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# Book Review. Making Civil Rights Law: Thurgood Marshall and the Supreme Court, 1936-1961

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Mark V. Tushnet, *Making Civil Rights Law: Thurgood Marshall and the Supreme Court, 1936–1961.* New York: Oxford University Press, 1994. xii + 399 pp.

Reviewed by Kevin Brown

At the request of Charles Hamilton Houston, Thurgood Marshall joined the NAACP staff in October 1936. Within three years the NAACP would establish a separate organization known as the NAACP Legal Defense and Educational Fund to carry on the legal work. Marshall was named LDF director-counsel and served in that capacity until 1961. Mark Tushnet's book examines the roles played by the Supreme Court, Marshall, and the NAACP and the LDF in the struggle during this period to secure civil rights through litigation.

The first third of the book addresses the LDF's legal activities outside the education arena. Tushnet begins by providing biographical information on Marshall and discussing the relationship that he forged in those early years with Houston. Tushnet also discusses Marshall's many roles: legal strategist, office manager, fundraiser, and coordinator of the LDF's relationship with the NAACP. Other early chapters examine the LDF's litigation against various aspects of racial discrimination. Chapter 4 focuses on criminal law and the death penalty, Chapter 5 mainly discusses transportation and labor unions, Chapter 6 deals with housing, and Chapter 7 considers voting rights.

Much of the rest of the book addresses the broad issue of school desegregation. Tushnet first discusses the graduate school cases, then focuses on the litigation surrounding *Brown v. Board of Education.*[1] The last portion of the book mainly examines the implementation of school desegregation.

Without question, the most significant aspect of the book is Tushnet's analysis of the Supreme Court's deliberations in *Brown.* The conventional view is that a number of justices were at first unwilling to strike down the "separate but equal" doctrine of *Plessy v. Ferguson.*[2] Rather than ruling on the cases, the Court decided to hold them over for reargument. Chief Justice Vinson, who by almost all accounts was unwilling to overturn *Plessy,* died suddenly. His death cleared the way for President Eisenhower to appoint Earl Warren as the new chief justice. Through his leadership abilities, Warren was able to unite

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1. 347 U.S. 483 (1954); see also Bolling v. Sharpe 347 U.S. 497 (1954).
2. 163 U.S. 537 (1896). Even the LDF thought the outcome would be close. See Jack Greenberg, Crusaders in the Courts: How a Dedicated Band of Lawyers Fought for the Civil Rights Revolution 178 (New York, 1994).

the Court behind a single opinion. Vinson's unexpected death, then, was a necessary condition for the production of the Court's unanimous opinion.[3]

Tushnet seeks to revise this conventional account. He boldly concludes that, from the Court's initial deliberations, all of the justices were willing to go along with a decision to strike down segregation. On this view, Chief Justice Vinson's death did not significantly affect the inevitable outcome. Tushnet begins by noting that the justices were initially split on whether to reject segregation. Drawing upon notes of Clark, Jackson, and Douglas, among other sources, he reconstructs the justices' deliberations to reach his unconventional conclusion: from the very beginning the Court was in the process of working its way to a unanimous opinion in *Brown*.

Tushnet's reinterpretation adds a sense of inevitability that does not exist in the conventional account. The unexpected death of Vinson is not a pivotal event. Since the unanimous opinion was inevitable, we must look to earlier developments that are obscured in the conventional account. Tushnet notes that "[m]ost of the justices who served on the Court in the early 1940s were personally sympathetic, to varying degrees, to the legal positions asserted by the NAACP, and none had strong objections based in constitutional theory to acting in a manner consistent with their inclinations" (page 70). More than ten years before *Brown* the Court was already moving in the direction of overturning *Plessy*.

Tushnet particularly emphasizes two 1950 cases, *Sweatt v. Painter*[4] and *McLaurin v. Oklahoma State Regents for Higher Education*.[5] The Court, he says, began working out the issue of segregation in elementary and secondary school in these graduate school cases. Even though the justices knew they could write an opinion that disposed of the graduate school cases without directly addressing segregation in elementary and secondary education, that issue could not be excised from the discussions. By the end of their deliberations in *Sweatt* and *McLaurin* two points were clear: a firm majority favored finding graduate school segregation unconstitutional, and nearly all the justices found it difficult to distinguish between higher education and elementary or secondary schools (145). Chief Justice Vinson supported these premises. Well before the initial deliberations in *Brown*, therefore, the Court was in principle committed to striking down segregation in elementary and secondary schools, even though the justices may not have been fully aware of their commitment at the time.

