
Introduction:

Shades of *Brown*: Black Freedom, White Supremacy, and the Law

Arguably the most important Supreme Court ruling in United States history, the *Brown* decision in 1954 not only overturned the doctrine of separate but equal schools as unconstitutional, but it also put other forms of antiblack discrimination on the road to extinction. The unanimous decision reversed the Court's 1896 decision in *Plessy v. Ferguson*, which had upheld the concept and practice of state-endorsed racial discrimination—Jim Crow—the chimera of separate but equal public accommodations and institutions for blacks and whites. The *Brown* decision was the culmination of countless interrelated collective and personal battles waged by blacks and of a series of legal efforts by the National Association for the Advancement of Colored People (NAACP) from the early days of its existence in the 1910s and 1920s.

Indeed, the legal cases that have influenced the status of African Americans historically have come out of the day-to-day struggles of regular people, such as those in Clarendon County, South Carolina, whose fight for better black schools in the late 1940s became one of five cases to be ultimately joined as *Brown v. Board of Education*. The segregated schools for blacks in Clarendon County at the time were a disgrace, clearly worse than most all-black schools in the South. Black life in the county was extremely hard. In his definitive work *Simple Justice: The History of Brown v. Board of Education and Black America's Struggle for Equality*, Richard Kluger notes that “if you had set out to find the place in America in . . . 1947 where life among black folk had changed the least since the end of slavery, Clarendon County is where you might have come.” In 1950, more than two-thirds of the county's black households earned less than \$1,000. The county maintained twelve schools for whites and sixty-one for blacks. Over half of the black schools were shanties with a teacher or two and a student body ranging widely in age and educational level.

In 1950, the total value of the black schools was \$194,575; that of the white schools was \$673,850. For the 1949–50 school term, the county school board spent \$43 per black child, \$179 per white child. Black teachers earned two-thirds less than their white counterparts.¹

In 1947, black parents, led by Reverend J. A. Delaine and Hugh Pearson, a local farmer, began pressing the county to provide buses for black students as it already did for white students. By the following year, with the help of local black lawyer Harold W. Boulware and the local and national branches of the NAACP, the struggle had escalated dramatically, with a lawsuit in federal court. Argued by Thurgood Marshall, the head of the NAACP legal defense team, the lawsuit demanded that the county go beyond equalizing its black and white schools and fully integrate its public school system. The plaintiffs in the suit, Liza and Harry Briggs, lost their jobs as maid and service station attendant, respectively; despite other instances of white repression of local blacks, the legal battle went forward.²

Briggs v. Elliott soon joined four similar cases argued by the NAACP's legal team before the Supreme Court: *Brown v. Board of Education of Topeka, Kansas*; *Davis v. County School Board of Prince Edward County (Virginia)*; *Belton v. Gebhart* (Delaware); and *Bolling v. Sharpe* (District of Columbia). In late 1952, the Court consolidated and first heard these cases under the rubric of *Brown*. Public school segregation, according to the NAACP's legal brief, was a violation of the Fourteenth Amendment's equal protection clause. An integral element of the effort to make blacks part of the nation during the Reconstruction period (1863–77), this 1867 amendment clearly defined U.S. citizenship to encompass all blacks. Furthermore, it stated that all citizens were equal under the law. Consequently, the NAACP lawyers argued, the blatantly unequal racially segregated schools were unconstitutional and had to be integrated. In each case, local lawyers in conjunction with NAACP lawyers sought the immediate end of Jim Crow schools as intrinsically separate and unequal. The lawyers also argued that state-sanctioned segregation stamped blacks with a stigma of inferiority that undermined their self-esteem. In effect, the aim in *Brown*—the total and unconditional abolition of Jim Crow schools—represented a critical move in the black freedom struggle.

HISTORICAL BACKDROP: THE CONSTITUTION, THE LAW, AND FIGHTING JIM CROW

The continuing African American freedom struggle has produced simultaneous, often overlapping, battles on many fronts: political, economic, social, cultural. The nineteenth-century war against slavery featured moral as well as political and economic campaigns in the North. This effort required that slaves and free blacks in the South struggle as best they could until conditions were ripe for seizing freedom for the enslaved, as they were in the Civil War. Abolitionism—various northern-based movements to emancipate the slaves—was a divisive national issue that alienated most whites, especially the proslavery forces in the North and South. Like the war against Jim Crow, abolitionism was a war waged by a dissenting black minority and its stalwart white supporters: a multifaceted and far-reaching struggle.

The history of the *Brown* decision constitutes an integral flank in the war against Jim Crow. While the story of *Brown* can be presented in various ways, the chronological emphasis here is twofold. A long-term perspective stresses the first half of the twentieth century, the *Plessy* period. A short-term perspective stresses post–World War II America, especially the late 1940s through 1955—the immediate historical context of *Brown*. To comprehend the shift from *Plessy*—the world of separate and unequal caste relations between blacks and whites—to *Brown*—the world of legal equality—more historical background is imperative.

In the antebellum period, the black slaves' lack of legal rights, combined with the severely circumscribed legal rights of free blacks in both the North and South, made the constitutional status of both groups precarious at best. The Supreme Court decision in *Scott v. Sandford* (1857) codified the “quasi-free” and degraded legal status of free blacks with its argument that blacks, free and slave, lacked legal standing in U.S. courts.³ Not surprisingly, therefore, well before the Civil War, emancipation, and Reconstruction, antiblack prejudice and discrimination was rife. It is clear that the racism of the Jim Crow era had important antecedents in earlier ideologies and structures of white supremacy.

These structures included severe job discrimination; political exclusion including disfranchisement; civic disabilities, such as exclusion from juries and prohibitions against black testimony in courts (typically in cases involving black testimony against whites); social ostracism and residential segregation; exclusion from the public domain of schools, churches, hotels, restaurants, pubs, halls, and conveyances; and antiblack terrorism. Proslavery ideology espoused the “civilizing” influence of

bondage for Africans, and polygenetic thought argued for multiple and separate human species, with Africans representing an inferior order of creation unrelated to that of whites. In the arena of popular culture, blackface minstrelsy, with its racist and demeaning caricatures of blacks, was the most popular form of mass entertainment in the nineteenth century.⁴

Emancipation and Reconstruction imperfectly incorporated African Americans into post-Civil War America. These developments encompassed upgrading the constitutional status of all blacks, leading to passage of the very important Reconstruction amendments to the Constitution: the Fourteenth Amendment (1867) defining citizenship and providing equal protection under the law, the Thirteenth Amendment (1865) outlawing slavery, and the Fifteenth Amendment (1870) removing race as a qualification for voting. This effort to rectify the disparity between the racist oppression of blacks and the American creed of freedom, justice, and equality for all was important, but it was part of a deeply flawed Reconstruction experiment.

The most crucial defect was the failure to provide emancipated blacks with an economic foothold in society—land of their own and the economic wherewithal to make a decent living. During the Reconstruction period, new forms of economic dependency, such as sharecropping and tenantry, developed, often leading to debt peonage, a new kind of “economic slavery.”⁵ In fact, slavery’s stigma—the mark of black racial inferiority—persisted, reinforcing the systemic economic exploitation of black labor. The struggle against Jim Crow was fundamentally as much about economic justice as about political and civil rights.

