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The thesis of Halle Czechowski entitled
IDEALISTIC PRAGMATIST: THE PUBLIC RELATIONS STRATEGIES OF
THURGOOD MARSHALL

submitted in partial fulfillment of the requirements for the degree of Bachelor
of Arts in Liberal Studies in the School for Summer and Continuing Education
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IDEALISTIC PRAGMATIST:
THE PUBLIC RELATIONS STRATEGIES OF
THURGOOD MARSHALL

A Thesis
submitted in partial fulfillment of the
requirements for the degree of
Bachelor of Arts
in Liberal Studies

By

Halle Czechowski

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IDEALISTIC PRAGMATIST:
THE PUBLIC RELATIONS STRATEGIES OF
THURGOOD MARSHALL

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ABSTRACT

In the 21 years that Thurgood Marshall served as the Director-Counsel of the NAACP Legal and Education Defense Fund he developed a phenomenal record before the Supreme Court, arguing thirty-two cases and winning twenty-nine. Those victories were not achieved solely through brilliant arguments nor the righteousness of the cause. Marshall also employed a battery of non-legal tactics to raise awareness of the civil rights movement and further its agenda. This thesis explores the extra-legal tactics utilized by Marshall, with an examination of his strategies and achievements in the areas of housing and education.

While it is impossible to separate his legal achievements from his non-legal accomplishments, examining the drives to secure specific rights illuminates the extraordinary way in which he utilized all of the weapons at his disposal. Creating a framework from which to analyze Marshall’s tactics and strategies was accomplished by reading biographies, magazine profiles, and law journal articles in order to review and assess his public outreach and interdisciplinary efforts. Marshall’s recent retirement from the Court and his subsequent death provided an opportunity for many friends and
colleagues to relate the colorful stories and events that offer insight into Marshall’s character and thought process.

Wielding the Constitution as a weapon, while recognizing the limitations of the law, Marshall battled to guarantee equal justice for Americans of color. Among the non-legal methods he called upon were public relations, public criticism, direct confrontation, personal prestige, investigations, nurturing young African-Americans who were breaking down barriers, and an interdisciplinary approach to the law which included utilizing economic, social, psychological, and historical information as well as soliciting support from interest groups outside the black community.

Although Thurgood Marshall is one of the great figures of the civil rights movement, his achievements have been obscured by the fact that he spent the last twenty-three years of his life as an Associate Justice of the Supreme Court. Outspoken to the end, Marshall, nevertheless, rarely granted interviews and was largely known through his written opinions. That so few Americans are today aware of Marshall is a tragedy because he was not simply the first black Supreme Court Justice or an advocate for his people; he was an advocate for the Constitution, whose work guaranteed that the Constitution remains a document of importance and relevance to every American.
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CHAPTER ONE

SETTING THE STAGE

Justice is the end of government. It is the end of civil society.
It ever has been and ever will be pursued until it be obtained,
or until liberty be lost in the pursuit.

-- James Madison

By devoting his life to the pursuit of justice, Thurgood Marshall personally and forcefully demonstrated that the Supreme Court serves not only as a forum for the adjudication of specific constitutional issues, but as a powerful stage for influencing public opinion as well. An energetic and gregarious personality, Marshall brilliantly used his public platform to further the cause of civil rights and, in doing so, confirmed that the Constitution is a document of continuing importance and relevance to every American.

During the 23 years that Thurgood Marshall served as an Associate Justice on the United States Supreme Court he was seen by much of the American public as a reclusive figure, rarely granting interviews and known largely by his written opinions. While Marshall’s retirement and subsequent death have sparked interest in his career and legal achievements, often overlooked are the non-legal strategies employed by Marshall during his tenure as Director-Counsel of the National Association for the
Advancement of Colored People (NAACP) Legal Defense and Education Fund, Inc., to further the civil rights agenda. This thesis will explore the extra-legal tactics employed by Marshall during his tenure at the Legal Defense Fund with an examination of his strategies and achievements in the areas of education and housing.


But Marshall’s legacy cannot be summed up by his won-loss record. “Thurgood Marshall is the living embodiment of how far we Americans have come on the major concern in our history -- race -- and how far we’ve to go... .He has been a conscience. In the law he remains our supreme conscience,” said Yale law professor Drew Days, a former assistant attorney general for civil rights, of Marshall’s impact.¹

During his 21 years as director-counsel, Marshall traveled extensively, using the Constitution as a weapon to force state and federal courts to protect the rights of Americans of color. His experience on the road provided him with invaluable insight into how the world really worked and how the law could change lives.

He knew what police stations were like, what rural Southern life was like, what the New York streets were like, what trial courts were like, what hard-nosed local political campaigns were like, what death sentences were like, and what being black in America was like -- and he knew what it felt like to be at risk as a human being. Most notably, perhaps, he knew the difference that law could make in all those places. None of his experiences with the harshness of life made him bitter or cynical about law's possibilities. He knew well how law could trample individuals, but he remained faithful to the ideal of what it could do to protect individuals.

wrote Paul Gerwitz, a former Marshall law clerk and Yale University Law professor in a retirement tribute to Marshall.\(^2\)

Thurgood Marshall was born in Baltimore, Maryland on July 2, 1908 the second of two sons. His mother was an elementary schoolteacher, his father a Pullman-car waiter and later a steward at the exclusive Gibson Island Club on Chesapeake Bay. By his own description, Marshall's childhood was loving and secure and it is not difficult to trace the seeds that gave rise to his great achievements. His mother implanted a deep respect for education as an avenue for opportunity. But it is his father who made him a lawyer. "He did it by teaching me to argue, by challenging my logic on every point, by making me prove every statement...He never told me to become a lawyer, but he turned me into one," Marshall remarked.\(^3\) An average student and a cut-up in high school, Marshall was frequently punished by being required to read the U.S.


Constitution aloud; by graduation he knew it by heart.

In September 1925, Marshall entered Lincoln University, an all-male, black college in Oxford, Pennsylvania, often referred to during that time as “the black Princeton.” Founded by a Presbyterian minister and Princeton alumnus who recruited most of the all-white faculty from his alma mater, the school encompassed a diverse student body, both Asian and African American, working-class to wealthy. The university imbued its students with the sense that they were being forged into a black elite; some of the outstanding individuals in Marshall’s graduating class are evidence that Lincoln largely succeeded: cabaret performer Cab Calloway, writer Langston Hughes, lawyer U. Simpson Tate, and Nnamdi Azikiwe, who served as the president of Nigeria.

Marshall’s mother sold her engagement ring to cover his college expenses and urged him to study dentistry because it was “a safe and relatively lucrative career for a Baltimore Negro.” He was a pre-dental student during his first two years of college, but found that the subject could not hold his interest and was expelled from school for fraternity pranks. During his temporary banishment, he met a University of Pennsylvania student, Vivian Burney, who proved to be a maturing force. They were married in September 1929, shortly before Marshall was readmitted to begin his junior year. He returned to school with his sights set on law school and in June 1930

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graduated cum laude with a degree in humanities.

Barred from attending the University of Maryland Law School by the state’s segregation laws, Marshall decided to attend Howard University Law School located in nearby Washington, D.C. At the time, Howard was undergoing a period of vibrant transformation. Howard’s first black president, Mordecai Johnson, was endeavoring to change the school’s image from that of aristocratic glamour to social consciousness. As part of this effort, he had begun to recruit a faculty that consisted of many of the nation’s black intellectual elite, including Charles Houston, William Hastie, and James Nabrit.

Houston was a brilliant legal scholar, who had been a Phi Beta Kappa at Amherst and received his J.D. from Harvard. A member of the NAACP, he believed that black lawyers had a responsibility to be social engineers and as vice-dean he endeavored to make Howard Law School the forge for a new breed of lawyer. To accomplish this, Houston recruited faculty like William Hastie, who had served as an editor of the *Harvard Law Review*. Houston lavished time and attention on those students in whom he saw potential, and in 1930 his most promising student was Thurgood Marshall.

