BLACK INSTITUTIONS OF HIGHER LEARNING: INADVERTENT VICTIMS OR NECESSARY SACRIFICES?

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I. *Introduction*

Of the many paradoxes of Black experience none is more poignant and stark than the beginning and positive development of pro-Black egalitarian decisions by the Supreme Court in higher educational opinions high pointed in *Sweatt v. Painter,* and the full operational implementation of those decisions in elementary and secondary school cases beginning with the landmark *Brown* decision and culminating thus far, in *Swann v. Board of Education.* — Kenneth S. Tollett[1]

ALTHOUGH *Brown v. Board of Education*[2] initiated the egalitarian revolution of the late 1950's and 1960's[3], principles developed in the progeny of this case pose a clear and present danger to the survival of predominantly Black institutions of higher learning. *Brown's* beneficial impact upon and galvanizing thrust to Black social, political and economic aspirations are difficult to overestimate. Yet it would be a perverse and paradoxical turn of constitutional law development if the seed of *Brown* produced vines which smothered the identity, historic mission, and the very existence of predominantly Black colleges and universities. These institutions have been a national asset and have especially served the educational needs and aspirations of Blacks.[4]

In principle, egalitarianism and integration have become practically synonymous in education. In practice, however, neither has been substantially realized. Disingenuous rhetoric about equality and integration has placed the educational opportunities of Blacks in an ominous pincer movement. One force is converging upon Blacks in the name of equal protection and in the form of an assault against special minority admission programs in white higher educational institutions.[5] The other force is converging upon Blacks in the name of integration and in the form of an assault against predominantly Black public,

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1. Tollett, *Blacks, Higher Education and Integration,* 48 Notre Dame Lawyer 189 (1972).
2. *Brown v. Bd. of Educ.,* 347 U.S. 483 (1954).
3. Tollett, *The Viability and Reliability of the U.S. Supreme Court as an Institution for Social Change and Progress Beneficial to Blacks,* 2 Black L.J. 197, 205 (1972).
4. The Carnegie Comm'n on Higher Educ., *From Isolation to Mainstream: Problems of the Colleges Founded for Negroes* (1971).
5. *See Defunis v. Odegaard,* 82 Wash. 2d 11, 507 P. 2d 1169 (1973), *cert. granted,* 42 U.S.L.W. 3306 (U.S. Nov., 1973) (No. 73-235), *vacated as moot* 42 U.S.L.W. 4578 (U.S. April 23, 1974). Although the U.S. Supreme Court did not decide the merits of the case, strong and influential voices have been raised against minority preferential admission programs approved by the Washington Supreme Court. The trial court opposed University of Washington Law School's preferential admissions policy for minorities (NO. 741727, Sept. 22, 1971); Justice C.J. Hale wrote a strong dissenting opinion when the Supreme Court of Washington reversed the trial court, 507 P. 2d 1169 (1973). Several Jewish organizations which were active in the Civil Rights struggle of the 1960's supported *DeFunis — See, e.g.,* Amicus Curiae briefs filed with the U.S. Supreme Court written for the Jewish Rights Council, Anti-Defamation League for B'nai Brith and the American Jewish Congress. Other organizations that filed briefs urging reversal were AFL-CIO, Advocate Society, American Jewish Committee, Joint Civic Committee of Italian Americans and Unico National, and National Association of Manufacturers of the United States.

higher educational institutions.[6] The materiel supporting the first force is a misplaced emphasis upon meritocracy, because equality of opportunity does not guarantee equality of results.[7] Moreover, while this meritocratic argument is being advanced as the true meaning of equality, a parallel contention is that Blacks are less intelligent than whites due to inferior genetic combinations.[8] Thus, at the same time the survival of predominantly Black higher educational institutions is being threatened, the gateway for Blacks into white higher educational institutions may be closing.

This paper will engage in an impact analysis of the principles and policies underlying the pincer movement. First this paper will set forth a contextual and background reconnaissance of the mission of Black higher education. This will require stating the accomplishments and functions of predominantly Black higher educational institutions. Secondly, this paper will argue against the victimization and sacrifice of Black institutions of higher learning. It will argue that their victimization is not inadvertent and that their sacrifice is not necessary. It will argue also, that a proper interpretation of the equal protection clause, including *Brown* and its progeny, does not require destroying the identity or existence of Black colleges and universities. Thirdly, it will argue that special and minority admission programs, including affirmative action, are both desirable and constitutional. It will argue that although the principle of merit is the ideal, the simplistic, mechanical application of this principle to Blacks is both supposititious and mischievous, particularly in the context of the past oppression of Blacks and of the present challenge to their native intelligence.

II. *The Mission of Black Higher Education*

> During the past century, the mission of the colleges founded for Negroes has been defined by the central reality of the Black man's isolation in America. As a result of court decisions of the 1950's and the historic civil rights legislation of the 1960's, their mission in the future will be defined by altered circumstances. The ultimate choice of missions, of course, is to be made by the institutions themselves. — Carnegie Commission[9]

A. The Education of Black Folk

UNTIL THE MIDDLE of the 1960's, the overwhelming majority of Blacks were educated in predominantly Black colleges and universities. Even today, the majority of Blacks graduating from four-year colleges graduate from such institutions. However, it must be observed, "with the dropping of barriers to white institutions and the migration of Blacks to the North, the percentage of Black enrollment in historically Black colleges dropped from 51 percent in the fall of 1964 to 36 percent in the fall of 1968."[10] This

