A RHETORICAL ANALYSIS OF THURGOOD MARSHALL'S ARGUMENTS
BEFORE THE SUPREME COURT IN THE PUBLIC
SCHOOL SEGREGATION CONTROVERSY

DISSERTATION

Presented in Partial Fulfillment of the Requirements for
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By

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* * * * * *

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A. The Purpose

In its fall term of 1953, the Supreme Court of the United States heard the reargument of Brown v. Board of Education, which actually included five separate cases pertaining to public school segregation. These cases had begun in four states—South Carolina, Virginia, Kansas, and Delaware—and the District of Columbia. Appealed from lower courts, they had been first argued before the high court in December, 1952. At issue was the specific question of whether public school segregation violated the Fourteenth Amendment of the United States Constitution. The National Association for the Advancement of Colored People, through its legal staff, held that it did.

The purpose of this study is to make a critical evaluation, from a rhetorical point of view, of the arguments presented in this controversy by the chief NAACP counsel, Thurgood Marshall. Selection of Mr. Marshall does not indicate that the other lawyers associated with him did not contribute immeasurably to the final outcome of Brown v. Board of Education. Thurgood Marshall, whose name is synonymous with the NAACP's fight for the Negro's civil rights, is actually a symbol for the entire legal team. For four of these original cases Marshall acted as a legal consultant, and for one, the South Carolina case, he was the chief counsel. The
reargument was based on a single brief filed by the staff of the Legal Defense and Educational Fund, Incorporated, of which Marshall is director-counsel.

B. Significance of the Problem

A court case that can (1) change an established pattern and alter an entire way of life for many people; (2) prevent states from denying certain citizens rights guaranteed to them under the Constitution; and (3) highlight the disparity between America's profession and practice of democratic ideals is a fertile area of interest to a student of rhetoric and public address. To indicate why this is an area of interest necessitates a definition of rhetoric and a description of a rhetorical situation. Perhaps the most quoted definition is Aristotle's, which designates rhetoric as "the faculty of discovering in the particular case all the available means of persuasion." Donald C. Bryant tells us that a situation is rhetorical when its focus is upon "accomplishing something predetermined and directional with an audience." The problem of this study is definitely related to Aristotle's definition; it also fulfills Bryant's criterion for a rhetorical situation.

The public school segregation controversy, which is but a facet of the whole problem of segregation itself, not only deals with an issue that can alter a way of life for the people of seventeen southern and border states and the District of Columbia but also involves a conflict concerning the interpretation of the
Constitution. To be resolved was the question of whether the Constitution would be adhered to or the public policy, customs, and mores of states would prevail.

The third factor which makes this problem a highly significant one is that this court case highlighted the fact that a nation founded on the proposition that "all men are created equal" was denying "due process of law" and "the equal protection of the laws" to one-tenth of its population solely because of racial differences. Because of this differential treatment accorded to its chief minority group, the United States and its role as a democratic leader has been questioned by some nations of the world.

Thonssen and Baird say that in order for speaking to be great, it "must deal with ideas which make a difference in the affairs of men and states." Thurgood Marshall’s oral arguments do deal with such ideas, as the analysis will seek to show.

C. Method

The method used in this study is based chiefly on Aristotelian standards modified by the criteria of effective advocacy. The specific type of criticism is judicial, which is described as follows by Thonssen and Baird:

...it reconstructs a speech situation with fidelity to fact; it examines this situation carefully in the light of the interaction of speaker, audience, subject, and occasion; it interprets the data with an eye to determining the effect of the speech; it formulates a judgment in the light of the philosophical-historical-logical constituents of the inquiry;
and it appraises the entire event by assigning its comparative rank in the total enterprise of speaking.4

Four of the canons of classical rhetoric, which also correspond with present forensic principles, are used as bases for the analysis of the oral arguments; they are invention, arrangement, style, and delivery. The specific functions of these canons follow.

Invention, or the search for ideas, is considered the most important part of the speech. It includes non-artistic and artistic proof. The former consists of laws, witnesses, contracts, tortures and the oath. The latter is composed of ethos, pathos, and logos. Ethos resides in the character of the speaker and demonstrates his intelligence, character, and goodwill. Pathos consists of the emotional motivations used to secure the desired audience response. Logos refers to the logical arguments which convince the audience. The special devices for logos are the example and the enthymeme, which latter is of particular importance in legal or forensic speaking.

Although contemporary rhetorical theory is essentially Aristotelian, the enthymeme, which is the focal concept in the rhetoric of Aristotle, is given comparatively little attention. The enthymeme bears the same relationship to rhetoric that the syllogism does to logic. For want of a better definition, one usually calls the enthymeme a rhetorical syllogism. The sources for enthymemes
are probabilities and signs. It is interesting to note that Ringwalt suggests that the argument of the lawyer often indicates that he has arrived at a probability and not a demonstration; hence, the advocate often says, "the weight of evidence seems to show," "the reasoning seems to prove."

The second canon to be used in the study is arrangement. This division includes the orderly disposition of the speech parts and of the speech as a whole. The specific parts are the exordium, statement, argument, and peroration.

Style, the third canon, involves the use of words, the collocation of sentences, and the embellishment of the language. Style may also be characterized as the plain, the moderate, and the grand.

The last canon is delivery, which is concerned with vocal variety and bodily movement, with each being coordinated with the other.

D. Similar Studies

Rhetorical criticisms of legal speaking have been done from time to time. One thinks immediately of William Norwood Brigance's classic analysis of Jeremiah S. Black's appeal before the Supreme Court in the case of L.P. Milligan and his right to trial by jury. Another study is John G. Drushal's analysis of the speeches of Louis Dembitz Brandeis, one of which was an oral argument before the Supreme Court in defense of the constitutionality of the Oregon
minimum wage law. More recently Keith S. Montgomery made a rhetorical analysis of Thomas R. Marshall's forensic and occasional speaking. There are, however, no completed studies which relate to Thurgood Marshall and the school segregation cases as argued before the Supreme Court.

E. Organization

Thonssen and Baird suggest that the critic must delve into the past if he is to understand the present. Chapter II, therefore, deals with the background of the problem. Since their first appearance before the Supreme Court in 1915, lawyers representing the NAACP have continued to come before this court on behalf of the rights of the Negro. Because it is this organization which has consistently fought for equality of educational opportunities for Negro youth, Chapter III defines the role of the NAACP in the present controversy. Chapter IV sketches Thurgood Marshall, the man, and is concerned with his family background, education, legal career, characteristics, forensic ability, and attitudes and beliefs. Chapter V is an analysis of the brief which was submitted on behalf of Brown v. Board of Education. Chapter VI analyzes the oral argument of Mr. Marshall before the Supreme Court. Since rhetorical criticism is also concerned with the effect of the speech, Chapter VII gives some major consequences of the decision. Chapter VIII contains a summary and the conclusions.
Included in the Appendix are the Chronology of Events; the Thirteenth, Fourteenth, and Fifteenth Amendments; the Civil Rights Acts; the NAACP Call and the Signers; the Opinion of the Supreme Court; and the Text of the Oral Arguments.
CHAPTER I

NOTES


4. Ibid., p. 18.


A. The Basic Problem

The basic issue which confronted Thurgood Marshall and his colleagues in the school segregation cases was by no means a new one. The history of the Negro in the United States provides proof of the existence of the fundamental problem of where and how the Negro should be educated. This is, in reality, but a facet of a larger area of concern, namely, that of the status of the Negro in American life. This problem had its genesis from the time Thomas Jefferson wrote that "All men are created equal." This canon implies that all men have certain natural rights; these have been assessed in various ways. The framers of the Declaration of Independence refer to them as "certain inalienable rights," among which are "life, liberty, and the pursuit of happiness." The subject with which we are concerned in this study hinges on the word liberty; and, as a result, our interest is in the civil rights of men, which interest is inherent in the public school segregation controversy.

The term civil rights has been defined as "those rights which usually belong to persons by reason of their citizenship or habitat in a state or country.... They include the right of property, marriage, protection by laws, freedom of contract, trial by jury ...." Because of the conditions under which the Negro was brought
to America, there was, from a very early time a question of his status. Unlike others who came to America seeking some kind of freedom, he was brought to be a servant and ultimately he became a slave. Alan Paton has described his lot as "a history of hope and despair, of acceptance and rejection, of justice and terror, a story so noble and tragic that it is one of the greatest epics of mankind." His first position in the United States was similar to that of the white indentured servant. In fact, records of Virginia show that the earliest Negroes in that state occupied such a position and were so listed in the census enumeration of 1623 and 1624. It was not until the middle of the seventeenth century that Virginians became aware of the possibilities that lay in the utilization and exploitation of black slave labor. This position as a slave the Negro was to have for some two hundred-odd years, until the nation suffered the throes of a civil war. Two years before the end of the war he was by proclamation emancipated from slavery in most of the seceded states. In 1865 Congress proposed and adopted the Thirteenth Amendment to remove legal doubt and to liberate slaves everywhere in America. This Amendment was followed by the adoption of two others—the Fourteenth and the Fifteenth—which give the Negro the legal right to all the benefits of citizenship. Despite the adoption of these Amendments, there is a constant denial of the civil rights of this minority. This problem constitutes a real dilemma for Americans in that their attitudes and actions with respect to the Negro represent a deviation from American ideals and beliefs.
It is interesting to note that neither the Emancipation Proclamation nor the Thirteenth, Fourteenth, and Fifteenth Amendments solved the problem of the Negro; for race dogma was still used in the South to justify the caste system which succeeded slavery. It was for the purpose of maintaining this caste system that segregation was instituted. The system of segregation was actually conceived as a device for keeping the emancipated Negroes in their place—"a place at all times and everywhere inferior to that of white persons." Contrary to popular belief, however, it was not until some time after the Reconstruction that there was passed a great deal of prohibitive legislation against Negroes.

Because of its unalterable opposition to freedom for the slaves, the South determined that freedom would mean only the absence of slavery as it had been known before Emancipation. In fact, Franklin believes that "the greatest concern of southerners was the problem of controlling the Negro." This the South felt was necessary because of the various items of federal legislation against segregation which were adopted, beginning in 1865 and continuing for a decade. In addition to the adoption of the Thirteenth, the Fourteenth, and the Fifteenth Amendments, Congress also passed three Civil Rights bills in 1866, 1870, and 1875, respectively. The latter bills were necessary because some of the southern states flatly refused to accept the Thirteenth Amendment. All of them rejected the Fourteenth Amendment; and, as a result, the South began to enact the Black Codes.
It is interesting to note that segregation laws did not appear upon the law books of a southern state until more than a decade after the end of the Reconstruction. It was even later before North Carolina, South Carolina, and Virginia adopted discriminatory legislation. As late as 1885 and 1890 in the states which are generally regarded as most rabid in their practice of segregation, there was a great deal of mingling among the races. But when Jim Crow did appear, the newer states were more prone to resort to discrimination than the older states along the seaboard. Even with the appearance of the segregation laws, it is generally conceded that more discrimination was practiced than was indicated by the statutes on the books.

Frazier states that racial prejudice may cause a person to refuse to sit next to a member of a different race in a railway coach or on a streetcar. These acts stemming from a feeling of racial superiority are matters of private concern. When, however, they become the basis of segregation laws against a group of people, such acts represent public discrimination and are a matter of public concern. Public concern was evidenced from the time the South adopted its policy of extreme racism. A consequence of this policy was the enactment of various types of legislation which were more often for and less often against segregation.

Pauli Murray's study on states' laws based on race and color reveals some interesting facts. Twenty-two of the forty-eight states by law permit or require racial segregation in one form or another. On the other hand, eighteen states have civil rights laws
prohibiting discrimination in places of public accommodation and amusement. Some states have laws against discrimination in specified private schools, while others expressly prohibit segregation in the public school system or declare that no distinction or classification shall be made on racial grounds to exclude students from public schools. There are several states outside the Deep South which prohibit mixed marriages. Fair Employment Practice Acts have been passed in only a few of the states of our nation.

Legislative acts such as these had a direct effect upon the lives of the millions of Negroes who were striving for first-class citizenship. Implications of this system of segregation have reached into all areas of the life of the American Negro and have had an indirect bearing upon the life of America in general.

B. Economic, Political, and Social Implications

Various sociological studies on the place of Negroes in American society reveal that the majority of them are denied the right to share in the dream of equal opportunities. Franklin is of opinion that this denial often forces the group to react in a hostile and an anti-social manner. This problem of segregation has economic, political, and social implications, which react on the entire pattern of American life.

Myrdal finds that except for a small minority enjoying upper- or middle-class status, the masses of American Negroes, in the rural South and in the segregated slum quarters in southern and northern
cities, are economically insecure. Their income is slow and irregular, and they own little property. Although it may be admitted that conditions in the North are not as bad as those in the South, it must be stated that the northern Negroes face keen competition from the immigrant classes there. That the situation is worse in the South may be accounted for by two facts: (1) a larger proportion of Negroes reside in the South; and (2) the South is a poorer and a more economically retarded region than the North. After the Civil War Negroes in the South, for example, lost the monopoly on many types of jobs which they had previously held. Such jobs as carpentry, bricklaying, painting were taken over by white men, while the increased use of white women in industry created a new source of competition. Even now, except for farm workers, most of the Negroes are in unskilled jobs. By comparison the proportion who are in business and in the professions is indeed small.

One might observe that this economic inequality which exists among the Negroes is tied in with an overall concern for maintaining social inequality. This aspect is connected with the white man's complex set of racial beliefs. The white southerner, for instance, who objects to a conspicuous rise in Negro levels of living is very much like the upper classes in most European countries who, some centuries ago, frowned on the lower-class people's rise to a higher level. This economic exploitation, then, is merely another manifestation of the tradition of caste which is built on race dogma.
As a consequence of the economic inequality, American society in general is the loser. DuBois believes that the economic implications of the race problem were once evidenced by management pitting two great groups of laborers against each other—the white and the black. Exploitation of the two resulted in low wages and unfair treatment of both. A writer for *Commonweal* sees this economic problem as a pressing one in the South today. He says:

> Segregation is a millstone around the American Negro who suffers it. To an almost equal extent it is an economic drag on the South which canonizes it. It means duplication—two drinking fountains where one would do; two waiting rooms where one is ample; two rest rooms where one is needed; two schools where one is enough.

One notes also that because of these inequities the entire culture and interests of the minority group are more narrow. This limitation of one-tenth of a country's citizenry must necessarily affect the total picture of American society.

One of the important rights in the life of a citizen is the privilege to participate in the political and civic life of his community, state, and country. To circumscribe him in this sphere of life is to deny him the status of a first-class citizen. Because there is so much controversy in the South today over the Negro's right of franchise, one might be prone to forget the extent to which the Negro has participated in the political affairs of this country. In early colonial days free Negroes apparently often enjoyed the same civic rights and duties as the poor white people freed
from indenture servitude. According to Myrdal, there has never been, in modern American history, a time when some few Negroes did not vote. Even during the period when the Constitution was framed, free Negroes had the right of suffrage in all of the original states except South Carolina and Georgia. After the Civil War and the subsequent passing of the Reconstruction Amendments, Negro men all over the Union were given the right to vote. While the North did not attempt to abridge this right, the South made many efforts to keep the Negro disfranchised despite the intention and spirit of the amended Constitution.

That the Negro was not disfranchised immediately is proved by his participation in local, state, and national political life, both during and following the Reconstruction. During the Reconstruction, for example, several states of the Deep South elected Negroes to high offices. In Louisiana, between 1868 and 1896, there were 127 Negro legislators, 38 of whom were senators and 95 representatives. This state also had three Negroes to serve in the office of lieutenant governor; and for 43 days, in the winter of 1873, one was acting governor. Mississippi had a similar record. Forty Negroes, some of whom had been slaves, were members of the legislature. At different times this state had Negroes as lieutenant governor, secretary of state, and superintendent of education. The State of South Carolina likewise had generous Negro representation in public office, with 87 Negroes in the legislature, two as lieutenant governor, and one a secretary of state. Alabama,
North Carolina, Florida, and Georgia all had some Negroes elected
to office; in the latter state, however, court action was required
to seat the officers. Between 1869-1901 two Negroes—both of whom
were from Mississippi—served in the United States Senate. During
this same period some twenty Negroes were members of the House of
Representatives.

In 1877, as a result of a political controversy, the position
of the Negro in political life became quite precarious. This
situation prevailed because of the Compromise of 1877, which gave
the South certain concessions. Two important ones among them were
(1) the withdrawal of troops from the South, and (2) the agreement
to permit the southern states to establish their own policies toward
the Negro. This compromise marked the beginning of the argument—
which is the underlying issue of the segregation cases of this study—
about the kind of equality Congress and the state legislatures meant
to give the Negro through the Fourteenth Amendment.

Subsequently many methods have been and are used to limit the
Negro's participation in political life. The white primary was
adopted in thirteen southern states between 1896 and 1915. In
others there were the literacy test and the grandfather's clause.
One case in proof of the effectiveness of the disfranchisement is
the example of Louisiana's Negro voters: the number decreased from
130,334 in 1896 to 1,342 in 1904. That the Negro has been pre-
vented from participating actively in politics in the South is to
be admitted. But that he has certainly been a political issue also
must be acknowledged. For, as Myrdal comments,

...the issue of white supremacy versus Negro domination has for more than a hundred years stifled freedom of thought and speech and affected all other civic rights and liberties of both Negroes and whites in the South. It has retarded its economic, social, and cultural advance.35

Many years before Myrdal made this astute observation, DuBois made a similar comment. DuBois' opinion was that in the deep South it is difficult to consider the merits of any political question because the white southerner must always vote to keep the Negro down. This type of attitude prevents reason from being applied to the settlement of great political questions.

The Emancipation Proclamation, which changed the legal status of the majority of slaves, created a decided problem as to their social status. In fact, it is Myrdal's belief that segregation is motivated as a precaution against social equality. So important is segregation in things social that there exists in the South an entire code of etiquette on race relations. One of the chief arguments against civil rights is that the granting of civil equality will lead to social equality, which, in turn, will lead to miscegenation. The majority group's theory of color caste is that everything must be rejected which might result in amalgamation. This concern for racial purity is so great that segregation and discrimination are extended to all areas of racial contact, such as recreation, religion, housing, education.
Myrdal attempts to substantiate this theory concerning racial purity by his "rank order of discriminations." His general conclusions indicate that in the white man's rank order factors of sex and social status are the determinants; in other words, the closer the association of interracial behavior is to an equalitarian basis which could end in amalgamation, either by intermarriage or illicit miscegenation, the higher it ranks among prohibited things. The Negro's "rank order of discriminations" is parallel with and inverse to that of the white man's. His rank order opposes least discriminations of a social nature—that which ranks highest in the white man's evaluation. He resents most the discriminations against him in economics, in the law courts, in the exercise of the franchise, and in the use of public accommodations, such as schools, churches, means of conveyance.

Since this background information is included solely for the purpose of making more clear and comprehensible the position of the appellants in the school segregation cases involved in this study, special attention will be given only to the social implications as they have affected the Negro in his struggle for education on an unsegregated basis.

C. Segregation in Education

Segregation per se was not in existence prior to the Civil War. The close proximity in which the slaves and their owners lived precluded any type of physical separation. When we speak today of
segregation in education, we do have in mind this type of separation. But to appreciate fully the situation which ultimately motivated Negroes to seek for equal opportunity in education, it is well to review the early struggle of the Negro in this respect.

The philosophy of the American Revolution was one of the most significant influences on the advancement of education for Negroes. It is interesting to observe that some patriots of the Colonial era, such as Benjamin Franklin and Thomas Jefferson, not only opposed slavery, but advocated the right of Negroes to be educated. The year 1704 marks the establishment of the first school for Negroes in America. Elias Menu, an agent for the Society for the Propagation of the Gospel in Foreign Parts, opened this institution in New York City.

In the post-revolutionary period various manumission and abolition societies began to encourage the setting up of schools for Negroes. Especially was this interest evidenced in the Middle Atlantic and in the New England states. Although sentiment was somewhat unfavorable among the southerners, educational training was carried on among the Negro slaves by various religious groups, such as the German Protestants, the English missionaries, and the Quakers. These groups were often handicapped, however, because the slaveholders passed laws prohibiting the instruction of slaves and limiting the education of free Negroes. In fact, prohibitive legislation against education in the South began in South Carolina in 1740 and extended for over a century. But learning went on
among the slaves in spite of this opposition. The slaves acquired knowledge in various ways. Some were taught by the white children whom they had to accompany to school. A few were able to pick up enough of the rudiments to teach themselves. A number of mistresses were known to give instruction to some of their favorite slaves. In other instances white fathers of Negro children often sent them to school in the North.

With the starting of the Civil War, the South was invaded by the New England school teachers and by representatives of various missionary groups who began to set up schools for the refugee slaves. The first such day school was established by the American Missionary Association six months after the beginning of the War. With the penetration of the Union Army, education was extended among the Negroes.

After the War and the emancipation of the slaves, Congress in 1865 created the "Bureau for Freedmen, Refugees and Abandoned Lands," one of its major purposes being the education of freedmen. Many conservative southern white men, opposing these educational efforts, burned school houses and physically attacked both white and Negro teachers, often expelling them from the communities. This struggle continued during the early days of the Reconstruction. On the one hand, the ex-slaves possessed a desire for education which was related to their struggle for status as free men; on the other, the southerners opposed their obtaining an education because they felt it would motivate the Negroes to aspire to social equality.
The opposition of the South to providing public schools for Negroes must be viewed in the larger framework of the position of the South on tax-supported schools in general. Harlan reminds us that the South did not accept the idea that one of a state's obligations is to provide universal education. The state-supported common schools of the South "were revolutionary institutions cut by aliens from the alien pattern of New England education." Consequently during the Reconstruction, education had many limitations for white children and even more for Negro children.

When laws were passed in the South requiring segregated schools, education was placed at an even greater disadvantage. A comparison of the South with other sections of the country reveals that it is the section least able to support a double system. Bond declares that the inability of the South to support systems for the two races results in the Negro children being "discriminated against universally in states with a heavy Negro population...." Harlan also recognizes that in addition to the inequality which is inherent in the segregation of a lower-caste minority, there is also a difference in the financial support given the Negro and the white schools. This financial disparity shows itself in various ways in Negro schools: shorter school terms, inferior educational facilities. Ginzberg takes this a step further and states that the quality of education the Negro receives in the segregated system is, for the most part, inferior. He bases his conclusion on the premise that while Negro teachers in many parts of the South are at least as well-prepared as white
teachers—in terms of formal educational qualifications—the Negro teachers have been handicapped by poorer schools and more deprived backgrounds.

That segregation in education is much more widespread in the South than in the North is accepted. But one may note also that educational segregation has not been entirely absent in the non-South states. Four states outside the South leave it to local school authorities to determine whether or not school children shall be segregated because of race. While eleven states have no legal statutes concerning the separation of the races according to color, sixteen non-southern states have specific prohibitive legislation. In some parts of the North school administrators often engage in discriminatory practices through "gerrymandering school districts, the encouraging of voluntary choice of separate schools by Negro pupils, carefully regulating transfer permits...."

One might mention another factor which, during the late nineteenth century, mitigated against the Negro in his quest for an education: the controversy over whether the Negro needed a classical or an industrial education. Myrdal believes that the white southerner preferred for the Negro an industrial education in order to make a better servant and laborer out of him. The New England teachers wanted to train the Negro after the classical pattern. The familiar Booker T. Washington—W.E.B. DuBois controversy was a follow-up of this original dichotomy.
These are the problems, then, which the Negro faced in his struggle for an education. During this struggle the Negro often made protests, some of which found their way into the courts. A brief resume of two early cases shows them to be significant steps which lead to the school segregation problem of this study.

D. Significant Early Cases

While Roberts v. City of Boston represents the first legal attack against discrimination in education, Negroes had protested on two previous occasions—(1) a petition to the State Legislature of Massachusetts on October 17, 1787, and (2) a resolution to the City of Boston on June 24, 1844, both seeking equal educational rights. The first school segregation case in the courts of the United States was filed in 1849 in Boston, Massachusetts, on behalf of Sarah Roberts, a Negro girl who had been barred from a white school.

The counsel for this suit was Charles Sumner, the famed abolitionist. The plaintiff had been refused admittance to the white school, 800 feet from her door, while being forced to attend a Negro one, 2,100 feet away. Sumner, in defending Sarah Roberts, based his argument on the bill of rights of the Massachusetts constitution which declared that all citizens are equal. Although he further pointed out that segregated schools perpetuate caste and are not equal, he was not able to convince the court. Chief Justice Shaw of the State Supreme Court handed down the decision which
stated that “segregation of the races did not in itself constitute discrimination.” In spite of the fact that he lost the case, his eloquent argument helped the cause of abolitionism and eventually was a factor in the outlawing of school segregation in Massachusetts in 1855.

The second significant case was that of Plessy v. Ferguson, 1896. Even though it was a transportation case, its decision was used for many years as a major legal and sociological justification for segregation in numerous other spheres. Homer Plessy was jailed for refusing to ride from New Orleans to Covington, Louisiana, in a special coach for Negroes only. First he denied that he was a Negro. In a later plea to the Louisiana Supreme Court, he petitioned it to prohibit the judge from proceeding with the trial on the ground that the segregation law was unconstitutional. When his petition was not granted, Plessy appealed to the United States Supreme Court, which upheld the Louisiana law.

The Court made some declarations which gave aid and comfort to the proponents of segregation. It indicated (1) that the Thirteenth Amendment did not prohibit state-imposed segregation; (2) that the Fourteenth Amendment did not abolish distinctions based on color, nor did it enforce social equality or a commingling of the two races on terms unsatisfactory to either; (3) that public education is social and, therefore, subject to segregation laws; but the state must secure "to each of its citizens equal rights before the law and
equal opportunities for improvement and progress"; and (4) that the railway segregation law was reasonable, in accord with the customs and traditions of the people.

The decision of the Court was not unanimous; one lone judge dissented. Justice John Marshall Harlan in his minority opinion made the famous declaration that has been used many times since by lawyers attempting to reverse the Plessy decision. Said Justice Harlan: "Our Constitution is color-blind, and neither knows nor tolerates classes among citizens...." These famous words were acclaimed by many individuals; among them was Walter White, who deplored the majority opinion on the ground that the South used the decision to fasten segregation more firmly upon Negroes, not only on means of conveyance but also in every other area of human existence.

During the intervening years the Plessy doctrine has been attacked on many occasions, all of which were building toward the time when this negative opinion would be reversed. The controversy with which this study is concerned is the history-making climax in the Negro's long struggle for equal opportunities in education as well as for an equal place in American life in general.
CHAPTER II
NOTES

6. Ibid., p. 88.
10. See Appendix for full text of Amendments and bills.
13. Mississippi and Louisiana.
17. Alabama, Arkansas, Delaware, D.C., Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, Missouri, North Carolina Oklahoma, South Carolina, Tennessee, Texas, Virginia, West Virginia.

19. Illinois and Minnesota, for example.


22. New York, New Jersey, Massachusetts.

23. Franklin, op. cit., p. 553.


26. Ibid., p. 216.


32. The electoral votes in the election of 1876 between Rutherford B. Hayes and Samuel Tilden were so close and the charges of fraud so numerous that Congress had to decide the election. An agreement made between the Republicans and the southern Democrats is known as the Compromise of 1877.

33. South Carolina, Arkansas, Georgia, Florida, Tennessee, Alabama, Mississippi, Kentucky, Texas, Louisiana, Oklahoma, Virginia, North Carolina.

34. Ibid.


38. For an interesting treatment of this idea, see Bertram W. Doyle, *The Etiquette of Race Relations in the South*. Chicago: The University of Chicago Press, 1937.


40. Rank Order of Discriminations

   Rank 1. Intermarriage and sexual intercourse involving white women

   Rank 2. Discriminations and etiquettes concerning behavior in personal relations (social intercourse generally)

   Rank 3. Segregation and discrimination in the use of public facilities (schools, churches, means of conveyance)

   Rank 4. Political disfranchisement

   Rank 5. Discrimination in law courts, by the police and other public servants

   Rank 6. Discrimination in economics, etc.

41. Myrdal, *loc. cit.*

42. Frazier, *op. cit.*, p. 419.


44. Frazier, *op. cit.*, pp. 418-419.


46. Ibid., p. 206 ff.

47. Frazier, *op. cit.*, pp. 420-422.


55. Ibid., p. 243.


58. Ibid., pp. 9-11.

CHAPTER III
THE ROLE OF THE NAACP

A. Origin and Purposes

Any study concerned with any facet of the Negro's struggle for civil rights must necessarily include an exploration of the role played by the NAACP. This fact has been generally accepted by many individuals and by numerous organizations, among them the National Council of Churches in Christ in the U.S.A. which recently had this to say:

Nearly two hundred years after the adoption of the Declaration of Independence, proclaiming "that all men are created equal," the American social scene of the mid-Twentieth Century is marked by a turbulent struggle between those striving toward basic human rights for all Americans and those who oppose such rights. Generally considered as one of the leaders of the former forces is the NAACP, which has as its goal the establishment of equal rights for citizens of all races and religions with respect to: security of the person, housing, education, employment, voting, and various public accommodations.1

The NAACP from its very beginning has been characterized as a vehicle for Negro protest action and as a pressure group. According to Wynn, the NAACP has shown through its program that it adheres to the major methods of Negro protest action which include dynamic activity, aggressive action, accommodative procedure, 2 racial and national emphasis, legalistic approach. St. James, in discussing the NAACP as a pressure group, defined the term as
"... a nonpartisan association or grouping of people who are organized and who seek positive or negative legislative and administrative aid in attempting to achieve certain common interests or objectives." These characteristics have shaped the policy and the program of the Association.

Organized efforts to improve the status of the Negro in the United States, however, did not originate with the NAACP. Among the other organizations which may be considered as forerunners is the American Anti-Slavery Society. Another is the Niagara Movement, which pre-dated the NAACP by three years. Organized in 1905 at Niagara Falls, New York, under the leadership of W.E.B. DuBois, the movement consisted of fifty-four colored men representing eighteen states. Its basic objective was the securing of fuller rights for Negroes.

The NAACP, nevertheless, was to be the ultimate medium for ameliorating the undesirable conditions of the lives of Negroes in America. The origin of this organization dates back to 1908 when a particularly disturbing racial incident set in motion a chain of circumstances motivating the individuals who ultimately became the founders. Shocked by the account of race riots in Springfield, Illinois, in the summer of 1908, William English Walling wrote in the September 3 issue of the Independent a stirring article entitled "Race War in the North." Deeply moved by the atrocities committed against the colored people, Mr. Walling closed his article
with these words: "... and what large and powerful body of citizens is ready to come to their aid?" This statement may be well considered the "first" call for the organization that later became the NAACP. Concurring with Mr. Walling in his feeling and attitude was Mary White Ovington, a social worker in New York, who was also intensely concerned over the plight of the Negro. As a result of this interest, in January, 1909, Mr. Walling, Miss Ovington, and Dr. Henry Moskowitz, prominent in the city administration of New York, met and discussed the problem, searching for some method of solution. This initial group decided to issue a call for a national conference on the Negro question. Appropriately February 12, the birthday of Lincoln, was the date selected. The support of Oswald Garrison Villard, president of the New York Evening Post Company, was enlisted. It was he who drafted the Lincoln's birthday call, which was signed by fifty-three outstanding Americans.

Shortly after the call the group held its first conference, out of which a committee of forty was formed and a secretary secured. In May, 1910, the second conference was held and the permanent body--National Association for the Advancement of Colored People--was organized. The first officers were: Moorfield Storey, President; William English Walling, Chairman of the Executive Committee; John E. Milholland, Treasurer; Oswald Garrison Villard, Disbursing Treasurer; Frances Blascoer, Executive Secretary; and W.E.B. DuBois, Director of Publicity and Research. The presence of Dr. DuBois, the
only Negro among the officers, brought the NAACP into contact with the Niagara Movement. Because of the similarity of their platforms and the inadequacy of financial support for Niagara, the latter merged with the NAACP.

The purpose of the NAACP, encompassing the spirit of the Niagara Movement, stated that the organization

... seeks to uplift the colored men and women of this country by securing to them the full enjoyment of their rights as citizens, justice in all courts, and equality of opportunity everywhere. It favors, and aims to aid, every kind of education among them save that which teaches special privilege or perogative, class or caste. It recognizes the national character of the Negro problem and no sectionalism. It believes in the upholding of the Constitution of the United States and its Amendments, in the spirit of Abraham Lincoln. It upholds the doctrine of 'all men up and no man down.' It abhors Negro crime, but still more the conditions which breed crime, and most of all the crimes committed by mobs in the mockery of the law, or by individuals in the name of the law.

It believes that the scientific truths of the Negro problem must be available before the country can see its way wholly clear to right existing wrongs. It has no other belief than that the best way to uplift the colored man is the best way to aid the white man to peace and social content; it has no other desire than exact justice, and no other motive than patriotism.9

To implement its purposes, the NAACP felt the necessity of outlining a practical program spelled out in very specific terms.

The following nine points were set forth:

1. To begin immediately a scientific study of Negro schools.
2. To organize a Legal Redress Committee of national scope, whose work shall be dealing with injustice in the courts as it affects the Negro.

3. To establish a Bureau of Information by means of which the press, magazines, or individuals may be given unbiased information on all questions pertaining to the Negro.

4. To publish The Crisis, a monthly magazine devoted to race topics. Also to publish pamphlets dealing with questions related to the work of the Committee.

5. To hold mass meetings, memorial exercises, etc., and place on the platform of other bodies of thinking people speakers who are recognized authorities on matters pertaining to the race question.

6. To form local groups, to which may be referred questions of race discrimination or injustice arising from race prejudice, and thus to prepare the ground for vigilance committees.

7. To take an active part in the matter of the reapportionment of Congressional Districts by Congress.

8. To form a national committee for the purpose of studying the question of national aid to education.

9. To make foreign propaganda, to which end Mr. DuBois, director of publicity and research for the Association, will make a European trip in April, May, June, culminating in the Race Congress in London, of which Mr. DuBois is one of the secretaries.

Ever alert to the improvement of the condition of the Negro, the NAACP indicated in the early years other possibilities for thought and action. It urged the widening of industrial opportunity. An appeal was made for Negro State Constabularies for the South. A crusade against lynching and lawlessness was inaugurated. The Association encouraged the presentation everywhere of the facts of the Negro's rise in forty-five years of freedom amid the handicaps under which he labored. In the field of education it urged the
setting up of industrial standards for the numerous southern
schools for colored which had been set up and were supported by
northern philanthropists. Along this same line it recommended the
discontinuing of needless schools. Alert to the problem of
migration, it sought to study the drift of the Negro to the cities
and to suggest ways of aiding him in the purchase of land. It
also devoted itself to the obnoxious peonage laws in the South and
to the adopting of anti-lynching laws, North and South.

To make clear and definitive the scope of the NAACP's purposes
and program, one can sum up the organization's position with the
following statement concerning equality:

Social equality is a private question which may well be left to individual decision. But, the prejudices of individuals cannot be accepted as the controlling policy of a state. The NAACP is concerned primarily with public equality--America is a nation--not a private club. The privileges no less than the duties of citizenship belong by right to no separate class of the people but to all the people, and to them as individuals. The Constitution and the laws are for the protection of the minority and of the unpopular, no less than for the favorites of fortune, or they are of no meaning as American instruments of government.

B. Early Legal Redress Activities

It is apparent that the NAACP is primarily concerned with the
denial of constitutional rights using color as a basis. In fact, the conditions under which the Association enters a case are quite definite:
1. Does the case involve color discrimination?

2. Is some fundamental citizenship right of colored people involved?

These criteria, as a result, covered a multiplicity of legal redress activities. During the first decade of its existence, the NAACP made its influence felt in a number of areas. Legal aid was given in cases which involved discrimination in housing, in the use of public amusement facilities, in voting, in the courts. In addition, the Association acted on behalf of the Negro soldier who frequently found himself discriminated against. It sought to prevent the passage of legislation hostile to the Negro and worked indefatigably to eliminate lynchings and mob violence.

In 1911 and 1912 the NAACP gave assistance in a variety of cases involving discrimination. In Kansas City, Missouri, aid was given Negroes whose homes were dynamited because they were bought in a white neighborhood. The Association conducted an investigation and furnished legal aid to Negroes who were discriminated against in the courts of New Jersey, Delaware, and Maryland. In 1912 in Winston Salem and Mooresville, North Carolina, Richmond, Virginia, and Baltimore, Maryland, the NAACP endeavored to test the constitutionality of segregation ordinances in housing. The same year a civil rights case concerning the use of public amusement facilities was filed in New York City. The Palisades Amusement Park, which had refused to admit a Negro, was ordered to pay damages.
The year 1913 found the branches of the NAACP actively engaged in fighting discrimination. The Chicago branch was instrumental in preventing six anti-Negro bills being reported out of committee of the General Assembly. Four of these bills were against miscegenation, one supported Jim Crow transportation and one favored discrimination in railroad employment. The branch in Boston persuaded the Boston School Committee to withdraw from the schools a book entitled Forty Best Songs, which contained words objectionable to the Negro race. In Detroit the branch was active in the field of legislation. It was responsible for smothering an anti-intermarriage bill; it fought fourteen civil rights cases and won four. This branch also secured appointment of two colored detectives to the police force, and it opened several restaurants and theatres.

The NAACP's most important work in 1914 was its vigilance in opposing hostile legislation in Washington. It sought to prevent the passage of such discriminating legislation as anti-intermarriage bills, residential segregation bills, and a bill making Negroes ineligible for service in the Army and Navy. In some instances the Association attempted to have the bills stifled in committee. When this was not possible, NAACP representatives would go to Washington to attend hearings on the bill and to interview Congressmen. In addition, letters of protest would be read on the floor of the Senate and printed in the Congressional Record. During this
year the name of the Association appeared again and again in debates and in speeches made by senators championing its cause.

In 1915 the NAACP's most significant triumph was the Supreme Court's decision on the "Grandfather" clause case, which had been brought up from an Oklahoma court by the United States Solicitor General. The court decided that the "Grandfather" clause was a mere evasion intended to disfranchise colored people. In addition, the court distinctly affirmed the right of the colored people to vote under the Fifteenth Amendment. In the opinion of the NAACP, this was "perhaps the greatest victory for democracy across the color line which has been gained in the last generation."

Two other significant steps were made in this early period: one in the area of housing, and the other in relation to the Army. In 1917 the United States Supreme Court handed down a decision declaring unconstitutional a segregation housing ordinance which had been passed in Louisville, Kentucky. About 1919 the Association, under the leadership of J.E. Spingarn, undertook to see that provision was made for the training of Negro soldiers to be officers in the Army.