Due in part to the school’s location and in part to the dedication of Charles Houston, Howard Law School attracted many of the period’s legal luminaries, such as Felix Frankfurter, Roscoe Pound, and Clarence Darrow, to lecture the students. Darrow
made a strong impression on Marshall with his exhortations that a good lawyer should study sociology as much as the law.\(^5\)

Marshall arrived at Howard at an exciting time. Professors Houston, Hastie, and Nabrit had represented the NAACP in a number of cases and in doing so made the law school a legal laboratory in which the NAACP leadership met with faculty and students to plot courtroom strategy.

Blossoming under Houston’s mentorage, Marshall graduated as valedictorian in 1933, but law school was just the beginning of a long and illustrious association. Even after his many victories before the Supreme Court, Marshall never failed to acknowledge his debt to Charles Houston for his legal accomplishments.

In the midst of the Depression, Marshall and his wife returned to Baltimore and set up a law office in his parent’s home. He had hoped to be a corporate and labor lawyer, but quickly found that profitable cases were few and far between. As a result, he ended up with a diverse general practice, in which much of his work was performed pro bono. His willingness to represent those who needed assistance but could not afford it demonstrates that the faculties of Lincoln and Howard succeeded in their efforts to develop socially responsible individuals. It is also a reflection of Marshall’s belief in the role of lawyers in society, an obligation he detailed in a speech to the Washington University School of Law in 1967:

The lawyer has often been seen by minorities, including the poor, as part of the oppressors in society. Landlords, loan sharks, businessmen specializing in shady installment credit schemes -- all are represented by counsel on a fairly permanent basis. But who represents and speaks for tenants, borrowers, and consumers? Many special-interest groups have permanent associations with retained counsel. Who speaks for the substantial segment of the populace such legislation might disadvantage? Outside of political processes, I think the answer is clear. Lawyers have a duty in addition to that of representing their clients; they have a duty to represent the public, to be social reformers in however small a way.  

Marshall began his long association with the NAACP in 1934 when he volunteered his services to the Baltimore branch. He traveled the Eastern Shore of Maryland investigating lynchings and teachers' salary inequities and organized a boycott against A&P grocery stores to encourage them to hire black clerks.

At the time, the NAACP was undergoing a period of great growth. The organization had recently received a substantial grant from the American Fund for Public Service to develop a long-range strategy to tear down the wall of racial discrimination in education. In October 1934, Charles Houston was appointed director of the NAACP's national campaign against segregated public schools. Houston's strategy was to make discriminatory policies by segregated graduate schools prohibitively expensive by filing a series of taxpayer suits that would ultimately force states to integrate public graduate and professional schools.

In 1935, Marshall won his first court case for the NAACP when he convinced the Maryland Court of Appeals to order the University of Maryland Law School to

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admit its first black student, Donald Murray. The effect of the decision upon the black community was electric. Juanita Jackson Mitchell, a NAACP activist in Baltimore recalled of the decision:

The colored people in Baltimore were on fire when Thurgood did that...They were euphoric with victory...We didn’t know about the Constitution. He brought us the Constitution as a document like Moses brought his people the Ten Commandments.\(^7\)

In 1936, Charles Houston invited to his protégé to join him in New York as assistant special counsel to the NAACP. Recognizing that law does not change dramatically with a single decision, but evolves slowly through a series of legal challenges, Houston and Marshall began to chart the course towards dismantling the staunchest legal barrier to racial equality, the “separate but equal” precedent laid down by the Court in 1896 in *Plessy v. Ferguson*.

**Marshall and the Inc. Fund**

In 1938, Houston resigned his position citing health reasons and Marshall was appointed to replace him. Marshall quickly reorganized the NAACP legal staff into a separate entity with its own financial resources, to act essentially as the NAACP’s law firm. Formally established in October 1939, the NAACP Legal Defense and Education Fund, Inc., set forth its purpose in its charter:

To render free legal aid to Negroes who suffer legal injustice because of their

\(^{7}\)Williams, “Marshall’s Law”, 17.
race or color and cannot afford to employ legal assistance; To seek and promote educational opportunities denied to Negroes because of their race or color; To conduct research and publish information on educational facilities and inequalities furnished for Negroes out of public funds and on the status of the Negro in American life.”

The charter specifically prohibited political lobbying. “The corporation shall not engage in any activities for the purpose of carrying on propaganda, or otherwise attempt to influence legislation, and shall operate without pecuniary benefits to its members.”

Despite the prohibition, Marshall “fully intended to use the courts as a ‘forum for the purpose of educating the public’ on any form of discrimination . . . . Needless to say, an aroused and informed public can also, if even indirectly, influence the flow of legislation.”

By 1940, Marshall was promoted to director-counsel of what came to be popularly known as the “Inc., Fund,” overseeing the development of strategy and coordination of the legal program and working closely with the board of directors to establish the Fund’s policies and priorities. He served in this capacity for 21 years.

By 1958, the Fund had brought forty-one cases before the Supreme Court and had won thirty-six cases. If those cases handled jointly are included, the Fund’s won-loss record jumps to forty-six out of fifty-one cases. The success of the Fund cannot

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8Bland, Private Pressure On Public Law, 23.

9Ibid.

10Ibid.
solely be attributed to the legal brilliance of its lawyers or the righteousness of the
cause, but to Marshall’s ability “to perceive changes in social climate and the resultant
change of judicial attitudes in the decades following the 1930's, since legal experience
and skill is not sufficient to win decisions in controversial areas in an unchanged climate
or in a closed society.”11

CHAPTER TWO

LIMITATIONS OF THE LAW

Perhaps it was a function of personality, or the result of a liberal education, or simply the burdens of being an African-American lawyer -- whatever the cause, Thurgood Marshall recognized early in his legal career that sharp oral arguments and well-written legal briefs would not be enough to secure for citizens of color the guaranteed rights promised to all Americans under the Constitution. Although his efforts were carried out under the framework of a broad legal strategy to break down the barriers of discrimination and exclusion, Marshall employed a battery of non-legal tactics to raise awareness of the civil rights movement and further its agenda. Among the methods he called upon were public relations, public criticism, direct confrontation, personal prestige, investigations, nurturing young African-Americans who were breaking down barriers, and an interdisciplinary approach to law which included utilizing economic, social, and historical information, as well as soliciting support from interest groups outside the black community.

From the very first, Marshall knew that his work as counsel for the NAACP would require more than legal research and court appearances. In a letter inviting Marshall to serve on his legal team, Charles Houston had written,

I went to New York to do the special job of the educational campaign. By the time I was there a week I was doing all of the legal work of the Association. The Association needs another full-time lawyer in the
national office. I am not only lawyer but evangelist and stump speaker. I think this work necessary in order to back up our legal efforts with the required public supporters and social force.¹

The need to serve as civil rights evangelist reflects not only Marshall’s view of the Constitution, but also the limitations of the law.

It seems to me that Marshall held fairly constantly to two ideas about the Constitution. One was that it could be a source of important remedies for the situation of African-Americans in the country; the other was that the remedies that could be obtained were likely to be limited. So, although he was never ambivalent about working with the Constitution, he was aware of the limitations of what litigation could accomplish.²

said Georgetown Law School professor Mark Tushnet, a former Marshall law clerk.

