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I. Introduction

Of the many paradoxes of Black experience[1] 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[2] high pointing in *Sweatt v. Painter*,[3] and the full operational implementation of those decisions in elementary and secondary school cases beginning with the landmark *Brown*[4] decision and culminating, thus far, in *Swann v. Board of Education*.[5] Conceivably the paradox could be compounded by the egalitarian decisions in the areas of voting qualifications,[6] poverty and criminal process,[7] and illegitimate offspring[8] decisions, were not the latter three categories of cases especially beneficial to Blacks because of their high incidence of disfranchisement, poverty and criminal process involvement, and atypical families. The *Green*[9] doctrine, which commanded the affirmative duty of the states to disestablish a dual system of racially identifiable public education, 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.

This article will argue that a sound and honest analysis of the equal protection doctrine does not require the application of the *Green* doctrine to predominantly Black public education. Moreover, if it were so applied the *Green* doctrine could strike a grievous blow to fair educational opportunity for Blacks and the realization of their self-fulfillment in an emergingly meritocratic society. This argument requires a brief historical sketch of how the law has regarded Blacks and what contributions predominantly Black higher educational institutions have made to the Black community. It will end with a discriminating

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1 Tollett, *Commentary*, in BETWEEN TWO WORLDS: A PROFILE OF NEGRO HIGHER EDUCATION 251 (F. Bowles and F. A. DeCosta eds. 1971).

2 McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950); Sipuel v. University of Oklahoma, 332 U.S. 631 (1948); Missouri ex rel. Gaines v. Canada, 305 U.S. 337 (1938).

3 339 U.S. 629 (1950).

4 Brown v. Board of Education, 347 U.S. 483 (1954).

5 402 U.S. 1 (1971).

6 Cipriano v. City of Houma, 395 U.S. 701 (1969) (holding unconstitutional a Louisiana law which granted only property taxpayers the right to vote in elections called to approve issuance of revenue bonds by a municipal utility); Kramer v. Union School District, 395 U.S. 621 (1969) (holding that New York could not exclude otherwise qualified voters from limited purpose elections unless the exclusion was necessary for promoting a compelling state interest); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (holding poll tax unconstitutional because it made affluence of voter or payment of a fee an electoral standard).

7 Griffin v. Illinois, 351 U.S. 12 (1956); Douglas v. California, 372 U.S. 353 (1963); Tate v. Short, 401 U.S. 395 (1971); Boddie v. Connecticut, 401 U.S. 371 (1971); Gideon v. Wainwright, 372 U.S. 335 (1963); Argersinger v. Hamlin, 40 U.S.L.W. 4679 (U.S. June 12, 1972).

8 Levy v. Louisiana, 391 U.S. 68 (1968).

9 Green v. County School Board, 391 U.S. 430 (1968).

and, perhaps, somewhat philosophical analysis of how constitutional and legal principles should be utilized for Blacks in the decision-making process.

II. How the Law Has Been Applied to Blacks

A discussion of a sound and discriminating application of the equal protection doctrine to predominantly Black higher educational institutions cannot begin properly without giving some historical background about how the law has been applied to Blacks. Legal decision-making inevitably involves choosing between values, wants, and preferences, which are substantially conditioned by experience and practice.[10] 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 unprotected Blacks; formal declarations of legal rights by the Nation; and official or governmental neglect, frustration, and violation of formal legal rights. This neglect, frustration and violation of rights are characterized, as was slavery, by racism or violence, or both.

Notwithstanding the Declaration of Independence proclaimed, "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness," paragraph 3 of section 2, article I of the Constitution regarded Blacks as three-fifths persons. Furthermore, section 9 of article I sanctioned the institution of slavery:

> The Migration or Importation of such persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

Slavery was an abominable institution, therefore, it was not surprising that it treated Blacks abominably. Despite the grand rhetoric of the Declaration of Independence and the Preamble to the United States Constitution, Blacks and slaves were regarded as fractional persons in the United States Constitution. Their legal status in various states of the Confederacy was that of chattels. They were considered, like mules, beasts of burden. Thus, it is not surprising that Chief Justice Taney said of them in 1857, in the infamous *Dred Scott* decision,[11] that they had no rights, privileges and immunities which the government or white men need acknowledge or enforce. Many acknowledge that this United States Supreme Court ratification and reaffirmation of an unjust *status quo* precipitated the Civil War.

The *Dred Scott* Court opined that surely the Declaration of Independence did not include or embrace Blacks when it said "all men are created equal." Mr. Chief Justice Taney noted:

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10 Tollett, *The Legalization of Social Ordering*, in VALIDATION OF NEW FORMS OF SOCIAL ORGANIZATION 123 (Dorsey and Shuman eds. 1968).

