9

Stalking the Law of the Jungle

The admission of Donald Murray to law school did not itself save the Negro race. Its immediate by-products, though, were considerable.

The Maryland Legislature, perhaps to discourage a wave of Donald Murrays, sharply raised its outlay for Negro higher education. The funds for out-of-state scholarships that had been at issue in the Murray case were tripled. The state colored teachers' college at Bowie was given more than $250,000 for new buildings. Morgan College, the private black school, had its annual appropriation doubled and received a $100,000 grant to put up a gymnasium. Weighing the court's decision in *Murray*, the neighboring state of Virginia authorized—but did not yet fund—graduate study at its principal college for Negroes and allocated money for out-of-state scholarships. Missouri, too, set up out-of-state funding.

To black morale in the Baltimore area, the legal victory was a strong tonic. NAACP membership in the local branch leaped from the few dozen when "Ma" Jackson took over in 1934 to more than 1,500 by the end of 1936.

"Don't Shout Too Soon" was the title of a cautionary article by Charlie Houston in *The Crisis*. The subheading read, "Victory in the University of Maryland test case does not mean the battle for educational equality for Negroes is over, warns the chief counsel in the legal campaign." Indeed, it was just beginning. Qualified applicants had been denied entry at the white state universities in Virginia, Tennessee, and Missouri since Murray made it at Maryland. The Richmond *Times-Dispatch* hollered that the first black in the door at the University of Virginia would be a giant step toward miscegenation.

In late 1935, even before the Court of Appeals ruled for Murray, Marshall and the Baltimore NAACP had picked their next target. It seemed a lot more important in many ways than the Murray case. In Baltimore County, which formed an arc on the east, north, and west of the city, there were ten high schools for white children and no high schools for colored children. Though Negroes made up nearly 10 percent of the county's population, white school officials contended that the wide but thin dispersal of blacks made it impossible to open a centrally located high school for them. Instead, black youngsters who wanted to continue their education past the seventh grade were given a test to see if they qualified for admission to Frederick Douglass High School for colored in Baltimore. About half those

tested were judged qualified and their tuition to the city school was paid by the county, which did not, however, provide the black students with transportation from their outlying homes, nearly ten miles from the school on average. White youngsters were automatically admitted to high school after seventh grade. The colored grade schools in the county, moreover, were a disgrace in many instances: the roofs leaked, the floors were rotten, the playgrounds were non-existent, and the approach roads were quagmires in wet weather. The whole arrangement, it seemed undeniable to Marshall and the Baltimore-area NAACP leaders, was meant to discourage black education. If Donald Murray had been denied equal protection by the failure of the state to provide a law school open to him, how much more pressing was the case of several thousand Baltimore County youngsters offered broken-down grade schools and no high schools?

Marshall brought a petition signed by leading county blacks to a regular session of the board of education meeting at Towson. The petition was flatly rejected. An appeal to the State Board of Education proved no more fruitful. After the Court of Appeals announced its decision in *Murray* early in 1936, Marshall was ready to act. But what relief action should be asked in behalf of the black seventh-grade girl Marshall had found to serve as plaintiff? There were three choices: (1) sue to force the county to equalize the black schools—a step that would likely require massive data to prove the inequalities, and even then the availability of Douglass High in the city might be held adequate for black needs; (2) sue to close the white high schools in the county until equal black facilities were provided—a course that had all the perils of the first alternative plus the unfavorable precedent of the *Cumming* decision by the Supreme Court in 1899; and (3) sue to gain the black plaintiff admission to the white high school nearest her home—in effect, the same remedy won for Donald Murray. Marshall chose the third course. In hindsight only, it was a blunder.

The case was heard in September in the State Circuit Court, where the judge ruled that the county board of education had the power to determine the basis upon which students might enter high school. Marshall went right to the Maryland Court of Appeals. Surely the state's high court would see the analogy to *Murray*, in which it had ruled for the Negro plaintiff's rights—and the county-high-school case was a far more flagrant instance of inequality. The appellate court mulled the case for months, and then in June of 1937 it ruled: Marshall had sought the wrong remedy. He should have sued not to gain admission of the plaintiff to the white high school but to require the county to pay her tuition to the colored high school in Baltimore without the obligation to pass an entrance examination. Whether the county should have provided a high school for Negro children was not considered.

It was Thurgood Marshall's first civil-rights loss. It was not a pleasing sensation. There was too much else to do, though, to let it get him down. By then, he was officially Charles Houston's assistant, plying between New York and Baltimore and points south.

In May of 1936, a few months after *Murray* had been resolved, Marshall had made a drastic appraisal of his financial situation and discovered, as he

wrote Houston in New York, that "things are getting worse and worse." He appealed to Houston and Walter White to see if there was any way he "could be assured of enough to tide me over, then in return, I could do more on these cases." It could not have been an easy letter for so proud a man to write. But there was no point in deceiving himself: either he was to be a full-time, all-out civil-rights lawyer or he would be a lawyer who would do what he could on occasion to forward the race.

Houston and White talked it over. It was already becoming clear that Maryland and then Virginia would be the critical laboratories for the NAACP campaign to overcome Jim Crow in the South. The two states were close to Washington, for one thing. They were relatively less hostile to black aspirations, for another. And the NAACP itself was making major strides in both places—an important consideration in seeking plaintiffs and community support for the legal drive for equal rights. Negro teachers in Maryland, for example, were proving receptive to the salary-equalization drive then shaping up under Marshall and Lillie Jackson. Houston was increasingly weighted down with other business in the New York headquarters; to have an alert and energetic younger man such as Marshall in the field, especially in the Maryland-Virginia territory where he was at home, made good sense. He was hired for $2,400 a year plus expenses.

It was like a finishing school for Marshall. His regard for Houston could occasionally border on dependency—a not unwise recognition by a young lawyer of his own callowness. And Houston never wearied of being the teacher. For all his skills as a lawyer, he was a teacher most of all. He could be a philosopher one moment and a meticulous technician the next, but at all points he was a pragmatist and taught his charges to be, too. He wrote Marshall, for example, to take pains not to antagonize his opposing counsel in the *Murray* appeal "because you may have to come back to him on this question of the judgment not conforming to the prayers. At the same time, I do not want any of our rights to be lost by default. Handle the matter diplomatically but I think that whatever you finally decide upon, you should put it in writing so as to have a record."

Houston was compulsive in his work habits and preached them to assistants like Marshall and to Edward Lovett, who worked with him in his Washington law office. "He used to work like hell and way into the night," says Lovett. "There was a certain minimum standard he set for himself and those who worked with him, and beyond that it was just a matter of polishing. But the trick was to get up to that minimum standard." Another one-time assistant, Juanita Kidd Stout, remembers his advising her, "Regardless of how small a case may be, act as though it will end in the Supreme Court." Spottswood W. Robinson III, who, like Mrs. Stout, eventually became a federal judge, recalls that Houston helped train him as a young NAACP lawyer in Virginia. "One thing he taught me," says Robinson, "was to read over the record the night before arguing a case, so I'd have all the facts and rebuttal arguments at my fingertips in the courtroom. He was always, without fail, doing that." Robinson, who worked closely with him on several cases, was struck, too, by the perfectionist drive in the older lawyer.

