LESSON: Learning About Marshall's Legal Strategy for *Brown*

GRADE LEVEL: Grades 11-12

SUBJECT: History and Government

TIME REQUIRED: 90 mins

This lesson will outline Thurgood Marshall's legal strategy for the *Brown* case.

RATIONALE

This lesson will be looking at the legal strategy implemented by Mr. Marshall and the NAACP lawyers to overturn *Plessy.* The lesson will help develop reading skills and engagement with resistant, primary texts.

NOTE: These texts are difficult and may need multiple readthroughs, potentially for homework and read together.

This lesson plan and materials needed to teach it can be found at the Thurgood Marshall Institute: https://tminstituteldf.org/

OVERVIEW

This lesson is about the NAACP's legal approach to the *Brown* case. Students will be examining the logic behind the argument and engaging with resistant, primary source documents.

ESSENTIAL QUESTIONS

- Why do people change their minds?

OUTCOMES AND OBJECTIVES

After the lesson, students will be able to better read and engage with resistant texts and to articulate the reasoning for overturning *Plessy*.

PREPARING TO TEACH

Familiarize yourself with the primary document ahead of time. Make sure you are aware of what the questions students will be answering are and ready to help them with the reading. Also make sure that your class has an understanding of what *Plessy v. Ferguson* made legal, particularly in schools.

SCAFFOLDS AND ACCOMMODATIONS TO SUPPORT LEARNERS

Reading support….

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The point of this exercise is to struggle with the reading. The scaffolds are built into the question to help direct their reading.

Differentiation…

None.

Adjusting for middle school grades…

If you want this activity for middle schoolers, create summaries of each paragraph or section with reading-level appropriate language.

INSTRUCTIONAL ACTIVITIES SEQUENCE

Begin the lesson with a review of what *Plessy v. Ferguson* meant for American schools. Have students then think about the essential question and discuss with a partner why they would change their mind. Then pass out the NAACP filing for *Brown v. Board of Education*. Have students read through the filing and use the guiding questions to help them articulate their understanding and guide their reading.

After they have read and filled out the guided reading questions, students will be put into pairs and will create a radio news broadcast to summarize the filing to the public. This radio summary should be under one minute and should teach someone who hears it about the reasoning behind the NAACP's lawsuit and argument.

ASSESSMENT

The assessment of understanding should be the radio presentation. Students in it should demonstrate that they know why the *Brown* case was filed and be able to articulate it to someone who is less informed. The guided reading questions can also be used as a knowledge checkpoint. The following are the instructions for the podcast students will be creating:

Time to create a radio broadcast. You and a partner will now write a radio broadcast script that reports on the Brown v. Board of Education *case being filed. The broadcasters should explain why the case is being filed and the NAACP's logic behind the suit. Then both partners will record the newscast, which will include both partners reading their respective roles from the script.*

MATERIALS NEEDED AND ADDITIONAL RESOURCES FOR ENRICHMENT

Binder 1 pgs. 1-7

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Topeka Case

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October 9, 1952

PUBLIC SCHOOL SEGREGATION CASES

Clarendon County, S.C., No.101
and Topeka, Kans., No. 8

Background information on two cases to be argued before U.S. Supreme Court, Oct. 14-15, 1952, with attorneys for the National Association for the Advancement of Colored People representing the appellants.

THE ISSUE

At issue in these two cases, one originating in the rural South Carolina county of Clarendon and the other in Topeka, Kansas, is the validity of state statutes and constitutional provisions pursuant to which Negro and white children are segregated in public elementary and secondary schools. Acting on behalf of the parents and children in both cases, the NAACP attorneys contend that segregation per se is discrimination and, accordingly, a violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution. In these cases the equality of facilities afforded the two groups is not at issue.

Both cases are before the Supreme Court on appeal from lower court decisions which upheld the constitutionality of segregation on the basis of a Supreme Court decision in Plessy v. Ferguson handed down in 1896. The Court at that time formulated the "separate but equal" doctrine, which asserted the right of the states to enforce segregation laws provided equal facilities were made available to both races. The present cases challenge this ruling. A third case, originating in Prince Edward County, Virginia, is pending.

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THE ARGUMENT

The lower courts, the NAACP attorneys contend, were in error in basing their decision on Plessy v. Ferguson. They maintain that this ruling has been made obsolete by later decisions of the Court, particularly McLaurin v. Board of Regents and Sweatt v. Painter, which held that segregation of Negro students at the University of Oklahoma and the University of Texas, respectively, was unconstitutional.