Perhaps the most bitter and persistent fight by the NAACP in its early years was the one directed against lynchings and mob violence. The legal department found this an increasingly demanding and imperative task and began to work for a federal anti-lynching law. The first steps for securing this enactment of a federal law
were taken in 1919 under the secretaryship of James Weldon Johnson. Although neither the Dyer Anti-Lynching Bill nor any subsequent bill passed, the Association's fight educated the public and awakened the national conscience to such an extent that lynching has been reduced to a minimum.

The effectiveness of the early program of the Association was evaluated by W.E.B. DuBois, its first Director of Publicity and Research, who declared that the NAACP proved between 1910 and the World War to be one of the most effective organizations of the liberal spirit and the fight for social progress which the Negro race in America has known.

C. The Initial Fight Against Segregation in Education

1. In the Public Schools

The NAACP realized the importance of concentrating a great deal of its efforts on the problem of segregation in education. It knew that Negro children denied an education would be at a fearful disadvantage. The Association was convinced that equal opportunity for a public school education for Negro children was a necessity, not only for their personal advantage but also for their participation as citizens in a democracy. The NAACP, therefore, reemphasized its objective of securing for these children an equal opportunity through a fair apportionment of public education funds.

During the early years of the NAACP's existence, racial discrimination in education was widely practiced throughout the
South and in the North as well. As early as 1913 the Chicago branch of the Association investigated charges of discrimination in night school at Wendell Phillips High School and corrected the condition. In Boston the NAACP worked with the Committee on Civil Rights to help a Negro boy and a girl gain admittance to schools of their choice. In the South, the State of Florida passed a law making it illegal for white teachers to teach in colored schools and colored in white schools. While such a law was not true of every southern state, acts of discrimination were, nevertheless, committed. In Charleston, South Carolina, for example, Negro children were taught by white teachers who never failed to let the children feel that they were inferior.

We find other examples of segregation in the North also. In Indianapolis, Indiana, Negro children were sent long distances to avoid enrolling them in nearby public schools. A Negro boy in Carlisle, Pennsylvania, who had completed as much training in his field as Steelton, the segregated school, offered, was refused admission to the white high school. In 1915 a separate school was organized in Dayton, Ohio. An attempt was made to establish a segregated one in Cincinnati. School officials in Hartford, Connecticut, unsuccessfully tried to place Negro children recently arrived from the South, in separate classes. This technique was used in Moline, Illinois, and Ypsilanti, Michigan, both of which awakened to find separate schools.
Because of these overt attempts at segregation in education, the NAACP, through its branches, began to make legal attacks against the offenders. One of the first important victories was won in Kansas. The case involved the interpretation of a Kansas statute which required separate elementary schools throughout the state and also separate high schools in Kansas City. The statute did not provide, however, for discrimination in any other high school in the state. Consequently, a case was filed in Coffeyville on behalf of a colored girl who wished to enter the ninth grade of the white high school. The school board then contended that ninth grade is not considered high school. The court ruled in favor of the plaintiff and established a precedent. Similar problems confronted Negroes in other sections of the Midwest and the Far West. The NAACP found it necessary to protest against discrimination in Arme, Kansas; in Boynton and Muskogee, Oklahoma; in La Cruces, New Mexico; and in Imperial, California.

In still other places where separate schools were not established, various kinds of tactics were used to segregate Negro children. In Dayton, Ohio, in 1924, Willard School attempted to segregate within the school building some retarded Negro pupils, whom they placed together in four rooms in the basement and required to use a back door. The Association sent a lawyer in to seek legal redress. Another device was tried in Shaker Heights, an exclusive residential suburb of Cleveland, Ohio. When twelve colored students from nearby Beechwood Village attempted to enroll in the white school, the
Board ordered them out and provided a renovated one-room schoolhouse. Mr. Harry E. Davis, a Cleveland attorney and a member of the NAACP Board of Directors, advised the parents not to send their children to the segregated school and secured against the Shaker Heights authorities a writ of mandamus which required them to admit the colored pupils to the white school. The NAACP had to fight still another case in Ohio. In Mansfield, school officials placed colored children in two classes under colored teachers, using the excuse of segregating "backward" children, but including normal colored children in these classes.

The Association won an important case in Gary, Indiana, in this early fight against discrimination. In that city in the year 1927 several hundred white students went on strike against the presence of twenty-four colored children in Emerson High School. The School Board bowed to the demands of the white students and the City Council acquiesced to the extent of appropriating $15,000 for a temporary colored high school. The NAACP brought suit and won the case, after a temporary injunction was made permanent. It is now a matter of court record that the City Council may not use public funds to build a Negro high school.

The Association did not meet with success, however, in all of its legal cases. A case in point occurred in Baltimore, Maryland. For nine years the Negroes living in Baltimore County requested the Board of Education to provide a county Negro high school. There were eleven white high schools in this county but no high school for
Negroes. When the Board of Education continued to refuse to act, two Negro girls—Margaret Williams and Lucille Scott—in September, 1935, applied for admission to the white high school at Catonsville. They were refused admittance because of state laws. In March the NAACP, represented by Thurgood Marshall, Leon Ransom, and Edward P. Lovett, filed a petition for writ of mandamus requiring the Baltimore County Board of Education to admit Miss Williams. The petition was denied on the grounds that Miss Williams had failed the qualifying examination, which the court held was legal. The NAACP had alleged that the examination was unfair because it was not given to white students. In May the Maryland Court of Appeals affirmed the order of the lower court. While the case per se was not won, the Baltimore Board of Education did liberalize its scholarship provisions for Negroes of the county who were sent to the City of Baltimore and did add transportation allowances for them. Further, as a direct result of the continued campaign against educational inequalities, the general assembly of the State of Maryland passed in 1937 a law equalizing the length of the terms for white and for colored schools.

Similar problems existed in nearby Virginia. In Loudoun County, Negroes sought for a number of years to get transportation for the colored children at Bluemont to attend a school at Round Hill. In this instance transportation was furnished white pupils; and colored children, because of the excessive distance to be travelled, had been deprived of any school whatever for three years.
The Association attempted remedial action in a like case in Louisa County. Here the races were about equally divided. On the one hand, the white children had five high schools and adequate bus transportation; while on the other, the colored pupils had no school nearby and their parents had to pay their transportation to the county training school.

In the State of Pennsylvania the NAACP had to act in order to prevent the spread of discriminatory practices. The branch in Philadelphia advised parents to refuse to send their children to a new segregated school which the Board of Education had built and was attempting to make a segregated one. The method which was used to accomplish this was the enforcing of a resolution transferring the colored pupils to a separate district. In Berwyn in 1932 parents of more than two hundred Negro children rebelled against the setting up of a separate school and kept their children away for two years. The case was won in 1934; but during the long struggle, five of the parents were arrested and served jail terms rather than pay nominal fines for keeping their children out of school.

As far north as New Jersey and New York the NAACP had to push its efforts against segregation in education. In Toms River, New Jersey, the supervising principal of a public school ordered the colored pupils from the school to a small church. A case was filed and carried to the State Supreme Court which ordered the children
reinstated. In 1931 a test case was prepared on the barring of colored children from the Main Public School of Hillburn, New York.

One thus may observe that segregation was widespread during these early years; and the NAACP, as a result, was exceedingly active in its legal redress department.

2. In Colleges and Universities

The NAACP as early as 1913 was extending its efforts on behalf of Negro students who were seeking for equality in higher education. These students were faced with problems relating to housing on college campuses. They were denied equal opportunity for participation in athletics. In some instances the Negro students were discriminated against in the matter of practice teaching. And they were often refused admittance to graduate and professional schools.

One of the most common forms of discrimination was the exclusion of Negro students from dormitories and from home management houses. Typical cases include the Oberlin College case of 1919 in which an attempt was made to exclude four colored girls from the dormitories after they had won "preferred" assignments by drawing lots. The Cleveland branch intervened and the girls were reinstated. At Columbia University in 1924 the NAACP had to intervene to prevent a young male student from having to give up residence in one of the halls. Likewise the Association made appeals at Harvard University and at the University of Michigan relative to segregation in dormitory facilities.
At Ohio State University during 1933 and 1934 discrimination was practiced by the refusal to permit colored girls majoring in home economics to live the required period in the home management cottage. Two unsuccessful cases— that of Doris Weaver and of Catherine Claughton— were filed by the NAACP.

A protest was registered with the School of Education of the University of Pennsylvania which did not give colored girls the same opportunities for practice teaching as were given white girls. Similar action was taken in the case of the barring of Willis Ward, star athlete, from the line-up of the University of Michigan football game with Georgia Tech in 1934.

Several state universities during the early 1930's had suits brought against them in an effort to test the constitutionality of the practice of excluding Negroes from their professional schools. The first three suits ended in failure; the cases against the University of North Carolina, the University of Virginia, and the University of Tennessee. As a direct result of the suit in North Carolina, an effort was made in the State Legislature to secure passage of a bill which would have provided for the state to pay the expenses of Negro students at professional colleges which could lawfully admit them. Two years later, in 1935, the University of Tennessee rejected the application of a Negro student desiring to enter the school of law. At the same time the University of Virginia turned down the application of a Negro girl who had applied for admission to the graduate school.
Despite these setbacks, the NAACP continued its forward march toward the achieving of equal educational opportunities for the minority group it represented. During the year of 1935, two significant cases were filed on behalf of Negro students desiring to matriculate in the law schools of the University of Maryland and the University of Missouri. Because of their importance in the whole fight for educational rights of colored youth, these two cases will be fully discussed.

1. University of Maryland v. Murray (169 Md. 478)

In April of 1935, Donald G. Murray, a twenty-one year old graduate of Amherst College and a resident of Baltimore, Maryland, filed a petition for mandamus against the officers of the University of Maryland, a tax-supported institution. The objective was to force the University to consider his application for entrance into the law school as a first year student for the academic year, 1935-36.

On June 18 a decision was rendered by Judge Eugene O'Dunne of the Baltimore City Court. This decision denied the right of the University of Maryland to bar Murray from the law school because of his color and ordered that he be admitted in September, 1935, pending an appeal by the University.

In an effort to keep Murray out entirely, the University requested that the hearing on its appeal be advanced to late August, since by the time of the October term of the Court of Appeals Murray would have already been admitted to the school of law. The University, therefore, wanted the court to render a decision prior
to the opening of school. The petition stated, among other things, that since the writ of mandamus in Murray’s case, several other Negroes had applied for admission, which fact posed two problems:

1. The student body of 2,000 included 500 women and the University would not assume responsibility for what might happen if Negroes were admitted.

2. The University would be threatened with extensive loss of students and consequent loss of income which would seriously curtail its educational program.

The petition further implied that any break in the traditional jim crow policy of Maryland might affect “the present amicable and cooperative relations” existing between the races.

In its reply the Association, through its counsels, Charles H. Houston and Thurgood Marshall, stated that a question of constitutional rights was involved that could not be measured in dollars and cents nor obscured by raising the sex issue. The result of this action was that on September 20, the petition of the University of Maryland was denied and Donald Murray was admitted to the law school.

On November 8, when the University’s appeal was heard, it contended (1) that Murray had no right to use the 14th Amendment in calling on the state for a legal education; (2) that the state had a right to erect a university for white students and exclude Negroes therefrom, without erecting a similar university for them; and (3) that under the provision of the Maryland Scholarship Act of 1935, whereby the state undertook to pay the tuition of certain
qualified Negro students outside the state, Murray was furnished an equivalent when his tuition was paid in a school such as the Howard law school. The court withheld its decision until January, 1936, at which time it affirmed the decision of the lower court.

2. **Missouri ex. rel Gaines v. Canada** (305 U.S. 337)

The NAACP, motivated by its victory in the Murray case, filed a second test case, this time in the State of Missouri. On January 24, 1936, Attorneys Sidney R. Redmond, Henry D. Espy, and Charles H. Houston filed, in behalf of Lloyd Gaines, a petition for a writ of mandamus against the University of Missouri to compel the acceptance of his application for admittance to the law school. Gaines, a twenty-four year old St. Louis youth and an honor graduate of Lincoln University (Jefferson City, Missouri), had been refused admittance earlier, despite the fact that the charter of the University provides that

...all youths, residents of the state, over age 16, shall be admitted to all privileges and advantages of the various classes of all departments of the university of the State of Missouri if they possess the scholastic, mental, and moral qualities.

When Gaines' application was rejected, a new suit was filed on March 27. The University of Missouri, in answering the suit, stated that Gaines was not qualified scholastically since he was graduated from Lincoln which was not accredited. This marked the first time such an excuse had been used and was an admission that the state had failed to provide standard college work for
Negroes. The judge ruled, however, (1) that the state had a right to separate Negroes and whites in the school; (2) that it was illegal for both races to attend the same schools; (3) that a Negro could force Lincoln University to open a law school; and (4) that the state scholarship fund provided equality of education.

The case was appealed and argued before the Supreme Court of Missouri on May 8. On December 9 it affirmed the decision of the lower court, dismissing the petition of Gaines. The NAACP then took the case to the Supreme Court of the United States.

When, on December 12, 1938, Chief Justice Hughes read the majority opinion, the decision of the Supreme Court of Missouri was reversed. The Chief Justice said:

"The admissibility of laws separating races in the State rests wholly upon the equality of the privileges which the laws give to the separated groups within the state."

The culmination of this case marked the first time the separate but equal doctrine at higher educational levels had been considered by the United States Supreme Court. The solution of the Maryland case had prodded the Virginia legislature into passing a scholarship bill providing financial assistance for Negro students having to go outside the state to get training available within the state's colleges. The Association, consequently, prepared to continue its fight to get Negroes into state graduate schools in other parts of the South. The decisions were also to be used as a basis for securing equal opportunities in other levels of education.
D. The Master Plan for Assault on Segregation

Encouraged by the decisive gains in the fight for equality, the NAACP, during 1939, changed its legal procedure in education cases from the bringing of mandamuses in state courts to instituting injunction proceedings and asking for damages in the federal courts. The new theory was based on the following federal statute:

Civil action for deprivation of rights:
Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.62

To put this new plan into practice, the NAACP, a year later, organized as a separate corporation the Legal Defense and Educational Fund whose purpose it is (1) to carry on a program of legal action within the courts to protect Negroes from discrimination because of race; and (2) to destroy racial segregation by governmental agencies. This corporation offers legal aid without fee to such Negroes as may suffer injustice by reason of race or color and who, for lack of money or other causes, are unable to engage competent legal aid and assistance. It has spearheaded, among other things, practically all of the litigation in state and in federal courts to destroy racial segregation in tax-supported schools and colleges.
One of the first cases in which this new approach was utilized was that of Lucille Bluford, graduate of the University of Kansas. Two cases were filed in her behalf: one in the Circuit Court of Boone County seeking mandamus to compel the officers of the University of Missouri to admit her to the graduate school of journalism; the other, filed in the United States District Court for the Western District of Missouri against the registrar of the University of Missouri, asking for damages based upon the federal statute which provides for the injured party to seek for redress when deprived of constitutional rights.

A similar suit was filed by Charles Eubanks against the University of Kentucky. Mr. Eubanks first filed a suit in the Kentucky State Court to compel the University of Kentucky to admit him to the undergraduate school for courses leading to a degree in civil engineering. This petition was withdrawn after a month and in its stead a new suit was filed in the federal courts. The latter included a personal action for damages against the registrar. Through his lawyers, Thurgood Marshall and Prentice Thomas, Eubanks asked for declaratory judgment and permanent injunction against the policy and practice of the University in refusing to admit qualified Negroes to courses not offered them elsewhere in the state.

During the next few years the Association continued to oppose those who would deny Negroes equal educational opportunities. Despite the United States Supreme Court decision of 1938, establishing, in the case of Lloyd Gaines v. the University of Missouri, the right
to equality in publicly financed educational facilities, southern states continued to evade the Court's mandate. States were able to avoid opening white colleges to Negroes by setting up inferior segregated institutions. Therefore, in 1947, the NAACP initiated a program for the legal demolition of the entire structure of segregation in education. Through court action the Association would demonstrate empirically the invalidity of the outmoded concept of "equal but separate" facilities. This was to be the master plan for assault on segregation.

The NAACP was encouraged in its decision when, at its 38th Annual Conference meeting in June of 1947 in Washington, D.C., the President of the United States, Harry S. Truman, addressed them and said:

We can no longer afford the luxury of a leisurely attack upon prejudice and discrimination. There is much that state and local governments can do in providing positive safeguards for civil rights. But we cannot, any longer, await the growth of a will to action in the slowest state or the most backward community. Our national government must show the way.

This unalterable opposition to segregation in public education as enunciated in its new strategy was reaffirmed in 1948. The legal department advanced the program that only cases directly challenging the validity of segregation would be filed in the field of public education. The Annual Conference and the Board of Directors voted their approval. By the end of the year three cases, in which the
basic issue was the validity of segregation in education, were ready for the United States Supreme Court. At the same time, legal procedure was being developed for the extension of this principle to cases involving secondary and elementary schools.

1. The Frontal Attack: Colleges and Universities

To launch its full-scale attack against segregation in tax-supported colleges and universities, the NAACP filed two cases, contending in both that segregation itself in school facilities is discriminatory and violative of the 14th Amendment to the United States Constitution and, accordingly, unconstitutional and illegal. The two cases involved Herman Marion Sweatt v. University of Texas and Ada Lois Sipuel v. University of Oklahoma.

A. Sweatt v. Painter (339 U.S. 629)

The NAACP filed on May 14, 1946, in the District Court of Travis County at Austin, Texas, a suit seeking a writ of mandamus compelling the Board of Regents of the University of Texas to admit Sweatt to the only law school maintained by the state. The court then stated that the petitioner had been denied equal protection of the law as guaranteed by the 14th Amendment and was, therefore, entitled to relief. The operative effect of the decision was postponed for six months in order to allow the State of Texas to establish a law school—separate but equal—for Sweatt.

On December 17, 1946, the Board of Regents filed with the court copies of the minutes of the Texas A. and M. College, indicating that a law school for Negroes was to be established in
Houston by February. The District Court, therefore, dismissed the petition for a writ of mandamus. The NAACP immediately appealed to the Civil Court of Appeals in Austin, but the Appellate Court refused to review the decision. The lower court was ordered, however, to hold a new trial for the purpose of taking evidence on the equality of segregated facilities.

The NAACP's next appearance in court saw it opening an uncompromising legal assault upon segregation per se. When the retrial was begun on May 12, 1947, the Association produced evidence demonstrating the inequalities of the "separate but equal" system. Expert testimony was also admitted including that of such reputable men as Dean Earl Harrison, University of Pennsylvania Law School; Dean Charles Thompson, Howard University, School of Education; Dr. Robert Redfield, Chairman of the Department of Anthropology, University of Chicago; and Dr. Malcolm Sharp, University of Chicago Law School. The District Court still refused to issue the writ on two grounds: (1) that the law school set up at Houston was equal to the University of Texas Law School and (2) that plaintiff could not attend the University of Texas because of state segregation laws.

The case was again appealed to the Civil Court of Appeals and ultimately to the Supreme Court. The Supreme Court on June 5, 1950, ruled unanimously that the equal protection clause required that Sweatt be admitted to the University of Texas, since the law school for Negroes could not afford equal facilities.

In March, 1946, the NAACP had filed on behalf of Ada Lois Sipuel in the District Court of Cleveland County, Oklahoma, a case asking for a writ of mandamus compelling the Board of Regents of the University of Oklahoma law school to admit Miss Sipuel. The petition was denied on the grounds that the Gaines decision does not require a state with segregation laws to admit a Negro to its white schools. The District Court further held that Miss Sipuel was required first to make a demand on the officials of Langston University, a Negro college in Oklahoma. The opinion was also expressed that there was no obligation upon the state to set up a separate school unless it had been asked to do so. This decision was affirmed by the State Supreme Court on April 29, 1947.

Using its frontal attack, the Association on December 26 filed a brief in the United States Supreme Court asking that the case be remanded to the state courts with the direction to admit the plaintiff to the University of Oklahoma on the grounds that unless she were admitted immediately, she would be denied equal protection of the law. In addition, the NAACP asked the Supreme Court to reexamine the constitutionality of "separate but equal" facilities relied on by the State of Oklahoma. In a *per curiam* opinion handed down just four days after the argument, the United States Supreme Court reversed the lower court and held that Oklahoma was required to provide equal educational opportunities for Negroes as soon as such facilities were available to white persons.
It was later necessary, however, for the NAACP to file another suit against the University of Oklahoma. (McLaurin v. Oklahoma State Regents for Higher Education, 339 U.S. 631) Mr. G. W. McLaurin, after having been admitted to the University, was discriminated against by being required to occupy a specified seat in the classroom, a designated table in the library, and a special table in the cafeteria. The U.S. Supreme Court handed down a unanimous opinion, along with the Sweatt decision, declaring that the Negro student must receive the same treatment at the hands of the state as students of other races and could not be segregated.

It is interesting to note that in both of these cases the students at the universities involved were sympathetic and encouraging. The University of Texas became the first white southern college to organize an NAACP college chapter and wholeheartedly backed up Herman Sweatt's attempt to matriculate at the University.

One might mention also the impact of these two decisions. Within six months after the NAACP took legal action, five southern and border states—Virginia, Delaware, Kentucky, Maryland, and Louisiana—opened to Negroes their publicly-financed institutions of higher education.

The year following the significant McLaurin and Sweatt decisions, the NAACP devoted a greater part of its legal activities to consolidating its gains. Benjamin Fine, education editor of the New York Times, estimated that in the fall of 1950 one thousand
Negro students were attending hitherto "lily-white" schools in the South as a result of the NAACP legal action committee. In order to extend to other areas the principles established in the Sweatt and McLaurn cases, 702 cases were filed in 1951, with 77 coming to trial. The Association hoped, however, that other publicly supported universities would voluntarily abandon the racial bar. Because this hope was not realized, additional suits had to be instituted in a number of states. In other instances, states agreed, just before the scheduled trial, to accept Negro students. A case in point is the University of Maryland, which adopted an over-all policy of admitting Negro applicants to all graduate, professional and special training schools of the University.

Other schools which adopted a similar policy include the University of North Carolina and Louisiana State University. Later the University of Tennessee, after having had its case carried to the U.S. Supreme Court (*Gray v. University of Tennessee*, 342 U.S. 517), announced at the time of its oral arguments that the Negro plaintiffs would be admitted.

2. The Frontal Attack: Secondary and Elementary Schools

Having made inroads on discrimination in colleges and universities, the NAACP turned its attention to the secondary and elementary schools. In 1946 the Association had filed a brief amicus curiae in the California Case of *Mendez v. Westminster School District* (161 F. 2, 774), which involved segregation of Mexican
children in the school system. The United States District Court had declared:

The equal protection of the laws pertaining to the public school system in California is not provided by furnishing in separate schools the same technical facilities, text books and courses of instruction to children of Mexican ancestry. A paramount requisite in the American system of public education is social equality. It must be open to all children by unified school association regardless of lineage.

This was actually the first case in which a federal court held that segregation per se is a denial of equal protection of the laws.

Now the NAACP made a thorough study of legal techniques in preparing for a direct attack on the public schools.

In Lumberton, North Carolina, in 1947, a complaint was filed in the Superior Court of Robeson County stating that school officials were discriminating against Negro children by not carrying out their statutory duty of maintaining a general and uniform system of public schools. The complaint specifically requested "the court to issue an injunction forever restraining the defendants from discriminating against Negro pupils." Cases based on similar complaints were filed in Virginia, Texas, Arizona, Georgia, Tennessee, Illinois, and New York. Most of these cases were pending at the end of 1951, the year in which they were filed, with the exception of the latter two cases.

In an effort to speed the progress of integration, Thurgood Marshall in March of 1953 called in New York a conference composed of members of the National Legal Committee of the NAACP, other legal
experts, and lay advisers. The purpose of the conference was to examine the existing plans and procedures which were being utilized, with the objective of evolving a still better plan of legal action. The outgrowth of this move was the developing of a guide, New Blueprint for Legal Action, which "presented new legal theories and proposed new techniques for consolidating and accelerating the attack upon racial discrimination and segregation." Two techniques which were to weigh heavily in the conduct of future cases were (1) the use of educators and sociologists as expert witnesses, and (2) the use of clinical psychiatry.

3. The "Historic Five" School Segregation Cases

The school segregation case with which this study is concerned is one of five cases filed at various times in four states and in the District of Columbia, argued under Brown v. Board of Education (347 U.S. 483) and finally decided at one time on May 17, 1954, by the United States Supreme Court. These five cases are: (1) the Kansas Case or Brown v. Board of Education; (2) the South Carolina Case or Briggs v. Elliott; (3) the Virginia Case or Davis v. County School Board; (4) the Delaware Case or Gebhart, et al v. Belton, et al; and (5) the District of Columbia Case or Bolling v. Sharpe. The last mentioned case is the only one that was not filed by the NAACP; it was sponsored by a PTA group, although counsel, George Hayes and James Nabrit, are members of the NAACP National Legal Committee.
The legal theory for the four cases from the states was fundamentally the same. The arguments were based on the premises (1) that segregation in public education violates the equal-protection clause of the Fourteenth Amendment; (2) that segregation in public schools is forbidden by the equal-protection clause of the Fourteenth Amendment; (3) that the solution is not to order equalization of facilities, but to assign pupils to schools, regardless of race. The Virginia case went a step further and insisted that segregation violates the due-process clause of the Fourteenth Amendment. The District of Columbia case was argued solely on the basis of segregation since the District school laws do not require separation of the races.

Because of the limitation of this study, only the historical background for the case under consideration will be given.

The South Carolina Case (*Briggs v. Elliott*)

On November 11, 1949, in Clarendon County, Negro parents, who were desirous of having the inequalities in the public school system corrected, filed with the Board of Education a petition asking for equalization of facilities and opportunities. At that time over 800 Negro children were forced to attend three dilapidated wooden structures, while 276 white children received their training in two modern brick buildings. The Negro pupils were taught by twenty teachers; the white, by twelve. When the board took no steps to correct the situation, the parents sought the help of the NAACP.
Representing sixty-seven Negro school children and their parents or guardians, who were plaintiffs in this case, Thurgood Marshall, Special Counsel for the Legal Department, assisted by Robert L. Carter and Harold L. Boulware, filed a suit in the Federal District Court in Charleston on May 16, 1950. At a pre-trial hearing in November, 1950, before Judge J. Waties Waring it was established that the objective of the suit was abolition of segregation. It was then agreed to take the case before a three-judge court for trial.

A special three-judge district court for the Eastern District of South Carolina heard the arguments on May 28 and 29, 1951. The Court's decision in June included a majority opinion and a minority opinion. The former, written by Fourth Circuit Judge John J. Parker and District Judge George Bell Timmerman, upheld the constitutionality of segregation on the basis of a Supreme Court decision in Plessy v. Ferguson handed down in 1896. The decision held that although the physical facilities were not equal, the state statutes of South Carolina were not violative of the Fourteenth Amendment. The opinion stated further that the problem of segregation on the public school level was a matter for the legislature, not the court. In a strong dissenting opinion Judge J. Waties Waring held that the place to stop segregation is on the elementary level and not in graduate school. Said he:

If the courts of this land are to render justice under the laws without fear or favor, justice
for all men and all kinds of men, the time
to do it is now and the place is in the
elementary schools where our future citizens
learn their first lesson to respect the 79
dignity of the individual in a democracy.

An appeal was filed on July 21; and on January 28, 1952,
the United States Supreme Court sent the case back to the lower
court on the ground that the latter had not given its opinion on
the report concerning equalization of facilities that had been
submitted by school officials. On January 31, the NAACP filed a
motion, in response to which the Supreme Court on February 4,
issued a mandate to the lower court to proceed immediately with
a second hearing. This move was followed on February 7 with the
attorneys for the Association submitting a motion for judgment
to the District Court, contending that the children they repre­
sented could "get no immediate relief except by issuance of a
final judgment of this court enjoining the enforcement of the
policy of racial segregation." Following this second hearing
on March 3, the three-judge court again upheld segregation.

The last chapters in the case were about to be written.
On May 10, 1952, the NAACP asked the Supreme Court to review the
case; and on June 9, the Court indicated that it would be heard
at the next term in the fall. Meanwhile the other three state
cases and the one from the District of Columbia were on their
way to the Supreme Court and were ultimately argued under Brown v.
Board of Education. The oral arguments, under direction of Thurgood
Marshall and a corps of seven lawyers, were heard from December 9
81
to 11, 1952.
When the Supreme Court rendered its decision on June 8, 1953, it ordered the reargument of the cases at the 1953 fall term. The order further requested the answers to five pertinent questions, which were to form the basis of the argument. Full details of this argument constitute the basis of this study and will be dealt with in a later chapter.
CHAPTER III
NOTES


4. Ibid., p. 33.

5. Ibid., p. 36.


7. The Call and the Signers are included in the appendix. This information was taken from Ovington, op. cit., p. 2-3.

8. The platform for the Niagara Movement was: 1. Freedom of speech and criticism. 2. An unfettered and unsubsidized press. 3. Manhood suffrage. 4. The abolition of all caste distinctions based simply on race and color. 5. The recognition of the principle of human brotherhood as a practical present creed. 6. The recognition of the highest and best training as the monopoly of no class or race. 7. A belief in the dignity of labor. 8. United effort to realize these ideals under wise and courageous leadership. As found in Ovington, op. cit., p. 4-5.


10. Ibid., p. 2.

11. Ibid., p. 3.


63. NAACP, Annual Report, 1940, p. 16.

64. NAACP, Annual Report, 1947, p. 22.

65. Ibid., p. 6.


70. NAACP, Annual Report, 1951, p. 27.


72. NAACP, Annual Report, 1947, p. 84.


74. NAACP, Annual Report, 1951, p. 42.

75. NAACP, Annual Report, 1953, p. 44.

76. NAACP, Annual Report, 1951, p. 37.


80. NAACP Files, NAACP Brief.

82. The five questions submitted by the court order were:

1. What evidence is there that the Congress which submitted and the State legislatures and conventions which ratified the Fourteenth Amendment contemplated or did not contemplate, understood or did not understand, that it would abolish segregation in public schools?

2. If neither the Congress in submitting nor the States in ratifying the Fourteenth Amendment understood that compliance with it would require the immediate abolition of segregation in public schools, was it nevertheless the understanding of the framers of the Amendment

(a) that future Congresses might, in the exercise of their power under Sec. 5 of the Amendment, abolish such segregation, or

(b) that it would be within the judicial power, in light of future conditions, to construe the Amendment as abolishing such segregation of its own force?

3. On the assumption that the answers to questions 2 (a) and (b) do not dispose of the issue, is it within the judicial power, in construing the Amendment, to abolish segregation in public schools?

4. Assuming it is decided that segregation in public schools violates the Fourteenth Amendment

(a) would a decree necessarily follow providing that, within the limits set by normal geographic school districting, Negro children should forthwith be admitted to schools of their choice, or

(b) may this Court, in the exercise of its equity powers, permit an effective gradual adjustment to be brought about from existing segregated systems to a system not based on color distinctions?
5. On the assumption on which questions 4 (a) and (b) are based, and assuming further that this Court will exercise its equity powers to the end described in question 4 (b),

(a) should this Court formulate detailed decrees in these cases;

(b) if so what specific issues should the decrees reach;

(c) should this Court appoint a special master to hear evidence with a view to recommending specific terms for such decrees;

(d) should this Court remand to the courts of first instance with directions to frame decrees in these cases, and if so, what general directions should the decrees of this Court include and what procedures should the courts of first instance follow in arriving at the specific terms of more detailed decrees?
CHAPTER IV

THURGOOD MARSHALL: THE MAN

Every great movement in history has associated with it the name of some individual. One never thinks of Christianity without Christ, the Reformation without Luther, the abolition of the slave trade in England without Wilberforce. In like manner, one cannot recall the NAACP victory in the public school segregation controversy without immediately thinking of Thurgood Marshall. That there are many other individuals important to the success of this 1954 victory is admitted. Mr. Marshall himself refuses to take credit for the success, declaring that he is only one of the many individuals, white and Negro, "whose courage, sweat, skill, imagination and common sense made the victory possible." Despite the realization that the success of every enterprise depends on the cooperation and contributions of numerous persons devoted to the cause, one is still aware that much of the progress in the fight for civil rights is due to Thurgood Marshall's leadership as Special Counsel for the NAACP and Director-Counsel of the Legal Defense and Educational Fund, Incorporated.

If Mr. Marshall's name is indelibly stamped on this victory, one is, then, interested in tracing the development of the man who became a lawyer and the lawyer who became a symbol for the Negro's fight in the court to achieve his civil rights. What is Thurgood
Marshall's family background? What influences were exerted on him during childhood? What kind of student was he during his early school years? What about his college days? What were his interests? What have been his legal successes? What are Marshall's outstanding characteristics? What of his forensic ability? What are his attitudes and beliefs? Such are the questions one must attempt to answer in evaluating Thurgood Marshall: The Man.

A. Family Background

Thoroughgood Marshall was born in Baltimore, Maryland, on July 2, 1908. He was named for his maternal grandfather, whom he describes as a 'rough and tough sailorman'; but Marshall, finding it burdensome in the second grade to write so long a name, shortened it to Thurgood.

That Thurgood Marshall's ultimate interest in human rights may well have been the natural results of his ancestry is substantiated by facts in his family background. Family legend has it that on his mother's side his great-grandfather was a slave brought to this country from the Congo. This ancestor made his personal objections to his slave status so widely known in Maryland that his master finally gave him his freedom rather than inflict him on another owner by selling him. Mr. Marshall's maternal grandfather, Isaac O.B. Williams, is said to have spoken out fearlessly against police brutality involving a Negro at a civic mass meeting held in Baltimore in the 1870's. On his father's side,
his grandmother may well be considered one of the early sit-down strikers. Court action had given a Baltimore utility company the legal right to erect an electric pole in front of her grocery store; in protest Marshall's grandmother calmly seated herself over the spot. A few days later the company selected another site for the pole.

Within his immediate family he was aware from his early years of the attitude of his own parents concerning human dignity and equality. Marshall's father, William, instructed his children to demand racial respect from those with whom they came in contact. A man of strong character, he often declared that he would "sleep in the streets" rather than betray his principles. Norma Marshall, his school-teacher mother, very likely provided balance, her feeling about race relations being tempered by her concept of her position as a public servant.

The seeds for Marshall's later ambition were sown early in his life through the influence of his father. He says of his father:

> He turned me into a lawyer without once saying that that was what he wanted me to do....He taught me to argue by challenging my logic on every point, by making me prove every statement even if we were only discussing the weather. I realized later that he was only trying to sharpen my mind to convince me I could take nothing for granted.

In Thurgood Marshall, then, one finds a composite of many elements that account for his own deep interest in the cause of freedom and equality.
B. Education

Marshall received his elementary and his secondary education in the public schools of Baltimore, graduating with honors from Douglass High School. Although he was an excellent student academically, his behavior was that of the average mischievous adolescent. As a punitive measure, he was frequently sent to the basement of the school and ordered to memorize sections of the United States Constitution. Marshall indicates that in two years he knew the entire document verbatim.

When Marshall matriculated at Lincoln University (Pennsylvania), he was the same fun-loving boy he had always been. He was not a serious student but was able, nevertheless, to graduate cum laude. The one thing that captured his attention was the debate team. Marshall recalls having been put out of school more than once during his four-year period. One such occasion was the result of a disagreement with school officials as to whether he would be permitted to remain in Washington, D.C., over the week end while on a debate trip to Howard University.

The year following his graduation from Lincoln, Marshall turned his eyes toward law school. Not being permitted to attend his state university, he went to nearby Washington and entered Howard University Law School. It is reported that after Marshall had been there a week he knew that this was the career for him. He said: "This is what I want to do for as long as I live."
Thurgood Marshall threw himself wholeheartedly into the study of law. "I'd heard law books were to dig in, so I dug deep," he said. Hours of intense study earned him adequate reward. He became an assistant in the law library. Later he attracted the attention of Dean Charles Houston, who was to be a significant influence upon him, and William H. Hastie—then practicing lawyer, now a federal judge. This association gave him the invaluable experience of working with them in planning strategy on segregation cases then pending. When in 1933 he received his law degree, he was graduated as the ranking student, magna cum laude.

Marshall's experiences at Howard had obviously deepened his concern for civil rights. Certainly a great deal of credit can go to Charles Houston, who was responsible for the NAACP's master plan for assault on segregation and for the guidance of this generation's young lawyers who are fighting for civil rights.

C. Legal Career

In 1933 Thurgood Marshall was admitted to the Maryland bar. Having disliked the fact that he had been forced to go out of the state for his legal training, Marshall had, during his years at Howard, been planning how to open the University of Maryland's Law School to Negroes. It was inevitable, then, that he would be more interested in civil rights cases than in any others. Because of this deep concern, he continually took on such cases, often with no compensation. As a result, the first year of his law practice found him $1,000 in the red.
The year 1935 marks the actual beginning of Marshall's legal triumphs on behalf of civil rights in the courts of the land. It was in this year that Thurgood Marshall, then only 27, made the first crack in the wall of segregation in education. Bringing suit against the University of Maryland to obtain entrance for Donald Murray, Marshall won the case so convincingly that the State of Maryland did not file an appeal in the Supreme Court.

By 1936 Marshall had so attracted the attention of the NAACP that he was invited to join the staff as assistant counsel. This job, which was presumably to be a temporary one, ultimately became his life's work.

Between 1915 and 1952, the year in which the "historic five" cases were filed, the NAACP won 30 of the 33 cases it carried to the Supreme Court. Since 1936 when Thurgood Marshall began his affiliation with the Association, he has appeared before the Supreme Court in 12 cases, 10 of which he has won. In addition, Marshall was consultant in 11 other Supreme Court cases, 10 of which were victories. On August 28, 1958, when he appeared before the highest tribunal in connection with the Little Rock case, Thurgood Marshall was then making his twenty-first appearance and adding his twentieth victory.

An indefatigable worker who travels over 50,000 miles a year in the interest of the NAACP, Mr. Marshall has argued five times as many cases as the ordinary lawyer. He has participated in over
fifty cases filed by the Association on such diverse issues as travel, restrictive covenants, franchises, lynching, and education.

It has been observed that in civil rights controversies Marshall has the advantage of his opposition in that the cases he won yesterday serve as precedents for today. Of the cases he has won as counsel for the NAACP, four are considered constitutional cornerstones of the Negro's new civil rights:

1. *Smith v. Allwright* in 1944, which outlawed the Texas "white primary" and opened the way to effective Negro voting throughout the South.


3. *Sweatt v. Painter* in 1950, which compelled the University of Texas to admit a Negro to its law school.

4. *Shelley v. Kraemer*, which held unenforceable, under the 14th Amendment, a racial housing covenant.

D. Characteristics

Among those who know Mr. Marshall, there seems to be unanimity of opinion about the kind of person he is. A tall, heavy man (6 feet 2 inches; 210 pounds), with a hooked nose, mustache, constant frown, Marshall has been described as resembling a Bedouin chief. A casual observer might find Mr. Marshall an enigma. On the one hand, he gives an almost deliberate impression of being a hedonistic, casual individual who wears life as a loose garment. On the other,
he can reveal himself as a person completely dedicated to the task of fighting for that in which he believes.