He remembers Houston laboring long in crafting his briefs for important cases; then he would park himself in the back room at his firm's office at 615 F Street Northwest, clamp on a green eyeshade, arm himself with a container of freshly sharpened pencils and snub-nosed black crayons, and mark up his brief until it was disfigured nearly beyond recognition. Sometimes the process took all night—or several nights—but he would not quit until he felt he had something worthy of himself. Confidence was the crucial ingredient for Houston, and it was perhaps the most difficult lesson of all to teach young blacks in that period. He wrote one student: "The most important thing now, as fast as conditions are changing, is that no Negro tolerate any ceiling on his ambitions or imagination. Good luck and don't have any doubts; you haven't time for such foolishness."

Thurgood Marshall thrived under the tutelage of Charles Houston. They worked closely for only a few years, but there was an immediate intimacy and understanding, born of their close association in the Thirties, whenever they worked together thereafter. "You have to understand that we had absolutely no money at all in those days," Marshall recounts. When they were on the road, filing lawsuits in the courthouses of the South, "Charlie would sit in my car—I had a little old beat-up '29 Ford—and type out the briefs. And he could type up a storm—faster than any secretary—and not with just two fingers going. I mean he used 'em all. We'd stay at friends' homes in those days—for free, you understand. I think the whole budget for the legal office then was maybe $8,000—that was for two lawyers and a secretary." And when they could not find a friend's home, they would put up at grimy hotels or something a little better if they could find it in the land of Jim Crow, and Houston and Marshall would jaw over bourbon about life and law far into the night. They were quite different as men and as lawyers. Where Houston was a private and somewhat remote man of deep intellectual fiber, Marshall was a constantly engaging extrovert who used ideas as steppingstones down a path of ever widening possibilities. Where Houston was smart, Marshall was shrewd. Where Houston was a fine writer and superb draftsman of legal briefs, Marshall was gifted with the spoken word, full of humor or fire as the occasion demanded, whether in a courtroom or before a packed house of overalled black farmers in a remote church. They shared a largeness of stature—both were formidable-sized men, with Houston the shorter and stockier of the two—and gesture. Each was a firecracker of energy and dedication to the task they shared.

At first, and really throughout the two years they worked together as full-time NAACP lawyers, Houston was a taskmaster who expected Marshall to snap to when his orders came down. Houston's manner was hortatory but never imperious, and Marshall did not feel himself a functionary with a law degree. Soon enough, he demonstrated his own skill as a leader and tactician with political savvy. In October of 1937, he made a swing through Virginia and North Carolina, mainly to line up plaintiffs for teachers' salary-equalization cases; his field reports to Houston and Walter White were intelligence briefings on the state of black militancy wherever he had been. In Petersburg, Virginia, he noted simply, "No franchise questions in immediate vicinity.

Negroes just do not vote." Of South Boston, a town of about 5,000 in tobacco country just north of the Carolina border, he wrote:

> . . . School situation is terrible. Principal of elementary school is gardener and janitor for the county superintendent of schools and is a typical uncle tom. New addition to high school at Halifax but not equipped. Elementary schools terrible. Question of voting has not arisen because so few register.
>
> Spoke at mass meeting and stressed school questions and voting questions. Negroes in this community very lax and inactive. President of [NAACP] branch fighting almost alone.

Regular meetings once or twice a year of all the NAACP branches, known as "the state conference," had lapsed in Virginia, and Marshall urged their renewal despite the laggard ways of the state NAACP president. He suggested the session be scheduled simultaneously with the annual meeting of the black teachers' association in the state, so that a joint committee of teachers and NAACP operatives could "handle the teachers' salary case and at the same time start the conference with a definite program around this case. Virginia could be built up around this case." In North Carolina, he encountered both hope and hostility. In Winston-Salem, for example, he found that

> only those Negroes are permitted to register who are "all right" Negroes. Others are refused. No one will bring a case on the question. Had the president of the branch . . . call a meeting of his executive committee. Stressed the point to them and told them that they should start a program to break this down. We will have to keep behind this branch. Winston-Salem Negroes have money—they all work in factories and make good money. They have a bus company on the streets owned and operated by Negroes. Branch should be strong. They want a speaker for mass meeting but do not have the money. Winston-Salem should be one of the main spots for the franchise fight.

Trying to organize teachers for the equal-pay fight, he ran into choppy waters. Those opposed to the move, Marshall reported, were claiming that the NAACP was a glory-seeking interloper and that North Carolina blacks could handle their own problems. Nevertheless, the state's 6,000 black teachers were "tired of waiting" and wanted action from the NAACP "or anyone else." Their main problem was a state teachers' association "controlled by . . . leaders who give no consideration to the rank and file." Marshall proposed a battle plan whereby the NAACP would stay out of the picture until teachers' committees were set up around the state and funds collected to finance the salary case and support anyone fired as a result. The branches had all been contacted and would stand by, "ready to cooperate when the case breaks and to use the case" as a way to revive interest in their activities. "This procedure," Marshall was sure after all his *sub rosa* talks, "is the only type that will work."

Already he was shaping up as an accomplished guerrilla fighter.

Established in his office at NAACP headquarters in New York at 69 Fifth Avenue near 13th Street, Charles Houston did not precisely take New York

by storm. He had his detractors on both ends of the political spectrum and would for the rest of his life. There were some who thought he was too radical and questioned the propriety of his representing Communists in civil-liberties actions, as he did on several occasions before and after but not during his time at the NAACP national office. "There was this fellow in Baltimore," Edward Lovett recalls, "who couldn't get anyone to handle his case, and Charlie finally agreed to take it, even though he was told it might hurt him. His concern wasn't limited to the well-being of the Negro. He was fighting for equality of treatment of all minorities." Others saw him as too much of a conservative, who settled for small gains while the severe afflictions of the race continued unabating.

Some who lacked Houston's learning or cultivation envied him and called him snooty; some who lacked neither—such as Du Bois—resented his closeness to Walter White, a man probably more welcomed in the white world than in the colored world he claimed to represent. Nor did Houston go out of his way to cultivate friends in the black press. Henry Lee Moon, who later became NAACP publicity director, was a reporter on the *Amsterdam News* in the late Thirties when the editorial staff of the Harlem weekly threw up a picket line and struck in an effort to install an American Newspaper Guild unit and union shop. "Charlie was against it," Moon remembers. "I think he felt that it wasn't right, all of us being black and the paper being kind of poor. But Walter White and Roy Wilkins [White's assistant and a former editor of the black Kansas City *Call*] and I, we were out on the picket line. No hard feelings against Charlie, though."