11 Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

> But it is too clear for dispute, that the enslaved African race were not intended to be included, and formed no part of the people who framed and adopted this Declaration: for if the language, as understood in that day, would embrace them, the conduct of the distinguished men who framed the Declaration of Independence would have been utterly and flagrantly inconsistent with the principles they asserted; and instead of the sympathy of mankind, to which they so confidently appealed, they would have deserved and received universal rebuke and reprobation.[12]

This is how the law regarded Blacks before the Civil War. They were less than persons, not even embraced by the human family, "a subordinate and inferior class of beings." This attitude should not be restricted to the pre-Civil War era, however, for Blacks are still discriminated against and exploited by millions of people in this country today. Indeed, from a study of the judiciary's application of the law to Blacks and the present struggle of Blacks for equal opportunity and justice, it is obvious that many people still refuse to acknowledge Blacks as full human beings. A learned white lawyer of the Georgia Bar has even suggested that the language quoted from the Declaration of Independence was a "gross fraud" and a "glaring imposition." He said that Jefferson, as did Lincoln in his Gettysburg Address, "needed a phrase that would arrest the imagination and stir emotion." He further pointed out that all men are no more created equal than are "all dogs or all race horses."[13] The distinguished lawyer has a point, but note he has reduced humankind to dogs and horses in order to make it.

Next to under-protection and non-protection by the laws which were rationalized and complemented by racism, slavery was most characterized by violence.[14] Although racial, economic and ethnic violence has dominated much of American history, no pattern of violence has been more sustained, brutal and savage as the suppression of Blacks by whites. However, the violence and suppression perpetrated against Blacks to preserve the institution of slavery brought on the retribution of a violent bloody struggle between the North and South. As one noted author has said, "Violence was a basic device used to change or preserve the system."[15] Of course, the rationalization for the violent suppression and the legal deprivation of Blacks was racism. Racism and violence, which irrationally denigrated human dignity, are the seemingly most indestructible heritages of slavery.

A. *Formal Declaration of Legal Rights*

The fratricidal Civil War ended the institution of slavery. The thirteenth amendment, ratified in 1865, reaffirmed the Emancipation Proclamation and constitutionally freed the slaves. The fourteenth amendment, ratified in 1868, granted Blacks or all persons born or naturalized in the United States citizenship. Also, it specially provided for the protection of freedmen by prohibiting the

12 *Id.* at 410.
13 R. Carter Pittman, *Equality vs. Liberty: The Eternal Conflict.*
14 Wallace, *The Uses of Violence in American History,* 40 The American Scholar 81, 82 ff.
15 *Id.* at 82.

abridgement of the privileges or immunities of citizens and the denial to any person of the equal protection of the laws within a state. The fifteenth amendment, ratified in 1870, prohibited the denial or abridgement of the rights of citizens to vote on account of race, color, or previous condition of servitude. Several civil rights acts were enacted by Congress to enforce these constitutional amendments.

For example, the Civil Rights Act of 1866 extended to Blacks the right to make contracts, to hold and enjoy property, to serve as witnesses, and to enjoy equal benefits of all laws. Violation of any of these provisions resulted in the commission of a crime. The Enforcement Act of 1870, amended in 1871, provided civil and criminal remedies for Blacks against those who flouted or circumvented the fourteenth and fifteenth amendments. The mayhem instigated and perpetrated by the Ku Klux Klan resulted in the Anti-Ku Klux Klan Act of 1871, which included a provision empowering the President to order the militia or armed forces to deal with conspiracies which sought to deprive "any portion or class of the people" of their rights. The Civil Rights Act of 1875 forbade discrimination on the basis of race or color in "inns, public conveyance on land or water, theaters and other places of amusement." These formal declarations of law, if properly enforced according to their spirit and meaning, would have placed the status of legal justice high, not only in the South, but in the entire country. That was not the case, however.

Approximately eighty-two years subsequent to the 1875 Civil Rights Act, a partial rededication to effective declarations of legal rights for Blacks was begun via the Civil Rights Act of 1957, which established the Civil Rights Commission and elevated the Department of Justice's Civil Rights Section to the status of a full Division. This Act also authorized the Attorney General to seek injunctive relief against "any person" where racial discrimination denied or threatened Blacks' right to vote. The 1957 Act, however, was not satisfactory, so Congress enacted the Civil Rights Act of 1960, which also sought to protect voting rights by requiring the preservation of voting records for twenty-two months and authorized the inspection of those records by the Attorney General. However, meaningful enforcement of voting rights, with an attendant expansion of the franchise for Blacks, did not arrive until the 1965 Voting Rights Act. Effective declaration and implementation of rights against discrimination in public accommodations and several other areas did not spawn until the 1964 Civil Rights Act.