As Reconstruction gave way to the restoration of white power in the South—a process described as “Redemption”—the brief yet important moment of black political participation in the nineteenth-century South began to close. Racist intimidation and violence buttressed the restoration of white rule in the South. By the turn of the century, the exclusion of blacks from the political process was pervasive, through devices like poll taxes and the “white primary.” The latter made the southern state Democratic parties into private clubs legally able to exclude blacks. This racist counterinsurgency effectively disfranchised southern blacks.⁶ As a result, political struggle through means like lobbying the president and Congress, spreading the struggle through the press and other forms of mass media, boycotts, and petitions became indispensable. Similarly, the lack of formal political influence made informal political struggle through instruments like the courts all the more necessary.

Complementing the formal political erasure of blacks in the South, the geographic and psychological exclusion basic to Jim Crow was a vital component of the turn-of-the-century resurgence of white supremacist belief and practice. In a very real sense, the spread of Jim Crow went hand

in hand with the growth of an increasingly influential scientific and intellectual racism: a kind of cultural “neoslavery.” From the nineteenth-century practice of measuring and comparing racial skulls to the twentieth-century fixation on IQ tests, the rage to offer “scientific” explanations for alleged racial difference has continued to this day.⁷

Concurrently, popular Western discussions of the “white man’s burden” confined African Americans and peoples of color to their place in the Victorian social hierarchy: structurally and intellectually below their racial superiors, whites. There, according to this racist ideology, blacks and their racial cohorts could rise to the level of civilization commensurate with their inferior capacities. Social Darwinism—a crude late-nineteenth-century sociobiological rationalization of the status quo, notably its inequities—justified this virulent racism as consistent with the natural order: the social “survival of the fittest” and the inevitable dominance of the superior race.⁸ This is the world that produced Jim Crow.

Largely as a white counterreaction to the perceived threat of post-bellum black freedom, then, white supremacy reasserted itself with a vengeance in the late nineteenth century. Jim Crow’s turn-of-the-century rigidification and codification exemplified this far-reaching, often violent reassertion. The realities of Jim Crow furthered the development of separate black and white worlds, economically, socially, and culturally. The institutional infrastructure within black communities expanded to address those communities’ most pressing concerns. This could perhaps best be seen in the growth of distinctive black business worlds—including black morticians, barbers and hairdressers, bankers, and insurance companies—catering almost exclusively to a black clientele.

Jim Crow also meant the brutal suppression of successful as well as assertive blacks as “uppity” and “getting out of their place.” The responsibility of protecting the privilege of whiteness demanded no less. These attitudes sustained the horror of growing numbers of rapes of black women by white men and white lynchings of black men falsely accused of raping white women. Intertwined myths of black animality and black hypersexuality justified these crimes against black humanity. The turn of the century was clearly a nadir for American race relations.⁹

In spite of the terrorism of Jim Crow, the black freedom struggle persisted. In the twentieth century as before, most black activism has been local and often unheralded, notably before the emergence of the modern civil rights movement (1954–65) with its attendant national, international, and mass-media spotlights. Innumerable battles were waged not only in the courts but in city halls, county boardrooms, state and national legislatures, and various executive offices as well as sites like the streets, the job, and prison—within institutional structures and outside them, as in

the civil disobedience campaigns of the civil rights movement. The various strategies—bus boycotts, sit-ins, marches—developed in response to specific historical challenges and contexts.

Of course, this increasing black politicization owed in part to many efforts, often earlier ones, including those of the Universal Negro Improvement Association, the mass black nationalist organization created by Jamaican Marcus Garvey that peaked in the early 1920s. Black political education and political organization expanded in response to the economic devastation of the Depression during the 1930s. While black allegiance shifted to the Democrats in response to the hope spawned by Franklin D. Roosevelt's New Deal, equally important was the burgeoning sense that a better world for blacks could be realized through renewed organization and agitation. The Communist Party's support for the black freedom struggle also encouraged growing black optimism regarding positive social change.

The black freedom insurgency grew dramatically during World War II as black protest, black mobilization within organizations like the NAACP, and the democratic and egalitarian rhetoric of the official war effort emboldened African Americans. During the war blacks created the Double Victory Campaign: victory over domestic racism—evil at home—as well as Nazism, fascism, colonialism, and international racism—evil abroad. The most important component of the ideological struggle, however, was domestic: the battle to realize the American creed.

A key aspect of this shifting context was the heightening awareness among increasing numbers of blacks of the international ramifications of their domestic struggle. For many, commitment to democracy in the United States demanded alignment with progressive struggles for self-determination, especially in the Third World. For more and more black freedom fighters as well as American politicians, postwar American apartheid was no longer domestically or geopolitically viable. The growing cold war between the Soviet Union and the United States highlighted the blatant contradiction between the American creed and the reality of America's treatment of its black citizens. As the putative leader of the "free world," the United States had to get its domestic house in order. World leadership in an international community made up more and more of non-aligned Third World nations—nations created principally by peoples of color—rendered Jim Crow unacceptable.

The declining legitimacy of racism in the United States stemmed from a mix of forces, both domestic and international, which came together at midcentury. The *Brown* decision crystallized and reflected the pivotal move toward racial equality: the rejection of white supremacy as signi-

fied in *Plessy*. In this way, the law assumed a critical role in the political and intellectual as well as constitutional struggles against racism.

Elite venues—lawyers' offices, courtrooms, judges' chambers—are principal sites of formal legal struggles. Nevertheless, the legal struggle—battles waged from the top down—does not happen in isolation but exists in dynamic mutuality with the social struggle—battles waged from the bottom up. This mutuality was especially vital in *Brown* where individual cases came together as class actions seeking relief for all members of the aggrieved class, in this instance all African Americans subject to Jim Crow discrimination. A crucial aspect of the civil rights litigation pioneered by the NAACP legal defense team was the guiding assumption that the legal battles were part and parcel of the collective struggle of African Americans.