Some, if not all, of these factors conspired to put Houston's private life, which he kept remarkably private, on the front page of the *Amsterdam News* of February 8, 1936. "DIVORCE SEEN/FOR HOUSTONS," said the one-column headline to the piece that ran above the centerfold, a testament to the eminence of its subject or the hostility of the editors, or both. Houston's first marriage—to Margaret Moran, whom friends have described as an older woman—had not been a love story for the ages. Some acquaintances suggest that he was married to his work more than his wife and she in time expressed her resentment. Whatever the details, which Houston chose never to disclose, he married Henrietta Williams the year after the newspaper report of his impending divorce and settled down with the second Mrs. Houston in a first-floor apartment at 227 West 149th Street, in the center of Harlem. They were happily married for the rest of Houston's life, though the pace of his work never truly slowed. Charles, Jr., was a product of the second marriage.

His courtroom appearances were by no means the principal part of his new job. He served as a steadying gyroscope to the flamboyant Walter White, who turned to him constantly for advice on policy and organization. Houston was not bashful about supplying it. In May 1936, for example, he sent White a brisk memo on the entire structure of the NAACP, which had seemed spongy to the lawyer. "If the Association is to function effectively and get the benefit of its numbers, it must be divided and sub-divided into smaller units very much after the fashion of an army," he wrote. In time, the proposal was essentially adopted.

But most of Houston's effort was addressed to protest [illegible] activity in the form of written and spoken pronouncements on racial inequality. He used every forum at his disposal. In *The Crisis*, he wrote on "How to Fight for Better Schools" and said that before real progress could be made, the Negro masses must be convinced that "they are part of the public which owns and controls the schools." He blueprinted the steps local people could take in pushing their school boards for equal funding and facilities, and he wound up: "Do not lose heart if victory does not come at once. Persevere to the end." In a Nashville courtroom, representing a young colored man seeking admission to the pharmacy school at the University of Tennessee, he declared in words carried across the country on the Associated Press wire and run in hundreds of newspapers: "This case may mean nothing in 1937, but in A.D. 2000 somebody will look back on the record and wonder why the South spent so much money in keeping rights from Negroes rather than granting them. . . . [W]e'll all be better off when instead of spending money in lawsuits we spend it for social advancement." At a church-sponsored interracial conference in Philadelphia, he thundered that the only solution to the race problem was to provide Negroes with "complete industrial and social opportunity."

His forensic gifts aside, Houston continued to be of greatest value to White as a pathfinder through the Washington political labyrinth. White's access to the chambers of power was enhanced by Houston's appointment in early 1937 as an unpaid consultant to Harry Hopkins, head of the mammoth Works Progress Administration. There was a great deal of racial inequity in the WPA's way of dispensing food, clothing, and work opportunities to the needy, and Houston had denounced openly discriminatory policies such as wage differentials between whites and blacks in federally funded jobs or federally approved industrial codes. Still, by the later part of the Thirties more than a million Negroes owed their livings to the WPA, and Houston's designation as an advisor to the New Deal's huge economic-rescue operation added to his strategic usefulness to the NAACP.

His credentials as a student of the Constitution were another invaluable asset. He was always on the lookout for new bills in Congress that might further damage the Negro's hard-pressed civil rights. Useful, too, was Houston's cold-eyed estimate of the NAACP's effectiveness as a lobbying center. In the aftermath of a 1938 filibuster that once again smothered a federal anti-lynching bill *in utero,* Houston suggested that a scattering of telegrams and letters to Senators was far short of the impassioned plea in the name of humanity that NAACP branches might have wrung from their communities by a sustained, graphic publicity campaign. Lobbying help from church-affiliated groups such as the YWCA and the Federal Council of Churches was no doubt adding arrows to the NAACP quiver, but they were more feather than point. The NAACP needed muscular help and ought to turn to the labor movement for it—a proposal that must have struck White as semi-utopian in view of the union movement's allergy to the Negro.

The main front, for Houston, remained the courtroom. While his other NAACP duties contrived to reduce his activities in the legal arena, he went to Columbia, Missouri, in July of 1936 to argue one of the three cases that would compose his monument as a civil-rights advocate. From the Missouri case would stem a full-scale assault on segregation in all the nation's schools.

Victory in the *Murray* case had been a breakthrough but no more. It had to be reinforced and then expanded. "We all recognized that Maryland was a border state, and you couldn't assume that states in the deeper South would follow the precedent," remarks William Hastie. "But as a result of *Murray*, local NAACP branches around the country started referring cases to the national office." One of them came from the St. Louis branch.

Colored lawyers were scarce in Missouri; there were only forty-five in the whole state, and thirty of those practiced in St. Louis. A total of just three Negro attorneys had been admitted to the Missouri bar in the previous five years, and there were fewer black practitioners in the state in 1936 than there had been ten years earlier. Something had to be done about it. The president of the St. Louis NAACP and one of the branch's directors, both lawyers, decided to launch a test case. Their plaintiff, a twenty-five-year-old St. Louis resident named Lloyd Lionel Gaines, did not have to be dragooned into participation. He had graduated from Missouri's state-supported black college, Lincoln University,* in June 1935 and wanted to go to law school. Lincoln, though, had no law school; it was, in fact, not a university at all but had merely been empowered to become one by the state legislature, should the need ever arise among the state's black population. The law school at the University of Missouri, a Jim Crow institution, refused Gaines's application and instructed him to apply either to Lincoln, which in theory could provide him with a legal education, or to an out-of-state law school. If he chose the latter course, the state would pay any tuition charge in excess of what Gaines would have paid if enrolled at the Missouri law school.

It was almost exactly like the Murray case, except for two factors. Missouri, unlike Maryland, said it had every intention of maintaining Lincoln University as a first-rate school, on a par with the white university, and had been a leader among the segregating states in providing quality higher education for Negroes. If they wanted a law school, then the state would build them a law school, but there was no point in building one if no colored applicants showed any interest. Let Gaines apply to Lincoln, and wheels would begin turning. The out-of-state subsidy, furthermore, was a *bona fide* offer—not an empty vessel as the scholarship program had been in Maryland when Murray was applying to the law school there—and if Gaines chose not to wait until Lincoln could meet his needs, the state would pay the extra tuition charge, if any. The state said nothing, of course, about paying Gaines's extra traveling and living expenses that would be necessitated by his attending an out-of-state law school.

The NAACP attorneys in St. Louis worked the case up and brought it to Charles Houston. Suit was entered in the Missouri circuit court for a

* Not to be confused with Lincoln in Pennsylvania, the college Thurgood Marshall attended.

mandamus writ against the registrar of the University of Missouri, S. W. Canada. The case was styled *Missouri ex rel. Gaines v. Canada.**

Houston had been hoping for a sizable turnout of blacks at the courthouse in Columbia to show officials and the white public that the case had sparked genuine interest among the Negroes of Missouri. When court opened at 9 a.m. on the morning of July 10, though, few of the promised throng from the St. Louis area were on hand. In fact, neither Gaines nor Houston nor the local Negro lawyers serving as Houston's co-counsel were on hand. Houston, staying in St. Louis to research the case for several days before the trial, had arisen at 4:15 a.m. to prepare for the 120-mile drive to Columbia, but by the time Gaines and the lawyers had been assembled and had a snack it was six o'clock. A detour for thirty miles on U.S. Highway 40 turned the drive into a steeplechase. Houston & Company showed up in court at 9:15, breathless and moist in the morning heat. The thermometer was flirting with 100 degrees.