B. *Neglect, Frustration and Violation of Formal Legal Rights*

As early as 1871 the United States Supreme Court began to frustrate the enforcement of formally declared rights. By ingenious and sophisticated reasoning the Supreme Court, in *Bylew v. United States*,[16] held that the 1866 Civil Rights Act did not grant federal courts jurisdiction to try two whites from Kentucky who had savagely mutilated and killed a Black couple, the 90-year-old blind mother of the wife, and their 17-year-old son. At that time Kentucky law did not permit

16 80 (13 Wall.) 581 (1871).

Blacks to testify against whites. The 1866 Civil Rights Act was designed to provide a federal tribunal for "all cases, civil and criminal, affecting persons who are denied or cannot enforce" those rights secured in the Act in local tribunals. The Court declared that since all of the victims of the brutal crime had died, there was no cause of action affecting persons who had been denied enforcement of any rights. Later, in the *Civil Rights Cases*,[17] the Court held the public accommodation provisions of the 1875 Civil Rights Act unconstitutional because the Act prohibited private discrimination. The Court reasoned that the fourteenth amendment protected persons only against state action or discrimination. This second major judicial frustration of formally declared rights for Blacks took place in 1883, barely a half dozen years after the Hayes-Tilden agreement in which the Republican Party turned its back upon freedmen.

However, the full neglect, frustration, and violation of the legal rights of Blacks were not sanctioned until 1896 when the Court announced the fateful separate-but-equal doctrine of *Plessy v. Ferguson*.[18] Justice Harlan stated, in his prophetic dissent, ". . . the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the *Dred Scott Case* . . . ." He further added, "the thin disguise of 'equal' accommodations for passengers in railroad coaches will not mislead anyone nor atone for the wrong this day done." This decision finally and formally sanctioned and unleashed the South in its remorseless repression and suppression of the dignity of Blacks. Disenfranchisement and Jim Crow laws spread like wildfire and extinguished most of the legal rights the Civil War amendments and Civil Rights Acts were designed to nurture and protect.

From the 1890's through the middle 1930's there was a brutal subjugation and mistreatment of Blacks. No doubt much of the South's demagoguery regarding the Warren Court decisions stemmed from its feeling that, perhaps, it had lost a former ally in its assault upon the dignity of Blacks. A quotation from a lecture given at Louisiana State University by a white southern scholar, who summarized the constitutional decisions during the afore-discussed period is very apposite:

> Although the South had lost the war, it had conquered constitutional law. Regardless of any subsequent developments in constitutional interpretation, the Court had emerged as an ally of the South in a most critical period of its existence as a conscious sectional minority. In turn, it was inevitable that what the South did with this constitutional victory, and how the southern states used the powers taken from them by constitutional amendment and restored to them by judicial decision, would inexorably influence the future course of judicial interpretation. It is melancholy to record that the southern states, instead of using their newly restored powers over race relations to bring about a gradual improvement of the legal, political, and economic status of Negroes used them in a discriminatory and oppressive manner, with a view of keeping the colored race in a low service and cringing status, under the leadership of irresponsible office seekers who fanned the flames of racial hatred and rode into office on the back of the Negro.[19]

17 109 U.S. 3 (1883).
18 163 U.S. 537 (1896)
19 HARRIS, THE QUEST FOR EQUALITY: THE CONSTITUTION, CONGRESS AND THE SUPREME COURT 108 (1960).

Contemporarily, crimes committed by Blacks are prosecuted more often than those committed by whites, whereas crimes committed against Blacks or their friends go unreported, undetected, or unprosecuted. When Blacks and whites are prosecuted, Blacks are more often convicted. When both are convicted, Blacks are both more often jailed and jailed for longer periods than whites.[20]

The United States Commission on Civil Rights in October of 1970 said:

> The Commission has examined Federal Civil Rights enforcement effort and found it wanting . . . . [The] failure [of the federal government] to implement court decrees, executive orders, and legislation . . . *weakens* the *fabric* of the *nation* . . . . Those who look to the law as an impartial arbiter of right and wrong and find that some laws are implemented while others are not, despair of the fairness of the system.

Further evidence of the denial of legal rights of Blacks is what can arguably be called the failure of government to fully implement the *Brown* decision. Critics of busing have won the support of powerful government officials. The anti-busing advocates have called for "legislation that would call an immediate halt to all new busing orders by federal courts."[21] Congress added to the Higher Education Amendments of 1972 a rider which bans until appeals have been completed or until January 1, 1974, court-ordered busing or transfer of students to achieve racial balance. However, the *Swann* case makes crystal clear that the implementation of the *Brown* requirement of a unitary system may necessitate busing.