THE EVOLUTION OF THE NAACP LEGAL CAMPAIGN AGAINST JIM CROW

"The problem of the twentieth century," African American scholar and leader W. E. B. Du Bois perceptively noted in 1903, "is the problem of the color line." This often quoted prophecy speaks directly to the uncharted road leading to *Brown*: how best to alleviate the "color line," a primary manifestation of Jim Crow. At this time, Du Bois increasingly favored public agitation, particularly political organization and political action. Booker T. Washington, the most famous and influential black leader from 1895 to 1915, publicly advanced an accommodationist strategy emphasizing black self-help and the cultivation of goodwill between the races, not agitation. These two positions reflected a continuing debate on how best to advance the interests of African Americans.¹⁰

In spite of Washington's accommodationist public persona, behind the scenes he was actively engaged in lawsuits challenging Jim Crow. Du Bois, however, took the more publicly activist route and along with prominent blacks such as Ida B. Wells and William Monroe Trotter and whites such as Mary White Ovington and Oswald Garrison Villard launched the interracial National Association for the Advancement of Colored People (NAACP) in 1909. Founded in part as a response to a series of antiblack race riots, most notably the 1908 Springfield, Illinois racial conflagration, the NAACP soon emerged as the leading black civil rights organization.¹¹

The NAACP pursued several lines of attack in its assault on the "color line." Lobbying for favorable legislative, judicial, and executive action; waging a publicity war through the media, most effectively in the *Crisis* magazine, initially edited by Du Bois; and working with grassroots chapters on specific issues of local concern such as discriminatory ordinances,

the organization endeavored to advance a black civil rights agenda. Intensely fought battles against antiblack discrimination in jobs, housing, voting, public accommodations, and education demanded functional knowledge, savvy, and flexibility. Given its limited resources and the awesome power of the racist status quo, the NAACP favored significant yet workable battlegrounds where its members could realistically achieve the upper hand. Victories with far-reaching impact were thus highly desirable.¹²

From the beginning, litigation proved to be a particularly important and effective tool in the organization's armament. The legal struggle against segregated schools in mid-nineteenth-century Boston and Jim Crow railway cars at the turn of the century clearly presaged the NAACP legal campaigns. In the Boston school integration (1849), *Dred Scott* (1857), and *Plessy* (1896) cases, the decisions went against the individual black claimants and the collective aspirations of blacks. Nevertheless, hope remained that the rule of law would eventually be squared with constitutional claims for full black equality, especially following the enactment of the Fourteenth Amendment.

The legal endorsement of equality in *Brown* was a capstone to an extraordinary series of battles against *de jure* (legal) and *de facto* (actual) Jim Crow. The Fourteenth Amendment's guarantee of equal protection under the law epitomized the legal tradition undergirding *Brown*. Early American legal tradition (1787–1830) was built on English common law and emphasized freedom, equality, and justice for all citizens as framed in the Constitution (1787) and Bill of Rights (1791). With its powerful Enlightenment grounding, this compelling vision of constitutional law stressed reason, order, and progress as inseparable from freedom, equality, and justice. The United States ideologically embraced a republican form of government that deepened the young nation's commitment to these tenets.

This libertarian, or pro-freedom, reading of the Constitution and the law is fundamentally antithetical to the slavery and racism the nation's founders embraced. In fact, the founding patriarchs countenanced freedom for whites fully predicated upon black slavery and black debasement. This haunting paradox has decisively shaped the American nation since its founding.¹³ However, the libertarian view of the Declaration of Independence (1776) and the Constitution, along with the radical egalitarianism of the former, provided indispensable ideological bases for the black freedom struggle from the beginning until now. The documents collected here capture the historic tension between law and social practice rooted in white supremacy on the one hand and human equality on the

other. As a result, they can be analyzed from at least two contrasting points of view—that of the white supremacist status quo and that of the black freedom struggle.

This work is also a discussion about the nature of the law, especially what is meant by the rule of law. To what extent is law organic and timeless? To what extent is it created and manipulated? What is the relationship between the rule of law and justice or fairness? How do issues of race impinge upon the law? What is the relationship between legal developments and historical context? The texts here provide a forum for the consideration of these kinds of questions. Through a critical history of *Brown*, this collection throws much-needed light on interrelated social, cultural, political, and economic as well as legal developments which gave rise to this epochal decision.

A deep-seated belief in the prospects for advancing black civil rights through the legal system earmarked the highly influential career of Charles Hamilton Houston, who was most responsible for charting the various legal paths that led to *Brown*. In 1983, Judge A. Leon Higginbotham Jr. wrote that "Houston was the chief engineer and the first major architect of the twentieth-century civil rights legal scene." He "almost single-handedly . . . organized and led the legal battalion in the critical early battles seeking equality for black Americans."¹⁴

Harvard-trained and the first black elected to *Harvard Law Review*, Houston left a private practice he shared with his father in Washington, D.C., to become dean of Howard University's law school (1924–35). Houston put that institution on sound academic footing, making changes that led to the school's full accreditation and greatly enhanced its prestige. Among his numerous accomplishments, several bear mentioning. First, he trained many talented black lawyers at a time when there were precious few. Besides Thurgood Marshall, who would be instrumental in *Brown* and later would be a Supreme Court justice, Houston taught a number of prominent attorneys who would distinguish themselves in civil rights litigation, including Edward P. Lovett, James G. Tyson, Oliver W. Hill, Coyness L. Ennix, and Leslie S. Perry.¹⁵ Second, he pioneered in two fields of legal study and practice: civil rights law and public interest law. Third, he engaged in a whirlwind of civil liberties, civil rights, and antidiscrimination activities, beyond his university duties, including the defense in the highly publicized Scottsboro case in which nine young Alabama blacks were accused of raping two white women on a freight train.¹⁶ By 1935, Houston had emerged as the most influential black lawyer in the United States.

In light of that status, it is not surprising that when the NAACP sought

a new special counsel in 1934, Houston was chosen. Having taught law and litigated a variety of cases, he was now charged with the responsibility of directing the litigation activities of the most important black civil rights organization in the country. Houston stressed that the law was a potentially useful means to promote social change, especially in the context of a complicated social struggle. Why the judicial system? As historian Genna Rae McNeil has noted: "With little power to compel congressional or presidential concessions and with virulent racism ever a possible consequence of direct action, blacks were in a better position to seek redress through the courts."¹⁷

Limitations of the judiciary tempered the optimism of Houston and other civil rights lawyers, however. They fully understood that historically the law had been principally a conservative and at times reactionary force. They were deeply aware of what historian Mary Frances Berry has aptly referred to as "constitutionally sanctioned violence against blacks and violent suppression of black resistance—the outgrowth of a government policy based on essentially racist, not legal, concerns—throughout the American experience." In other words, whites used "the Constitution in such a way as to make law the instrument for maintaining a racist status quo."¹⁸

Houston's view of the lawyer as a social engineer owed heavily to his fervent commitment to the black freedom struggle and his belief in the integral relationship between that social insurgency and legal activism. The black lawyer, according to Houston, had to envision and to practice law as a mechanism for progressive social change. A modern "race man," he fully understood that black lawyers had a special mission to fight their own people's battles. They could not depend on the white-dominated legal guild—given its historic support for white supremacy—to fight for black rights. It was imperative, according to Houston, that the black lawyer embrace

... the social service he can render the race as an interpreter and proponent of its rights and aspirations. . . . Experience has proved that the average white lawyer, especially in the south, cannot be relied upon to wage an uncompromising fight for equal rights for Negroes. He has too many conflicting interests, and usually himself profits as an individual by that very exploitation of the Negro, which, as a lawyer he would be called upon to attack and destroy.¹⁹

Houston's adherence to the legal realism of his Harvard mentors Roscoe Pound and Felix Frankfurter provided a powerful intellectual framework for his activist legal philosophy. According to the sociological

jurisprudence of legal realism, law served particular social interests; it reflected the biases and predilections of those who made and interpreted it. Legal realism, a view first fully enunciated by the eminent Supreme Court Justice Oliver Wendell Holmes Jr. (1841–1935) earlier in his legal scholarship, rejected the dominant and traditional view of the law as a set of formal rules deducible from abstract concepts like justice. Whereas legal tradition inspired judicial restraint, legal realism—especially as articulated by Houston—inspired judicial activism.²⁰

