

majority⁵⁵ that Fried leveled at the court of appeals. Indeed, each dissent employs strong language in characterizing the course of the abortion decisions.⁵⁶

If the law is increasingly shaped in the appellate courts—especially the Supreme Court—and if an attorney general wishes to pursue an activist agenda seeking changes in the law, the appellate business of the Department of Justice will inevitably play the key role in advancing the agenda. Thus it was under President Roosevelt and thus it was under President Reagan. No one should be surprised that this substantive agenda has been pursued at a cost: the loss of some able advocates from government service, the deterioration of procedural regularity within the Department, and the loss of some of the luster of the Office of the Solicitor General.

It should be stressed, however, that these costs seem to have brought the Reagan administration few of the gains it sought. Arguably a less tendentious approach to its agenda might have been more successful, while costing less. One hopes that the costs are only temporary; much depends on the new solicitor general and attorney general.

THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950. By Mark V. Tushnet.¹ Chapel Hill, N.C.: The University of North Carolina Press. 1987. Pp. xiv, 166. Cloth, \$29.95; paper, \$9.95.

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Are you ready to read more about the School Desegregation Cases? You probably thought that you had this topic well in hand after reading Richard Kluger's *Simple Justice*, the chapter in Bernard Schwartz's *Superchief* dealing with *Brown v. Board of Education*, and Dennis Hutchinson's ambitious article.³ Maybe you've even kept up with the recent firefight between Philip Elman and

55. *Thornburgh*, 476 U.S. at 814.

56. *E.g.*, Chief Justice Burger ("undermines" limitations of *Roe* "astonishingly"; renders them "shallow rhetoric"), *id.* at 782-84; Justice White ("nonsensical," "mysterious" findings, "linguistic nit-picking," "baffling," "inexplicable," "warped," and "tortuous"), *id.* at 802-14; and Justice O'Connor ("major distortion," "mischaracterizes," "dangerous extravagance"), *id.* at 814-29.

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3. Hutchinson, *Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948-1958*, 68 *GEO. L.J.* 1 (1979).

Randall Kennedy about the role played by the Department of Justice in the cases,⁴ and a law clerk's recollections about the deliberations which eventually led Justice Reed to join the rest of the Court in repudiating the "separate but equal" doctrine.⁵ It would be reasonable to wonder whether many readers need or want to know more about the School Desegregation Cases than can be learned by reading these and other works.

Professor Mark Tushnet's book nonetheless provides a valuable supplement to the literature about *Brown*. His principal focus is on events that prepared the ground for *Brown* rather than on that case itself. Prior to the direct attack on school segregation, the NAACP had devoted its resources to three more limited classes of desegregation suits: those seeking to desegregate the graduate and professional schools at public universities; those attempting to equalize the salaries of black and white teachers; and those challenging inequality of physical facilities at black and white elementary and secondary schools. Professor Tushnet describes in great detail the planning and execution of this earlier litigation, so that readers will appreciate the significance of the NAACP's decision in 1950 to change direction and tackle head-on the legality of all segregation in public education.

To a greater degree than previous studies of *Brown*, this book "was written from the perspective of the national office of the NAACP," primarily on the basis of NAACP papers which have been transferred to the Manuscript Division of the Library of Congress.⁶ Not only are the source materials (other than published court decisions) mostly drawn from the NAACP's files, but Tushnet consistently views the desegregation campaign from the institutional perspective of the NAACP. Thus, there is a detailed examination of how the money was raised to support the litigation, how the legal staff was selected, how the cases to be litigated were identified, how the NAACP's central staff and the local attorneys assisting them developed and presented their legal theories, and how disagreements among the staff and between the staff and other segments of the black community on strategy were resolved. Every

4. Elman, *The Solicitor General's Office, Justice Frankfurter, and Civil Rights Litigation, 1946-1960: An Oral History*, 100 HARV. L. REV. 817 (1987); Kennedy, *A Reply to Philip Elman*, 100 HARV. L. REV. 1938 (1987); Elman, *Response*, 100 HARV. L. REV. 1949 (1987).

