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Robert L. Carter

United States District Court for the Southern District of New York

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THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION

*Robert L. Carter**

THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950. By *Mark Tushnet*. Chapel Hill: University of North Carolina Press. 1987. Pp. ix, 222. Cloth, \$29.95; paper, \$9.95.

It may be doing Professor Tushnet a disservice for me to review his book since I was one of the lawyers involved in the planning and execution of the "strategy" he seeks to explore. Yet, I suppose that one in my position should be able to appraise more closely the accuracy, if not the merits, of such an examination.¹

Much of the historical ground covered by Professor Tushnet's study has been plowed rather thoroughly. Richard Kluger's *Simple Justice*² and Robert Rabin's *Lawyers for Social Change: Perspectives on Public Interest Law*³ are prime examples. Since Kluger's study narrated many of the events that Tushnet covers, and Rabin used the NAACP staff as a model for public interest law activity, any author would be somewhat pressed to add much of anything new.

Professor Tushnet seems, in particular, to be constantly looking over his shoulder at Kluger's *Simple Justice* in an attempt to stake out a territory of his own. He states:

[M]y narrative has a narrower scope than [Kluger's *Simple Justice*] in regard to both the period of time covered and the subject matter discussed. It is informed by a concern for the constraints placed on the litigation strategy by organizational needs, and for the significance of the NAACP campaign as it applies to the theory and practice of public interest law in general. It is, therefore, an interpretation as well as a narrative of events. [p. xi]

While I appreciate the extent to which one's present personal recollection of events long past is suspect, I am convinced that in this instance the written record does not provide a full picture of the events

* Judge, United States District Court for the Southern District of New York.

1. I am somewhat troubled by one thing which I did not recall and do not now recall even after learning from a reference in the book that it occurred. P. 191, n.12. Professor Tushnet interviewed me in 1980 in the course of preparing this treatise. I have no recollection of it or him, and as far as I can tell, he uses the interview only to support the written record of my firm commitment to a direct attack on school segregation. It seems evident, therefore, that the interview did not influence the writing of the book or its review.

2. R. KLUGER, *SIMPLE JUSTICE* (1975).

3. Rabin, *Lawyers for Social Change: Perspectives on Public Interest Law*, 28 *STAN. L. REV.* 207 (1970).

and decisions forming the legal strategy about which Tushnet writes.⁴ Tushnet sometimes reaches conclusions that are at odds with what I believe took place. This is most notably true in his reliance, for example, on letters exchanged among Thurgood Marshall, William Hastie and others, in apparent support of Tushnet's conclusion⁵ as to how and why "strategy" was affected or modified. Unfortunately, there is no record of oral staff discussions, debates, or determinations. While Marshall solicited advice and comments from a great many people, I know of no decision on legal strategy in the school cases, or indeed in any other area, that he made during my tenure (and I was on the staff from the mid-forties through the period covered here) that was at odds with the staff's view. Even when his chief outside advisors (Hastie, Robert Ming, and William Coleman) favored a course opposed by his staff, Marshall allowed his staff's view to prevail.

Professor Tushnet's narrative traces the NAACP's program to outlaw segregation in education from its origin pursuant to a 1930 grant from the American Fund for Public Service, founded by Charles Garland ("The Garland Fund"), to the institution of the school-segregation litigation in Kansas and South Carolina in 1950. The Garland Fund pledged \$100,000 to the NAACP. Only about \$20,000 of that grant was actually disbursed. Nonetheless, upon obtaining the money in 1930, the NAACP was able to hire Nathan Margold, a prominent New York lawyer, for a three-month period. Margold's contribution was the submission of a proposed plan of attack on "segregation irretrievably coupled with discrimination" in the public schools (p. 27). Margold, did not remain involved long enough, however, to do anything other than devise the proposal. The NAACP lacked funds to pay him beyond the three-month period.

Thereafter, Charles Houston became the NAACP's chief counsel. Houston put Margold's plan into operation, but not at the public school level. Rather, Houston's strategy was to have qualified blacks

4. For his historical data, Professor Tushnet seems to rely almost wholly on the written record — documents (correspondence, memoranda) in the files of the NAACP and Legal Defense Fund now in the Library of Congress. When the manuscript was being written, Tushnet notes, many of the documents of the Legal Defense Fund were inaccessible. They had not been sorted and were stored in boxes piled from floor to ceiling without any labelling. I do not know whether a review of these documents would have added anything to his narrative or conclusions. The documents he was able to study were those available to Kluger, and additional material donated to the Library of Congress subsequent to Kluger's study.