Opposition to busing is almost entirely racially motivated. Neil Maxwell in the March 20, 1972, *Wall Street Journal* reports that "it seems clear the feeling against busing is purely racial." The January 17, 1972, *Washington Post* reports a white mother's opposition to busing in these terms: "Mrs. H. says distance isn't the issue: 'It's the niggers.' " Senator Walter F. Mondale wrote in the March 4, 1972, *The New Republic,* "Forty percent of our school children—65 percent when those riding public transportation are included—ride to school every day for reasons that have nothing at all to do with school desegregation."

A discussion of anti-busing naturally leads to a consideration of predominantly Black higher educational institutions, for if the charge can be made that anti-busing is racially motivated, then why cannot the same charge be made against those who urge the preservation and strengthening of predominantly Black higher educational institutions? A brief review of Black public higher education will show that, although its preservation and strengthening are certainly partially racially motivated, they are not racist in motivation and furthermore are not inconsistent with the sound implementation of *Brown*.

III. Black Public Higher Education

> . . . One ever feels his two-ness—an American, a Negro; two souls, two thoughts, two unreconciled strivings; two warring ideals in one dark body . . . . The history of the American Negro is the history of this strife,—

20 Wright, *Poverty, Minorities and Respect for Law,* 1970 DUKE L.J. 425, 434-37; Tollett, *Southern Justice for Blacks,* EBONY, October 1971, at 58.

21 Washington Post, Mar. 17, 1972, at A8.

> this longing to attain self-conscious manhood, to merge his double self into a better and truer self. He would not Africanize America, for America has too much to teach the world and Africa. He would not bleach his soul in a flood of white Americanism, for he knows that Negro blood has a message for the world. He simply wishes to make it possible for a man to be both a Negro and an American, without being cursed and spit upon by his fellows, without having the door of opportunity closed roughly in his face.[22]

It is mistakenly thought that Black higher education first started with Lincoln University in Pennsylvania (1854) and Wilberforce University in Ohio (1856). However, as early as 1817 higher educational institutions were established for Blacks.[23] Interestingly enough, the first higher educational institution for Blacks which still survives today is a state institution, Cheyney State College.[24] There were earlier, and later, abortive efforts, abortive because of the racist opposition of the communities in which they were established or attempted.

Two basic groups with different philosophies concerning the future of Blacks in America initiated efforts to start institutions for the education of Blacks. One group, largely represented by the American Colonization Society, wanted to prepare Blacks usefully for emigration to Africa. They represented an early species of Black Nationalism or separatism which Theodore Draper calls "migrationism" or "emigrationism."[25] The second group, largely represented by abolitionists and members of the Conventions of the Free People of Color, "argued for the establishment of higher institutions for Negroes to prepare them for greater service within the American social order."[26] It is the identification of Black Nationalist separatism with the desire of many Blacks to preserve and strengthen predominantly Black institutions which causes some to believe the preservation of predominantly black institutions is incompatible with the *Brown* decision and its progeny, *Swann*. Thus, more should be written about Black Nationalism, particularly about the defense of Black higher education as a permutation of it.

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. It was argued that the overwhelming majority of Blacks who have graduated from college graduated from Black institutions. For example, the Carnegie Commission reported, "In 1947 . . . between 80 and 90 percent of

22 W. Du Bois, The Souls of Black Folks (1903).

23 Bowles and DeCosta, Between Two Worlds: A Profile of Negro Higher Education 21 (1971).

24 Richard Humphreys, a Philadelphia Quaker, in 1832 "bequeathed $10,000 to a board of trustees for the education of descendants of the African race." *Id.* at 23-24. Implementation of this bequest was not begun until 1839. The school was incorporated in 1842 when it received additional small contributions. Between 1850 and 1852 it became the Institute for Colored Youth. In 1902 it was reorganized and moved to Cheyney, Pennsylvania.

> Since its removal to Cheyney, it has gone through the following stages: the Cheyney Training School for Teachers (1914); Cheyney State Normal School (1920); a degree-granting state college (1932); Cheyney State Teachers College (1951); and Cheyney State College (1959) . . . *Id.* at 24.

25 Draper, *The Fantasy of Black Nationalism*, 48 Commentary 27 (September, 1969). Emigrationism and another species of Black Nationalism called "internal statism" discussed in the *Commentary* article are more fully developed in Draper, The Rediscovery of Black Nationalism (1970).