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6. *Adams v. Richardson*, 356 F. Supp. 92 (D.D.C. 1973), modified and aff'd *per curiam* 1480 F. 2d 1159 (U.S. App. D.C. 1973), held that HEW abdicated its statutory duty provided by the Civil Rights Act of 1964, S 601 *et seq.*, 42 U.S.C.A. S. 2000d when it failed to enforce proceedings against and had continued to provide federal funds to segregated systems of higher education in states which had failed to submit desegregation plans; states which had submitted unacceptable desegregation plans; and states which had reneged on prior approved desegregation plans. Furthermore, the court held that although HEW lacked the experience in dealing with desegregation problems in colleges and universities, nevertheless, it must formulate state-wide guidelines to provide more minority professionals.
7. D. Bell, *On Meritocracy and Equality*, 29 The Public Interest 29 (Fall 1972).In criticizing Jencks' contention in *Inequality* (1972) that equality of opportunity cannot be realized and even if it could, it would not appreciably reduce inequality of results, Bell argues that Jencks' contention leads to the following proposition: "The aim of social policy, thus, has to be equality of result — by sharing and redistribution policies — rather than equality of opportunity." *Id.* at 47.
8. Arthur Jensen, *Selection of Minority Students in Higher Education*, 70 Univ. of Tol. L. Rev. 403 (Spring-Summer 1960); Richard Herrnstein, *I.Q.*, Atlantic 228:44 (September 1971); *But see The Misuse of I.Q. Testing: Interview with Leon Kamin by John Egerton*, Change 5:40 (May 1973); Norman Daniels, *The Smart White Man's Burden*, Harper's, 247:24 (October 1973).
9. Carnegie Comm'n., *supra* note 4, at 17.
10. Tollett, *supra* note 1, at 196.
    Allan B. Ballard gives the following statistics on Black enrollment: "In 1960, there were 200,000 Black collegians, 65 percent of whom were enrolled in Black colleges. By 1964, there were 234,000 Black collegians 51 percent of whom were enrolled in Black colleges. By 1970, the population of Black students had increased to almost 500,000, only 34 percent of whom were enrolled in Black institutions. But of the Black students enrolled in white institutions, half were students in two-year community colleges. Perhaps the best estimate would be that the student bodies of the two-year colleges had a 7.9 percent Black enrollment, four-year public colleges 3.1 percent, and private four-year institutions, 2 percent. . . . Among the four hundred public four-year institutions containing some 122,000 Black students, for example, the City University of New York and its open admissions policy accounts for well over 15 percent of the national total . . ." Ballard, *The Education of Black Folk, The Afro-American Struggle for Knowledge in White America*, 65-66 (1973).

percentage has been questioned seriously.[11] What is not questioned is that the majority of Black students in college are presently enrolled in predominantly white post-secondary institutions.

The Carnegie Commission has enumerated some of the accomplishments of Black higher educational institutions. It stated:

> Among their 385,000 alumni are substantial numbers of the country's black government officials, army officers, professors, doctors, lawyers, and members of other professions . . .
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> They have prepared most of the teachers employed for the education of many generations of Negro children in the South. One-third of all principals and one half of all teachers in public schools in Mississippi are graduates of one Negro college — Jackson State . . .
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> Some of them have extensive experience in providing higher education for students who come to them under-prepared by reason of inadequate prior schooling . . .
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> They have recruited and educated students from low-income families. The average family income of 37.6 percent of entering black students and 17.1 percent of other entering students in Negro colleges in the fall of 1968 was less than $4,000 a year . . .[12]

This part of the report concluded, "Colleges founded for Negroes have many obstacles yet to overcome, but they have already contributed significantly to the life and progress of Black Americans."[13]

Black higher educational institutions not only have had to struggle through severe obstacles in order to function, but also have had to face constant threats to their very survival. As early as the first quarter of the nineteenth century, efforts were made to establish higher educational institutions for Blacks.[14] Most of the efforts were "abortive because of the racist opposition of the communities in which they were established or attempted."[15] The first successful effort was the establishment of what is now Cheyney State College in Pennsylvania (1837). Lincoln University in Pennsylvania (1854), and Wilberforce University in Ohio (1856) were also established before the Civil War.

A system of higher education was developed for Blacks in the South after the Civil War, although most of the institutions were little more than high schools. Ballard has observed, "Some two hundred institutions of higher learning for Blacks were created in the three decades after the Civil War, but only a few were worthy of the designation 'college.' "[16] Although many of these institutions failed, many others succeeded, and after the turn of the century most of them were presenting *bona fide* college programs. Indeed, "40 of the present 53 . . . private historically black colleges and 17 of the present 36 four-year public historically black colleges were founded during this period."[17] Some of their great accomplishments have already been enumerated.

Apart from the special legal threats to these public institutions, they should require no more justification for their continuation than do thousands of comparable predominantly white institutions. The Carnegie Commission began its discussion of their record of achievement as follows:

> The colleges founded for Negroes are both a source of pride to blacks who have attended them and a source of hope to black families who want the benefits of higher learning for their children. They have exercised leadership in developing educational opportunities for young blacks at all levels of instruction, and, especially in the South, they are still regarded as key institutions for enhancing the general quality of the lives of black Americans.[18]

These colleges enrolled 183,418 students in the fall of 1973. They granted 25,094 baccalaureate degrees the same year, up from 15,728 granted in 1966.[19] The Black colleges' enrollment figure represents between 30 and 40 percent of the total Black enrollment in

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11. Blake, *Post-Secondary Higher Education for Black Americans; Issues in Achieving More than Just Equal Opportunity*, in National Policy Conference on Education for Black Proceedings 118 (1972); Tollett, Commentary, In *Between Two Worlds: A Profile of Negro Higher Education*, F. Bowles and F. A. DeCosta (1971).
12. Carnegie Commission, *supra* note 4, at 14-15.
13. *Id.*, at 16.
14. Tollett, *supra* note 1, at 195.
15. *Id.*
16. Ballard, *supra* note 10, at 13.
17. Tollett, *supra* note 11, at 257.
18. Carnegie Comm'n, *supra* note 4, at 11.
19. The Chronicle of Higher Education, April 1, 1974, at 1, 5.

all post-secondary institutions. Over 100,000 of the Black enrollment in predominantly Black institutions is in public institutions, which are the most threatened legally. These figures and percentages indicate the defense of Black colleges cannot rest solely on numbers, for as it has been written earlier:

> Until the advent of Black Power and Black Consciousness, Black higher education had been evaluated and even defended in terms not too much unlike the assessment of the progress of the United States' involvement in Indochina, namely, body count.[20]

Their defense now depends upon a more specific delineation of their mission and functions in the higher educational system.

