
46. See supra note 36, at Frame 858.
between education and transportation litigation. Houston believed that education was the more important goal because of the benefits that would be derived by the African-American students while the campaign was still in progress. He recommended a two-pronged attack: one against unequal allocation of school funds and the other against differentials in teacher salaries. Houston explained that his goals were: "(1) to arouse and strengthen the will of the local communities to demand and fight for their rights; (2) to work out model procedures through actual tests in court which can be used by local communities in similar cases brought by them on their own initiative and resources."47

In this 1934 memorandum, Houston proposed what would become the NAACP's equalization strategy. This approach would be carried out over the next several years in hundreds of cases and would ultimately result in the reversal of the Plessy doctrine. Margold's legal analysis was sound, and his approach would be adopted by the NAACP's lawyers several years later. However, Houston believed that the Supreme Court was not prepared to respond favorably to a direct challenge to Plessy.48 Under Houston's direction a different strategy was devised.

Focusing on education, Houston proposed a series of lawsuits demanding that states comply with Plessy by providing equal allocations of financial and other resources for black students in segregated schools. This would be followed by a second series of suits demanding equal salaries for black teachers.49 As Robert Carter explained some years later,

underlying this strategy was the belief that the segregation system would eventually implode—in other words, that the financial burden of having duplicate educational systems for blacks and whites in the various professions would become so great that the states would be forced to abandon segregation all together at the graduate and professional school level.50

Houston did not underestimate the scope of the task he proposed and the scarce resources that were available. Yet, he believed that successful cases would stimulate enough local support to sustain the effort long after the national office moved on to other projects.

47. Id. at Frame 859.
48. In a 1926 decision, Gong Lum v. Rice, 275 U.S. 78 (1927), the Supreme Court relied on Plessy to sustain a Mississippi segregation statute. Id. at 86-87. In the mid-1930s the Court struck down virtually all of President Franklin Roosevelt's New Deal legislation. This was not a Court that would welcome radical changes in the existing order.
50. Carter, supra note 22, at 33-42.
Part of Houston's confidence was based on the success of his earlier efforts. Houston's transformation of Howard had borne fruit. Howard graduates had established practices in cities and towns throughout the South. Houston was confident that these lawyers would volunteer to handle cases. What was important from an organizational perspective was to demonstrate how the cases could be handled by filing test cases and developing model pleadings. After the Joint Committee approved the proposal, Houston applied for a leave of absence from Howard and began to make preparations to move to New York. He arrived there on July 11, 1935, and found a room at the Harlem Branch of the YMCA. On the next day he reported to work at the NAACP headquarters at 69 Fifth Avenue.

V. Executing the Strategy

A. Finding a Test Case

Before he joined the NAACP on a full-time basis, from January 1, 1935, through July 28, 1935, Houston drove more than 10,000 miles to various destinations in connection with his NAACP duties. These activities included delivering several addresses to local branches of the NAACP and other civic organizations, making visits to lawyers and other individuals involved in NAACP cases, and handling cases for the NAACP. The pace accelerated after Houston moved to New York. Shortly after he assumed his new position, events that would lead to his first important case began to unfold in Baltimore, Maryland.

Donald Gaines Murray applied for admission to the Law School of the University of Maryland in 1935. Although two African-Americans had graduated from the law school several years earlier, in 1920 the State of Maryland approved legislation that required segregated schools. As in other states that practiced segregation, the quality of facilities provided for the black students of Maryland were far below those provided for whites.

By 1935 the desire to improve educational opportunities extended well beyond the Civil Rights activists who were associated with the NAACP. The number of black students attending institutions of higher learning had been rising steadily during the previous decade. Houston's activities at Howard produced dozens of young African-American lawyers who

were anxious to apply Houston's theories to actual cases. None was more eager than Thurgood Marshall, one of Houston's star students. Marshall graduated at the top of his class in 1933 and established a busy, though far-from-lucrative practice in Baltimore, Maryland. The fees that Marshall earned were not enough to support a family. Despite this, Marshall managed to handle several cases for the NAACP on a volunteer basis. One of these became the first successful equalization case.\footnote{RANDALL W. BLAND, PRIVATE PRESSURE ON PUBLIC LAW: THE LEGAL CAREER OF JUSTICE THURGOOD MARSHALL, 1934-1991, 3-7 (rev. ed. 1993) (1973).}

Not long after Marshall returned to Baltimore, Alpha Phi Alpha, a black fraternity, began to organize an effort to force the desegregation of the University of Maryland. This effort was led by Belford Lawson, a Washington, D.C. attorney who was counsel to the fraternity. Lawson enlisted the aid of the Washington Branch of the NAACP and the New Negro Alliance to assist him. After Marshall became aware of Lawson's activities, he wrote Houston in New York to inquire whether the NAACP's national office would be interested in backing the litigation. Houston did not immediately respond.\footnote{RICHARD KLUGER, SIMPLE JUSTICE 186 (1975).}

In November 1934 Lawson invited Marshall and William Gosnell, another Baltimore attorney, to a meeting. After Marshall sent another letter to the NAACP, Houston replied with a telegram instructing Marshall to attend the meeting but cautioning him to avoid making any commitments. At the meeting, Lawson outlined his plans and asked whether Gosnell or Marshall knew of any potential plaintiffs. A few weeks later Gosnell suggested Donald Gaines Murray, a 1934 graduate of Amherst College. Murray was an ideal plaintiff. He was articulate, had a pleasant appearance, and had impeccable educational credentials. After Murray agreed to become the plaintiff, Houston decided to take the case under the auspices of the NAACP.

In the AFPS/NAACP report submitted in March 1935, Houston described the status of the University of Maryland case. Murray's application, he explained, had been submitted and rejected by the university solely on the ground of his race. In their response, university officials suggested that Murray apply to Princess Ann Academy, which had been established for black students. Because the Princess Ann Academy had very limited facilities for college training and no provisions for graduate or professional training, Houston decided this would be a good opportunity to test the equalization strategy.

Houston outlined a number of possible actions depending upon the specific manner in which the university officials responded to the
demands that Houston and Marshall were making on Murray's behalf. Houston also stated that he intended to file a mandamus action that would seek to compel Murray's admission to the university. After considering Houston's recommendations, the Joint Committee passed a formal resolution that authorized Houston to "proceed at once with the case against the University of Maryland." With this action, the NAACP embarked on what would become a decades-long campaign to eliminate formal segregation. After receiving the Joint Committee's approval, Houston filed a civil action in Baltimore City Court against the University of Maryland. The case was tried before Judge Eugene O'Dunne in June 1935. Murray was represented by Houston, Marshall, and William Gosnell. The university was represented by Charles T. LeViness, III, an Assistant Attorney General for the State of Maryland.

1. Murray v. The University of Maryland: The Trial. Houston led off with an opening argument on Murray's behalf. Summarizing the facts, Houston explained that Murray had applied for admission to the University of Maryland's Law School and that he satisfied the prerequisites for admission but his application had been denied solely on the basis of his race. These actions, Houston asserted, violated Murray's rights under the Fourteenth Amendment of the United States Constitution.

After Houston completed his opening, Assistant Attorney General LeViness responded. LeViness argued that the public policy of the State of Maryland required the exclusion of black students from schools reserved for white students. There had been no demand for higher education by black students until relatively recently, he added. The State satisfied the demand by establishing Princess Ann Academy, as well as out-of-state scholarships for black students who wanted to attend graduate schools.