Citing the decisions in the Sweatt and McLaurin cases, the NAACP brief in the Clarendon County case, filed on September 23, maintains:

> "This rule cannot be peculiar to any level of public education. Public elementary and high school education is no less a governmental function than graduate and professional education in state institutions."

The brief in the Topeka case, also filed on September 23, asserts:

> "Since 1940, in an unbroken line of decisions, this court has clearly enunciated the doctrine that the state may not validly impose distinctions and restrictions among citizens based upon race or color alone in each field of governmental activity where question has been raised."

Segregation, the NAACP points out, impairs the educational development of its victims. Race as a factor in the selection of students for admission to public schools, the Association holds, is a "constitutional irrelevance" which "cannot be justified as a classification based upon any real difference which has pertinence to a valid legislative objective."

The South Carolina Case

HISTORY

Segregation in public education is mandatory in South Carolina under Article II, Section 7, of the state constitution, which states:

> "Separate schools shall be provided for children of the white and colored races, and no child of either race shall ever be permitted to attend a school provided for children of the other race."

Distressed by the long-standing and glaring inferiority of facilities available to their children under this provision, Negro parents filed a petition with the county board of education in November, 1949, asking for equalization of educational opportunities. The county board refused to act. Meanwhile the parents sought and secured the assistance of the South Carolina State Conference of branches of the NAACP. As it became increasingly evident that no steps were being taken by the authorities to bring the Negro schools up to the standard of those maintained for white children, the decision was reached to make a frontal attack upon the segregated school system.

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The original suit was filed in the Federal District Court in Charleston on May 16, 1950, on behalf of 67 Negro children and their parents. The court was asked to issue an injunction "forever restraining and enjoining the school board from making a distinction on account of race and color in maintaining public schools for Negro children which are inferior to those maintained for white children."

When attorneys in the case appeared before United States District Judge J. Waties Waring for a pre-trial hearing in November, 1950, it was indicated 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.

Argument on the suit was heard on May 28 and 29, 1951, before Senior Circuit Judge John J. Parker of Charlotte, N.C., and Federal District Judges J. Waties Waring, Charleston, and George Bell Timmerman, Batesburg, S.C. Expert witnesses, from the fields of education, psychology, sociology and anthropology testified as to the harmful effects of segregation upon school children. A surprise turn at the trial took place when Robert McC. Figg, chief counsel for the state, admitted that inequalities in white and Negro schools existed and asked the court to grant time to remedy the situation. He said that an estimated $40,000,000 would be needed to equalize schools in the state and that the state had levied a 3% sales tax and floated a $75,000,000 bond issue for the purpose.

In a two-to-one decision handed down on June 21, 1951, segregation was upheld. Judge Waring entered a vigorous dissenting opinion, in which he declared that from testimony offered by the expert witnesses, "it was clearly apparent, as it should be to any thoughtful person, irrespective of having such expert testimony, that segregation in education can never produce equality and that it is an evil that must be eradicated."

The court ordered the school board to furnish Negro pupils in its jurisdiction "educational facilities, equipment, curricula and opportunities equal to those furnished white pupils." Further, the court ordered the school officials to submit a report within six months indicating progress made towards equalization.

NAACP attorneys filed a petition for appeal to the U.S. Supreme Court on July 20, 1951. The petition asked the Court to hand down a definitive ruling "as to whether racial separation in public elementary and high schools is a constitutionally possible pattern." This had been clarified on the graduate and professional levels, the petition pointed out. However, it continued, "the Court has never had the opportunity to consider the question as to elementary and high schools on the basis of a full and complete record with the issue clearly drawn and with competent expert testimony."

On January 28, 1952, the Supreme Court sent the case back to the lower court on the ground that the latter had not given its opinion on the report submitted to it by school officials at the end of the six-month period, as ordered. Justices William O. Douglas and Hugo Black dissented from the per curiam opinion sending the case back to the lower court, on the ground that the report was irrelevant to the segregation issue presented.

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Forthwith, on January 31, the NAACP field 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. On February 7, NAACP attorneys submitted a motion for judgment to the District Court, contending the children they represented 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.

On May 10, the NAACP for a second time asked the Supreme Court to review the case. It is this appeal which will be argued before the Court on October 14.

IMPACT IN SOUTH

Alarmed by the possibility of the demolition of the legal props to segregation, advocates of that system, under leadership of Governor James F. Byrnes of South Carolina, are seeking some means to retain the traditional southern pattern in the event of a Supreme Court decision against segregation. Addressing the South Carolina Education Association on March 16, 1951, Gov. Byrnes said:

> "Should the Supreme Court decide this case against our position, we will face a serious problem. Of only one thing can we be certain. South Carolina will not, now nor for some years to come, mix white and colored children in our schools.
> "If the court changes what is now the law of the land, we will, if it is possible, live within the law, preserve the public school system, and at the same time maintain segregation. If that is not possible, we will abandon the public school system. To do that would be choosing the lesser of two great evils."