B. *The Functions of Black Higher Educational Institutions*

WHEN PREDOMINANTLY Black higher educational institutions are primarily controlled and operated by Blacks, they serve several functions in the Black community. First, they provide creditable models for aspiring Black youth. Black youth from disadvantaged and oppressed backgrounds need to see other Blacks manage and operate important affairs. This is most important in education where their native intelligence is repeatedly challenged. Black administrators and teachers serve as living proof that Blacks can succeed in the educational enterprise.[21]

When Black institutions were first established after the Civil War, their governing boards and staffs were practically all white. This has substantially changed except for the governing boards of most public Black institutions. Thomas Sowell, an acerbic critic of both Black institutions and many other aspects of the Black presence in higher education generally,[22] has argued that Black faculty and administrators were not put into firm control of these institutions until about a decade after World War I, and that academic freedom and quality were the casualties of this 'black renaissance'.[23] Although this writer has acknowledged that Black institutions are not free from criticism,[24] Sowell overstates his attack upon Black administrators who hired "more tractable, but less able [Black faculty members]."[25] He accurately observes that Black administrators were "fearful clients of white power figures,"[26] but this was generally true of most Blacks whatever their status in education or elsewhere.

Sowell is a most able writer and economist who happens to be Black, but like many critics of Blacks he seems to blame the victim more than the oppressor. He would have one believe that there has been practically no improvement in Black institutions, for he says,

> More importantly, each generation of black administrators chose a succeeding generation after its own image, thereby driving more intellectual and independent elements to the periphery of institutional affairs, or beyond. Thus the choice of black representation over quality had lasting negative consequences, even after large numbers of qualified black scholars and administrators emerged.[27]

This is a sweepingly irresponsible libel of Black administrators and teachers — made even more so by the seeming claim that there is a short-term irremediably small supply of Black scholars such that affirmative action programs "can only mean reducing standards."[28] This is not the place to rehash arguments for and against affirmative action. However, Sowell's argument implies that there are enough good scholars and administrators for Black institutions, but very few available for white institutions. More disturbingly, the question is not the availability of Black scholars, but whether they really need to be of high quality to work in Black institutions. Of course, Sowell would protest that the above inference is a gross misreading or distortion of his position. Although his

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20. Tollett, *supra* note 1, 195.
21. As will be discussed more fully later, this is a major reason affirmative action programs are so important in predominantly white institutions. See discussion, text *infra* at 28.
22. Sowell, *Black Education: Myths and Tragedies*, (1972).
23. Sowell, *The Plight of Black Students in the United States*, Daedalus 179, 188 (spring 1974).
24. Tollett, *supra* note 11, at 252, 260-264.
25. Sowell, *supra* note 23, at 188.
26. *Id.*
27. *Id.*
28. *Id.* at 185.

position will be discussed later in this paper, the major point here is that the results of the black renaissance were beneficial to Blacks in higher education. Blacks who are creditable models[29] are axiomatically good for aspiring Black youngsters.

The second function of predominantly Black higher educational institutions is cultural and psycho-social. They are educational settings which many Blacks find more congenial to attend than predominantly white institutions. Many state college systems have a variety of institutions, including community colleges, liberal arts institutions, comprehensive colleges, and doctoral granting universities.[30] Although a driving force behind such variety may be programmatic, cultural and psycho-social factors also play important roles in their respective settings. This is a manifestation of the value of the pluralism of higher education in the United States. Diverse groups have historically sought to attend institutions they found congenial; whether one is talking about rural and farm students attending land grant colleges, Catholic students attending the many Catholic colleges and universities, or Jewish students attending Brandeis University. Are Blacks less entitled to congenial educational settings than whites?

A third function of predominantly Black higher educational institutions is that they provide special-group-oriented transitional educational enclaves, "in which their students can prepare for and make the necessary transition from underprivileged isolation to 'mainstream.' "[31] This function is a permutation of the cultural and psycho-social function. A transitional enclave connotes more than a "congenial setting". It should include a need for special concern, freed from the possibly demeaning and abrasive competition and conflict of the white world. This does not mean that whites should be systematically excluded from these enclaves, but it does mean that they should be in a minority. A transitional enclave is related to the first function in the sense that many Blacks need the experience of developing their potential, free from the psychologically destructive dominance of whites.[32]

THE EMPHASIS HERE is not separation but the salubrious reversal of ethnic distribution and roles in a context of reciprocal respect. Moreover, as the writer has said of a predominantly Black law school:

> . . . I believe we should operate a program which exemplifies how majority and minority groups may teach, learn, and live together in a mutually satisfactory and reciprocally enriching way. However, majority and minority groups are, so to speak, reversed. I believe it is good for non-black students to attend an educational institution in which they are a minority. I believe it is also good for blacks to operate an institution in which they are the majority. Perhaps the non-blacks can begin to get an insight into what it means to be in the minority and, more importantly, perhaps blacks will learn about the great temptations that beset the majority or dominant group. I believe our University and Law School are proof that blacks and whites can make it together.[33]

Although a transitional enclave may be the converse of a *cordon sanitaire,* this does not mean that students educated in the enclave will be unprepared for the disease of racism and the cruel competition of the white world. Some Blacks need a measure of separation to develop self-esteem and a healthy sense of identity. Many whites need integration to develop respectful, non-stereotypical perceptions of non-whites.