It has been over forty years since the Supreme Court's decision in *Brown*. Few doubt that it was the engine for major economic, educational, political, and social change. To reinterpret the Court's deliberations in *Brown* is also to reinvent the understanding of how contemporary American society came to be.

3. See generally Richard Kluger, Simple Justice 543–747 (New York, 1976).

4. 339 U.S. 629 (1950).

5. 339 U.S. 637 (1950).

At the time the Court delivered the *Brown* opinion, people of African descent were called Negroes, respectfully, and "nigger," "darkie," or even "black" as an insult. Segregation and conscious racial discrimination were not only the explicit law of the land in many places, but also standard American business, educational, political, and social practices. Discrimination based on race in stores, restaurants, places of entertainment, hotels, and motels was generally accepted. Negroes seldom occupied positions in American businesses above the most menial levels; for the most part, they could not hold lower-level management positions. What in the 1990s is referred to as the glass ceiling was then an outright concrete barrier. In 1954 only a handful of Negroes attended first-rate colleges and universities, and almost none of them taught there. A Negro had not been elected mayor of a major U.S. city in this century, and there were only four Negroes serving in Congress (none having been elected from the South since 1900). In 1954 many places had separate water fountains, waiting rooms, transportation facilities, restrooms, schools, hospitals, and cemeteries for whites and coloreds.

Over the past forty years, however, millions of people of every hue have been involved in efforts to desegregate American society and break down rigid racial barriers. There is no doubt that America today is a very different place than it was in 1954. Many of the people who were called Negroes as a term of respect in 1954 would be offended to be called a Negro today. "Black" is not an insult, but a sign of respect. And in most circles the term used is "African-American," which makes an explicit link to and shows respect for both past and present homelands. Many African-Americans have proven their ability to excel in corporate America. Blacks head some of the nation's leading corporations. Not only are blacks students and teachers at America's most prestigious colleges and universities, but some are even heads of those institutions.[6] Americans no longer live with "white" and "colored" signs in public facilities, and it is considered clearly wrong to discriminate against blacks solely on the basis of race.[7]

Many of the racial barriers to participation in the American mainstream for African-Americans have broken down. Significant improvement in the social, political, educational, and economic conditions of African-Americans can be seen in virtually every phase of American life. Nevertheless, blacks still lag far behind in terms of social, economic, educational, and political power. America is rightly torn between recognizing and congratulating itself over the obvious progress and being demoralized and dispirited over the lack of complete success.

If the Supreme Court had not unanimously struck down segregation in *Brown,* these developments would not have been possible in so short a time—

6. For example, Ruth Simmons is president of Smith College, and Condoleezza Rice is provost of Stanford University. There are some 2,000 four-year colleges and universities in the United States. Less than .1 percent have black presidents. I do not intend to suggest that the numbers are anything approaching what they should be, only that there has been significant improvement in the last 40 years.

7. But see Richard Herrnstein & Charles Murray, The Bell Curve: Intelligence and Class Structure in American Life (New York, 1994).

if at all. In 1954 the history of race relations in North America had spanned 335 years. Except for the period of Reconstruction after the Civil War, the history was an uninterrupted use of race to classify people of African descent for the purpose of their collective subjugation. *Brown* helped to ignite the civil rights movement that swept away Jim Crow segregation in the United States. The fact that the Supreme Court rendered a unanimous opinion made the position of those attacking segregation that much stronger.

Beyond *Brown's* implications for American race relations, the opinion helped to spark other significant social movements. One of the ideological thrusts of the civil rights movement—overthrowing dominant cultural conceptions and practices that consciously and explicitly constrained individual self-determination—provided the ideological force for the women's movement, the gay-lesbian movement, and the disability movement. In 1954 America was a very different place for women. They were generally expected to stay in the private realm of the home. Raising children, cooking dinner, washing dishes, cleaning house, and providing emotional support for their husbands were the dominant images of success presented to them. Gays and lesbians were firmly shut into the closet in 1954; homosexuality was not only considered to be a sin against God and nature, but was officially recognized and treated in the medical profession as a mental disease. In 1954 no federal laws addressed discrimination against the disabled, so it was easy for the dominant society to close its collective eyes to their unnecessary hardships.