His unpretentiousness may be observed in his speech and in his manner. Among his friends and in informal situations, Marshall displays a keen sense of humor, indulging in raucous banter, telling humorous stories with gusto, and lapsing deliberately into Negro dialect. So successful is he in keeping the common touch that he has great mass appeal for all elements of the Negro race. Elmer Carter of the New York State Commission Against Discrimination says:

It's very important that we Negroes have a man who is at home in the Supreme Court and equally at home with the man on the street. Thurgood can talk on terms of equality with a social scientist like Sweden's Gunnar Myrdal, but he talks the argot of Harlem with the man on the street corner. He creates confidence on all levels of Negro life.

Whether on a train, engaged in banter with the porters, or on a college campus, engrossed in speaking to a formal assembly, Thurgood Marshall receives the same warm response from people.

Paradoxically, Marshall the man at work creates an entirely different impression. He is a persistent, tireless worker. A former associate once referred to him as "a working machine." He spends most of his evenings "hunched over a table covered with briefs and law books, with a scowl of concentration on his face." During the twenty-two weeks in which he and his associates engaged in intensive research and study in preparing the brief for the
reargument of the school segregation cases before the Supreme Court, Thurgood Marshall slept at home eight times and during the last twelve weeks had dinner with his wife only twice.

Marshall's temperament has been compared with the movement of a pendulum. His dignity can swing easily into arrogance, his humility into self-abasement, his emotional pattern from the serious to the absurd. His voice can be soft or raucous, and his manner rude or gentle and courtly. It is his own humor that stops the pendulum, bringing him back to center.

E. Forensic Ability

Despite the many contradictory aspects of Thurgood Marshall the man, Marshall the lawyer has been preeminently successful in the profession he chose to follow. It is interesting to observe the excellence of his reputation in the field of constitutional law. The following comment is indicative:

The strength and flexibility of the United States Constitution made possible the fact that the man at the vortex is a constitutional lawyer. His is a technical calling. The Constitution itself is a complex work of statecraft, put together by some of the most sophisticated political scientists who ever lived. Along with the document there is a constitutional residue of 168 years of intense legal, political, and social history—a coral-like cathedral of precedent, compromise, balance, and bold interpretation. It takes scholars to move in this maze—and Thurgood Marshall is a sound, conscientious, imaginative legal scholar.
In the opinion of such colleagues as Morris Ernst, general counsel for the Civil Liberties Union, Arthur Spingarn, President of the NAACP, and Earl G. Harris, former Vice-President of the University of Pennsylvania, Marshall is one of the finest civil rights constitutional lawyers. According to Federal Judge William H. Hastie, he is unquestionably our greatest civil liberties lawyer. In his estimation Marshall has been more instrumental than any other man in professionalizing the area of law dealing with civil rights. It is Hastie's further belief that "no other lawyer and practically no member of the bench has his grasp of the doctrine of civil rights law."

Mr. Marshall spends unlimited time in preparing for each case. He recalls a three-way long distance conversation he and a colleague carried on with the Attorney General during the time of the school segregation controversy. The conversation, carried on intermittently between 11 P.M. and 5 A.M., involved the two sides citing cases to substantiate certain points and procedures.

Thurgood Marshall has mastered the technique for the forthright presentation of a case. The first year he was associated with the NAACP, he had occasion to fly to Austin, Texas, to protest the exclusion of a Negro from jury duty. Choosing to go directly to Governor James Allred, and thereby avoid delaying tactics in litigation, Mr. Marshall made such a straightforward presentation of the issues that the Governor not only ordered out the Texas
Rangers to defend the rights of Negroes to jury duty but also asked the FBI to study the situation.

Mr. Marshall displays this same directness in arguing in the courts. After observing him in a recent appearance before the Supreme Court, one reporter made the following observation:

He pleads his cause in a straightforward fashion, never with histrionics or bombast, self-righteousness or pedantry. The quiet scholarly voice that set forth the winning argument in all the Supreme Court school segregation cases might have been that of a sociologist.

It is this type of presentation that attracts the attention of legal experts and laymen alike. According to Poling, when he takes his stand before a lectern in the United States Supreme Court the justices lean forward in their seats and the courtroom is filled with class-cutting law students. This same interest was shown in his appearance before the United States Court of Appeals for the Fourth Circuit in the case of Alston v. School Board, which involved racial inequalities in salaries of public school teachers in Norfolk, Virginia. When Marshall completed his argument, the three judges paid him a rare compliment; still in robes, they stepped down off the bench to congratulate him on his masterly presentation. On another occasion, back in 1941, when he was arguing a criminal case in Alabama, the superintendent of schools declared a half holiday in order that the students might go to court to hear him.
Mr. Marshall's forensic ability has won for him the respect of the highest tribunal in the land. He has won this regard of the Justices not because he is a crusader for a cause in which he believes but because they can speak to him as lawyer to lawyer and technician to technician. Judge Breitel of the New York Supreme Court once said of Mr. Marshall: "I have so much respect for his ability and integrity, I'd accept his word for anything." One of the highest compliments was indirectly paid him when the State of South Carolina retained John W. Davis, a former Presidential candidate and dean of the American bar, to represent its position against Marshall in the school segregation controversy.

Another factor accounting for Thurgood Marshall's success at the bar is his objectivity. He rarely allows his emotions to cloud his reasoning. His sage opinion is: "Lose your head, lose your case." In arguing his cases, he seeks to avoid making derogatory statements about his opposition. During the time the brief for the Briggs case was being prepared, it is reported that Mr. Marshall stayed up most of one night to delete from the draft some unfavorable remarks about Mr. John W. Davis, his opponent, the remarks having been put in by more emotional and less respectful junior members on the NAACP's interracial legal staff.

Mr. Marshall shows this same lucid reasoning in discussing race relations. He observed at one time that the greatest mistakes are made through oversimplification. It is his opinion that the South is not all bad nor the North all good. As a result of his
experiences, he notes progress in the South, especially among the younger generation of white people and the enlightened older ones. He points to the reaction of more than 200 students at the University of Texas who set up an NAACP branch when the Association was attempting to gain admittance for Herman Sweatt to the University. These students even built a booth to collect funds to help defray NAACP legal expenses.

One of the most admirable of Thurgood Marshall's qualities is his high sense of ethics. He refuses to use what he refers to as "ornery" tactics. Arthur B. Spingarn, President of the NAACP, relates that Marshall once refused to employ a means of destroying a witness' credibility which he had suggested. Marshall based his refusal simply on the fact that even if the means were legitimate, he would not want anyone to say a similar thing about him. Morris Ernst, another associate, recalls his effort to get Thurgood Marshall to attempt to solve a transportation discrimination case by a technically legitimate but devious method. Marshall refused.

F. Basic Philosophy of Life

The pattern of a man's life is determined, to a great extent, by the attitudes he forms and the beliefs he possesses. Thurgood Marshall's faith in people, his respect for institutions, his regard for ideals, are but manifestations of his basic philosophy of life. What is Mr. Marshall's attitude toward the American people? How does he feel about the Constitution and the Supreme Court? What is his conception of equality? What does he think about segregation? How does he regard his clients? Thurgood Marshall, in his speaking and in his writing, provides us with the answers.

In a speech in July, 1950, before the Institute on Race Relations held annually at Fisk University, Mr. Marshall, anticipating the ultimate victory in the court in the matter of segregation, indicated his belief in the inherent ability of the American people to accept whatever decisions might be made. Believing that, even in the most prejudiced communities, the majority of people have some respect for truth and some sense of justice, he said:

We now have the tools with which to destroy all governmentally imposed racial segregation. ....To hear some people talk, one would get the impression that the majority of Americans
are lawless people who will not follow the
law as interpreted by the Supreme Court.
This is simply not true.43

Thurgood Marshall's effectiveness as a constitutional lawyer
may stem, in part, from his own deep feeling about the Constitu-
tion itself. Pointing out the difference between the Constitu-
tion and the law, Marshall once stated that the law can fluctuate
because of the changing whims of the people and their legisla-
tors. But he sees the whole purpose of the Constitution to be
an instrument that cannot be changed overnight, which does not
change when mores and customs change. In like manner, he has
a similar attitude toward the Supreme Court. In an article
written for *The Annals of the American Academy of Political and
Social Science*, Marshall admits that the approach of the Court has
been undeniably cautious through the years; but he believes that
"any fair assessment of the Court's role in the past decade com-
pels the conclusion that it has done considerably more than any
other arm of the federal government to secure, preserve, and extend
civil rights." Mr. Marshall predicts that if the Court "continues
along the path blazed by its recent decisions, the Constitution's
mandate of equal protection of the laws will eventually accomplish
the objective its framers intended— that of prohibiting all forms
of community discriminatory action based upon race or color."

Behind Marshall's legal efforts has been the motivating force
of his firm belief in human equality. When he was called to appear
before the Senate Judiciary Committee, he made this epigrammatic
statement on equality: "The only way to get equality is for two people to get to the same thing at the same time at the same place."

With such a feeling about equality, it is logical that Thurgood Marshall would regard segregation as a deterrent to American democracy. In an address to the graduating class of Grinnell College in June, 1954, Mr. Marshall stated unequivocally that compulsory racial segregation is not only unlawful and immoral but also is it un-American, costly, and damaging to the nation's prestige. It is his opinion that the only way to eliminate the so-called "race problem" in this country is for Americans to recognize and to grant "every other American the right to stand on his own individual merit without regard to race, creed, color, or racial origin."

Perhaps there is no better index to Thurgood Marshall's basic philosophy of life than his great concern for his clients. It has been said that his feeling of love and awe for the Constitution is exceeded only by his empathic response to his clients. These clients are the Negroes, particularly those of the South and of the border states, who—although they are faced with threats, intimidations, economic reprisals, and even death—continue to sign legal petitions that must be the point of departure on the road to equality. Despite his legalistic interest in the constitutional questions which may be involved, Mr. Marshall always has his client in the focus of his attention. Of them he sympathizingly says:
There isn't a threat to man that they do not receive. They're never out from under pressure. I don't think I could take it for a week. The possibility of death for them and their families is something that they've learned to live with like a man learns to sleep with a sore arm.

In Thurgood Marshall, then, one finds, as a writer for *Time* expresses it, a kind of tolerance that must stretch all the way from understanding fear in the South to the well-yoked ambiguities of Mr. Justice Felix Frankfurter. It moves from his hatred of inequality to a recognition that much of the opposition to Negro equality is just as honestly felt as his own convictions. This tolerance extends all the way from an idealist's demand for nothing less than justice to a practical lawyer's acceptance of what he can get when he knows he can get no more.

G. Honors

Because of Mr. Marshall's zealous pursuit of equality for Negroes in America, he has been honored by numerous organizations and institutions. In 1953, Marshall became the fourth person to receive the Scottish Rite Masons' Achievement medal, one of the highest honors given by a Masonic body. The Workmen's Circle, an anti-totalitarian group with some 70,000 members in the United States and Canada, presented him a Human Rights Award. Grinnell College in 1954 gave him an honorary Doctor of Laws degree, Marshall thus becoming the first Negro to be so cited by this institution. In this recognition of his role in winning the United States Supreme
Court decision of May 17, 1954, the Newspaper Guild of New York named him for the annual Page One Award it gives for outstanding achievement in national public affairs. Along with Chief Justice Earl Warren and Vice President Richard Nixon, Mr. Marshall in 1955 received one of the annual Honorary Citizenship-Distinguished Service Awards from the George "Junior Republic"; he was selected as one having "done the most to help preserve democracy for America's youth."

The Negro press, recognizing Thurgood Marshall's outstanding contributions to the fight for his race's first-class citizenship, refers to him as "Mr. Civil Rights." Aware of the distance that he and the NAACP have traveled on the road to equality, Mr. Marshall is justly proud of the part which he has played. Of the progress which has been made, Marshall comments simply: "It is good to see the change, when you know you did it." Despite the distance which has been covered, moving slowly from precedent to precedent, Thurgood Marshall is aware of the journey which lies ahead.
CHAPTER IV
NOTES


2. Thurgood Marshall served as Assistant Counsel for the NAACP from 1938 to 1940, when he became Chief Counsel.

3. Since 1957 he has been Director-Counsel of the Legal Defense and Educational Fund, Inc.


5. Ibid. See also James Poling, "Thurgood Marshall and the 14th Amendment," Collier's, 129 (Feb. 23, 1952), 72.


10. Informal Conversation with Mr. Marshall, November 16, 1957, Atlanta, Georgia.


14. Ibid.


16. See Chapter III, pp. 48-50, for a discussion of this case.


18. Of the cases won four were criminal cases, and six were in the areas of education, housing, transportation, and voting.
23. Ibid.
26. "News from the NAACP," Nov. 16, 1953. Mr. Marshall is married to Cecil Suyatt, former NAACP secretary; they have two children.
28. Ibid.
30. Informal conversation with Mr. Marshall, Atlanta, Georgia, November 16, 1957.
36. Ibid., 73.
37. Ibid.
38. Ibid.
39. Ibid.
41. Poling, *op. cit.*, 73.
42. Ibid.
43. Poling, *op. cit.*, 73.
44. "The Tension of Change," *op. cit.*, 27.
47. Cartwright, *op. cit.*, 5.
56. "May It Please the Court," *op. cit.*, 19.
CHAPTER V
THE BRIEF AS A MEANS OF PERSUASION

A. The Background

To understand the oral arguments of Thurgood Marshall before the Supreme Court in December, 1953, in the public school segregation cases, one must, first, take a critical look at the brief which was filed beforehand. Accepting Aristotle's definition that rhetoric is the faculty of finding all of the available means of persuasion in a given case, the writer submits that the brief was an important means of persuasion in the school segregation controversy.

Before attempting to justify this position, let us, first, recapitulate briefly the background for the cases. In 1952 the NAACP launched its all-out attack on segregation in the public elementary and secondary schools by filing four precedent-shattering cases before the United States Supreme Court. A fifth case, also challenging segregation in the schools, was filed simultaneously but independently. The four cases were argued by NAACP lawyers and involved the segregation of Negro pupils in the public schools of Topeka, Kansas; Clarendon County, South Carolina; Prince Edward County, Virginia; and a suburb of Wilmington, Delaware. The fifth case, while it used NAACP lawyers, was filed by a group, independent of the NAACP, which wished to abolish segregation in
the schools of Washington, D.C. In all except the Delaware case, the attorneys were appealing to the United States Supreme Court from lower court decisions upholding segregation in the public schools in question. In the Delaware case, the State Supreme Court had ruled that the Negro children could not be forced to attend the inferior segregated schools, and here the State of Delaware was appealing to the United States Supreme Court.

During the three-day argument before the Court in December, 1952, the NAACP lawyers and the states' attorneys made oral presentations of five hours each. The NAACP lawyers maintained on behalf of plaintiffs that segregation in public schools violated the Fourteenth Amendment, while the states' attorneys contended that segregation was not in opposition to the Amendment. The trial is considered by some to have had possibly the widest newspaper, wire service, magazine, radio, and television coverage of all civil rights cases in history. It was, in reality, a dramatic battle between youth and age, with the young men of the NAACP fighting for a new order in which racial distinctions are banned, and the older men defending the southern way of life and its racial taboos.

On Monday, June 8, 1953, six months after first having heard the lawyers in these cases, the United States Supreme Court called for reargument in the following fall term. In order to assist it in arriving at a decision, the Court propounded five questions to be answered by counsel on both sides and invited the Attorney General of the United States to participate in the argument as amicus curiae.
The NAACP's Legal Defense and Education Department, under the direction of Thurgood Marshall, now had the task of organizing research and preparing the brief. To accomplish this objective, a corps of more than one hundred lawyers, law professors, political scientists, sociologists, historians, and other experts was organized to compile the necessary information. In addition, the Department secured the services of lawyers in each of the thirty-seven states which constituted the Union at the time of the ratification of the Fourteenth Amendment. These lawyers were asked to do special research on the history of school segregation in their respective states.

By midsummer this legal corps was putting in endless hours of work. Some staff workers were going two and three days without sleep, taking time out only to eat. By the end of October, no one was getting more than three or four hours of sleep at a time. The lives of six of the lawyers who came to New York to work on the brief were so disrupted that they did not see their families in three months. Many of the secretaries and volunteers worked fifteen to twenty hours a day, seven days a week, with no requests for extra remuneration. It has been humorously estimated that the workers in the Legal Defense office consumed enough coffee to supply a regiment for a full week. The staff used 1,000,000 sheets of copy paper, 6,000,225 sheets of manifold, 2,700 stencils, more than 12 million sheets of mimeographing paper, and 115,000 sheets of carbon paper. This intensive and exhaustive twenty-two weeks of work
resulted in the Legal Department filing with the Supreme Court a 235-page brief with 525 footnotes, representing the research and study of 130 lawyers and experts of all races scattered across forty-five of the forty-eight states.

B. Outline of the Brief

To make the analysis as meaningful as possible, an outline of the Brief for the Appellants in Brown v. Board of Education in the Supreme Court of the United States, October Term, 1953, is now presented.

Thesis: The Fourteenth Amendment prevents states from according differential treatment to American children on the basis of their color or race.

Introduction

I The substantive question asks whether a state can, without violating the Constitution, exclude Negroes from public schools because of race.

II The procedural question inquires into the problem of implementa-
tion should the Court render a favorable decision.

Argument

I It is within judicial power to abolish segregation in public schools.

A. Normal exercise of the judicial function calls for a declaration that the state is without power to enforce
distinction based upon race or color in affording educational opportunities in the public schools.

B. The statutory and constitutional provisions involved in these cases cannot be validated by any separate but equal concept.

1. Racial segregation cannot be squared with the rationale of the early cases interpreting the reach of the Fourteenth Amendment.

2. The first time the question came before the Court, racial segregation in transportation was specifically disapproved.

3. The separate but equal doctrine marked an unwarranted departure from the main stream of constitutional development and permits the frustration of the very purpose of the Fourteenth Amendment as defined by this Court.

4. The separate but equal doctrine was conceived in error.
   a. The dissenting opinion of Justice Harlan in *Plessy v. Ferguson*.
   b. Custom, usage and tradition rooted in the slave tradition cannot be the Constitutional yardstick for measuring state action under the Fourteenth Amendment.
   c. Preservation of public peace cannot justify deprivation of constitutional rights.
d. The separate but equal doctrine deprives Negroes of that protection which the Fourteenth Amendment accords under the general classification test.

5. The separate but equal doctrine has not received unqualified approval in this Court.

6. The necessary consequences of the Sweatt and McLaurin decisions is repudiation of the separate but equal doctrine.

C. Viewed in the light of history the separate but equal doctrine has been an instrumentality of defiant nullification of the Fourteenth Amendment.

1. The status of the Negro, slave and free, prior to the Civil War.

2. The post war struggle.

3. The Compromise of 1877 and the abandonment of Reconstruction.

4. Consequences of the 1877 Compromise.

5. Nullification of the rights guaranteed by the Fourteenth Amendment and the re-establishment of the Negro's pre-Civil War inferior status fully realized.

II The Congress which submitted the Fourteenth Amendment and the state legislatures and conventions which ratified it contemplated and understood that it would abolish segregation in public schools.
A. The Fourteenth Amendment was intended to destroy all caste and color legislation in the United States, including racial segregation.

1. The Pre-Civil War era was marked by determined efforts to secure recognition of the principle of complete and real equality for all men within the existing constitutional framework.

2. The movement for complete equality reached its successful culmination in the Civil War and the Fourteenth Amendment.

3. The principle of absolute and complete equality began to be translated into federal law as early as 1862.

4. From the beginning the Thirty-ninth Congress was determined to eliminate race distinctions from American law.

5. The Fourteenth Amendment was intended to write into the organic law of the United States the principle of absolute and complete equality in broad constitutional language.

6. The Republican majority in the Thirty-ninth Congress was determined to prevent future Congresses from diminishing federal protection of these rights.

7. Congress understood that while the Fourteenth Amendment would give authority to Congress to enforce
its provisions, the Amendment in and of itself would invalidate all class legislation by the states.

8. The treatment of public education or segregation in public schools during the Thirty-ninth Congress must be considered in the light of the status of public education at that time.

9. During the Congressional debates on proposed legislation which culminated in the Civil Rights Act of 1875, veterans of the Thirty-ninth Congress adhered to their conviction that the Fourteenth Amendment had proscribed segregation in public schools.

B. There is convincing evidence that the state legislatures and conventions which ratified the Fourteenth Amendment contemplated and understood that it prohibited state legislation which would require racial segregation in public schools.

1. The eleven states seeking readmission understood that the Fourteenth Amendment stripped them of power to maintain segregated schools.

   a. Arkansas
   b. North Carolina, South Carolina, Louisiana, Georgia, Alabama and Florida
   c. Texas
   d. Virginia
e. Mississippi
f. Tennessee

2. The majority of the twenty-two Union States ratifying the Fourteenth Amendment understood that it forbade compulsory segregation in public schools.

a. West Virginia and Missouri
b. The New England States
   (1) Connecticut
   (2) Rhode Island
   (3) Maine
   (4) Massachusetts
   (5) New Hampshire
   (6) Vermont
c. The Middle Atlantic States
   (1) New York
   (2) New Jersey
   (3) Pennsylvania
d. The Western Reserve States
   (1) Ohio
   (2) Indiana
   (3) Illinois
   (4) Michigan
   (5) Wisconsin
e. The Western States
   (1) Nebraska
3. The non-ratifying states understood that the Fourteenth Amendment forbade enforced segregation in public schools.
   a. Delaware
   b. Maryland
   c. Kentucky
   d. California

III Assuming that the Court rules that public school segregation violates the Fourteenth Amendment, should the Appellants receive immediate or postponed relief?

A. The Court should declare invalid the constitutional and statutory provisions which require segregation in public schools and should not postpone relief to the Appellants.

1. The Fourteenth Amendment requires that a decree be entered directing that Appellants be admitted forthwith to public schools without distinctions as to race or color.

2. There is no equitable justification for postponement of Appellants' enjoyment of their rights.
3. Appellants are unable, in good faith, to suggest terms for a decree which will secure effective gradual adjustment because no such decree will protect Appellants' rights.

Conclusion

I Under the applicable decisions of this Court, the state constitutional and statutory provisions herein involved are clearly unconstitutional.

II The historical evidence surrounding the adoption, submission and ratification of the Fourteenth Amendment compels the conclusion that it was the intent, understanding and contemplation that the Amendment proscribed all state imposed racial restrictions.

III The practice of arbitrarily excluding the Negro children in these cases from state public schools can only be continued on a theory that Negroes, not Negroes, are inferior to all other Americans.

IV A ruling which will permit such segregation would destroy the intent and purpose of the Fourteenth Amendment and the very equalitarian basis of our Government.

C. Analysis of the Brief

That the preparation of an appeal brief is an important part of presenting arguments to the Court is substantiated by the following declaration of Hicks:
The preparation of appeal papers, especially in the arguments, is the most advanced kind of legal work in the lawyer's ordinary field of activity. These arguments are the result of the application to specific problems of all the powers which the respective counsel possess. In them we see exemplified attempts to convince the court, sometimes that well-settled rules of law already exist applicable to the case, but quite as often, on one side or the other, that an extension or modification of law, or the creation of downright new judge-made law, is needed in order to render justice in the particular circumstances set forth.9

Its further importance is established by the fact that the purpose of the brief is to lay the foundation for the oral argument. With regard to the Brown brief, one may infer from the detailed way in which the arguments were analyzed and synthesized that they were of utmost importance in convincing the Court.

Because the filing of this brief is, in the opinion of the writer, the submitting of evidence, the next step of this study will be an analysis of it. The main divisions of a brief are the introduction, the body, and the conclusion; and the brief for Brown v. Board of Education will be analyzed according to the respective criteria for each division.

1. Introduction

The Introduction of a brief, like the introduction of a speech, is chiefly used to secure the attention of the audience, i.e., the reader or the listener, and to give an indication of what is to follow. The Introduction has these objectives:
1. To secure attention
2. To explain the topic and the terms
3. To determine and state the issues

One of the chief means of getting the attention of the audience is through emphasizing the importance of the subject itself. The school segregation cases, consolidated for argument before the Supreme Court, are concerned with the same legal questions. The substantive question asks whether a state can, without violating the Constitution, exclude Negroes, solely on the basis of race, from public schools which they are otherwise qualified to attend. The procedural question is interested in the Court's role and the time-table for the desegregation of schools should the Court decide that the exclusion of Negroes on the basis of race is unconstitutional. Because the substantive question suggests that there may be a violation of the Constitution, which implies a disparity between the principles of American democracy and the practice, the importance of the problem is obvious. The authors of the brief emphasize this idea in the Introduction, tying it in with the basic tenets of the American faith. Their attention-getting device closes with this challenge:

The question is whether a nation founded on the proposition that "all men are created equal" is honoring its commitments to grant "due process of law" and "the equal protection of the laws" to all within its borders when it, or one of its constituent states, confers or denies benefits on the basis of color or race.
The second purpose of the Introduction is to explain the topic and the terms. This is done in the brief through their interpretation of the purposes of the Fourteenth Amendment and the citing of cases as substantiation. The brief begins with the positive statement that "distinctions drawn by state authorities on the basis of color or race violate the Fourteenth Amendment." It is contended that whatever other purposes the Amendment may have had, it was certainly meant to assure the Negro of equality before the law and so complete the emancipation provided by the Thirteenth Amendment. It is further stated that even if the Fourteenth Amendment did not per se invalidate racial distinctions, as a matter of law there would still be a problem in that racial classifications have no real relation to any valid legislative purpose. The Court is reminded that in previous cases—Sweatt v. Painter, 339 U.S. 629, and McLaurin v. Oklahoma State Regents, 339 U.S. 637—the detrimental effect of segregated education on Negro pupils has been recognized. As a final point in the explanation it is stated that the separate but equal practice is but a reiteration of the Plessy v. Ferguson decision, which must be met head-on and declared erroneous.

The last step in the Introduction is the determining and stating of the issues. These issues had been spelled out beforehand when the Court propounded the five questions with which the brief was to be concerned. The questions are answered briefly and in such a way as to indicate the position to be maintained in the subsequent
arguments. The first and second questions inquired as to whether the Congress which submitted the Fourteenth Amendment and the state legislatures and conventions which ratified it "contemplated or understood that it would prohibit segregation in public schools, either of its own force or through subsequent legislative or judicial action." It is held, in answering these questions, that there is sufficient evidence to indicate that the substantial intent of the proponents of the Amendment was to proscribe all forms of state-imposed racial distinctions. Evidence cited includes mention of the debates of the Thirty-ninth and succeeding Congresses and the Civil Rights Bill of 1866. These determined efforts on the part of the Radical Republican majority in Congress demonstrate that they wanted equality for all, regardless of race or color.

Evidence is also presented to the effect that the states ratifying the Amendment understood the intention. The eleven states which had seceded from the Union not only ratified the Fourteenth Amendment but also, in accord with it, eliminated racial distinctions from their laws and adopted constitutions. Proposals for segregated schools were even rejected by many of these states; in fact, it was not until after readmission that any one state enacted a school segregation law. In addition, twenty-two of the twenty-six Union states ratified the Fourteenth Amendment.
The third question propounded by the Court is not mentioned in the Introduction because it required an answer only if the answer to question two were in the negative.

Questions four and five posed by the Court concerned the possible procedure for desegregation should the Court declare segregation unconstitutional: immediate relief to the appellants or gradual relief. Here the answer is brief but reasonable. Recognizing the possibility of delay for purely administrative reasons, counsel declare that "...in the present posture of these cases, appellants are unable to suggest any compelling reasons for this Court to postpone relief."

The Introduction has, thus, secured the attention of the readers because of the importance attached to the problem itself; it has explained the question in point and has stated the position of counsel on the issues. Moving to the second division of the brief, we shall examine the evidence in the Argument as set forth by the attorneys for the appellants.

2. The Argument

According to Ringwalt, the purpose of the argument is to present the reasoning and the evidence which prove the issues. Evidence consists of statements of the facts which form the bases for the conclusion, together with a citation of the sources and authorities from which the facts have been derived.
The Argument for the Brown brief is divided into three parts, which seek to substantiate the position taken by counsel on the questions propounded by the Supreme Court.

In setting forth arguments in Part I to prove that it is within judicial power to abolish segregation in public schools, the advocates advance three propositions:

1. Normal exercise of the judicial function calls for a declaration that the state is without power to enforce distinctions based upon race or color in affording educational opportunities in the public schools.18

2. The statutory and constitutional provisions involved in these cases cannot be validated under any separate but equal concept.19

3. Viewed in the light of history the separate but equal doctrine has been an instrumentality of defiant nullification of the Fourteenth Amendment.

To show, first, that the state has no power to enforce segregation in public schools by reason of race or color, the attorneys insist that the Court in a long line of decisions has already expressed itself to this effect. Reasoning inductively from this fact, the attorneys, then, cite legal precedents covering property ownership, housing restrictions, voting rights, jury duty, job opportunities, travel, as well as educational inequities, in which the Court has ruled against state-enforced racial distinctions based on color or race. The following cases are examples of those cited:

Shelley v. Kraemer, 334 U.S. 1, in which the Court held unanimously "that the States of Missouri and Michigan
had violated the Fourteenth Amendment when their courts ruled that a Negro could not own real property whose ownership it was admitted the state law would have protected him in, had he been white." The sole basis for the decision was that the Fourteenth Amendment demands that the states be color blind in dealing with their citizens.21

**Buchanan v. Warley**, 245 U.S. 60, in which the Supreme Court invalidated an ordinance passed in Louisville, Kentucky, which required racial residential segregation.

**Nixon v. Condon**, 286 U.S. 73, in which state action restricting the right of Negroes to vote was struck down as a violation of the Fourteenth Amendment.23

**Pierre v. Louisiana**, 306 U.S. 354, and **Hill v. Texas**, 316 U.S. 400, in which the Court refused to sanction the systematic exclusion of Negroes from the petit or grand jury.24

**Cassell v. Texas**, 339 U.S. 282, and **Shepherd v. Florida**, 341 U.S. 50, in which the Court rejected Negro representation on juries on a token or proportional basis.25

**Avery v. Georgia**, 345 U.S. 559, in which the Court opposed any method in the selection of juries that was susceptible of racial discrimination in practice.26

**Truax v. Raich**, 239 U.S. 33, and **Takahashi v. Fish and Games Commission**, 334 U.S. 410, in which the Court stated that legislation depriving persons of particular races of an opportunity to pursue a gainful occupation is a denial of equal protection. 27

**Morgan v. Virginia**, 328 U.S. 373, in which the Court declared invalid state laws requiring racial segregation in interstate travel.28

**Henderson v. United States**, 339 U.S. 816, 825, in which the Court stated unanimously that the use of signs, partitions, and curtains segregating Negroes in railroad dining cars emphasized "the artificiality of a difference in treatment which serves only to call attention to a racial classification of passengers holding identical tickets and using the same public dining facility." 29
Cases dealing with educational inequities were more closely related to the problem at hand and were, therefore, submitted as controlling factors in the Brown case. The first such ruling went back to 1938 and *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, in which the Court took the position "that the Fourteenth Amendment prohibits a state from using race or color as the determinant of the quantum, quality or type of education and the place at which education is to be offered." In *McLaurin v. Oklahoma State Regents*, 339 U.S. 637, and *Sweatt v. Painter*, 339 U.S. 629, the educational process was viewed as a totality; and the Court struck down racial distinctions, declaring that equal educational opportunities were not available to Negro students. The Court, in arriving at this decision, considered such factors as the faculty and the prestige of the school, the value judgment of the community with respect to the segregated school, the depriving of the Negro student of such benefits that might be obtained in attending school with representatives of the dominant racial majority, and the impact of segregation per se on the individual.

Recalling Aristotle's dictum that enthymemes are best suited to forensic speeches, one might observe at this point the use made in this section of the brief of the enthymematic chain of reasoning. It may be observed in the handling of the two aforementioned cases. The point is made that since in the McLaurin case segregation is found to impair and inhibit an adult's ability to study, it is clear that segregation will have an even more detrimental effect on the
mental development of children. Note the enthymeme:

Since segregation was found to impair and inhibit an adult’s ability to study in the McLaurin case, it seems clear that such segregation has even more far reaching adverse consequences on the mental development of the children involved here.\textsuperscript{33}

This enthymeme is based on the \textit{topos of a fortiori}, which argues from the degrees of more and less. Another example of this deductive reasoning appears when it is argued that if the Court has already recognized that Sweatt and McLaurin were denied certain educational benefits, it would be logical for it to do the same in the present cases before the Court. Here we have an enthymeme constructed from the \textit{topos of an existing decision}:

Moreover, just as Sweatt and McLaurin were denied certain benefits characteristic of graduate and professional education, it is apparent from the records of these cases that Negroes are denied educational benefits which the state itself asserts are the fundamental objectives of public elementary and high school education.\textsuperscript{34}

In addition to the cited cases on which the Court has ruled, the brief mentions as further argument the undisputed oral testimony given by expert witnesses as to the injury done Negro pupils by compulsory racial segregation. Henry Wade Rogers defines expert testimony as "evidence of a scientific or technical character in regard to a matter that is outside the domain of ordinary experience and knowledge." The expert witnesses alluded to are educators, sociologists, psychiatrists, anthropologists who testified in all of the cases involved in this study.
The second main point considered in the first part of the Argument is the repudiation of the separate but equal concept, which concept, in the opinion of the lawyers, is really responsible for the difficulty of the present cases. The lawyers point out that the doctrine of *Plessy v. Ferguson*, 163 U.S. 537, has been misinterpreted as the correct expression of the meaning of the Fourteenth Amendment. Although the Court handed down this decision in a transportation case, the proponents of segregation have relied on it for justification of all types of racial segregation.

The attorneys of the *Brown* brief are convinced that the separate but equal doctrine has received only very limited and restricted applications in the actual decisions of the Supreme Court. They state:

> Whatever appeal the separate but equal doctrine might have had, it stands mirrored today as the faulty conception of an era dominated by provincialism, by intense emotionalism, in race relations caused by local and temporary conditions and by the preaching of a doctrine of racial superiority that contradicted the basic concept upon which our society was founded.36

Arguing from causal relation they say that even the early support of the Court has been upset by more recent decisions, such as in *McLaurin v. Oklahoma State Regents* and *Sweatt v. Painter*.

In support of their contention that the statutory and constitutional provisions involved in these cases cannot be validated under the separate but equal concept, the following secondary arguments are given:
1. The early cases decided under the Fourteenth Amendment are proof that the Court was convinced that the Amendment secured to Negroes full citizenship rights and prohibited any state discriminating against them because of color. Two cases in point are the Slaughter House Cases, 16 Wall. 36 and Strauder v. West Virginia, 100 U.S. 303.

2. In the first case involving the validity of segregation to reach the Supreme Court after the adoption of the Fourteenth Amendment, segregation was struck down as an unlawful discrimination.—Railroad Company v. Brown, 17 Wall. 445.

3. The separate but equal doctrine was conceived in error in that it has aided and supported efforts to nullify the true purpose of the Fourteenth Amendment, which was to give equal status to the Negroes.37

Some of the fallacies which have been helpful in perpetuating the erroneous doctrine are also pointed out. The writers of the Brown brief hold that it is a fallacy to allow custom and usage rooted in the slave tradition to be the constitutional yardstick for measuring state action under the Fourteenth Amendment. They hold further that the preservation of public peace cannot justify deprivation of constitutional rights of a segment of the populace. Another fallacy lies in the fact that the Fourteenth Amendment, the primary purpose of which was the protection of Negroes, "is construed as encompassing a narrower area of protection for Negroes than for other persons under the general classification test."38

The third and last main point advanced in Part I of the Argument is the assertion that historically speaking the separate but equal doctrine has been an instrumentality of defiant
nullification of the Fourteenth Amendment. This section is developed by briefly narrating the historical background against which the validity of the separate but equal doctrine is to be tested. This recapitulation includes a discussion of the status of the Negro, slave and free, prior to the Civil War; the post war struggle; the Compromise of 1877 and the abandonment of Reconstruction; and such consequences of the Compromise as the passage of rigid laws to achieve segregation and the disfranchisement of the Negro.

Reasoning from effect to cause, the attorneys point out that segregation is a result of the belief on the part of the white society that the Negro is inferior. They state that one of the basic assumptions of the slave system was the Negro's allegedly inherent inferiority. This concept included not only Negroes of slave status but also those several hundred thousand supposedly free Negroes.

By contrasting economic conditions before and after the Civil War, the lawyers argue from statistics to show the kind of economy each era produced. Before the war some 1000 families received approximately $50,000,000 a year as a result of the slave system while the remaining 600,000 families received about $60,000,000 a year. After the Civil War, the independent white farmer cultivated the lands of the former large plantation and attempted to rebuild the old type aristocracy by subjugating both poor whites and Negroes.
The advocates proceed to argue from causal relation when they point out that the Compromise of 1877 and the abandonment of Reconstruction led to laws and practices to achieve rigid segregation. Specific measures were taken to destroy the political power of the Negro so that he would be in no position to challenge the new order that was being established. These measures included the poll tax, the Grandfather Clause, intimidation and threats of violence, the white primary, gerrymandering. There was even a movement to repeal the Fourteenth and Fifteenth Amendments. Again pointing out that segregation was a result of the racist belief in the Negro's unassimilability and uneducability, the NAACP lawyers quote the views expressed by such racist spokesmen as Senator Edward Carmack of Tennessee, Ben Tillman of South Carolina, and Alfred H. Stone of Mississippi. For example, Ben Tillman of South Carolina is quoted as saying that a Negro should not have the same treatment as a white man "for the simple reason that God Almighty made him colored and did not make him white." The lawyers cite as final cause for segregation the decision of *Plessy v. Ferguson*. It was actually this decision which nullified the real intent of the Fourteenth Amendment.

To establish their final argument in Part I, the attorneys state that the nullifications of the rights guaranteed by the Fourteenth Amendment reestablished the Negro's pre-Civil War status. They reason that this result may be traced to the machinery which
the South set up to maintain the caste system with regard to the Negro. This machinery included separate inferior schools, an elaborate system of Jim Crow, and the disfranchisement of the Negro. The NAACP lawyers conclude the first part of the Argument by restating the minority opinion of Justice Harlan in *Plessy v. Ferguson* which maintains that our Constitution is color blind.

The advocates submit that the Court cannot uphold the school segregation laws under the separate but equal doctrine unless it accepts the racist beliefs of the segregationists. It is respectfully suggested that *Plessy v. Ferguson* should be overruled.