Judge O'Dunne interrupted LeViness, asking him what public policy had to do with the case. LeViness responded by stating that segregation was the State's policy, even though no state law specifically required segregated educational facilities at the graduate level. Evidencing

58. Court Orders U. of Md. to Admit Amherst Graduate, BALTIMORE AFRO-AMERICAN, June 22, 1935.
59. Id. at 7.
60. Id.
61. Id.
some skepticism toward the State's position, Judge O'Dunne asked how a $200 scholarship would cover all of the costs of attending a university outside of the state. O'Dunne asked LeViness whether the State would stipulate that Murray satisfied all of the academic qualifications for admission. The assistant attorney general reluctantly conceded this point.

After the conclusion of the opening statements, Houston called plaintiff as his first witness. Murray took the stand and testified about his life-long residency in Maryland, his desire to attend law school within the state, and his unsuccessful efforts to secure admission to the state university. After Murray concluded his testimony, Houston called as his next witness Dr. Raymond A. Pearson, president of the university. Houston's skills as a trial attorney were legendary among those who saw him at work. Pearson spent an extremely uncomfortable hour and a half on the witness stand. His evasive statements could not stand up to Houston's withering examination. In fact, Houston used the testimony of university officials to establish all of his major points. First, Houston forced Pearson to confirm that Murray's application had gone through the proper channels and that Murray's record at Amherst satisfied all of the academic standards for admission. Next, Houston compelled Pearson to admit that out-of-state scholarships were not available at the time Murray's application was rejected. During subsequent questions, Pearson conceded that appropriations voted by the legislature were insufficient to satisfy the demands of the numerous scholarship applicants. After Dr. Pearson claimed that the state had made adequate provisions for black students at Princess Ann Academy, Houston led him through a step-by-step comparison of the two facilities.

Houston began with an examination of the qualifications of the faculties at the two schools and moved on to the physical facilities. During this line of questioning, Pearson was unable to explain how a chemistry laboratory at Princess Ann Academy consisting of a single table, a few test tubes, and a butterfly case was equal to the state-of-the-art facilities at the main campus. Houston also established that the majority of the faculty members at Princess Ann Academy did not have advanced degrees and that salaries at Princess Ann Academy were far lower than those at the main campus. Comparisons along these lines continued throughout Houston's examination. It was, of course, clear to everyone present that the provisions made for African-American students were grossly inferior to the resources available to whites.

62. *Id.*
63. *Id.*
64. *Id.*
After Pearson concluded his testimony, Houston called as his next witness Roger Howell, the Dean of the University of Maryland's Law School. During Houston's direct examination, Howell made several damaging admissions. The most significant of these consisted of Howell's concession that several of the courses taught at the law school focused on state law. This admission established that students attending law schools outside of Maryland were placed at a disadvantage.

After Dean Howell concluded his testimony, J. Walter Huffington, the state Supervisor of Education, was called to the stand. The State's attorneys hoped that Huffington's testimony would show that the State had allocated substantially equal resources for black students. During cross-examination, however, Huffington conceded that black teachers were paid less and that black students attended school for fewer months each year than white students.

The next witness to testify was Albert Cook, the state Superintendent of Education. Cook's testimony established inequities in the allocation of resources at the high school level. Another witness, Dr. John O. Spencer, the President of Morgan College, a private institution that served black students, was called to the stand. Dr. Spencer testified that students who completed Princess Ann Academy, which the State contended was a two-year junior college, were not admitted to Morgan as juniors because they did not receive adequate preparation at Princess Ann Academy. After Spencer completed his testimony, he was followed by W. M. Hillegist, the University's Registrar and Robert P. McGuinn, Executive Secretary of the Governor's Commission on Higher Education. Hillegist testified that nine blacks had applied for admission to the University of Maryland since 1933. This testimony undermined the State's claim about low demand for graduate education. McGuinn testified that 380 applications were pending for the fifty out-of-state scholarships that were available.

Houston and Marshall shared the closing argument. Marshall began with a discussion of the precedent governing the obligation of states to provide equal educational opportunities for black students. Carefully remaining within the confines of Plessy, Marshall argued that the state had a constitutional obligation to provide equal educational opportunities for students of all races. Maryland, he argued, violated that require-

65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.*
ment when it established a publicly-funded law school for whites without making adequate arrangements for black students.

Houston concluded the argument by emphasizing that no state law barred black students from attending publicly-funded institutions. Houston emphasized that Plessy obligated the State to make equal educational opportunities available to students of both races. Maryland violated its constitutional duty by failing to do so. The out-of-state scholarships, he argued, did not satisfy the State's legal obligations because they were non-existent when Murray's application was rejected and could not satisfy the current demand. At the conclusion of the hearing, Judge O'Dunne issued a ruling from the bench. He found the university had a legal obligation to offer the same educational opportunities for black students as those provided to whites. Because the State had failed to fulfill its constitutional duty, the judge issued a writ of mandamus compelling the university to admit Murray to the class that was scheduled to enter in the fall.69

A few days after the conclusion of the trial in Murray, the NAACP convened its 1935 annual meeting in St. Louis, Missouri. Houston was unable to attend, so he submitted a written report of his activities to the Conference.70 He advised the Association that a possible hearing in the Murray appeal prevented him from appearing in person but that the NAACP had won "a significant victory in the [Maryland] trial court, which if it can be held all the way to the United States Supreme Court will mean the opening up, in one form or another, of professional and graduate education for Negroes in all the States."71 Houston stated that a full report of the trial from the Baltimore Afro-American was being sent to the Conference. Houston informed the organization that he was formulating model procedures that, with minor modifications, could be used in similar cases any place in the country.72

He went on to report that several cases had been filed by Howard graduates who had been in contact with him. Houston noted optimistically that:

[T]he most hopeful sign about our legal defense is the ever increasing number of young Negro Lawyers, competent, conscientious and courageous, who are anxious to pit themselves against the forces or [sic] reaction and injustice. In most of these cases these young lawyers

69. Court Opens Maryland U. Doors, CRISIS, Aug. 1935, at 239.
71. Id.
72. Id.
have served without fee; in non [sic] case has a fee been charged commensurate with the service rendered. The time is soon coming when the Negro will be able to rely on his own lawyers to give him every legal protection in every Court, no matter [the situation].

The report concluded with a summary of Houston’s other activities and closed with a description of how the campaign against segregation would proceed, including confronting issues of discrimination in per capita cost of education, in teacher salaries, in transportation, and in professional and graduate education. During the convention a film was shown that Houston prepared with the assistance of a former student, Edward Lovett. During the months prior to the convention, Houston traveled in South Carolina. While there he filmed several black schools and white schools. This film, along with charts Houston prepared graphically, documented the racial disparities in South Carolina.

Houston drafted a report that was submitted to the Joint Committee of the AFPS/NAACP. After describing the success in Murray and the coverage it received in the black press, Houston made an observation that reflected a mixture of disappointment and hope. He wrote that at the time Murray went to trial:

Interest on the part of Negroes was not keen. The court room was not crowded when the case was tried. Several persons have said that the reason Negroes did not take more interest in the case was because they felt it was hopeless. Much more interest is now being manifested since Judge O’Dunne’s order. One indication is the fact that a number of Negroes have applied for admission to the school since that time.

Two additional items of significance were included in this report. The first concerned proposed teacher salary litigation. Houston noted that the "Afro-American [newspaper] is very much interested and active in obtaining a qualified teacher to bring suit for equalization of teachers’ pay in Maryland. It is probable that this case will be filed before September." The second item related to what would become the next graduate school case. Houston wrote that “the favorable Court decision in Murray will encourage similar suits in other states. Already Sidney R. Redmond, Esq., of St. Louis, Missouri, is investigating discrimination and exclusion at the University of Missouri.”