The fourth function of predominantly Black institutions is that "they serve as an insurance against a second post-Reconstruction substantive betrayal of formally declared pro-Black rights."[34] There is already some

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29. Sowell would challenge just how creditable the models were and are.
30. *See* the Carnegie Comm'n on Higher Education, *New Students and New Places: Policies for the Future Growth and Development of American Higher Education,* "Appendix A: Carnegie Commission Classification of Higher Education, 1970" (October 1971).
31. Tollett, *supra* note 1, at 198.
32. This applies to some Black scholars as well as to students. Ballard has aptly stated, "Black colleges served as a refuge and haven for Black professors intent on the development of Black scholarship." Ballard, *supra* note 10, at 23.
33. Tollett, *Making it Together, Texas Southern University School of Law,* 53 Am. Jud. Soc. 366, 372 (1970).
34. Tollett, *supra* note 1, at 198.

evidence that white institutions have a declining interest in the education of Blacks. This writer has already written:

> The country's movement toward the vindication of Blacks' civil rights seems to be in decline while being replaced by *ecophilism, consumerism,* and *feminism.* Although in recent years the national government has been financially supportive of Black higher education, congressional and presidential support of the anti-busing movement marks a governmental disengagement from the integration struggle which is most likely to result in a general lessening of interest in getting Blacks into and through higher educational institutions.[35]

The pincer movement already mentioned is a general allusion to the evolving precarious position of Blacks. Furthermore, President Nixon's great election victory in 1972 was in large measure influenced by his opposition to busing and his fraudulent attack upon "quotas" for hiring minorities and women. The opposition and attack were a thinly disguised continuation of the Southern Strategy and a signal to water down, if not drown, affirmative action programs.[36] Paradoxically, Blacks probably have been spared a full-scale march toward a second post-Reconstruction because of Watergate, inflation and the energy crisis. However, eternal vigilance is imperative, because history can repeat itself.

III. *Black Higher Education and Integration*

> However, the United States Supreme Court as an institution historically has not served an especially beneficial role in the lives of Blacks. The Court, like all other major institutions in America, has reflected much of the overall racism of the society at large. The Warren Court moved the Court in a significantly different direction from its past by liberally interpreting and applying the doctrines of judicial review, actively recognizing egalitarian humanism and individual integrity, and boldly affirming the positive content and worth of American citizenship.
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> —Kenneth S. Tollett[37]

UNTIL THE CIVIL WAR, the federal government had little legislative and judicial impact upon educational policy. With the land-grant movement through the Morrill Acts of 1862 and 1890, and a spate of legislation in the late 1950's and in the 1960's which culminated in Title VI of the 1964 Civil Rights Act and the higher education legislation of 1965 and 1972, the federal government became a major source of educational policy. This included elementary, secondary, and higher education. Nevertheless, from the Black perspective, the federal judiciary played an even more important role in developing educational policy. *Gong Lum v. Rice,*[38] with little analysis, applied the "separate but equal" doctrine of *Plessy v. Ferguson*[39] to public schooling. The assault upon the "separate but equal" doctrine in the federal courts began in a law school admission case in *Missouri ex rel. Gaines v. Canada.*[40] *Gaines* held that the *Plessy* doctrine required Missouri to provide educational opportunity for Blacks inside the state equal to that provided for its white citizens, a requirement not met by subsidizing Black students' attendance in adjacent states.

The assault was pressed even harder a decade later in such a way that two astute observers of educational policy have correctly noted:

> Over the past two decades . . . [f]or each public policy issue — school desegregation and busing, public financing of parochial and non-public schools, and the growing awareness that our system of educational finance promotes a maximal separation

35. *Id.*
36. Tollett, *supra* note 3, at 197, n. 1.a.
37. Tollett, *The Viability and Reliability of the U.S. Supreme Court as an Institution for Social Change and Progress Beneficial to Blacks,* Part II, 3 Black L.J. 5 (1973).
38. 275 U.S. 78 (1927). See also *Cumming v. Richmond County Bd. of Educ.,* 175 U.S. 528 (1899).
39. 163 U.S. 537 (1896). Curiously enough, *Plessy* concerned equal accommodation in public transportation but was based in significant measure upon a Massachusetts decision which condoned the separation of the races in education before the adoption of the Fourteenth amendment equal protection clause. *Roberts v. City of Boston,* 5 Cush. 198 (1849). *See Also* M. Forkosch, *The Desegregation Opinion Revisited: Legal or Sociological,* 21 Vand. L. Rev. 47 (1967).
40. 305 U.S. 337 (1938).

> between resources and areas of greatest educational need — most of the political conflict has been over definition and, more painfully, the application of . . . [the] phrase ("equality of opportunity").
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> It is not surprising, therefore, that the courts have become increasingly a major focus for interest groups concerned with education. Consequently, any analysis of the current status of educational politics must focus in large part on past and present judicial activity affecting education.[41]

In 1948 the Supreme Court ordered a Black woman admitted to a white law school in Oklahoma, a state where a separate law school for Blacks had not been established.[42] *Sweatt v. Painter*[43] ordered a Black admitted to the University of Texas Law School even though a separate Black law school had been established. The Court held that intangibles such as prestige, faculty reputation, and experience of the administration made the educational opportunity and experience at the Black law school unequal to those at the University of Texas. *Brown*[44] soon followed, holding in the field of public education that the doctrine of "separate but equal" had no place. It categorically affirmed that the separation of educational facilities was inherently unequal.

Not since *Sweatt* has the Court spoken directly and explicitly to the status of predominantly Black public higher educational institutions. However, it has rendered a series of decisions[45] implementing *Brown* in public education, one of which has particularly ominous implications for public Black colleges. In *Green v. County School Board*, the Court held the states had an affirmative duty to dismantle a dual system of racially identifiable public education. "Racially identifiable" seems to mean predominantly Black. The *Green* doctrine, "if applied strictly, simplistically and mechanically to higher education, would result in the consolidation and merger and, thus, the dismantling and destruction of predominantly Black public higher educational institutions.[46]

A. The Application of the *Brown* and *Green* Doctrines to Higher Education

BEFORE DISCUSSING the application of the *Green* doctrine to *Adams v. Richardson*,[47] a few words need to be written about the meaning and proper interpretation of the equal protection clause. It has already been written, "Legal decision-making inevitably involves choosing between values, wants and preferences, which are substantially conditioned by experience and practice."[48] Principles and rules may be clear enough in the abstract,[49] however, political and ideological considerations seem to inevitably intrude themselves into the resolution of concrete controversies and into the formulation and the interpretation of specific legislation. Surely, psycho-social and economic-political considerations are most relevant and important factors in the formulation of legislation. Their role in adjudication is more problematical and