Houston's legal realism complemented and energized his view that black lawyers had to be social engineers. These interlocking philosophies had an enormous impact on the Howard law curriculum, the lawyers he trained and influenced, the legal philosophy of the NAACP, and the activism of those engaged in black rights litigation. In effect, social engineering through law meant the use of the law itself wherever possible to solve the problems confronting blacks.²¹

Houston's legal reasoning authenticated the use of sociological evidence when arguing against segregation. A key example was the use of social psychological data to argue the harmful effects of racism on whites and blacks (see p. 142 in this book). Persuasive challenges to public and social policies which braced Jim Crow became an important objective of this brand of sociological jurisprudence. These kinds of legal arguments also gave focus and shape to the burgeoning field of civil rights law. As legal scholar Mark Tushnet notes, "The constitutional argument against segregation could be keyed to facts and policy." Tushnet concludes that "the sociological argument was Realist to the core. Law, even constitutional law, was social policy. Social policy had to be understood as it actually operated."²²

Houston, Marshall, and the many other lawyers and activists engaged in the war against segregation understood that victory could not be won solely in the courts, but only through a broad-based attack. Marshall, who succeeded Houston as NAACP general counsel in 1939, relied on his mentor's counsel until Houston's untimely death in 1950. He continued to elaborate on his mentor's social engineering framework throughout his distinguished legal career.²³ Both men envisioned litigation as a tool to educate and politicize the public, white and black, about the black freedom struggle and the role of the judiciary in advancing that cause. The NAACP's legal campaign, therefore, was not a series of uncoordinated court battles, but an integral part of a much broader philosophy of social insurgency. In part, this legal campaign functioned as a mechanism to publicize the work of the NAACP and in turn to recruit members for the organization and the black freedom struggle generally.²⁴

Believing that carefully executed litigation could contribute to local grassroots activism and the development of a mass movement, the NAACP and its legal staff supported local legal struggles. NAACP lawyers worked hand in glove with local lawyers, whether the issue was black political exclusion, disparities between white and black teachers' salaries, a black falsely accused or convicted of a crime, or some other miscarriage of racial justice. The NAACP also mounted a vigorous legal and educational campaign against the most virulent forms of legal racism, such as the highly visible terrorism of state-sanctioned white rule through mob action and lynch law. In far too many instances in the first half of the twentieth century, a black accused of a crime—especially a black man accused of raping a white woman—was murdered publicly by angry white lynch mobs with no concern for niceties like court trials or convictions. Although the NAACP had waged an unrelenting and highly public battle against white lynch law since 1919, the group—like others struggling against this heinous injustice—was unable to persuade the federal government to pass an antilynching law. Southern white opposition, notably in the Congress, effectively blocked all such efforts.

Battered but undaunted, the NAACP went forward. The seemingly impregnable state-sanctioned world of Jim Crow fueled extensive debate within the organization around what tactics to use to dismantle institutionalized racism. Two related debates in the 1930s illuminate the nature and impact of this spirited discourse: (1) the kind of legal strategy to pursue and (2) more broadly considered, legalism versus alternative strategies.

The first debate was over whether the NAACP lawyers should attack the entire edifice of Jim Crow forthrightly by seeking a ruling nullifying *Plessy*—a direct attack strategy—or, whether they should work incrementally, building a series of legal victories that paved the way for the eventual dismantling of *Plessy*—a developmental strategy. A principal goal of the developmental strategy was to force the South to equalize its separate black and white worlds through litigation by making Jim Crow fiscally and politically unworkable. Given the relative poverty of the South and the declining respectability of Jim Crow, equalization would undermine American apartheid.

Nathan Margold, Houston's predecessor as head of the NAACP legal team, had pushed for the direct attack strategy. Like Houston, Margold was a protégé of Felix Frankfurter and was committed to both legal realism and judicial activism. In 1931, a year after his hiring, Margold issued a bold report strategically arguing for a direct attack on segregation, leaving open the issue of equalization. A frontal assault would cut imme-

diately to the heart of the issue—cogent legal demonstration of the fundamental wrong of state-sanctioned racial segregation—and would require an immediate end to Jim Crow. Margold preferred that the issue of equalization be treated as a related but subordinate concern.

Margold maintained that a direct attack was preferable as it required fewer suits and the NAACP's legal staff could devote its attention to precedent-setting cases. Similarly, this approach avoided litigating overlapping suits at the state and local levels and thus the often confusing and conflicting welter of federal, state, and local statutes. Also, as the Margold report explained, a direct attack was a better use of the NAACP's limited fiscal resources and its small legal staff.²⁵

Houston and Marshall after him firmly believed that the Margold report put forth a position which the NAACP and the larger black freedom struggle should support in theory; however, in reality, they realized that the times were inauspicious for such an aggressive strategy. In the Depression years, economic hardships intensified among blacks and spread among whites. Economic turmoil further exacerbated racial tensions and did not provide the most supportive setting to battle Jim Crow. In addition, the NAACP lacked sufficient mass black support and progressive white support on the one hand and the necessary strategic support within the legal establishment on the other. In the 1930s in particular, many blacks still had to be convinced that a legal assault against Jim Crow was viable. Otherwise, local blacks facing the extraordinary pressures brought to bear against those who filed anti-Jim Crow suits might not have the uncommon courage and the black community support necessary to proceed. Another important impediment which had to be overcome was the widespread lack of trained black lawyers.²⁶ Therefore, Houston decided to employ a more moderate strategy of equalization as a way to build support for a direct attack later. Cultivating a network of popular and professional support became a vital tactical goal.

Houston chose to focus the legal assault on education because of its centrality to advancement and fulfillment within American culture. As such, the blatant denial of equal educational opportunities to black youth touched a powerful nerve in the American psyche. The terrible realities of segregated education in the South offered compelling evidence of gross racial disparities in facilities, budgets, and salaries. Also, Houston contended, "discrimination in education is symbolic of all the more drastic discriminations,"²⁷ such as lynch law. Furthermore, Jim Crow education represented the deeply ingrained stigma of innate black racial inferiority.

Houston's strategy featured three related aspects. Desegregation of public graduate and professional schools was one. Here the battle was

fought at a less contentious level than that of elementary and secondary schools. Equalization of white and black teachers' salaries was the next aspect. The NAACP legal team achieved a number of important victories in salary cases. As a result, many southern school boards masked salary differentials through the use of so-called merit criteria, and the cases became much harder to argue. It was not until the late 1940s that the next level of the legal plan—equalization of elementary and secondary school facilities—became feasible. Until then, overcoming the local and tactical obstacles hindering these cases proved too difficult.²⁸

Another challenge was finding and sustaining the morale of litigants whose character and resources would have to withstand intense public scrutiny and white reprisals—typically economic, sometimes physical and violent. The prolongation of many cases caused litigants to lose enthusiasm and even drop out. Racist southern school districts used various legal strategies to tie up the proceedings and to exhaust black litigants financially and emotionally. Often these districts admitted to the disparities in their educational offerings but exaggerated or lied about efforts under way to ameliorate them. The defense used this tactic in the South Carolina district court case of *Briggs v. Elliott* (see p. 126).