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73. Id.
74. See supra note 38; Memorandum Report to the Joint Committee of the AFPS/NAACP, Frame 00013.
75. Id. at Frame 00014.
76. Id.
2. *Pearson v. Murray*: The Appeal. After the trial court entered its decision, the attorneys for the State of Maryland filed an appeal. Oral arguments in the *Murray* appeal took place in the fall of 1935. The court of appeals decision was issued on January 15, 1936. The State sought reversal of the trial court's decision on three separate grounds. First, the university argued that it was a private entity rather than a state agency and so was not obligated to comply with the Fourteenth Amendment. The State also claimed that even if the university were deemed to be a governmental unit, the State had satisfied its obligation by establishing a separate school for black students. The State's final argument was that, to the extent it was required to provide graduate educational opportunities for black students, its obligations had been satisfied by establishing a scholarship fund, which black students could use to attend schools outside of Maryland.

The first argument was rejected almost summarily. The court found that the university became a state agency when it was consolidated with the Maryland College of Agriculture. In the court's view there was "no escape from the conclusion that the school is now a branch or agency of the State government." The court then turned its attention to whether the educational facilities maintained for black students were equal to those provided for whites. After acknowledging that *Plessy* authorized segregated schools, the court emphasized that "separation of the races must nevertheless furnish equal treatment."

Because the State did not have a law school for black students, "the main question in this case [was] whether the separation can be maintained, and negroes excluded from the present school, by reason of equality of treatment furnished the latter in scholarships for studying outside the state." The scholarships, the court found, could not provide the basis for a defense because they were not available at the time Murray’s application was rejected. Furthermore, funds that were subsequently appropriated were not adequate to satisfy the demands of the students who had applied for state aid. Finally, even if a black student received a scholarship, it would not have covered the costs of attending law school in another state because the scholarship

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78. *Id.* at 591.
79. *Id.* at 592.
80. *Id.* at 593.
81. *Id.*
82. *Id.*
83. *Id.*
only covered tuition differentials.\textsuperscript{84} For these reasons, the court held that the "slender chance for any one applicant at an opportunity to attend an outside law school at increased expense, falls short of providing for students of the colored race facilities substantially equal to those furnished to the whites in the law school maintained at Baltimore."\textsuperscript{85} After holding that Murray had been denied Equal Protection of the law, the court considered the question of relief.\textsuperscript{86} It found that "the erection of a separate school [was] not an available alternative remedy."\textsuperscript{87} As a consequence, it affirmed the trial court's order requiring Murray's admission to the University of Maryland.\textsuperscript{88}

\textit{Murray} represented a solid victory for Houston, Marshall and the NAACP. In their first major case after launching the litigation campaign, the NAACP's lawyers won a judgment that broke through the racial barriers erected by \textit{Plessy}. The Maryland Court recognized that the mere provision of some facilities for black students did not satisfy the requirements of the Equal Protection Clause of the Fourteenth Amendment. The decision was a stunning accomplishment and its implications were far-reaching. No state that created separate school systems had attempted to establish anything resembling equality. If the holding in \textit{Murray} were adopted in other jurisdictions, the states would be faced with the burden of equalizing the educational facilities. Houston was certain that the maintenance of separate, but actually equal, systems was a burden no state could afford to bear. Segregation would eventually break down under its own weight.

Another important aspect of \textit{Murray} was the relief that the court granted. The court could have ordered the State to establish a separate school for black students and given it a period of time to comply with its order. In the alternative, the court could have required the State to increase the amount of the out-of-state scholarships to cover the actual costs of attending schools in other states. Finally, the court could have simply declared that the State's actions fell short of its obligations under the Fourteenth Amendment and allowed the State to develop its own plan of compliance. By ordering Murray's admission to the law school, the court forestalled any delaying tactics that might have been devised.

The decision in \textit{Murray} sent a galvanizing message of hope to a black community that had all but resigned itself to permanent second-class status. Throughout the years that he served as special counsel to the

\begin{thebibliography}{88}
\bibitem{84} Id. at 593-94.
\bibitem{85} Id. at 593.
\bibitem{86} Id. at 594.
\bibitem{87} Id.
\bibitem{88} Id.
\end{thebibliography}
NAACP, Houston complained about the apathy he encountered. In a 1935 memorandum Houston observed that:

The difficulty which has developed and which has prevented the program from being pushed more vigorously is the degree of apathy on the part of the Negro population. Conservative Negroes are afraid of the program . . . . It is astonishing to know the lack of knowledge and indifference on the part of the public in general to the question of Negro education.  

*Murray* was a much needed victory. As William Hastie recalled several years later,

throughout the first third of this century, the effective institutionalization of racism was the common experience of most Negroes. "Settled" American law required and sanctioned such rigid and comprehensive segregation and subordination of blacks that, to most people, even talk of any significant movement toward an equalitarian legal order seemed visionary, or even foolish.  

As Hastie's comments suggest, by the early 1930s most African-Americans had resigned themselves to subordinated status. *Murray* provided a critical boost for the Civil Rights movement.

As Houston predicted, lawyers in other states were encouraged by the decision in *Murray* to bring similar suits in other jurisdictions. Black students who were anxious to expand their educational opportunities were willing to take the substantial risks involved in becoming plaintiffs in Civil Rights litigation. The courage to demand equal rights was aided immeasurably by Houston's victory in *Murray*. Houston showed that African-Americans could challenge segregation in the courts and prevail against what many considered insurmountable odds.

**B. The Role of Black Bar Associations**

One of the cornerstones of Houston's legal strategy involved the use of African-American lawyers to handle Civil Rights cases. One of the means by which this strategy was facilitated was the National Bar Association ("NBA"), which was founded in August 1925 in Des Moines, Iowa.  

As a result of Houston's victory, lawyers were encouraged to bring similar suits in other jurisdictions. Black students who were anxious to expand their educational opportunities were willing to take the substantial risks involved in becoming plaintiffs in Civil Rights litigation. The courage to demand equal rights was aided immeasurably by Houston's victory in *Murray*. Houston showed that African-Americans could challenge segregation in the courts and prevail against what many considered insurmountable odds.

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89. See *supra* note 36; Houston Memorandum To Joint Committee AFPS/NAACP, November 14, 1935, Frames 00025-26.
was organized in 1902 by George H. Woodson. Woodson served as President of the Iowa group for several years. The first meeting of the NBA was attended by black attorneys from Iowa, Kansas City, and Chicago. Woodson was elected to serve as the first president of the NBA. Articles of Incorporation were filed in Polk County, Iowa, on July 29, 1926. Among the organization's purposes was "to form a nationwide organization of practicing attorneys of the Negro race."92

The NBA grew rapidly, adding as affiliate chapters existing or newly organized black bar associations across the country. Houston was a founding member of the Washington Bar Association, which was established in 1925 in Washington, D.C. and later became the District of Columbia's NBA affiliate.93 Houston's father, William Houston, served as president of the NBA from 1937-1938. The organization was critical to black lawyers during this period because segregation excluded them from the American Bar Association and local bar associations. The NBA and its local affiliates provided a critical link to colleagues within the profession.

Beginning in 1926, the NBA held yearly conventions at which black lawyers from across the nation gathered. This practice gave them an opportunity to meet, compare notes, and discuss issues of importance to practicing lawyers. Eventually, an interlocking network of lawyers spread itself across the country. Most of the lawyers were Howard graduates. They were members of the NBA and saw each other at least yearly at NBA conventions. Finally, the same lawyers were active in local branches of the NAACP. These associations formed a vast network in which the NAACP, Howard Law School, and the NBA provided the critical links. As NBA President Raymond Pace Alexander explained in 1941:

The Negro Bar, most of whom are members of the National Association for the Advancement of Colored People, many of the officers, directors, and most active of the membership being either members of the Legal Committee of the N.A.A.C.P. or officers in their respective city branches, have since the formation of the Bar Association, given active support to the many important cases involving the civil and political rights of the Negro which have been brought in the various courts throughout the country.94

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93. MCNEIL, supra note 3, at 67.
94. Alexander, supra note 92, at 4-5.
C. Gaines v. University of Missouri

The value of this network of African-American lawyers was reflected in the way in which the next equalization case was orchestrated. A St. Louis lawyer, Sidney Redmond, recommended the case to Houston. Redmond was a 1923 graduate of Harvard College. He received a law degree from Harvard University in 1927. He moved to St. Louis from Mississippi in 1929, became active in the St. Louis Chapter of the NAACP, and later served as President of the NBA. When Redmond recommended that the NAACP file a case on behalf of a black student in Missouri, Houston agreed.