The heat, the distance, the lack of public transportation, and the fact that there had been a pair of lynchings in the Columbia area not long before had all contributed to the scarcity of colored faces in the courtroom audience. There was no lack of rustic white faces, however. Surrounding Boone County was suffering a serious drought, and dozens of farmers had come to town in their overalls to see officials at the county relief agencies located in the courthouse. When the backlog of farmers piled up, the overflow went upstairs to watch the colored lawyers perform. One hundred or so students attending summer school at the University of Missouri, located in Columbia, also crowded into court, and before long the jammed room was a hotbox.

Yet it was not a hostile crowd, Houston thought. The opposing white counsel shook hands cordially all around and shared a single table in front of the witness stand with their colored adversaries—an arrangement "odd to us," Houston reported afterward in an office memo. "All during the trial we were looking down one another's throats. For private conference at the table we almost had to go into a football huddle." At the outset, "the Court and all concerned agreed to remove coats, so we had a shirtsleeve trial." There was not a single hostile demonstration or outburst during it, and nobody in court called Lloyd Gaines anything other than "Mr. Gaines." The courtroom was unsegregated. During recess, Houston noted, some of the farmers "looked a little strange at us drinking out of the same fountain and using the same lavatories with them, but they did not say anything."

The hearing itself went less satisfactorily. The university's lawyers,

* The term *"ex rel."* is an abbreviation of *ex relatione*, which is defined by the fourth edition of *Black's Law Dictionary* this way: "Legal proceedings which are instituted by the attorney general (or other proper person) in the name and behalf of the state, but on the information and at the instigation of an individual who has a private interest in the matter, are said to be taken 'on the relation' *(ex relatione)* of such person, who is called 'the relator.' " Lloyd Gaines's case was instituted not by the attorney general, however, but by Houston, who exercised the plaintiff's prerogative of captioning his suit and was apparently indulging in the then permitted formalism of invoking the state of Missouri as the party he believed legally obliged to act in Gaines's behalf in directing the state university to stop denying him his right of admission. The somewhat poetic practice has disappeared, and today the case would be called simply *Gaines v. Canada.*

skillful private practitioners from a top Kansas City firm, were "driving and dramatic" in their opening presentation, in Houston's judgment. Gaines's remedy, they declared, obviously lay with the officials of black Lincoln University, which was built to provide the kind of study this laudably ambitious young Negro now sought. Houston himself had his hands full trying to pry any acknowledgment from the university officials he put on the stand that the Missouri law school was a particularly good place to be trained if you wanted to be a lawyer in Missouri. Other state officials were no more helpful. "It is beyond expectation that the court will decide in our favor, so we had just as well get ready for the appeal," Houston wrote his office.

He was right. The court ruled against Gaines. His appeal would take nearly two and a half years to travel to the Supreme Court of the United States. By the time he argued it, Charles Houston was no longer working full-time for the NAACP.

Despite a robust physique—in 1938 he carried 200 pounds on his six-foot frame—he had never been a particularly hardy man. When he was in the Army, a touch of tuberculosis had been detected and arrested. But an inguinal hernia suffered while in service lingered, and though he was advised to have it operated on ten years later, he dismissed the suggestion because the condition did not bother him sufficiently, he said. In 1928, he had suffered a breakdown, and now in 1938 he was again on the verge of nervous exhaustion. His work did not inflict the normal anxieties suffered by a private person with merely high goals and only twenty-four hours a day to achieve them. Charlie Houston was always a spokesman, always engineering, always on exhibit as an exemplar of his race. It was a killing regimen for a man of his hyper-kinetic temperament. "Telling him to slow down," says Houston's later associate Joseph Waddy, "was like talkin' to the wind."

In March 1938, he made his only appearance before the Supreme Court as the NAACP's full-time attorney. It was a reprise of the all-white jury case, *Hollins v. Oklahoma*, he had successfully argued in his first appearance before the Court three years earlier. The Paducah, Kentucky, Colored Civic League had brought him the problems of nineteen-year-old Joe Hale, charged with murdering a white woman and convicted by a jury in McCracken County, where no Negro had served as a juror in more than fifty years. Since there were 8,000 Negroes in the county, of whom 700 fully qualified under Kentucky law for jury service, the Court had little trouble in setting aside the conviction. Joining in the unanimous decision was the newest member of the Court and the first to come from the Deep South in twenty-six years—Justice Hugo Lafayette Black of Alabama. He had also voted for the black plaintiff in another case that first term on the bench, a suit successfully brought by the New Negro Alliance to defend its right to picket a Washington, D.C., grocery chain that had refused to hire blacks at stores in colored areas. It was a hopeful sign, especially considering that Black was Franklin Roosevelt's first appointment to the Court.

By the time the Court's decision in *Hale v. Kentucky* came down in April 1938, Charles Houston had decided to go home to Washington and resume

private practice. The firm of Houston & Houston was nearly in a state of dissolution by then. Houston's father, William, had been appointed an Assistant Attorney General of the United States, and their partner and relative William Hastie had been named the previous year to the United States District Court for the Virgin Islands—the nation's first Negro federal judge. For the senior Houston, appointment to the Justice Department was more of a reward for decades as a model civic leader than an invitation to share in policy-framing. For the precociously ascendant Hastie, elevation from the Solicitor's office at Interior to the lowest rung on the federal judicial ladder was an unmistakable portent. Charles Houston, though, neither sought nor won a federal position. His new dream was to put Houston & Houston back on its feet and then turn it into a haven for public-interest lawyers who might have fallen from grace in their communities for championing unpopular causes.

"I have had the feeling all along that I am much more of an outside man than an inside man; that I usually break down under too much routine," he wrote his father on April 14. "Certainly for the present, I will grow much faster and be of much more service if I keep free to hit and fight wherever circumstances call for action." As an afterthought, he noted that in the previous ten tumultuous years his financial situation had not improved. "I will come home with debts practically closed out, more insurance and no money saved. But I would not give anything for the experience that I have had."

The feeling was mutual at NAACP headquarters. Recalls Roy Wilkins, later to succeed Walter White as executive secretary of the NAACP: "Charlie was never afraid to challenge an idea. He operated from the certainty of his own intellect. He knew that when the chips were down, he had what it takes in that sharp, brilliant mind of his. Walter was slightly different—he didn't have that same certainty. Charlie Houston passed through here and left a lot of sparks."

Between the time Charles Houston threw himself against the tide of white supremacy in a steaming Missouri courtroom in the summer of 1936—while in Berlin throngs watched a black American sprinter kick cinders on Teutonic claims of racial supremacy—and the final adjudication of the *Gaines* case at the end of 1938, America had undergone a bloodless revolution. At its center was the issue of the power and reach of the Supreme Court. The question came down to whether the Justices, in their priestly raiment and putatively higher wisdom, could stymie the rest of government in its earnest effort to meet the needs of a public under severe economic distress.