41. D. Shalala & J. Kelly, *Politics, the Courts and Educational Policy*, 75 Teachers College Record 223,224 (Dec. 1973).
42. *Sipuel v. Univ. of Oklahoma*, 332 U.S. 631 (1948).
43. 339 U.S. 629 (1950).
44. *Brown v Bd. of Educ.*, 347 U.S. 483 (1954).
45. *Cooper v. Aaron*, 358 U.S. 1 (1958) (holding that the interpretation of the fourteenth amendment enunciated in *Brown* is the supreme law of the land; and, threats of violence or disruptions do not excuse delay in enforcement); *Griffin v County School Bd.* 377 U.S. 218 (1964) (holding a system of closing public schools and giving state and county grants to white children to attend private schools violated the equal protection clause); *Green v. County School Bd.*, 391 U.S. 430 (1968) (holding that school boards have the burden and the affirmative duty to develop plans that will work immediately); *Monroe v. Bd. of Comm'rs*, 391 U.S. 450 (1958) (holding a "free transfer" plan unconstitutional if it would delay rather than further conversion to a unitary school system); *Alexander v. Holmes County Bd. of Educ.*, 396 U.S. 19 (1969) (holding that every school district should eliminate dual school systems and operate only unitary schools); *Swann v. Bd. of Educ.*, 402 U.S. 1 (1971) (holding that racial ratios and busing are tools for ending state imposed segregation); *Wright v. Council of the City of Emporia*, 407 U.S. 451 (1972) (holding that a new school district could not be created if it would impede the dismantling of a dual system); *United States v. Scotland Neck City Bd. of Educ.*, 407 U.S. 484 (1972) (holding the creation of a new school district in order to avoid desegregation unconstitutional); *Keyes v. School Dist. No. 1*, 413 U.S. 189 (1973) (holding that intentional segregation by the school board — *i.e., de jure* segregation — of a meaningful portion of a school system creates a presumption of segregated schooling).
46. Tollett, *supra* note 1, at 189.
47. *Adams v. Richardson, supra* note 6.
48. Tollett, *supra* note 1, at 190.
49. Tollett, *Verbalism, Law and Reality*, 37 U. Det. L.J. 226 (1959).

delicate.[50] Yet, when legislation or the Constitution is being interpreted and applied, the interests, needs and rights of Blacks get unfavorable treatment.[51]

Although the Warren Court changed this pattern, there are signs of its return. It is difficult to improve upon Justice Miller's characterization of the Civil War Amendments, particularly the equal protection clause. He stated in the *Slaughter House Cases*:[52]

> We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision (Equal Protection Clause). It is *so clearly a provision for that race and that emergency, that a strong case would be necessary for its application to any other.*
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> . . . the one pervading purpose found in them all, (Thirteenth, Fourteenth, and Fifteenth Amendments) . . . (was) the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him.[53]

The Warren Court returned to the spirit of Justice Miller's characterization, although the Warren Court's egalitarian humanism benefited all underprivileged classes and the oppressed.[54]

Thus, in applying the equal protection clause to Black higher education, or for that matter to affirmative action and special minority admission programs:

> (I)t must be determined what values are served by that application. If it impairs the fulfillment of Black interests and rights, then it does violence to the spirit, purpose, and meaning of the equal protection clause.[55]

The importance of predominantly Black higher educational institutions to the educational opportunities for Blacks is clear. The dismantlement, elimination, or radical transformation of these institutions (racially) would be a perversion of the spirit and meaning of the equal protection clause. The operation and effect of such action would be detrimental to educational opportunities for Blacks. If one knows this in advance, then the victimization of Black colleges and universities cannot be regarded as inadvertent.

1) Judicial Threats to Black Higher Education

ALTHOUGH *Adams v. Richardson* and the federal enforcement of Title VI of the Civil Rights Act poses a danger to Black institutions, the future of these institutions was threatened as early as 1968. In *Alabama State Teachers Association v. Alabama Public School and College Authority*[56], a federal district court refused to enjoin the construction of an extension of Auburn University in the City of Montgomery, where predominantly Black Alabama State was also located. The class-action plaintiffs claimed that the construction of the Auburn branch, in competition with Alabama State, would perpetuate the Alabama dual system of higher education. Although the court found that the dual system of higher education had not been completely dismantled, it maintained that higher education need not be dismantled to the same full extent as elementary and secondary education. It correctly distinguished elementary and secondary education from higher education by noting that the former

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50. *See e.g.*, Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1 (1959); Forkosch, *supra* note 39.
51. "The application of law to Blacks in general, and in the South in particular, must be viewed in the context of this country's heritage of slavery which legally under-protected or did not protect Blacks; [*e.g.*, through] formal declarations of legal rights by the Nation; and official or governmental neglect, frustration, and violation of [those] formal legal rights." Tollett, *supra* note 1, at 190.
52. 83 U.S. (16 Wall.) 36 (1873).
53. *Id.* at 81, 71. [Emphasis added].
54. *See e.g.*, *Baker v. Carr*, 396 U.S. 186 (1962) (holding that a suit alleging that the apportionment of a state legislature denied [applicants] the equal protection of the laws and seeking reapportionment of that legislature presented a justiciable constitutional cause of action; *Gideon v. Wainwright*, 372 U.S. 335 (1963) (holding that the sixth amendment guaranty of counsel was applicable to the states through the fourteenth amendment.); *Miranda v. Arizona*, 384 U.S. 436 (1966) (holding that a defendant in custody must be advised of his constitutional rights before questioning).
55. Tollett, *supra* note 1, at 207.
56. 289 F. Supp. 784 (M.D. Ala. 1968), aff'd *per curiam*, 393 U.S. 400 (1969).

was free, was compulsory, and that before freedom-of-choice, students were assigned to segregated schools. Nevertheless, the court precluded any significant white enrollment in Alabama State by permitting the construction of the Auburn branch. If *Green* and Department of Health, Education and Welfare (H.E.W.) guidelines require a significant presence of whites in predominantly Black schools, then the refusal to grant the injunction has placed Alabama State in a very precarious position.