5. Pp. 105-37. Tushnet gives the impression that the sudden constraints of trial preparation in the *Sweatt* case, *Sweatt v. Painter*, 339 U.S. 629 (1950) affected the NAACP's strategy. Pp. 126-29. I do not believe that observation is correct. The all-out-attack position had been articulated in the *Mendez* case, *Westminster School Dist. v. Mendez*, 161 F.2d 749 (9th Cir. 1947). The national staff had been at work in researching historical materials, legal and otherwise, supporting the invalidity of enforced segregation. Moreover, the sociological approach had been decided upon and we were waiting for a case that would enable us to make a record of our sociological thesis. The *Sweatt* trial provided that opportunity. Thus, all we needed when *Sweatt* was being readied for trial was to secure the necessary expert witnesses.

apply for graduate and professional training in the states where blacks were barred from existing state graduate and professional institutions and in which no "separate but equal" facility for blacks had been established.⁶ Houston's aim was to undermine segregation by forcing states that practiced segregation to establish graduate and professional schools for blacks, with the expectation that the economic costs would be such that state authorities would themselves decide to desegregate the existing facilities. Thurgood Marshall followed Houston as the organization's chief counsel, and under his stewardship the program culminated in the United States Supreme Court's historic decision in *Brown v. Board of Education*.⁷ While Margold focused on the public schools, Houston on the full equalization of facilities at the graduate school level, and Marshall on the desegregation of law schools, graduate schools and finally public schools, the ultimate goal of all three was to have the enforced separation of black and white students in public institutions declared unconstitutional. Viewed in this light, the NAACP's legal strategy to outlaw segregated education followed a cohesive, unitary course from Margold to Marshall.

Professor Tushnet has done a service, I believe, in illuminating the politics surrounding the Garland Fund grant to the NAACP. That grant could be said to mark the genesis of the NAACP's paid national legal staff. Controversy raged between Roger Baldwin, subsequently the long-time director of the American Civil Liberties Union, and Walter White, Executive Director of the NAACP, over the use of the Garland Fund grant. Tushnet cites W.E.B. DuBois' disapproval of the NAACP's proposed use of the grant to attack segregated education. He points out that DuBois at the time believed that discrimination in education, rather than segregation, should be fought.⁸ The author proceeds to address the Margold proposal and Houston's and Marshall's subsequent activities. The general outline of all of these

6. See, e.g., *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938); *Bluford v. Canada*, 32 F. Supp. 707 (W.D. Mo. 1940). Charles Houston left the NAACP staff in 1940, and never had any official connection with it during my tenure, which began in 1945.

7. 347 U.S. 483 (1954), *affd. on rehearing*, 349 U.S. 294 (1955) (Brown II).

8. However, I believe that Tushnet, at pages 8-10, provides a misleading impression of DuBois' views. One would conclude from the quoted material and discussion that DuBois favored a legal strategy seeking equal educational facilities only, leaving *Plessy v. Ferguson*'s separate-but-equal doctrine undisturbed. See *Plessy v. Ferguson*, 163 U.S. 537 (1896). My own understanding is that his views were more complex. Despite the quotes from DuBois' editorial in the January 1934 issue of the *Crisis* (pp. 8-9), DuBois' primary point was that blacks needed "neither segregated schools nor mixed schools. What [blacks need] is Education." DuBois, *Does the Negro Need Separate Schools*, 4 J. NEGRO EDUC. 328, 335 (1935) reprinted in 2 THE SEVENTH SON, THE THOUGHTS AND WRITINGS OF W.E.B. DUBOIS 408 (J. Lester ed. 1971). DuBois' eventual break with the NAACP came about because he felt the organization's basic emphasis was solely on integration. His belief was that the goal should be equal education however it could be achieved — without segregation, if possible, but if not, with segregation as long as the black child was educated.

events is known; the details that Tushnet describes, however, are much less familiar and are of considerable interest.