As we look back to the Supreme Court's deliberations that produced the unanimous opinion in *Brown*, we are also looking back to the genesis of perhaps the most significant social event that has shaped the current national environment. In a way, all Americans live in a society wrought by *Brown*. The impact of the Supreme Court's deliberations that produced that opinion cannot be overstated.

Tushnet's reinterpretation of the Court's deliberations in *Brown* is significantly different from the conventional account. These two accounts suggest alternative explanations as to how our current society came to be. Tushnet's account leans towards the proposition that our current society was inevitable: as we live in history, we are living with the unfolding of a master plan that is directing our society. The conventional interpretation is shaded to highlight the importance of chance and unpredictability: how modern American society deals with racial issues is not inevitable, and we are all victims or beneficiaries of happenstance.

Both of these views suggest a limited role for dedicated persons to shape their country's social environment. I will, therefore, add a third account that is intended to highlight the ability of committed people to mold the future.[8]

8. While I will present three different versions of the Court's deliberations in *Brown*, I do not mean to suggest that this exhausts all possible interpretations. I have criticized the *Brown* opinion as a product of the justices' inability to get beyond their own views that blacks were not the equal of whites. See Has the Supreme Court Allowed the Cure for De Jure Segregation to Replicate the Disease? 78 Cornell L. Rev. 1 (1992).

The three versions reflect fundamentally different understandings of the human condition and our ability to shape that condition.

In one of his more significant pieces Michael Foucault distinguishes between two different styles of historical examination, "traditional history" and "genealogy."[9] Traditional history is a glance back into the past in an effort to try to see a given sequence of events in its purest light. The traditional telling of history assumes a sort of suprahistorical perspective where the potential diversity in our understanding of events from the past is reduced to fully disclose an underlying purpose that generated those events. Traditional history finds its support outside time and pretends to base its judgments on an apocalyptic objectivity. This revealed objectivity is the ultimate purpose that has shaped and motivated the historical events. History can thus be conceptualized as the unfolding in time of this master plan.

In contrast, genealogy refuses to go back into time to reveal an unbroken continuity of events in history. Genealogy tries to identify the accidents, the minute deviations, the complete reversals, the errors, the false appraisals, and the faulty calculations that gave birth to those things and those ideas that continue to exist and have value for us today. Genealogy is not intended to erect foundations and pillars to organize our understanding of the present from the past, but to disturb and fragment what had previously been considered unified and immobile. Every significant event has its history in which the unexpected has played an important role. When history is retold from a genealogical approach, what is revealed is the impact of unpredictability that lies at the root of what we know and who we are.

Applying the structure of traditional history to American race relations allows us to view the past as the working out of the racial master plan. This plan is organized around progress towards a perfect, egalitarian society where individual freedom and self-determination exist for all. When the master plan has completely unfolded, judgments about individual persons based on race or ethnicity will be eliminated. America will truly be a society where persons are judged by the content of their character and not the color of their skin.[10] Race will no longer matter in interpersonal or intergroup relationships.

Consistent with the unfolding of the master plan, the traditional history of American race relations can be told in broad strokes dealing with differing major social eras. Each era has brought us closer to the racial promised land. America was born tainted with the original sin of slavery. As America lived with the denial of the natural rights of African-Americans, this ignominious state inevitably produced tensions that eventually led to the Civil War. Although the Civil War proved to be the final chapter of the slavery epic, it did not establish the colorblind utopia. After Reconstruction, slavery gave way to a system of legal apartheid parading under the banner of "separate but equal." This era of

9. Nietzsche, Genealogy, History, *in* The Foucault Reader, ed. Paul Rabinow, 76 (New York, 1984).

10. See I Have a Dream, *in* A Testament of Hope: The Essential Writings of Martin Luther King, Jr., ed. James Melvin Washington, 217, 219 (San Francisco, 1986).

Jim Crow segregation did not yet recognize the full equality of blacks. Nevertheless, it was a significant step forward from slavery.