Geier v. Dunn[57] was a similar case reaching the same results. It adopted for higher education the *Green* doctrine's affirmative duty to dismantle dual educational systems. *Geier* involved an action to prevent the construction of a Nashville Center of the University of Tennesse in competition with predominantly Black Tennessee A & I State University. The case is still pending. The onus for producing a greater white presence at Tennessee State has been placed upon that institution, while the court has treated lightly and apologetically the small Black presence in the University of Tennessee system. The injunction was not granted, and the Nashville Center is moving rapidly toward completion.

THESE CASES MAKE TWO points about the application of the law to Blacks. The first point is that the rules of the game are changed when Blacks master and stand to benefit from them. The second point is that even if the rules are not changed, they are applied in a detrimental way to Blacks.[58] Moreover, Black schools are burdened by the consequences of neglect due to past segregation and are being undermined by present efforts to integrate.

In *Hunnicutt v. Burge*[59], the court castigated predominantly Black Fort Valley State College for its inferior academic program and low standards for graduation. The court stated these as the reasons for such a small white presence. However, like Tennessee State, over 25 percent of its faculty was white while barely 2 percent of the faculties of predominantly white schools in the state were Black. Furthermore, the court complained that the white faculty hired were given unimportant committee assignments so that they were not in a position to even attempt to change Fort Valley. The implication was that white faculty members have peculiar talents for improving educational programs.

The court insisted that Fort Valley eliminate its racial character in the name of *Brown* and that this required not only improving its academic program, but also raising its admission standards. However, the court acknowledged that most of its Black students came from low socio-economic backgrounds and generally have been underprepared for college. The court inferred from all these facts that Fort Valley's educational programs were designed explicitly for Blacks and not to attract whites. The court ordered the Board of Regents to formulate and present written plans to the court that would reverse and change the educational program of Fort Valley so as to eliminate its appeal for only Black students. The court wrote of Fort Valley's students, academic program and graduates in such disparaging terms that it will be a marvel if it even continues to attract Blacks in significant numbers.[60] One wonders whether in the name of *Brown*, any Black institution can survive when it is characterized in such sweepingly derogatory terms as was Fort Valley.[61]

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57. 337 F. Supp. 573 (M.D. Tenn. 1972), formerly *Sanders v. Ellington*, 289 F. Supp. 937 (M.D. Tenn. 1968).
58. But See *Norris v. State Council of Higher Educ.*, 327 F. Supp. 1368 (E.D. Va. 1971) enjoining escalation of two-year predominantly white Richard Bland College into four-year college because it would have been in competition with predominantly Black Virginia State College (both near Petersburg, Virginia). Nevertheless, the court did not support plaintiff's contention that Bland College should be merged into Virginia State College.
59. 356 F. Supp. 1227 (M.D. Ga. 1973).
60. Enrollment at the school dropped to 1,835 in the fall of 1973 from 2,373 in the fall of 1971. The decision was rendered in March of 1973 and probably contributed to this decline in enrollment.
61. Symbolic of Fort Valley's past neglect is its absence of campus outdoor lighting, parking areas, and sidewalks. THE ATLANTA JOURNAL, March 27, 1974, at 3-E.

Since Georgia has submitted to H.E.W. a statewide desegregation plan in connection with *Adams v. Richardson*, a discussion of that case and of the implementation of Title VI of the 1964 Civil Rights Act is in order.

2) *Adams v. Richardson* and Title VI of the 1964 Civil Rights Act

PRIVATE CIVIL RIGHTS lawyers, primarily in the South, with assistance from the NAACP Legal Defense Fund, methodically enforced the 1954 *Brown* decision until 1964. However, the Civil Rights Act of 1964 reposed responsibility in the federal government to effectuate school desegregation. Title IV permitted the Justice Department to file suits in federal courts upon behalf of parents claiming discrimination in local schools. The Department of Health, Education, and Welfare was also authorized to give technical assistance to desegregating school systems when requested by local school officials. Title IX authorized the intervention of the Justice Department in school desegregation suits on the behalf of aggrieved plaintiffs. And Title VI prohibited the use of federal funds in any program or operation which discriminated on the basis of national origin, color or race. The proper enforcement of Title VI was a major issue in the *Adams* case.[62]

Beginning in the 1966-67 school year, H.E.W. issued a series of guidelines under Title VI. They required the submission of voluntary desegregation plans as a condition precedent for receiving federal funding. In 1968, the Department requested submission of complete or terminal plans to totally eliminate the dual system by September of 1969, or in some unique circumstances, by September of 1970. A big issue in *Adams* was the use or non-use of the administrative enforcement process which could result in the termination of funds.[63] The Nixon Administration's half-hearted enforcement of Title VI[64] precipitated the *Adams v. Richardson* litigation. An action was brought against the Secretary of Health, Education, and Welfare and the Director of H.E.W.'s Office of Civil Rights (OCR) to secure declaratory and injunctive relief. The plaintiffs alleged that defendants had been derelict in their duty to enforce Title VI because they had not taken appropriate action to end segregation in institutions receiving federal funds. The district court found defendants' performance to fall below that required of them under Title VI and ordered seven courses of action, one of which was to institute compliance procedures against ten state operated systems of higher education.[65] The United States Court of Appeals on June 12, 1973 held that the terms of the statutory provisions in question were not so broad as to preclude review, that enforcement must follow within a reasonable time, and that more time was required with respect to systems of higher education than was provided by the district court. According to the district court order, proceedings for the termination of federal funds were to be in-