The interpretive prong of Professor Tushnet's thesis — less successful than the narrative one — attempts to show that the NAACP's legal strategy for desegregation was ad hoc, pragmatic, and subject to shifts and modifications influenced by organizational needs. I am not persuaded by this thesis, principally for two reasons. The first is that Professor Tushnet couples the university and public school cases, which sought to undermine the constitutionality of segregation in education, with litigation that sought to secure equal pay for black teachers. He therefore treats these two independent litigation programs as if they were one. The second source of my dissatisfaction is Professor Tushnet's failure to account for or to understand the reasons that led the NAACP's national legal staff not simply to advocate "separate but equal" facilities, but to press relentlessly for a direct attack on *Plessy v. Ferguson*.⁹

Tushnet's emphasis on the teachers'-salary litigation and the initial failure of litigation in North Carolina and Tennessee to redress university segregation does not make his intended point.¹⁰ The teachers'-salary litigation and the university and school cases were a breed apart. The litigation to equalize the pay of black teachers was not an attack on segregation in education. Nor was it an effort to integrate teaching staffs. It simply sought to upgrade the pay scale of black teachers to that of white teachers. The only justification I can discern for lumping the school segregation and teacher-pay litigation together is that the teachers'-salary cases advance the book's thesis that the NAACP's legal strategy was subject to mutation as demanded by organizational requisites.

In the teachers'-salary litigation, the named teacher-plaintiff was exposed and vulnerable. No such vulnerability was present for the university-plaintiff. Admittedly, she or he might have faced mob attack upon seeking to enter school after a victory in court. This was the case at the Universities of Georgia¹¹ and Alabama.¹² But a student's economic base was not threatened. Moreover, the teacher-plaintiff did not necessarily come to the NAACP through its local units. At the time, there were black teacher organizations in each state. Their members had a paramount interest in the issue of equal

9. 163 U.S. 537 (1896).

10. See pp. 52-55. Despite the decision in *Pearson v. Murray*, 169 Md. 478, 182 A. 590 (1936), the separate-but-equal doctrine was still firmly entrenched. No court insisted on equal facilities as requisite to enforcement of the doctrine until 1938, when the Supreme Court decided *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337. Therefore, I am not certain that the result would have made a difference even absent the deficiencies the author points out.

11. See, e.g., *Holmes v. Danner*, 191 F. Supp. 394 (M.D. Ga. 1961).

12. See, e.g., *Lucy v. Adams*, 350 U.S. 1 (1955), *affg. per curiam*, 134 F. Supp. 235 (N.D. La. 1955).

pay. Usually, such organizations found a teacher willing to take the risk of becoming a plaintiff. The organization would agree to insure the teacher a year's salary if fired. Then, the teachers' group would ask the NAACP to take on the litigation. After 1945, with the one exception cited below, none of these cases was handled by the national legal staff.¹³

When I came to the NAACP after the war, the focus had already shifted to securing the admission of blacks to law schools and graduate schools in the South. Teachers'-salary litigation as an NAACP enterprise was then winding down. Litigation had been instituted in most states; the NAACP, at the request of the teachers, had sponsored suits in states where none had been filed. Constance Motley and I tried one such case in Jackson, Mississippi, for example, the only such case either of us ever handled, as I recall. It was, I am certain, the last such case sponsored by the national legal staff. During my tenure we were primarily engaged in attacking segregation in housing,¹⁴ transportation,¹⁵ and education.¹⁶

The key point that must be grasped concerning the relationship between organizational needs and legal strategy is not, as Professor Tushnet would have it, that NAACP litigators and local branches conformed their approach to the short-term desires of black Southern communities in order to increase the Association's organizational base among that constituency. Rather, the organization's staff took the lead in setting an agenda at the local level. If organizational needs

13. See, e.g., *Bates v. Batte*, 187 F.2d 142 (5th Cir. 1951) (handled by national staff); *Cook v. Davis*, 178 F.2d 595 (5th Cir. 1950) (handled by A.T. Walden of Atlanta, Georgia, and Oliver W. Hill of Richmond, Virginia); *Reynolds v. Board of Pub. Instruction*, 148 F.2d 754 (5th Cir. 1945) (handled by Florida counsel); *Carter v. School Bd.*, 87 F. Supp. 745 (E.D. Va. 1949) (handled by Hill, Martin & Robinson of Richmond, Virginia); *Butler v. Wilemon*, 86 F. Supp. 397 (N.D. Tex. 1949) (handled by Dallas counsel); *Pitts v. Board of Trustees*, 84 F. Supp. 975 (E.D. Ark. 1949) (handled by Arkansas counsel); *Freeman v. County School Bd.*, 82 F. Supp. 167 (E.D. Va. 1948) (handled by Hill, Martin & Robinson); *Whitmyer v. Lillian Parish School Bd.*, 75 F. Supp. 686 (W.D. La. 1948) (handled by A.P. Tureaud and Louis Berry of New Orleans and Thurgood Marshall of New York City).