Part II of the Argument directs attention to the first and second questions set forth by the Court. These questions are asked to help the Court determine (1) whether or not Congress and the states in passing the Fourteenth Amendment contemplated and understood that it would abolish segregation in public schools; and if not (2) whether it was the understanding of the framers of the Amendment that future Congresses might abolish such segregation, or the judicial power might construe the Amendment as abolishing such segregation of its own force.

The attorneys for *Brown*, convinced that there is evidence that both Congress which submitted and the state legislatures and conventions which ratified the Fourteenth Amendment contemplated and understood that it would abolish public school segregation, answer only the first question. They submit two main propositions:
1. The Fourteenth Amendment was intended to destroy all caste and color legislation in the United States, including racial segregation.

2. There is convincing evidence that the state legislatures and conventions which ratified the Fourteenth Amendment contemplated and understood that it would proscribe racial segregation in public schools.

To prove the first proposition, the advocates set forth and support nine primary arguments. The first primary argument maintains that the pre-Civil War era was marked by determined efforts to secure recognition of the principle of complete equality of all men. The lawyers reasoning from causal relation assert that the men who wrote the Fourteenth Amendment were reflecting the humanitarian philosophy as postulated in Jefferson's words that "all men are created equal." These authors of the Amendment were dominated to a great extent by the Abolitionist movement. The arguments lead the lawyers to the following historical conclusions which buttress their contentions:

1. Equality was an absolute concept to the Abolitionists, who, after the Civil War, became the Republican majority in Congress.

2. Members of the Congress who proposed the Fourteenth Amendment understood the significance of the phrases, included therein, "privileges and immunities," "equal protection," and "due process." 40

3. The majority of the Joint Committee of Fifteen which translated the equalitarian concepts into constitutional provisions were of anti-slavery backgrounds. 41

The argument concedes, however, that despite the high principles and dedication of the Abolitionist leaders, many difficulties were
encountered with both individual groups and state machinery. Special attention is drawn to one particular decision—Dred Scott—which was an end result of the counter movement to limit the rights of Negroes. The Court declared in this case "that no person of the 'African race, whether free or not' could enjoy under the Constitution of the United States, any right or protection whatsoever." The second primary point states that the movement for complete equality reached its successful culmination with the Civil War and with the adopting of the Fourteenth Amendment. Arguing from effect to cause, the lawyers reason that the success of the movement for complete equality was a result of the Emancipation Proclamation of 1863 and the adoption of the Thirteenth Amendment in 1865 by the Abolitionist-dominated Thirty-eighth Congress. It is noted, however, that these legislative acts were not altogether a result of pure Abolitionist idealism. A part of the motivation lay in the Radical Republicans' desire to remain in control, which desire could be realized by giving Negroes their complete legal and political equality.

In the third primary argument, the attorneys submit that the principle of absolute and complete equality began to be translated into federal law as early as 1862. Citing specific instances, the lawyers mention the Congressional debates of the Thirty-seventh and the Thirty-eighth Congress (1862 and 1863), which reveal the steps that were taken to secure complete equality for the recently freed
Negroes. The results of Congressional action include the adoption of the bill which abolished slavery, the discontinuance of the application of the Black Codes of Maryland and Virginia to the District of Columbia, and the elimination of Jim Crow transportation in Washington, D.C. Concluding this argument the NAACP lawyers state:

Thus, when Congress in 1866 framed the Fourteenth Amendment, it did so against a background of Congressional determination—that segregation in transportation was unequal, unjust, and was in defiance of decency.45

The fourth primary argument states that from the beginning the Thirty-ninth Congress was determined to eliminate racial distinctions from American law. To substantiate this point, attorneys for the Brown brief argue from specific instances by citing (1) the resolutions and speeches of the Senators and Representatives of the Thirty-ninth Congress, (2) the introduction of two bills aimed at protecting the civil rights of the Negro minority, and (3) the drafting of the Fourteenth Amendment by the Joint Committee of Fifteen. The resolutions and speeches make it clear that the aim was at nothing less than complete destruction of the caste system in the southern states. The debates surrounding the introduction of Senate Bill No. 60 and 61 indicate that the Radical Republican majority in Congress wanted to forbid any discrimination in the area of civil rights. Opponents of the civil rights legislation insisted that Congress did not have the power to endow Negroes with
citizenship and civil rights. Proponents, on the other hand, argued that once slavery was abolished the naturalization clause of the Constitution gave Congress the power to endow Negroes with citizenship. Using the legislative history of the civil rights bill, the advocates infer that the great majority of the Senate "was determined to bar the states from using their power to impose or maintain racial distinction." Ultimately the bill was amended, adopted by Congress, but vetoed by President Johnson. Advocates believe that the evidence is conclusive that the Thirty-ninth Congress desired equality before the law for all Americans. In addition, they point out that while Congress was engaged in the passage of the Civil Rights Act, the Joint Committee of Fifteen was drafting the Fourteenth Amendment. It is also observed that it is extremely important to note that these framers were "under the domination of a group of Radical Republicans who were products of the great Abolitionist tradition." These arguments are strengthened by an analysis of the backgrounds and the attitudes of these framers of the Fourteenth Amendment. Four members of the committee were completely dedicated to securing full equality for Negroes. Four, who although they may not have been as idealistic in their approach as the ones previously mentioned, took the position that race or color is not a basis for legal distinctions. The views on segregation of two other committee members are unascertained, but no record exists of their ever having voted for segregation based on race. One individual was not consistent nor predictable where segregation
was concerned. Complete opposition to civil rights for Negroes was expressed by the last two members of the committee.

Moving to the fifth primary argument, we find the NAACP attorneys using causal relation to justify their belief that the Fourteenth Amendment was intended, by use of broad constitutional language, to write into the organic law of the United States the principle of absolute and complete equality. This justification is based on the record of the debates carried on over the proposed wording of the amendment. The drafters and those who participated in the debates realized that constitutional amendments should be worded in broad, comprehensive language. The point of controversy centered around federal encroachment on states rights. The moving spirit for the broad, comprehensive language was Representative John A. Bingham of Ohio. One of the chief opponents was New Jersey's Representative Andrew Jackson Rogers, who attacked the proposed amendment as "more dangerous to the liberties of the people and the foundation of the government" than any other proposed constitutional amendment. His chief objection was that all state laws against racial intermarriage and against school and other types of segregation would be invalidated. Despite the opposition and the critical changes in draftings, finally the Amendment was completed with its broad constitutional language. The Amendment did not confer upon Congress the power to legislate; instead it prevented state interference by making privileges and immunities, due process, and equal protection constitutional guarantees.
That the Republican majority in the Thirty-ninth Congress was determined to prevent future Congresses from diminishing federal protection of these rights is the next primary point set forth in the brief. Continuing to rely on the Congressional debates to support their position, the lawyers review the division which existed between the Radical Republicans and their opponents. Fearful lest some more conservative Congress in the future would invalidate their work, the Radical Republicans wanted to include as sections of the Amendment constitutional guarantees beyond the power of Congress. There was no effort made to strip Congress of the power to enforce the Amendment—only precautions to put the guarantees themselves beyond the reach of a hostile Congress. The opponents, on the other hand, were holding that the Radical Republicans had forced through an unconstitutional statute (the Civil Rights Act) and were now trying to write the statute into the supreme law. That the Civil Rights Bill was a part of the law of the land was admitted; but the proponents for civil rights were pressing for a section to reinforce the Bill lest a later Congress destroy their work.

The seventh primary argument holds that Congress understood that although the Fourteenth Amendment would give authority to Congress to enforce its provisions, the Amendment in and of itself would invalidate all class legislation by states. The attorneys substantiate their point of contention by mentioning specific
instances in which the debates in the Senate emphasized (1) the scope of legislative power Congress would have in the enforcement of the Amendment; and (2) the extent to which the due process and the equal protection clauses would prevent states from depriving any person of his civil rights. The Fourteenth Amendment, which on May 10, 1866, passed the House by a vote of 128 to 37, was accepted by the Senate in June, 33 to 11. Congress then formally proposed the Amendment and submitted it to the states for ratification. The advocates declare that while it was not possible for the Republican majority to envisage all possible future applications of the Amendment they wanted to protect civil rights as much as possible. The brief says:

By separating section 1 of the Amendment, which provides an absolute federal constitutional guarantee for those rights, from section 5, which endows Congress with legislative capacity to protect such rights, the framers of the Amendment assured continued protection of these rights, by making it possible to win enforcement of them in the courts and eliminated the power of Congress alone to diminish them. 57

With regard to Congress specifically intending to abolish state laws which impose racial segregation, the attorneys state that "the whole tenor of the dominant argument in Congress was at odds with any governmentally enforced racial segregation as a constitutionally permissible state practice." 58

The eighth primary argument states that the treatment of public education or segregation in public schools during the Thirty-ninth
Congress must be considered in the light of its status at that time. Arguing from the facts of attendant circumstance, the lawyers admit that the concept of universal free education was not established throughout the states in 1866. The previous attitude had been that the education of children was an individual responsibility. When, however, the concept of universal education was accepted in principle, the progress in that direction was slow, especially in the South. Benefits were denied Negroes even when public education did begin to advance in the South between 1840 and 1860. That the framers of the Fourteenth Amendment were familiar with these conditions of public education is admitted. But also must the fact be recognized that the language these framers used in the Fourteenth Amendment "was broad enough to forever bar racial distinctions in whatever public educational system the states might later develop."

The final point on the first proposition of Part II of the Argument establishes proof that the veterans of the Thirty-ninth Congress, now members of the Forty-second and Forty-third Congress, continued to propose legislation with regard to racial equality, especially in education. Substantiation is given by recounting the events of the two Congresses. The Forty-second Congress (1871) found itself involved in discussion of the effect of the Fourteenth Amendment upon racial segregation, particularly in school systems. Examining statements by the champions of Negro rights and the opposers, the advocates arrive at the following judgment:
The conclusion seems inescapable that as of 1872 a substantial majority of the Republican Senators and perhaps half of the Senate at large believed that the prohibitions of the Fourteenth Amendment extended to segregated schools.60

The Forty-third Congress (1872) was also enmeshed in extended discussion of the issue of segregated schools. The attorneys of the Brown brief give examples of some of the arguments, both pro and con, concerning the constitutionality of Congress's power to prohibit segregation within the states. Drawing on some of the actual arguments of the congressmen, the lawyers quote opinions to reinforce their position. For example, Senator Edmunds made a statement which maintains the same position as the lawyers of Brown:

> What the Congress authorizes us to do is to enforce equality, and... not half-equality, for there is no such thing as half-equality. It is entire equality or none at all. 61

And in a similar vein Senator Boutwell argued that segregation precluded any possibility of either adequate or equal facilities for the reason that the South was financially unable to support two school systems. Likewise Senator Pease of Mississippi made an unequivocal statement expressing the belief that if a bill were passed prohibiting the states from making racial distinctions the South would not rebel. He went on to observe that racial distinctions are degrading to the persons who are discriminated against. His own personal feelings are expressed in these words:
...I want every college and every institution of learning in this broad land to be open to every citizen, that there shall be no discrimination.

From the mass of evidence the lawyers for the NAACP come to what seems to them a fairly clear conclusion: "A majority of the Forty-third Congress, under control of leaders, a number of whom had supported the passage of the Fourteenth Amendment eight years earlier, thought Congress had the constitutional power to ban segregated schools and that it would be good national policy to do so."

The second proposition of Part II of the Argument asserts that there is convincing evidence that the state legislatures and conventions which ratified the Fourteenth Amendment contemplated and understood that it prohibited state legislation which would require racial segregation in public schools. The lawyers present three primary arguments as proof:

1. The eleven states seeking readmission understood that the Fourteenth Amendment stripped them of power to maintain segregated schools.

2. The majority of the twenty-two Union states ratifying the Fourteenth Amendment understood that it forbade compulsory segregation in public schools.

3. The non-ratifying states understood that the Fourteenth Amendment forbade enforced segregation in public schools.

To support the first primary argument, the attorneys examine the actions and the attitudes of the eleven southern states which ratified the Fourteenth Amendment. The evidence set forth is based
on messages delivered by governors, reports made by legislative committees on federal relations, and entries written in the journals of the legislatures.

Arkansas, the first state to be readmitted, has no reference to race in its constitution. It did require the general assembly to provide free schools for all persons of school age. Florida made it a duty of the state to provide education for all resident children "without distinction or preference." North Carolina specified that the general assembly be responsible for a free public school system for all children between the ages of six and sixteen. In this state a move to provide separate schools was defeated by a vote of 86 to 11. The constitution of Louisiana was specific in not prohibiting any students from its schools because of race. The State of South Carolina provided that all the children and youth of the State, regardless of race and color, would be permitted to attend any school, college, or university which was supported in whole or in part by the public school fund. Alabama included an anti-segregation article in its constitution while Georgia, which had no public school system before Reconstruction, in its Constitutional Convention of 1867-68 included an article to provide free public education to all children of the state. Several efforts to include provisions for separate schools for Negro and white children were defeated. A system of free public schools for all children of school age was required by Texas. While Virginia had considerable debate, it finally omitted all reference to race and merely required
a uniform system of public free schools. Likewise Mississippi adopted an educational article that contained no reference to race or racial separation. Tennessee also made no mention of racial segregation in requiring the legislature to provide for common schools "for the benefit of all the people" in the state. One interesting point may be observed, that statutes passed by states requiring segregation in education appeared on the books from four years after ratification, as in the case of Tennessee, to as long as thirty-two years in Virginia.

The second primary argument asserts that the majority of the twenty-two Union states which ratified the Fourteenth Amendment understood that it forbade compulsory segregation in public schools. The attorneys admit that the evidence concerning these states is somewhat less uniform in character in that the Union states were not required to re-examine their constitutions and laws. As a result, some of the states which had required or permitted segregation did not change their laws for several years. The majority, however, did understand that ratification meant the elimination of segregated schools.

West Virginia and Missouri are examples of two states which ratified the Fourteenth Amendment and perpetuated laws requiring segregated schools, with no apparent discernment that such laws were inconsistent with the Amendment. Although the New England states—Connecticut, Rhode Island, Maine, Massachusetts, New Hampshire and Vermont—were strongly abolitionist, segregated schools existed in
some places. With their adoption of the Amendment, all of these states subsequently made the necessary adjustments. The three Mid-Atlantic States—New York, New Jersey, and Pennsylvania—ratified the Amendment and, after a time, brought their laws into conformity. The five Western Reserve States—Ohio, Indiana, Illinois, Michigan, and Wisconsin—also ratified the Amendment. Each had public school systems prior to the Civil War, but racial segregation in schools existed in two of the states, namely, Ohio and Indiana. The other three Western Reserve states had never specifically required separate schools, although in some instances such schools did exist. Of the Western States, Nebraska is significant in that it was admitted to the Union during the Thirty-ninth Congress when conditions were imposed upon its admission which implied that the Amendment intended to eradicate racial distinctions. Kansas, before it ratified the Amendment, had adopted a policy of permissive segregation. After ratifying it, Kansas shifted its position on segregation back and forth until 1879 when the legislature reenacted the law permitting racial separation in schools in its first class cities. In Minnesota the practice of conducting segregated schools had been made a penal offense in 1864; and, therefore, the question of ratification posed no problem. A few years after ratification this state specifically prohibited school segregation by rephrasing its old school law. Prior to ratification of the Amendment, Nevada had a school law which excluded Negroes from public schools. Finally the segregation statute was eliminated from the books. While some few
separate schools did exist in Oregon, there were no compulsory school segregation laws either prior or subsequent to its ratification of the Fourteenth Amendment. In the same category as Oregon is Iowa, which had no laws requiring racial separation in the schools. With this evidence, the attorneys for Brown conclude that "the legislatures in all of the Union States, except three, understood and contemplated that the Amendment proscribed State laws compelling segregation in public schools."

The last primary argument holds that the non-ratifying states understood that the Fourteenth Amendment prohibited enforced public school segregation. There were four states which withheld ratification of the Fourteenth Amendment—Delaware, Maryland, Kentucky, and California. Delaware refused to ratify it because of the belief that the adoption of the Amendment would tend to destroy states rights. Shortly after this decision was made, Delaware passed laws permitting racial separation although it did not sanction compulsory school segregation until after the Plessy decision. Maryland, a loyal former slave-holding state, likewise refused to ratify the Amendment. This state, while maintaining a dual system, had no specific law requiring school segregation. Sympathetic with the South with regard to the status of the Negro, Kentucky is the third state which withheld ratification. It had laws for the benefit of white and Negro children, but it had no compulsory segregation law until 1904. The only state which did not ratify the Amendment simply because it was unable to take a definitive stand is California.
Its attitude toward school segregation had gone through a series of changes, with the ultimate result being the elimination of provisions from the school laws which had required separate schools for Negro children.

With the submission of this final evidence concerning the understanding which the non-ratifying states had with regard to the Fourteenth Amendment and enforced school segregation, the lawyers conclude Part II of the Argument. They are convinced that the evidence is sufficient for the Court to decide "that the constitutional provisions and statutes involved in these cases [Brown et al.7] are in violation of the Fourteenth Amendment and therefore unconstitutional."

Part III of the Argument seeks to answer the fourth and fifth questions propounded by the Court. These questions are based on the assumption that the Court may rule that public school segregation violates the Fourteenth Amendment. The questions concern the problem of immediate or postponed relief to the appellants.

Counsel, arguing from the proposition that this Court should invalidate segregation statutes in the field of public education, present three primary arguments:

1. The Fourteenth Amendment requires that a decree be entered directing that appellants be admitted forthwith to public schools without distinction as to race or color.70

2. There is no equitable justification for postponement of appellants' enjoyment of their rights.71
3. Appellants are unable, in good faith, to suggest terms for a decree which will secure effective gradual adjustment because no such decree will protect appellants' rights.72

In dealing with the first primary argument, the advocates use a line of reasoning based on the *topos of a fortiori*. In attempting to justify their position that the appellants should be admitted forthwith to public schools on an unsegregated basis, counsel point out that if the rights of the adult cases in Sweatt and in McLaurin required vindication forthwith, these same rights are due children for a public education.

The second primary argument asserts that there is no equitable justification for postponement of the appellants' enjoyment of their rights. Here we have the overtones of ethical and pathetic appeal as the brief states:

> These infant appellants are asserting the most important secular claims that can be put forward by children, the claim to their full measure of the chance to learn and grow, and the inseparably connected but even more important claim to be treated as entire citizens of the society into which they have been born.73

The NAACP lawyers, to reinforce their position on this question, use a line of argument based on the *topos of induction*. They hold that the purpose of the Fourteenth Amendment was not to conform to the mores of the states whose actions it was intended to limit. Note the enthymemes:

> The Fourteenth Amendment can hardly have been intended for enforcement at a pace geared down to the mores of the very states whose action it was designed to limit.74
The attorneys then use the refutative method in handling the reasons for the delay or postponement of desegregation as set forth by the appellees. The first reason suggested in the brief of the Appellees in Davis v. County School Board, one of the five cases in this study, is that desegregation may cause unemployment for Negro teachers. The lawyers for the appellants use a counter-argument as they declare:

If this unemployment of Negro teachers is more than a remote possibility, it undoubtedly can be offset by good faith efforts on the part of responsible school boards. On the other hand, if Appellees' suggestion is based upon an unexpressed intention of discriminating against Negro teachers by wholesale firings, it is not even worthy of notice in a court of equity.

The second suggestion from the opposition is that certain of the states involved in litigation will either cease to support or abolish their public school systems rather than desegregate them. The lawyers for Brown et al object, saying that such action is not permissible. Further, such threats are irrelevant in that they are based upon opposition to desegregation in any way and not merely to gradual adjustment. To the third suggestion that there may be trouble ranging from hostility and deterioration in race relations to actual violence, the advocates state that the Court obviously will not be deterred by threats of unlawful action. Reasoning inductively, they say that the states in question are inhabited for the most part by law-abiding citizens who have relied in the past upon what they
believe to be the law. Framing an enthymeme from the *topos* of past fact, the attorneys suggest that if they have obeyed the law in the past, it cannot be presumed that they will not obey the law of this Court. This primary argument is reemphasized by an indirect appeal to the duty of the Court. It is stated that a higher public interest than any urged by the opponents is "the need for the enforcement of constitutional rights fought for and won about a century ago." Urging that public interest requires that the rights given by the Constitution be fully protected, the attorneys for the Brown brief reason from the *topos* of consequences in the following enthymeme: "Survival of our country in the present international situation is inevitably tied to resolution of this domestic issue."

The last primary argument admits that counsel are unable, in good faith, to suggest terms for a decree which will secure effective gradual adjustment. The reason is that such a decree would violate their conviction that the appellants are due immediate relief. The NAACP lawyers are of opinion that because of the lack of uniformity in segregation patterns in the South, it would be difficult to predict the extent of the task of adjustment from segregated to non-segregated schools. The attorneys also reject two suggested methods of postponement made to the Supreme Court by the United States in its Brief as Amicus Curiae.

These suggestions were: (1) "integration on a grade basis" and (2) integration "on a school-by-school basis." The advocates
state firmly that "the first suggestion is intolerable," in that
the rights of the appellants would be denied. They reject the
second plan "because it would mean the deliberate denial of the
rights of many of the plaintiffs. Posing two rhetorical ques-
tions, the attorneys argue from the topos of possible and impossible.
"If desegregation is possible in some schools in a district, why
not in all? Must some appellants' rights be denied altogether so
that others may be more conveniently protected?" As a closing
argument on this point, the lawyers for the appellants point out
that once a right is judicially declared, any plans for postpone-
ment of the remedy are the responsibility of those desiring the
postponement.

We submit that it would be customary pro-
cedure for the Appellees to first produce
whatever reasons they might urge to justify
the postponement of relief. Appellants then
would be in a position to advise the Court
of their views with respect to the matter.80

3. The Conclusion

Ringwalt indicates that the third main division of the brief,
the Conclusion, may have a summary, an appeal, or both. No new
subject matter should be included in the summary—either in the
form of conclusions or evidence. Attorneys for the appellants in
the case of Brown et al conclude their Brief by summarizing the bases
of their argument. They declare:

1. That under the applicable decisions of
the Court, the state constitutional
and statutory provisions herein involved are clearly unconstitutional.

2. That the historical evidence surrounding the adoption, submission and ratification of the Fourteenth Amendment compels the conclusion that it was the intent, understanding and contemplation that the Amendment proscribed all state imposed racial restrictions.

3. That the practice of arbitrarily excluding the Negro children in these cases from state public schools can only be continued on a theory that Negroes, our Negroes, are inferior to all other Americans.

4. That a ruling which will permit such segregation would destroy the intent and purpose of the Fourteenth Amendment and the very equalitarian basis of the Government. 82

C. Summation

I believe that the persuasiveness of the Brief has been achieved in the following ways:

1. By presenting a body of pertinent evidence from which inferences were drawn;

2. By applying both deductive and inductive reasoning so as to establish the logical probability of the arguments;

3. By utilizing rhetorical devices through the inclusion of both non-artistic and artistic proofs;

4. By documenting adequately the sources of and the authority for the facts.

Of special significance to one interested in rhetorical criticism is the distinct way counsel handle the three parts of the Argument. In answering the first four questions in Parts I and II,
the NAACP attorneys rely, to a great extent, on what Aristotle refers to as inartistic proof. This type of proof, Aristotle tells us, belongs "especially to the forensic branch of Rhetoric."

The kinds of non-artistic proof made use of in the Brown brief are law and witnesses. Repeated references to laws and statutes occur throughout the argument as has already been pointed out. The use of ancient witnesses may be observed as the lawyers refer to the judgments on record of the various legislators of the past. Recent witnesses include the experts who contributed useful testimony.

In Part III the attorneys make use of artistic proofs, those which they furnish through their own efforts. Artistic proof may be ethical, pathetic, or logical. Although the greater emphasis is on logical proof, there are examples of ethical and pathetic overtones which are implied and suggested. The use of enthymemes are also used effectively to advance the argument.

One further notes that Part II of the Argument is over twice the combined length of Parts I and III. Part II deals with the question of whether the Congress which submitted and the states which ratified the Fourteenth Amendment understood that it would abolish racial segregation in public schools. In addition to the detailed treatment, this part of the argument is also well documented; of the 447 footnotes for the three parts of the Argument, 410 of them are in Part II. These notes come from books on history and biography; diaries and correspondence; reports from sessions of
Congress as found in the *Congressional Globe*; citations from statutes and laws; proceedings of constitutional conventions; addresses and speeches of proponents and opponents of segregation; quotations from the constitutions; official reports of various state superintendents of public instruction; and newspaper accounts. One observes with interest that despite the exhaustive handling of the aforementioned question by the NAACP lawyers, the Court still regarded the evidence as inconclusive and inadequate to convince.

In addition, one might mention briefly the effectiveness of the style. That arguments fail more often for lack of substance rather than for want of skill in presentation is generally conceded. But it is also accepted that while matters of expression, diction, and style are second in importance to clear thinking, the two are actually inseparable in that a problem cannot be properly defined until it is clearly stated. The analysis of the *Brown* brief reveals that the writers have used lucid language, simple and unadorned. Despite the absence of ornament, the writing is not dull. Various excerpts previously cited are proof of this.

In conclusion, we reaffirm our position that the *Brown* brief is an important means of persuasion in the school segregation controversy. The arguments printed in the Brief are the Invention for the oral arguments to be analyzed in the next chapter.
CHAPTER V
NOTES

1. Case No. 1 (Topeka, Kansas): Robert L. Carter; Case No. 2 (Clarendon County, South Carolina, Thurgood Marshall; Case No. 4 (Prince Edward County, Virginia): Spottswood Robinson; Case No. 10 (Wilmington, Delaware): Jack Greenberg and Louis L. Redding.

2. District of Columbia case: George E.C. Hayes and James M. Nabrit, Jr.


6. See Note 82, Chapter III, pp. 70-71.


10. Brown will be used hereafter for Brown v. Board of Education.


13. Ibid., p. 16.
14. Ibid.
15. Ibid., p. 17.
16. Ibid., p. 20.
19. Ibid., p. 31.
20. Ibid., p. 50.
21. Ibid., pp. 21-22.
22. Loc. cit.
24. Ibid.
25. Ibid.
26. Ibid.
27. Ibid.
28. Ibid., p. 25.
29. Ibid., p. 23.
30. Ibid., p. 22.
32. Lane Cooper, The Rhetoric of Aristotle (New York, 1932), I, 9, p. 54.
33. Brief for Appellants, op. cit., p. 27.
34. Ibid.


40. The Joint Committee of Fifteen, established by the two houses of Congress in December, 1865, had as its objective "to inquire into the conditions of the states which formed the so-called Confederate States of America and report whether any or all of them were entitled to representation in Congress. Its constituents were: Co-chairmen: Representative Thaddeus Stevens of Pennsylvania and Senator William P. Fessenden of Maine; Members: Senator James W. Grimes, Iowa; Senator Ira Harris, New York; Senator George H. Williams, Oregon; Senator Jacob H. Howard, Michigan; Senator Reverdy Johnson, Maryland; Representative John A. Bingham, Ohio; Representative George Boutwell, Massachusetts; Representative Roscoe Conklin, New York; Representative Henry T. Blow, Missouri; Representative Justin S. Morrill, Vermont; Representative Elihu Washbourne, Illinois; Representative Henry Grider, Kentucky; and Representative Andrew Jackson Rogers, New Jersey. The sentiment of the committee ranged from complete dedication to the principle of absolute racial equality, through moderate compliance with the radical bloc, to open opposition to civil rights. Only the two Democratic members of the Joint Committee fall in the latter category—Representatives Grider and Rogers. See Brief for Appellants, *op. cit.*, pp. 93-103.


42. The *Dred Scott v. Sandford* case was decided three years before the outbreak of the Civil War. The case involved Dred Scott, a slave owned by one Dr. Emerson, a surgeon in the United States Army, who carried him into free territory for four years. On his return he sued for his liberty. The case ultimately went to the United States Supreme Court.


47. Ibid., pp. 79-93.
48. Ibid., p. 93.
49. Stevens, Howard, Bingham, Blow.
50. Boutwell, Conklin, Merrill, Washbourne.
51. Williams, Harris.
52. Johnson.
53. Grider, Rogers.
54. Brief for Appellants, op. cit., p. 104.
55. Ibid., pp. 103-108.
56. Ibid., pp. 109-114.
57. Ibid., p. 120.
58. Ibid., p. 119.
59. Ibid., p. 124.
60. Ibid., p. 131.
61. Ibid., p. 135.
62. Ibid., p. 136.
63. Ibid., p. 138.
64. Ibid., pp. 142-182.
65. Ibid., pp. 142-157.
66. Ibid., pp. 157-182.
67. Ibid., p. 182.
68. Ibid., p. 183-188.
69. Ibid., p. 188.
70. Ibid., p. 190.
71. Ibid., p. 191.
72. Ibid., p. 195.
73. Brief for Appellants, op. cit., p. 191.
74. Ibid., p. 191.
75. Ibid., p. 193.
76. Ibid., p. 194.
77. Ibid.
78. Ibid., p. 196.
79. Ibid.
80. Ibid., p. 197.
82. Brief for Appellants, op. cit., p. 198.
83. Cooper, op. cit., 1, 15, p. 80.
84. Part I is 45 pages and Part III, 9; while Part II is 119 pages.
86. Hicks, op. cit., p. 372.
A. Introduction

The first step in the analysis of the oral argument is to isolate it as to speech type. Aristotle, in defining the kinds of speeches according to the kinds of hearers, specifies three types: the deliberative, the epideictic, and the forensic. The deliberative speech is one of counsel and advice; the epideictic, praise or blame; the forensic, prosecution and defense. It is to the last class—the forensic or judicial speech—that the oral argument belongs.

There is a division of opinion with respect to the value of the oral argument. It is the belief of some lawyers and judges, on the one hand, that the important part of the presentation of a case is the brief and that oral argument adds nothing to what perhaps may have been said more effectively in writing. On the other hand, there is a school of thought which says that the oral argument is of great value and quite as important as the written brief.

Nor is this controversy a new one. Some seventy years ago, minimizing the importance of the oral presentation, one of England's greatest advocates declared that "the issue of a cause rarely depends on a speech and is but seldom ever affected by it...." Recently Justice Robert H. Jackson of the United States Supreme
I think the justices would answer unanimously that now, as traditionally, they rely heavily on oral presentations. Most of them form at least a tentative conclusion from it in a large percentage of the cases....So long as controversies between men have to be settled by judges, proficiency in the art of forensic persuasion will assure one of first rank in our calling. 4

In like vein Chief Justice Arthur T. Vanderbilt of the Supreme Court of New Jersey observes that

...the written brief, save in the rarest instances, cannot hope to move its readers. It achieves its objective if it convinces. The aim of the oral argument, however, is to persuade. The human presence, and particularly the human voice, can convey meanings, can produce reactions, both favorable and unfavorable, far beyond the power of the printed page. More often than most counsel imagine, the oral argument may change the judge's mind, no matter how carefully he may have studied the briefs in advance. 5

Taking note, thus, of these divergent views, one may take the middle ground and concede with Walter that while the oral argument cannot be a substitute for a printed brief, neither is the printed page a complete substitute for a living personality. Since the oral presentation is a means of augmenting and clarifying the arguments in the appeal brief, one can understand former Chief Justice Hughes' sage observation that "the desire of full exposition by oral argument in the highest court is not to be gainsaid."
In analyzing the oral argument, one becomes aware of the difficulties the lawyer encounters in presenting it. Since, in the opinion of the late John W. Davis, an eminent constitutional lawyer, the chief purpose of the oral argument is a simple and sincere desire to help the court, the lawyer’s first handicap is that he is oratorically limited. Because the court wants to hear only pertinent information, the forensic speaker has to avoid many of the rhetorical devices which would otherwise be permissible. He may not indulge in pleasant descriptions, amusing anecdotes, witty sayings unless they bear directly on the subject of discussion and stimulate the ideas of the court on the points involved. "While nothing useful is to be discarded, nothing useless is to be intruded...." Another difficulty which the lawyer faces is the limitation of the oral argument as to time. In the United States Supreme Court the time allowed for each side is one-half hour to one hour, depending on the nature of the case. An advocate must be very careful not to be verbose or he may use his allotted time before he really presents his case. While it appears that lawyers attempt to observe this rule, they may, at the outset, request additional time, if such is necessary. This limitation does not suggest that the court thinks the oral argument unimportant; it simply means that there is no time for oratory as such and that the spoken argument to be helpful must be to the point. Since the advocate, particularly, in the argument of an appeal, is consciously
and deliberately trying to convince the legal mind, his whole art is choosing what tends to attract judicial favor and avoiding whatever repels.

To provide a proper frame of reference for the analysis and evaluation of the oral argument of this study, the writer will (1) describe the occasion and the audience, (2) identify the appellants in the Brown case and their opponents, and (3) discuss briefly the Justices of the Supreme Court.

B. The Occasion, the Audience, and the Advocates

On December 7, 1953, at twelve o'clock noon, the Supreme Court justices, led by Chief Justice Earl Warren, filed into the marble-colored courtroom. The occasion was the hearing of the final oral arguments on what is regarded as one of the most momentous issues to come before the Court in its 164-year history. The crucial question was: Should segregation in the public schools be abolished?

For two additional days—December 8 and 9—the highest court in the land was to continue to hear final arguments on the problem of segregation in education. The principal audience may be referred to as the nine justices who listened with intense interest to the presentations. These nine men realized that the decision which they would make could well be a landmark in the history of race relations. Included also among this immediate audience were the spectators who, realizing the significance of the case, crowded the courtroom. One might observe at this point that appellate courts are seldom filled
with laymen because usually the proceedings of this type of court are far less publicized than are the jury trials of lower courts. There is no cross-examination of witnesses, and usually there is none of the excitement nor the human interest that is found in the courts of first instance. But at these sessions of Court there were assembled some three hundred spectators: lawyers, reporters, class-cutting law students, ordinary individuals of both races. Such were the constituents of the immediate audience.

In addition to those who were within the hearing of the proceedings, there was a remote audience. Most directly concerned were over ten million Negroes, 62% of the total Negro population, who live in the seventeen southern states and the District of Columbia. Intensely interested also were the majority of southern whites who opposed any change in the status quo. The attention of those thoughtful Americans who deplored the disparity between the principles and the practices of American democracy was likewise directed toward the Court. Not to be omitted from this vast but remote audience were the people of the rest of the world, two-thirds of whom are colored, who were waiting to see what steps the United States would take toward making one-tenth of its population first-class citizens.

It was in this specific setting that the advocates for and against segregation appeared. On behalf of the appellants came Thurgood Marshall, Chief Counsel for the NAACP, key figure in a
quarter century of hard-fought legal combat on behalf of the Negro. Assisting him were Robert L. Carter and Jack Greenberg of New York, Spottswood Robinson of Virginia, all of the NAACP legal staff; Louis L. Redding of Delaware, George E. C. Hayes and James Nabrit of Washington, the latter two retained by the parents in the District of Columbia case. Leading the opposition was John W. Davis, Democratic nominee for President of the United States in 1924, veteran of more Supreme Court battles than any other lawyer in American history. He had associated with him the attorney generals of two states, J. Lindsay Almond, Jr., of Virginia and H. Albert Young of Delaware; Paul E. Wilson of Kansas and T. Justin Moore of Virginia. Assistant Attorney General J. Lee Rankin of Department of Justice spoke for the United States.

One notes with interest the respect which Thurgood Marshall had for his chief opponent. Marshall, age 45, had long been an admirer of the 80-year old constitutional lawyer, John W. Davis. It is said that during Marshall's law school days at Howard he used to cut classes regularly to observe the appearance before the Supreme Court of Mr. Davis, whose finest role was not swaying juries at a trial but persuading judges on an appeal.

C. The Supreme Court Justices

In accordance with the thinking of Aristotle, we accept the fact that "rhetoric finds its end in judgment." In forensic speaking the decision of the court is the judgment. The advocate,
then, is concerned with producing the right attitude in the hearer so as to win the right judgment. The advocate's purpose in making an appeal is to move the court from a condition of indifference or hostility to one of interest and favor. To do this he must seek to understand each member of the court as a step toward knowing how best to approach and convince him. John W. Davis once told an assembly of lawyers that knowing the mental habits of any particular judge and adapting yourself to his method of reasoning is not artful; it is simply elementary psychology. Another consideration is the basic difference between dealing with an appellate court and dealing with a jury. Many arguments appealing to twelve laymen might not be suited to the "more tutored ears and minds of judges." Even so Stryker suggests that "it would be a cardinal mistake for one moment to forget that for all their learning and austere dignity, judges are only men."

Justice Felix Frankfurter of the present Supreme Court concedes that the attitude and philosophy of the justices themselves are factors in decision making. He says:

Since the litigation that comes before the Supreme Court is so largely entangled in public issues, the general outlook and juristic philosophy of the justices inevitably will influence their views and in doubtful cases will determine them....

If, as Robinson suggests, the lawyer must adapt his thoughts, language, and manners to those of the members of the Court, one may...
infer that the advocate must find out as much as possible about the justices of the Court. He carefully investigates the history and the predispositions of the judges. He evaluates them in an attempt to determine what factors may produce what decisions in a given case. This evaluation might well involve the posing of certain questions. From what sections of the country do they come? By whom were they appointed to the bench? May they be classified as liberals or conservatives? What is their constitutional philosophy? While it is not possible to answer categorically every question about each justice, the writer feels that the following discussion will enable the reader to know what perhaps Thurgood Marshall and his legal staff ascertained about the Court.

The Chief Justice of the Supreme Court which heard the re-argument of Brown v. Board of Education was Earl Warren, a Republican from California. Appointed to the Court by President Eisenhower, Mr. Warren succeeded the late Chief Justice Fred Vinson, who sat on the Court during the early deliberations on the cases. Varied opinions were expressed, before and after Warren's appointment, concerning his attitude toward civil rights. Blaustein and Ferguson indicate that prior to the May 17 decision Warren was classified not as a liberal or a conservative, but as a middle-of-the-roader. James Reston, just a few days before Warren was named Chief Justice, stated that it was generally believed by students of the Court that Warren, "if appointed...would tend to be with Justices Douglass and Black, or with their more moderate brethren, Justices Jackson and
Frankfurter, more often than the late Chief Justice." After Warren's appointment, a writer for Time declared that the new Chief Justice had a "well-illustrated attitude of racial tolerance" and supported his opinion with three examples: (1) Warren was reared in a town where segregation was unknown; (2) one of his good friends in college was a Negro, who later received a high state position during Warren's governorship; and (3) he was said to have laid down a rule after he became governor to the effect that there was to be no racial or religious discrimination in hiring state personnel. The Chief Justice has the reputation of being a good administrator and a natural leader—a man popular with and respected by his colleagues.