Other obstacles faced the legal team. First, the fact that the states and local school districts themselves were primarily responsible for public school education policy and funding inhibited litigation at the federal level. Second, with the awesome weight of tradition and social custom, *Plessy* was the precedent upon which pro-Jim Crow rulings rested. Third, it followed that courts did not consider state-sanctioned Jim Crow to violate the Fourteenth Amendment right of blacks to equal protection under the law and therefore left Jim Crow intact. Fourth, the defendants and courts alike variously ignored, trivialized, masked, neutralized, explained away, and accepted the pervasive reality of separate and unequal. All of these tactics naturalized Jim Crow as fundamental to a "higher law" of white supremacy, or integral to the organic order of society. According to Mary Frances Berry, the controlling factor in legal decisions was the ubiquity of constitutional racism. Ultimately, as Derrick Bell maintains, the law functioned to sustain white supremacy.²⁹

The NAACP's Legal Strategy Challenged

It is not surprising, then, that searching questions were raised about the NAACP's growing commitment to legalism as a primary strategy: the group's second pivotal 1930s controversy. Many committed to the black freedom struggle called for greater emphasis on economic issues

because of the Depression's ravaging effects. As one would expect, economic critique was widespread: it could easily be found on the street, in colleges and universities, and among radicals and progressives. Bluesman Carl Martin observed:

Everybody's crying: "Let's have a New Deal,"
'Cause I've got to make a living,
If I have to rob and steal.³⁰

At the same time, economist Abram Harris and political scientist and future United Nations stalwart Ralph Bunche, both young professors at Howard University, called for interracial labor unity and an understanding of the centrality of economics, or material forces, to the historic oppression of blacks. They maintained that the oppression of blacks was not merely a problem of race but was a question of class as well. Broadly speaking, the struggle had to be one of ameliorating capitalism's most flagrant abuses. Far more oppositional, albeit less influential, voices like black Alabama Communist Party activist Hosea Hudson found capitalism itself to be the problem, socialist revolution the solution.³¹

The venerable W. E. B. Du Bois was the most provocative and powerful voice questioning the NAACP's focus in the 1930s. His perceptive critique cut two ways. First, harking back to the ideas of Booker T. Washington at the turn of the century, Du Bois now wanted the fiercely interracialist and integrationist NAACP to promote black economic development—and in turn black elevation—through aggressive support of a separate black economic world. Du Bois's Marxist-socialist-inspired critique of capitalism, calling for greater workers' control over the economy, spoke more and more of the necessity for black networks like consumer cooperatives. This message did not sit well with the intensely pro-capitalist NAACP.

Du Bois and others emphasized that legalism had to be prefaced by the redistribution of wealth and across-the-board leveling of power and influence. Reliance on legalism as a remedy for the problems confronting black Americans signaled a reformist agenda at best, they felt, certainly not a revolutionary one. After leaving the association in 1934, once the ideological rift became irreparable, Du Bois continued to offer an increasingly militant socialist and internationalist approach.³² The "road to *Brown*," however, was clearly being plotted through capitalism, not socialism.

Du Bois's call for black economic nationalism vividly exposed the ten-

sions between voluntary and imposed segregation, between separatism and integrationism, between black nationalism and American nationalism. Seeking to get beyond these tensions, he stressed that blacks had to strengthen the institutional infrastructure and social fabric of their own communities. The critical issue was to forge more effective forms of collective organization and action aimed at intraracial uplift. In this vision, integration assumed a decidedly secondary, even ancillary, position. He emphasized the importance of black institutions and black culture in structuring and propelling the black freedom struggle and in nurturing the black psyche. The thrust of NAACP politics, from this point of view, increasingly now collided with rather than meshed with black needs and aspirations.

The historical and rhetorical development of *Brown* reflected a profound discomfort with racial separatism. Essential to the social-scientific discourse behind *Brown* was the argument that racial segregation, even voluntary segregation, was responsible for the psychological damage and sociocultural pathology among blacks. Du Bois clearly perceived that this negative characterization of a distinctive black life and culture as well as of blacks as victims was one-sided and misleading. This potentially baneful argument, increasingly vital to the NAACP's liberal indictment of Jim Crow, failed to make the crucial distinction between what Du Bois saw as the benefits of voluntary segregation—autonomy and psychic health—and the harm of state-imposed segregation—dependency and dehumanization.³³ The point was not that white racism had deformed black life and culture, but rather that it had deformed the American experience.

Du Bois stressed in his 1935 discussion "Does the Negro Need Separate Schools?" (see p. 91) that the fundamental issue was equality of educational opportunity: making available to black students the best education possible, whether that be in segregated or integrated schools. He explained that

... the Negro needs neither segregated nor mixed schools. What he needs is education. What he must remember is that there is no magic, in either mixed schools or in segregated schools. A mixed school with poor and unsympathetic teachers, with hostile public opinion, and no teaching of truth concerning black folk, is bad. A segregated school with ignorant placholders, inadequate equipment, poor salaries, and wretched housing, is equally bad. Other things being equal, the mixed school is the broader, more natural basis for the education of all youth. It gives wider contacts; it inspires greater self-confidence; and sup-

presses the inferiority complex. But other things are seldom equal, and in that case, Sympathy, Knowledge, and the Truth, outweigh all that the mixed school can offer.³⁴

Du Bois also reiterated that the problem was white racism, not the cruel hoax of innate black inferiority. Structurally speaking, he maintained, the crux of the issue was the symbiosis between racism and capitalism. In terms of education in particular, the problem went in two directions: racist constraints on black educational opportunity, and black as well as white devaluation of black institutions and culture. In this case, the denigration of black schools and black educators, in spite of their noteworthy achievements against all odds, was common even among blacks. The brainwashing of blacks, what historian Carter G. Woodson referred to as "The Mis-Education of the Negro," was indispensable to the propaganda of white supremacy. Du Bois countered, however:

If the American Negro really believed in himself, if he believed that Negro teachers can educate children according to the best standards of modern training, if he believed that Negro colleges transmit and add to science, as well as or better than other colleges, then he would bend his energies, not to escaping inescapable association with his own group, but to seeing that his group had every opportunity for its best and highest development. He would insist that his teachers be decently paid; that his schools were properly housed and equipped; that his colleges be supplied with scholarship and research funds; and he would be far more interested in the efficiency of these institutions of learning, than in forcing himself into other institutions where he is not wanted.³⁵

Whereas Du Bois's economic and cultural nationalism did not find favor with the NAACP leadership, Du Bois and his opponents within the NAACP did agree upon the necessity of strengthening the organization's grassroots constituencies. Ordinary black folk had to be brought into the organization; they had to be made to feel that this was *their* civil rights organization. Otherwise, a black freedom struggle guided in large measure by the NAACP stood no real chance of success. Local and state branches had to be strengthened. Black politicization during the Depression and war years, especially the latter, was the seedbed of the concurrent flowering of the NAACP's membership rolls. Growing black movement toward the Democrats, the party of FDR, most notably in the North, marked this politicization. A more important signal of this trend, especially in the South where the "lily white" Democratic Party moderated the ultimately pivotal black shift toward the Democrats, was the phenomenal expansion of the NAACP.