Despite this recognition of the law’s boundaries, Marshall was initially reluctant to be involved in the NAACP’s public relations campaign to end the use of crude racial stereotypes in popular culture. Advertisements in magazines and on the radio commonly employed offensive terms like “darkies” and “shine.” The NAACP also led a well-publicized effort to force a seafood company to change the name of one of its brands, Nigger Head Shrimp.³

Although Marshall felt that the NAACP needed a public relations agent not a


lawyer to wage these cultural battles, as his tenure at the NAACP grew so did his recognition of the power of public criticism. His first act of public protest was to publicize a letter he had written to the Whitman candy company criticizing it for selling “Pickaninny Peppermints.” In response, a Whitman’s production manager wrote back that the brand name was not a slur but meant to connote a “cute colored kid.” Marshall exchanged letters with Whitman executives for over four years, complaining that “Pickaninny” was as offensive a term as “Sheeny, Dago, Kike, and Wop.” It was not until he got the Afro-American newspaper involved, which printed a front-page story under the headline, IF YOU WANT TO BE CALLED A NAME, BUY WHITMAN’S, that the company finally relented.4

In another successful public relations initiative over the use of epithets, Marshall challenged the American Tobacco Company’s use of the brand name “Nigger Hair” for pipe tobacco. Upon receipt of the letter, an official wrote back, “I may inform you that immediately upon the receipt of the communication calling our attention to the . . . use of a certain brand name that was originated back in 1878, [it] was immediately discontinued.”5

Although both public relations victories may seem small in comparison to the grand sweep of the civil rights movement, they demonstrate Marshall’s capacity to

5Ibid, 105-6.
utilize his public platform as the leading civil rights lawyer to raise awareness and effect change.

Marshall also came to recognize that personal confrontation could at times be as effective as a well-written legal brief. In 1940, without ever setting foot in a courtroom Marshall successfully resolved a matter involving the right of black Americans to sit on a jury. The case grew out of an incident in Dallas, where a 65-year-old black junior college president received and complied with a jury summons, but in the course of attempting to fulfill his civic duties, was confronted by a group of white citizens and kicked down the courthouse stairs. Dallas was a city teeming with racial tension and, many believed, on the verge of explosion. The local NAACP chapter called Marshall for assistance; he immediately flew to Texas and called Governor James Allred, a maverick liberal Democrat, for a meeting. Armed with a good case for assault, but hoping for a bigger victory, Marshall pled the facts to the governor. Taken aback by Marshall’s boldness, but moved by his protest, Allred issued an executive order upholding the right of African Americans to serve in Texas courtrooms and commanding the Texas Rangers to enforce their safety while serving jury duty.

The Texas victory was achieved at considerable personal risk for Marshall. As word of Marshall’s arrival in Dallas spread, the city’s police chief announced to his officers that a black lawyer from New York City was coming to town to stir up trouble and that he intended to personally handle the situation. Tensions were running so high
that the governor was forced to provide Marshall with a state trooper for protection. Despite this precaution, the police chief confronted Marshall as he was leaving the courthouse, announcing, “Hi, you black son of a bitch. I’ve got you.” The trooper was forced to pull his gun in order to restrain the police chief.

In spite of the danger, Marshall travelled throughout the 1940’s investigating lynchings and filing court challenges to the routine denial of voting rights, jury service, and fair trials to black Americans. Although much of Marshall’s travel took him to the South, he did not limit his work to that region. In one notable case, he journeyed to Freeport, Long Island, New York to investigate the activities of the Ku Klux Klan. He asked Ted Poston, a reporter with the *Amsterdam News*, a black newspaper, to accompany him and publicize the investigation. Black citizens complained that they were being harassed by police officers who were also Klan members. After taking affidavits from the victims, Marshall complained to the state’s attorney and the harassment stopped.\(^7\)

Personal prestige and boldness were not the only traits Marshall employed when seeking to resolve an issue outside of the court system; when necessary he could also play to opponents’ common sense and need to avoid negative publicity. A 1952 *Colliers* magazine profile related the story of Marshall receiving a call late one night in


\(^7\)Ibid.
Washington, D.C. while playing poker. He was told that a lynching was about to take place. Marshall immediately telephoned the White House and the Federal Bureau of Investigation, but was told that they would be unable to send help to the man until the next day.

He then performed an instantaneous, cerebral tour-de-force, the magazine wrote. He put through a long-distance call to an influential southern lawyer representing strong anti-Negro factions. When he had the man on the phone he said ‘Look, just two sets of people can’t afford a lynching at this time -- us Negroes and you people. You are right in the midst of a Dixiecrat political campaign and a lynching is going to make your people look awful bad.’ The man’s answer was ‘Check. Give me the details and get off the phone so I can get moving. Call you back in half an hour.” In twenty minutes, Marshall’s telephone rang and he was told, ‘The state troopers made it in time -- call this number in a few minutes and your man will be there unharmed.” And he was although he was still too shaken to talk.  

Between legal battles, Marshall was involved with other events and personalities that shaped the civil rights movement. In the late 1940’s he received a call from the general manager of the Brooklyn Dodgers who asked him if he would help a young ballplayer named Jackie Robinson get his finances in order. 

Marshall’s public relation’s efforts were not without controversy. Jack Greenberg, who succeed Marshall as director-counsel recalled that Marshall’s evangelizing activities were often viewed as a waste of time.

Time and time again he would say -- so often that people would get a

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little annoyed by it -- 'we've got to get out in the field, and we've got to educate the black community, and we've got to educate the lawyers.' Unfortunately, while he could control litigation, he had relatively little influence over the ability of people to change their opinions."\(^{10}\)

It is also interesting to note that while Marshall did recognize the value of the public platform, he did not support the efforts of Martin Luther King and others to utilize civil disobedience to further the civil rights movement. Although Marshall and the Fund represented King during the Montgomery bus strike and other confrontations with the legal system, civil rights activist and later U.S. Senator Harris Wofford recalled receiving a letter from Marshall in which he wrote, "For American Negroes or American Civil Rights people, black or white, to start disobeying laws on grounds that it was against their conscience would set it all back."\(^{11}\)

Marshall's extra-legal efforts, however, were not limited to pounding the pulpit, educating the community, and direct confrontation; Marshall's view of law as an interdisciplinary practice allowed him to capitalize on a good idea regardless of where it arose. Said Professor Tushnet of Marshall's strategy development, "he would regularly convene conferences to get everybody thinking in the same strategic way he was . . . he was able to extract from a diverse group the ideas that were most likely to work effectively."\(^{12}\) Marshall put it more succinctly: "I never hesitated to pick other

\(^{10}\)Goldberg, Ortmann, and Reske, "The Long-Distance Runner," 71.


\(^{12}\)Ibid.
people's brains--brains I didn't have.\textsuperscript{13}

Also, Marshall possessed a great talent for perceiving public sentiment and utilizing it to fuel his legal strategies. Post-World War II America was a culture on the brink of great change and no one played to those transforming winds better than Thurgood Marshall.

World War II was a period of national unity, but for black Americans it was also a time of great frustration. Required to serve in segregated units of the armed forces where they were more likely to be killed, maimed, or injured, they were acutely aware that they were not afforded the same protections of the law as white Americans.

The conclusion of World War II brought both opportunities and challenges. The horror of the Nazi concentration camps and the threat of communism combined to give the American public a newfound focus on humanitarianism, both at home and abroad. The Supreme Court was also undergoing a dramatic transformation during this period, moving from the restrained leadership of Chief Justice Fred Vinson to the dynamic administration of Earl Warren. These unconnected events brought new prominence to the civil rights movement and to Marshall some of his most important and far-reaching victories.

Recognizing the limitations of resources and court activism, Marshall focused his efforts to dismantle the barriers to racial equality on three broad areas: interstate

\textsuperscript{13}Davis and Clark, \textit{Thurgood Marshall: Warrior At The Bar, Rebel On The Bench}, 96.
transportation, housing, and education. Marshall’s ability to achieve such a remarkable degree of success in the court system was not solely the result of significant social changes, but also of the fact that Marshall and the Fund lawyers carefully chose the cases they would accept to ensure that they brought before the courts cases which offered the greatest and clearest opportunities for success. “The restrictive covenant cases were bubbling up all over the country, not really under any central control. Marshall understood instinctively that it was important to take charge of them,” said Professor Tushnet of Marshall’s strategy.¹⁴

¹⁴Goldberg, Ortmann, and Reske, “The Long-Distance Runner,” 71.
CHAPTER THREE

HOUSING: A CASE STUDY

While it is impossible to separate Marshall’s non-legal accomplishments from his legal achievements, examining the drives to secure specific rights illuminates the extraordinary way in which he used all of the weapons at his disposal. Deftly mining public opinion to determine the most effective manner to challenge discriminatory barriers, organizing conferences to bring together a diversity of academic disciplines to confront the consequences of segregation as well as its constitutionality; and making full use of his public platform to raise awareness were all elements of the strategy to dismantle the barriers of housing discrimination. Although thoroughly intertwined with the legal tactics, the extra-legal strategies offered significant contributions toward the ultimate victory of opening up housing opportunities for millions of Americans.