14. See, e.g., *Shelly v. Kramer*, 334 U.S. 1 (1948) (restrictive covenant); *Birmingham v. Monk*, 185 F.2d 859 (5th Cir. 1951); *Detroit Hous. Commn. v. Lewis*, 226 F.2d 180 (6th Cir. 1955); *Heywood v. Public Hous. Admin.*, 135 F. Supp. 217 (E.D. Ga. 1955); *Johnson v. Levitt & Sons*, 131 F. Supp. 114 (E.D. Pa. 1955); *Dorsey v. Stuyvesant Town Corp.*, 299 N.Y. 512, 87 N.E.2d 541 (1949); *Northwest Civic Assn. v. Sheldon*, 217 Mich. 416, 27 N.W.2d 36 (1947) (restrictive covenant).

15. See, e.g., *Morgan v. Virginia*, 328 U.S. 373 (1946); *Westside v. Southern Bus Lines*, 177 F.2d 949 (6th Cir. 1949); *Flemming v. South Carolina Elec. & Gas Co.*, 224 F.2d 752 (4th Cir. 1955), *revd. on reh.*, 239 F.2d 277 (4th Cir. 1956), *appeal dismissed*, 351 U.S. 901 (1956).

16. See, e.g., *Sipuel v. Board of Regents*, 332 U.S. 631 (1948), *petition for writ of mandamus denied sub nom. Fisher v. Hurst*, 333 U.S. 147 (1948); see also, e.g., *McKissick v. Carmichael*, 187 F.2d 949 (4th Cir. 1951); *Gray v. Board of Trustees*, 97 F. Supp. 463 (E.D. Tenn. 1951), *aff'd*, 100 F. Supp. 113 (E.D. Tenn. 1951), *vacated and dismissed as moot*, 342 U.S. 517 (1952). Compare *Westminster School Dist. v. Mendez*, 161 F.2d 774 (9th Cir. 1947), where the NAACP's amicus brief was the forerunner of its brief in *Brown v. Board of Education* arguing that segregation *per se* violated due process and equal protection guarantees.

dictated legal strategy, that was because the legal strategy was *ab initio* the product of institutional necessities. After all, the organizational purpose of the NAACP was to secure equal citizenship rights for blacks, and among those rights was the right to equal educational opportunity. That litigation thus fulfilled one of the organization's most basic functions.

Thus, the education cases, at both the university and grade school levels were the products of local NAACP efforts to implement national policy. Local branches stimulated opposition to school segregation and encouraged their members to challenge segregation in schools, housing, and transportation in accord with national NAACP policy. Such local efforts encouraged members of the branches, or the friends or acquaintances of members, to come forward as plaintiffs to prosecute the litigation. It is true that economic pressure was placed on the parents of children involved in South Carolina and Virginia school desegregation cases in an attempt to derail the litigation. However, in those cases, so many plaintiffs were enlisted that opponents were never able to frighten off all of them in any case.

The NAACP certainly sought followers, money, and influence, but the hope was that success in the courts would bring them to bear. That Professor Tushnet has inverted the true relationship between national strategy and local organizational needs is best illustrated by the decision in 1950 to pursue a "direct attack" on school segregation, the strategy that culminated in *Brown v. Board of Education*. I believe that the Association could have held back on its all-out attack on segregation without adverse organizational effect. While the national staff was committed to an attack on segregation *per se*, there was no compelling demand from the local units that such an attack be launched. Local units would have been satisfied at the time if the organization had opted for litigation merely to upgrade the black schools. Indeed, black teachers and principals were very wary about an attack on segregation, and with good reason. Our success cost a number of them their jobs,¹⁷ even if they benefited in the long run.