Historian Patricia Sullivan has shrewdly observed:

Black identification with the party of Roosevelt and the revival of the NAACP were primary mediating forces in the emerging civil rights movement. The NAACP provided the essential vehicle for meeting the escalation of black expectations and militancy that accompanied the war. NAACP membership in the South by the late 1930s was slightly more than 18,000. By the end of the war it approached 156,000.³⁶

That jump in the association's membership owed heavily to the good work of the group, including its legal defense work, its efforts to remove impediments to the black vote, and its southern speaking and recruitment tours featuring prominent national spokesmen like Houston and Marshall. It likewise owed significantly to the indefatigable efforts of Ella Baker, wartime southern field secretary for the NAACP.

While the national office paid much lip service to the notion of making the NAACP relevant to the masses of black people, within the upper echelon an elitist and top-down vision of black liberation dominated. The NAACP leaders firmly believed that they would lead their people to freedom. Baker, however, advanced a far more democratic and participatory vision of black insurgency. She saw herself as a facilitator of local-based movements, working with a broad spectrum in local communities to articulate clearly both common goals and viable strategies for effective collective struggle. In other words, she advanced a bottom-up approach to organization. Baker "spent six months of each year in the South, taking the NAACP to churches, schools, barbershops, bars, and pool halls," writes Sullivan, adding that Baker "helped to build chapters around the needs and concerns of individual communities and encouraged cooperation with labor unions and other progressive organizations."³⁷

Baker's emphasis on alliances constituted another article of faith within the NAACP. For example, there was the Southern Negro Youth Congress (1937–48), a group committed to forging links between workers and southern black youth. Similarly, the 1940s South Carolina Progressive Democratic Party constituted another element of the growing black insurgency. Organized labor, notably CIO unions and the Highlander School, with its commitment to working toward interracial labor activism in the South, played crucial roles in fostering support for the black struggle. So did the Communist Party—especially prior to the widespread postwar anti-Communist hysteria and repression. Also important were many New Deal-inspired southerners and white-dominated interracial organizations like the Southern Conference for Human Welfare. In various and sundry ways, these organizations and many other

groups and individuals contributed to the groundwork for *Brown*. These were often difficult yet heady times; the 1930s and the pre-cold war 1940s were ultimately, as Sullivan demonstrates, "days of hope."³⁸ *Brown* was clearly a product of that hope.

THE GROWING ANTI-RACIST OFFENSIVE: AN AMERICAN DILEMMA CONFRONTS WORLD WAR II

Another vital development fueling the NAACP's crusade was the declining intellectual and cultural respectability of racism. In *Brown* and the various cases the NAACP lawyers argued leading up to it, the growing scientific and humanistic consensus in favor of egalitarianism was crucial. Nowhere was this point more effectively put forward to national and worldwide audiences than in Gunnar Myrdal's magisterial study of race relations in the United States, *An American Dilemma* (1944). The Swedish economist directed a large staff in an exhaustive study, four years in the making, of the evidence and significance of the discrepancy between the American creed and the American reality for African Americans. The awesome final product consisted of more than 1,000 pages of text, ten appendices, and more than 250 pages of notes (see p. 102 in this book).³⁹

For 1950s America and beyond, the *Brown* decision and *An American Dilemma* constitute twin pillars in the evolving liberal racial orthodoxy: America had no choice but to live up to the American creed in its treatment of its black citizens. Evidence of the impact of *An American Dilemma* can be seen in its extensive use in the theory and practice of civil rights law—where its findings became crucial—and its influence on the Supreme Court that decided *Brown*. It became the authoritative work on black-white race relations until the mid-1960s when its assimilationist and integrationist approach came under attack (notably within the black insurgency) as being too liberal, too reformist, and complicitous in the negative construction of black life and culture. From World War II up to the radical Black Power movement beginning in 1966, *An American Dilemma* defined the liberal orthodoxy on American race relations. The *Brown* decision experienced a similar path.

As the antisegregation documents for the period after 1944 in this collection make clear (see chapter 4), the authority of *An American Dilemma* was constantly invoked, implicitly as well as explicitly. The earlier documents demonstrate, moreover, that an understanding of the basic problem discussed in *An American Dilemma*—the disjunction between the

American creed and the white oppression of African Americans—goes back to the nation's founding. Of course it can be traced back even further to the European enslavement of Africans in the New World. Even the related emphasis in Myrdal's text on the baneful impact of white racism on whites as well as on blacks is a recurrent historical theme, traceable here in both earlier and later documents.

As a social scientist committed to moral exhortation and social engineering, Myrdal emphasized both vigorous government leadership and strong government intervention to resolve the problems among blacks engendered by racial prejudice and discrimination. Those engaged in the black freedom struggle—including antebellum abolitionists, postbellum supporters of Reconstruction, and New Deal-inspired racial activists—have shared Myrdal's faith in an activist government committed to racial equality. Unfortunately, at midcentury this activist approach had not found enough public support.⁴⁰

While there was much new and original material in *An American Dilemma*, what was particularly striking then and now is how well the text captured the evolving liberal support of racial egalitarianism and integrationism among the lay public and scholars, especially sociologists and anthropologists. Myrdal employed many of the best available black and white minds for his study and distilled the results of their contributions through his own perspective as a relative outsider to the American scene. The fact that extraordinary national effort had to be undertaken to ameliorate the inequalities African Americans experienced was patently clear. In line with its scholarly and objective goals, though, Myrdal's text was very long on description and analysis and short on policy prescriptions.

As in *Brown*, the argument and the remedy in *An American Dilemma*—like most American efforts to deal with racial inequality—did not go far enough. What became increasingly clear in the period from *An American Dilemma* to *Brown* was a growing yet insufficient national will to tackle this thorny problem. In spite of brief moments to the contrary, such as the noteworthy government efforts spawned by black insurgency between 1954 and 1974, the national will has proven insufficient to the challenge.

Even the explosive wartime economy that brought the nation out of the Depression and the subsequent thirty years of sustained economic growth were insufficient to create racial equality. Neither was postwar U.S. global supremacy. Nonetheless, in this broad context of sustained

economic growth and "Pax Americana," or worldwide U.S. dominance, the black freedom struggle surged. *Brown* represented a turning point in its building momentum.

The pulsating wartime economy transformed the American landscape. Streams of rural blacks leaving the South during the Depression reached flood proportions during the war as job opportunities and prospects for a better life proliferated in northern and western cities. Heightened black political consciousness engendered by the Depression continued to grow during the war. Increasingly, the race problem became a national issue, not merely a southern one. As Pax Americana demanded that the United States assume the awesome pressures and glaring spotlight of international center stage, African Americans and their allies fully understood that from a geopolitical perspective, state-enforced white supremacy was indefensible. In this radically altered context, with its local southern black membership base expanding and energized, the NAACP shifted its strategic attack from equalization to direct attack.