The end of Jim Crow segregation and the dawning of the civil rights movement was the next significant step toward the racial promised land. *Brown* was the catalyst for that movement. Tushnet's reinterpretation of the Court's deliberations in *Brown* fits nicely into the unfolding of the master plan. Retelling the Court's deliberations in terms that suggest the justices were going to strike down segregation all along reinforces the notion that our society is more or less being directed by principles or a governing will that guides us to the "more perfect union."

I must admit that I find a tremendous amount of solace in Tushnet's version. It gives me the same sense of reassurance I feel when I read the last public words uttered by the Reverend Martin Luther King, Jr., on the night before he was assassinated:

> Well, I don't know what will happen now. We've got some difficult days ahead. But it doesn't matter with me now. Because I've been to the mountaintop. And I don't mind. Like anybody, I would like to live a long life. Longevity has its place. But I'm not concerned about that now. I just want to do God's will. And He's allowed me to go up to the mountain. And I've looked over. And I've seen the promised land. I may not get there with you. But I want you to know tonight, that we, as a people will get to the promised land.[11]

Tushnet's version connects to the belief that human history does—and, more important, will continue to—unfold in a proper way. Like a latter-day King, he is assuring me that there is a racial promised land and that the inexorable movement of history will deliver us there. As one who has long fought against the specter of racial subordination and who sees little reason for optimism about the future, I take comfort in that. The guiding hand of fate (or natural law or God) will keep American society on the proper course. It may be that I too will not get to the racial promised land, but I can rest assured that humanity will get there and that one day justice will come rolling down like waters and righteousness like a mighty stream.[12]

From the genealogical perspective, our current society's views about race and racial issues have not developed inevitably but are a product of happenstance and chance. The search for an inevitable unfolding plan is replaced by a focus on the contingent. "What if?" is the question constantly posed. Consider the Civil War, for example. Early in 1861, President Lincoln asked Robert E. Lee to lead the Union forces. As we all know, Lee turned down the offer and eventually became commander of the Confederate army. But what if Lee had accepted the commission offered by Lincoln? The Civil War started with the firing on Fort Sumter on April 12, 1861. But Lincoln did not announce his decision to emancipate the slaves until September 22, 1862—

11. I See the Promised Land, *in id.* at 279, 286.

12. See I Have a Dream, *supra* note 10, at 219.

over seventeen months after the Confederates fired on Fort Sumter. The reason: Lincoln and Congress were very clear that their initial aim was to restore the Union. The issue of freeing the slaves always entailed risk because slaveholding border states that had remained loyal to the Union might secede and join the Confederacy. It is generally recognized that the reason the Civil War lasted so long was the incompetence of the generals leading the Union army.

What if Lee had accepted Lincoln's offer? With Lee in command, those early humiliating defeats might have become Union victories. The shorter the war, the sooner the national authority would have been restored, and the nearer the Union would have been to the Union as it was before the war—that is, with slavery intact. That would have completely altered our current racial landscape.

A genealogical approach might also focus on an incident involving Martin Luther King, Jr. In 1958 King was stabbed in the chest while autographing books in New York City. X-rays revealed that the tip of the blade was on the edge of his aorta. If King had sneezed with the blade so close to the aorta, he would have drowned in his own blood.

What if King had sneezed? King would not have lived to write his letter from the Birmingham jail or his book *Why We Can't Wait.* Nor would he have delivered his "I Have a Dream" speech or touched the lives of so many people after 1958. Would the Civil Rights Act of 1964 and the Voting Rights Act of 1965 have been possible if King had died before becoming the national embodiment of the civil rights struggle?

The conventional account of the Court's deliberations in *Brown* highlights the importance of the unexpected death of Chief Justice Vinson and the appointment of Earl Warren. It produces very different beliefs not only about our current social structure, but about our society's ability ever to reach the racial promised land. I remember how distraught I was when I first learned that the Court did not see the "simple justice" of overturning *Plessy* after the first round of arguments in *Brown.* The conventional account always left me with the dreaded question: "What if Vinson had not died?" This account suggests that our current understandings about racial issues are a product of happenstance. The racial attitudes (along with those about gender, disability, and sexual orientation) that exist in our society today were neither inevitable nor the products of our collective desire for self-definition. All of us are helpless victims or beneficiaries of random developments.