5. Fassett, *Mr. Justice Reed and Brown v. The Board of Education*, 1986 SUPREME COURT HISTORICAL SOCIETY Y.B. 48.

6. In 1939, the NAACP Legal Defense and Education Fund, Inc. was established as a corporate entity distinct from the NAACP. However, until 1957 the "Inc. Fund" served as a subsidiary of the NAACP, and therefore there is no need to distinguish between the two organizations in this review. See *NAACP v. NAACP Legal Defense and Educ. Fund, Inc.*, 753 F.2d 131 (D.C. Cir.), cert. denied, 472 U.S. 1021-22 (1985).

lawsuit has this sort of underbrush, but it is rare for such matters to be exposed to public view. Tushnet speculates that this is because "information is available about the practice of public interest law that is in general not available about the practice of law on behalf of corporations and individuals." As a rule, attorneys representing private parties, even in litigation of great moment, do not make similar documents public—don't plan on going down to the Library of Congress any time soon to look over Cravath, Swaine & Moore's files on *United States v. IBM*. It is rare for even a public interest litigation campaign to be so amply documented and open to public view, and therefore Tushnet's careful sifting of the records is especially valuable to anyone interested in how an important and interesting group of interrelated cases was handled by dedicated and able attorneys.

Tushnet's book is unusual in another respect: it treats litigation as a social process that "begins well before a lawsuit is filed and ends well after a judgment is entered." Tushnet describes public interest litigation as a process which begins when a group of people "discover that they agree that something is wrong," and continues through their efforts to find counsel and prosecute their claims, up to a resolution of the claims by the courts, and beyond. Even after judgment, the process often continues, as "the locus of controversy shifts from the courts to the legislatures, as prevailing plaintiffs seek more effective relief, or as losing plaintiffs seek to get some relief from someone."

From his exhaustive study of the NAACP's litigation campaign, Tushnet attempts to draw conclusions about public interest litigation in general. This effort focuses on several issues. Tushnet states that prior chroniclers of the *Brown* litigation, most notably Richard Kluger, have succumbed to the temptation to "see the outcome as the obvious product of plans that had been laid many years before." While recognizing the "manifest virtues" of *Simple Justice*, Tushnet believes that it "is flawed by the dramatic unity that its style gives to the story. The novelist's talents suggest that each small item in the story contributed in an important way to the larger outcome, and the journalist's talents simplify a complex reality to make it easier to understand." Tushnet attributes a larger role to "chance—unexpected events or decisions by individuals outside of the movement—and choice—decisions by insiders to pursue one path rather than another that in retrospect seems almost equally sensible." Tushnet notes, moreover, that the choices made by the individuals controlling a given piece of litigation are affected by their own preferences and personalities. He concludes that,

within the wide boundaries set by the NAACP's determination to attack white supremacy, the organization's efforts were not systematic or strategic. Instead, it "attacked what might be called targets of opportunity."

The "targets of opportunity" approach is more sensible than it may sound. It would be foolish to adopt a long-term litigation strategy that required an organization to eschew a promising case simply because it had not been anticipated. Reformist lawyers need to keep their minds open, while recognizing that some spur-of-the-moment cases should be declined. The NAACP's litigation campaign provides examples of both self-restraint and aggressive litigation of the "damn the torpedoes" variety. For example, the organization did not pursue a possible suit in North Carolina on behalf of an applicant to medical school who had scored very poorly on the aptitude examination. On the other hand, it did represent Lloyd Gaines in his efforts to attend the University of Missouri Law School, even though the staff feared that he was not a suitable plaintiff. Those fears turned out to be justified, since the victory Gaines won in the Supreme Court could not be implemented because the plaintiff had dropped from sight and could not be located by his attorneys.