62. *Adams v. Richardson, supra* note 6.
63. "Under the administration of President Nixon the desegregation situation changed dramatically. During its first year in office the Republican administration hesitantly followed the earlier pattern. While student desegregation took a large statistical jump by 1970, the increase was largely the result of the Legal Defense Fund's success in several big-city school desegregation suits and of earlier plans enforced by H.E.W. By 1972, Title VI enforcement was nearly dormant, the Justice Department had ceased filing desegregation suits on behalf of minority students, and almost no technical assistance to local school systems was forthcoming from H.E.W. . . . [Siding, with the opponents of busing, the Nixon Administration shifted responsibility for desegregation from the Executive branch (i.e., H.E.W. jurisdiction) to the neutral courts]. This shift allowed the Executive branch to lead the attack against busing and court requirements. By switching the focus to the courts, the administration could fix responsibility for controlling the courts in school desegregation cases on the Democratic Congress."
Shalala and Kelly, *supra* note 41, 225-26.
64. *Id.*
65. The ten states were Arkansas, Florida, Georgia, Louisiana, Maryland, Mississippi, North Carolina, Oklahoma, Pennsylvania and Virginia.
The other six courses of action were to commence enforcement proceedings against seventy-four secondary and primary school districts found either to have reneged on previously approved desegregation plans or to have otherwise not been in compliance with Title VI; to commence enforcement proceedings against forty-two districts previously deemed by H.E.W. to be in presumptive violation of the Supreme Court's ruling in *Swann*; to demand of eighty-five other secondary and primary districts an explanation of racial disproportion in apparent violation of *Swann*, to implement an enforcement program to secure Title VI compliance with respect to vocational and special schools; to monitor all school districts under court desegregation orders to the extent that H.E.W. resources permit; and to make periodic reports to plaintiffs on their activities in each of the above areas.

itiated within 120 days. The court recognized that desegregation problems in colleges and universities differ from those in elementary and secondary schools. H.E.W. had not formulated desegregation guidelines for statewide systems of higher education. The court recognized that minority students had special problems and that predominantly Black institutions fulfilled a crucial need and would continue to play an important role in higher education. State-wide desegregation plans were to be submitted by the states within 120 days, and if an acceptable plan had not been arrived at within an additional period of 180 days, H.E.W. would then initiate compliance proceedings.

H.E.W. has received plans from every state involved in the suit except Louisiana. It has postponed its determination on the state plans until June 21, 1974. What is disturbing about the court's decision is the implication that most predominantly Black higher educational institutions are *ipso facto* segregated. However, the responsibility of H.E.W. to formulate guidelines permits leeway for practicality and for the preservation and improvement of predominantly Black institutions. Any guidelines which result from this process should take into account the accomplishments and functions of these institutions.

The Office of Civil Rights (OCR) has taken into account the Court of Appeals' recognition of the special problems of minority students and Black colleges. In a letter from OCR to the Florida Department of Education, there is hope that Black colleges will not be made "necessary sacrifices."[66] Selected points made in Director Holmes' letter evidence serious concern not only for Black students, but also for Black institutions. If this serious concern is effectively implemented, Black colleges may be neither victims nor sacrifices to *Brown, Green* and *Swann*. The importance of them not being sacrificed or victimized is underscored by present assaults upon special admission and affirmative action programs, the other half of the pincer movement.

IV. *Preferential Admission and Affirmative Action Programs*

> Technical skill in the post-industrial society is what economists call "human capital" . . . Thus the university, which once merely reflected the status system of the society, has now become the arbiter of class position. As the gatekeeper, it has gained a quasi-monopoly in determining the future stratification of the society. — Daniel Bell[67]

ANY POLICIES OR PRACTICES which diminish the access of Blacks to higher educational institutions consigns them permanently to a lower status in our society. Just as the Supreme Court in *Alexander, Green,* and *Swann* insisted upon workable plans and programs, the increased access of Blacks to white institutions necessarily requires special admission programs because of past deprivation, neglect and oppression. Although this may sometimes result in the mismatching of students with institutions as Sowell has suggested,[68] the affirmative duty to dismantle

66. Letters from Peter E. Holmes, Director of Office of Civil Rights Department of Health, Education, and Welfare, to Dr. Robert B. Mautz, Chancellor of Florida Board of Regents, Florida Department of Education, November 10, 1973. The OCR found deficiencies in Florida's "A Plan for Equalizing Educational Opportunity in the State University System . . .". The plan lacked specificity, particularly in not indicating when and how many resources would be provided for predominantly Black Florida Agricultural and Mechanical University. By way of guidelines and objectives, Director Holmes wrote that the plan must not place greater burdens on Black, as compared to white students, faculty and staff in any aspect of the educational process. The closing of FAMU in connection with desegregation would raise a presumption that greater burdens were being placed upon Black students and faculty in the state. He also urged significant Black participation in the formulation and development of a statewide plan. In addition, the academic roles of institutions should be differentiated in order to insure increased enrollment at each university by members of the race traditionally in the minority at universities. His letter also argued that curriculum at FAMU must be made more attractive to whites, and the placing or realizing of curricula at particular institutions should be done in a way to enable the institutions to compete aggressively for students of race not traditionally identified with those institutions. Director Holmes also urged core courses in more traditional disciplines be retained at all locations; the elimination of dual systems of higher education should not result in a reduction of the percentage of Black students enrolled throughout the System; the state must coordinate efforts with FAMU and predominantly white institutions in order to obtain positive participation of secondary school personnel; and the state plan should examine why a disproportionate number of Black students are graduating from junior or community colleges.
67. Bell, *supra* note 7, at 31.
68. Sowell, *supra* note 23, at 179.

dual education systems, whether *de jure* or *de facto*[69], requires special recruitment and admission of Blacks.

A. Preferential Admissions

IN *Defunis v. Odegaard*,[70] the Washington Supreme Court explicitly acknowledged the constitutional propriety of taking race into consideration in the admissions process. The court found that the gross underrepresentation of Blacks in the legal profession, and the great societal need to correct this imbalance, was a compelling state interest which justified giving special consideration to underprivileged minority groups.