Lloyd Gaines was a 1935 graduate of Lincoln University in Jefferson City, Missouri. He applied to the University of Missouri's Law School. After his application was denied, a civil action was filed on his behalf. Sidney R. Redmond and Henry D. Espy of St. Louis (both of whom were members of the Mound City Bar Association, the local affiliate of the NBA) and Charles Houston represented Gaines. Houston traveled to St. Louis to complete the final preparations a few days prior to the trial. On July 10, 1935, the day of the trial, Houston rose at 4:15 a.m. to prepare for the 120-mile drive to Columbia. By the time Gaines and the other lawyers had assembled it was 6:00 a.m. An unanticipated detour caused further delays. Houston, Redmond, Espy, and Gaines did not arrive at the Boone County Courthouse until 9:15 a.m.95

It was an unusually hot summer. Boone County was suffering through a severe drought. Dozens of farmers were in town to visit officials at the county relief agencies located in the courthouse. Several of the farmers wandered into the courtroom to watch the Gaines proceedings. Nearly a hundred students who were attending a summer session at the University of Missouri also crowded into the courtroom. Before long the courtroom was filled to capacity. The opposing counsel shook hands cordially, and they all shared a single table, an arrangement "odd to us," Houston reported later.96 In a memorandum to his office, Houston explained that "all during the trial we looked down one another's throats. For private conferences at the table we almost had to go into a football huddle."97 Although the courtroom was filled with spectators, there were no displays of overt hostility during the trial.

96. Kluger, supra note 55, at 203.
97. Id.
Furthermore, unlike many courthouses during that period, the one in Boone County was not segregated. Houston noted that during the recess, some of the farmers "looked a little strange at us drinking out of the same fountain and using the same lavatories with them, but they did not say anything."98

Houston reported that the university's lawyers, practitioners from a Kansas City firm, were "driving and dramatic" in their opening presentation.99 They argued that Gaines' remedy lay with the officials of Lincoln University; he should have requested that Lincoln establish a law school. During the trial university officials admitted that Gaines was otherwise qualified for admission and was denied admission solely on the basis of his race. The trial judge was obviously not receptive to Houston's arguments. In the memorandum to his office, Houston concluded that "it is beyond expectation that the court will decide in our favor, so we had just as well get ready for the appeal."100 As Houston expected, the trial judge entered a judgment for the university.101

The case was appealed to the Supreme Court of Missouri. Houston and Redmond argued the appeal. The Missouri Supreme Court affirmed the trial court's ruling, noting that "the established public policy of this State has been, and now is, to segregate the white and Negro races."102 The court also found that the state laws requiring separate schools were not forbidden by the Fourteenth Amendment of the Federal Constitution.103 Houston and Redmond argued that the laws requiring segregation did not extend to support colleges and universities.104 After reviewing statutes establishing Lincoln University "for the higher education for the Negro race," the court disagreed and held that there was "a clear intention on the part of the Legislature to separate the white and Negro races for the purpose of higher education."105 Houston and Redmond argued that the broadly worded statutory language, which made state-supported higher education available to "all youths" who were residents of Missouri, could not be interpreted to restrict admission to white students.106 In the court's view that interpretation would be "at war" with other statutory provisions that evidenced "a clear

98. Id.
99. Id. at 204.
100. Id. at 203-04.
101. Id. at 204.
102. Gaines v. Canada, 113 S.W.2d 783, 785 (Mo. 1938).
103. Id.
104. Id.
105. Id. at 786.
106. Id. at 787.
and unmistakable intention on the part of the legislature to separate the races for the purpose of higher education.”

Houston and Redmond also claimed that the university’s actions denied Gaines’ rights to equal protection of the law under the Fourteenth Amendment. After explaining somewhat cryptically that “color carries with it natural race peculiarities” and that “[t]hese differences create different social relations,” the court relied on Plessy v. Ferguson to conclude that “[e]quality, and not identity of privileges and rights, is what is guaranteed to the citizen.” The court believed that “differences” in the black and white races justified disparate treatment. Equality did not mean that Gaines was entitled to the same education that was made available to whites. Based on this reasoning, the court held that Gaines would not be deprived of any rights in violation of the Federal or Missouri Constitutions if the educational opportunities provided by the State were “substantially equal to those furnished white citizens of the State.”

The court also found that Gaines had not applied for admission to Lincoln University but that, if he had done so, the Board of Curators at Lincoln would have been obligated to establish a law school “or furnish him opportunity for legal training elsewhere, substantially equal to that furnished white students at the University of Missouri.” The court noted that law schools at universities in adjacent states admitted black students. Those programs were as “sound, comprehensive [and] valuable” as the University of Missouri’s curriculum. The court observed that the distance Gaines would be required to travel to attend law schools located in adjacent states would not be any greater than the distance white residents in some areas of Missouri would travel to attend the University of Missouri.

In an attempt to avoid one of the critical weaknesses in the State’s position in the Maryland case, the Missouri court struck down a statutory provision that would have limited the funds supplied to Gaines to the difference between the tuition charged by the University of Missouri and the cost of attending an out-of-state law school. It
held that Missouri would be required to pay “full tuition in the law department of the university of an adjacent state.”

Houston and Redmond’s final argument was that the Missouri court should apply the Maryland court’s reasoning in Murray. In the court’s view, however, the circumstances that prompted the Murray decision in Maryland were “radically different” because, unlike Missouri, Maryland had not made adequate provisions for black students as Missouri had done with Lincoln University. Based on these findings, the Missouri court held “that the opportunity afforded [Gaines] for a law education in the university of an adjacent State is substantially equal to that offered to white students by the University of Missouri.”

Gaines was appealed to the United States Supreme Court. On the day before the oral arguments, Houston rehearsed before a group of students and professors at Howard University Law School. This rehearsal was one of the first of several “dry runs” that were conducted at Howard in Civil Rights cases. On the following day, the university’s lawyers argued that Gaines was not entitled to a writ of mandamus because “if, on the date when [Gaines] applied for admission to the University of Missouri, he had instead applied to the curators of Lincoln University it would have been their duty to establish a law school.” The Supreme Court found no such “mandatory duty” because the state law on which the university relied left “to the judgment of the curators to decide when it will be necessary and practicable to establish a law school.”

More important, the Supreme Court acknowledged the realities of the situation when it stated that “the fact remains that instruction in law for Negroes is not now afforded by the State, either at Lincoln University or elsewhere within the State.” Based on these findings, the Court reasoned that the critical issue was “the question [of] whether the provision for the legal education in other States of [negro] resident[s] in Missouri is sufficient to satisfy the constitutional requirement of equal protection.”