This significant shift reflected several developmental and organizational factors as well. In the South, there were increasing numbers of blacks willing to file civil rights cases and black lawyers able to argue those cases. The NAACP legal staff had grown in size and maturity, reaching the point where by the war's end it had become a well-oiled and flexible machine. In 1939 the NAACP created the NAACP Legal Defense and Educational Fund as a functionally autonomous wing. This streamlined and enhanced the association's legal enterprise. By 1945 the staff had coalesced around the move from equalization to direct attack and in 1948 the board of directors and the Annual Conference issued a full-fledged statement in support of the direct attack strategy.⁴¹

Recent court successes by the NAACP legal team and its cohorts, especially the 1944 Supreme Court ruling in *Smith v. Allwright* outlawing the white primary in the South spurred that support.⁴² This racially exclusionary device had functioned as a critical prop of white, one-party, Democratic rule in the South. In a related vein, a significant measure of the success of NAACP organizing in the 1940s owed to increasing black political mobilization around voting, particularly in the South. Growing black political power in the North enhanced the national impact of black politicization in general. Chicago's South Side and New York City's Harlem, where recently elected black congressmen were beginning to flex their political muscles—most notably Harlem's Reverend Adam

Clayton Powell Jr. — signaled this important trend. In the overall domestic and international context, an all-out legal assault against Jim Crow and *Plessy* became a viable enterprise.

CONTINUITY AND CHANGE IN THE LEGAL STRUGGLE: EQUALITY, EQUALIZATION, AND DIRECT ATTACK

The creation of legal precedents was absolutely essential to the NAACP's overall strategy against Jim Crow. Reverses as well as victories thus proved to be invaluable learning tools. Indeed the long-term "road to *Brown*" had many ups and downs.⁴³ This collection includes two key legal setbacks in the nineteenth century: *Roberts v. City of Boston* (1849), which dealt with equal educational opportunity (see p. 42); and *Plessy v. Ferguson* (1896), which legitimized separate but equal railway accommodations. The former case painfully revealed that the prejudice and discrimination endured by free blacks in the antebellum slave South had clear parallels in the free states of the antebellum North. White supremacy was a national dilemma, not a regional one.

Roberts was a Supreme Judicial Court of Massachusetts decision that separate common or public schools for Boston's black schoolchildren did not deny them their legal rights and did not expose them to undue logistical difficulties or degradation. In addition, Massachusetts' highest court agreed with the defendant, the Boston School Committee, that it was within its constitutionally delegated power to separate black schoolchildren from white schoolchildren, given the committee's statutory authority over the ways and means of local public education. If in the committee's judgment racially segregated schools served reasonable educational and sociopolitical objectives, the ruling maintained, then this particular form of racial discrimination was legal. While a state law in 1855 overturned the original decision, the resonances between the *Roberts* and *Plessy* cases and the significance of both cases in the history of American apartheid are revealing.⁴⁴

An even more stunning and influential constitutional setback was *Plessy v. Ferguson*. The majority opinion cited *Roberts v. City of Boston* as one among several key precedents. The legal logic in *Plessy*, as in *Roberts*, owed heavily to social customs rooted in white supremacy. It also relied on an interpretation of the Fourteenth Amendment's guarantee of each citizen's right to equal protection under the law as consistent with racially separate but equal public accommodations and institutions. In later cases,

Plessy was at times interpreted narrowly as affirming segregation in transportation and comparable kinds of public accommodations, while *Roberts* affirmed segregated education. As the documents demonstrate, pro-segregation legal cases relied extensively on these distinctions and related arguments and rulings.

In the case for the black plaintiff in *Roberts*, the venerable Massachusetts abolitionist and senator Charles Sumner eloquently articulated an elaborate and powerful brief for the concept of racial equality as well as the policy of integrated public schools in "enlightened" Boston. Again, the pro-egalitarian and pro-integration documents here demonstrate that the twentieth-century "road to *Brown*" made extensive use of Sumner's stirring and ultimately compelling nineteenth-century brief. In many ways, the antebellum abolitionist crusade that gave rise to Sumner's brief later reconfigured itself into a neo-abolitionist crusade against Jim Crow. The NAACP's legal campaign exemplified this transition.⁴⁵

Justice John Marshall Harlan's famous dissent in *Plessy* is best known for its articulation of the Constitution as color-blind. He wrote that "in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law." This inspiring and idealistic vision was eventually enshrined in *Brown*, furnishing the egalitarian and integrationist forces with a powerful endorsement.

Less well known and less often discussed was Harlan's embrace of de facto white supremacy and his opposition to any kind of social equality between the races. As seen in documents here, Jim Crow's legal partisans often quoted Harlan on these points as a way of undercutting his assertion that the Constitution is color-blind. Harlan's acceptance of segregated public school education as consistent with state power likewise carried favor with advocates of Jim Crow education and incurred the opprobrium of its opponents. His dissent proved to be very influential in large measure precisely because of its double edge.⁴⁶

Until direct attack became the NAACP's guiding strategy in the late 1940s, both sides accepted the *Plessy*-defined terms of the debate — separate and equal — as the controlling issue. *Gong Lum v. Rice* (1927) illustrates how *Plessy* carried the day. The father of nine-year-old Martha Lum sought admission for his daughter to a local white school in Mississippi on the grounds that his family was of Chinese descent. He argued that it was wrong for Martha to be compelled to attend the black school,

given the stigma attached to blacks and their separate schools, especially as his daughter was not black. Neither was she white, the Supreme Court argued, as it upheld the power of the state to categorize and place students as it saw fit. The issue here was not the right of the state to maintain segregated schools, which the plaintiff accepted. Rather, the issue was both legal and categorical: the state of Mississippi could compel the girl to go to a black school when she was neither black nor white, but of Chinese descent.

This case is also instructive in its erasure of Chinese racial identity and its conflation of that identity with a black racial identity. Two points, among others, are critical to this discussion. First, the dualistic construction of race in America obscures both powerful cultural differences among nonwhites, in this case blacks and Chinese, and critical differences in their historical experiences in the United States. This racial dualism also misrepresents and thus devalues the integrity of their group-based identities. In turn, it buttresses white supremacy.⁴⁷

Second, it is worth thinking critically about the power of the state, or the government, to determine racial identities or to define who belongs to which race. That power did not reside ultimately with the oppressed, nonwhite minorities themselves, in this instance with the black and Chinese citizens. Indeed, a vital aspect of the Asian American movement, particularly between the late 1960s and early 1980s, and the black civil rights and Black Power movements (1955–75) was the same. Both fought to wrest the ultimate power of group definition from the state and federal governments and to reassert control over their identity: to define on their terms who they are.⁴⁸

In the years before *Brown*, the search for precedential decisions undermining *Plessy* proceeded. In the area of equal educational opportunity for blacks, particularly in the Upper South, the NAACP carved out a series of important victories in salary equalization cases in the 1930s. The larger strategic problem, of course, had been anticipated: the process was piecemeal, gradual, and very time-consuming because each separate school jurisdiction had to be challenged separately. In addition, the tactical move among southern school districts to mask racial disparities in salaries through the introduction of merit criteria exposed a serious flaw in the salary equalization strategy and pushed the NAACP lawyers toward the direct attack strategy.⁴⁹

Similarly, a series of “victories” in graduate and professional school cases—*Pearson v. Murray* (1936), *Missouri ex rel. Gaines v. Canada* (1938), *Sipuel v. Oklahoma State Regents* (1948)—nibbled away at *Plessy*.