One of the basic justifications for the establishment of the Supreme Court had been to shield property-owners and creditors from the grasp of the landless, the luckless, the reckless, the penniless, the unscrupulous, and other unsavory multitudes. For if a man were not free to apply his energy, ingenuity, courage, and ruthlessness to the quest for maximum rewards—and be sheltered by the new national government in the accumulation of those

rewards—then there would be no way to carve a great republic from the wilderness. The membership of legislatures was always shifting with the popular will, but a Supreme Court of Justices with life tenure might repulse lawmakers who would seek to defile the sanctity of private property in the name of some fancied public interest.

In theory, this conception of a judicial breakwater against a tide of potentially rampaging masses was a reassuring one. But in practice the Court worked to institutionalize the hold of the past upon the present. The Justices remained in place long after the men who had appointed them had passed from office. They were answerable to no one beyond themselves. They were disposable only by death or extreme dereliction of duty. And they were not obliged to conform their conceptions of the nation's laws and needs to the pleasure of the voting masses. The Court was a defiantly undemocratic body that viewed as its highest duty the need to strike down the errant acts of willful majorities. The Holmesian doctrine that, on the contrary, the Court's highest duty was to restrain itself and acquiesce in the determination of public policy by legislative will—except in the most glaring transgressions of constitutional limits—had never captured more than two or three adherents among the Justices. Power meanwhile kept flowing to the Court. And so long as confidence in the economic future of the great land did not flag, the Court's allegiance to the preferred position of property rights was unshakable. In the first century and a half of its existence, the Supreme Court of the United States had rarely been the protector of any but the conservative and wealthy interests in the land.

But by the onset of the 1930s that allegiance had become untenable. The American economy lay distraught and disorganized, its confidence shattered, and an increasingly impoverished citizenry groped in desperation for a way out. In doggedly holding that business must not yield to government intrusion, even in the name of stilling chaos and restoring the semblance of an orderly marketplace, the Court threatened both to forestall the return of economic well-being to the nation and to promote the pauperization of the American masses. A collision between Court and country became inevitable.

The bills hurriedly carpentered by Congress and the state legislatures to repair the worst damage of the Depression began to come before the Court in 1934. Before long, it was clear that the radical relief programs of the New Deal would be sustained by, at best, a precarious majority of the Justices or be rudely overturned in a conservative charge led by the doomsday foursome of Van Devanter, McReynolds, Sutherland, and Butler. The first test was a New York state law to adjust the price of milk when it ran amuck. Here was undeniable tampering—in the name of babies and the public interest—with the laws of supply and demand. The conservative four could not win over a single member from the rest of the Court, which thus narrowly upheld the milk-pricing statute.

The doctrinal confrontation escalated. By the same five-to-four vote, the Court upheld a statute tampering with an even more firmly fixed verity in the American economic firmament: the sanctity of contractual obligations. At issue was a Minnesota law granting a moratorium on farm foreclosures.

Landless farmers, like milkless infants, constituted a national emergency, and so the majority on the Court was willing to stretch things a bit. The Minnesota law, the five Justices voting to affirm it held, would not diminish or alter any debtor's ultimate obligation; all it would do was alter the method and timing of meeting it—a necessity in view of the hard times engulfing so large a portion of the people. Hard cheese, said the right-wing bloc. The nation had suffered through economic travail before, noted Justice Sutherland, and, thanks to "self-denial and painful effort," had ultimately corrected its problems. "If the provisions of the Constitution be not upheld when they pinch as when they comfort," Sutherland added in a classic defense of *laissez-faire*, "they may as well be abandoned."

By early 1935, the conservatives were being joined by the moderate Justices. With only Cardozo dissenting, the Court threw out an act of Congress to stabilize the oil industry after its leaders had sought a federally imposed quota on the production within any given state in order to prevent ruinous price-slashing across the nation. Then, by a single vote—Chief Justice Hughes's—the Court avoided fiscal chaos. It upheld the 1933 joint resolution of Congress declaring unenforceable and against public policy any contract that called for the repayment of a loan in gold. Such a requirement had been common to corporate and government bonds when the Roosevelt administration, to bolster the plummeting dollar in world currency markets, devalued it and Congress declared such debts payable in any legal tender—meaning the devalued dollar.

In May 1935, the ax fell. The first blow was struck by gyrating Justice Owen Roberts, who had swung between the conservative and moderate poles of the Court since joining it in 1930. Now he delivered the five-to-four opinion that scuttled the Railroad Retirement Act, a forerunner of the Social Security Act's old-age payment, on the ground that it forced the railroads to contribute to the pension kitty for their employees. Such a step, Roberts said sniffishly, smacked of "the contentment and satisfaction" theory of society and was not a safety measure stemming from the right of Congress to regulate interstate commerce but was "really and essentially related solely to the social welfare of the workers."

Three weeks later, the Court struck three times against the New Deal on the same day, and it did so unanimously. A federal bankruptcy act designed to keep farmers afloat by allowing them to buy back their foreclosed property at a devalued price (and on the installment plan, with only token interest charges) was denounced by Brandeis as class legislation that transferred the property of creditors to debtors without compensation—precisely the sort of Robin Hood tactics the Constitution had been designed to prevent. Then the Court denied President Roosevelt the power to fire a member of the Federal Trade Commission who had been appointed to the post by President Hoover and was at odds with New Deal philosophy. But most vital of all that day was the Court's unanimous decision to shoot down the blue eagle of the National Recovery Administration, one of the two foundation stones of the New Deal.

Pushing through a sweeping industrial-recovery law, Congress had

empowered the new agency to relieve rampant joblessness by a series of codes that provided for shorter work hours, a minimum pay scale, and the end of unfair trade practices and price-cutting within each industry covered. In short order, the New Deal's NRA czar had framed codes governing 541 industries from automobiles to pants-pressing, and the blue-eagle insignia of participation flew like a patriotic phoenix above the plants and mills of the nation. The only way the complex industrial codes could be thrashed out in time to be useful in the emergency and revised as necessary, Congress agreed, was to leave their specific provisions and enforcement in the hands of the President and his administration. No, said the Supreme Court, that was a legislative function of great magnitude and could not be delegated by Congress under the Constitution. That cut the heart out of the whole program.

Over the summer of 1935, the Justices moved from their modest quarters in the old Senate chamber on the second floor of the Capitol into the outsized Corinthian mausoleum that became the Court's permanent home on the east side of Capitol Hill. The move may have inspired delusions of Olympian divinity, for that fall term the Justices proceeded to dismantle most of the rest of Franklin Roosevelt's handiwork. They pulled down the Agricultural Adjustment Act, the second of the economic keystones of the New Deal and a measure that had worked well to bolster depressed farm prices and curb overproduction by means of a subsidy program. The act, said Roberts for the Court's six-to-three majority, was an underhanded device by Congress to gain control over farm production, which, unlike interstate commerce, was not subject to regulation by the federal lawmakers. Justice Stone was furious at what he called Roberts's "tortured construction of the Constitution" and delivered his memorable chastisement of the majority:

> While unconstitutional exercise of power by the executive and legislative branches of the government is subject to judicial restraint, the only check upon our own exercise of power is our own sense of self-restraint. . . . For the removal of unwise laws from the statute books appeal lies not to the courts but to the ballot and to the processes of democratic government. . . . Courts are not the only agency of government that must be assumed to have capacity to govern.