In the wake of Reconstruction, numerous communities throughout the United States had enacted statutory restrictions on blacks and whites residing in the same neighborhoods. In one of the earliest legal cases handled by the NAACP, the Supreme Court in 1915 struck down an ordinance established by the city of Louisville, Kentucky, that prohibited blacks from occupying a house on a block in which the majority of the residents were white and vice versa. The advocates of racial discrimination were not deterred and quickly developed other techniques of exclusion. One of the most widely adopted was a strategy to achieve essentially the same residential patterns enforced by
ordinance by establishing agreements among white homeowners not to sell their houses to African Americans. These “restrictive covenants” were written into the deeds and sale contracts and served as a permanent restriction on future owners to sell their property to whomever they chose. The impetus behind such provisions is that because they were a private contract they were beyond the reach of the Constitution.

Indeed, in 1926 the Supreme Court ruled unanimously against a white homeowner in the District of Columbia, Irene Corrigan, who had contracted to sell her home to an African American family. A suit to prevent the completion of the sale had been brought by one of her neighbors, John Buckley, who owned a house which was covered by the same interlocking covenant as the Corrigan home. The Court ruled that because the case did not raise substantial constitutional issues and because Ms. Corrigan had not been denied procedural fairness, the lower court’s ruling prohibiting the sale was allowed to stand. Corrigan v. Buckley established a significant obstacle to securing the right of Americans to live wherever they please.

In 1940, the Fund brought Hansberry v. Lee to challenge the Court’s 1926 ruling that restrictive covenants were not unconstitutional because the Fifth, Thirteenth, and Fourteenth Amendments did not prohibit private individuals from entering into contracts to determine the control and disposition of their property. The Court ruled in favor of the black residents, but on the grounds that the property owners had not met the threshold requirements of the contract. The Court did not address the issue of the
constitutionality of restrictive covenants. Nevertheless, the case was significant because it was the first successful blow against restrictive covenants and because it opened for purchase and rental twenty-seven city blocks of Chicago to black families.

As a complement to the legal strategy, Marshall also waged a high-profile non-legal effort to force the federal government to end its support for segregated housing policies. In 1940, he began a campaign to force the Federal Housing Administration (FHA) and other federal housing agencies to halt funding to segregated housing systems. As part of its program to assist states with housing development, FHA distributed a manual to its field agents outlining the types of projects that should be approved and listing the types of covenants that should be included to ensure that the projects were socially valuable. Among the recommended restrictions were racial restrictions. After exchanging a series of letters with FHA officials, Marshall was successful in having the racial covenant suggestion removed from the handbook, but failed at compelling FHA to refuse housing projects with restrictive covenants, a policy the agency maintained throughout the 1940's.¹

As noted in the previous chapter, legal challenges to restrictive covenants were percolating all over the country. While Marshall knew that it was critical for the Fund to take charge of these cases, he was undecided as to the approach that should be used to break down the barrier of restrictive covenants and did not want to move forward with

the Supreme Court challenge until a strategy had been agreed upon. In 1944, Marshall called upon Virginia lawyer Spottswood Robinson to write a comprehensive report on the issue. Although Marshall was frustrated by the length of time it took Spottswood to produce the report, he also used the pending report to allay the concerns of those who wanted immediate action.

The return of black veterans exacerbated the issue of housing for black Americans and made the issue one of the primary concerns of the NAACP. Despite the earlier legal setbacks, Marshall decided to bring housing to the forefront of the Fund’s agenda because he hoped to play to white America’s patriotic sentiments by raising the issue within the context of the treatment of black veterans. In 1945, by a narrow vote, the Supreme Court refused to review the case of a black federal employee, Clara Mays, who was denied occupancy due to a restrictive covenant. The case was significant because the dissenting federal district court judge had issued a sharply worded opinion based on the economic and social data recommended by Marshall to Mays’ lawyers to bolster her case. While not successful, the case gave hope to the Fund lawyers that they were on the right track with the use of sociological and economic data and not solely legal reasoning to open up housing opportunities for black Americans.

A few months later, on July 9-10, 1945, Marshall convened a “Conference on Restrictive Covenants” in Chicago to raise public awareness of the issue and to ensure that the diverse group of lawyers working on restrictive covenant cases were operating
on the same strategic plan. Thirty three lawyers attended. In addition to the strategic planning, the conference also presented sociological studies on the consequences of housing segregation, including evidence that restrictive covenants cause overcrowding in black communities and statistics on the relation between overcrowding and crime and infant mortality rates. Robert Weaver a prominent sociologist and Dr. Alfred Yankauer, an East Harlem health officer, led the academic discussions. As a result of the conference, Marshall pledged that the NAACP would wage a national public relations campaign against "the evils of segregation and restrictive covenants" and recommended that the NAACP hire a social scientist to compile and distribute information on African-American housing conditions.

With the number of legal challenges growing, Marshall continued to search for the perfect case to bring before the Supreme Court. Uncomfortable with the litigants, the lawyer or the sociological evidence presented, he wanted to wait until a case could be brought that included evidence of housing conditions in the trial record. J.D. Shelley and his wife living in rented housing in St. Louis, Missouri refused to wait. Mr. Shelley was a construction worker, his wife was employed in a munitions plant and despite providing for six children, the Shelleys managed to save throughout the war and in 1945 were ready to buy a house. Through their minister, who was also a real estate agent, they contracted to buy a house that was covered by a restrictive covenant

\[2\] Bland, Private Pressure on Public Law, 50.
established in 1911 and enacted for fifty years. The Shelleys were sued by Louis and Fern Kraemer, who lived ten blocks away on the same street and whose house was covered by the same covenant. The Shelleys’ lawyer, George Vaughn was active in the local NAACP and had attended the Fund’s Chicago conference on housing two months before being approached by the Shelleys.³

The Shelleys prevailed in their first trial, but were reversed in December 1946 by the Missouri Supreme Court. On January 26, 1947, Marshall convened a second lawyers’ housing conference. “The Conference on Restrictive Covenants” was held at Howard University in Washington, D.C. It was at this conference that the decision was made that the principal point of assault would be sociological and economic data. George Vaughn did not attend the Howard conference, but he did file an appeal to the U.S. Supreme Court. When the Court accepted the case, Marshall immediately moved to have several other cases that the Fund had been monitoring be considered along with *Shelley v. Kraemer*, and began preparing a coordinated defense.

In an effort to exert some control over the cases and to solicit the support of broader interest groups, a third housing conference, “The Shelley v. Kraemer Lawyers Conference” was convened in New York City in September 6, 1947. Both housing lawyers and representatives from outside interest groups were invited to attend. Again, the strategy of utilizing sociological and economic evidence was agreed upon, although

serious doctrinal differences remained over the constitutional issues raised.

Marshall wanted to present a broad array of support to the Court and hoped to coordinate presentations to ensure that interest groups were concentrating on different aspects of the cases so that the Court was not offered a collection of repetitive briefs. At the New York conference, Marshall was successful in his effort to engage the American Jewish Committee, which had been invited to send a to lawyer participate in the strategy discussions. The Committee not only filed a substantial brief presenting sociological data, but also made a significant contribution toward litigation expenses. Unfortunately, other interest groups were not as cooperative and most of the briefs repeated the same socio-economic data and arguments.