Associate Justice Hugo L. Black, a Roosevelt appointee, is a native of Alabama. He is considered an ardent New Dealer and one of the strong liberals on the bench. Mr. Black's record on civil rights has been on the positive side. An important aspect of his judicial philosophy is his interpretation of the Fourteenth Amendment, with its "equal protection" and "due process" clauses. For the major portion of his tenure on the bench, he has tried unsuccessfully to get his colleagues to adopt his construction of that Amendment. His position on this matter is that just as "the first eight Amendments to the Constitution—the specific provisions of the Bill of Rights—enumerate the restrictions placed on federal government" so does the Fourteenth Amendment incorporate the first eight as restrictions against the states. Mr. Black further believes that
faithful adherence to the specific guarantees in the Bill of Rights insures a more permanent protection of individual liberty than the majority decisions of the Court.

Justice Stanley Reed of Kentucky is another Roosevelt appointee. Mr. Reed, who has spent nearly a score of years writing opinions on virtually every aspect of constitutional law, is generally regarded as a part of the conservative core of the Court. His views on the Fourteenth Amendment reveal him more as a supporter of economic interests than of individual rights, except where the Negro is concerned. He wrote the opinion that invalidated legislation requiring all-white primary elections. Said he: "Under our Constitution the great privilege of the ballot may not be denied a man by the State because of his color...."

The most complex of the nine men of the United States Supreme Court is Justice Felix Frankfurter. A native of Massachusetts, Mr. Frankfurter was also appointed by the late President Roosevelt and was at one time a leading member of Roosevelt's Brain Trust. Blau-stein and Ferguson feel that "if some of Justice Frankfurter's colleagues are unpredictable because they have written so little, the former Harvard Law Professor presents an enigma because he has written so much." A great deal of what he has written for the legal journals concerns the role of the Supreme Court. Mr. Frankfurter has been classified both as a radical and as a reactionary. Some of his early liberal supporters regard him as a turncoat, when
they recall his defense of Sacco and Vanzetti. Conservatives, on
the other hand, look askance at his liberal past. He has been
referred to as the "Emily Post" of the Court. As to his legal
philosophy, judicial restraint, which he calls "dominating humility,"
is the keynote. He does not consider the Court either omnipotent
or omnicompetent. Reluctant to disturb existing enactments, he
defers to authority outside of the Court. He says: "The admoni-
tion that judicial restraint alone limits arbitrary exercise of our
authority is relevant every time we are asked to nullify legisla-
tion."

Another enthusiastic New Dealer and Roosevelt appointee is
Justice William O. Douglass, originally of Oregon, now from Connec-
ticut. A staunch liberal, Mr. Douglass believes that in constitu-
tional law "stare decisis must give away before the dynamic component
of history." It is his opinion that throughout American history
the Supreme Court has never shown any hesitancy in overruling
constitutional decisions that were not adaptable to the demands of
the new age.

The late Justice Robert H. Jackson of New York, an appointee
of President Roosevelt and a former member of the Brain Trust, was
closely related to Justice Frankfurter in legal philosophy and
judicial action. Conscious of the mandate of judicial restraint,
he was reluctant to brand as unconstitutional state and federal
enactments. Like Mr. Frankfurter, he had written many scholarly
articles in the judicial field. An indication of his position on
desegregation may be noted in his comments on the "equal protection"
clause of the Fourteenth Amendment: "There is no more effective
practical guaranty against arbitrary and unreasonable government
than to require that the principles of law which officials would
impose upon a minority must be imposed generally." Actually he
may be said to have the same point of view as the NAACP. This is
evidenced, for example, by his pronouncements when California
enacted legislation to stem the Okie migration of the late 1930's.
The state made it a misdemeanor to bring any "indigent person" into
California. Said Justice Jackson: "'Indigence' in itself is neither
a source of rights nor a basis for denying them. The mere state of
being without funds is a neutral fact—constitutionally an irrele-
vance, like race, creed, or color." In this case Mr. Justice
Jackson pointed out that the migrant Okies were United States
citizens and under the Fourteenth Amendment were due equal protection.

The last members of the Court are Justices Harold H. Burton
of Ohio, Tom C. Clark of Texas, and Sherman Minton of Indiana—all
of whom are Truman appointees. Justice Burton, the only other
Republican on the bench except the Chief Justice, and Justice Minton
are a part of the conservative segment of the Court. In this
respect, Justice Clark is somewhat difficult to analyze. An un-
fortunate victim of criticism because his appointment was regarded
as strictly political, Mr. Clark is still trying to refute this
charge. Although he may not be classed as an intellectual, a liberal,
or a brilliant lawyer, Justice Clark has demonstrated considerable legal talent. His Texas background does not provide a key to his judicial views on racial discriminations. It is interesting to observe that while he has been denounced as anti-Negro, it was he who demanded the admission of Negro lawyers to the Federal Bar Association during his term as president.

One other justice who was a vital part of the early deliberations on the school segregation cases might be mentioned—the late Chief Justice Fred M. Vinson of Kentucky, a Truman appointee.

It was Justice Vinson who directed the closed sessions in which were drafted the five questions propounded for reargument.

Blaustein and Ferguson say:

It was the Vinson court, with Vinson writing unanimous opinions on behalf of the Court, which set the pattern of decision which was to lead to the major determination on May 17, 1954.

Vinson in a previous civil rights case, *McLaurin v. Oklahoma Board of Regents*, had indicated his belief in the principle of judicial restraint; hence, in this Chief Justice one finds an individual who may well have laid the groundwork for the unanimous decision by proposing reargument.

These, then, are the Justices of the Supreme Court who heard the eleven hours of argument. Chief Justice Warren, dominating the bench, occasionally asked a quiet question to clarify a point. Associate Justice Felix Frankfurter "fired quick, needling questions at the attorneys, sent messengers scurrying for law books."
entire Court obviously realized both the enormity of the decision which they would have to make and the implications which result. With regard to the individual positions of the Justices on racial discrimination, one notes with interest that Thurgood Marshall and his associates made the following positive statement in their briefs:

Every member of the present Court has from time to time subscribed to the view of race as an irrational premise for government action.43

D. Analysis of the Oral Argument

1. Invention

From the time of the ancients there has been general agreement that the most important part of a speech is the ideas. The discovery of valid, or seemingly valid, arguments to render a cause plausible is what Cicero calls invention. Robinson says that the advocate will select the ideas best suited to the case, excluding those which may divert the attention of the Court. The first duty of the advocate, therefore, is to discover the decisive or ultimate issue and then adapt his subject matter or invention to it.

After the lawyer determines the ultimate issue, he must establish arguments to support his position. He gets these from all legal principles and rules bearing upon the question which can be found in recognized authorities. If such do not specifically apply, the advocate must deduce from them particular propositions governing the cause at bar and make application of them. The arguments used
by the lawyer should be the strongest which the case affords.

Some of the sources for these arguments are (1) statutes, including written constitutions; (2) maxims and definitions, deriving their authority from universal assent and judicial sanction; (3) precedents and decisions by which new rules are formulated; and (4) rules of court.

Let us, first, turn our attention to invention as it applies to Thurgood Marshall’s oral argument before the Supreme Court on December 7. Ringwalt’s opinion is that to argue effectively, one must first have a belief he wishes to have accepted. Mr. Marshall, in his opening words to the Court, indicates the issues he will discuss and states the belief he wants accepted. The specific question is whether or not the Supreme Court has judicial power in construing the Fourteenth Amendment to abolish segregation in the public schools. He expresses his belief in a succinct reply: “And our answer to that question is a flat ‘yes.’” His sources of invention are revealed in his next statement:

But in answering the question ‘Does the Court have judicial power in construing the Amendment to abolish school segregation?’ we want to develop from the legal precedents in this case the necessary answer....”

Marshall specifies the three groups of legal precedents upon which he will rely to substantiate his position. The first group consists of decisions by the Supreme Court in recent years which uphold the idea that, under the Fourteenth and the Fifth Amendments,
neither a state nor the federal government can discriminate on the basis of race, class, or national origin. The second group includes decisions of the Supreme Court immediately following ratification of the Fourteenth Amendment, which make it clear that there is to be no discrimination on the basis of race, class, or national origin. The third group is comprised of decisions, some used inferentially, which are relied upon by the opponents to support the idea of separate but equal. In addition to depending on these legal precedents, Mr. Marshall cites a statute as part of his invention.

1. Non-Artistic Proof

Proof is composed of arguments by which the advocate establishes his propositions and overthrows the objections of his adversary. It is the essence of forensic speaking, the part on which success or failure ultimately depends. Persuasion may be effected by using non-artistic and artistic proof. Since the former belongs especially to the forensic branch of rhetoric, let us first examine Thurgood Marshall's use of non-artistic proof in his oral argument of appeal.

When Mr. Marshall indicates in his preliminary statement what he proposes to do, Mr. Justice Jackson comments that the chief concern, as it appears to him, is whether the Court, after all that has intervened since the passing of the Fourteenth Amendment, has the power to abolish public school segregation or whether such power should be left to Congress. Aristotle says that if the written law favors the case, the speaker must say that it is the judge's
obligation to decide in favor of that law. This Thurgood Marshall does in answering Justice Jackson. Using a statute, Act of 1871, Title 8, Section 43, Mr. Marshall declares:

...it is our position that the Court gets specific power in addition to the regular judiciary act in this Act of 1871, Title 8, which is now Title 8, Section 43 which, I submit, not only gives the Federal Courts power, but imposes upon the Federal Courts a specific duty...

Marshall also cites cases, which he uses either specifically or inferentially, as bases for his position. These cases are Strauder v. West Virginia, the Slaughter House cases, Tanner v. Little, Pleas v. Ferguson, Gong Lum v. Rice, McLaurin v. Oklahoma, and Sweatt v. Painter. The last type of inartistic proof which Mr. Marshall uses is witnesses. Aristotle refers to ancient witnesses as men of note whose judgments are on record. Marshall's quoting of Justice Miller's opinion in the Slaughter House cases of 1873 and of Justice Strong's in the Strauder v. West Virginia case of 1880 may be classified as references to ancient witnesses.

2. Artistic Proof

The second kind of proof which may be employed by the forensic speaker is artistic. This type consists of that means of persuasion furnished by the method of rhetoric through the speaker's own effort. There are three types of artistic proof: ethos, pathos, and logos. Ethos, or moral suasion, resides in the character of the speaker. Although the speaker's character is one of the most effective media in persuading the listener, the speaker must realize that the trust
is also created by the speech itself. **Pathos** consists of producing a certain attitude in the hearer through an appeal to the emotions. **Logos** refers to persuasion effected by the arguments through which are demonstrated "the truth, real or apparent, by such means as inhere in particular cases."

One agrees with Aristotle that logical proof is the most effective means of persuasion, but one also realizes that ethical and pathetic proof have their places in the forensic situation. Considering, first, ethical appeal, the writer refers the reader to Chapter IV, which discusses Thurgood Marshall, the man. From that sketch, one may infer that Mr. Marshall possesses the three qualities characteristic of **ethos**: intelligence, character, and goodwill. Thurgood Marshall's reputation as a constitutional lawyer and as a man of probity are, in the writer's opinion, potent weapons in convincing the Court.

Robinson suggests that the advocate, knowing that the purpose of a court of law is to administer a specific remedy for a specific wrong, should never attempt to prostitute the power of the court by excitation of the emotions. One notes, over and above this, that the court is more easily moved by an intellectual and logical appeal than by any other type. Nevertheless, one cannot rule out completely pathetic proof in Marshall's oral argument. Cognizant of the intensity with which Thurgood Marshall believes in the Constitution, conscious of the deep sympathy he has for his deprived clients, aware of his sincere belief in the equality of all men, one must admit
that naturally he would be emotionally motivated by his cause.

Despite the fact that Marshall displays no histrionics, one reporter has observed that in the courtroom he "is at his most moving when he is most moved." There is no attempt on Marshall's part to substitute emotional appeals for reason, but one may point out the subtle plea for fair play when he declares that the Fourteenth Amendment was adopted to ensure fair treatment of Negroes. Note his words:

...the Fourteenth Amendment was adopted for the express purpose, and the purpose was, to correct the situation theretofore existing in regard to the treatment of Negroes, slave or free, in a different category from the way you treated the others.

In another instance Mr. Marshall makes an indirect appeal to the Court's sense of justice as it relates to the intention of the United States Constitution:

...as of this time we have a test to see whether or not the public policy, customs and mores of the states of South Carolina and Virginia or the avowed intent of our Constitution, as to which one will prevail.

Since logical proof is the chief element of persuasion in legal presentations, let us examine the oral argument for Marshall's use of *logos*. It has been pointed out previously that the purpose of the oral argument is to augment the brief and clarify for the Court any points of controversy. The Court, thus, is free to interrupt the argument to question the advocate more closely. While Thurgood Marshall's chief opponent, Mr. John W. Davis, long
recognized as the dean of the appellate bar, has a reputation for seldom being interrupted by Court, Mr. Marshall has one for being frequently questioned by various members of the Court. Marshall is said to be as proud of these exchanges as Davis should be of his immunity from them.

The interrogation of Mr. Marshall provides the critic the opportunity to observe his ability to reason closely. For example, Mr. Justice Frankfurter questions Marshall as to whether he is using the Act of 1871 to support his claim that the Court has the power to use the Fourteenth Amendment to prohibit segregation, or he is relying on the compulsions and implications derived from the Fourteenth amendment. In answering Mr. Marshall argues from the legal precedents of the Strauder and the Slaughter House cases, which he feels are the key to the situation because they were decided at the time nearest to the adoption of the Fourteenth Amendment. He reasons from authority, stating that the decision in the Slaughter House cases makes it clear that the Amendment was adopted for the express purpose of correcting an existing situation in which Negroes were discriminated against. As substantiation Mr. Marshall quotes what Justice Miller had to say in those cases:

The existence of laws in the states where the newly emancipated Negroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied by this clause \( \langle \text{equal protection clause} \rangle \), and by it such laws are forbidden.68
As Justice Frankfurter continues to question Mr. Marshall, they agree that Justice Miller's interpretation of the Fourteenth Amendment was that it intended to give Negroes not certain rights, but all rights. The problem of certain rights as opposed to all rights enables Mr. Marshall to state that in the Strauder case the decision upheld the idea that constitutional amendments, which are meant to set down broad principles, are, consequently, written in broad language. This decision made it clear that the framers of the Fourteenth Amendment did not enumerate rights because they intended that all rights should be included.

Mr. Marshall advances his argument concerning judicial power by stating that a reading of the debates proves that the Amendment was adopted for the express purposes of depriving the states of the authority to enforce the existing Black Codes and of preventing them from setting up additional ones. Note here that his line of argument is based on the topos of future fact—consequences will occur if their natural antecedents have occurred—from which the following enthymeme may be constructed:

If the states set up Black Codes in the past, it is likely that they will set up additional ones in the future.

Marshall, then, indicates that what strikes him as being crucial in the present controversy is that the opponents have not proved that the statutes involved in the present case are not the same type as those discussed in the debates and in the early decisions of the court concerning the Black Codes.
Thurgood Marshall's skill in refuting his opponents' argument is revealed as he continues to discuss the question of judicial power. The appellees have claimed that the only way states such as South Carolina and Virginia can keep schools is to have segregation. They have further insisted that the debates fail to show that Congress intended that public school education would come within the province of the Fourteenth Amendment. Mr. Marshall retorts that this is not the way to approach the problem. He believes the conclusion that the Fourteenth Amendment was designed to destroy all legislation dealing with class and caste is inescapable. The appellees, says Marshall, must now show that the Fourteenth Amendment was not intended to include segregation in public schools. Exposing the fallacy in his opponents' arguments, Marshall declares that since they have admitted by their references to the McLaurin case that segregation in education does come under the purview of the Fourteenth Amendment, they are in the impossible position of trying to prove that the Court, therefore, is without power to say whether or not it can apply to segregation in the public elementary and high schools. An enthymeme based on the topos of opposites may thus be evolved:

If you admit that education on one level is within purview of the Fourteenth Amendment, you would have to admit that education on another level is also.

Mr. Justice Frankfurter injects a comment at this point which gives Thurgood Marshall the opportunity to restate the crucial issue
of the case and present the problem which faces the Court. Note the following statements:

Justice Frankfurter: I should suggest that the question is not whether this Court loses its power, but whether the states lose their powers. I understand the answer you make to it—

Mr. Marshall: It is my understanding, yes, sir, I think definitely, Mr. Justice Frankfurter, that a reading of the two briefs in this case demonstrates clearly that as of this time we have a test to see whether or not the public policy, customs and mores of the states of South Carolina and Virginia or the avowed intent of our Constitution, as to which one will prevail.69

Concluding his answer to the question on power, Mr. Marshall attacks the appellees' argument that racial prejudice is a factor which must be considered. Marshall argues from legal precedents, one of which he uses inferentially and the other to "turn the tables" on his opponents. He mentions first the case of Tanner v. Little, which involved the use of green stamps by trading stores. While he is not advocating the actual final decision in that case, he is applying inferentially the following language of the decision:

Red things may be associated by reason of their redness, with disregard of all other resemblances or of distinctions. Such classification would be logically appropriate. Apply it further: Make a rule of conduct depend upon it, and distinguish in legislation between red-haired men and black-haired men, and the classification would immediately be seen to be wrong; it would have only arbitrary relation to the purpose or province of legislation.70

Carrying the inference to an applicable conclusion, Thurgood Marshall declares that the opposition would have to show, as the NAACP lawyers
have shown to the contrary, "(1) that there are differences in race; and (2) that differences in race have a recognizable relationship to the subject matter being legislated, namely, public education."

Marshall "turns the tables" on his opponents who have used *Yick Wo v. Hopkins* to support their claim that the state does have these powers of classification. Marshall asserts that the Court is thoroughly familiar with this case, the principle established therein being directly to the contrary.

Thurgood Marshall, having concluded his answer to the question on power as originally raised by Mr. Justice Jackson, turns his attention to a discussion of the doctrine of separate but equal which has been relied on by the opposition and by the lower courts. Marshall concedes that there is a point of distinction in the *Plessy v. Ferguson* case in that it involved transportation instead of education; but, he continues, there is no point of distinction in this controversy since *Plessy v. Ferguson* has been recognized as the originator of the separate but equal doctrine. Marshall also attacked the appellees' use of *Gong Lum v. Rice*, the case in which a Chinese child objected to being classified as a Negro and put in an inferior school. The decision in Gong Lum gave the state the right to classify on the basis of class, race, or ancestry. First, he argues from the *topos* of *past fact* that *Plessy v. Ferguson* and Gong Lum are out of step with the earlier decisions of the Court in the Slaughter House and the *Strauder v. West Virginia* cases. His second line of argument
is from *existing decision* when he states that the Gong Lum and Piessy decisions are also contrary to those of recent cases before the Supreme Court.

The recent cases to which Mr. Marshall refers are the Sweatt and the McLaurlin. At this point Justice Reed indicates that in order for Marshall's conclusion to hold he has to take the Sweatt case based on the separate but equal doctrine. Marshall disagrees, stating that the decision in *Sweatt v. Painter* found that certain intangibles produced inequality. In addition, he states that the McLaurlin case does not embrace the separate but equal doctrine. As a result of further questioning by Justice Reed and Justice Frankfurter, Thurgood Marshall continues to emphasize what is actually the crux of the argument, that is, that the state is deprived of the power to make distinctions based on race. Reasoning from cause to effect, Marshall says:

...it is clear to me, to my mind, under the Fourteenth Amendment that you cannot separate people or denote that one shall go there if the facilities are absolutely equal; that is the issue in this case, because in the South Carolina case especially it is admitted on record that every other thing about the schools is equal, schools curricula, everything else.72

To further stress his point, Mr. Marshall uses the *topos of induction* as he declares:

...It is my understanding and my argument, Mr. Justice Frankfurter, that the Court has gradually come step by step, which is the proper way to come along, on the question of the right and power of the state to draw any line, and we have gone—through from college—I mean from law
Justice Frankfurter's next comment permits Mr. Marshall to state that he and his colleagues have deliberately used an argument sufficiently broad to exclude the issue of equality. He reasons, however, that since the Court is emphasizing equal in equal protection, the appellants have been obliged to show that the intangibles in the Sweatt case are also present in the Brown case. And he concludes, "if necessary the doctrine of Sweatt and McLaurin could automatically on all fours come here except for the question of difference of schools." Here Thurgood Marshall is using a fortiori reasoning. He concludes this point by emphasizing that the questions propounded by the Court requested that the appellants find out whether class legislation and segregation, in and of itself, violates the Fourteenth Amendment. Marshall declares that they are convinced that such is the case. He further contends that he is basing his claim chiefly on the equal protection clause.

Justice Frankfurter then asks Mr. Marshall if he would still contend that segregation is unconstitutional if the situation were reversed—if more money were spent and better schools provided for Negroes than for white children. Marshall's emphatic and unqualified answer is "yes."
The remainder of the argument is devoted to clarifying the appellants' position on the basic issue of the case. To Marshall the issue is segregation per se, "separate but equal" being irrelevant. Mr. Marshall makes it clear that his attitude is that separate can never be equal, which judgment he arrives at by arguing from causal relation. Note the following example:

...And the Delaware case...demonstrates a situation more so than it does in South Carolina, because in Delaware so long as the schools are unequal, O.K. And then the schools are made equal, and if I understand the procedure, you move the Negroes back to the colored school, and then next year you put ten more books in the white school, and the colored school is unequal, and I do not see how that point would ever be adequately decided, and in truth and in fact, there are no two equal schools, because there are no two equal faculties in the world in any school. They are good as individuals, and one is better than the other...that is the trouble with the doctrine of separate but equal; the doctrine of separate but equal assumes that two things can be equal. 76

When Justice Reed then says that "there is not absolute equality, but substantially equal, in accordance with the terms of our cases," Marshall agrees and makes his closing statement, indicating that the use of the word *substantial* has in fact amended the Fourteenth Amendment. Says he:

"Substantial" is a word that was put into the Fourteenth Amendment by *Plessy v. Ferguson*, and I cannot find, and it cannot be found in any place in the debates. 78

Since the success or failure of forensic speaking depends on the effectiveness of the advocate's arguments, one is impressed by
Thurgood Marshall's skillful use of inventive resources. Mr. Marshall's chief strength is his ability to amass logical proof. His thorough knowledge of the case and his logical reasoning are significant parts of his invention. One observes Marshall's astuteness in choosing legal precedents which render his case more convincing. In some instances he uses the cases specifically; in others, inferentially. Mr. Marshall demonstrates his skill in reasoning by utilizing both the inductive and deductive approach. He frequently appeals to authority, reasons from cause to effect, and uses enthymemes. That he understands the working of the minds of the Justices is revealed in the manner in which he answers, and sometimes anticipates, their questions. One notes also the effective way Thurgood Marshall refutes his opponents by exposing their fallacies and "turning the tables." An evaluation of Mr. Marshall's invention, thus, leads to the conclusion that it is indeed his strongest weapon in this case.

2. Arrangement

One of the main divisions of classical rhetoric is dispositio which we today call arrangement. In the opinion of Russell H. Wagner, this term has long been misinterpreted. The familiar connotation is merely to define it in terms of the parts of a speech. Wagner agrees, however, with the Ciceronian conception of dispositio, which calls not only for the arrangement of the speech in a certain order but also for the organization of the material in accordance with the weight of the subject matter and the judgment of the speaker. While Aristotle does not give a detailed discussion of dispositio, he does
infer, in addition to specifying the parts of the speech, that the selecting and arranging of materials of a speech should be adapted to the function and character of the audience. Our next step, then, is to see to what extent Thurgood Marshall adheres to the principles of arrangement in both the grouping of ideas into the familiar pattern of division and the organizing of the arguments in the most effective order.

If ideas are grouped into the Aristotelian pattern, there are two indispensable constituents of a speech: the Statement and the Argument. In Aristotle's opinion there may be no more than two other elements, the Proem and the Epilogue. Robinson, in advising the forensic orator, agrees that there may be the same four parts, which he calls Exordium, Statement and Partition, Proof and Refutation, and Peroration. He admits that if the purpose of one or more of these parts has been accomplished in another way, by brief, for example, the advocate may simply allude to them.

Because of the limitations of the argument of appeal, we find that Mr. Marshall omits the Proem or Exordium. The general purposes of the Exordium—to conciliate the hearers, to attract their attention, to interest them in the subject of discussion—are extraneous in this situation. The Court did not need to be conciliated, nor did its attention have to be attracted. As to its interest in the subject, the Court itself demonstrated that when it handed down the five questions for reargument.
Having omitted the Proem, Marshall begins with the Statement, which is very brief:

May it please the Court, Mr. Robinson has addressed himself particularly to the Congressional history and specifically to the first two questions asked by the Court. I would like for a moment to review particularly questions two and three. 83

Mr. Marshall then proceeds to specify the issues of the controversy and to indicate the order in which he will develop the arguments.

Since the purpose of the Argument is to convince the hearer, the effectiveness of this division rests in part on the organization of the material into the most effective order. Thurgood Marshall's order is governed, to some extent, by the Court. As he begins to follow the order which he has specified, he is interrupted by questions from the Justices. Since these interruptions interfere with the planned presentation of the material, they preclude the emergence of the Argument as a distinct division. Despite this, however, Mr. Marshall does not neglect the arguments he had prepared; for he returns to them consistently after each interruption, develops them, and indicates what topic is to come next. Note the following example:

Now, with that, it seems to me that if I am correct in interpreting Mr. Justice Jackson's position...it seems to me that is a sufficient answer to it, and if it is, I would conclude it by going back to the difference between the cases /in their argument/ and the cases on the other side....84
Just as Thurgood Marshall has no clearly defined Proem, neither does he have an Epilogue or Peroration. Having completed the Argument, he closes with these words, which indicate the limitations of time in the presentation of appeal arguments:

If it please the Court, we would like to, if possible, conserve the balance of the time for rebuttal. Mr. Robinson was a little over his time, and I cut mine down. Unless there are any questions on this particular point, because we still have some time left, I would like to leave that for rebuttal. 85

Although Mr. Marshall's presentation was interrupted, he obviously organized his arguments in an order that would most effectively produce conviction. When he begins, Marshall indicates that he proposes to develop his arguments from legal precedents, which divide themselves into three groups. He then states that although it would be perhaps more logical to discuss the precedents in chronological order, he would like to divide them as follows:

1. Cases the Supreme Court had decided in recent years in which, on the basis of the Fourteenth and the Fifth Amendments, the government was prohibited from using race, class, or national origin for classification purposes.

2. Decisions of the Court construing the Fourteenth Amendment in the same way during the period immediately following the ratification of the Fourteenth Amendment.

3. Cases alleged to support the separate but equal doctrine.

Mr. Marshall's indication that he prefers a method other than the chronological, which might be more logical, suggests that he prefers
to arrange his arguments in the order of increasing importance. He chooses to discuss recent decisions first and then move back to the decisions near the time of the ratification of the Fourteenth Amendment. He leaves until the last the most important argument, that which concerns the separate but equal doctrine. Realizing the emphasis which the opposition is placing on the Plessy case which has been the precedent for separate but equal, Thurgood Marshall apparently feels that his discussion of this argument will be his most effective one and, therefore, reserves it for the last.

When Marshall then begins to discuss the first group of cases, Mr. Justice Jackson interrupts with the observation that the Court is not troubled about its own cases and suggests that the question is whether the Fourteenth Amendment makes it appropriate for judicial power to abolish school segregation. This observation causes Thurgood Marshall to change the order of his arguments and discuss the second group of cases instead of the first as he had specified. While this deviation prevents Mr. Marshall from proceeding as he had planned, he, nevertheless, discusses the three sets of precedents and does emphasize, last of all, his position on the separate but equal doctrine.

Although the type of legal speaking in which Thurgood Marshall was engaged proscribes a strict evaluation of dispositio by the classical standard, one may conclude that the arrangement of his oral argument emerges as an effective means of persuasion.
3. Style

Modern legal writers agree with ancient rhetoricians that the style of forensic speaking, like that of the other forms of oratory, must be appropriate. Robinson, using the Ciceronian concept, suggests that

> When the character of the hearers or of the occasion affords no better guide, the simple style should be employed in proving, the moderate in pleasing and the sublime in all direct attempts to rouse the feelings and control the will. 86

Style, like all other parts of the speech, is controlled by the speech situation. It will vary, depending upon the speaker's objective. In forensic speaking, in which the chief appeal is to the intellect, the style will necessarily be subject to certain limitations. The expression will be governed by the demands of the occasion and the audience. Since the court is not won by emotional appeal, the advocate's presentation has the character of moderation and sobriety. Dignity and restraint characterize his choice of language. Realizing that the Court is there to judge, the wise pleader keeps his illustrations "plain and simple" and his deportment "self-contained and courteous."

Hugh Blair has defined style as "the peculiar manner in which a man expresses his conceptions by means of language." 88 The constituents of style include (1) choice of words to represent ideas, (2) collocation of words into sentences, and (3) construction of
rhetorical figures. Let us, then, evaluate Thurgood Marshall’s oral argument according to the requirements of these elements.

Diction, or choice of words, must in forensic speaking express the exact meaning of the lawyer and present it at once to the mind of the hearer. Thonssen and Baird see word choice as "a highly individual matter, the eventual choices varying with a large number of circumstances...." Diction may be formal, informal, or colloquial. Despite the formality of the occasion and the general legal tone of his presentation, Mr. Marshall’s diction may be more accurately classified as informal. The familiar epigram "style is the man" may be used to account, in part, for this informality. Granting that it is possible for a man’s personality to permeate the communicative act, one infers that is true of Thurgood Marshall. His dedication to his cause, his faith in the rightness of it are revealed through his earnest but informal flow of language.

One can point out examples of this informality in his oral argument. A characteristic mannerism of speech may be observed in his repetition of “it seems to me” and “as I understand.” His use of the colloquial “believe it or not” to preface a statement is said as naturally as he would say it in a friendly conversation. Another example of a colloquialism may be noted in the following excerpts:

No, sir; and the Delaware case, if I can go to that without going outside the record, demonstrates a situation
Collocation of words into sentences, or the orderly arrangement of words, is the second constituent of style. Words should, first of all, be arranged in sentences to render them intelligible and attractive to the hearer. The primary requisite to the intelligibility of a sentence is its clearness. In addition, a sentence should possess unity and should be free from redundancies, ornamental words, and unpleasant repetition.

What of Marshall's sentence structure? An examination of this phase of his style reminds the writer of a statement made by that famous British orator, Charles James Fox. One of the secrets of his style as an orator lay in this observation: "Did the speech read well when reported? If so, it was a bad one." The analogy is not perfect, for Mr. Marshall was not making a speech in the usual sense; but one may observe that his sentences which, when transcribed, appear long and involved obviously were effective when delivered. One must remember at this point the difference between oral and written style. The circumstances of the appeal argument would prevent the advocate's sentence structure from having the polish and finish of written style. An examination of Marshall's sentences reveals that some of them are extremely short, being merely brief answers to the interrogations of the judges; others are inordinately long, following the pattern of conversation. That the sentences, short and long, satisfy the criteria of clearness is
evidenced by the Justices' indication that they comprehend his arguments. Mr. Marshall's answers to the interrogations, with his now simple, now diffuse style, show the meeting and the understand­ing of legal minds.

The third constituent of style is the use of rhetorical figures, or embellishment. While the excessive use of such stylistic devices would be inappropriate for the calm deliberations surrounding the appeal argument, it must be admitted that some embellishment would be permissible. Thonssen and Baird divide rhetorical figures into two classes, tropes and figures. These compare with Robinson's classification for legal speakers; he designates his as figures of thought (figures) and figures of words (tropes).

Analyzing Mr. Marshall's arguments from this point of view, one discovers that he makes use of some rhetorical figures. Relying on definitions from Aristotle, Thonssen and Baird, and Robinson, the writer selects a few examples. Marshall uses the following figures of thought: antithesis, epanorthosis, prolepsis, and epanaphora.

Antithesis, a figure based on contrast in which an opposite is balanced by an opposite, may be observed in the following excerpt. In restating the crucial issue of the controversy, Mr. Marshall says:

...we have a test to see whether or not the public policy, customs and mores of the states of South Carolina and Virginia or the avowed intent of our Constitution ...will prevail.
Epanorthosis is a figure in which the speaker retracts or recalls what he has already spoken. At the beginning of the oral argument an interruption by the Justices caused Mr. Marshall to change his announced plan of procedure. Note the following:

Justice Jackson: ...I do not like to see you waste your time on a mis-understanding, because I do not think we had any doubt about our cases. Things are so often read——

Justice Frankfurter: And the books.

Mr. Marshall: ... I think then that I should change and leave out the first group, for the time being, and go to the other group....96

The figure of thought called prolépsis is a device by which a speaker is able to advance his own argument by refuting an opposing one. Thurgood Marshall, in clarifying his position on the court's power to deal with segregation, mentions the objections of the opponents who have declared that segregation is necessary.

The only way they [appellees] can keep schools would be to keep segregation and for that reason, as I understand their argument, that reason takes them out of the general flow of invidious legislation under the Fourteenth Amendment; and then they say that there is no definite material in the debates that shows the intent of Congress to include segregation in public education and we submit that that is not the way to approach this problem. 97

Epanaphora is a figure of thought in which the same word is repeated for emphasis, or the same word is used to start distinct sentences. Note Thurgood Marshall's employment of this figure.
Justice Frankfurter has questioned Marshall on his position on "equal protection" and "due process." Marshall's answer suggests that he is repudiating the McLaurin and the Gaines doctrine. Incorporated in his reply of clarification, he repeatedly uses "I think":

*I think that Gaines was interpreted within the separate but equal doctrine. I think the Sweatt was, with the addition of you have to do it now. I think that Sweatt and McLaurin, if I could disagree for a moment, are moving between the two; that is the way I look at it. 98 [*italics supplied]*

Marshall's use of figures of words includes parallelism, pleonasm, and anastrophe. Parallelism suggests that the grammatical structure of several parts of a sentence is the same. Again citing an interrogation by Justice Frankfurter, we have Mr. Marshall establishing his position on the broad language which he believes to be characteristic of constitutional amendments. He asserts that although certain specifics are not mentioned in the amendment itself, the reading of the debates establish the various intentions. Marshall declares, using noun clauses:

...But when you read the debates, as Mr. Robinson explained, you cannot escape this point: that the amendment was adopted for the express purpose of depriving the states of authority to exercise and enforce the existing Black Codes; that by putting it in they obviously intended that the states would not have power in the future to set up additional Black Codes....99
Pleonasm, or the repetition of an idea in more forcible language, may be observed in the following passage:

Once we admit, either by reading the legislative debates or reading cases such as Strauder, the Slaughter House cases and the other cases, once we arrive at the conclusion that the Fourteenth Amendment was intended to strike down all types of class and caste legislation....100

Note the increase in emphasis between once we admit and once we arrive at the conclusion.

Anastrophe is a figure in which we remove from the beginning of the sentence that, which according to common order, is usually mentioned first. Marshall uses this device frequently with his words of direct address:

Well, so far—if I understand you correctly, Mr. Justice Jackson....101

On the power, Mr. Chief Justice Warren, we take the position....102

As I understand it, Mr. Justice Frankfurter....103

The only thing that was preliminary to this, Mr. Justice Frankfurter....104

An overall evaluation of Thurgood Marshall's style leads the writer to the conclusion that it is, according to Aristotelian standards, both clear and appropriate. Clearness was secured through the diction, the collocation of words, and the embellishment. Marshall's suiting of his language—its proportion and emotion—to the occasion also contributed to his effectiveness.
4. Delivery

That Aristotle puts less emphasis on delivery than some of the other ancient rhetoricians is accepted. But this fact does not suggest that Aristotle completely disregarded its importance. He admits that "delivery is of the utmost importance to the effect of a speech." While he disapproves of any substitution for proof, he admits that because of the nature of the audience some attention must be given to this division of rhetoric.

Our legal source, Robinson, also advises the lawyer to cultivate an effective delivery. According to him, its purposes are to convince and to persuade. Processes by which these objectives may be achieved are through the use of the voice and gestures. The chief requirements for an effective speaking voice are clear tones, perfect flexibility, and sufficient volume. The degrees of audibility move through three ranges: the high, the middle, the low; the high and low are used for more forcible and solemn presentations, and the middle for ordinary discourse. In addition to adaptation of the degrees of audibility, the voice conforms itself to the various divisions of the speech. The exordium is given in a gentle winning voice, using moderate volume. The statement is expressed in a calm but higher key than the exordium, with a stronger emphasis and a more marked inflection. The proof and refutation require a general tone which is slow and forcible, but varying to fit whatever emotion may be involved.
Just as he needs a clear, flexible voice, a lawyer must also use appropriate gestures. Gestures may be defined as "the adaptation of the motions of the countenance, and of the other portions of the body to the ideas and language of the speaker." There is an old adage which says that the speaker delivers two speeches, one that the audience sees and the other that the audience hears. These two elements are important because in them are reflected the thoughts and the emotions of the speaker.

It is the opinion of the writer that a proper evaluation of Thurgood Marshall's delivery before the Supreme Court would be dependent either upon an eye-witness account or on a detailed report of this specific aspect by some person who was present in the Court. Since the writer did not hear the oral argument, the analysis will be based on two sources: (1) the brief reference to Mr. Marshall's delivery in a periodical; and (2) inferences based on the writer's observations of Mr. Marshall in other speech situations.

Wellman tells us that a good speaking voice is a wonderful weapon of the advocate. As to this requisite, one can say that Marshall possesses this effective weapon. His voice is deep and resonant, there being no irritating qualities to distract the listener. The resonance of Mr. Marshall's voice results in appropriate volume for the occasion, the room, and the speech itself. Not only is the volume adequate, but also is his speech distinct. One notices too that Marshall's voice possesses emotional color,
which reveals him as now earnest and impassioned, now ironic and 
indignant. His genuine feelings seem to permeate his voice to such 
an extent that a responsive chord is struck with the audience. The 
tempo of his speech is usually slow and deliberate. One may note 
particularly the restrained way in which he is able to handle 
emotionally loaded material. Mr. Marshall's use of variations in 
force aids him in effectively communicating his ideas.

As to his bodily action, one observes, first of all, his 
excellent eye contact. He is both physically and mentally direct. 
While he does not gesticulate unduly, he makes one aware of his 
expressive hand movements. The manner in which Marshall walks to 
the platform, for example, shows that he is poised, self-confident, 
and in control of his physical machinery. His facial expressions 
connote clearly the mood and the emotion of his words. On the 
whole, one may conclude that Thurgood Marshall's delivery is 
characterized by coordinated use of the voice and the body.

E. Analysis of the Rebuttal Argument

According to Wiener, there are certain conditions which require 
a rebuttal. In fact it is essential "whenever there is a real argu­
ment to answer, or whenever the court is obviously in doubt, or 
whenever there is a palpable misstatement to be corrected or even 
a residuum of honest confusion to be cleared up. Preparing 
refutative arguments is infinitely more difficult than constructing 
main arguments. The task requires great shrewdness, readiness of
invention, and dialectical skill. It is in this part of the legal presentation that the advocate can utilize his mental endowments, which Wellman lists as perception, keenness of observation, clearness and quickness of comprehension, and sound, prompt judgment. Says Wellman,

An advocate, of all men, must think, and think constantly and quickly through every stage of his case, and train his mind for adverse turns of evidence. 114

Ordinarily his procedure is to refute first the strongest arguments, then separate and rebut the weaker ones.