Tushnet gives considerable attention to Carter Wesley's¹⁸ dispute with Marshall over the merits of a direct challenge to segregation as opposed to an effort to obtain equal school facilities. The black community was divided on the issue. Some felt very strongly that a direct

17. See, e.g., *Rolf v. County Bd. of Educ.*, 391 F.2d 77 (6th Cir. 1968); *Wall v. Stanley County Bd. of Educ.*, 378 F.2d 275 (4th Cir. 1967); *Smith v. Board of Educ.*, 365 F.2d 770 (8th Cir. 1966); *Chambers v. Hendersonville Bd. of Educ.*, 364 F.2d 189 (4th Cir. 1966); see also N. DORSEN, P. BENDER, B. NEUBORNE & S. LAW, 2 EMERSON, HABER & DORSEN'S POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 754 (4th ed. 1979) (reporting that HEW data from Alabama, Florida, Georgia, Louisiana, Mississippi and Texas showed that the number of black teachers declined by 5% between 1968 and 1970, and the ratio of black to white teachers declined by 69% during the same period).

18. Wesley was editor of an influential black newspaper published in Houston and was one of the most influential men in the Texas black community. See pp. 107-09.

attack on segregation would be irresponsible because of the possibility of failure, while others were convinced that such an attack was the only prudent course. I believe that the majority sentiment in the black community was a desire to secure for blacks all of the educational nurturing available to whites. If ending school segregation was the way to that objective, fine; if, on the other hand, securing equal facilities was the way, that too was fine.

Far from being preordained by organizational considerations, the direct-attack strategy actually cost the Association, for a time, the services of some of our best-trained lawyers in the South. These lawyers refused to continue working with us when we determined that no more equal facilities cases would be brought under NAACP auspices.¹⁹ Indeed, as late as the announcement by the Supreme Court that it would hear argument in *McLaurin v. Oklahoma State Rights*²⁰ and *Sweatt v. Painter*,²¹ opposition to the NAACP's strategy of an all-out attack on segregation was so strong that Thurgood Marshall felt the need to hold a conference at Howard University in Washington, D.C., to afford advocates of the strategy an opportunity to make their case and counter the opposing sentiment. Interestingly enough, W.E.B. DuBois' presentation at the conference was among the most influential in gaining support for the all-out attack. (His presence lends support to my challenge of Tushnet's interpretation of DuBois' views.)²² While he did not address himself to the merits of the controversy, DuBois spoke eloquently about the economic exploitation and degradation of blacks and advised the audience that blacks had to become knowledgeable about the ways and means of such exploitation in order to free themselves from bondage. He certainly understood the purpose of the conference, and his participation in it indicated to the conferees and the public his support for a direct attack on segregation.

It is true that in all but the last of its briefs filed in the United States Supreme Court in the cases grouped together as *Brown v. Board of Education*, the NAACP straddled the issue — arguing that segregation was, itself, invalid and arguing as well that the state had failed to provide equal facilities. Nonetheless, the NAACP's public posture from 1950 onward was that an all-out attack on segregation was being waged. The equal-facilities arguments were retained only out of the lawyers' sense of caution, not because of any need to appease local organizational sentiment. On the contrary, my perception is that the

19. Lewis Hill and Martin Martin of the Hill, Martin, Robinson firm in Richmond refused to abide by the NAACP policy adopted by the Board in 1950, providing that the organization would thereafter handle cases attacking segregation *per se*. After about a year or two, however, those and other lawyers resumed their cooperation with the NAACP.

20. 339 U.S. 637 (1950).

21. 339 U.S. 629 (1950).

22. See note 8 *supra*.

national office took a stand against any form of segregation and led its local constituency to accept that view.

When the NAACP made its commitment in 1930 to an attack on segregation in education, Charles Houston stood alone as its legal staff. Later he was assisted and then succeeded by Thurgood Marshall. Marshall began to build a paid legal staff during World War II. He hired Milton Konvitz²³ and Edward Dudley²⁴ as full-time assistants in the early 1940s. Konvitz left in mid-1940 and I joined the staff. By 1950, the staff had grown to about ten lawyers.²⁵

Houston and Marshall were extraordinary men — brilliant lawyers, charismatic, and politically astute. They had help from the Howard University Law Faculty, principally William Hastie and Leon Ransom, also extraordinary men. Indeed, while Hastie and Marshall are generally acknowledged as being among the best legal minds of their generation, until recently only insiders recognized the brilliance of Houston and Ransom. Despite such formidable talent on the national level, there was no cadre of reliable local talent to turn to in the South. Therefore, the litigation effort was, of necessity, severely circumscribed. Moreover, Hastie and Ransom had other full-time employment and could devote only part of their time to NAACP causes.