26 Bowles and DeCosta, *supra* note 23, at 21.

all Negroes who had graduated from college had received their education in Black Institutions in Southern states."[27] However, 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.[28] Although Black enrollment figures are a statistical quagmire,[29] there is some basis for thinking that predominantly Black institutions' share in overall Black enrollment is even lower today.[30] Nevertheless, most informed observers believe predominantly Black institutions are producing about two-thirds of the undergraduate degrees received by Blacks, and few informed observers would deny that about two-thirds of the Black enrollment in predominantly Black institutions is now in public Black institutions.[31] Although a strong "body-count" argument still can be presented on behalf of Black institutions in the light of the higher attrition rate of Blacks in predominantly white institutions and Blacks' emerging concentration in non-degree programs in community colleges, the most serious reason for the use of such a standard is its seeming justification based upon Black Nationalist separatism or some variation of it.[32]

Although Theodore Draper's contention is sound that much of the nationalism of Martin R. Delany, one of the first back-to-Africa pre-Civil War Black leaders, "was based more on unrequited love, on rejection by the whites, than on a self-sustaining, independent need for national existence," he is probably in error when he associates Black Nationalism with the governmental control of land and traditional nationhood. While the rhetoric of Marcus Garvey, Malcolm X, and the Nation of Islam may support *external emigrationism* or *internal statism,* nevertheless nationalism may be cultural, economic, religious, and political. What August Meier and Elliott Rudwick say of Black Power can also be said of Black Nationalism, "[It] first articulated a mood rather than a program—disillusionment and alienation from white America, race pride, and self-respect, or 'black consciousness.' "[33] As this author has written elsewhere:

> Programmatically it [Black Power] means political power and independent action; economic institutions, enterprises, and turf owned, controlled, and run by blacks; educational institutions—elementary, secondary, and higher—controlled and run by blacks; and cultural self-appreciation and self-definition.[34]

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27 THE CARNEGIE COMMISSION ON HIGHER EDUCATION, FROM ISOLATION TO MAINSTREAM: PROBLEMS OF THE COLLEGES FOUNDED FOR NEGROES (1971) [hereinafter cited as Carnegie Commission].

28 *Id.* at 14.

29 *Id.; see also* Tollett, *supra* note 1, at 257.

30 *But cf.* Blake, *Post-Secondary Education, Higher Education for Black Americans: Issues in Achieving More Than Just Equal Opportunity,* in NATIONAL POLICY CONFERENCE ON EDUCATION FOR BLACKS PROCEEDINGS 118 (1972).

31 Public Black institutions enrolled about 58 percent of students in four-year Black institutions in 1969. Carnegie Commission, *supra* note 27, at Appendix Tables 1 and 2 at 70-79.

32 Reverting to our original theme of irony and paradox, I am of the opinion that the most important justification for continuing historically black higher educational institutions is psychocultural.
Tollett, *supra* note 1.

33 Meier and Rudwick, *Introduction,* BLACK PROTEST THOUGHT IN THE TWENTIETH CENTURY 1i (2d ed. A. Meier, E. Rudwick and F. L. Broderick 1971).

34 Tollett, *Stages of Black Protest,* 4 THE CENTER MAGAZINE 70, 73 (Nov./Dec. 1971).

To the extent Black nationalism connotes "emigrationism" or "internal statism," several Black students and a few teachers may subscribe to it, but hardly any Black educational leaders would subscribe to it, particularly those who run predominantly Black public higher educational institutions. The latter on the whole have a middle-class mentality which is predominantly assimilationist in outlook. Thus, nationalism may be too unhappy and ambiguous a metaphor for characterizing the dominant motives of those who seek to preserve and strengthen predominantly Black higher educational institutions.

The dominant motive of Blacks who would maintain Black institutions is not separatist either. Probably the most elemental drive or residual motive to maintain most predominantly Black higher educational institutions is institutional and bureaucratic inertia.[35] Most institutional organizations are instinctively committed to self-preservation or self-perpetuation, and Black organizations are no exception. However, their heritage of victimization, dependency and self-doubt causes them to engage internally in more than normal self-destructive strife and displaced aggression.

Yet, Blacks as a group prize education, including higher education, as much, if not more, than any other ethnic group in the United States.[36] This is evidenced by the survival to this day of 53 private Black higher educational institutions from among the hundreds of such institutions established since the Civil War. Segregationism initially necessitated their separate existence, but separatism never has been and is not now their major driving force.[37] Indeed, initially the majority of their faculty was white and most still have a substantial number of whites on their faculties and a few in their student bodies.

Predominantly Black higher educational institutions serve several functions in the Black community, particularly when they are primarily controlled and operated by Blacks. First, they provide creditable models for aspiring Black youth that not only can Blacks manage and operate important affairs, but also can succeed and achieve notwithstanding oppressed and disadvantaged backgrounds.