In early 1946, representatives of the National Emergency Committee Against Mob Violence, which was composed of forty-seven interest groups and headed by the NAACP’s executive secretary, Walter White, called on President Truman to create a board to examine the critical state of race relations in America. In December 1946, Truman established the President’s Committee on Civil Rights, signaling that a major initiative of his administration would be dismantling racial barriers. Marshall played on Truman’s sympathy for the civil rights movement by asking the Justice Department to file a brief in support of the Fund’s arguments on *Shelley v. Kraemer*. Although officially non-committal, the Civil Rights Division sent requests to ten federal agencies asking that they report on how restrictive covenants affect their operations. Attorney
General Tom Clark personally presented the arguments to President Truman

On October 29, 1947, the committee issued its report, *To Secure These Rights*. Among the forty-three recommendations, three concerned restrictive covenants and one called for the Department of Justice to intercede in future litigation aimed at abolishing state-enforced racial agreements. The Truman Administration's response was immediate. The next day, Attorney General Tom Clark announced that the Justice Department would file an *amicus* brief on behalf of the Fund. Marshall hailed the decision as "the first amicus curiae brief ever filed by the United States in private civil rights litigation." As electrifying as that news was, it was an even greater victory for Marshall that the Justice Department's brief did not solely rely on legal arguments, but also cited the evidence of the social damage caused by restrictive covenants.

Marshall also prepared for oral arguments in *Shelley v. Kraemer* by holding a mock court at Howard University Law School. Both students and faculty were invited to participate in the freewheeling discussions, which allowed Marshall to clarify his arguments and ensure that he was equipped to respond to any question the Justices might raise. It is reported that a second-year student asked a long, rambling question which Justice Frankfurter actually raised at the proceeding.¹

In May 1948, the Court struck down state enforcement of restrictive covenants

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on the strict constitutional lines that such action by the state violated the Fourteenth Amendment. Despite the fact that three Justices recused themselves from the case because they owned houses with restrictive covenants, the Court issued an unanimous decision.

In spite of the Supreme Court decision, the FHA continued its policy of subsidizing housing projects with racial restrictions and Marshall continued his public relations campaign to reverse the policy. On August 12, 1949, Marshall spoke at a FHA conference in Mississippi and sharply criticized the agency for adopting the stance that it was simply following local custom. Declaring that segregation is not a permissible policy option, Marshall said, “there can be no room for a discussion of realities, expediency, or statesmanship.” A NAACP Staff member in attendance said that Marshall was “in rare form . . . and handed out liberal education all over the place.” His performance left one government lawyer “closed up like a tongue-tied clam.”

In December, Marshall’s commitment to his public crusade paid off when Solicitor General Philip Perlman announced that the FHA would no longer be permitted to assist housing projects that had racial restrictions. In an unsigned editorial praising the decision, the New York Times summed up the realities and challenges of ending segregated housing, concluding that legal remedies were not enough.

Public and private home building in this country will probably proceed about as it has been doing in spite of the teapot tempest caused by Solicitor General

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6Tushnet, Making Civil Rights Law, 97.
Perlman's announcement the Federal Housing Administration financing would be refused on new housing in which occupancy or use was restricted on account of race, creed or color. It is certain that the public housing agencies and the private builders, some of whom went into a dither when they heard Mr. Perlman's statement, will not be greatly hampered. Communities in which there is faith that the different races can harmoniously be neighbors can testify to that faith by encouraging mixed groups in apartments and developments. Communities which have not advanced to that point, or in which local customs would simply make the situation untenable, can go about as before. The facts seem to be under a Supreme Court decision of May, 1948, reaffirmed in May 1949, the courts are forbidden to enforce restrictive housing covenants. The Federal Housing Administration will not make loans in cases where such covenants have been filed. But it seems unlikely that any government agency will interfere if segregation is effected by informal agreement. It may be remembered that an attempt was made to put an anti-discrimination clause into this year's Federal Housing Bill and that this attempt was defeated in both houses by the votes of liberal who were staunch defenders of civil rights, but who were even more concerned that those who needed housing most -- and these must include great numbers of Negroes North and South -- should have it. This newspaper has always warmly applauded every effort to break down racial or religious discrimination in this country. It will continue to do so. We hope that the restrictive covenant -- or understanding -- will eventually vanish from American life. We hope that a real civil rights bill will be introduced and passed at the next session of Congress. But federal law cannot in a day break down long-established attitudes and customs. We cannot compel people to be neighbors if some of them don't wish to. The great task is one of education, not compulsion. After these basic rights are guaranteed we have to let time do its healing and constructive work.7

The decision in Shelley v. Kraemer was a significant victory for Marshall and offered a basis on which to challenge a broad array of discriminatory practices. At the same time, Marshall recognized that the basic cause of segregated neighborhoods was far greater than that which could be ameliorated by a single Supreme Court decision.

The real victory of the *Shelley v. Kraemer* decision was that it demonstrated that the Fund could successfully argue cases on the basis of extra-legal reasoning and it provided a critical blueprint for waging the assault against segregation in public education.
CHAPTER FOUR

HIGHER EDUCATION: A CASE STUDY

While the campaign against restrictive covenants provided a road map for the direct assault against the doctrine of “separate but equal,” the drive against segregation in education was symbolically -- in realized gains much-- more significant to the civil rights movement.

Every African-American in the South was subjected to segregated education in grossly inadequate schools. Segregated schools were the central symbol of African-American subordination, a visible and daily demonstration to children as they were growing up that whites did not consider them fit to associate with. Although it was not inevitable that Marshall’s triumph came in cases challenging segregated education, it was certainly appropriate.”

The education drive was undertaken as a two-pronged attack: first on the inequity in teachers’ salaries and then on segregation in higher education and, later, elementary and secondary education. The education drive is significant not only for the rights secured but as an illustration of the extraordinary efforts Marshall undertook to support the plaintiffs and keep these cases on track in order to have the opportunity to argue the constitutional questions in a court of law.

From his earliest association with the NAACP, Marshall worked on the issue of salary disparity between black and white teachers in public education. In 1936, while volunteering his talents to the Baltimore NAACP, Marshall brought suit against the

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1Tushnet, Making Civil Rights Law, 116.
Board of Education in Montgomery County, Maryland, on behalf of acting principal, William Gibbs, who was earning an annual salary of $612, compared with the average salary for a white principal of $1,475. Finally settled in 1938, when the Maryland Court of Appeals ordered the equalization of teachers' salaries within the county, the suit served as a model for the effort to equalize salaries throughout the state. This was an enormously satisfying victory for the son of a Baltimore public school teacher. As a result of this case, the NAACP later determined that the cumulative pay won for black teachers in nine Maryland counties exceeded $100,000.\(^2\) A enormous amount of money for that time.

Until the mid-1940’s, salary disparity cases composed the bulk of the Fund’s education drive. Beyond the personal connection, Marshall liked teachers as plaintiffs. Sizable numbers existed in every community and they were well-organized and committed. The large numbers of female teachers provided a stable source of potential plaintiffs since they were not subject to being drafted, and the prospect of salary increases provided a strong incentive to put aside personal and political differences to focus on winning the case. Interestingly, these were rarely contentious or hard-fought cases because the school boards and local officials perceived them as a battle over money rather than the symbols of segregation and as such the stakes were not as high.\(^3\)


After Marshall successfully litigated cases in Maryland and Kentucky, and as other cases bubbled up throughout the South, school boards began to recognize the importance of the issue. The United States Office of Education determined in 1941 that it would cost southern states nearly $26 million a year to equalize teachers’ salaries, and an additional $9 million to bring student-teacher ratios in black schools in line with white schools.⁴

School boards in Norfolk, Virginia, Escambia County, Florida, and Chattanooga, Tennessee, responded by promising to equalize salaries if the teachers dropped their suit. Local officials also attempted to reach agreement without any guarantees of a time line, since they recognized that equalizing teachers’ salaries would require large and immediate tax increases. In these cases, Marshall had to personally and forcefully lobby the teachers to stand firm. Without a court order to equalize salaries, the Fund would have no way to enforce the promised raises and without a strict time line -- Marshall favored two years -- school boards could take years, even decades to equalize salaries. Marshall knew that if he couldn’t demonstrate actual salary gains, he couldn’t claim victory with the teachers or the public at large.