Let us look now at Thurgood Marshall's rebuttal argument before the United States Supreme Court on December 8. The setting is the same as for the previous oral argument. The Court convened at 12:10 P.M.; and after the Justices listened to arguments on behalf of the appellees in the Prince Edward County, Virginia case by Mr. Moore and Mr. Almond, Chief Justice Warren recognized Mr. Marshall, who proceeded.

Mr. Marshall opens his rebuttal by indicating that he wishes to make some points of clarification. He says:

May it please the Court, there are several points I would like to clear up preliminarily, and then I would like to make sure that our position is correctly stated, and as it relates to statements made by counsel on the other side. 116

Before he can indicate what he proposes to do, Mr. Justice Frankfurter requests that he elaborate on the question of remedies
before he sits down. Wiener has suggested that it is wiser, unless one has a great deal of time left over, to take care of the more important points first. Marshall, obviously realizing this, indicates that he will get to Mr. Frankfurter's request first. In discussing this question, Marshall states, first of all, that he and his colleagues, after having done as much research as they could, are unable to intelligently set forth a plan. He accepts the opinion of his opponents that there would be certain administrative problems which would delay immediate desegregation, but he does not consider any other of their suggestions valid. He further states that he does not agree with the Government's proposal that "if it isn't done within a school year, that they could get more time..." The core of his answer comes in the following words:

So for that reason I don't think it should take more than a year for them to adequately handle the administrative techniques, and I submit that a longer period of time would get the lower court into the legislative field as to whether or not to do it this way or that way.

Specifically, I am a firm believer that especially insofar as the Federal courts are concerned, their duty and responsibility ends with telling the State, in this field at least, what you can't do. And I don't think anybody is recommending to this Court that this Court take over the administrative job. Obviously, that is not recommended by anyone. So with that, I think that is our position. Having complied with Justice Frankfurter's request, Mr. Marshall proceeds to refute what may be considered the strongest argument set
forth by his opponents. He begins with an issue which has run throughout their arguments: their denial that there is any race prejudice involved in the cases. Marshall, using the line of reasoning based on the topoi of conflicting facts, states that throughout the opponents' brief and argument they have not only recognized that there is a race problem involved but also have they emphasized that race is the whole problem. "And," Marshall declares, "...you can't read the debates, even the sections they rely on, without an understanding that the Fourteenth Amendment took away from the states the power to use race." Adopting for a moment the line of argument of his opponents, Mr. Marshall denies the validity of their position by using the method of "turning the tables." The opponents have asserted that segregation is justified for two reasons: (1) it is best for the races to be separated, and (2) segregation has existed for over a century. Marshall refutes the argument by attacking the use Mr. Davis and Mr. Moore made of the census figures which show the large Negro population in the South. Says Mr. Marshall:

...and I thought at some stage it would be recognized by them that it shows that in truth and in fact in this country that high percentage of Negroes they talk about can be used to demonstrate to the world that in so far as this country is concerned, two-thirds of the Negroes are compelled to submit to segregation. 121

One may here observe the ethical appeal of the argument—Thurgood Marshall's concern that an unfavorable image of America be showed to the world.
To make further use of the opponents' reasoning for his own benefit, Marshall quotes from statements made by a witness for the opposition when *Briggs v. Elliot* was in the lower court. The witness, a Mr. Crow, was asked if he would change his opinion concerning segregation if ninety-five per cent of the pupils were white and only five per cent Negro. His answer was "No," and, when questioned further, he admitted that a part of the basis for his opinion was rooted in his lifelong belief in the segregation of the races. Mr. Marshall concludes this refutative point with a statement which again shows his belief in the fairness of a color-blind Constitution.

To a rhetorical critic this has an ethical overtone.

And that answers all of those arguments about this large number of people involved. They were all American citizens who, by accident of birth, are a different color, and it makes no difference one way or another insofar as this court is concerned. 122

Mr. Marshall, in supporting his contention that race has always been an issue, quotes from the statement of jurisdiction in the Virginia case. He uses Senator Carter Glass of Virginia, to whom he refers as a man who can hardly be characterized "as anything but a respected former Senator of the United States," who once said in a debate in the Virginia Convention:

Discrimination, that is precisely what we propose. That exactly is what this Convention was elected for, to discriminate to the very extremity of permissible action under the limitations of the Federal Constitution. 123
He refutes again the opponents' argument that it is best for the races to be separated by quoting an opinion from a case, appealed to the Fourth Circuit Court, involving the University of North Carolina Law School which was not forced by the District Court to admit a Negro applicant. Judge Soper, commenting on the question of the mutual benefits to be derived by the separation of the races, had this to say:

...the defense seeks in part to avoid the charge of inequality by the paternal suggestion that it would be beneficial to the colored race in North Carolina as a whole, and to the individual plaintiffs in particular, if they would cooperate in promoting the policy adopted by the State rather than seek the best legal education which the State provides. The duty of the Federal Courts, however, is clear. We must give first place to the rights of the individual citizens, and when and where he seeks only equality of treatment before the law, his suit must prevail. It is for him to decide in which direction his advantage lies. 124

As to the opponents' argument that segregation should continue because it has been practiced for a hundred years, Mr. Marshall disposes of this implied appeal to tradition and custom by stating that this argument of stare decisis has been used in every case to come before the Supreme Court. Marshall, employing the method of residues, declares:

...And we come to the question as to whether or not the wishes of these States shall prevail, as to whether or not our Constitution shall prevail. And over against the public policy of
the State of Virginia and the State of South Carolina is an amendment that was put in the Constitution after one of the worst wars that was ever fought, and around that Constitutional provision we say that the public policy of the United States does not look to the State policy, but looks to our Government. 125

One observes that Mr. Marshall continues to reemphasize his basic philosophy concerning the Constitution and its preeminence.

Thurgood Marshall's final point on the issue of segregation is the citation of a recent monograph which indicates that segregation in the South almost caused the loss of one war and may, unless corrected, cause the loss of another. Here Marshall is using an enthymemematic chain of reasoning based on the *topos* of *consequences*.

Marshall goes next to Mr. Davis' allegation that "the only thing the Negroes are trying to get is prestige." Marshall agrees and "turns the tables" by equating *prestige* and *equality regardless of race*. Marshall renders Mr. Davis' argument empty when he answers:

> Exactly correct. Ever since the Emancipation Proclamation, the Negro has been trying to get what was recognized in *Strauder v. West Virginia*, which is the same status as anybody else regardless of race. 127

Marshall's next attack is on the opponents' recommendation of judicial remedies. He uses a line of argument based on the *topos* of *existing decision* and states that the opposition "should show some
effort on their part to conform their States to the clear intent of past decisions." Mr. Marshall recalls the McLaurin and the Sweatt case in which the argument set forth by the opponents indicated that if decisions were given prohibiting segregation in graduate schools, "the schools would have to close up and go out of business." Marshall, arguing from statistics and from example, proves that the alleged causal relation is false. He states that since the decisions some 1500 Negroes have enrolled in graduate and professional schools in previously all-white universities in twelve states, one among them being South Carolina. Pointing out, in this same connection, that segregation has also been broken down, without any lawsuit, in certain private schools in the South and in states like Arkansas, Marshall concludes this refutative point on a note of ethical appeal which reveals him as a man of goodwill:

The truth of the matter is that I for one have more confidence in the people of the South, white and colored, than the lawyers on the other side. I am convinced they are just as lawful as anybody else, and once the law is laid down, that is all there is to it.

Mr. Marshall now proceeds to the opponents' argument on the congressional debate. An ironic note is injected when Marshall suggests that on this argument they do a job too well. His method of attack here is to show that one part of the argument negates another part. The opponents have contended that education was not
intended to be covered by the Fourteenth Amendment. Marshall argues:

Obviously, that is not correct, because even their pet case, *Plessy v. Ferguson* recognized that education was under the Fourteenth Amendment. 131

The next argument which he destroys is one made by Mr. Moore, who had emphasized that the Fourteenth Amendment had deliberately excluded some rights, suffrage being one. Using the line of reasoning based on the *topos* of conflicting facts, Mr. Marshall exposes the inconsistencies of the opposition. Asserts Marshall:

And how anyone can stand in this Court, having read the opinion of Mr. Justice Holmes in the first Texas Primary case, and take that position is beyond me, because that decision, in the language of Mr. Justice Holmes, said specifically that they urged the Fourteenth and Fifteenth Amendments, but we don't have to get to the Fifteenth Amendment because the Fourteenth Amendment said that the states can do a lot of classifying which we, speaking as a Court, can't seem to understand, but it is clear that race cannot be used in suffrage. So I don't see the purport of any of that argument. 132

Remembering that one of the purposes of the oral argument is to correct any misstatement or clear up any confusion, one notes that Thurgood Marshall now endeavors to clarify a point from his presentation of the previous day. The point of confusion concerns his position as to whether the McLaurin case is a negation of the separate but equal doctrine. Marshall's ability to reason closely is demonstrated in this explanation. He states that the McLaurin case proved that inequality resulted from segregation itself.
McLaurin had the same school and the same everything else, but he was segregated; the inequality, therefore, was inherent in segregation. Marshall's reasoning is enthymematic, based on criss-cross consequences. He says:

And if McLaurin won because he was denied equality, it is also true and much more important that he suffered constitutional equality in the enjoyment of these identical offerings. 133

And, he continues, arguing from opposites, if the Court has made segregation and inequality equivalent concepts, "it makes no great difference whether we say that the Negro is wronged because he is segregated, or that he is wronged because he received unequal treatment."

Thurgood Marshall's final rebuttal argument concerns the question of remedy. The lawyers for the opposition are urging judicial restraint. In this closing statement one may discern the moving quality of the speech even in its written form. Here one sees the pathetic overtones. Here one observes the ethical appeal. And here both are blended with the convincing soundness of logic. Marshall, first of all, concedes that the opponent's position might be acceptable except for the loss being suffered by the appellants. He says:

There is no way you can repay lost school years. These children in these cases are guaranteed by the States some twelve years of education in varying degrees, and this idea, if I understand it, to leave it to the States until they work it
out—and I think that is a most ingenuous argument—you leave it to the States, they say, and then they say that the States haven't done anything about it in a hundred years, so for that reason this Court doesn't touch it. 135

Observe the pathetic overtone in the first statements: "There is no way you can repay lost school years."

Marshall, then, states that the lawyers on the other side have charged him and his colleagues with making a legislative argument; he answers with the counter-charge that they are making the same argument that was made before the Civil War and during the period between the ratification of the Fourteenth Amendment and the Plessy v. Ferguson case.

As he continues, one again gets insight into the pathos of the speaker and of the cause. One may observe also the ethical appeal as it relates to Marshall's concern for the prestige of the United States before the world at large. Likewise may one note the intensity of his convictions as he proceeds:

And I think it makes no progress for us to find out who made what argument. It is our position that whether or not you base this case solely on the intent of Congress or whether you base it on the logical extension of the doctrine as set forth in the McLaurin case, on either basis the same conclusion is required, which is that this Court makes it clear to all of these states that in administering their governmental functions, at least those that are vital not to the country alone, but vital to the world in general, that little pet
feelings of custom—I got the feeling on hearing the discussion yesterday that when you put a white child in a school with a lot of colored children, the child would fall apart or something. Everybody knows that is not true. 136

As Thurgood Marshall moves into his closing words, he returns to the argument he attacked first, that of race. Here one is reminded of the opinion of Wiener who believes that in addition to the technical equipment and a mastery of the principles of advocacy, the advocate to be really outstanding must have "an inner conviction of the soundness and correctness of his case...and abiding conviction that law and justice are both on [his] side." 137

Marshall declares that from the day the case was filed race has been in the case and he holds that "the Fourteenth Amendment was intended to deprive the States of power to enforce Black Codes or anything else like it." He insists, therefore, that the only way the Court can decide against his side is to admit that the States have the right to classify Negroes differently from everyone else. "And," says Marshall, "we submit the only way to arrive at this decision is to find that for some reason Negroes are inferior to all other human beings." 138

Stryker quotes Mr. Justice Jackson as having said that the advocate's most persuasive quality is personal sincerity. I believe that Thurgood Marshall's personal sincerity is definitely reflected in these last sentences of his rebuttal argument:
Nobody will stand in the Court and urge that Negroes are inferior to all other human beings, and in order to arrive at the decision they want us to arrive at, there would have to be some recognition of a reason why of all the multitudinous groups of people in this country you have to single out Negroes and give them this separate treatment. It can't be because of slavery in the past, because there are very few groups in this country that haven't had slavery some place back in the history of their groups. It can't be color because there are Negroes as white as the drifted snow, with blue eyes, and they are just as segregated as the colored men. The only thing can be is an inherent determination that the people who were formerly in slavery, regardless of anything else, shall be kept as near that stage as is possible, and now is the time, we submit, that this Court should make it clear that that is not what our Constitution stands for. Thank you, sir.

Our last consideration in connection with the rebuttal is the style and delivery. Both follow the same pattern as in the presentation of the main arguments. As to style, Mr. Marshall again makes use of simple, informal diction. One notes the same use of "it seems to me" and "as I understand." His colloquial expressions include "and for the life of me," "I can't for the life of me," "the truth of the matter is," and "the kids in Virginia and South Carolina."

Thonissen and Baird tell us that the speaker, having certain thoughts to communicate, cannot have his style circumscribed by rules requiring the statistical proportion of one sentence type to the other. Mr. Marshall's sentences do not conform to any
proportionate pattern. In fact, he uses a large number of long, loose sentences. His transitions, nevertheless, are especially clear and well-defined. One may point out such examples as:

On the other hand....

It gets me, if it please the Court, to one of the points....

That brings me to the other point which I want to make clear.

And finally....

With regard to Mr. Marshall's use of rhetorical figures, one finds that he uses—in addition to a repetition of some of the ones discussed under the analysis of the oral argument—aposiopesis, irony, and hyperbole. Aposiopesis is a figure in which the speaker, because of an emotion, breaks off his speech without finishing the sense of it. Such occurs when Thurgood Marshall in discussing judicial restraint declares:

It is our position that whether or not you base this case solely on the intent of Congress or whether you base it on the logical extension of the doctrine as set forth in the McLaurin case, on either basis the same conclusion is required, which is that this Court makes it clear to all of these states that in administering their governmental functions, at least those that are vital not to the life of the State alone, not to the country alone, but vital to the world in general, that little pet feelings of race, little pet feelings of custom—143 [italics supplied]

Here Marshall breaks off and starts another trend of thought.
An example of irony—one contrary signified by another to give greater force or vehemence—may be noted when Marshall refutes a statement made by Mr. Moore and Mr. Davis concerning the high percentage of Negroes in the South. He refers ironically to the census figures and the population as “these horrible census figures, the horrible number of Negroes in the South”—[Italics supplied]

One can point out examples of hyperbole—a figure of words in which the representation of things magnifies or diminishes beyond the strict level of truth—in such statements as “the child would fall apart,” “the world will fall apart,” and “Negroes as white as the drifted snow.”

F. Summation

The chief duty of the lawyer is to arrest the attention of the judges, interest them in the questions which they are to determine, lead them step by step to the conviction that his claims are just, and thus compel the Court to decide the case in his favor. The decision of the Supreme Court in the school segregation controversy was proof that Thurgood Marshall and his colleagues had achieved the aforementioned objectives. On May 17, 1954, at 12:52 P.M.—“335 years after the first Negro slaves arrived in America in chains,” 165 years after the adoption of the Constitution, and 91 years after the signing of the Emancipation Proclamation—Chief Justice Earl Warren read the unanimous decision which held that laws requiring racial separation in public schools
are violative of the Constitution. According to some authorities

...this was the most important legal
decision of the twentieth century,
and it may well have been the most
important legal decision rendered
by an American court. 147

The analysis of Thurgood Marshall's oral argument of appeal
in this case has led me to certain conclusions. While I am well
aware that Mr. Marshall was not the whole team in winning the
decision, I am convinced he as the leader deserves special credit.
It was he, as the symbol for the NAACP and its struggle for equal
educational opportunities for Negroes, who organized the legal
corps, infused it with his dedication and determination to triumph
over the injustice of segregation. I, therefore, submit that
the following factors were important in the resolution of the case:


This is significant because the object of law
is to protect rights and redress wrongs 148
and the aim of judicial pleaders concerns justice
and injustice. 149 Mr. Marshall was convinced
that the exclusion of Negro children from public
schools solely on the basis of color violated
the rights of these children as guaranteed
them by the Constitution and thereby consti-
tuted an injustice.

2. Marshall's thorough preparation and knowledge of the
case.

Not only did Mr. Marshall have the conviction of
the rightness of his cause but also did he make
adequate preparation for the arguing of the case.
The exhaustive research for the case and Marshall's
familiarity with all aspects of it contributed to
the effectiveness of the oral argument.

Mr. Marshall demonstrated his ability to take the facts of the case and, through the convincing soundness of his arguments, lead the Court to logical conclusions. Evidence of this ability was observed in Marshall's presentation of main arguments, his answering of the questions of the Justices, and his refutation of the claims of the opposition. Of special interest to me was the use which was made of the enthymematic chain of reasoning.


I believe Thurgood Marshall's professional status as a civil rights lawyer, who had won many previous cases before the high court, served him in good stead. His personal integrity, his dedication to the cause, his own high sense of ethics would necessarily create a kind of rapport with the Court. In addition, the presence of emotional overtones, which would be inherent in any case concerning justice and injustice, had some weight.

5. The superior strategy of the entire Marshall team.

Marshall and his colleagues recognized that on their side, in addition to the law, was the necessity of preserving in the eyes of the world the prestige of the United States as a democracy. They were also aware that world conditions—the striving for freedom of colored peoples all over the world—were a mitigating factor. Not to be overlooked were the social and economic changes in the structure of American society—"the felt necessities of the time," to use an expression of Oliver Wendell Holmes.


While a court is not concerned with oratory, it is to be admitted that a clear, well-ordered and well-delivered appeal argument would be to the advantage of the advocate. I am of opinion that Marshall's oral presentation followed the fundamental principles of rhetoric.
CHAPTER VI

NOTES


5. Ibid., p. 236.


42. "The Supreme Court," *loc. cit.*

44. Cicero, *De Inventione*.


53. Legal precedents may be defined as "decisions of the same questions by the courts of last resort in the same jurisdiction which have, until overruled, the force of law." Robinson, *op. cit.*, p. 106.


57. For citation of statute, see Note 62 of Chapter III, p. 69.


59. Cooper, *op. cit.*, I, 15, p. 82.


64. "May It Please the Court," *op. cit.*, p. 19.


67. "May It Please the Court," *loc. cit.*


71. *Loc. cit.*


83. Brief for Appellants, *op. cit.*, p. 34.


89. Robinson, op. cit., p. 229.

90. Thonseen and Baird, op. cit., p. 417.


95. Oral Argument, p. 45.

96. Ibid., p. 37.

97. Ibid., p. 44.

98. Ibid., pp. 55-56.

99. Ibid., p. 43.

100. Ibid., p. 44.

101. Ibid., p. 36.

102. Ibid., p. 38.

103. Ibid., p. 41.

104. Ibid., p. 42.

105. Cooper, op. cit., III, 1, p. 182.

106. Ibid.


108. Ibid., p. 308.


110. The Supreme Court, op. cit., p. 15.


118. Oral Argument, loc. cit.

119. Ibid.

120. Ibid., p. 125.

121. Ibid., p. 126.

122. Ibid., p. 127.

123. Ibid., p. 128.

124. Ibid., p. 129.

125. Ibid.

126. Ibid., p. 130.

127. Ibid.

128. Ibid.

129. Ibid., p. 131.

130. Ibid., p. 132.

131. Ibid.

132. Ibid., p. 133.

133. Ibid., p. 134.
134. Ibid.
135. Ibid., p. 135.
136. Ibid., p. 136.
139. Ibid.
144. Robinson, *op. cit.*, p. 3.
146. For text of the decision, See Appendix.
149. Cooper, *op. cit.*, i, e, p. 18.
That a speech is judged by its effect is accepted. But the test of the effectiveness of the initial triumph rests not only on the immediate reactions but also on the subsequent results. The ruling in the case of *Brown v. Board of Education* affected some 8,200,000 white children and 2,530,000 Negro pupils attending public schools in seventeen southern states and the District of Columbia. From the moment the Court spoke, democratic Americans hailed its decision as a significant one. Alan Paton considered it the greatest moral event in America since the passage of the three great post-Civil War Amendments, the only comparable one being President Truman's Executive Order No. 9981 of July 26, 1948, in which he required equality of treatment and opportunity in the armed services. The *Christian Century* stated that the decision would make history far beyond the boundaries of the United States since nothing had so weakened this country's claim to world democratic leadership as its ambiguous record on the race issue.

In anticipation of the Supreme Court decision, the states concerned and the District of Columbia reacted in a variety of ways. Some of the states of the South took steps to ensure that "separate but equal" obtained with reference to adequate facilities and buildings. North Carolina, for example, in January, 1953, passed
a special act which set up machinery for a $50 million school bond referendum. South Carolina attempted to equalize its school facilities between white and Negro children; in addition, the General Assembly appointed a committee to report on an advisable course should the federal court nullify the provisions of the State Constitution requiring separate schools. A few months before the decision South Carolina, as a "preparedness measure," also repealed the constitutional section requiring "free public schools." Public planning in Alabama had been aimed at providing separate but equal schools, but in the early sessions of the 1953 Legislature, a bill was introduced providing for "the establishment, operation, financing and regulation of free public schools." Georgia's pre-decision strategy was similar to that of Alabama. In addition to making provisions to cut off state financial help for any schools which mixed the races, Georgia created a committee to make plans for the state to provide adequate education in keeping with both the state and federal constitutions. Virginia's attitude was that any action prior to the court's ruling would be premature. In West Virginia the general attitude was "Let's cross the segregation bridge when we come to it," although it was the opinion of some of the state's leading educators that a gradual integration of Negro and white students could be worked out peacefully. Both Arkansas and Mississippi were engaged in a Negro-white public school equalization program. The State of Maryland had no plans in the event the
Supreme Court outlawed school segregation. Kentucky had a committee studying what could be done to ease the situation should integration come. Florida's preparation was limited to discussions on the philosophical level among state school officials and certain planning groups. The District of Columbia, on the other hand, began drafting plans for a conversion of the dual school system into a single one.

Expressing the opinion of a small minority was the Reverend Mr. Vance Barron of the Second Presbyterian Church, Charleston, South Carolina, who discussed with his congregation on a Sunday shortly before the decision "Some Luxuries We Can't Afford Today." He mentioned (1) the cost of an additional billion dollars for the South to provide separate but equal schools; and (2) the greater cost to the church of Jesus Christ. Said he:

We have enjoyed the luxury of not thinking about it for a long time in our church. Without saying much about it, we have just gone quietly along and practiced segregation. The time for us to enjoy such quiet obscurity is running out fast.

A. Immediate Reactions

When Chief Justice Warren read the Supreme Court's unanimous decision making illegal public school segregation, the immediate reactions ran the gamut, ranging from calm acceptance to stormy resistance. One finds both affirmative and negative responses on the part of the press, the states, individuals, and organizations.
An examination of the statements made by southern newspapers reveals that there was no complete agreement among them. The Chattanooga Times expressed the belief that most of the southern states would meet the situation calmly. The ruling was hailed by the Washington Post and Times-Herald as a healing decision. The Dallas News conceded that a long era had come to an end. It was the thinking of the Richmond Times-Dispatch that while it was the most momentous decision in the interracial field since the Dred Scott case of 1857, considerable time was needed by the South to make the complicated adjustments. The Atlanta Constitution reacted by cautioning the citizens of Georgia against hasty or ill-considered actions. According to the Baltimore Sun, the high court ban on segregation in public education carried painful implications. These, then, were typical reactions of the southern press.

The press in the nonsegregated states generally believed that the decision was inevitable and would be accepted. "A milestone in our history" was the language used by the Hartford Courant. The Minneapolis Tribune saw the decision as influencing our relations with dark-skinned people the world over. In the opinion of the Cincinnati Enquirer, what the justices did was simply to act as the conscience of the American nation. The Des Moines Register predicted there would be peaceful adjustment to equality in schools. The inevitability of the decision was recognized by both the Pittsburgh Post-Gazette and the Cleveland Plain Dealer.
As was to be expected, the Negro papers were unanimous in their approval of the outcome of the case. The Amsterdam News called the decision the greatest victory for the Negro people since the Emancipation Proclamation. The Pittsburgh Courier declared that the ruling would stun and silence America's Communist traducers behind the Iron Curtain. The Chicago Defender was happy to see the end of the dual society in American life. The Atlanta Daily World declared that the opinion to end school segregation would strengthen America's position in carrying out the imposed duties of world leadership.

In addition to the response from the professional press, college newspapers added their voices to the chorus of pros and cons. The University of Virginia's student newspaper, Cavalier Daily, felt that the decision was contrary to a way of life and violated the southern way of thought since 1619. The Kernel of the University of Kentucky stated that the ruling was one of the hardest blows dealt against Communistic propaganda in many years. The South must face the truth that segregated education is inherently unequal, said the Daily Tar Heel of the University of North Carolina and added "if we are wise, we will welcome Negro North Carolinians to our schools and to our universities."

Not only was there no complete agreement among the newspapers of the country but also was there no united opinion among the seventeen southern states and the District of Columbia, all of whom
were directly affected by the decision. The most positive reaction was made by the District of Columbia. Just one day after the decree it decided not to wait for fall rearguments on the method and timing of integration; instead the District of Columbia indicated that integration would start with the fall term beginning in September and be completed by the fall of 1955. Seven of the southern states accepted calmly the decision and indicated that they would comply—Oklahoma, Missouri, Kentucky, Maryland, Delaware, West Virginia and Arkansas. The opinion was expressed in Oklahoma that the Supreme Court had handed Oklahoma white and Negro leaders a problem both groups considered more financial than social, the question being not whether to merge the schools but how to get it done. Missouri's attorney general held that the Supreme Court decision had immediately voided all state constitutional and statutory requirements for segregation. Maryland's immediate reaction was one of general acceptance and of willingness to comply with whatever decrees were handed down to bring about racial integration; it indicated, however, that the state's segregation laws would remain in force until final decrees were issued. Kentucky quietly accepted the implications of the ruling and indicated it would abide by the Supreme Court's subsequent decrees concerning implementation. Delaware proclaimed that "separate but equal" was no longer binding upon the schools and adjustments to the United States' constitutional requirements would be made. West Virginia said that it intended to abide by the Court's decision.
Arkansas' governor, Francis Cherry, announced that his state, following its previous pattern of obeying the law, would do so in this case. Protests on the local level, however, caused the Education Committee to decide that Arkansas would continue to have segregation until the local communities were willing to accept integration.

A general policy of "wait and see" was adopted by Tennessee, North Carolina, and Texas. The reaction on the part of the public and the state officials of Tennessee was temperate and reserved. Although the governor of North Carolina, William B. Umstead, was disappointed over the decision, he indicated that this was not a time for rash statements and the proposal of impossible schemes. Texas resolved to continue her operation of schools on the regular segregated basis since the Supreme Court had not written its final decree.

In some of the states there was little overt reaction, the underlying response being directed toward finding means of evading the court's mandate. The decision caused very little apparent reaction in Florida. While the Educational Council intended to do everything legally possible to avoid desegregating the schools, it agreed that any attempt to eliminate the public school was unthinkable. Although no legal action was to be taken in Alabama until after the final decree was handed down, the consensus was to find a lawful way to maintain school segregation. Governor Stanley of Virginia, two hours after the decision was announced, requested
his constituents to receive the ruling calmly and consider the situation carefully before deciding what steps would be taken. The State Superintendent of Public Instruction declared there would be no defiance of the decision, and Attorney General Almond stated that he felt "a satisfactory solution may be reached which would not necessarily mean the abandonment of separate but equal schools." The decision "shocked" Governor James F. Byrnes of South Carolina; but he, nevertheless, urged all of the citizens, both Negro and white, "to exercise restraint and preserve order." It was the hope of the lieutenant governor, George Bell Timmerman, that means could be found to preserve separate schools "in accordance with the wishes of the vast majority of parents of that state."

The greatest core of resistance was to be found in three of the states of the Deep South—Louisiana, Georgia, and Mississippi. Louisiana refused to accept the Supreme Court ruling that segregation in public education violates the Constitution. This was one of the few southern states in legislative session at the time of the decision. A resolution was introduced into the legislature censuring the Court for what Louisiana regarded as a usurpation of power. Within a month three bills, seeking to prevent desegregation, were passed by the legislative body. The high court's decision found Georgia totally unprepared to accept or follow it. In fact, the reaction from Georgia was most bitter and violent. Governor Talmadge declared that the Supreme Court had reduced the Constitution to a
mere scrap of paper." Having previously said that violence and bloodshed would be the result of any attempt at integration, Talmadge again asserted that Georgia would not accept racially mixed schools. Just as defiant was Mississippi which stated it would not accept the Supreme Court decision to integrate its public schools; rather would Mississippi as a last resort abolish the tax-supported free public school system.

There was a varied reaction from the citizenry, both individually and collectively. Defiant words were heard from such segregationists as Representative James Davis of Georgia and Senator James C. Eastland of Mississippi. Eastland agreed with Talmadge that the United States Constitution had been destroyed and the South was, therefore, obligated to defy the recent decision. On the other hand, many other leaders applauded the work of the Court. On July 4, following the decision, President Eisenhower sent a message to the Annual Convention of the NAACP in Dallas, Texas. It read:

\[\text{The year 1954 represents...a milestone of social advance in the United States. The social and political maturity of our people evidenced by the reception given the recent Supreme Court decision is of great significance to our nation and to the cause of freedom in the world...We must have continued social progress, calmly but persistently made so that we may prove without doubt to all the world that our nation and our people are truly dedicated to liberty and justice for all.}\]

Judge J. Waties Waring, whose dissenting opinion in the original Clarendon County case was vindicated by the May 17 decision, stated
that the ruling was in reality a reaffirmation of "our belief 43
in the Declaration of Independence and the Constitution." A
prominent social psychologist, Dr. Otto Klineberg of Columbia,
believed that the Supreme Court decision would take away from
the Communists one of their most effective arguments against the
American way of life. John Gange, director of the Woodrow
Wilson School of Foreign Affairs at the University of Virginia,
commented that the decision would open the way to relieving mil-
lions of white Americans of a sense of guilt which they carried
in them. And, he continued, it would "at least relieve some of us
of some self-consciousness we have had even when practicing equality." 44
According to Dr. Gordon Allport, the famous psychologist of Harvard
University, the Supreme Court decision might serve to strengthen
the moral backbone of many individuals whose consciences were at
war with their racial prejudices. Said he:

People really know that segregation
is un-American; even the masses in
the South know it. They also have
prejudices. This mental conflict
is acute....People do accept legisla-
tion that fortifies their inner
conscience. Protests are short-
lived and readjustment rapidly sets in.46

One spokesman for the Christian faith, Bishop G. Bromley Oxnam,
declared that resistance to the decision would be subversive and
would do more to undermine democratic government than any traitor
47
Communist.
As individual Americans expressed themselves regarding the decision, likewise did organized groups indicate their reactions. On the same day of the decision, Bryant W. Bowles, president of the National Association for the Advancement of White People, Incorporated, reacted by calling for a membership drive to gain ten million members. Conversely, speaking for the American Federation of Labor, George Meany indicated that the Supreme Court decision "squares with the A.F.L. policy of non-discrimination throughout its history." The organization most closely concerned, the NAACP, made this statement:

The NAACP regards the unanimous decision handed down today by the United States Supreme Court as a highly significant step in the forward progress of American democracy. In overruling the "separate but equal" doctrine laid down by *Plessy v. Ferguson* in 1896, the Court reinforced the faith of all Americans in the basic justice of our system.

This ruling further vindicates the 45 year fight of the NAACP to establish the principle that to segregate is to discriminate and, accordingly, violates our Constitution and American spirit of equality. This decision gives the lie to the Communist propaganda that American democracy is decadent and that Negroes or other minorities cannot obtain justice through the democratic process.

While some Americans were acclaiming the decision as a just one, in keeping with this country's belief in equality, a new movement was organized in the South, the purpose of which was to prevent desegregation by means of pressure. The White Citizens'
Council was organized in Indianola, Sunflower County, Mississippi, less than two months after the decision. This Council was to see its counterparts spring up in other sections of the South. The group sought to use intimidation—both economic and physical—to force the Negroes to remain silent on integration. For the sympathetic whites, social and political pressure was to be applied.

B. Subsequent Results

That the subsequent results of the Supreme Court decision had far-reaching implications is substantiated by the following statement from Race Relations Law Reporter:

No other court decision in this country has had comparable repercussions... The dynamism of the 1954 school decision is demonstrated by the fact that the principle, originally stated and supported in terms of public education, has been applied in the three-year period to invalidate legalized racial segregation in governmentally-owned recreational facilities and in local as well as inter-state transportation facilities.52

One might mention that the Supreme Court’s implementation decision of May 31, 1955, charted the path which desegregation would follow. The decree was sufficiently flexible to permit a variety of reactions. The five cases were remanded to the lower courts with the instruction that they require the defendants to make a prompt and reasonable start toward full compliance with the May 17, 1954, ruling. Said the Court:
The cases are remanded to the lower courts to take such proceedings and enter such orders and decrees consistent with this opinion as are necessary and proper to admit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties to these cases. 53

It is interesting to compare this decree with an opinion expressed six months earlier by Thurgood Marshall. Said Mr. Marshall in addressing the State NAACP Convention in Lumberton, North Carolina: "The only effective way to accomplish desegregation is to do it at once and firmly."

Looking back on the past four years, one finds that the implementation decree has been complied with—willingly in some cases, reluctantly in others—resisted openly and sometimes violently, and evaded legislatively. Let us consider, first, those states which followed the implementation decree and began the desegregation of public schools. By August, 1955, for example, desegregation was accomplished in a number of districts and counties of Texas, Oklahoma, West Virginia, Missouri, Delaware, Kentucky, and Arkansas. When school opened in September, 134,000 Negro children were attending schools in eight southern or border states and the District of Columbia. By the beginning of the next school year, September, 1956, desegregation had begun or was accomplished in 650 school districts of the 3700 having students of both races. In fact, 319,184 Negroes were in integrated schools with approximately two million white students.
By the time of the fourth anniversary of the original ruling, the progress of desegregation could be especially noticed in the border states. For instance, all of West Virginia's school districts and 80 per cent of Kentucky's were integrated. Desegregation had been started or completed "in 29 per cent of Delaware's districts, 70 per cent of Kentucky's, 91 per cent of Maryland's, 58 80 per cent of Oklahoma's and 17 per cent of Texas'."

Only fifteen of 1,354 bi-racial school districts outside the border states had made any attempt at complying with the desegregation decree. These districts are concentrated in three states: 59 Arkansas, North Carolina, and Tennessee. The seven Deep South states—Alabama, Florida, Georgia, Louisiana, Mississippi, South Carolina, and Virginia—had made no effort to desegregate any of their public schools. With reference to a pupil-count, there were 1,952,761 white students and 377,286 Negroes in integrated situations. The majority of these students were in the border states and the District of Columbia, leaving about 4 per cent each of Negroes and whites in integrated situations in the remaining 61 southern states.

Blaustein and Ferguson comment that the Supreme Court decision of May 17, 1954, "caused a deeper schism between North and 62 South than any since Reconstruction days." While many communities integrated their schools, perhaps reluctantly but nevertheless peacefully, some others openly resisted—even to the point of violence. When the fall term immediately following the decision began, there
were demonstrations in Greenbrier County, West Virginia; Milford, Delaware; Baltimore, Maryland, and Washington, D.C. The school year 1955 saw a boycott in Hoxie, Arkansas, which lasted some two months. With the opening of the school term in 1956 demonstrations more violent in nature broke out in Mansfield, Texas; Clinton, Tennessee; and in Clay and Sturgis, Kentucky. In the case of Mansfield, Governor Allan Shivers sent the Texas Rangers to the scene. Governor Clement called out the National Guard to "promote law and order and preserve the peace" at Clinton, Tennessee. Likewise Governor Chandler dispatched the National Guard to the Kentucky areas of conflict. The climax of resistance came, however, in the fall of 1957 when Central High School of Little Rock, Arkansas, became the scene of international interest. Just prior to the opening of this high school on a desegregated basis, Governor Orval Faubus called out the National Guard to prevent the entrance of nine Negro students. This act set in motion a chain of circumstances which resulted in President Eisenhower's ordering troops to Little Rock to prevent Governor Faubus' interference with a federal mandate. Nashville, Tennessee, which began its desegregation in 1956 with the first grade also figured prominently in the September, 1957, news. Encouraged by John Kasper, a segregationist, demonstrations occurred which precipitated the bombing of one of the elementary schools.

The major news of the 1958 school term came from the States of Arkansas and Virginia. Because of the conflict during the
previous year in Little Rock, the NAACP again went before the Supreme Court seeking to overrule a lower court ruling to grant a two and one-half year delay in integration at Central High School. When the Supreme Court did not make a decision at its special extraordinary session called on August 28, it called another for September 11 to hear further argument. The Supreme Court handed down its decision on September 29, which directed Little Rock "to proceed with desegregation at Central High School." The result was that Governor Faubus ordered the four Little Rock high schools to be closed.

Virginia, which had been pledged to massive resistance, likewise defied a federal court desegregation order and several of its cities closed their schools. Included were one high school at Front Royal, six at Norfolk, and a high school and a grammar school at Charlottesville. These defensive acts on the part of Virginia and Arkansas meant that thirteen schools were closed and 16,000 pupils were without access to public education.

While desegregation was quietly accomplished in some places, and violently resisted in others, many of the states affected by the Supreme Court decision were using legislative media to evade integration. Patrick E. McCauley of Southern Education Reporting Service states that during the three years following the decision, "the legislative pattern of resistance moved along these lines":
1. Pupil placement laws in at least eight states have been enacted to control, if not to restrain, desegregation.

2. Abolition of public schools has been authorized in six states as a last resort.

3. Financial aid to students who wish to attend segregated, private, non-sectarian schools in the event public schools are either closed or mixed has been provided in four states.

4. Curtailment of court attacks on segregation laws has been the aim of new laws in four states.

5. Miscellaneous statutes have been enacted affecting compulsory attendance, teacher tenure, transportation, and use of funds for desegregated education. Primarily these acts have been designed to adjust general education laws to the new legislation bearing directly on the segregation issue.