Professor O'Neil sees preferential admission as the only reasonable alternative for dismantling a dual system of higher education.[71] Once the *de facto-de jure* distinction is collapsed, O'Neil's argument carries much weight. Yet, one might raise the question — why does this paper maintain that the affirmative duty to dismantle dual higher educational systems in the South does not require a great influx of white students into Black schools, while it does require a significant influx of Black students into white schools? The short answer is that both contentions serve the interests, needs, and rights of Blacks which are at the heart of the equal protection clause.

The lower LSAT score and PFYA's of some minority students admitted in preference to Defunis raise serious legal problems only if admission test scores are taken as sacrosanct. Although they do have some validity for what they attempt to measure, even a severe critic of special minority admission programs such as Sowell recognizes that "standardized tests tend to underestimate ability among blacks but to overestimate performance."[72] At first, this statement may be small consolation to Blacks and to admission officers. However, if the underestimation of ability is emphasized, then the overestimation of performance is a verification of the unreliability of standardized tests when applied to a deprived and oppressed minority. In another insightful article, Sowell dramatically suggests that psychological environment may be a major factor in the performance of Blacks on tests.[73] Sowell reports that Jensen's own research on low-scoring children showed that their test scores rose from eight to ten points "after allowing them several days to become acquainted with him in a play situation, without actually teaching them anything."[74]

This validates a contention this writer has long maintained as the reason for the low performance of Blacks throughout the educational system, including law schools and bar examinations.[75] Effective teaching and instruction first requires that instructors and institutions have a genuine respect for and belief in the dignity and integrity of students. Secondly, they must have a strong conviction and commitment to the proposition that practically all students are educable and have the capacity to learn. Thirdly, instructors must have an infectious enthusiasm for and commitment to learning. Fourthly, instructors must have a high level of competence and expertise in the subject taught. The first three considerations are highly psycho-social and give rise to a special problem of Black performance on bar and other certifying examinations.

Many Blacks suffer from a factually based, but self-defeating paranoia.[76] This paranoia compounds the Pygmalion effect. Whether instructors or examiners have low expectations of Blacks, which Blacks may internalize,

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69. *See Keyes v. School District No. 1*, 413 U.S. 189 (1973). (The *de jure* and de facto distinction has outlived its usefulness, Powell, J. concurring).
70. *See* note 5 *supra*.
71. R. O'Neil, *Preferential Admissions: Equalizing the Access of Minority Groups to Higher Education*, 80 Yale L. J. 699 (1971); *But see*, C. Summers, Preferential Admissions: An *Unreal Solution*, 70 U. Toledo L. Rev. 377 (1970).
72. Sowell, *supra* note 23, at 183.
73. Sowell, *Arthur Jensen and His Critics: The Great I.Q. Controversy, Change*, May 1973, at 33.
74. *Id.* at 34.
75. *See Richardson v. South Carolina State Bd. of Law Examiners*, Civil No. 72-1219 (D.S.C., filed Oct. 18, 1973). Four Black law school graduates unsucessfully claimed that the practice of bar examiners in South Carolina was unconstitutional and discriminatory. However, the court left open the due process issue of whether candidates had a right to review their examination papers until the Supreme Court of South Carolina ruled on the issue.
76. Quoted in Tollett, *supra* note 33, at 368.

Blacks frequently presume and perceive hostility in many individuals, institutions, and activities which hold power over their destiny. Thus they frequently face courses, instructors, and tests with subliminal self-doubt and defeatism. Although Black instructors, Black institutions, and Black studies do not completely eliminate these problems, they do have the potential of substantially alleviating them. This discussion then leads to a brief look at affirmative action programs in higher education.

B. Affirmative Action

MANY OF THE ARGUMENTS in favor of preferential admissions apply to affirmative action programs. Groups which have been invidiously excluded from employment in institutions funded by the federal government are entitled to affirmative action to correct or compensate for this past exclusion. Blacks, Chicanos, Indians and women have been discriminated against in their employment in higher educational institutions. The special propriety of vigorously pursuing affirmative action in higher education has been stated in the following terms:

> Whereas all humankind are learning beings, none should be denied access to, or participation in the learning enterprise because of race, color, religion, sex or national origin. Open admissions, universal access programs, and affirmative action programs foster social justice and support learning.[77]

If the psycho-social contentions of this paper are sound, then all higher educational institutions should have a significant presence of faculty and staff with whom the student can readily emulate and identify. Raising the issue of quotas is a diversionary tactic. Past neglect and exclusion can only be corrected by aggressive, affirmative, compensatory action. There are some standards and qualification problems, but they are not insurmountable. There are various criteria for determining competence; the Ph.D. degree and publications are only two among many. Policies and standards which disproportionately affect Blacks adversely are presumptively suspect. Black talent and competence are available. If affirmative action is not pursued now, Blacks will increasingly lose (instead of gain) ground in higher education. If the pincer movement is permitted to continue, affirmative action will be seriously undermined.

V. *Conclusion*

HIGHER EDUCATION IS ONE of the central institutions in America. It is a major avenue for upward social mobility, to say nothing of the development of human potential and self-realization. Blacks must pursue this avenue in increasing numbers. Black institutions of higher learning have been one of the major means of reaching this position of mobility. To sacrifice this avenue in the name of integrated locomotion is to push to the wayside thousands of Blacks who could benefit from the experience. Some Blacks can travel better through thoroughfares where the majority of travellers are Black. This does not require the exclusion of white travellers. For some destinations Blacks travel better where the majority of travellers are white. Indeed, some white thoroughfares are so important that Black and other minority groups should be given both open and preferential access to them. The pluralism and complexity of the American mobility system demand the preservation and the improvement of predominantly Black avenues to education. Surely, they should not be victimized and sacrificed at the same time "conservative chic" "experts" are claiming Blacks are inherently handicapped for travelling down the white avenue of education. The pincer movement is moving rapidly to close the educational options open to Blacks. If it is successful, the consequences for Black people will be disastrous.

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77. Tollett, "The Faculty and the Government," American Council on Education, 56th Annual Meeting, Oct. 11, 1973, at 20.