Tushnet mulls over two other issues pertinent to all public interest litigation, on which the NAACP's desegregation campaign might shed light. One is the degree to which the NAACP lawyers were free of control by their clients in designing and implementing the direct attack on segregated education. He concludes that the attorneys "could not have imposed, and did not need to impose, decisions on their clients." Tushnet argues that the NAACP could not win its lawsuits without strong support from the black community for which it claimed to speak, and that the actual clients which the organization represented in particular cases were strong-willed individuals motivated primarily by idealism rather than individual self-interest—the sort of person who is least likely to defer to an attorney.

Tushnet also tries to determine whether the shape of the NAACP's litigation campaign was more a product of what was going on inside the NAACP or of the broader social developments occurring in the United States between the early 1930s and 1950. He concludes that the "role of organizational factors seems significantly more important than that of variations in the general social environment." "[B]y the time the campaign became a major effort, it had developed its own dynamic. . . . [E]conomic and political

developments had no more than a rough connection to what occurred during the litigation campaign.”

In my view, the narrative elements of the book are an unqualified success. Tushnet is careful and straightforward, and his story sustains its momentum despite the fact that the nature of the material inevitably leads to some dense passages. *Gaines, Sipuel, Sweatt, and McLaurin*, along with a number of less prominent cases, are fleshed out in a way that contributes a great deal to our understanding of the desegregation campaign.

Tushnet's effort to draw general principles out of the NAACP's experience is ambitious and well-handled, but may in the end confirm the suspicion that every major case (and every litigation campaign) is so nearly unique that any effort to generalize (even a careful and imaginative one like Tushnet's) is doomed to fall short. To his credit, Tushnet himself emphasizes the temptations to which an historian is prone. A jumbled, chaotic, and somewhat arbitrary series of events, through the lens of hindsight, may seem to reveal a clear and steady line of development heading toward a conclusion which is seen as virtually inevitable. By identifying the false starts, errors, and other setbacks which at times deflected or delayed the school desegregation campaign, Tushnet injects a healthy dose of reality into a story which can easily be streamlined and distorted by our knowledge of how *Brown* was decided.

Tushnet is also right to stress the large role played in litigation by chance, by personalities, by the characteristics of the organizations involved, and even by geography. For example, he tells us repeatedly that much of the NAACP's early school litigation was conducted in Maryland, North Carolina, and Virginia (rather than in the Deep South) primarily because those areas were often more accessible to the NAACP's attorneys. Maryland was, in addition, the "home ground" of Thurgood Marshall, who played the lead role in the desegregation campaign, and for that reason, among others, it became one of the NAACP's preferred venues for litigation. No litigator would question the importance of such seemingly mundane considerations, and I suspect that close examination of other litigation would confirm that accidents of geography have often affected choices of where to litigate. I know, for example, that the Commonwealth of Virginia has, over the past fifteen years, been drawn into more than its fair share of test-case litigation because it is such a short drive from the Washington, D.C. office of the Public Citizen Litigation Group to the United States District Court for the Eastern District of Virginia.

The role of chance in litigation, while significant, is usually dif-

difficult to disentangle from other determinants of success. Opportunities for false inferences abound. For example, like many attorneys, I generally prefer to prosecute federal constitutional claims in the federal courts, in the belief that on balance state courts will be less receptive to such claims.⁷ Yet, on occasion, I have taken over constitutional litigation which has already been initiated in state courts and carried it forward, since it could not be refiled in federal court without suffering substantial delay or some other detriment. While I was pleased when the state courts ruled for my clients in those cases, my confidence in my ability to select the most favorable forum was badly shaken: my clients could have done no better—and might have done worse—in the federal courts. If I had been able to litigate in federal court and we had ultimately won, I'm sure that to this day I would believe that my seemingly astute forum-shopping was one of the reasons for our success. A historian reviewing the litigation would probably agree, especially after talking to me!