In 1943, the Fund had thirty-one salary disparity cases pending. In 1946, the NAACP declared victory on the issue. Most of the South’s large cities had settled, but rural communities remained a problem as local officials knew they had little chance of

⁴Ibid, 117.
being sued. Recognizing the limits of resources and plaintiffs, Marshall decided to turn the Fund’s attention to the effort to expand opportunities in higher education. Nonetheless, it is important to note that as a result of the fifty pay equalization cases brought by the Fund in southern and border states more than $3 million flowed into the paychecks of black teachers over a 15-year period.\textsuperscript{5}

Teachers’ salaries were a pivotal issue because they demonstrated that the educational resources devoted to black children were significantly less than those being provided to white children. Lower salaries meant less qualified and less committed teachers. But Marshall knew that equalizing the educational infrastructure was not sufficient remedy; children must have equal avenues to educational opportunities at every level of learning.

With his very first higher education victory, Marshall learned that brilliant arguments are not enough. After the Maryland Court of Appeals ordered the University of Maryland to admit Donald Murray to the law school, Marshall had to confront the problem that Murray did not have enough money to pay tuition. Realizing that the legal victory would be moot if Murray did not enroll, Marshall first attempted to raise funds in the Baltimore community. Despite the fact that Murray’s grandfather was a well-respected bishop in the African Methodist Church, the fundraising drive was not successful. Marshall then appealed to Walter White, executive secretary of the

\textsuperscript{5}Bland, \textit{Private Pressure on Public Law}, 11.
NAACP, who provided the first semester’s tuition money through Carl Murphy, publisher of the Baltimore *Afro-American*, on the premise that the law student was more likely to repay a powerful local figure.

Marshall also had to attend to the public relations challenges created by Murray’s presence at the all-white school. Upon enrollment, the law school dean suggested to Murray that he not sit next to white students in class. Marshall walked around campus until he found several white students willing to tell the dean that sitting next to a black student posed no problems for them. By the end of Murray’s first week in law school, the *Afro-American* was reporting that “classmates were exceedingly cordial and so were professors.”

The battle against discrimination in higher education also illustrates Marshall’s adeptness at determining public opinion. Marshall later said that he chose to go after higher education institutions because Southerners were not as adamantly opposed to the integration of colleges and universities as they were to elementary schools.

Those racial supremacy boys somehow think that little kids of six or seven are going to get funny ideas about sex and marriage just from going to school together, but for some equally funny reason youngsters in law school aren’t supposed to feel that way. We didn’t get it but we decided if that was what the South believed, then the best thing for the movement was to go along.”

The first brief that Marshall prepared as an NAACP legal counsel was on behalf

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of Lloyd Gaines, a qualified black student, who had applied for admission to the Law
School at the University of Missouri and was rejected because Missouri did not have a
separate black law school, although it did provide tuition assistance for graduate and
professional training outside of the state, as was consistent with the separate but equal
doctrine. The brief would prove to be significant because *Missouri ex rel. Gaines v.
Canada* was the first case involving education brought before the Supreme Court by the
NAACP. In 1938, the Court ruled that the state had violated Gaines’s Fourteenth
Amendment rights and, absent a comparable black law school, he must be allowed to
attend the University of Missouri.

While the University of Maryland case was electrifying, it was decided in the
state courts and had no effect beyond Maryland, but the Gaines case had national
implications. One sign of the heightened stakes was how quickly the state moved to
nullify the ruling. The State of Missouri lost no time in opening an all-black law school
at Lincoln University, a historically black college in Jefferson City, in early 1939.
Missouri officials then declared that separate and equal facilities existed and that there
was no need to admit Gaines to the University of Missouri law school. While the
NAACP lawyers challenged that contention in the courts, they found that the plaintiff
was creating new challenges. Overwhelmed with the burdens of attention and ego,
Gaines began to demand that the NAACP accord him the star treatment he felt he
deserved. “He wanted adulation and stroking from fellow students, from his friends, the
press, and anyone else who dared to speak to him. At the same time, he complained that he was under pressure from all the attention that came to him because he was the NAACP’s client in a case that was attracting national attention."

Having achieved a small degree of success with the Gaines case, Marshall recognized that if they lost him they would have to start all over, finding a new plaintiff and devoting more time and resources to the same issues. In an effort to appease Gaines, the NAACP provided him with the tuition money to earn a master’s degree in economics at the University of Michigan while the Missouri case was being resolved.

While the Fund lawyers and the state sparred over whether a hastily created black law school fit the definition of equal facilities, Marshall was involved in an intricate dance with his plaintiff to keep him happy and available to appear in court. But by the first day of classes, Gaines had disappeared and the Fund was unable to proceed with the case. In October 1939, the missing law student made headlines nationwide, but his whereabouts remained a mystery.

The *Afro-American* declared in an editorial that Gaines was not missing, but was refusing to cooperate because the NAACP was no longer paying him. “The association in refusing [to pay Gaines] said that it was not marrying him but defending him in court . . . . With Gaines gone, however, it might have proved cheaper for the NAACP to marry

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Gaines was never found; his fate remains unknown. While Gaines’s disappearance was a heart wrenching setback for the Fund, it also demonstrated the terrible toll breaking down barriers could take on the brave individuals who allowed themselves to be precedent-setters. Marshall was required to serve not only as their legal advocate, but also as their protector, financial advisor, mentor, or whatever roles were required.

Despite the disappointment of Missouri, Marshall continued the war of attrition against separate but equal facilities in higher education, recognizing that African-Americans would never receive full equality under the law as long as the doctrine was upheld. “There is no such thing as ‘separate but equal.’ Segregation itself imports inequality,” Marshall wrote in a column for the Afro-American. He attacked the doctrine in higher education on two fronts, first by challenging the lack of educational opportunities in an effort to make such practices prohibitively expensive. Secondly to erode the legal basis for such discrimination by demonstrating that equality was comprised of many intangible factors such as institutional prestige, quality of the faculty, and the reputation of the degrees awarded.

In the Fall of 1945, Marshall decided to begin a sustained attack on segregation

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9Williams, Thurgood Marshall: American Revolutionary, 98.

10Davis and Clark, Thurgood Marshall, 143.
in higher education. As a result of the housing and other cases, Marshall felt that the Fund had developed a network of lawyers necessary to bring the cases, but had not yet found the right plaintiffs. He hoped that the flood of returning black veterans would provide a new pool of potential plaintiffs. On April 27 and 28, 1946, Marshall convened a “Special Lawyers Conference” in Atlanta to thrash out the legal questions and plot strategy. Although not many questions were decided -- the gathered lawyers decided that their strategy would be determined by how the courts responded to the cases the Fund brought -- the conference was an important event because it served to reinvigorate the lawyers, many of whom were concerned that they had played out the string on university and salary cases.\(^1\)

In the first post-war case, the Fund brought suit in 1946 on behalf of Ada Lois Sipuel, a qualified black student, denied admission to the University of Oklahoma School of Law on the grounds that the state intended to establish a “substantially equal” black school as soon as enough applications for such an institution were received. While the central question of the case paralleled that of the *Gaines* decision, “Does the Constitution prohibit the exclusion of a qualified black applicant solely because of race from attending the only law school maintained by a state?”, the case differed in one significant way; it was the first time Fund lawyers had directly asked the Supreme Court to reexamine the constitutionality of the doctrine of separate but equal in educational

facilities.