6. Resolutions of interposition, nullification or protest against the Supreme Court decisions have been adopted in all of the resisting states. In addition, it has been predicted that "fifteen of the seventeen southern and border states will hold 1959 legislative sessions with new anti-integration measures slated to be added to the more than 200 already on the books."

One might mention that although there is still resistance to the high court mandate in many states—six of which do not even have token integration—the NAACP continues to look ahead to a day when the decision which they won will be accepted in reality.
as the law of the land. Addressing the 1957 Association, Roy Wilkins, the executive secretary, made this firm declaration:

If our convention here in Detroit had a theme it was that we not be dismayed, that we continue to press forward. If I sense correctly the feeling of the delegates, it is that in goodwill, but with firm determination we continue in the NAACP tradition of attacking evils and attacking again, until victory is won. We will attack them in the North as well as in the South, and we will have, as we have always had, an affirmative, positive program, as well as a program of protest and attack....71
CHAPTER VII

NOTES


4. Ibid., p. 10, c. 1.

5. Ibid., p. 12, c. 2.


7. Ibid., p. 5, c. 2.

8. Ibid., p. 13, c. 1.


10. Ibid., p. 2, c. 1.

11. Ibid., p. 8, c. 5.

12. Ibid., p. 6, c. 1.


15. Ibid., p. 4, c. 1.


18. Ibid.

19. Ibid.


42. *News from the NAACP*, NAACP Files, July 4, 1952.


47. Southern School News, Nov. 4, 1954, p. 5, c. 3.


55. Ibid., May, 1957, p. 9, c. 1, 2.

56. Ibid.

57. Ibid.


59. Ibid.

60. Ibid.

61. Ibid.


63. Southern School News, May, 1957, p. 9, c. 3.

64. Southern School News, October, 1957, p. 1, c. 1, 2.


67. Ibid.


70. Alabama, Florida, Georgia, Louisiana, Mississippi, and South Carolina.

CHAPTER VIII
SUMMARY AND CONCLUSIONS

A. Summary

1. Purpose and Method

My purpose in making this study was to evaluate from a rhetorical point of view the arguments of Thurgood Marshall before the Supreme Court in the public school segregation controversy.

I based my method chiefly on Aristotelian standards modified by the criteria of effective advocacy. The kind of criticism, according to the types as they are described by Thonssen and Baird, is judicial.

2. Background of the Study

Because the historical method is a part of rhetorical criticism and because one may better formulate a judgment by viewing a problem in its historical frame of reference, I sought to establish that public school segregation is, in reality, but a facet of the larger issue of segregation itself. The conditions under which the Negro was brought to America, his subsequent status as a slave, and the discriminatory treatment accorded him, even after he was emancipated, relegated him to the position of a second-class citizen. It was within this framework that I traced his struggle to obtain equal educational opportunities.
Since no study dealing with the Negro and his attempt to secure equality before the law would be complete without a discussion of the National Association for the Advancement of Colored People, I endeavored to assess the role of this organization in connection with the Brown case. Founded forty-five years after the emancipation of Negroes and dedicated to securing for them their full rights as citizens, the NAACP has been concerned with legal redress activities involving cases based on color discrimination. I emphasized especially the Association's continuous attempts to secure for Negro youth equal educational opportunities in public supported schools.

3. Background of the Advocate

In evaluating any type of speaking situation, a rhetorical critic is necessarily concerned about the background of the speaker, be he orator, statesman, or advocate. I, therefore, traced the development of Thurgood Marshall, the man who became a lawyer and the lawyer who became a symbol for the Negro's fight in the court to achieve his civil rights. While I admitted that Mr. Marshall did not achieve the victory alone, I selected him as the subject for this study on the ground that, as chief counsel, he has become synonymous with the NAACP's legal attacks. I discussed Marshall's family background and education as forces that helped to shape him. I regarded his attitudes and beliefs as determinants in forming the pattern of his life; I considered his faith in people, his
reverence for the Constitution of the United States, and his idealism as manifestations of his basic philosophy of life. Against this background, I discussed his legal career and his forensic ability.

4. Analysis of the Media of Persuasion

It was my position that the brief and the oral argument were the media of persuasion in the school segregation controversy. I analyzed these media, considered by Mr. Marshall himself as being of equal importance to the success of the case. An examination of the brief revealed that its persuasiveness was achieved by (1) the presentation of evidence, (2) the use of deductive and inductive reasoning, (3) the utilization of both non-artistic and artistic proof, and (4) adequate documentation.

I reconstructed the background of the occasion and the audience against which Thurgood Marshall presented his oral argument. I, then, analyzed the argument according to the canons of classical rhetoric, namely: invention, arrangement, style, and delivery. Discovering that Thurgood Marshall's chief strength was skillful use of inventive resources, I noted his thorough knowledge of the case and his logical reasoning. I observed the two-fold arrangement of his argument: (1) the grouping of ideas into the Aristotelian pattern of Statement and Argument, and (2) the organizing of his arguments in the order of increasing importance. My analysis of Mr. Marshall's style led me to conclude that it was both clear and appropriate.
He secured clearness through the diction, collocation of words, and embellishment; he achieved appropriateness through suiting the language to the occasion. With regard to his delivery, I found that Marshall's coordinated use of the voice and the body made for effectiveness in the communication of his ideas.

5. Impact of the Decision

Since the effectiveness of a speech is determined by the decision of the judges, I concluded that Thurgood Marshall and his colleagues were successful in their forensic efforts. On May 17, 1954, Chief Justice Earl Warren read the unanimous opinion of the Supreme Court that racial segregation in public education violates the Fourteenth Amendment of the Constitution. Realizing the impact which this verdict had on so many people, I gave some major consequences of the decision. These I discussed as immediate reactions and subsequent results.

B. Conclusions

The appraisal of Thurgood Marshall's oral argument from a rhetorical standpoint has led me to the conclusion that the following factors contributed to the effectiveness of the total speaking enterprise:

1. His training in public speaking and experience in debating.

2. His style and delivery.

3. His ethical appeal.
4. His legal philosophy.

5. His inventive skill.

I am of opinion that Mr. Marshall's training in public speaking in high school and in college provided him a good background for his court presentations. In addition, Marshall's debating experience on both levels was most likely useful. I observed, for example, certain techniques of debate as Mr. Marshall used the devices of "turning the tables" and residues. While it may have been unconscious on his part, I feel sure that Thurgood Marshall has a good understanding of rhetorical principles.

Mr. Marshall's style and delivery also were aids to an effective oral presentation. Despite the fact that the cause he espoused was one with which he was personally identified, Marshall's presentation had the character of moderation and sobriety. The simplicity and informality of his style, the dignity and restraint of his delivery made for both appropriateness and clearness.

A third important factor was Thurgood Marshall's ethical appeal. The strength of his character and the excellence of his reputation have been established both in and outside of the legal profession. Unlike Socrates who considered the lawyer a somewhat unprincipled person, I submit that Thurgood Marshall's high sense of ethics in the practice of law has earned for him the respect of his colleagues. Mr. Marshall's earnestness, sincerity, and dedication to duty have marked him as a man of character and goodwill.
Thurgood Marshall's legal philosophy was also a factor which contributed to his success. As a civil rights lawyer and a legal scholar, Marshall believes wholeheartedly in the Constitution of the United States. Familiar with this document since his high school days when he was required to memorize sections of it as a punitive measure, Mr. Marshall is firmly convinced that the Constitution is an instrument of stability which does not change according to mores and customs, nor the whims of people and their legislators. Marshall held that public school segregation violated the Fourteenth Amendment of the Constitution of the United States; and despite the opinion in some quarters that the decision was based on social science and that the justices may have been influenced by America's loss of prestige as a democratic nation, Thurgood Marshall believes that the decision was based on the law and nothing else.

I am convinced that the factor which contributed most to Mr. Marshall's success was his inventive skill. Marshall's ability to think clearly and quickly, to reason cogently and closely had its beginning in his childhood when his father insisted that he test the logic of his every statement. This quickwittedness served him in good stead in his appearance before the high court. I observed with interest Thurgood Marshall's ability not only to answer the questions of the Justices but also to anticipate their queries. This asset, coupled with his talent for choosing effective
and appropriate arguments and logically supporting them, proved an area of strength. I also believe that Mr. Marshall's thorough preparation for and knowledge of his case were decisive factors in producing conviction. Marshall had a comprehensive grasp of the legal precedents he presented as evidence as well as those his opponents relied on. In fact, he was able on occasion to take the cases cited by the opposition and use them to his own advantage.

An examination of the decision itself reveals what Thurgood Marshall's strongest arguments were. I was particularly impressed by the fact that the question which received the most adequate treatment in the Brief was the one which the Court declared inconclusive as to submitted evidence. The most effective argument presented by Mr. Marshall was obviously the one which held that any differential treatment of Negro children solely on the basis of race is completely out of harmony with the Fourteenth Amendment. Marshall believed and insisted that the Amendment had been adopted for the express purpose of preventing discrimination because of race. He further held that the separate but equal doctrine which had served as a precedent for similar cases ever since the Plessy decision of 1896 is violative of the spirit of the Amendment, since, in his opinion, separate can never be equal. With regard to Thurgood Marshall's invention, I, therefore, think that his competence in this respect resulted in a closely reasoned and well thought-out presentation.
Finally, it is my firm conviction—as I view the situation from the vantage point of five years afterwards—that because of Thurgood Marshall's contribution to the winning of the public school segregation case, he well deserves the epithet "Mr. Civil Rights." I believe that he has rendered an invaluable service to his race as well as to his country. While it is impossible to predict what might have happened under other circumstances, I am of opinion that had Thurgood Marshall's suggestion been followed—that the only way to accomplish desegregation is to do it at once and firmly—some of the problems which have accompanied desegregation would have been prevented. It seems to me that not only the Negro race but also the country as a whole is done a disservice when a section which has already retarded itself economically, socially, and culturally for many decades is permitted to hold back further the progress of the nation. In addition, I also feel that the majority of Americans—in the South as well as in the North—are law-abiding citizens who would not flagrantly disregard the law of the highest court of the land. Unfortunately the threats, intimidations, and violence have stemmed, for the most part, from politicians who believe they must raise the race issue in order to be elected to office. It is regrettable that in the din the voices of the moderates have been all but silenced.

Looking ahead I see that opposition to the court ruling will still be the continuing trend. I see that for a number of years to
come there will be only token integration in many places in the South. And I see that Thurgood Marshall—and those others who are dedicated to the cause of freedom and equality for all Americans—will mount the steps of the Supreme Court building and appear again and again before the high tribunal on behalf of the Negro race.
THE APPENDIX
APPENDIX A

CHRONOLOGY OF EVENTS
CHRONOLOGY OF EVENTS

Significant Dates before and after the Supreme Court Decision of May 17, 1954

1857-1958

1857  Dred Scott Decision stated that Negroes were not citizens.

1863  President Lincoln signed the Emancipation Proclamation.

1865  13th Amendment abolished slavery.

1866  Civil Rights Bill became law; gave "protection to all persons in their constitutional rights before the law, without distinction of race or color, or previous condition of slavery or involuntary servitude."

1868  14th Amendment prohibited states from abridging the privileges or immunities of citizens of the United States; provided also that Congress shall have power to enforce, by legislation, the provisions of the amendment.

1870  15th Amendment prohibited discrimination in suffrage on account of race, color, or previous condition of servitude. Civil Rights Act; reenactment of the 1866 Civil Rights Bill.

1875  Civil Rights Act passed; a stronger act to meet the situation of the South's refusal to accept its loss of the Civil War and the subsequent status of the Negroes.

1883  Supreme Court declared the Civil Rights Bill of 1875 unconstitutional.

1896  Plessy v. Ferguson (163 U.S. 537) established the "separate but equal" doctrine.

1915  Supreme Court declared unconstitutional the "grandfather clause" used to discriminate against Negro voters.

1935  *University of Maryland v. Murray (169 Md. 478).


*These cases were argued and the courts held that the spirit of the Plessy doctrine was being violated; that equal schools in law meant equal schools in fact.


Sweatt v. Painter (339 U.S. 629); in this case against the University of Texas the argument shifted to the point that even if facilities are equal, segregation is itself an inequality, a denial of equal protection of the laws, and a discrimination against the Negro, violating the 14th Amendment. The Court upheld the opinion.

Brown v. Board of Education (347 U.S. 483); five cases were argued under this one title—Kansas case, South Carolina case, Prince Edward County, Virginia case, Delaware case, and District of Columbia case. Lawyers for Negro plaintiffs attacked public school segregation as being violative of the Fourteenth Amendment, pressing the argument advanced in the Sweatt case, supra.

1952

May 17 Supreme Court handed down in the Brown v. Board of Education case the decision outlawing racial segregation in the public schools of the United States.

May 23 NAACP leaders from 18 states met in Atlanta, called for integration at all levels.

May 24 Four school districts in Delaware desegregated before end of the 1953-54 school year, becoming the first to act after the decision.

July 11 White Citizens Council organized in Indianola, Mississippi.

Sept. 17 Demonstration in Milford, Delaware.

Sept. 30 Demonstration in Baltimore, Maryland; schools returned to normal by October 6.

Oct. 4 Demonstration in Washington, D.C., schools; order restored in 4 days.

1955

May 31 United States Supreme Court called for "prompt and reasonable start toward full compliance with our May 17, 1954, ruling."

*These cases were argued and the courts held that the spirit of the Plessy doctrine was being violated; that equal schools in law meant equal schools in fact.
October Southern School News survey showed less than 300 Negro teachers out of 75,000 in region lost jobs as a result of desegregation.

1956 Jan. 23 300 pro-segregationists "march" on Tennessee capitol; demands rejected by Governor Clement.

Feb. 3 to 6 Riots on University of Alabama campus after the enrollment of a Negro student, Autherine Lucy.

May 14 United States Supreme Court refused to review University of Alabama appeal in the Autherine Lucy case, leaving doors open to qualified Negroes.

June 1 NAACP enjoined from operation in Alabama.

June 6 North Carolina Supreme Court, in a case involving school bonds, ruled state segregation laws invalid.

July 25 Alabama NAACP fined $100,000 for contempt in failing to obey July 11 court order to produce records.

Aug. 31 Mobs formed on school ground at Mansfield, Texas to prevent enrollment of Negroes. Governor Shivers sent Texas Rangers; school trustees asked to transfer any students whose presence might likely cause violence.

Sept. 1 to 3 Demonstrations at Clinton, Tennessee, after Negro students enrolled at high school under court order. Governor Clement sent National Guard, which remained until September 11.

Sept. 4 to 7 Demonstrations at Clay and Sturgis, Kentucky, as Negro students sought to attend all-white schools. Governor Chandler sent National Guard. Students later were removed after enabling opinion by attorney general.

October Tennessee Supreme Court ruled state school segregation laws invalid.

Oct. 24 Texas state court enjoined NAACP from further operation in the state.

1957 February Georgia asked, among other things, for impeachment of United States Supreme Court justices.

March Arkansas general assembly enacted four pro-segregation bills. One set up a state sovereignty commission with investigating powers.
Three western counties and a fourth in central Kentucky were ordered by a court to desegregate their schools.

In the State of Louisiana, 100 Negroes, out of some 200 previously enrolled, reentered integrated state colleges under injunctions restraining application of new state laws which would have excluded them.

South Carolina general assembly added an antibarratry statute to a body of legislation aimed at the NAACP.

April

Federal court ordered school integration plan in Delaware.

Florida State Supreme Court refused to carry out an order of the U.S. Supreme Court for admission of a Negro graduate law student to the University of Florida because this course might result in "violence."

U.S. Circuit Court of Appeal ordered desegregation of the New Orleans, Louisiana, schools.

Maryland State Board of Education turned down an appeal from 11 Negro pupils in Harford County seeking admission to white schools not included in the first stage of a limited program which restricted desegregation to the first three grades of two schools in the current year.

The North Carolina state's pupil assignment law upheld by the U.S. Supreme Court in a test over admission of Negro children to a McDowell County school.

South Carolina legislature approved bill giving the governor broad powers "for the protection of persons and property."

U.S. Supreme Court refused to review lower court orders directing Charlottesville and Arlington County, Virginia, to begin school desegregation. A state official told the school officials involved that they were helpless to obey under Virginia law.
A federal district court judge made formal an opinion holding the Virginia Pupil Placement Act unconstitutional.

June

Maryland State Court of Appeals upheld the legality of school desegregation as several counties prepared to extend their integration programs.

Texas legislators adopted a pupil assignment law and a measure requiring elections before other school districts desegregate.

Texas state court issued a modified permanent injunction against the NAACP.

Virginia pupil placement law challenged by a number of school patrons who refuse to sign required forms.

Clinton, Tennessee, high school graduated its first Negro.

July

A federal court approved "selective integration" in Harford County, Maryland, a plan involving the screening of Negro applicants.

Applications for school entry, governed by the state's pupil placement act, filed in Charlotte, Greensboro, Raleigh, and Winston-Salem, plus Mecklenburg County, North Carolina.

August

North Carolina desegregated three Piedmont cities and accepted 12 Negro pupils for enrollment under the state's Pupil Assignment Act.

Knoxville, Tennessee, jury convicted seven and acquitted four defendants in a contempt-of-court case involving disturbances in 1956 in Clinton.

Virginia's Pupil Placement Act was held unconstitutional by the Fourth Circuit Court in a ruling affirming a lower court decision. Desegregation orders against Norfolk, Newport News, and Charlottesville were stayed pending a U.S. Supreme Court ruling, but a district court ordered Arlington County to begin desegregation.
September  Arkansas desegregated two districts as planned, a third tried desegregation and abandoned it, and a fourth called it off. The fifth district with plans—Little Rock—saw state troops at first block Negro pupils, then demonstrations following withdrawal of the militia, and finally federal troop enforcement of desegregation order under President Eisenhower's direction.

October  Southern governors, meeting at Sea Island, Georgia, arranged a conference of five with President Eisenhower to discuss the Little Rock situation and integration generally.

First grade integration in Nashville, Tennessee, schools completed under police protection, after a building was bombed.

November  Florida legislature adopted a measure requiring the immediate closing of any school where federal troops are assigned to enforce integration.

U.S. Supreme Court struck a blow at Virginia's placement law by refusing to review a lower court decision holding it invalid in the Norfolk-Newport News case.

December  Six Tennessee state colleges were instructed by the board of education to admit all qualified students who meet entrance requirements.

John Kasper was sentenced to six months in federal penitentiary for his part in the 1956 Clinton, Tennessee, disturbances and six co-defendants received suspended sentences.

A special session of the Texas legislature passed a law authorizing closing of any school to prevent the using of troops.

1958 February  Ten Negro parents filed suit on behalf of 28 children to gain entry to all-white schools in Atlanta, Georgia.

Three of Virginia's NAACP laws were held unconstitutional in a 2-1 decision by a special three-judge federal court while a state court upheld legislative subpoena of the NAACP membership lists.
<table>
<thead>
<tr>
<th>Month</th>
<th>Event</th>
</tr>
</thead>
<tbody>
<tr>
<td>March</td>
<td>Little Rock, Arkansas, school board asked the federal district court to postpone integration at Central High.</td>
</tr>
<tr>
<td>April</td>
<td>Alabama's pupil placement law challenged by four Negro children who sought to enter two all-white schools in Birmingham. Texas desegregated thirty-five colleges in practice and eight others as a matter of policy.</td>
</tr>
<tr>
<td>June</td>
<td>In a ruling on Alabama's public school entry suit in Birmingham a three-judge federal court ruled that the state's pupil placement law was not unconstitutional &quot;on its face&quot; but allowed for the possibility that it might be found so in its application. Negro children seeking entry to all-white schools in Charlottesville and Arlington County, Virginia, won court victories.</td>
</tr>
<tr>
<td>July</td>
<td>Little Rock's school board was granted a 2½-year postponement of integration at Central High School by federal district court. Immediate appeals were taken by Negro plaintiffs to the Eighth Circuit Court and the U.S. Supreme Court. University of Florida was ordered by federal court to open its graduate schools to Negroes. U.S. district court approved Nashville's gradual grade-by-grade integration program. Norfolk and Newport News, Virginia, ordered to integrate schools.</td>
</tr>
<tr>
<td>August</td>
<td>U.S. Eighth Circuit Court of Appeals ordered Little Rock schools opened on an integrated basis. Governor Long of Louisiana signed five new bills giving him the power to close schools and sell the buildings to private groups rather than permit desegregation.</td>
</tr>
<tr>
<td>September</td>
<td>Florida accepted integration in principle at the graduate level. One of two Negro applicants qualified for admission to the school of law.</td>
</tr>
</tbody>
</table>
A new college integration suit was filed by 11 Negroes seeking admission to the Louisiana State University.

Charlottesville and Arlington joined Norfolk in postponing school opening in Virginia in face of federal court orders and state threats of closure.

October

With Little Rock's high school closed, trouble developed in Van Buren and Ozark, Arkansas, where Negroes were harassed.

The first Negro to enter the University of Florida enrolled without incident. It was the state's first public school integration anywhere.

Louisiana State University opened a new branch at New Orleans with 59 Negroes enrolled under federal court order.

Nine schools remained closed while Virginia pondered the next move in its "massive resistance" to federally-ordered desegregation.

November

A private school sponsored by Governor Orval Faubus of Arkansas opened while anti-integration steps were taken at Ozark and Van Buren.

A federal district court handed down an order making permanent an injunction against separation of the races in New Orleans public schools.

Three dynamite blasts caused an estimated $250,000 damage to desegregated Clinton, Tennessee, high school.

December

A Nashville jury sentenced John Kasper to six months imprisonment and fined him $500 for his part in disturbances at the opening of integrated city schools in 1957.
APPENDIX B

The Thirteenth Amendment

The Fourteenth Amendment

The Fifteenth Amendment
The Thirteenth Amendment
of the
United States Constitution

Section I.

Neither slavery nor involuntary servitude, except as a
punishment for crime whereof the party shall have been duly
convicted, shall exist within the United States, or any place
subject to their jurisdiction.

Section II.

Congress shall have power to enforce this article by
appropriate legislation.
The Fourteenth Amendment
of the
United States Constitution

Section I.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section II.

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.
Section III.

No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section IV.

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section V.

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.
The Fifteenth Amendment of the United States Constitution

Section I.

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude—

Section II.

The Congress shall have power to enforce this article by appropriate legislation.
APPENDIX C

The Civil Rights Acts of 1866, 1870 and 1875

(The Civil Rights Act of 1870 was the same as that of 1866)
The Civil Rights Act
April 9, 1866

An Act to protect all Persons in the United States in their Civil Rights, and furnish the Means of their Vindication.

Be it enacted, That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.

Section 2. And be it further enacted, That any person who, under color of any law, statute, ordinance, regulation, or custom, shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by this act, or to different punishment, pains, or penalties on account of such person having at any time been held in a condition of slavery or involuntary servitude, except as a punishment for crime whereof
the party shall have been duly convicted, or by reason of his color or race, than is prescribed for the punishment of white persons, shall be deemed guilty of a misdemeanor, and, on conviction, shall be punished by fine not exceeding one thousand dollars, or imprisonment not exceeding one year, or both, in the discretion of the court.

Section 3. And be it further enacted, That the district courts of the United States, . . . shall have, exclusively of the courts of the several States, cognizance of all crimes and offences committed against the provisions of this act, and also, concurrently with the circuit courts of the United States, of all causes, civil and criminal, affecting persons who are denied or cannot enforce in the courts or judicial tribunals of the State or locality where they may be any of the rights secured to them by the first section of this act. . . .

Section 4. And be it further enacted, That the district attorneys, marshals, and deputy marshals of the United States, the commissioners appointed by the circuit and territorial courts of the United States with powers of arresting, imprisoning, or bailing offenders against the laws of the United States, the officers and agents of the Freedmen's Bureau, and every other officer who may be specially empowered by the President of the United States, shall be, and they are hereby, specially authorized and required, at the expense of
the United States, to institute proceedings against all and every
person who shall violate the provisions of this act, and cause him
or them to be arrested and imprisoned, or bailed, as the case may
be, for trial before such court of the United States or territorial
court as by this act has cognizance of the offence. . . .

Section 8. And be it further enacted, That whenever the President
of the United States shall have reason to believe that offences
have been or are likely to be committed against the provisions of
this act within any judicial district, it shall be lawful for him,
in his discretion, to direct the judge, marshal, and district attor­
ney of such district to attend at such place within the district,
and for such time as he may designate, for the purpose of the more
speedy arrest and trial of persons charged with a violation of this
act; and it shall be the duty of every judge or other officer,
when any such requisition shall be received by him, to attend at
the place and for the time therein designated.

Section 9. And be it further enacted, That it shall be lawful for
the President of the United States, or such person as he may empower
for that purpose, to employ such part of the land or naval forces of
the United States, or of the militia, as shall be necessary to pre­
vent the violation and enforce the due execution of this act.

Section 10. And be it further enacted, That upon all questions of law
arising in any cause under the provisions of this act a final appeal
may be taken to the Supreme Court of the United States.
The Civil Rights Act
March 1, 1875

An act to protect all citizens in their civil and legal rights

Whereas it is essential to just government we recognize the equality of all men before the law, and hold that it is the duty of government in its dealings with the people to mete out equal and exact justice to all, of whatever nativity, race, color, or persuasion, religious or political; and it being the appropriate object of legislation to enact great fundamental principles into law: Therefore,

Be it enacted, That all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude.

Section 2. That any person who shall violate the foregoing section by denying to any citizen, except for reasons by law applicable to citizens of every race and color, and regardless of any previous condition of servitude, the full enjoyment of any of the accommodations, advantages, facilities, or privileges in said section enumerated, or by aiding or inciting such denial, shall, for every such offense, forfeit and pay the sum of five hundred dollars to
the person aggrieved thereby, . . . and shall also, for every such offense, be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than five hundred nor more than one thousand dollars, or shall be imprisoned not less than thirty days nor more than one year . . .

Section 3. That the district and circuit courts of the United States shall have, exclusively of the courts of the several States, cognizance of all crimes and offenses against, and violations of, the provisions of this act . . .

Section 4. That no citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State, on account of race, color, or previous condition of servitude; and any officer or other person charged with any duty in the selection or summoning of jurors who shall exclude or fail to summon any citizen for the cause aforesaid shall, on conviction thereof, be deemed guilty of a misdemeanor, and be fined not more than five thousand dollars.

Section 5. That all cases arising under the provisions of this act . . . shall be renewable by the Supreme Court of the United States, without regard to the sum in controversy. . . .
APPENDIX D

The NAACP Call and the Signers
The celebration of the Centennial of the birth of Abraham Lincoln, widespread and grateful as it may be, will fail to justify itself if it takes no note of and makes no recognition of the colored men and women for whom the great Emancipator labored to assure freedom. Besides a day of rejoicing, Lincoln's birthday in 1909 should be one of taking stock of the nation's progress since 1865.

How far has it lived up to the obligations imposed upon it by the Emancipation Proclamation? How far has it gone in assuring to each and every citizen, irrespective of color, the equality of opportunity and equality before the law, which underlie our American institutions and are guaranteed by the Constitution?

If Mr. Lincoln could revisit this country in the flesh, he would be disheartened and discouraged. He would learn that on January 1, 1909, Georgia had rounded out a new confederacy by disfranchising the Negro, after the manner of all the other Southern States. He would learn that the Supreme Court of the United States, supposedly a bulwark of American liberties, had refused every opportunity to pass squarely upon this disfranchisement of millions, by laws avowedly discriminatory and openly enforced in such manner that the white men may vote and black men be without a vote in their government; he would discover, therefore, that taxation without representation is the lot of millions
of wealth-producing American citizens, in whose hands rests the economic progress and welfare of an entire section of the country.

He would learn that the Supreme Court, according to the official statement of one of its own judges in the Berea College case, has laid down the principle that if an individual State chooses, it may 'make it a crime for white and colored persons to frequent the same market place at the same time, or appear in an assemblage of citizens convened to consider questions of a public or political nature in which all citizens, without regard to race, are equally interested.

In many states Lincoln would find justice enforced, if at all, by judges elected by one element in a community to pass upon the liberties and lives of another. He would see the black men and women, for whose freedom a hundred thousand of soldiers gave their lives, set apart in trains, in which they pay first-class fares for third-class service, and segregated in railway stations and in places of entertainment; he would observe that State after State declines to do its elementary duty in preparing the Negro through education for the best exercise of citizenship.

Added to this, the spread of lawless attacks upon the Negro, North, South, and West—even in the Springfield made famous by Lincoln—often accompanied by revolting brutalities, sparing neither sex nor age nor youth, could but shock the author of the sentiment that 'government of the people, by the people, for the people; should not perish from the earth.'
"Silence under these conditions means tacit approval. The indifference of the North is already responsible for more than one assault upon democracy, and every such attack reacts as unfavorably upon whites as upon blacks. Discrimination once permitted cannot be bridled; recent history in the South shows that in forging chains for the Negroes the white voters are forging chains for themselves. 'A house divided against itself cannot stand'; this government cannot exist half-slave and half-free any better to-day than it could in 1861.

Hence we call upon all the believers in democracy to join in a national conference for the discussion of present evils, the voicing of protests, and the renewal of the struggle for civil and political liberty.

This call was signed by: Jane Addams, Chicago; Samuel Bowles (Springfield Republican); Prof. W. L. Bulkley, New York; Harriet Stanton Blatch, New York; Ida Wells Barnett, Chicago; E. H. Clement, Boston, Kate H. Claghorn, New York; Prof. John Dewey, New York; Dr. W.E.B. DuBois, Atlanta; Mary E. Dreier, Brooklyn; Dr. John L. Elliott, New York; Wm. Lloyd Garrison, Boston; Rev. Francis J. Grimke, Washington, D.C.; William Dean Howells, New York; Rabbi Emil G. Hirsch, Chicago; Rev. John Haynes Holmes, New York; Prof. Thomas C. Hall, New York; Hamilton Holt, New York; Florence Kelley, New York; Rev. Frederick Lynch, New York; Helen Marot, New York; John E. Milholland, New York; Mary E. McDowell, Chicago; Prof. J.G. Merrill, Connecticut; Dr. Henry Moskowitz,

Note: Seven Last Signers of NAACP Call Discovered

On March 12, 1959, fifty years after the founding of the NAACP, the Association announced that the names of seven additional signers of the historic Lincoln Day call of 1909 had come to light.

Recent research by Flint Kellogg, professor of history at Dickinson College in Carlisle, Pennsylvania, led to the discovery of the seven last signers: Ray Stannard Baker, New York; Rev. Jenkin Lloyd Jones, Chicago; Rev. Walter Laidlow, New York; Mrs. Mary Church Terrell, Washington; Mrs. Henry Villard, New York; Mayor Brand Whitlock, Toledo, Ohio; and Rev. M. St. Croix Wright, New York.
APPENDIX E

The Opinion of the Supreme Court:


MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

These cases come to us from the States of Kansas, South Carolina, Virginia, and Delaware. They are premised on different facts and different local conditions, but a common legal question justifies their consideration together in this consolidated opinion.

In each of the cases, minors of the Negro race, through their legal representatives, seek the aid of the courts in obtaining admission to the public schools of their community on a non-segregated basis. In each instance, they had been denied admission to schools attended by white children under laws requiring or permitting segregation according to race. This segregation was alleged to deprive the plaintiffs of the equal protection of the laws under the Fourteenth Amendment. In each of the cases other than the Delaware case, a three-judge federal district court denied relief to the plaintiffs on the so-called "separate but equal" doctrine announced by this Court in *Plessy v. Ferguson*, 163 U.S. 537. Under that doctrine, equality of treatment is accorded when the races are provided substantially equal facilities, even though these facilities be separate. In the Delaware case, the Supreme Court of Delaware adhered to that doctrine, but ordered that the plaintiffs be admitted to the white schools because of their superiority to the Negro schools.
The plaintiffs contend that segregated public schools are not "equal" and cannot be made "equal," and that hence they are deprived of the equal protection of the laws. Because of the obvious importance of the question presented, the Court took jurisdiction. Argument was heard in the 1952 Term, and reargument was heard this Term on certain questions propounded by the Court.

Reargument was largely devoted to the circumstances surrounding the adoption of the Fourteenth Amendment in 1868. It covered exhaustively consideration of the Amendment in Congress, ratification by the states, then existing practices in racial segregation, and the views of proponents and opponents of the Amendment. This discussion and our own investigation convince us that, although these sources cast some light, it is not enough to resolve the problem with which we are faced. At best, they are inconclusive. The most avid proponents of the post-War Amendments undoubtedly intended them to remove all legal distinctions among "all persons born or naturalized in the United States." Their opponents, just as certainly, were antagonistic to both the letter and the spirit of the Amendments and wished them to have the most limited effect. What others in Congress and the state legislatures had in mind cannot be determined with any degree of certainty.

An additional reason for the inconclusive nature of the Amendment's history, with respect to segregated schools, is the status of public education at that time. In the South, the movement
toward free common schools, supported by general taxation, had not yet taken hold. Education of white children was largely in the hands of private groups. Education of Negroes was almost nonexistent, and practically all of the race were illiterate. In fact, any education of Negroes was forbidden by law in some states. Today, in contrast, many Negroes have achieved outstanding success in the arts and sciences as well as in the business and professional world. It is true that public education had already advanced further in the North, but the effect of the Amendment on Northern states was generally ignored in the congressional debates. Even in the North, the conditions of public education did not approximate those existing today. The curriculum was usually rudimentary; ungraded schools were common in rural areas; the school term was but three months a year in many states; and compulsory school attendance was virtually unknown. As a consequence, it is not surprising that there should be so little in the history of the Fourteenth Amendment relating to its intended effect on public education.

In the first cases in this Court construing the Fourteenth Amendment, decided shortly after its adoption, the Court interpreted it as proscribing all state-imposed discriminations against the Negro race. The doctrine of "separate but equal" did not make its appearance in this Court until 1896 in the case of Plessy v. Ferguson, supra, involving not education but transportation. American courts have since labored with the doctrine for over half a century. In this
Court, there have been six cases involving the "separate but equal" doctrine in the field of public education. In *Cumming v. County Board of Education*, 175 U.S. 528, and *Gong Lum v. Rice*, 275 U.S. 78, the validity of the doctrine itself was not challenged. In more recent cases, all on the graduate school level, inequality was found in that specific benefits enjoyed by white students were denied to Negro students of the same educational qualifications. *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337; *Sipuel v. Oklahoma*, 332 U.S. 631; *Sweatt v. Painter*, 339 U.S. 629; *McLaurin v. Oklahoma State Regents*, 339 U.S. 637. In none of these cases was it necessary to reexamine the doctrine to grant relief to the Negro plaintiff. And in *Sweatt v. Painter*, supra, the Court expressly reversed decision on the question whether *Plessy v. Ferguson* should be held inapplicable to public education.

In the instant cases, that question is directly presented. Here, unlike *Sweatt v. Painter*, there are findings below that the Negro and white schools involved have been equalized, or are being equalized, with respect to buildings, curricula, qualifications and salaries of teachers, and other "tangible" factors. Our decision, therefore, cannot turn on merely a comparison of these tangible factors in the Negro and white schools involved in each of the cases. We must look instead to the effect of segregation itself on public education.

In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy*
v. Ferguson was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other "tangible" factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does.

In Sweatt v. Painter, supra, in finding that a segregated law school for Negroes could not provide them equal educational
opportunities, this Court relied in large part on "those qualities which are incapable of objective measurement but which make for greatness in a law school." In *McLaurin v. Oklahoma State Regents*, supra, the Court, in requiring that a Negro admitted to a white graduate school be treated like all other students, again resorted to intangible considerations: "...his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession." Such considerations apply with added force to children in grade and high schools. To separate them from others of similar age and qualification solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. The effect of this separation on their educational opportunities was well stated by a finding in the Kansas case by a court which nevertheless felt compelled to rule against the Negro plaintiffs:

"Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the Negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to retard the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racially integrated school system.

Whatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*, this finding is amply supported by
modern authority. Any language in *Plessy v. Ferguson* contrary to this finding is rejected.

We conclude that in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment. This disposition makes unnecessary any discussion whether such segregation also violates the Due Process Clause of the Fourteenth Amendment.

Because these are class actions, because of the wide applicability of this decision, and because of the great variety of local conditions, the formulation of decrees in these cases presents problems of considerable complexity. On reargument, the consideration of appropriate relief was necessarily subordinated to the primary question—the constitutionality of segregation in public education. We have now announced that such segregation is a denial of the equal protection of the laws. In order that we may have the full assistance of the parties in formulating decrees, the cases will be restored to the docket, and the parties are requested to present further argument on Questions 4 and 5 previously propounded by the Court for the reargument this Term. The Attorney General of the United States is again invited to participate. The Attorneys
General of the states requiring or permitting segregation in public education will also be permitted to appear as amici curiae upon request to do so by September 15, 1954, and submission of briefs by October 1, 1954.

It is so ordered.
APPENDIX F

THE TEXT OF THE ORAL ARGUMENTS

Following is a transcript of the oral arguments of Thurgood Marshall before the Supreme Court on December 7 and 8, 1953. These arguments were transcribed by Ward and Paul, Official Reporters, Washington, D. C.
Mr. Marshall: May it please the Court, Mr. Robinson has addressed himself particularly to the Congressional history and specifically to the first two questions asked by the Court. I would like for a moment to review particularly questions two and three.

As I understand it, the second question raised the question about Congress in submitting the amendment as to whether future Congresses would have the power; and (b) was as to whether or not it was within the judicial power in the light of future conditions to construe the amendment as abolishing such segregation of its own force; and then we get to question three, which is the one I would like to address myself to for the first part of this argument, namely, that, as I understand it, the Court is first requesting us to make the assumption that the answers to questions two (a) and two (b) do not dispose of the case, and on this assumption we are requested to direct our attention the specific question as to whether or not the Court—this Court—has judicial power in construing the Fourteenth Amendment to abolish segregation in the public schools. And our answer to that question is a flat "Yes."

But in answering the question, we want to develop from the legal precedents in this case the necessary answer, and to us these legal precedents divide themselves into three groups; and it would be normal and, perhaps, would be more logical to cover these groups of cases in chronological order.
But, however, with the permission of the Court and for the purpose of this argument, we would like to divide them as follows: In the first group to discuss the cases this Court has handed down in the recent years construing the Fourteenth Amendment and the Fifth Amendment, in both instances in regard to the power of the Government, Federal or State, to use race, class or national origin for classification purposes.

Then, we would like to go to the second group, being the decisions of the Court construing the Fourteenth Amendment during the period immediately subsequent to the ratification of the Fourteenth Amendment.

We believe that a review of these two groups of cases will show that during these two periods, this Court uniformly gave to the Amendment the broad scope which the framers intended, as set forth by Mr. Robinson.

If there were no other cases on the point, the answer to question three would be simple. However, there is a third group of cases, including at least two decisions, and some others inferentially in that group, which are heavily relied upon by the appellees as compelling a contrary decision of this Court. These cases, obviously, are the ones alleged to support the separate but equal doctrine.