This situation did not begin to change until early 1940, as a national staff began to form. However, finding competent local counsel remained a problem. Except for cases brought in Virginia (which were handled by the firm of Hill, Martin & Robinson) and Delaware (where Lewis Redding supervised the cases locally), local counsel required close supervision from New York until late in my tenure on the staff. In short, the NAACP's commitment to a direct attack on segregated education did not get off the ground until 1945 or 1946, when, as I have indicated, the equal-pay teacher cases were no longer part of the national staff's agenda.

The book's theoretical agenda is grander than suggested by the foregoing discussion, however, for in his conclusion, Professor Tushnet offers some general speculations on the practice of public-in-

23. Konvitz, subsequent to leaving the NAACP, taught at the Cornell School for Industrial and Labor Relations and the Cornell Law School.

24. Edward Dudley left the staff to serve as Ambassador to Liberia during President Truman's administration. Thereafter, he returned to the staff for a brief period, was appointed to New York City Family Court, became President of the Borough of Manhattan, and was subsequently elected to the New York State Supreme Court.

25. Among those on the staff were Constance Baker Motley, who became President of the Borough of Manhattan, and subsequently Chief Judge of the Southern District of New York until taking senior status in 1987; Franklin H. Williams, who subsequently was assistant to the first director of the Peace Corps, United States Ambassador to the United Nations, then to Ghana, and is now president of the Phelps Stokes Fund; Jack Greenberg, who became Director of the NAACP Legal Defense Fund after Marshall and is now teaching at Columbia Law School; and Marian Wyn Perry, who later married and became a housewife. Other lawyers were also hired, all after 1950.

terest law. Since I discerned no deeper unity in his conclusions than that of a series of unlinked observations, I will limit myself to addressing the particular ones with which I take issue.

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. But what is there in our experience to validate that supposition? While residential patterns of segregation and the neighborhood-school policy have produced more segregated schools today than existed before *Brown*, little effort at equalization seems to have been made. So vast is the economic cost of equalization that there is no public will to expend such money, particularly when the funds are viewed as benefiting chiefly blacks, Hispanics and poor children. Thus far, efforts to equalize facilities or to provide equal education have been meager throughout the country. The assumption appears to have been that less rigorous educational training is needed in the schools that are predominantly black. The belief that an equal-facilities strategy would have produced greater rewards for black children in the upper South by 1970 is myth. I can understand the impulse to retreat to fantasy when one faces the studied indifference of the white majority to the educational neglect of black children and a callousness which justifies that neglect with the racist notion that black children are uneducable. Still, residential segregation in the urban North produces segregated and unequal schools as relentlessly as did the dual-school system in the South. The Public Education Association conducted a study of New York City schools in 1955 and found the predominantly black schools unequal to the predominantly white schools in the three R's, as measured by standardized achievement tests. A follow-up study in 1965 found no improvement over the ten-year interval.²⁶

Perhaps an even firmer rejection of Tushnet's conjecture results from a reading of *Hobson v. Hansen*.²⁷ Judge Skelly Wright's opinion in that case is a thorough exposé of the methodology utilized in urban school districts to maintain white school enclosures, to restrict high-quality educational offerings to those schools, and deliberately to insure low-quality educational offerings in predominantly black schools.

In *Hobson*, a neighborhood school policy insured racial segregation

26. The Public Education Association assisted by the New York University Research Center for Human Relations prepared two reports in 1955: *The Status of the Public School Education of Negro and Puerto Rican Children in New York City* and *Quality of Education Offered to Majority and Minority (Negro, Puerto Rican) Children in New York City's Public Schools*. The latter study, at pages 35-37, showed that based on the results of standardized achievement tests, schools which were predominantly black and Puerto Rican were behind predominantly white schools by a half year in reading and arithmetic at the third grade level, one and one-third years behind at the sixth grade level, and two years behind at the eighth grade level.