117. Id.
118. Id. at 790-91.
119. Id. at 791.
120. Id. at 790.
122. MCNEIL, supra note 3, at 149-50.
123. Gaines, 305 U.S. at 346.
124. Id. at 347.
125. Id. at 345.
126. Id. at 348.
The Court reasoned that the quality of legal education provided by states adjacent to Missouri was irrelevant. The question was "what opportunities Missouri itself furnishes to white students and denies to negroes solely upon the ground of color." The Court found that each state had an independent constitutional obligation to provide equal educational opportunities and that this requirement could not be shifted by one state to another. The Court also concluded that the right to equal protection is a "personal one." As a consequence, "the State was bound to furnish [Gaines] within its borders facilities for legal education substantially equal to those which the State there afforded for persons of the white race." Because Missouri had failed to establish a law school for African-American students, Gaines was entitled to admission to the University of Missouri Law School.

Gaines represented a major victory for the NAACP. The reasoning of the Maryland court in Murray had been adopted by the United States Supreme Court. This meant that Gaines had nationwide applicability as a binding legal precedent. Murray was significant, but a victory in the Supreme Court carried far more weight. Houston's "equalization" strategy prevailed for a second time. The Supreme Court victory meant the fight against segregation in public schools was on a solid foundation.

One of the strangest stories of the Civil Rights cases involves the ultimate disposition of the Gaines litigation. After the case was remanded to the trial court, the university scheduled a deposition of Gaines. After repeated efforts to contact him, it became apparent that he had disappeared. He was last seen leaving an Alpha Phi Alpha fraternity house in Chicago but was never seen again. Various theories exist as to what happened to Gaines, but all that is actually known is that he was never heard from again.

D. Thurgood Marshall Succeeds Houston at the NAACP

By the middle of 1936, Houston found himself almost overwhelmed with his duties at the NAACP. He was serving not only as director of the NAACP's litigation campaign but also as general counsel, fundraiser, public speaker, and legal advisor to Walter White. At the same
time, Marshall's work in Baltimore, which was tantamount to volunteer work, was causing the financial aspects of his practice to suffer. In one of his frequent letters to Houston, Marshall wrote in desperation that "something must be done about money." Houston replied that Marshall should consider joining the staff of the NAACP on a full-time basis. Marshall eagerly accepted Houston's proposal. Houston then approached Walter White, who concurred in Houston's suggestion. In mid-October 1936 Marshall moved to New York to serve as Houston's assistant.

Approximately one year later Houston moved back to Washington, where he rejoined his father's law firm but continued to serve as special counsel to the NAACP. The reasons for Houston's departure are not entirely clear, but the move was probably prompted by a mixture of personal and professional reasons. Houston suffered occasional bouts with tuberculosis, which he had contracted during World War I. He was suffering from extreme exhaustion when he returned to Washington. Other changes occurred in Houston's personal life. He divorced and remarried during the time he lived in New York, separating from his first wife when he moved to New York in 1935. In a letter to his father written in 1938, Houston expressed his feelings about the move. "I have had the feeling all along that I am much more of an outside man than an inside man... I usually break down under too much routine." Houston continued, "Certainly, for the present, I will grow much faster and be much more of service if I keep free to hit and fight wherever the circumstances call for action."

After Houston moved to Washington, there was a major internal reorganization within the NAACP. In 1924, the Internal Revenue Service denied tax exempt status for contributions to the NAACP based on the organization's lobbying activities. The initial decision was affirmed in 1934 and reaffirmed in 1938. In 1939, at Marshall's suggestion, the NAACP's Board passed a resolution to establish a separate, tax-exempt legal entity to carry out its litigation and educational activities. As a result, the NAACP's Legal Defense and Education Fund ("LDF") was organized in September 1939. After his departure, Houston retained a close alliance with the NAACP. He returned to the Legal Advisory Committee, continued to handle NAACP cases, and

134. Id.
135. Id. at 145.
136. Id. at 146-49.
137. Id. at 149; see also MARK TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936-1961 (1994).

During the early to mid-1940s, the NAACP filed numerous actions against local school districts in teacher salary cases, but the pace of the university cases declined. America was preoccupied with World War II. The NAACP turned much of its attention to discrimination in the military. At the same time, the NAACP responded to requests for assistance in cases raising other issues. Several of these reached the Supreme Court, and the NAACP obtained a number of significant victories during this period. In *Chambers v. Florida*, four black defendants who were accused of murdering a white fish merchant pleaded guilty after being detained for five days without access to counsel. The Supreme Court reversed the convictions after finding that confessions extracted under brutal conditions such as those used by the Florida police were not voluntary and violated defendants' rights to Due Process of law.  

In 1941, a unanimous United States Supreme Court decided an important transportation case, *Mitchell v. United States*, in which a black Illinois congressman challenged an order moving him from his first-class accommodations while travelling in a train to a smoker without running water or toilets after the train that started out from Illinois entered the state of Arkansas. The Court found that the facilities provided for black passengers were not equal to those provided for whites.  

In 1943 Charles Houston filed an employment case on behalf of B.W. Steele, a black railroad fireman. This class action alleged that the railroad and the union had conspired to eliminate jobs held by black railroad workers. The case was filed in Alabama. After the Alabama courts ruled against Houston, the case was appealed to the United States Supreme Court. In a unanimous opinion, the Court found in *Steele v. Louisville & Nashville Railroad* that the union had breached its duty of fair representation and that the Railway Labor Act imposed a duty to protect equally the interests of black and white union

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139. 309 U.S. 227 (1940); see also The Legal Front, CRISIS, July 1940, at 206.
140. 309 U.S. at 229-31.
141. Id. at 241-42.
142. 313 U.S. 80 (1941).
143. Id. at 89.
144. Id. at 96.
146. 323 U.S. 192 (1944).
members.\textsuperscript{147} In the field of labor law, this was the seminal decision concerning a union's duty of fair representation.

In 1944 the NAACP prevailed in an important voting rights case, \textit{Smith v. Allwright}.\textsuperscript{148} In an earlier case, \textit{Nixon v. Herndon},\textsuperscript{149} the Supreme Court invalidated a Texas statute that disenfranchised black voters.\textsuperscript{150} Texas responded by establishing an "all white" primary. Because Texas, like the other Southern states, was a one-party state, primary elections determined who would serve in a given office. In a case challenging the white primary, \textit{Grovey v. Townsend},\textsuperscript{151} the Supreme Court considered whether the actions of the Texas Democratic Party were state actions for purposes of the Fourteenth Amendment.\textsuperscript{152} Grovey's lawyers, Carter Wesley, J. Alston Atkins, and James Nabrit, argued that the Fourteenth Amendment applied because state law regulated the operation of the primaries.\textsuperscript{153} The Supreme Court disagreed and found instead that the primary elections were operated by the Democratic Party rather than a state agency.\textsuperscript{154} In the Court's view, Grovey's argument "confuse[d] the privilege of membership in a party with the right to vote for one who is to hold public office."\textsuperscript{155}

\textit{Grovey} allowed Texas to continue the practice of disenfranchising black voters. In a later case, \textit{United States v. Classic},\textsuperscript{156} the Justice Department charged Louisiana election officials with corrupt practices.\textsuperscript{157} Despite the precedent in \textit{Grovey}, the Supreme Court found in \textit{Classic} that because the United States Constitution required that the time, place, and manner of elections were to be prescribed by state legislatures, Congress had the authority to regulate primary as well as general elections.\textsuperscript{158} Using the \textit{Classic} precedent, Marshall brought a case on behalf of a black Texan, Louis E. Smith, against an election judge, S.W. Allwright. In 1944 the Supreme Court voted eight to one to outlaw the Texas white primary.\textsuperscript{159} The Court found in \textit{Smith v. Classic\textsuperscript{160}, that" the privilege of membership in a party with the right to vote for one who is to hold public office."\textsuperscript{155}}

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Allwright, that the State's actions, although performed by a political party, were not "private" but racially discriminatory state actions.\textsuperscript{160} Grovey was overruled.\textsuperscript{161}