Taken together and over time, these cases played out the equalization approach to the point where the direct attack approach became imperative. In *Pearson v. Murray*, the Maryland Court of Appeals ruled that Donald Murray, a black Amherst College graduate, had been denied equality of educational opportunity when he was refused admission to the University of Maryland's law school. The state's alternative of providing scholarships for blacks to attend out-of-state schools was viewed as a violation of Murray's Fourteenth Amendment right to equal treatment under the law. Because the constitutional injury to Murray was “present and personal,” the remedy had to be immediate. Murray either had to be admitted at once to Maryland's School of Law or a separate and equal school of law for Maryland blacks had to be created forthwith. Since a comparable black law school could not be created overnight, he had to be admitted to Maryland's School of Law.

Nevertheless, with the possibility that a separate black law school might satisfy the letter of the ruling, *Plessy* clearly remained intact. In the *Gaines* and *Sipuel* cases, similar circumstances resulted in similar rulings, this time in the Supreme Court. The decisions in these cases turned on the issue of the inequality between the reputable all-white state-supported law schools in Missouri and Oklahoma and the makeshift all-black arrangements those states scrambled to provide to avoid admitting blacks to their all-white law schools. Notwithstanding the impact of the sociological arguments on the behind-the-scenes discussions of these cases, the Court was deeply divided on the issue of overruling *Plessy* and thus did not go that far.⁵⁰

For the NAACP, the *Gaines* decision was a moment to be savored, however; it was the first favorable Supreme Court judgment casting doubt on the legality of *Plessy*. In a comparable decision in *Sipuel*, the Supreme Court upheld the right of the black plaintiffs to equal educational opportunity, although possibly under separate circumstances. The limits of equalization as a strategy were becoming patently clear, particularly in light of fallacious defense arguments claiming the comparability as against the actual equality of separate schools. By the late 1940s, the NAACP legal trust was working on a Texas case, *Sweatt v. Painter* (1949), where the direct attack strategy was being readied (see p. 87).

The strategy employed in *Sweatt v. Painter* and a related case, *McLaurin v. Oklahoma State Regents* (1949), failed to get the Supreme Court to overturn *Plessy*. Even so, that same strategy would soon prove effective in *Brown*. In the *Sweatt* and *McLaurin* cases, the NAACP lawyers used

a two-pronged approach. First, they focused on how separate black law schools, especially quickly contrived ones created to forestall integration, lacked the many advantages of the traditional all-white law schools and were thus a blatant denial of equal educational opportunity. Second, in a tactical innovation, the NAACP lawyers utilized psychosocial evidence on the harm segregation inflicted on its victims. This kind of argument had been used in a 1945 friend-of-the-court brief filed in support of a lawsuit against Orange County, California, for its practice of segregating Mexican American schoolchildren from white schoolchildren. In *Sweatt* and *McLaurin*, this tactic foreshadowed the increasingly influential emphasis in postwar America on the psychological damage that segregation inflicted on blacks.

In *Henderson v. United States* (1949), a case coupled with *Sweatt* and *McLaurin*, the federal government issued a friend-of-the-court brief vigorously condemning segregated railroad dining cars, which the Court subsequently declared illegal. Earlier, in *Shelley v. Kraemer* (1947) and *Sipes v. McChes* (1947), the Supreme Court outlawed restrictive covenants (contracts forbidding the sale of property to blacks and other "stigmatized" groups and individuals) as invidious and unconstitutional forms of racial discrimination. Charles Houston himself, in concert with his NAACP colleagues, argued this series of cases. In its friend-of-the-court brief to support the government's opposition to restrictive covenants, the Department of Justice revealed the growing importance of cold war concerns. That brief made it clear that Jim Crow was a very serious problem for the United States in its propaganda war with the Soviets for the hearts and minds of the Third World, especially in Africa.⁵¹ Indeed, this was an issue that the NAACP legal team and its cohorts increasingly exploited to good effect.

In *Henderson*, Attorney General Howard McGrath maintained before the Supreme Court that "segregation signifies and is intended to signify that a member of the colored race is not equal to the white race." Jim Crow, McGrath further explained, represented "an anachronism which a half-century of history and experience has shown to be a departure from the basic constitutional principle that all Americans, regardless of their race or color or religion or national origin, stand equal and alike in the sight of the law."⁵² This ringing endorsement of constitutional egalitarianism by the nation's number one lawyer meshed well with the Justice Department's earlier argument for desegregation on cold war grounds. This kind of ammunition, including President Harry Truman's official initiation of desegregation of the armed forces, verified strong opposition

within the government to state-sanctioned racial segregation. The stage was now set for a full-fledged direct attack against *Plessy*-sanctioned segregation: the "road to *Brown*" was taking shape.

POLITICS, SOCIAL CHANGE, AND DECISION-MAKING WITHIN THE SUPREME COURT: THE CRAFTING OF *BROWN*

Brown v. Board of Education of Topeka, Kansas, as well as *Briggs v. Elliott*, *Davis v. County School Board of Prince Edward County, Belton v. Gebhart*, and *Bolling v. Sharpe*—the cases eventually argued collectively as *Brown v. Board of Education*—all wound their separate ways toward the Supreme Court in the early 1950s. In each case, and in spite of anticipated lower court setbacks, the NAACP legal staff remained hopeful about a positive Supreme Court ruling in favor of equal educational opportunity. Third World nationalist struggles, most importantly growing assertiveness within America's own communities of color, pervaded the international community, which was reeling from the Holocaust, the dropping of the atomic bomb on Hiroshima and Nagasaki, and an escalating cold war. Worldwide as well as at home, white supremacy was under furious assault. Even though the "Red scare" repressed left-progressive forces in this country, seriously undermining the most radical elements within the black struggle, that insurgency soon reinvigorated itself via the civil rights movement. *Brown* contributed significantly to the ethos and spirit of this revitalized social movement, which was fast becoming a mass movement.

As the excerpts collected here show, both sides in *Brown* mounted strong cases. From the lower courts, *Briggs v. Elliott* (see p. 126) is included because the case featured two legal titans: the celebrated establishment lawyer John W. Davis for the defense and Thurgood Marshall for the plaintiffs. In oral arguments, they both provided high drama as well as astute argumentation. In their legal briefs, they compellingly presented their cases. *Briggs v. Elliott* encapsulated the twin battles in the NAACP's all-out war on segregated schools. First was the clear-cut evidence of the denial of equal educational opportunity owing to gross physical and funding disparities between white and black schools. Second was the interrelated argument of psychosocial harm inflicted on black schoolchildren as a result of Jim Crow schools. Although only the lower court dissent of Judge J. Waties J. Waring responded favorably to the second argument, it clearly made an impact on both sides.