But the four conservative Justices, joined by Roberts and sometimes Hughes, kept right on chopping away throughout the term. A law regulating the output and pricing of soft coal was ruled an infringement of states' rights, even though the major coal-producing states filed *amicus* briefs urging the Court to uphold the law. In the spring of 1936, the Court scrapped the Municipal Bankruptcy Act, a realistic effort to meet the needs of more than 2,000 communities that were unable to fulfill their obligations to bondholders.

Finally, and suicidally, the Justices voted five-to-four to kill the New York minimum-wage law for women. Roberts once again joined the four hatchet men on the Court's right when they proclaimed, just as other Court majorities had been proclaiming for fifty years, that such humanitarian measures undercut private employers' "freedom of contract." Said Justice

Butler blandly for the majority: "In making contracts of employment, generally speaking, the parties have equal right to obtain from each other the best terms they can by private bargaining." Here was the high-water mark of social Darwinism and the ultimate display of hardheartedness by the Court. Writing in 1941, the same year he himself donned Justice's robes, Robert H. Jackson labeled Justice Butler's revealing remark a declaration of "the freedom of the sweat shop":

> This, of course, meant that the weak must bear the consequences of their weakness, and the strong may drive the best bargain that their strength and labor's necessities make possible. Labor relations were to be governed by the law of the jungle, and the state might not protect even women and children from exploitation.

The Court had outreached itself, just as it had in formulating the *Dred Scott* decision nearly eighty years before in the only comparable national showdown. What made his setbacks by the Court especially galling to Roosevelt was the narrowness of the majority's margin. The swing of just one vote, or two to be safe, was all he had needed to preserve the New Deal. But none of the Justices had died or retired during Roosevelt's first term, though six of them were over seventy. They were indeed "the Nine Old Men," as they had been lampooned and decried by the Court's critics for hamstringing the nation's economic recovery. In view of the severity of the ideological split within the Court, any Justice who now departed from the new marble palace on Capitol Hill seemed unlikely to go any way other than feet first.

Roosevelt took his plight to the people in the presidential election of 1936. They gave him 61 percent of the popular vote and 523 electoral votes to 8 for Alfred M. Landon. The Senate lineup was 76 Democrats to 16 Republicans, and there were 331 Democrats against 89 Republicans in the House. It was the most lopsided political triumph in the history of the United States. The people had given the President his own marble palace.

Shortly after his second inauguration, Roosevelt aimed his great counter-blow at the Court. Called a judiciary-reorganization bill, the therapeutic measure provided that when any federal judge reached the age of seventy after serving for ten years and did not retire within six months, the President would be empowered to name an additional judge to the same court, though at no time might the Supreme Court number more than fifteen members. His enemies—and even many of his admirers who felt he was tinkering with something too basic in the machinery of federalism—tagged the plan "court-packing" and a fierce national row erupted over who was the more overweening in the exercise of power, the Court or the President. There is no telling what even that Congress, top-heavy with New Dealers, would have done with the President's bill to curb the Court, but its very framing served the purpose Roosevelt intended.

Less than two months after the bill was introduced, the Court upheld a minimum-wage law of the state of Washington that was substantially the same as the New York law the Justices had overturned the previous year. Justice Roberts had abandoned the conservative camp, and Hughes wrote

the five-to-four opinion. Such minimum-wage laws, as well as measures against the sweat shop and child labor, were at last recognized as necessary, humane, and justifiable under the police powers of the states. In short order, the Court upheld the revised railroad-workers' retirement law and the patched-up bill to help farmers hold on to their mortgaged lands—both measures that the Court had earlier invalidated—and then approved the National Labor Relations Act, state laws banning injunctions against picketing, state and federal social-security laws, the Fair Labor Standards Act, and a good many other pieces of public-welfare legislation. The era of judicial nullification had ended. Thirty-seven years into it, the Supreme Court of the United States decided by a narrow vote that the twentieth century was constitutional.

Though it lacked the court-packing provision Roosevelt had sought before Justice Roberts switched judicial gear, a bill to reform the federal courts was passed by Congress in 1937 and helped speed the rejuvenation of the Supreme Court. The act provided that retiring Justices would continue to receive full salary and might be called on to sit in the circuit courts when those calendars grew crowded. Willis Van Devanter, then seventy-eight years old, was the first to take advantage of the new arrangement. After twenty-six dogmatic years, the conservative from Wyoming left the Court. In his place, Roosevelt named Hugo Black, a liberal from Alabama whose record suggested he thought people mattered even more than money.

The disclosure by the Northern press that Black had been a member of the Ku Klux Klan for two years before running for the Senate could not have brought comfort to Negroes across the country who did not know much about the rest of the new Justice's career. A little research might have suggested what time was to prove: the black man had never had a better friend on the Supreme Court than this lean, courtly son of the Deep South. The offspring of a small-town shopkeeper, he began to practice law in the industrial metropolis of Birmingham, and from the start showed concern for the abused rights of blacks. One of his first clients was a Negro ex-convict who, in the custom of the day, was leased out to work while serving time but was held for fifteen days beyond his sentence period without pay—as a slave, that is. Black sued for damages and, remarkably enough, won a judgment of $137.50. As a police-court judge, he did not treat Negro defendants more harshly than whites—a trait noted in the local press, which did not pillory him for it. His obvious competence led to his appointment as county prosecutor, and in that role he exposed the torture chamber that police were operating in the Birmingham suburb of Bessemer; many of the victims of the police brutality were black, including one seventy-year-old who had been strapped to a door and beaten to the brink of death. In time, Black developed into perhaps the foremost trial lawyer in Alabama, with a private practice that stressed personal-injury claims and included labor-union business. As he could honestly say when running for the Senate in 1926, "I am not now, and never have been, a railroad, power company, or corporation lawyer."

His first term in the Senate was not a spectacular one. Its highlight was

his spirited protest against customs controls over the import of allegedly obscene or subversive publications—a position that foreshadowed his nearly religious defense of First Amendment rights while he was a Justice. When the New Deal came to power, he was among its most devoted supporters in Congress. He was a principal architect of the Fair Labor Standards Act, setting minimum wages and maximum hours and outlawing child labor, and his Senate investigations disclosed fraud and corruption in airline and shipping companies receiving federal subsidies for carrying the mail. He won acclaim as a reformer by uncovering the brass-knuckled practices of public-utility holding companies in their efforts to prevent the federal government from dissolving them, and by showing how big money in general lobbied in a variety of guises to gain its ends. Hugo Black had won his spurs as an authentic defender of the underdog. He was fifty-one years old when he was named to the Supreme Court. He would serve there for thirty-four years and one month.