A genealogical approach to the Court's deliberations in *Brown* shows that we live in the midst of uncertainty about the future. And our certainty about the inevitability of the present is obtained by ignoring the contingencies of the past. We never know when an important and unexpected event will change an otherwise stable situation. Nothing is given or inevitable. No one can assure us that America will ever make it to the racial promised land.

These two perspectives lack something that is vitally important. On the one hand, Tushnet's reinterpretation adds an appearance of inevitability to the Court's unanimous opinion. Under this view humanity (or at least American society) is directed by a force that is beyond our control. It is as if the hand of

God or the will of nature is motivating and directing our collective destiny.[13] On the other hand, the conventional account suggests that *Brown*—and thus much of our current social structure—is a product of the happenstance death of Chief Justice Vinson. Our current society is a product of the random play of events. Neither of these versions emphasizes the ability of people to be the primary force directing the development of society.

A normative approach rests on the assumption that groups or individuals possess the ability to independently identify a social problem and then to voluntarily take a series of actions that eliminates the problem. The normative approach assumes the ability of free-willed persons or groups to engage in self-determined action to shape their society's dominant social environment.[14]

In a society (and a legal profession) where the belief in free will and self-determined action is so important, no account of the Supreme Court's deliberations in *Brown* would be complete without providing an explanation that treats the Court's opinion as the product of self-directed human actors. It is possible to view the Court's unanimous opinion principally in terms of Chief Justice Warren's working to convince hesitant members of the Court of the need for unanimity. Another example is Justice Frankfurter's proposal for reargument as a device for resolving lingering doubts among his colleagues. Perhaps the best illustration of this view is the LDF's coordinated litigation strategy that brought *Brown* to the Supreme Court. Jack Greenberg has noted that Chief Justice Vinson's death and Earl Warren's appointment "had no discernible effect" on the LDF's work in the summer of 1953.[15] Tushnet's book also develops the theme that LDF's strategy was intended to force the Court to decide whether segregation was constitutional (141, 169).

Before *Brown* the NAACP and LDF had long been involved in challenging racial discrimination in the courts. As early as 1917 NAACP lawyers convinced the Supreme Court to strike down a Louisville zoning ordinance that required segregated housing.[16] But the approach was ad hoc. In 1930 the NAACP set up a committee directed by Nathan Margold to outline a coordinated legal strategy. The 218-page Margold Report primarily discussed legal challenges to segregation in education and housing (12–13). Margold rejected the notion of acquiescing in the doctrine of separate but equal and seeking only to enforce equality within school districts. He concluded that few districts would be equalized and those that were would eventually slip back into inequality. Such a strategy would thus eliminate only a minor part of discrimination and then just temporarily. Margold suggested that the best approach would be to

13. It is of course possible to seek to harmonize these versions by viewing Vinson's passing as part of the master plan. Justice Frankfurter is reported to have responded: "This is the first indication I have ever had that there is a God." Kluger, *supra* note 3, at 656.

14. This approach has come under criticism by certain legal scholars. See, e.g., Pierre Schlag, Normative and Nowhere to Go, 43 Stan. L. Rev. 167 (1990); see generally Symposium, The Critique of Normativity, 139 U. Pa. L. Rev. 801 (1991).

15. Greenberg, *supra* note 2, at 182.

16. Buchanan v. Warley, 245 U.S. 60 (1917).

try to show that wherever there was segregation there was also inequality.[17] This would eventually lead to the conclusion that separate could not be equal and that therefore segregation was unconstitutional.

With this blueprint, the NAACP and later the LDF began a coordinated legal attack on segregation in education. Before launching its assault on segregated elementary and secondary schools, the NAACP attacked unequal salaries for schoolteachers. Tushnet covers this aspect of the litigation strategy in Chapter 8. Salary equalization suits had a number of attractions. There was a relatively large pool of potential plaintiffs who could be found over the entire South. The salary differences were large, and some rested on schedules that explicitly set lower rates for black teachers. Moreover, the plaintiffs had an important personal interest at stake. Since equalization suits did not directly challenge segregation, defendants put up less resistance.