In 1946 Marshall and William Hastie were back before the Supreme Court to argue Morgan v. Virginia,\textsuperscript{162} another transportation case. Morgan boarded a Greyhound bus in Gloucester County, Virginia. A state law required black passengers to sit at the rear of buses. When she was ordered to the rear of the bus, Morgan declined on the ground that she was a passenger on a bus engaged in interstate commerce.\textsuperscript{163} The Supreme Court held that because she was an interstate passenger, Morgan could not be subjected to local and state ordinances requiring segregation in public transportation.\textsuperscript{164}

E. The Final Graduate School Cases

After World War II, the NAACP directed its energies toward revitalizing the graduate school litigation program. Spurred by the thousands of returning veterans with government benefits that could be used to finance their educations, the NAACP recognized that there was an increased demand for higher education. With Marshall at the helm, the LDF renewed its campaign to break through the barriers that prevented black students from attending state-supported institutions. In some ways the LDF picked up where it had left off with Murray and Gaines, but in the post-war cases, several innovative approaches were introduced. One involved a move from state courts to federal courts. This expedited the cases by eliminating several steps in the appeals process. Instead of appealing from a trial court to an intermediate appellate or a state supreme court, the lawyers took advantage of a procedure created by the Judiciary Act of 1937 that allowed constitutional challenges to state statutes to be heard by special three-judge panels in district courts. Judgments entered by these tribunals could be reviewed directly by the Supreme Court instead of proceeding through the usual appellate process. This process reduced the time and expense associated with protracted court battles and allowed the LDF to move cases much faster than in previous years.

Another development involved the strategic use of expert testimony. Marshall began to employ the testimony of educational and other experts to demonstrate the psychological harm that enforced segregation

\textsuperscript{160} Id. at 664-65.  
\textsuperscript{161} Id. at 666.  
\textsuperscript{162} 328 U.S. 373 (1946).  
\textsuperscript{163} Id. at 374-75.  
\textsuperscript{164} Id. at 380-86.
inflicted on black students. Focusing carefully on the intricacies of the educational process, Marshall also used experts to prove that several intangible features of the educational experience could not be duplicated in a segregated setting even if the physical facilities were equalized. Because most of the trials involved efforts to gain admission to law schools, the judges presiding over the cases were able to grasp, from personal experience, the technical concepts that the experts described. Because the judges were law school graduates, it was not difficult for them to understand why intangible features like the interaction of students were such an integral part of the educational process. This made it clear that the *Plessy* doctrine was not only predicated on a flawed assumption, but the equality anticipated by the Fourteenth Amendment could not be realized even if the states were able to establish separate systems that duplicated exactly the facilities reserved for white students.

The final graduate school cases represented a transition from the holdings in the early equalization cases to the final decisions involving primary and secondary schools. The post-war cases went beyond a demand for physical equality to a showing that equal facilities could not remedy all of the deprivations caused by racial segregation. Once the courts were forced to grapple with this evidence, it would not be long before they were forced to concede that there was no such thing as separate equality.

1. *Sipuel v. Oklahoma.* The first of the post-war cases was filed against the University of Oklahoma in April 1946. Roscoe Dundee, an attorney and publisher of a black newspaper, was one of the leaders of the Oklahoma chapter of the NAACP. Like Missouri and Maryland, Oklahoma established separate schools for black students but made no provisions for graduate school training. After months of publicizing the inequities of the Oklahoma system, Dundee identified several potential plaintiffs. From a field of several possibilities the NAACP settled on Ada Louise Sipuel.

Sipuel was an honor student at the State College for Negroes in Langston, Oklahoma.\(^{165}\) She applied for admission to the University of Oklahoma's Law School but was denied on the grounds that the school did not admit black students. The lawsuit was filed in an Oklahoma trial court. In July, the trial court dismissed Sipuel's case. On appeal the Oklahoma Supreme Court held that Sipuel's failure to demand a law school for black students precluded her from seeking admission to the

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school established for whites. The court found Oklahoma was not obligated to establish a black law school until demand justified the expenditure of funds. Since Sipuel had not made the necessary demand, the State could not have anticipated the need for creating a separate law school. Based on this reasoning, the court found that Sipuel had "wholly failed to establish any violation of the Fourteenth Amendment of the Federal Constitution." Based on this reasoning, the court found that Sipuel had "wholly failed to establish any violation of the Fourteenth Amendment of the Federal Constitution." Based on this reasoning, the court found that Sipuel had "wholly failed to establish any violation of the Fourteenth Amendment of the Federal Constitution." Based on this reasoning, the court found that Sipuel had "wholly failed to establish any violation of the Fourteenth Amendment of the Federal Constitution." Based on this reasoning, the court found that Sipuel had "wholly failed to establish any violation of the Fourteenth Amendment of the Federal Constitution."

The NAACP sought review of the Oklahoma court's decision in the United States Supreme Court. At the time the petition for a writ of certiorari was filed, Marshall was reluctant to proceed because the facts of the case had been stipulated. This meant that the evidentiary record was not as fully developed as he would have preferred. Despite Marshall's reservations, the appeal was pursued and the case was argued in the Supreme Court during the first week of 1948. In a surprise move, the Court issued a decision four days later that reversed the Oklahoma Supreme Court.

In a brief, per curiam opinion, the Court noted first that Sipuel's "application for admission was denied, solely because of her color." The Court then found:

The petitioner is entitled to secure legal education afforded by a state institution. To this time, it has been denied her although during the same period many white applicants have been afforded legal education by the State. The State must provide it for her in conformity with the equal protection clause of the Fourteenth Amendment and provide it as soon as it does for applicants of any other group.

On January 17, 1948, the Oklahoma Supreme Court ordered the Board of Regents to allow Sipuel to attend law school as soon as it accorded that opportunity to any other student. On the basis of that decision, the Oklahoma trial court issued an order that enjoined the state from enrolling any students at the university's law school until a separate school for black students was established and ready to function. Unwilling to retreat from its policy of racial segregation, the Board of Regents responded by roping off an area in the State Capitol, designating it as the "Negro law school," and hiring three black lawyers to serve

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167. Id. at 144.
168. Sipuel v. Board of Regents of the Univ. of Okla., 332 U.S. 631 (1948); see also CRISIS, Nov. 1947, at 343-44.
169. 332 U.S. at 632.
170. Id. at 632-33; see also CRISIS, Feb. 1948, at 54-55.
171. 332 U.S. at 632-33.
as faculty. Marshall was so outraged that he took the extraordinary step of returning to the United States Supreme Court with a request that it find that the State of Oklahoma had not complied with the Court's decision. To Marshall's surprise and disappointment, the Supreme Court ruled in Oklahoma's favor.

Despite this setback, Walter White, the NAACP's Executive Secretary, was heartened by the response the case received outside the courtroom. When Sipuel originally applied in person on the University of Oklahoma's campus, she was cordially received by a number of white students who treated her to lunch after the ordeal of the admission refusal was over. The university's actions created an uproar on the Oklahoma campus. Students held a large demonstration in front of the administration building to protest the university's segregation policies. Another demonstration was held when Oklahoma established a separate law school in the State Capitol. During the latter demonstration, speaker after speaker insisted that the university allow the admission of black students. In a dramatic conclusion to the rally, a copy of the Fourteenth Amendment was burned, and the ashes were mailed to the White House in symbolic protest against the state's nullification of Sipuel's Constitutional rights.

2. Sweatt v. Painter. At the same time that the NAACP was battling against Oklahoma, an identical suit was filed on behalf of a student in Texas. Hemon Marion Sweatt, a letter carrier employed by the United States Post Office, applied for admission to the University of Texas Law School in 1946. Sweatt's application was denied on the grounds of his race even though Texas had not established a separate law school for black students. On May 14, 1946, suit was filed in Texas state court. In June, the trial court held a hearing and issued an order giving the State six months to establish a law school for African-American students.