The State of South Carolina retained the eminent constitutional lawyer John W. Davis to represent the state in this case. Mr. Davis was the Democratic nominee for the presidency in 1924.

The governors of Georgia and Mississippi have similarly threatened to "abandon the public school system." Meanwhile, South Carolina, Georgia and Mississippi have initiated costly plans to improve and equalize the schools in the hope that the Court will merely reaffirm the "separate but equal" doctrine.

Despite pressure and threats of intimidation, Negroes in South Carolina have stood firm. James M. Hinton, state president of the NAACP, has responded to threats with the assurance that "Negroes will not turn back. Whites and Negroes will have public schools in South Carolina after all of us have died and present officials either are dead or retired from public life."

The South Carolina Baptist Educational and Missionary Convention, a Negro group, went on record early in May, 1951, "as being opposed to segregation in all forms." The convention condemned segregation as "undemocratic and contrary to the Christian view of life." Efforts to induce Negro church groups to take over the Negro schools in case the Court bans segregation have been rebuffed.

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The Topeka, Kansas, Case

HISTORY

Segregation in the elementary schools of Topeka (the high schools are unsegregated) is maintained under authority of Chapter 72-1724 of the General Statutes of Kansas, 1949, which empowers school boards in the cities of the first class

> "to organize and maintain separate schools for the education of white and colored children, including the high schools in Kansas City, Kans.; no discrimination on account of color shall be made in high schools except as provided herein..."

Negro children in Topeka had to pass nearby schools set aside for whites only and travel distances from a mile and a half to two miles in order to attend an inferior all-Negro school. Weary of such discrimination and inconvenience, Negro parents appealed to the NAACP for legal assistance in breaking the long-existing pattern of segregation which was re-affirmed in the General Statutes of 1949.

A suit filed by NAACP lawyers on February 28, 1951, asked the U.S. District Court to grant a declaratory judgment and injunction invalidating the Kansas segregation statute. Twenty Negro children and 13 of their parents joined in this suit. The following June an amended complaint was filed asking the court to issue a permanent injunction restraining the Board of Education from setting up separate schools for white and Negro children. The case was heard on June 25, 1951, before Judges Walter A. Huxman of the U.S. Circuit Court of Appeals, and Judges Arthur J. Mellott and Delmas C. Hill of the U.S. District Court.

THE DECISION

Although the decision handed down by the three-judge court upheld the legality of segregation, the court found that

> "Segregation of white and colored children in public schools has a detrimental effect upon 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 development of Negro children and to deprive them of some of the benefits they would receive in a racially integrated school system."

The Court adhered to Plessy v. Ferguson but noted that "if the denial of the right to commingle with the majority group in higher institutions of learning as in the Sweatt case and gain the educational advantages resulting therefrom, is a lack of due process, it is difficult to see why such denial would not result in the same lack of due process if practiced in the lower grades."

In October, 1951, the NAACP asked the U.S. Supreme Court to review the case. The brief for the present case before that Court was filed on September 23, 1952. It asks for reversal of the lower court decision.

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Virginia Case Pending

A third case, involving the high school facilities in Prince Edward County, Virginia, is also pending before the Supreme Court. The case was tried in Richmond, Va., in February, 1951. The lower court found that the physical facilities for Negroes were unequal and, as in the South Carolina case, ordered equalization of physical facilities but refused to outlaw segregation or to order the admission of Negroes to the "white" schools. There is a possibility that the court may decide to hear this case on appeal also, and that it will be argued after the South Carolina and Kansas cases.

Counsel for the Appellants

Thurgood Marshall, Special Counsel of the National Association for the Advancement of Colored People, heads the battery of lawyers seeking the abolition of segregation. Associated with him in arguing the cases will be Robert L. Carter.

Others who have participated in the preparation of the cases include Constance Baker Motley, Jack Greenberg, Elwood H. Chisolm, David Pinksy and Leonard W. Schroeter of the NAACP legal staff in New York. Also, Jack B. Weinstein, Professor of Law at Columbia University; William T. Coleman, Jr., of Philadelphia; George E. C. Hayes of Washington, D.C.; George M. Johnson, Dean of Howard Law School, Washington, D.C.; William R. Ming, Jr., Professor of Law at the University of Chicago; Spottswood W. Robinson, III, and Oliver W. Hill, of Richmond, Virginia; John Scott and Charles Scott, of Topeka Kansas; Harold R. Boulware of Columbia, S.C.; Frank D. Reeves of Washington, D.C.; and James M. Nabrit, Jr., Executive Secretary and Professor of Law, Howard University, Washington, D. C.