Only a few months after Black took his seat for the first time, seventy-six-year-old George Sutherland of Utah stepped down after sixteen years on the Court. Half of the mastodons were gone now. In Sutherland's place, Roosevelt named his long-suffering Solicitor General, Stanley Forman Reed of Kentucky, who had argued and lost the government's side when the Court skewered the NRA and AAA among other New Deal agencies. A man of kindly disposition, Reed had come up East from the rich tobacco country around Maysville, just south of the Ohio River in eastern Kentucky, and gone to Yale for his bachelor's degree, Virginia and Columbia for his law degree, and the Sorbonne to combine a honeymoon and graduate study. Such exposure to cosmopolitanism did not sour him on small-town Kentucky life. Back home, he became a highly successful lawyer whose clients included the Chesapeake & Ohio Railroad and a large tobacco-growers' cooperative. As a progressive state legislator, he introduced child-labor and workmen's-compensation bills in the Assembly. A moderate Democrat in politics, a conventional legal thinker of informed but hardly flaming social views, and a civilized gentleman by any standard of the day, he was summoned to Washington by Herbert Hoover in 1929 and named general counsel to the Federal Farm Board. As the Depression deepened, he was chosen chief counsel to the Reconstruction Finance Corporation (RFC), the Old Deal's chief weapon to combat the economic nosedive by means of loans to banks, farmers, and other businessmen. His solid performance as a government lawyer won him holdover status under Roosevelt and then elevation to the Solicitor General's job at Justice in 1935 and leadership of the New Deal's defense of its recovery programs against the bloodletting of the Court. By the time he took his own seat on the Court, Reed had become a confirmed believer in government power when wielded discerningly in the public interest.

Over the summer of 1938, Justice Benjamin Cardozo died. Cardozo, like Brandeis, was a Jew, and Roosevelt hesitated at naming the man he had settled on to succeed Cardozo—Professor Felix Frankfurter of Harvard, one of the most intimate and reliable of the President's back-door braintrusters.

He had helped draft some of the New Deal's most complex legislation and counseled Roosevelt on key speeches, personnel, and other vital matters, but the President wished to wait until Brandeis had indicated his readiness to retire. Two Jews on the Roosevelt Court were evidently one too many. Brandeis, though, was not eager to be shoved aside. He would not indicate his retirement plans until the beginning of 1939, and so as the Supreme Court convened on November 9, 1938, to hear *Missouri ex rel. Gaines v. Canada*, the most important civil-rights case since *Grovey v. Townsend* three years earlier, there were only eight sitting Justices—the moderate-liberal bloc of Hughes, Stone, Brandeis, Black, and Reed; the moderate-conservative, Roberts; and the two surviving arch-conservatives, McReynolds and Butler. All but the two newcomers had joined in the *Grovey* decision, so disastrous to the Negro's cause in its approval of the Texas white-primary scheme. Would the new libertarian mood of the Court envelop civil-rights cases as well as economic matters? *Gaines* would be the first test.

Charles Houston was not asking for the moon. Arguing before the Court, he did not challenge the holy writ of *Plessy v. Ferguson* and the legitimacy of separate-but-equal schools. But he insisted that the Court enforce the principle. If Missouri offered its white citizens a law school, then it had to offer its black citizens a law school every bit as good. That was what separate-but-equal meant. Anything short of that was pantomime justice. He had the Maryland courts' disposition of *Murray* to back him. And no decision of the Supreme Court conflicted with Houston's view. It seemed an airtight case. But then so had the black plaintiff's in *Grovey*. Houston had learned to take nothing for granted.

A month after the case was heard, Chief Justice Hughes read the six-to-two opinion of the Court. It went along with Houston's reading of the *Plessy* doctrine. Missouri's efforts to establish a university for Negroes on the same basis as the ones for whites was certainly "commendable," but the fact remained that

> instruction in law for negroes is not now afforded by the state, either at Lincoln University or elsewhere within the state, and that the state excludes negroes from the advantages of the law school it has established at the University of Missouri.

The Court understood that law schools in surrounding states might be every bit as good as the one in Missouri, which, it was further granted, might offer no special advantage to anyone who planned to practice law in Missouri. But all that was beside the point.

> The basic consideration is not as to what sort of opportunities other states provide, or whether they are as good as those in Missouri, but as to what opportunities Missouri itself furnishes to white students and denies to Negroes solely upon the ground of color. The admissibility of laws separating the races in the enjoyment of privileges afforded by the State rests wholly upon the equality of the privileges which the laws give to the separated groups within the State. . . . By the operation of the laws of Missouri a privilege has been created for white law students which is denied to Negroes by reason of their race. The white resident is afforded legal education within the State; the Negro resident having

> the same qualifications is refused it there and must go outside of the State to obtain it.

Nor did it matter that there was slight demand by Negroes for legal education, for the petitioner's right was "a personal one. It was as an individual that he was entitled to the equal protection of the laws, and the State was bound to furnish him within its borders facilities for legal education" equal to those offered whites regardless of whether any other Negro sought the same opportunity. In the future law school that might or might not be opened by Lincoln University, the Court saw no satisfactory remedy; it said that "we cannot regard the discrimination as excused by what is called its temporary character." Lloyd Gaines was entitled to admission to the University of Missouri's school of law.

Justice McReynolds could not stomach this alarming development. In a dissent concurred in by his antediluvian colleague, Justice Butler, McReynolds remarked:

> For a long time Missouri had acted on the view that the best interest of her people demands separation of whites and Negroes in schools. Under the opinion just announced, I presume she may abandon her law school and thereby disadvantage her white citizens without improving petitioner's opportunities for legal instruction; or she may break down the settled practice concerning separate schools and thereby, as indicated by experience, damnify both races. . . .

Gaines was an enormous milestone. If Missouri had either to build a separate law school for colored students or desegregate the white one, did not the same principle apply to the colored high-school students of, say, Baltimore County, Maryland, who were deprived of equal facilities within the county? Shouldn't it apply to colored students in any county in America that failed to provide a high school for them? Could not the case serve as the basis for suits against any jurisdiction that failed to provide equal public-school facilities for Negroes anywhere along the educational ladder? And why would the principle be limited to physical facilities? Why wouldn't the separate-but-equal rule now reinforced by *Gaines* apply to the salaries of teachers and the length of the school term and the availability of bus transportation, all of which presently worked to the disadvantage of Negroes? And why should the principle be restricted to the field of education? Should it not apply as well to parks and libraries and hospitals? If blacks could be kept out of such facilities by Jim Crow, then were they not entitled to ones of their own?

September 23, 1935; extensive correspondence on the case may be found in the NAACP Collection, Library of Congress, especially Marshall to Houston, January 4 and October 11, 1934; Houston to Marshall, November 22, 1934; Hillegeist, W. M., to Donald Murray, February 9, 1935; Murray to Board of Regents, University of Maryland, March 5, 1935; Pearson, R. A., to Murray, December 14, 1934; and Lawson, Belford V., Jr., to Houston and to William Gosnell, December 5, 1934.