In January 1948, only four days after hearing oral arguments in *Sipuel v. University of Oklahoma*, the Court ruled in favor of Ms. Sipuel on the basis of the *Gaines* decision and ordered the state to "provide such education 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."\textsuperscript{12} The Court, however, did not comment on the question of the separate but equal doctrine.

Faced with the choice of either enrolling Ms. Sipuel, who had married since bringing her original suit and was now known as Mrs. Fisher, or refusing all new applicants until an all-black school could be established, the state decided to rope off a section of the state capitol, provide three law professors and designate it a "law school." Mrs. Fisher refused to attend on the basis that such an arrangement did not satisfy the equality requirements of the Fourteenth Amendment. The Supreme Court heard oral arguments in *Fisher v. Hurst* in February 1948, and subsequently ruled 7-2 that the state had complied with the Equal Protection Clause of the Fourteenth Amendment.

Despite the setback of the *Fisher* decision, the Fund lawyers continued their assault against racial segregation in higher education, bringing suit on behalf of a black Texas postal clerk, Heman Sweatt, who had applied for admission to the University of Texas Law School for the Fall 1946 term and was denied admittance on the basis of

\textsuperscript{12}Randall Bland, *Private Pressure On Public Law*, 64.
racial policy. Mr. Sweatt filed suit, but the state court delayed his trial for six months in order to give the university time to establish a separate law school for black students. The state legislature created an unaccredited institution which had four law professors, and a law library a fraction of the size of the university’s.

To prepare for the Sweatt case, Marshall reached out to friends to ask for ideas for attacking the separate but equal doctrine and also to test out arguments. Interestingly, Marshall’s initial inclination was to argue that the university’s racial policies violated a student’s “liberty” to attend public schools without segregation.¹³

In appealing the case to the Supreme Court, Marshall’s goal was to build a case which would demonstrate that separate facilities could never be equal, indirectly forcing the Court to reexamine Plessy v. Ferguson. Relying on both the legal arguments and sociological data, the Fund asked the court to rule that the separate but equal doctrine had no social or legal justification.

Marshall held a series of advisory conferences with a wide array of lawyers and academics in the Fund offices throughout November and December 1948 in an effort to pull together his arguments. On January 3, 1949, he convened a conference at the Fund offices to solicit briefs from friendly interest groups. In a move to bring more than legal arguments to bear, the representative from the Federal Council of Churches was urged to argue beyond the factual basis for the suit because it is “appropriate for those charged

¹³Tushnet, Making Civil Rights Law, 134.
with the moral leadership of our nation to evaluate those social forces in our society which must enter into” the decision.14

Again, Marshall honed his oral arguments through the use of mock courts at Howard University Law School, an exercise that not only strengthened Marshall’s legal reasoning, but allowed the students an opportunity to participate in the strategy and preparation of one of the great precedent-setting cases of this century.

On June 5, 1950, in a unanimous decision, the Court ruled in favor of Mr. Sweatt, holding that the tangible features of the two institutions were substantially unequal. While the Court again declined to reconsider Plessy v. Ferguson, Marshall considered the Sweatt decision the first substantive crack in the wall of segregated public education.15

Graduate education cases were being brought against state universities throughout the South during this time, but Marshall felt that it was critically important for the Supreme Court to be presented with a law school case to decide the constitutionality of segregated higher education.

Supporters occasionally asked Marshall why the principal case involved a law school. He replied, accurately enough, that “it is easier to prove that a law school is unequal than it is to prove a primary school is unequal.” He added that states would surely be unable to create medical schools for African-American students, but that it was harder to find qualified applicants and to prove that they were denied admission because of their race. More important than these, though,

14Tushnet, Making Civil Rights Law, 134.
15Randall Bland, Private Pressure On Public Law, 68.
was the fact that Marshall knew law schools intimately. He understood what made one law school better than another, and his network of acquaintances made it easy for him to find expert witnesses to explain why a new and segregated law school could not possibly be equal to the existing one. Marshall may also have understood that the Justices of the Supreme Court, most of whom, after all, had graduated from law school, would be more comfortable saying that they new law school could not be equal to the old one no matter how elaborate its physical facilities were.\footnote{Tushnet, \textit{Making Civil Rights Law}, 131.}

As a result of the Fund’s steady assault on segregation in graduate public education, by 1957, for all practical purposes, state-imposed segregation in institutions of higher learning was no longer practiced.

\textit{Elementary and Secondary Education}

Although in many ways the non-legal strategy of the elementary education campaign tracks that of higher education, the drive is noteworthy because it illustrates Marshall’s interdisciplinary approach to the law and the wide use he made of non-legal experts, such as historians and psychologists, to formulate his arguments.

With the integration of higher education institutions proceeding relatively peacefully, Marshall decided it was time to take aim at segregation in elementary and secondary education. This was not a decision which met with universal approval. Many African-Americans believed that white America would violently resist desegregation and when faced with the decision of whether putting their children through a tempest of opposition was worth the achievable gains, many felt that forcing the South to make the necessary investments to bring black schools up to par with white
schools was the better option.

In the summer of 1950, Marshall and his lawyers began preparing cases to be brought in federal district courts at strategic points around the nation. The suits were designed to compel the admittance of black children into white elementary and secondary schools in Clarendon County, South Carolina; Topeka, Kansas; Prince Edward County, Virginia; Chancery Court of the State of Delaware; and Washington, D.C. Again, utilizing both sociological evidence and legal precedent, Marshall and his deputies argued that black children were being denied the equal protection of the laws and the equality in treatment required by the Fourteenth Amendment. In the Kansas brief, Marshall wrote,

> Since elementary education is absorbed during the formative years of a child’s life, it assumes a peculiar and more important role than education at any other level....Negro children cannot be afforded the opportunity to develop fully their intelligence and their mental capabilities if their training is circumscribed and their development stunted by state practices which, at the very outset of their search for education, places them at a disadvantage with children belonging to other racial groups.\(^{17}\)

Marshall relied heavily on non-legal academic studies, particularly the work of Kenneth Clark, a black psychologist from City College of New York, who had undertaken landmark research of the effect of prejudice on children. Marshall made Clark’s powerful and emotional testimony the centerpiece of his case at the initial trial in Clarendon County, South Carolina. He also presented a host of social scientists and

educators to compliment his legal arguments.

The South Carolina case also demonstrated the public relations value of these cases. Although the outcome of the case at the district level was never in doubt, Clarendon County’s black community recognized that the case held national implications. While the importance of the case weighed heavily on Marshall, his mood stood in stark contrast to the excitement and passion of the local black community. More than 500 people showed up at the federal courthouse in Charleston for a courtroom which only seated 75. Marshall’s secretary Alice Stovall later recalled of the event, “they came in their jalopy cars and their overalls, and they had this little section of the court where they could go..All they wanted to do -- if they could -- just touch him, just touch him. Lawyer Marshall, as if he were a god. These were poor people wh had come miles to be there.”¹⁸

After being rebuffed at the district court level, the Supreme Court agreed to take up the South Carolina and Kansas cases in June 1952. Oral arguments were delayed until December to allow the remaining lawyers to file their briefs and the cases were consolidated into Brown v. Board of Education. The District of Columbia case was brought in separately because it involved quirky and technical issues of federal jurisdiction.

Marshall again convened a series of conferences at the Fund’s offices to pick the

brightest minds in the nation for ideas on how to handle every aspect of the case.

"Lawyers, law professors, sociologists, anthropologists, and even psychologists, notably Ken Clark, all came to Marshall's office to discuss how to convince the Court that separate but equal was a devastating burden to black people, nothing more than racism."

The heightened stakes of a Supreme Court case brought the conflict between lawyers and academics to a head. Concerned that the Court would reject anything that was not a serious, strictly legal approach several members of Marshall's legal team strenuously fought their inclusion in the strategy session.

Marshall had to act as a peacemaker when the lawyers and social scientists began sniping. But even as he tried to smooth out the tensions, some of the lawyers got mad at Marshall for giving any credence to the work of social theorists. Finally, Marshall had to lay down the law. He had become a fan of Ken Clark's studies -- the psychologists, the historians, and the political scientists were going to stay.