27. 269 F. Supp. 401 (D.D.C. 1967), cert. dismissed, 308 U.S. 801 (1968), *affid. sub nom. Smuck v. Hobson*, 408 F.2d 175 (D.C. Cir. 1969) (en banc). There were many other decisions published in this case, but the one cited is for our purposes of primary interest.

in the system, but various options enabled white children to avoid attending their neighborhood schools if they were predominantly black. Moreover, the students were educated on a track system which had the effect of resegregating the races within individual schools based on ability groupings. There were four tracks — a track for gifted students, a college preparatory track, a general track for those who did not plan to go to college, and a basic track for slow learners and the academically retarded. Judge Wright found a socioeconomic correlation between the percentage of children in a given track and the income level of the neighborhood served. The higher the median income, the greater the percentage of children in the high tracks. The percentage of blacks enrolled in the “basic track” exceeded their proportionate representation in the student body. Moreover, Judge Wright found that at every level of comparison — in terms of physical adequacy, quality of the faculty, textbooks, supplies, curricula and special programs — the predominantly black schools were shortchanged.

At another point Tushnet notes that equalization would not have been compatible with the ideal of equality embodied in *Brown*, but claims that “there was no relatively fixed ideal of equality with which racial discrimination was incompatible” (p. 160). He describes as arbitrary the Supreme Court’s rejection of out-of-state scholarships for blacks in compliance with the states’ requirement to provide equality for blacks.²⁸ Unless one is prepared to perpetuate an abstraction on the order of *Plessy v. Ferguson*, equality in a Constitutional sense can only have a meaning that effectuates equality in real life.

28. See pp. 160-61, citing *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938). The *Gaines* Court stated:

Manifestly, the obligation of the State to give the protection of equal laws can be performed only where its laws operate, that is, within its own jurisdiction. It is there that the equality of legal right must be maintained. That obligation is imposed by the Constitution upon the States severally as governmental entities — each responsible for its own laws establishing the rights and duties of persons within its borders. It is an obligation the burden of which cannot be cast by one State upon another, and no State can be excused from performance by what another State may do or fail to do. That separate responsibility of each State within its own sphere is of the essence of statehood maintained under our dual system. It seems to be implicit in respondents’ argument that if other States did not provide courses for legal education, it would nevertheless be the constitutional duty of Missouri when it supplied such courses for white students to make equivalent provision for negroes [sic]. But the plain duty would exist because it rested upon the State independently of the action of other States. We find it impossible to conclude that what otherwise would be an unconstitutional discrimination, with respect to the legal right to the enjoyment of opportunities within the State, can be justified by requiring resort to opportunities elsewhere. That resort may mitigate the inconvenience of the discrimination but cannot serve to validate it.

305 U.S. at 350. The above is a reasoned argument, clearly setting out the basis for the Court’s holding that out-of-state scholarships do not satisfy the states’ obligation to provide equal treatment for blacks. The dissent does not make a reasoned argument to the contrary. Justice McReynolds merely makes a conclusory statement that the problem “obviously is a difficult and highly practical one. A fair effort to solve it has been made by offering adequate opportunity for study when sought in good faith. The State should not be unduly hampered through the theorization inadequately restrained by experience.” 305 U.S. at 354 (McReynolds, J., dissenting).

A state builds a university with tax funds to which blacks contribute, yet Tushnet implies that barring blacks from their home-state university and giving them scholarships to secure their education elsewhere need not be in absolute conflict with equality. For the Court to hold that a state could not condition its own constitutional obligations on what another state might do — in this instance, erect no barriers to admissions of blacks to institutions of higher learning within its borders — seems entirely principled. The text from Chief Justice Hughes' opinion in *Gaines*²⁹ provides powerful justification in support of the thesis that "out of state scholarships" were constitutionally insufficient. "Arbitrariness" more aptly describes Tushnet's unusual notion that out-of-state scholarships could fulfill the state's obligation to provide equal treatment for its black citizenry.

He chides the Court for its emphasis in *Sweatt* and *McLaurin* on the intangibles rather than on the finite facilities in determining educational equality.³⁰ But what makes a university great are undoubtedly the intangibles — its reputation, the success and power of its alumni, the prestige of its faculty, and the public perception of its institutional quality. To be sure, material endowments may, over time, upgrade an institution to the highest rank. In the process, however, the intangibles are upgraded as well. Professor Tushnet, in suggesting that intangibles might be disregarded as part of the equation which defines educational equality, is again giving equality an abstract, sterile and enfeebled connotation.

In the final analysis, what I find most troubling about the treatise is Tushnet's argument that such a sterile and abstract approach to equal educational opportunity by the Court in 1954 could have satisfied fourteenth amendment guarantees (pp. 160-61) admittedly designed, at a minimum, to bar state-ordered discrimination. The Court, on the other hand, rightfully sought to give the clause a twentieth-century dimension with pragmatic effect.