The biggest question in any history of litigation is likely to be, "Why did the case turn out as it did?" While this inquiry can be interesting on its own terms, one hopes that the historian will provide an answer with implications for other litigation strategists. It is in pressing for a satisfactory explanation of the NAACP's success that Tushnet takes on his most difficult task, and it is on that score that the book is most disappointing, at least to those of us with a strong practical interest in public interest litigation. His short answer to the question of "Why victory?" is: "Thurgood Marshall." Having recounted the process by which the NAACP moved from its program of "equalization" suits to an all-out attack on segregation, Tushnet observes:

Marshall had preferred the direct attack from the start, and between 1945 and 1950 there were essentially no legal developments making it more sensible to begin the attack in 1950 than it would have been in 1945. But Marshall deferred the decision from a time when it would have seriously split the NAACP to a time when the external environment, in politics and legal doctrine, and the internal politics of the organization made it easier for others to agree that what Marshall wanted was in their interest too. Marshall's strength had always resided in his superb judgments about life and law, rather than in his ability to construct a legal argument. The way in which the direct attack decision was made shows him at his best.⁸

My disappointment with the interpretive component of Profes-

7. See generally Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977).

8. Along the same line, Tushnet states that "the extraordinary character of Thurgood Marshall played a crucial part" in achieving favorable settlements in the suits in which black teachers sought salaries equal to their white counterparts, since "Marshall was a charismatic figure in the black community" and thus able to convince the black teachers to hold firm in the negotiations.

sor Tushnet's book should not be taken as necessarily reflecting any disagreement with his conclusion. Thurgood Marshall unquestionably made an enormous contribution to the successful outcome of the litigation campaign, in conjunction with the other able and dedicated attorneys for the NAACP. From my perhaps narrow perspective as a litigator, however, attributing victory to the lawyer is too much like attributing it to luck: it's interesting to know why things turned out the way they did, but the answer, even if correct, is of little or no assistance to lawyers planning the next litigation campaign.

Be that as it may, Tushnet has written a fine book: solid, fascinating, and instructive.⁹ For those who contemplate similar projects, I have one final suggestion: We need studies of *unsuccessful* constitutional campaigns. There is a natural tendency to write about victories rather than defeats. Yet our understanding of success can never exceed our understanding of failure. Wouldn't it be fascinating to read a book, as thorough and intelligent as Tushnet's, about *Bowers v. Hardwick*, the daring but unsuccessful challenge to state laws making homosexual sodomy a crime? "Comparative litigation" might be as instructive as comparative law.

9. Judge Robert L. Carter of the United States District Court for the Southern District of New York has recently leveled a number of harsh criticisms at Professor Tushnet's book. Carter, Book Review, 86 MICH. L. REV. 1083 (1988). Judge Carter's reactions are especially important because he participated in the events described in the book as a staff attorney for the NAACP. In my view, the tension between the theories set out in the Tushnet book and those advanced by Judge Carter is not nearly as great as the Judge's review would make it appear. For example, Judge Carter states that "contrary" to Professor Tushnet's view, "the national office [of the NAACP] took a stand against any form of segregation [in 1950] and led its local constituency to accept that view." *Id.* at 1089-90. I do not believe that Professor Tushnet disagrees. ("It is true that the choice between equalization and direct attack was postponed from 1945, when the issue surfaced, to 1950. . . . The delays were used to prepare the organization for the direct attack decision that Marshall preferred all along.") Judge Carter also states that "Professor Tushnet seems to believe that if the NAACP had lowered its sights and pressed for equal facilities, whites might have been more sympathetic and success more likely." *Id.* at 1091. I read Tushnet as supporting the appropriateness of the direct attack strategy. I believe that Judge Carter and Professor Tushnet are in agreement that, while the education received by blacks today may be no better than the education they would be receiving under a system of separate-but-really-equal schools, the separate-is-not-equal principle of *Brown* provided the impetus for much broader efforts to achieve equal treatment for blacks, such as through civil rights legislation, in addition to removing a major source of humiliation and stigma.