Statement of the Experts

In support of the Clarendon and Topeka briefs, 32 social scientists filed an appendix on "the effects of segregation and the consequences of desegregation." These psychiatrists, psychologists, sociologists, anthropologists and educators agree in their statement that "regardless of facilities which are provided, enforced segregation is psychologically detrimental to the members of the segregated group" as well as to those of the majority group. They further assert that segregation has been and can be removed without "outbreaks of violence."

Signing this statement were the following social scientists:

Prof. Floyd H. Allport, University of Syracuse; Prof. Gordon W. Allport, Harvard University; Charlotte Babcock, M.D., Chicago, Ill.; Viola W. Bernard, M.D., New York, N.Y.; Prof. Jerome S. Bruner, Harvard University; Prof. Hadley Cantril, Princeton University; Prof. Isidor Chein, New York University; Prof. Kenneth B. Clark, College of the City of New York; Dr. Mamie P. Clark, Northside Center for Child Development, New York, N.Y.; Prof. Stuart W. Cook, New York University; Bingham Dai, Duke University Medical School; Prof. Allison Davis, University of Chicago; Prof. Else Frenkel-Brunswik, University of California; Prof. Noel P. Gist, University of Missouri; Prof. Daniel Katz, University of Michigan; Prof. Otto Klineberg, Columbia University; Prof. David Krech, University of California; Prof. Alfred McClung Lee, Brooklyn College;

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Prof. R. M. MacIver, Columbia University; Prof. Robert K. Merton, New York University; Prof. Gardner Murphy, Menninger Clinic, Topeka, Kans.; Prof. Theodore M. Newcomb, University of Michigan; Prof. Robert Redfield, University of Chicago; Prof. Ira DeA. Reid, Haverford College; Prof. Arnold M. Rose, University of Minnesota; Prof. Gerhart Saenger, New York University; Prof. R. Nevitt Sanford, Vassar College; Prof. S. Stanfield Sargent, Barnard College; Prof. M. Brewster Smith, Social Science Research Council, New York, N.Y.; Prof. Samuel A. Stouffer, Harvard University; Prof. Wellman Warner, New York University; and Prof. Robin M. Williams, Cornell University.

The Expert Witnesses

In each of the cases, the NAACP called to the witness stand experts in education, anthropology, sociology and psychology who testified to the injury inherent in a segregated situation. Among those who testified in these cases were the following:

Prof. Hugh W. Speer, Chairman, Department of Education, University of Kansas City; Prof. Horace B. English, Ohio State University; Prof. John J. Kane, Notre Dame University; Prof. Willard B. Brookover, Michigan State University; Dr. Louisa Holt, Topeka, Kansas; Prof. Matthew Whitehead and Prof. Ellis Knox, Howard University; Prof. David Krech, University of California; Prof. Kenneth Clark, CCNY; Dean James L. Hupp, West Virginia Wesleyan College; Prof. Howard J. McNally, Teachers College, Columbia University; Prof. Louis Kesselman, University of Louisville; Prof. Robert Redfield, University of Chicago; Miss Helen Trager, Vassar College; Dr. Mamie Clark, Northside Center for Child Development, New York City; Dr. Isidore Chein, American Jewish Congress Committee on Community Interrelations; Prof. M. Brewster Smith, Vassar College; Dr. John J. Brooks, Director, The New Lincoln School, New York City; Prof. Alfred McClung Lee, Brooklyn College; Prof. Elsa Robinson, New York University; Dean Thomas Henderson, Virginia Union University.

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Worksheet:

Prompting Question	**Response**
Why is this suit being brought to the Supreme Court? What is the grievance that the *Brown* case is trying to address?	
What is the history of this case/issue in South Carolina? How has the state ruled in the past? Does the NAACP agree with that decision, and why or why not?	

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What is the history of this case/issue in Topeka, Kansas? How has the state/city ruled in the past? Does the NAACP agree with this decision, and why or why not?	
What state is there a third case pending in? What have the courts ruled so far? Which state is it similar to?	
What have the expert witnesses for the defense helped argue? Name at least two fields these experts come from.	

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In reviewing this filing, please summarize, in 3-5 sentences, what the filing is arguing for and on what grounds.	

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