Second, for cultural and psycho-social reasons, they provide educational settings which many Blacks find congenial and prefer to attend. It is the genius of United States history that every underprivileged group which was on the ascent has had educational institutions with which the members of that group could comfortably, easily, and readily identify. Land grant universities responded to the needs of farmers and the frontier states in the last quarter of the nineteenth and in the first quarter of the twentieth centuries. Private Roman Catholic schools responded to the needs of the Irish and other Catholics; female colleges, private and public, responded to the needs of aspiring women; and New York City College and Brandeis fulfilled the special needs of the largest community of Jews in the United States.

35 *But see* Tollett, *supra* note 1, at 269 n.5. In speaking of private Black colleges it was said, "[M]ost of these schools will survive as much from nostalgic gratitude as from institutional and bureaucratic inertia."

36 Bowles and DeCosta, *supra* note 23, at 191-92.

37 *But see* Draper, *The Fantasy of Black Nationalism, supra* note 25, at 29. "Between white segregationism and black separatism, there has been always from the beginning a peculiar symbiosis."

Third, as special-group-oriented colleges they serve as educational enclaves in which their students can prepare for and make the necessary transition from underprivileged isolation to "mainstream." And fourth, they serve as insurance against a second post-Reconstruction substantive betrayal of formally declared pro-Black rights.[38]

Before turning to a discussion of the application of integration decisions to Black higher education, a few additional comments must be made about insurance and the substantive betrayal of formally declared pro-Black rights.[39] 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,[40] 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. What assurance is there, in the light of this already seemingly declining interest, that the more than 100,000 Blacks attending the 32 or 33 predominantly Black public higher educational institutions will find comparable educational opportunities elsewhere if these institutions are consolidated, merged, or eliminated?[41]

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38 Deep challenges and great opportunities confront these institutions. Although Black student enrollment in predominantly non-Black higher educational institutions has been increasing at a faster rate than in predominantly Black colleges, nevertheless some of these colleges, particularly the public ones, face the prospect of considerable expansion. Their 170,000-odd total enrollment in 1970-71 may rise to 300,000 by as early as 1980.

These colleges should move toward more comprehensive programs than their past primary emphasis upon teacher-education programs, although their teacher-education programs should be improved since they will continue to produce a significant number of elementary and secondary teachers. These colleges not only have an excellent opportunity for service, but also have an overriding obligation to serve their communities.

More comprehensive programs in these colleges will afford them special opportunities to record and analyze the Black experience in America and to cooperate with other higher educational institutions. Such programs will pose these institutions with special financial problems which will require special assistance from foundations, states, and the federal government. Like other higher educational institutions, these institutions must make more effective use of their resources. Carnegie Commission, *supra* note 27, at *passim.*

39 The Supreme Court's role in eviscerating the Reconstruction amendments and civil rights has already been touched upon. The discriminatory application of the criminal process has been briefly noted. The governmental alliance against the enforcement of the *Swann* case has also been treated.

40 The federal government's support is indeed recent. As few as six years ago Black public colleges received only .5 percent of federal funds allocated to all public colleges, Black private colleges received only .6 percent. Combined federal and state aid to white land-grant colleges, however, is more than nine times the aid to the 17 predominantly Black land-grant institutions, although white land-grant enrollment is only 5½ times Black land-grant enrollment. Per capita federal aid to predominantly Black land-grant institutions is $352.00 and to predominantly white land-grant institutions is $705.00. The comparable state aid figures are $1,013 to Blacks and $1,591 to whites.

41 Black lawyers have reported to me in Missouri that the growth of the Black bar remained practically static after the closing of the Black, Lincoln School of Law in Jefferson City, Missouri, in 1955. Incidentally, the majority of students attending Lincoln University now is white. A roughly similar experience has followed the closing of the South Carolina State School of Law in 1966 and of the Florida A & M School of Law in 1968. Although the University of Texas Law School initiated a special program for minority students in the closing sixties, the University of Texas Regents abolished the program. Only one or two Blacks were members of the over 500 entering fall class of the University of Texas Law School in 1971.

> Experience demonstrates that when existing Negro institutions are dismantled, many black students are unable to gain admission elsewhere. For example, Florida abolished its Negro junior colleges between 1962 and 1965, and although special

IV. Integration and Black Higher Education

It is a remarkable characteristic of the white mind that if one hundred or so Blacks attend a predominantly white higher educational institution of over 20,000, it is regarded as integrated, but if a score or so whites attend a predominantly Black higher educational institution of less than 5,000 it is regarded as segregated. Such thinking makes sense in many, but not all cases of elementary and secondary education; however, it is unrealistic and even simplistic in the context of higher education.