Tushnet also speculates that the attack on segregation undermined some of the institutions within the black community (pp. 164-65), but he gives no examples of this. I do not know of any viable black community institution that *Brown* leveled. Perhaps the black teacher organizations constitute the exception. Some black public and private colleges are indeed under severe stress today, but that stress results

29. See note 28 *supra*.

30. P. 161. Tushnet states that "accepting the NAACP's sociological argument was an innovation," and that the sociological evidence was used to challenge legislative policy as being inconsistent with "a higher norm of equality." P. 161. I do not understand what that means. He says this argument could have been resisted and the intangibles stressed in *Sweatt* and *McLaurin* could have been seen as the result of economies of scale in education. It is true that economies of scale could have led to a determination that the low level of demand at the university level was the basis for the gap in intangibles. But at the grade school level where compulsory schooling is enforced, that argument would not work. Indeed, if the basis is economies of scale, racially separate schooling would be doomed. The cost would outweigh the benefit.

from a lack of financial support. We do not know whether the strictures which some of the black institutions now suffer would have occurred in any event. The 1964 Civil Rights Act did much to enlarge a black middle class that had heretofore been virtually static. This greatly enlarged group would have sought to secure admission to colleges and universities with national prestige in the North and West even if *Brown* had not been decided. Moreover, affirmative action requirements imposed by Title VII of the Civil Rights Act probably did more to spur white universities to seek more black applicants than did the *Brown* decision.

Tushnet seems to believe that some of the new NAACP staff members, having lived in New York before joining the staff, "enthusiastically favored the direct attack" on segregation and may not have fully appreciated the difficulty the litigation might cause for blacks in the South (p. 111). There is no basis for that conjecture. The potentially dire implications for participants in the South Carolina and Virginia cases were carefully explained to them by national staff lawyers. Before these cases were filed, the challenge to segregation had intensified in all areas — at the university level, in interstate and intrastate commerce, and even in regard to recreational facilities. White resistance was also intensifying. The cases were filed at a time when economic pressure was being exerted on blacks to curb their new militancy. In that climate, it was necessary for national staff lawyers to meet with the parents of all putative plaintiffs before the complaint was filed in South Carolina or Virginia to point out the risks being taken in joining a lawsuit as threatening as one challenging segregation and to afford them the opportunity to give the matter careful, further consideration before making a final commitment to join in the litigation. That so few stepped back still astounds me. Undoubtedly, they felt that the only hope for their children lay in putting themselves at economic risk.

I believe the treatise is largely accurate in its narrative of the events that constituted the organization's legal activity in the university and school cases, the origin of the program and its early developments. It is also a serious effort to provide a full and fair presentation of the surrounding events. However, Tushnet's interpretation gives a narrow and constricted reading of the import and meaning to blacks and to the country of the long struggle he discusses. Blacks clearly would have been in no worse position today, in terms of educational benefits in the public school arena, if we had concentrated on an equal facilities goal. This is so because *Brown*, seen solely as a school case, must be considered a failure. What makes *Brown* historic, however, is its fall-out effect. It transformed and radicalized race relations in this country, removing blacks from the status of supplicants to full citizenship under law, with entitlement by law to all the rights and privileges of all other citizens. Equal citizenship is not yet a reality, but blacks can

now contend that the reality is contrary to the law.³¹ This is a powerful argument — a potent force that an equal facilities victory could not have produced.

What for me is the most basic defect in Professor Tushnet's thesis is his fundamental misunderstanding of the NAACP strategy. True, the strategy was to attack segregation in education, but the real agenda was the removal of the basic barrier to full and equal citizenship rights for blacks in this country. With segregation eliminated, blacks, it was thought, would have an unrestricted opportunity to function in America on equal terms with whites. We now know, of course, that the NAACP lawyers erred. The lawyers did not understand then how effective white power could be in preventing full implementation of the law; nor did they realize at the time that the basic barrier to full equality for blacks was not racial segregation, a symptom, but white supremacy, the disease. Although any thoughtful person might readily see that fact now, it took the removal of constitutional support for racial segregation to make clear that black subordination is a national, not a regional, problem. At any rate, NAACP aims, misconceived though they may have been, were far grander than Professor Tushnet's discussion implies.

31. The same point was made in this publication about 20 years ago. See Carter, *The Warren Court and Desegregation*, 67 MICH. L. REV. 237 (1968).