In addition to the usual amicus briefs from interest groups and influential legal authorities that Marshall had been collaborating with, he also attached to his written arguments an analysis signed by thirty-five of the nation's most eminent social thinkers supporting Clark's assessments of the effects of segregation on children, both white and black.

In June 1953, the Supreme Court issued a memorandum decision that held that it

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19 Ibid, 209.

was necessary to clarify certain points before a decision could be handed down. The case was assigned reargument in October 1953. Additionally, the Court requested that both side provide answers to several significant questions regarding the original intent of the Fourteenth Amendments authors and the state legislatures that ratified it, as well as evidence that the Amendment can be legitimately construed to prohibit or support segregation. Lastly, the Court asked how an order to end segregation should be implemented. Needless to say, the Court’s questions raised hopes and fears on both sides of the case.

Marshall immediately began telephoning prominent historians and asking them to provide him with research on what state legislatures had debated and decided as they ratified the Fourteenth Amendment. Congressional historians were called upon to provide a history of the amendment and to determine if there was any legislative record of Congress’s intent toward integrating schools. Two professors were brought to New York to work with the Fund’s staff: Howard University history professor John Hope Franklin who was responsible for determining how the Fourteenth Amendment had been implemented, and Alfred Kelly of Wayne State University who was responsible for providing research on the congressional debates over the amendment. Lawyers who opposed the use of psychological and sociological data now had to content with historians being the centerpiece of their legal case.

As Marshall struggled to synthesize an argument he was well aware that legal
precedent was not on his side, but he was also dismayed to learn that most of the historical evidence indicated that Congress and the state legislatures had no intention of integrating schools. He was equally unhappy with the legal briefs being produced. Finally, it was the academics who gave Marshall the basis for arguing that the Fourteenth Amendment prohibited segregated schools. Alfred Kelly developed an argument using the speeches of liberal Republican Congressman Thaddeus Stevens of Pennsylvania, who contended that Congress always had the power to prohibit the states from making distinctions in the law between people.21

Brown v. Board of Education is an important case not only because of the legal precedent it set, but also because it illustrates the role that luck and timing play in determining legal precedent. In September 1953, before oral argument could be heard again, Chief Justice Vinson died, leaving the justices who favored the cause of the states without a leader. President Eisenhower made a recess appointment of California Governor Earl Warren. This is not to argue that the separate but equal doctrine in public schools would never have been overturned if Warren had not been nominated to the Court, but that under his leadership it was accomplished much more quickly.

In May 1954, the Court handed down a unanimous decision that segregated public schools stand in violation of the Fourteenth Amendment. It is interesting to note that while this critical decision did not establish a right to education, it also did not

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21Williams, Thurgood Marshall: American Revolutionary, 221.
overturn *Plessy v. Ferguson* as unconstitutional, but rather its application to public education was invalid. Nonetheless, Marshall had decisively demonstrated that segregation was inherently unequal.

Unlike the decisions in higher education, states fought the desegregation order tooth and nail and the Fund lawyers found that they devoted a considerable amount of time and effort in the courts determining the meaning of phrases like, “with all deliberate speed.” Between 1955 and 1960, the Fund filed seven major cases dealing with the rights of black children to public education.
CHAPTER FIVE

THE CURTAIN CLOSES

The Brown decision heralded a new era of awareness and activism in the civil rights movement. With the effective dismantlement of segregation laws, a new breed of leaders took their place on the civil rights battlefield and Marshall, who had at one time been labeled a radical for his moderate call to work within the system for change, found himself eclipsed. Although some of the new activists considered Marshall an accommodationist, most recognized that Marshall opposed the new confrontational tactics out of concern for the young people who willingly risked injury and incarceration in order to tear down the barriers of American apartheid. Civil rights leader and Congressman John Lewis, said of Marshall’s efforts:

I think Thurgood Marshall had this abiding concern that we didn’t need to continue to put ourselves in harm’s way. I think that, more than anything else, was his idea. He wasn’t saying be ‘patient’ and ‘wait,’ he was just saying that this is the way that he would do it, through the courts, and that we didn’t need to have people spitting on us, pulling us off lunch-counter stools, and putting lighted cigarettes out in our hair. I think that was his overriding concern, because Thurgood Marshall was one of those and still is one of these imposing figures. To hear him and see him during my days in Nashville come to a little church or to the Fisk University gym was an inspiration. I grew up hearing about Thurgood Marshall, and the first time I met him was like meeting a legal savior.¹

In 1961, Thurgood Marshall, the vanguard of the civil rights movement,

¹Davis and Clark, Thurgood Marshall, 218.
accepted the appointment of President Kennedy to the U.S. Second Circuit Court of
Appeals and while he left behind the day-to-day struggles to achieve equality under the
law he forged a new role for himself. Said Harvard Law professor Randall Kennedy of
Marshall's groundbreaking efforts:

It seems to me that Marshall worked as an advance guard. First, he was very
much a disrupter and a rebel. Then others took over that position, and he became
an advance guard at being a black American insider at very high levels of
government. At each point, he had been a pioneer, opening doors that others have
gone through behind him.²

Leaving the Fund was a difficult decision, but for a man who has never earned
more than $10,000 a year the allure of financial security was too great. Marshall knew
that his family had made great sacrifices to his career and as the father of young
children he knew the time was right to provide them with a degree of stability. In
moving to government service, Marshall gave up a powerful public platform and though
he remained outspoken, his public profile was dimmed. Indeed, Marshall was
appointed to the Supreme Court in 1967, and yet, he did not grant his first press
interview until 1987. The eclipsing of Marshall's profile meant that the attention-
deficient American public quickly forgot the achievements of this civil rights pioneer.

Lack of exposure cannot diminish what he accomplished. "When I think of
great American lawyers, I think of Thurgood Marshall, Abe Lincoln, and Daniel
Webster... He is certainly the most important lawyer of the twentieth century," said

²Davis and Clark, Thurgood Marshall, 382.
Georgetown Law professor Thomas Krattenmaker.³

Although inexorably intertwined with Marshall’s legal victories, his extra-legal accomplishments are a powerful component of his legacy. Perhaps his greatest gift was his ability to connect with people, to draw them to his cause, to convince them that change was possible, and to believe in the fulfillment of the rights and freedoms promised by the Constitution. He was in every sense a true leader.

The full measure of Marshall’s extra-legal legacy must include an examination of his personal contributions. At the Fund, he continued a practice initiated by Charles Houston of identifying and nurturing the best young legal talent he could find. The list of lawyers who worked for Marshall at the Fund reads like a “Who’s Who” of the current federal judiciary. These young lawyers were not only given the opportunity to work on some of the most significant issues facing their generation, but they were given an invaluable lesson in how to be a successful trial lawyer. In fact, Marshall’s greatest legacy may not be his legal victories, but the cadre of well-trained lawyers dedicated to using the courts as the best avenue to the expansion of guaranteed rights to every American.

Like Houston, he also continued to use the Howard Law School as a laboratory, arguing his important cases first before a mock trial of professors and students, who threw out questions and ensured that Marshall was prepared for any question the Court

³Williams, Thurgood Marshall: American Revolutionary, 400.
might raise. Undoubtedly, these exercises resulted in the molding of scores of exemplary black lawyers.

His vision of law practiced in the public interest established the model for legal defense funds for women’s groups, environmental organizations, and a host of other causes. The phone book is full of non-profit organizations dedicated to practicing the type of law pioneered by Marshall at the Fund.

Thurgood Marshall was more than an advocate for his people, he was an advocate for the Constitution. "Thurgood Marshall stood for the broadest interpretation of almost all the provisions of the Constitution . . . He was a very stout champion of individual rights. And he was an equally stout champion of minority rights," said Chief Justice William Rehnquist.⁴

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