A. *Purpose of Equal Protection Clause*

It is now appropriate to turn to an analysis of the proper application of the *Brown v. Board of Education* decision. First, it must be observed that the decision is an interpretation and application of the fourteenth amendment equal protection clause. The relevant part of that clause provides:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; *nor deny to any person within its jurisdiction the equal protection of the laws.* (Italics added.)

1. Establish, Secure, and Protect Black Rights and Interests

Although there is much room for debating the soundness of the *Slaughter-House Cases*,[42] there is very little room for debating the following language of Mr. Justice Miller's majority opinion for the Court:

> 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 the 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.[43]

Indeed, he had earlier said:

> laws which imposed upon the colored race onerous disabilities and burdens, and curtailed their rights . . . to such an extent that their freedom was of little value . . . 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

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provision was made for black students in the new system, there has since been a drastic decline in the number of black students enrolled in the consolidated junior college system.

Note, *The Affirmative Duty to Integrate in Higher Education*, 79 YALE L. J. 666, 677-78 (1970).

42 83 U.S. (16 Wall) 36 (1873).

43 *Id.* at 81.

> of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him.[44]

Obviously, the above means that Congress, in implementing the Reconstruction amendments, and the Supreme Court, in interpreting and applying them, are required to establish, secure, and protect the freedom, rights, and interests of Blacks.[45]

In a well-deserved tribute to the Warren Court's effort to eradicate racism in the United States, Professor Black said, ". . . the Court has rejected fiction as a substitute for fact in its dealing with racism," and has rejected "the fiction of equality in the separate-but-equal formula."[46] Although the Court was correct in rejecting this fiction, that does not mean fictions are not a properly integral part of the law. Indeed, law as a conventional symbolization and generalization of normative imperatives is inescapably surfeited with fictions.[47] Even the concept of equality has a fictional or "as-if" quality about it.

The Stoics regarded men as equal by nature. The Christian Fathers connoted spiritual equality by the concept. Democratic theorists "meant the political and legal equality of all men, as distinguished from physical qualities, material wealth, and social position."[48] Yet, the separate-but-equal doctrine in application and in purpose and effect did not mean equality. It was a verbal subterfuge for rationalizing racism and the grossest forms of unequal treatment and anti-human oppression.[49] As an abstract principle it was not defective, however, in application; it neither established, secured, nor protected Black rights and interests. Thus, it resulted in a state-commanded wrong or injury to Blacks which *Brown* and its progeny are still trying to remedy.

This does not mean the doctrine should be revived in higher education. On the contrary, forced separation has been proven to be inherently unequal and

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44 *Id.* at 70-71.

45 Paradoxically, until 1937 the equal protection clause was used more to protect corporate, economic and property interests than to protect the rights and interests of Blacks. In a study by Robert J. Harris published in 1960 he reported:

> In the course of making this study 554 decisions of the Supreme Court in which the equal protection clause was invoked and passed upon have been examined. No claim is made that these completely exhaust the cases involving equal protection, but they account for most of them and include all into which discrimination entered because of race, nationality, or color. Of these, 426, or 76.9 percent, dealt with legislation affecting economic interests. In turn, 255 of these decisions dealt with regulation, and 171 with taxation. State laws allegedly imposing racial discrimination or acts of Congress designed to eliminate it were involved in 78 cases, or in only 14.2 percent of the total. Seven cases involved discrimination against women, nine were concerned with political discriminations by way of malapportionment of representation and the like, and one with religious discrimination against the Jehovah's Witnesses and their right to make nuisances of themselves in a public park. The remaining 33 had to do with miscellaneous statutes involving criminal procedure, laws applicable to cities on the basis of size, and matters equally unexciting. Harris, *supra* note 19, at 59.

46 Black, *The Unfinished Business of the Warren Court,* 46 WASH. L. REV. 3, 17 (1970).

47 "Fictions are not inherently bad. They aid our thought processes and are practically unavoidable. They are obstructive, and delusive when they become incantation." Tollett, *Verbalism, Law and Reality,* 37 U. DET. L. J. 226, 232 (1959).