The State responded by renting a few rooms in Houston and hiring two black lawyers to serve as faculty for what it designated as the newly established branch of Prairie View University, a school previously established for black students. At a status conference in December 1946,
the trial court found that the facilities at Houston were "substantially equal" to the Austin campus.\textsuperscript{179}

Marshall appealed the trial court's ruling.\textsuperscript{180} While the appeal was pending, Texas took steps to bolster the trial court's finding of substantial equality. The location of the "Negro" Law School was transferred to Austin, pending the construction of a permanent facility in Houston. Three rooms in a building across the street from the State Capitol were set aside to house the temporary law school. The students were given access to the law library located at the State Capitol. Professors from the University of Texas were assigned to provide instruction.\textsuperscript{181} The Texas legislature subsequently appropriated three million dollars to upgrade the facilities at Prairie View and designated one hundred thousand dollars for the creation of a law school. Because of the change in circumstances, the case was remanded to the trial court for a full evidentiary hearing.\textsuperscript{182}

Faced with a weakened case on the issue of physical inequality, Marshall, who was assisted by James Nabrit and a Dallas attorney, W. J. Durham, chose a different tack. His new approach became critical to the Supreme Court's decision in the final series of graduate school cases and would provide the foundation for the decision in \textit{Brown}.\textsuperscript{183} Marshall presented the testimony of an array of expert witnesses who testified that segregation had no scientific basis in public schools.\textsuperscript{184} Other experts testified about the relative learning abilities of black students and white students. The dean of the law school at the University of Pennsylvania testified about the importance of interaction among students in the learning process. A professor, he explained, however well qualified, could not provide the elements of the educational experience that are derived from interaction among students. Another witness, Robert Redenfield, who held doctorates in anthropology and law, testified that there was no scientific basis for the general assumption concerning the inherent intellectual inferiority of black students.\textsuperscript{185}

\begin{itemize}
\item \textsuperscript{179} \textit{Crisis}, June 1947, at 181.
\item \textsuperscript{180} \textit{Id}.
\item \textsuperscript{181} \textit{Id}.
\item \textsuperscript{182} \textit{Crisis}, Nov. 1947, at 343.
\item \textsuperscript{183} \textit{Brown v. Board of Educ.}, 349 U.S. 294 (1955).
\item \textsuperscript{184} \textit{Crisis}, Nov. 1947, at 343.
\item \textsuperscript{185} See \textit{Segregation and the Equal Protection Clause: Brief of the Committee of Law Teachers Against Segregated Legal Education}, 34 Minn. L. Rev. 289 (1950); see also Mark Tushnet, \textit{NAACP Legal Strategy Against Segregated Education 1925-1950}, 129 (1987).
\end{itemize}
The university's attorneys attempted to undermine the experts' testimony. They attacked Sweatt's motives for filing the lawsuit and attempted to prove that the case was actually initiated by the NAACP. They also contended that Sweatt's refusal to enroll in the black law school demonstrated his bad faith. Approximately one month after the trial ended, the trial court entered a judgment for defendants. The case was appealed to the Texas Court of Civil Appeals. On February 25, 1948, that court issued a decision affirming the trial court's ruling.

The NAACP was unable to persuade the judges in the Texas courts, but it had better luck with the students at the University of Texas. After Sweatt was filed, mass meetings were staged by students during the trial. The president of the student council and several members of the faculty spoke in support of Sweatt. As Walter White reported later, "[a] college chapter of the National Association for the Advancement of Colored People was organized on the campus of the University—the only all-white unit of the NAACP." To White, at least, this demonstrated that the litigation program was having a tangible effect on public opinion. It was, at minimum, a sign that the NAACP's position was gaining support among whites.

The last of the major graduate school cases involved a sixty-eight-year-old black professor at Langston University, George W. McLaurin, who applied in 1948 to the graduate school of education at the University of Oklahoma. After his application was denied, the NAACP filed a suit on his behalf. This time Marshall pursued an approach that the NAACP and other public interest lawyers would follow in later years. Charles Houston preferred to file suits in state courts based on his multi-purpose strategy of winning cases for individual plaintiffs, creating precedents that could be applied later, and generating broad-based support for the NAACP's mission within African-American communities. Marshall decided to alter this approach. McLaurin was heard by a three-judge panel in the federal district court. After the trial court entered a judgement for the university, a petition for a writ of certiorari was filed in the Supreme Court.

3. The Supreme Court's Decisions in Sweatt and McLaurin. Sweatt and McLaurin reached the Supreme Court at the same
time. *McLaurin* was argued on April 3 and 4, 1950, and *Sweatt* was presented on April 4, 1950. The decisions in both cases were issued on June 5, 1950. The Court declined to consider whether "*Plessy v. Ferguson* should be reexamined in the light of contemporary knowledge respecting the purposes of the Fourteenth Amendment and the effects of racial segregation." Nevertheless, in the two opinions, the Court came close to acknowledging the inequities inherent in state-sponsored segregation.

In *Sweatt* the Court found that the facilities available at the newly established law school were not equal in quantity or quality to those available at the law school in Austin. "In terms of number of the faculty, variety of courses and opportunity for specialization, size of the student body, scope of the library, availability of law review and similar activities, the University of Texas Law School is superior." The Court did not limit its analysis to a comparison of physical resources. It went on to conclude that the quality of educational instruction was inevitably diminished by isolation. The Court found that:

> [T]he University of Texas Law School possesses to a far greater degree those qualities which are incapable of objective measurement but which make for greatness in a law school. Such qualities, to name a few, include reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige. It is difficult to believe that one who had a free choice between these law schools would consider the question close.

The Court reached a similar conclusion in *McLaurin*. *McLaurin* was different from *Sweatt* because the State allowed McLaurin access to the same instruction as whites, except on a racially segregated basis. Thus, in *McLaurin*, the Court considered whether segregation *within* a university violated the Fourteenth Amendment. As the opinion explained, McLaurin

was required to sit apart at a designated desk in an anteroom adjoining the classroom; to sit at a designated desk on the mezzanine floor of the library, but not to use the desks in the regular reading

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194. Id. at 635.
195. Id. at 633-34; see also CRISIS, July 1950, at 446.
196. 339 U.S. at 634-35.
197. Id. at 634.
199. Id. at 638.
While the case was pending, some modifications were made in the arrangements to accommodate McLaurin:

For some time, the section of the classroom in which [McLaurin] sat was surrounded by a rail on which there was a sign stating, "Reserved For Colored," but these have been removed. He is now assigned to a seat in the classroom in a row specified for colored students; he is assigned to a table in the library on the main floor; and he is permitted to eat at the same time in the cafeteria as other students, although here again he is assigned to a special table.\textsuperscript{201}

These actions, the Court found, "handicapped [McLaurin] in his pursuit of effective graduate instruction. Such restrictions impair and inhibit his ability to study, to engage in discussions and exchange views with other students and, in general, to learn his profession."\textsuperscript{202}

With these decisions, the stage was finally set for a direct challenge to \textit{Plessy}. In \textit{Sipuel}, \textit{Sweatt}, and \textit{McLaurin}, the Court did not directly address the constitutionality of state-enforced segregation. Viewed together, however, it is clear from the analysis of these decisions that the \textit{Plessy} doctrine had been completely undermined. As the Court recognized in earlier cases, the states failed to provide educational facilities for black students that were equivalent to those established for white students. This legal recognition meant that the states could not continue to allocate generous resources to white schools while they maintained inadequate and poorly financed facilities for black students. This effect, of course, was the import of the earlier graduate school cases, but the final decisions went much further. Responding to the NAACP's expert testimony, the Court recognized in \textit{Sweatt} that there was more to education than bricks and mortar. Much of the process involved interaction among students and the exchange of diverse ideas through discussions. Exchanges of this sort could not occur in a system in which African-American students were cut off from contact with other students.