With that preliminary statement, I would like to get to this first group of cases.

Justice Jackson: May I suggest, I do not believe —

Mr. Marshall: Yes, sir.
Justice Jackson: I do not believe the Court was troubled about its own cases. It has done a good deal of reading of those cases.

Mr. Marshall: And the first group are all from this very Court; I was just trying to relate them.

Justice Jackson: Good.

Maybe the question was more nearly, instead of power—in the strong sense—I only speak for myself not for others—it is the question of the propriety of exercising judicial power to reach this result, if the result would be reached, in the absence of any legislation. I do not think it was a question of power in the sense that our cases have dealt with it. It is a question—

Mr. Marshall: Well, so far—if I understand you correctly, Mr. Justice Jackson, you mean power that would come from the legislative history of the Fourteenth Amendment?

Justice Jackson: Whether the Amendment, with what light you can throw on it, makes it appropriate for judicial power, after all that has intervened, to exercise this power instead of—

Mr. Marshall: Leaving it to the Congress.

Justice Jackson: That is right.

I do not like to see you waste your time on a misunderstanding, because I do not think we had any doubt about our cases. Things are so often read—

Justice Frankfurter: And the books.

Mr. Marshall: Believe it or not, I have read about it. I
have read about it.

I think then that I should change and leave out the first group, for the time being, and go to the other group beginning with Slaughter House, because the reason I would like to discuss those—because, for example, Mr. Justice Frankfurter raised the question about Mr. Justice Miller in the Slaughter House case, and I wanted to add to that the fact that we cannot ignore the opinion of Justice Strong in the Strauder v. West Virginia case, and at that stage of the argument I wanted to say that in these decisions at that period of time they recognized the exact same legislative historical argument that we have just completed; and the Slaughter House case, as I read it, stands for the proposition, and at least it has been cited by this Court all the way up at least to the Covenant cases of Shelley, that the Fourteenth Amendment and the intent that you get from the framers of it, is definitely on the broad purpose that we allege here.

As to whether or not Congress intended to leave this matter to Congress, I submit that one of the short answers is that Title 8, Section 43, which is the statute that we base all of these cases on, says specifically in its enacting clause adopted in 1871, which we have in our brief, that "this bill is enacted for the purpose of enforcing the Fourteenth Amendment."

Congress has already acted and, in that act I am sure it will be remembered that it says that anyone acting under color of state
statute, who denies anyone rights guaranteed by the Constitution or laws of the United States shall have a right of action in law or in equity. The original statute said "in the District Court or Circuit Courts," and in codifying it they, of course, have left out the Circuit Court point.

But if there is a need for Congressional action, it is there, and in Strauder against West Virginia Mr. Justice Strong, in his opinion—and we quote it in our brief on page 22 and 23 the language which we believe—either I have the wrong brief or—it is there, 33.

The Chief Justice: I would like to have you discuss the question of power because I believe that is the question the Court asked you to discuss.

Mr. Marshall: The power.

The Chief Justice: Yes, the power.

Mr. Marshall: Yes, sir. On the power, Mr. Chief Justice Warren, we take the position, and we have covered it in the brief—

The Chief Justice: Yes.

Mr. Marshall: —and that was the part that Mr. Robinson was to deal with this morning, and it is our understanding that the Fourteenth Amendment, following the Civil Rights Law, but not limited to the Civil Rights Act of 1866, in the debates, it is obvious, especially in the later debates, that left with the courts of the land was this problem of deciding as to the interpretation, so that as to power, it is our position that the Court gets specific power in addition to the regular judiciary act in this Act of 1871, Title 8,
which is now Title 8, Section 43 which, I submit, not only gives the Federal courts power, but imposes upon the Federal courts a specific duty which is different, and this is where we get our power point, and we thought that was sufficient.

The Chief Justice: Yes.

Justice Frankfurter: Mr. Marshall—

Mr. Marshall: Yes, Mr. Justice Frankfurter.

Justice Frankfurter: --you trouble me about saying there has been legislation.

You are not resting your claim here on the Act of 1871, and are then discussing whether that Act is constitutional?

Mr. Marshall: No, sir.

Justice Frankfurter: You have to--you are resting, as I understand it, on the compulsions, the implications, derived from the Fourteenth Amendment, as such, in your cases?

Mr. Marshall: Yes, sir.

Justice Frankfurter: So I do not know why you constantly revert to the fact that Congress has already exercised the power. I do not understand what you mean by that.

Mr. Marshall: Well, as I understand, running through the questions, especially those in number two, the second question—and fortunately, insofar as this case is concerned, the appellees here claim that Congress has no power to legislate in this field at all and, as I understand their position, the courts and Congress and
nobody else can touch it, it is a matter solely for the states.

Justice Frankfurter: That we have not got here.

Mr. Marshall: No, sir; but it is our position that the Fourteenth Amendment was intended to leave to the courts the normal construction of the statute— I mean of the Constitution—and this Act of 1871 is merely recognizing that.

Justice Frankfurter: I do not know what that Act has to do with this, our problem. If your claim prevails, it must prevail by virtue of what flows out of the Fourteenth Amendment, as such?

Mr. Marshall: And would be —

Justice Frankfurter: And so far as I am concerned, 1871 need not be on the statute books.

Mr. Marshall: And we would still have a valid —

Justice Frankfurter: And does not help me any.

Mr. Marshall: Yes, sir.

Justice Frankfurter: All right, I understand.

Mr. Marshall: As I understand it, Mr. Justice Frankfurter, if I may for a minute leave the Congressional debates, because I think on the matter of time—and go to the Strauder and the Slaughter House cases which, I think, are the key to this situation, because they were decided at the time nearest to the Fourteenth Amendment—and the Slaughter House cases, Justice Miller's opinion has been, as I said, cited over and over again, and there is no question that that opinion makes it clear that the Fourteenth Amendment was adopted for the express purpose, and the purpose was, to correct the situation
theretofore existing in regard to the treatment of Negroes, slave or free, in a different category from the way you treated the others.

Then, in that particular instance on page 81, which is cited on page 33 of our brief, it is stated that, "The existence of laws in the States where the newly emancipated Negroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied by this clause, and by it such laws are forbidden." That is the expression that is nearest to the time of the amendment.

Justice Frankfurter: Wouldn't you say, sir, we do not have to elaborate that because the whole point—not the whole point, but one of the difficulties or one of the assumptions that has to be remedied by later cases was the intimation of Justice Miller that it was related exclusively to equalizing things?

Mr. Marshall: Yes, sir.

Justice Frankfurter: So one does not have to argue that the Fourteenth Amendment, the target of the Fourteenth Amendment, was to give Negroes certain rights.

Mr. Marshall: I think so, sir.

Justice Frankfurter: I do not see that that needs any argument.

Mr. Marshall: The only thing that was preliminary to this, Mr. Justice Frankfurter, was that in the Strauder case—and I think that is the one that is really on the point for this particular issue, in Strauder v. West Virginia—it was made clear, one thing which I
would have considered obvious all along—and that is the constitutional amendments are setting down rules—I mean broad principles and not rules—of conduct, as such, and they are put in broad language.

Well Strauder mentions that.

But the important point is that in the Strauder case the decision in that court makes it clear that they did not intend to enumerate these rights; and that, to my mind, is the crux of whether or not the court has power to deal with segregation.

Certainly it did not mention it in the amendment itself, and a lot of items it did not mention. But when you read the debates, as Mr. Robinson explained, you cannot escape this point: That the amendment was adopted for the express purpose of depriving the states of authority to exercise and enforce the existing Black Codes; that by putting it in the Constitution it was obviously intended that the states would not have power in the future to set up additional Black Codes; and to use the language of this Court in one case, Lane v. Wilson, whether it is sophisticated or simple-minded; and the part that is to my mind crucial in this case, is that until this time the appellees have shown nothing that can in any form or fashion say that the statutes involved in these cases are not the same type of statutes discussed in the debates and in the decision of the court nearest to that, namely, the Black Codes, and I do not see how the inevitable result can be challenged, because they are of the exact same cloth, when you go to these Black Codes.
They do, however, on the question of power argue that the State of South Carolina and the State of Virginia have themselves worked out this problem, and for that reason they have found they have to have segregation.

The only way they can keep schools would be to keep segregation and for that reason, as I understand their argument, that reason takes them out of the general flow of invidious legislation under the Fourteenth Amendment; and then they say that there is no definite material in the debates that shows the intent of Congress to include segregation in public education and we submit that that is not the way to approach this problem.

Once we admit, either by reading the legislative debates or reading cases such as Strauder, the Slaughterhouse Cases and the other cases, once we arrive at the conclusion that the Fourteenth Amendment was intended to strike down all types of class and caste legislation, this on its face, involves class, then it seems to me that the only way the appellees can destroy that very clear and logical approach is to show that it was intended not to include schools, not to include segregation, and then we have the very interesting position— they immediately recognize that in their briefs, especially in the South Carolina brief, because they say that the McLaurin case involves separate but equal doctrine, and certainly if ever there was a case that did not involve separate but equal, it was McLaurin, because as soon as the McLaurin case recognizes the broad intent of the Fourteenth Amendment to cover in progressive
stages education, graduate education, I mean, excuse me, legal education, then graduate education; and, as I understand the task the appellees have by force addressed themselves to, it is that even admitting that education is within the purview of the Fourteenth Amendment, when you get to elementary and high schools this Court loses its power to decide as to whether or not segregation in elementary and high schools is illegal.

Now, as to the power argument, it seems to me that that is it in the simplest fashion, and despite the fact that we thought we were obliged to develop it, I think that is a shorthand statement of our position on it, and I think it has not been met, at least up to this point, in any of the briefs and cases.

Justice Frankfurter: I should suggest that the question is not whether this Court loses its power, but whether the states lose their powers. I understand the answer you make to it—

Mr. Marshall: It is my understanding, yes, sir, I think definitely, Mr. Justice Frankfurter, that a reading of the two briefs in this case demonstrates clearly that as of this time we have a test to see whether or not the public policy, customs and mores of the states of South Carolina and Virginia or the avowed intent of our Constitution, as to which one will prevail.

For example, in their briefs they rely on the fact that they mention the fact that there is such a thing as racial prejudice, and this is this and that is that, and I would like to, if I could, quote
to you one case in our reply brief which, at least is I know, not news to the Court, but it was news to us. I am sure the Court is familiar with the case of Tanner v. Little. I am not advocating the actual final decision in that case as of this time, but in the language in that case, which involved as you may remember, the green stamps by trading stores—the language is cited on pages 8 and 9 of our brief, and I submit that it is in the middle of a paragraph, is that:

"Red things may be associated by reason of their redness, with disregard of all other resemblances or of distinctions. Such classification would be logically appropriate. Apply it further: Make a rule of conduct depend upon it, and distinguish in legislation between red-haired men and black-haired men, and the classification would immediately be seen to be wrong; it would have only arbitrary relation to the purpose of province of legislation."

In these cases the only way—and if I will stay with the power point a short while longer, there would have to be a showing in order to sustain this legislation under the broad power of this Court to construe statutes under the reasonable classification doctrine.

They would have to show, and we have shown to the contrary—they would have to show, one, that there are differences in race; and, two, that differences in race have a recognizable relationship to the subject matter being legislated, namely, public education.
That is a rule that has been uniformly applied by this Court in all other challenges that a classification is unreasonable. Those cases, of course, are also set out in our brief.

The other side of the South Carolina case says that the rule is a general rule, and the state has these powers; and they cite, of all cases to support that, Yick Wo v. Hopkins, which this Court is thoroughly familiar with, the principle established in that case, which is directly to the contrary.

So, on the power point, it seems to me that there are only two relative groups of arguments: One, the congressional side, and the other, in addition to the recognized cases, the regular reasonable classification cases.

Now, with that, it seems to me that if I am correct in interpreting Mr. Justice Jackson's position, that that is what that point involves, it seems to me that is a sufficient answer to it, and if it is, I would conclude it by going back to the difference between the cases and the cases on the other side, because I feel obliged to touch the cases that the other side, of course, relies on and the lower courts relied on, beginning with the Plessy v. Ferguson case, and its doctrine.

In our brief we have pointed out the obvious ways that those cases could be distinguished. For the purpose of this argument and for the purpose of answering the specific question of this Court, we believe that it is proper for us to say here and now that the distinction, for example, in the Plessy v. Ferguson case, that it
involved railroads instead of education, transportation against education, is a point of distinction, but for this point there is none, in fact, because it has been recognized as the originator of the separate but equal doctrine.

The next case that is near to the point is the Gong Lum v. Rice case, which was different; they did not raise the issue of the validity of the classification. All they were objecting to, and possibly it is understandable that the Chinese child was objecting to, being classified as a Negro and put in an inferior school. Maybe that is—but so far as the law in the country today is concerned, that decision stands for the proposition that a state has a right to classify on the basis of class, race or ancestry, and our position on that is merely that the Gong Lum case, and the separate but equal doctrine of Plessy v. Ferguson, is just out of step with the earlier decisions in Slaughterhouse and Strauder v. West Virginia, and the recent cases in this Court.

The other point which is made—

Justice Reed: But to reach that you have to take the Sweatt case based on the separate but equal doctrine.

Mr. Marshall: No, sir; I only say the McLaurin case does not embrace the separate but equal doctrine.

I think in Sweatt v. Painter, the truth of the matter is that the decision was able to find that these intangibles produced inequality, and to that extent—
Justice Reed: But didn't the McLaurin case—

Mr. Marshall: There was none of that.

Justice Reed: Granting the facts in the statement showed that they were equal—

Mr. Marshall: Yes.

Justice Reed: But didn't the fact that they did not have the opportunity for association or discussion have any effect on it?

Mr. Marshall: Yes, sir.

Justice Reed: And that, therefore, since they were graduate students, they did not have equal opportunities.

Mr. Marshall: As I read it, sir, the best I could do is read it—as I understand it, the conclusion in there in two particular places, he says that in a situation of this type the state is deprived of the power to make distinctions, and the other point it says, to make any difference in treatment, but it was my idea that the thrust of the McLaurin opinion is that segregation in and of itself, at least as far as graduate training is concerned, is invalid, and that it was that conclusion was reached by first finding out—

Justice Reed: But they gave the reasons why, for undergraduate students, because they did not give equal opportunity.

Mr. Marshall: But the only reason, I submit, Mr. Justice Reed, on the McLaurin case and these cases is age, age of students, and the fact that obviously graduate training is different from elementary training and high school training, but it has a difference, to use the language about another point in the McLaurin case, there is
constitutional difference or rather it is insignificant as to the minor points, because if I understand, if we follow that to the logical conclusion, I do not have the slightest idea of where the line would be; whether the line would be at the college level, the junior college level, or the high school level, as to where this discussion with other pupils is of benefit.

Justice Frankfurter: Am I wrong in thinking that you must reject the basis of the decision in McLaurin for purposes of this case?

Mr. Marshall: You mean reject the basis of the fact that they were not allowed to associate?

Justice Frankfurter: No. The basis was the criterion of those cases was, whether each got the same thing. Your position in these cases is that that is not arguable, that you cannot differentiate, you cannot enter the domain of whether a black child or a white child gets the same educational advantages or facilities or opportunity. You must reject that, do you not?

Mr. Marshall: We reach——

Justice Frankfurter: Therefore, that is what I mean by saying you must reject the basis on which those cases went.

Mr. Marshall: We reject it to this extent; I think I am——

Justice Frankfurter: You reject the Delaware ground of decision, don't you?

Mr. Marshall: Absolutely.
Justice Frankfurter: Well, therefore, you reject the basis of the McLaurin case.

Mr. Marshall: I think so far as our argument on the constitutional debates is concerned, and these two cases, that the state is deprived of any power to make any racial classifications in any governmental field.

Justice Frankfurter: So I understand.

Mr. Marshall: But I do have to qualify it to this extent: I can conceive of some governmental action— to be perfectly frank, sir, we have discussed the point of census-taking— so they could take the census and name in the census, but so long as it affects not either group— but in any area where it touches the individuals concerned in any form or fashion, it is clear to me, to my mind, under the Fourteenth Amendment that you cannot separate people or denote that one shall go here and one shall go there if the facilities are absolutely equal; that is the issue in this case, because in the South Carolina case especially it is admitted on record that every other thing about the schools is equal, schools, curricula, everything else. It is only the question as to the power of the state to—

Justice Frankfurter: Well, the Delaware case tests that. You are opposed to— you are in favor of the requested equality there, because I do not know whether you are—

Mr. Marshall: Yes, sir.

Justice Frankfurter: That is generally under your wing?
Mr. Marshall: It is not only under our wing, sir; we are very proud of the fact that the children are going to school there, and they are demonstrating that it can be done.

Justice Frankfurter: All I am going is that with reference to the basis on which the Delaware decision went, you reject—

Mr. Marshall: Yes, sir.

Justice Frankfurter: I follow that.

Mr. Marshall: Yes. It is my understanding and my argument, Mr. Justice Frankfurter, that the Court has gradually come step by step, which is the proper way to come along, on the question of the right and power of the state to draw any line, and we have gone through from college—I mean from law school—way back in the Gaines case on up until we are now met with the proposition as to determining once and for all as to whether or not the Fourteenth Amendment was intended to do this, and I submit as to whether or not the courts have the right to do it.

Justice Frankfurter: But the point is important whether we are to decide that the facilities are equal or whether one says that is an irrelevant question, because you cannot apply that test between white and black.

Mr. Marshall: In this case it is irrelevant—

Justice Frankfurter: All right.

Mr. Marshall: (continuing)—for two reasons: One, it is not in the case because we have agreed that equality is outside the case,
and our argument is deliberately broad enough to encompass a situation regardless of facilities, and we make no issue about it.

Justice Frankfurter: I understand that, but that will be a ground on which the series of cases in the McLaurin case—the point of my question is that I think we are dealing with two different legal propositions; McLaurin is one and what you are tendering to the Court is another.

Mr. Marshall: Well, it seems to me, sir, that there is considerable—there is an opening for argument that, after all, the Court is interpreting the phrase "equal protection" underlining the word "equal," and for that reason, that is the reason in our record in the case we felt obliged to show that these, what we considered as intangibles in the Sweatt case, were there in this case and, if necessary, the doctrine of Sweatt and McLaurin could automatically on all fours come there except for the question of difference of schools.

The questions raised by this Court in June, as we understand it, requested us to find out as to whether or not class legislation and, specifically segregation, whether or not it, in and of itself, with nothing else, violated the Fourteenth Amendment.

We have addressed ourselves to that in this brief, and we are convinced that the answer is that any segregation, which is for the purpose of setting up either class or caste legislation, is in and of itself a violation of the Fourteenth Amendment, with the only proviso that normally, in normal judicial proceedings, there must
be a showing of injury or what have you. That is our position and that is up—

Justice Reed: That is solely on the equal protection clause?

Mr. Marshall: Solely on the equal protection clause except, sir, that is true in South Carolina, but we are arguing two cases together.

In Virginia we rely on equal protection and due process both, but the argument in our brief is limited to equal protection; not that we have discarded due process, but we did not have to get to it because of the wording of the questions of the Court.

But we think it is a denial of both. I urge particularly the equal protection clause because it seems to me, at least from the restrictive covenant case, the Shelley case on that these rights are beginning to fall into the equal protection clause rather than the due process clause, but we do not abandon the due process clause at all.

Justice Frankfurter: In the District of Columbia case—

Mr. Marshall: Automatically—

Justice Frankfurter: (continuing)—the opposite would happen.

Mr. Marshall: In the District of Columbia—we are not the lawyers in that case—we are all working together on it—they, of course, are relying on the due process clause and they have the cases that support that; so I would say that in so far as there is a due process argument to be in the District of Columbia and Virginia, they would be related except for the difference that in the District of
Columbia this Court has broad power—

Justice Frankfurter: Your argument comes down to this: If in one of the states in which there is a large percentage of Negro voters, a preponderance, where we get a situation where X state has a preponderance of Negro voters who are actually going to the polls, and actually assert their preponderance and install a Negro governor to the extent that more money is spent for Negro education, better housing, better schools, more highly paid teachers, where teachers are more attracted, better maps, better schoolbooks, better everything than the white children enjoy—and I know I am making a fantastic, if you will, assumption—

Mr. Marshall: Yes.

Justice Frankfurter: (continuing)—and yet there is segregation, you would come here and say that they cannot do that?

Mr. Marshall: If it is done by the state, the state has been deprived of—

Justice Frankfurter: That is your position; that is the legal—

Mr. Marshall: I think, sir, that is our flat legal position, that if it involves class or caste legislation—

Justice Frankfurter: That is the antithesis of the McLaurin and the Gaines doctrine.

Mr. Marshall: Well, of the Gaines case, certainly so, sir, because I, for one, do not believe that the language used by Chief Justice Hughes was—I mean, I just do not consider it as dictum when
he said that they operated under a doctrine, the validity of which had been supported.

I think that Gaines was interpreted within the separate but equal doctrine.

I think the Sipuel was, with the addition of you have to do it now.

I think that Sweatt and McLaurin, if I could disagree for a moment, are moving between the two; that is the way I look at it.

Justice Frankfurter: My only purpose is to try to see these things clearly without a simplifying darkness, and to try to see it clearly.

Mr. Marshall: Yes, sir. But I do not believe—the point I wanted to make clear is that we do not have to—this Court does not have to—take my position to decide this case. Because of what I told you a minute ago, they could take up that material in those other records and find that the children were not getting an equal education, but it would not help in the situation.

Justice Frankfurter: No, but if that line is taken, then the whole problem that you bring your weight to bear on is opened, and in each case we have to decide that.

Mr. Marshall: I think so, sir.

Justice Frankfurter: I did not suppose that you would say that we had to open this case, that they were not equal, whether psychologically, whether buildings, whether they spent X million
dollars for white, or X minus Y for the black, that does not open any doctrine?

Mr. Marshall: No, sir; and the Delaware case, if I can go to that without going outside of the record, demonstrates a situation more so than it does in South Carolina, because in Delaware so long as the schools are unequal, C.K. And then the schools are made equal, and if I understand the procedure, you move the Negroes back to the colored school, and then next year you put ten more books in the white school, and the colored school is unequal, and I do not see how that point would ever be adequately decided, and in truth and in fact, there are no two equal schools, because there are no two equal faculties in the world in any school.

They are good as individuals, and one is better than the other, but to just—that is the trouble with the doctrine of separate but equal; the doctrine of separate but equal assumes that two things can be equal.

Justice Reed: There is not absolute equality, but substantially equal, in accordance with the terms of our cases.

Mr. Marshall: Yes, sir; starting with Plessy the word "substantial" and we say in our brief—I mean we are absolutely serious about it—that the use of the word "substantial" emphasizes that those cases in truth and in fact amend the Fourteenth Amendment by saying that equal protection can be obtained in a substantially equal fashion, and there is nothing in the debates that will hint
in the slightest that they did not mean complete equality—they said so—to raise the Negro up into the status of complete equality with the other people. That is the language they used.

"Substantial" is a word that was put into the Fourteenth Amendment by Plessy v. Ferguson, and I cannot find it, and it cannot be found in any place in the debates.

If it please the Court, we would like to, if possible, conserve the balance of the time for rebuttal. Mr. Robinson was a little over his time, and I cut mine down. Unless there are any questions on this particular point, because we still have some time left, I would like to leave that for rebuttal.
2. Rebuttal Argument, December 8, 1953

Rebuttal Argument on Behalf of Appellants

Harry Briggs, Jr., et al.

By Mr. Marshall

Mr. Marshall: May it please the Court, there are several points I would like to clear up preliminarily, and then I would like to make sure that our position is correctly stated, and as it relates to statements made by counsel on the other side.

Justice Frankfurter: Mr. Marshall, I do not want to interrupt your closing argument, but I hope before you sit down you will state to the Court whether you have anything more to say on the question of remedies.

Mr. Marshall: Yes, sir.

Justice Frankfurter: In case you should prevail, more than is contained in your brief.

Mr. Marshall: Yes, sir, I would be glad to get to that first, Mr. Justice Frankfurter.

In our brief we found ourselves, after having given as much research as we could, in a position where we intelligently could not put forth a plan. We find that in the briefs of the other side they recognized there would be certain administrative problems involved, and anything else that they mentioned we, of course, well, not of course, we do not recognize as being valid for this Court to consider.
On the other hand, we spent as much time as we could during the time of filing and the present time on the United States Government's suggestion as to the decree, and so far as we are concerned, it appears to us that there are administrative problems, there would be administrative problems, and that the decree of this Court could very well instruct the lower court to take into consideration that factor, and if necessary give to the State involved a sufficient time to meet the administrative problems, with the understanding so far as we are concerned that I do not agree with the last part of the Government, that if it isn't done within a school year, that they could get more time for this reason, sir.

I can conceive of nothing administrative-wise that would take longer than a year. If they don't have staff enough to do these administrative things, the sovereign States can hire more people to do it.

So for that reason I don't think it should take more than a year for them to adequately handle the administrative techniques, and I submit that a longer period of time would get the lower court into the legislative field as to whether or not to do it this way or that way.

Specifically, I am a firm believer that especially in so far as the Federal Courts are concerned, their duty and responsibility ends with telling the State, in this field at least, what you can't do.
And I don't think anybody is recommending to this Court that this Court take over the administrative job. Obviously, that is not recommended by anyone. So with that, I think that is our position.

We said in the opening brief that if any plans were put forth, we would be obliged to do it, we wanted to do it, and that is our position on the limited point.

It gets me, if it please the Court, to one of the points that runs throughout the argument in the brief on the other side, and that is that they deny that there is any race prejudice involved in these cases. They deny that there is any intention to discriminate.

But throughout the brief and throughout the argument they not only recognize that there is a race problem involved, but they emphasize that that is the whole problem. And for the life of me, you can't read the debates, even the sections they rely on, without an understanding that the 14th Amendment took away from the States the power to use race.

As I understand their position, their only justification for this being a reasonable classification is, one, that they got together and decided that it is best for the races to be separated and, two, that it has existed for over a century.

Neither argument, to my mind, is any good. The answer to the first argument is in two places, if I may for a moment address myself to it. This one that Mr. Davis and Mr. Moore both relied on,
these horrible Census figures, the horrible number of Negroes in
the South—and I thought at some stage it would be recognized by
them that it shows that in truth and in fact in this country that
high percentage of Negroes they talk about can be used to demon­
strate to the world that in so far as this country is concerned,
two-thirds of the Negroes are compelled to submit to segregation.

They say that is the reason for it. The best answer is in
the record in the Clarendon County case, where the only witness
the other side put on on this point—and a reading of it will
show he was put on for the express purpose—he is a school admin­
istrator—of explaining how the school system would be operated
under the new bill that was going to tax people, but they dragged
this other point in and made him an expert in race relations and
everything else.

He emphasized—well, the best way to do it is this way on
page 119 of the record in the Briggs case:

"What I was saying is that the problem of the mixed
groups and racial tensions is less in communities where
the minority population is small. That has been true of
the testimony that I have heard," et cetera.

Then the question, "Well, Mr. Crow"—incidentally, that was
his name—"Mr. Crow, assuming that in Clarendon County especially
in School District No. 22 the population was 95 per cent white
and 5 per cent Negro, would that change your opinion?

"Answer. No."
"Question. Then that is not really the basis of your opinion, is it?

"Answer. The question that you have asked me is in my opinion, will the elimination of segregation be fraught with undesirable results, and I have said that I thought it would. That may not be stating your question exactly, but that is still my answer.

"Question. As a matter of fact, Mr. Crow, isn't your opinion based on the fact that you have all of your life believed in segregation of the races? Isn't that the reason, the real reason, the basis of your opinion?

"Answer. That wouldn't be all.

"Question. But it is a part of it?

"Answer. I suppose it is."

And that answers all of those arguments about this large number of people involved. They are all American citizens who, by accident of birth, are a different color, and it makes no difference one way or another in so far as this Court is concerned.

Then, in that same vein, Attorney General Almond gets to the name-calling stage about these State Conventions. Well, let's go up to the later convention in his State of Virginia. I don't believe that the man I am now going to quote can be characterized as anything but a respected former Senator of the United States, and in debating the section in the latter Constitution of Virginia,
not the one in this period, but the later one, Senator Carter Glass, who was a delegate to the Convention, spoke thusly in the debates:

"Discrimination, that is precisely what we propose. That exactly is what this Convention was elected for, to discriminate to the very extremity of permissible action under the limitations of the Federal Constitution."

That is quoted in the statement of jurisdiction in the Virginia case on page 11. And another answer I submit is quoted in our reply brief involving the University of North Carolina Law School case which was decided adversely to the Negro applicants in the District Court, and on appeal to the Fourth Circuit Court of Appeals, the very Circuit that is involved here, in an opinion by Judge Soper of Maryland met this question of what we are doing is for the benefit of the white and Negro people alike, saying:

"--the defense seeks in part to avoid the charge of inequality by the paternal suggestion that it would be beneficial to the colored race in North Carolina as a whole, and to the individual plaintiffs in particular, if they would cooperate in promoting the policy adopted by the State rather than seek the best legal education which the State provides. The duty of the Federal Courts, however, is clear. We must give first place to the rights of the individual citizens, and when and where he seeks only equality of treatment before the law, his suit must
prevail. It is for him to decide in which direction his advantage lies."

As to this time of how long segregation has been in existence in the South, the same argument has been made in every case that has come up to this Court, the argument of stare decisis, that you should leave this because it has been long standing, the separate but equal doctrine, and that there are so many States involved, was made in even more detailed fashion in the Sweatt brief filed by Attorney General Price Daniel, and as an aside, it is significant that in the Virginia brief on the last page they go out of their way to pay acknowledgement to that brief filed by the Attorney General, which was obviously discarded by this Court.

There is not one new item that has been produced in all of these cases. And we come to the question as to whether or not the wishes of these States shall prevail, as to whether or not our Constitution shall prevail.

And over against the public policy of the State of Virginia and the State of South Carolina is an amendment that was put in the Constitution after one of the worst wars that was ever fought, and around that Constitutional provision we say that the public policy of the United States does not look to the State policy, but looks to our Government.
And in the brief we have filed in our reply brief, we quote from a document which just came out, at least we just got ahold of it a couple of weeks ago, monograph, which we cite in our brief from the selective service of our Government, and we have some quotes in our brief.

I don't emphasize or urge the quotes as such, but a reading of that monograph will convince anyone that the discriminatory segregation policies, education and otherwise in the South, almost caused us to lose one war, and I gather from the recommendations made in there that unless it is corrected, we will lose another.

Now that is the policy that I understand them to say that it is just a little feeling on the part of Negroes, they don't like segregation. As Mr. Davis said yesterday, the only thing the Negroes are trying to get is prestige.

Exactly correct. Ever since the Emancipation Proclamation, the Negro has been trying to get what was recognized in Strauder v. West Virginia, which is the same status as anybody else regardless of race.

I can't, for the life of me—it seems to me they recommend to us what we should do. It seems to me they should show some effort on their part to conform their States to the clear intent of past decisions.

For example, the argument was made in McLaurin and Sweatt of what would happen if these decisions were granted, and indeed the brief, joint brief filed by the Attorney's General of all the
States, and if I remember correctly it was signed by General Almond, said that if this Court broke down exclusion and segregation in the graduate and professional schools, or maybe it was the law schools—I know exactly what they said—the schools would have to close up and go out of business.

And the truth of the matter—and we cite in our record the figures that show that since that decision there are now 1500 Negroes in graduate and professional schools in heretofore all white universities, 1500 at least in twelve States, one of the States significantly out of the group being South Carolina.

It is also pointed out in our brief a very long list of private schools in the South, which as a result, with no legal binding upon them at all, do so.

It is also significant that in States like Arkansas—I could name four or five—without any lawsuit, segregation was broken down. The truth of the matter is that I for one have more confidence in the people of the South, white and colored, than the lawyers on the other side. I am convinced they are just as lawful as anybody else, and once the law is laid down, that is all there is to it.

In their argument on the congressional debate, they do a job too well. They say no education was intended to be covered by the Fourteenth Amendment.
Obviously, that is not correct, because even their pet case, Plessy v. Ferguson, recognized that education was under the Fourteenth Amendment.

Then Mr. Moore goes to great detail to point out that the Fourteenth Amendment could go no further than the Civil Rights Act, and he emphasized yesterday and he emphasized today that in addition to that, there were some rights that were deliberately excluded.

His language is clearly eliminated, and then he says, "Suffrage was clearly not intended to be included."

And how anyone can stand in this Court, having read the opinion of Mr. Justice Holmes in the first Texas Primary case, and take that position is beyond me, because that decision, in the language of Mr. Justice Holmes, said specifically that they urged the Fourteenth and Fifteenth Amendments, but we don't have to get to the Fifteenth Amendment because the Fourteenth Amendment said that the States can do a lot of classifying which we, speaking as a Court, can't seem to understand, but it is clear that race cannot be used in suffrage. So I don't see the purport of any of that argument.

Justice Frankfurter: Do you think the Fourteenth Amendment was redundant, superfluous?

Mr. Marshall: No, sir, definitely not.

Justice Frankfurter: So if it had not been there, it would have been included in the Fourteenth?
Mr. Marshall: I think definitely under the reasoning of Mr. Justice Holmes, it would have been.

Justice Frankfurter: That is superfluous, then it is an extra.

Mr. Marshall: It is an extra.

Justice Frankfurter: An extra.

Mr. Marshall: I just—maybe it is timidity, but I just can't say a constitutional amendment is superfluous, but if you are asking me if I think Mr. Justice Holmes was absolutely correct, definitely, yes, sir.

That brings me to the other point which I want to make clear. It involves the questions yesterday about our position as to the McLaurin case, and I am a little worried in thinking of what I said yesterday as to whether the position was absolutely clear. And it is suggested today that the position we take in this case is a negation of the McLaurin case, and as to whether or not the McLaurin case is a negation of the separate-but-equal doctrine, and it is argued that McLaurin had a constitutional grievance, because he was denied equality, but in the McLaurin case the answer is that the only inequality which he suffered is that which is inherent, emphasis on "inherent," if you please, in segregation itself.

He had the same schools, same everything else, but he had this segregation, so that is inherent. And if McLaurin won because he was denied equality, it is also true and much more important that he suffered constitutional equality in the enjoyment of these identical offerings.
And it follows that with education, this Court has made segregation and inequality equivalent concepts. They have equal rating, equal footing, and if segregation thus necessarily imports inequality, it makes no great difference whether we say that the Negro is wronged because he is segregated, or that he is wronged because he received unequal treatment.

We believe that what we really ask this Court is to make it explicit what they think was inevitably implicit in the McLaurin case, that the two are together. But most certainly I do not agree, and I want to make it clear, that the McLaurin case is under the one-way, and I think that with this understanding, the Court has no difficulty in our position at least.

And finally, I would like to say that each lawyer on the other side has made it clear as to what the position of the State was on this, and it would be all right possibly but for the fact that this is so crucial. There is no way you can repay lost school years.

These children in these cases are guaranteed by the States some twelve years of education in varying degrees, and this idea, if I understand it, to leave it to the States until they work it out—and I think that is a most ingenious argument—you leave it to the States, they say, and then they say that the States haven't done anything about it in a hundred years, so for that reason this Court doesn't touch it.
The argument of judicial restraint has no application in this case. There is a relationship between Federal and State, but there is no corollary or relationship as to the Fourteenth Amendment.

The duty of enforcing, the duty of following the Fourteenth Amendment is placed upon the States. The duty of enforcing the Fourteenth Amendment is placed upon this Court, and the argument that they make over and over again to my mind is the same type of argument they charge us with making, the same argument Charles Sumner made. Possibly so.

And we hereby charge them with making the same argument that was made before the Civil War, the same argument that was made during the period between the ratification of the Fourteenth Amendment and the Plessy v. Ferguson case.

And I think it makes no progress for us to find out who made what argument. It is our position that whether or not you base this case solely on the intent of Congress or whether you base it on the logical extension of the doctrine as set forth in the McLaurin case, on either basis the same conclusion is required, which is that this Court makes it clear to all of these States that in administering their governmental functions, at least those that are vital not to the life of the State alone, not to the country alone, but vital to the world in general, that little pet feelings of race, little pet feelings of custom--I got the feeling on hearing
the discussion yesterday that when you put a white child in a school with a whole lot of colored children, the child would fall apart or something. Everybody knows that is not true.

Those same kids in Virginia and South Carolina—and I have seen them do it—they play in the streets together, they play on their farms together, they go down the road together, they separate to go to school, they come out of school and play ball together. They have to be separated in school.

There is some magic to it. You can have them voting together, you can have them not restricted because of law in the houses they live in. You can have them going to the same State university and the same college, but if they go to elementary and high school, the world will fall apart. And it is the exact same argument that has been made to this Court over and over again, and we submit that when they charge us with making a legislative argument, it is in truth they who are making the legislative argument.

They can't take race out of this case. From the day this case was filed until this moment, nobody has in any form or fashion, despite the fact I made it clear in the opening argument that I was relying on it, done anything to distinguish this statute from the Black Codes, which they must admit, because nobody can dispute, say anything anybody wants to say, one way or the other, the Fourteenth Amendment was intended to deprive the States of power to enforce Black Codes or anything else like it.
We charge that they are Black Codes. They obviously are Black Codes if you read them. They haven't denied that they are Black Codes, so if the Court wants to very narrowly decide this case, they can decide it on that point.

So whichever way it is done, the only way that this Court can decide this case in opposition to our position, is that there must be some reason which gives the State the right to make a classification that they can make in regard to nothing else in regard to Negroes, and we submit the only way to arrive at this decision is to find that for some reasons Negroes are inferior to all other human beings.

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

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

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

Thank you, sir.
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I, Jamye Coleman Williams, was born in Louisville, Kentucky, December 15, 1918. My parents are Frederick Douglass and Jamye Harris Coleman. I have one brother, Frederick D. Coleman, Jr.

I was graduated from Dunbar High School, Lexington, Kentucky, in 1934. I matriculated at Wilberforce University, from which I received the Bachelor of Arts degree in 1938. Fisk University granted me the Master of Arts degree in 1939.

Since 1939, I have been engaged in teaching English and speech on the junior-college and college level. For three years, 1939-1942, I taught in two junior colleges, one in Florida and the other in Arkansas. From 1942 to 1956 I was on the faculty of Wilberforce University. During 1953-54 I was granted a leave of absence from Wilberforce at which time I entered The Ohio State University to fulfill residence requirements for the degree Doctor of Philosophy. From 1956 to 1958 I taught at Morris Brown College, Atlanta, Georgia.

In June, 1958, I received a Danforth Special Fellowship which has enabled me to spend the present year at The Ohio State University. Beginning in June, 1959, I shall be a member of the Department of Speech of Tennessee A. & I. University at Nashville.

I am married to McDonald Williams and am the mother of one daughter, Donna Margaret.