The salary equalization lawsuits were pursued simultaneously with the graduate school cases. The NAACP started the graduate school attack in states where there were no public graduate programs for African-Americans.[18] Then came the companion cases of *Sweatt* and *McLaurin*, where the NAACP was able to show that separate graduate education was not equal and that segregation regulations within supposedly integrated schools made no sense. Having established the precedential framework, the LDF could move toward a frontal assault on segregation in elementary education.

The normative paradigm shows the importance of self-directed human action. This retelling of the beginning of the civil rights era reaffirms that people can and do make their destiny consistent with ideas about what their society could become. By celebrating the accomplishments of dedicated people who positively affected our society, we reinforce the notion that each of us can and should make an important difference.

This version is not as comforting as Tushnet's, but it does not produce the sense of helplessness that the conventional account does. The racial promised land is not a given, but can be reached only through dedication and commitment. The normative paradigm adds a sense of self-determined purpose to my work as a legal academic. I can place my fingers on the keyboard and stroke out the normative plan that should be followed for a better tomorrow. In fact, not only can I make a difference, but I must. The battle has been joined and each must choose. One will either be part of the solution or be part of the problem.

Few of us would assert that only one of the above versions captures the Court's deliberations that produced unanimity in *Brown*. Most would probably

17. The Margold Report also noted that an effective litigation effort would stir the spirit of revolt among blacks and cause whites to view them with more respect. Again this report proved prophetic. In December 1955, less than seven months after the Court delivered its opinion in *Brown II*, Rosa Parks refused to move to the back of the bus. This precipitated the Montgomery bus boycott, led by a little-known minister named Martin Luther King.

18. See Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938); Sipuel v. Board of Regents, 332 U.S. 631 (1948).

be willing to accept a compromise position which asserts that each of these accounts contains a partial picture of what actually happened. To a certain extent our current society is a product of all three versions (and perhaps of some others I have not discussed). The "truth" about the Court's deliberations lies somewhere among these various versions.

Normally, suggesting this compromise position obscures a fundamental question about the nature of the human condition embedded in the notion that "the truth must lie somewhere in between" and we are not yet smart enough to know it. This allows us to (re)turn our attention to those activities that require our relentless industry or intellectual attentiveness. We can go back to writing the next article, preparing for the next class, critiquing the next draft, reading the next page, grading the next paper, talking to the next student or colleague, or any of the other "next tasks" we perform.

But if we take a minute and seriously consider the compromise, we will face the startling implications that stir just outside our normal view. Embedded in these three versions of what produced the Court's unanimous opinion in *Brown* are conflicting views of matters that go to fundamental concerns for humanity. One version suggests that our current racial situation can be thought of as the product of chance, another as the unfolding of an inevitable plan, and the third as the fruit of self-directed human activity. These views are irreconcilable: if one view is true, the others cannot be. If our current racial situation is a product of happenstance, there is no unfolding destiny for us nor is our current society a product of self-directed activity. If our current racial situation is the result of an unfolding master plan, neither chance nor human desires can make a difference. And if our current racial situation is the realization of a normative vision, humanity has no destiny beyond that which we create. It is impossible to conclude that these three views express partial truths. For each excludes the possibility of the other.

Now to say that the truth lies somewhere among these versions takes on a different connotation. It is tantamount to saying "We simply do not know." More important, if despite our best efforts we cannot describe the "truth" about the Court's deliberations in *Brown* by now, we may never be able to describe it. To know that we do not know is to know that our understanding of a significant event like *Brown* is not structured around the "truth." Rather it is structured around a given narrative that organizes and produces an understanding of what actually happened. To know that we do not know is to know that what we know is structured by unthought categories that lie hidden in these various narratives. And those unthought categories limit the thinkable and predetermine what is actually thought.

It is this condition of our human understanding that Tushnet's reinterpretation of the Court's deliberations in *Brown* forces upon us. In analyzing Tushnet's version, the relevant question is no longer whether his version is "more accurate" than the conventional one. If you see the world and America's racial problems in terms of the unfolding of a master plan, Tushnet's version adds credence to that belief. For those who see life and these same problems in terms of the unexpected, the twists and turns, Tushnet's reinterpretation

will be less attractive than the conventional account. For those who place their emphasis on purposeful human directed activity, Tushnet's reinterpretation of the Court's deliberations in *Brown* will not be as significant as his discussion of the NAACP and the LDF's coordinated attack on segregation.