The final, and in some ways, most compelling case was made by the State of Oklahoma's actions in \textit{McLaurin}. Because McLaurin was allowed to sit in a classroom and receive the same instruction as white students, the isolation rationale of \textit{Sweatt} did not apply. Yet, by roping McLaurin off in a "colored only" section in the classroom and setting aside separate tables in the library and cafeteria, the state graphically

\begin{footnotesize}
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\item \textsuperscript{200} \textit{Id.} at 640.
\item \textsuperscript{201} \textit{Id.}
\item \textsuperscript{202} \textit{Id.} at 641.
\end{itemize}
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demonstrated the stigmatizing effects of segregation far better than any expert testimony ever could. While the case was pending, a photograph of Professor McLaurin appeared in newspapers and magazines across the country. The picture shows a classroom at the University of Oklahoma. Sitting in a corner of the classroom behind a rope with a small sign attached, McLaurin is leaning forward, peering into the classroom apparently straining to hear the discussion. Proving the axiom that "one picture is worth a thousand words," the photograph shows just how demeaning segregation was in actual practice.

By the time the NAACP proceeded with the primary school cases, the defenses raised by segregation's supporters had been considerably undermined. The separate facilities were not equal, and there was never any pretense of equivalence in any place where segregated education was practiced. The separate equality on which segregation was premised had never been a reality. The expert testimony in McLaurin and Sweatt focused the courts' attention on the devastating psychological effects of segregation and on the impact these practices had on the learning process. Once the courts were compelled to confront the stigmatizing effects of segregation and the message of inferiority the system was designed to convey, it would be impossible to reconcile segregated education with the equality principle of the Fourteenth Amendment.

In 1950 the NAACP held another conference of the lawyers and consultants who were working on desegregation cases. During that meeting, the conferees adopted a formal resolution that in all future cases the relief sought would be "aimed at obtaining an education on a non-segregated basis."\textsuperscript{203} This resolution meant that the "equalization" strategy had finally given way to a direct challenge to segregation. The graduate school cases shattered the foundation on which formal segregation was premised and compelled the courts to concede the inequities that prevailed under the separate but equal doctrine. After Sipuel, Sweatt, and McLaurin, it was clear that the time had come to challenge directly the policy of racial subordination that the system of segregation was designed to perpetuate. This challenge was accomplished four years later in Brown when the Supreme Court held that segregation in public schools was unconstitutional.\textsuperscript{204}

\textsuperscript{203} Crisis, Nov. 1950, at 650.
\textsuperscript{204} Brown, 349 U.S. at 298-301.
V. CONCLUSION

Charles Houston did not live to see the culmination of his efforts. He died in 1950 when the final school desegregation cases were pending in the lower courts. Houston represented plaintiffs in *Bolling v. Sharpe*, a District of Columbia case during the early stages of the case. Had he lived, Houston would have been among the lawyers who argued the five school desegregation cases that are now remembered as *Brown v. Board of Education*. Shortly before his death, however, Houston recorded what turned out to be his last comments on the struggle by African-Americans to obtain equality:

> There've been times when it is possible to forecast the results of a contest of a battle, of a lawsuit long before the final event has taken place. And so far as our struggle for civil rights is concerned, I'm not worried about that now. The struggle for civil rights in America is won . . .

> What I am more concerned about is the fact that the Negro shall not be content with simply demanding a share in the existing system. It seems to me that his fundamental responsibility [is] to make sure that the system which shall survive in the United States of America . . . shall be a system which guarantees justice and freedom for everyone.

The decision in *Brown* launched an era of Civil Rights activism on an unprecedented scale. In the 1950s and 1960s, African-Americans united in a broad-based effort to demand a full measure of Constitutional freedoms. Boycotts, sit-ins, and other forms of nonviolent protest spread across the South. As Houston predicted in the 1930s, the NAACP's litigation campaign encouraged local communities to demand and to fight for their rights. In the 1960s, black Americans insisted that the system of segregation be dismantled in its entirety. Lawsuits challenging discrimination filled the dockets of courthouses across the United States. After a decade of intense struggle, often in the face of violent resistance, a series of Congressional enactments in the 1960s ended de jure segregation. These enactments included the various Titles of the Civil Rights Act of 1964, which prohibited discrimination in education, employment, and public accommodations; the Civil Rights Act of

207. Audio recording by Charles Houston at the home of Dr. Edward Mazique in Washington, D.C. during the Christmas holidays (1949) (copy of tape on file with Author).
1965,\textsuperscript{209} which re-enfranchised African-American voters in the South; and the Fair Housing Act of 1968,\textsuperscript{210} which outlawed discrimination in housing. These events were the direct product of the foundation laid by the equalization cases.

In the past few years, the optimism generated by the Civil Rights advances of the 1950s and 1960s has given way to setbacks and disappointment. Since the late 1980s, the Supreme Court has all but halted the advances of the post-	extit{Brown} era. Ironically the majority of African-American children in urban areas still attend segregated and unequal schools. Their parents are relegated to the lowest paying and least desirable jobs. In urban areas, most African-Americans live in what one study described as a state of “multi-dimensional hyper segregation.” After years of progress, race relations are now in a state of marked decline. In the case of public schools, the South reacted to 	extit{Brown} with a policy of massive resistance. The “deliberate speed” language of the remedy in 	extit{Brown II} was used to delay compliance except for a few token efforts. Almost fifteen years after 	extit{Brown}, the Supreme Court finally abandoned its gradualist approach and ordered school districts to take immediate steps to dismantle their segregated systems. By then, changes in the demographic patterns made this undertaking a far more complicated task. During the years following World War II, white families relocated to suburban areas while the African-American population remained concentrated in the cities. Racial segregation, formerly required by law, persisted through custom and practice. Residential segregation is so pervasive now that blacks and whites are further apart in 2001 than they were in 1954. In 	extit{Missouri v. Jenkins},\textsuperscript{211} the Supreme Court established a new standard for determining “unitary status.”\textsuperscript{212} Prior to Jenkins, school authorities had an affirmative duty to eliminate all vestiges of segregation “root and branch.”\textsuperscript{213} Under Jenkins they are only required to eliminate segregation to the “extent practicable.”\textsuperscript{214} Because almost all school districts will be able to satisfy this relaxed standard, Jenkins signals the end of court-supervised desegregation efforts.

The federal courts that were once receptive to the claims of Civil Rights advocates have grown hostile or indifferent. Invoking the mantra of “color-blindness,” the courts are undermining gains made in previous

\textsuperscript{210} Pub. L. No. 90-284, 82 Stat. 81.
\textsuperscript{211} 515 U.S. 70 (1995).
\textsuperscript{212} Id. at 82-102.
\textsuperscript{213} Id. at 140.
\textsuperscript{214} Id. at 90.
years. It is clear, however, that the promise of Brown has not been fulfilled. A color-blind standard will treat blacks and whites as if they were similarly-situated, but this standard ignores the history of segregation in America and the pervasive vestiges of that system. African-Americans and other people of color do not enjoy the same privileges as whites. Racial barriers have been lowered, but they still exist. A color-blind approach to Equal Protection jurisprudence will operate to prolong the existing racial hierarchy. The question that Charles Houston posed nearly fifty years ago remains: whether "the system which shall survive in the United States of America . . . . Shall be a system which guarantees justice and freedom for everyone." 215

215. Audio recording by Charles Houston at the home of Dr. Edward Mazique in Washington, D.C. during the Christmas holidays (1949) (copy of tape on file with Author).