Quotations

p. 188—Pearson letter of December 14, 1934, NAACP Collection, Library of Congress.

p. 188—Hillegeist to Murray, February 9, 1935; Murray to Board of Regents, March 5, 1935. Both in NAACP Collection, Library of Congress.

p. 193—*Crisis*, October 1935, 300 ff.

Chapter 9 / Stalking the Law of the Jungle

Books: Bickel, *The Least Dangerous Branch*; Du Bois, *Autobiography*; Fenderson, *Thurgood Marshall*; Franklin, *From Slavery to Freedom*; Friedman and Israel, *The Justices of the Supreme Court* (see especially John P. Frank's sketch on Hugo L. Black, 2321–2346); Jackson, *The Struggle for Judicial Supremacy*; Lewis, *Gideon's Trumpet*; Myrdal, *An American Dilemma*; Pfeffer, *This Honorable Court*; and Rodell, *Nine Men.*

Interviews: Banks, W. Lester; Hill, Oliver W.; Marshall, Thurgood; Moon, Henry Lee; Robinson, Spottswood W. III; Waddy, Joseph C.; and Wilkins, Roy.

Articles and Documents: On *Murray* appeal, *Afro*, January 25, 1936, and Baltimore *Sun*, January 16, 1936. On Baltimore County school-equalization suit, *Afro*, October 12, 1935, and February 15 and 22 and September 19, 1936; Baltimore *Sun*, September 14 and 15, 1936; correspondence, Hershner, John T., to Marshall, September 9, 1935, and Marshall to Walter White, October 3, 1935, and September 16, 1936, NAACP Collection, Library of Congress. On Marshall's teacher-equalization drive in Maryland, see *Journal of Negro Education*, 1936–39, *passim.* On Houston's tenure as NAACP counsel in New York, *Afro*, April 9, 1938; *Amsterdam News*, February 8, 1936; Associated Press dispatch on Houston arguing case to desegregate University of Tennessee school of pharmacy, March 22, 1937, in many papers; Houston, writing in *Crisis*, "How to Fight for Better Schools," February 1936, 52, 59, "Don't Shout Too Soon," March 1936, 79 ff., and "Cracking Closed University Doors," November 1936, 364, 370; articles about him in Philadelphia *Independent*, March 21, 1937; Segal, "Sketch of Charles Houston," 65 and 67; correspondence, Houston to Walter White, May 28, 1936; Houston intra-office memo on *Gaines* trial, July 10, 1936; Houston to Roy Wilkins on anti-lynching drive and other matters, March 2, 1938; Houston to Marshall, January 8 and 18, 1938; Houston to White and Marshall, October 19, 1936, and Houston to his father, April 14, 1938; Houston, application to Employers' Liability Assurance Corp., May 31, 1938, all in NAACP Collection, Library of Congress. On Marshall's early career with the NAACP and relationship with Houston, see correspondence, Marshall to Houston, October 2, 1935, and May 25, 1936; Houston to Marshall, July 11, 1935; Marshall to NAACP Legal Committee, June 9, 1936; Marshall to law-office staff, October 17, 1937; Marshall intra-office memo, June 23, 1938; Marshall to Walter White, August 24, 1938, and January 30, 1939, all in NAACP Collection, Library of Congress.

Quotations

p. 199—Marshall memo to office, October 17, 1937, Library of Congress.

p. 208—*United States v. Butler*, 297 U.S. 1 (1936).
p. 209—Jackson, *The Struggle for Judicial Supremacy*, 172.

Chapter 10 / One of the Gang

Books: Bennett, *Before the Mayflower*; Bland, *Private Pressure on Public Law*; Fenderson, *Thurgood Marshall*; Franklin, *From Slavery to Freedom*; Frazier, *The Negro in the United States*; Friedman and Israel, *The Justices of the Supreme Court* (see especially Philip B. Kurland's sketch of Robert H. Jackson, 2543–2571); Greenberg, *Race Relations and American Law*; Mason, *The Supreme Court from Taft to Warren*; Miller, *The Petitioners*; Myrdal, *An American Dilemma*; Redding, *The Lonesome Road*; Rodell, *Nine Men*; and White, *A Man Called White.*

Interviews: Hastie, William H.; Hill, Herbert; Hill, Oliver W.; Lovett, Edward P.; Marshall, Thurgood; Moon, Henry Lee; Nabrit, James M., Jr.; Poston, Ted; Redding, Louis L.; Thompson, Charles H.; Waddy, Joseph C.; Wechsler, Herbert; Wilkins, Roy; and Williams, Franklin H.

Articles and Documents: On Marshall, see his articles in *The Crisis*, "Equal Justice Under Law," July 1939, 199–201, "The Gestapo in Detroit," August 1943, 232 ff., and "Negro Status in the Boilermakers Union," March 1944, 77–78; text of prepared addresses by Marshall to Wartime Conference of the NAACP at Metropolitan Community Church, Chicago, July 13, 1944, and meeting of the National Newspaper Publishers' Association at Tuskegee Institute, January 23, 1954, and extemporaneous remarks he delivered to Columbia Law School students, April 16, 1969 (attended by author); correspondence including Marshall to Walter White, August 24, 1938, and January 30 and March 8, 1939; Marshall to William H. Hastie, re *Alston* case, July 21, 1939; Phillips, Utillus R., head of Memphis NAACP branch, to Marshall, April 1, 1939; miscellaneous documents including Marshall's expense account for four-day trip to Richmond in connection with *Alston* case, March 9, 1939; intra-office memo, undated, on Marshall's May 1939 speaking engagements, and memo on his hectic itinerary for week of March 24–31, all in NAACP Collection, Library of Congress. Other articles consulted: *Afro*, October 15, 1938, and June 3, 1944; Allen, Oliver, "Chief Counsel for Equality," *Life*, June 12, 1955, 141 ff.; *Amsterdam News*, November 22, 1946; *New York Times*, July 1, November 20 and 23, 1946; Poling, James, "Thurgood Marshall and the Fourteenth Amendment," *Collier's*, February 23, 1952, 28 ff.; Ross, Irwin, "Thurgood Marshall," New York *Post*, June 15, 1960; and Wechsler, Herbert, "Toward Neutral Principles of Constitutional Law," *Harvard Law Review*, LXXIII, No. 1 (November 1959), 1–35. Poling's article is the best and most extensive on Marshall that I found anywhere. On Houston, see Chicago *Defender*, December 7, 1945; letter from Frankfurter, Felix, to Francis Biddle, May 4, 1942, Frankfurter Papers, Library of Congress; Houston, "Foul Employment Practice on the Rails," *The Crisis*, October 1949, 269 ff.; Segal, "Sketch of Charles Houston," 41; and Washington *Post* and Washington *Star*, December 4, 1945, on his resignation from FEPC.

Quotation

p. 222—From Marshall's speech to black newspaper publishers at Tuskegee, January 23, 1954.

Chapter 11 / A Foot in the Door

Books: Baker, *Felix Frankfurter*; Black, *A Constitutional Faith*; Clayton, *The Making of Justice*; Corwin, *The Constitution and What It Means Today*; Friedman and