48 Harris, *supra* note 19, at 4.

49 *"Plessy* announced the separate-but-equal doctrine. Under its operation there was hardly ever seen a pretense of equality of educational opportunity and facilities. Blacks were confined to used or worn-out schools, books, chairs, desks, test tubes, and, even in some instances, litmus paper for science courses." Tollett, *supra* note 1, at 253.

practically unworkable. One commentator has stated the proper formula for applying *Green* and *Brown* to higher education:

> In state systems of higher education once racially segregated by law, student admission policies must be free of racial discrimination; in addition the state has the duty to:
>
> (1) equalize per pupil expenditures on similar kinds of institutions insofar as such institutions are racially distinguishable;
>
> (2) make positive efforts to alter present segregated attendance patterns by influencing student choice of colleges and universities through recruiting techniques;
>
> (3) insure that the administrative staff and faculty of its institutions are desegregated;
>
> (4) utilize expansion of facilities and new construction to gradually integrate the dual system.[50]

This formula is necessary to secure and protect Blacks' interests in the rights to creditable models, psycho-socially congenial settings, special-group-oriented colleges, and an insurance against geographical, admission and recruitment obstructions to atypical[51] Blacks entering public higher educational institutions.

The Carnegie Commission[52] has reported five obstacles to a chance to learn: *income, ethnic group, location, age* and *quality of early schooling.*[53] Children of a family with an income of more than $15,000 are five times more likely to attend full-time college than similar children of a family with an income of less than $3,000. Sixty-four percent of all college students come from families with incomes above $10,000—seventeen per cent of Black students fall into this

50 *See supra* note 41, at 682.

51 "Atypical" is used instead of "deprived" or "disadvantaged" because each connotes an educational deficiency which seems to lead inevitably to racistly negative inferences. It is common knowledge that Blacks on the average score lower on standardized tests such as SAT, ACT, and LSAT. It has been observed:

> Evidence in the *Sanders* [See *Sanders, infra* note 67 and accompanying text] case indicated that if white institutions in the Nashville area had set an entrance requirement of a score of 16 on the American College Testing Program (ACT) composite tests (the score supposedly indicating the minimum ability, to perform acceptably in college), 78 percent of the Tennessee A & I freshmen would not have been admitted. The mean score of the freshman classes at the historically white institutions ranged from 18.3 at Austin Peay State University to 22.0 at the University of Tennessee Nashville Center; the mean score at Negro Tennessee A & I was 11.9.

Id. at 678.

This is not the place to comment extensively upon the resurgent interest and concern about the native intelligence of Blacks. However, it should be pointed out that a dominant class inevitably will define the elements of intelligence in terms of its own developed skills, attributes, and concepts of the good, the true, and the beautiful. Current lucubrations about the I.Q. of Blacks express the dormant belief and fear that in some significant way Blacks are biologically or genetically different from whites. The effect and operation of such lucubrations lead to rationalizations and justifications for the mistreatment or "benign neglect" of Blacks and other non-white underclasses. Legal and political equality makes this impermissible.

52 THE CARNEGIE COMMISSION ON HIGHER EDUCATION, A CHANCE TO LEARN: AN ACTION AGENDA FOR EQUAL OPPORTUNITY IN HIGHER EDUCATION (March 1970) [hereinafter cited as CARNEGIE COMMISSION: A CHANCE TO LEARN].

53 *Id.* at 2-3.

category with only seven per cent of them in Black colleges. The median income of families of Black students entering Southern Black colleges is $3,900.[54]

Blacks are highly or disproportionately represented not only in the economically disadvantaged group but also in the geographically and quality-of-early-schooling group. However, as an ethnic group their enrollment in college has increased 85 percent between 1964 and 1968:

> In 1968, however, the proportion of black persons enrolled from the 18- to 24-year age group was only half that of white persons. Young persons from other minority groups—Indians, Mexican-Americans, Puerto Ricans—are even less well represented in college enrollments.[55]

Blacks' higher representation than the other named ethnic groups is obviously related to their 100-odd higher educational institutions, especially their public ones. The disestablishment of identifiably Black public higher educational institutions would replace the fiction of equality in the separate-but-equal doctrine with the fiction of equal opportunity or access in a "unitary nonracial" higher educational system.

The application of the equal protection doctrine of *Brown* and *Green* to Black public higher education must now be analyzed more closely. Professor Black in his article on the Warren Court spoke of another change the Court made in trying to eradicate racism and provide full citizenship to Black people. He said:

> Secondly—and this is a vaguer but vastly important point—the Court has broken altogether out of the quite unjustified juristic style of reading the constitutional and statutory guarantees of racial equality in a narrow sense, as one reads criminal law, and has begun to apply to them the same kind of broad interpretative spirit as has long been applied to virtually all the other parts of the constitution.[56]

This means what Professor Wechsler urged[57] upon the Court, neutrality of principles may be inappropriate when applying the equal protection doctrine to cases or problems where the rights and interests of Blacks arise.

As an abstract statement of principle, "neutrality of principle" is a com-

54 E. Blake, HIGHER EDUCATION FOR BLACK AMERICANS 3 (1970).
55 CARNEGIE COMMISSION: A CHANCE TO LEARN, *supra* note 52, at 2.
56 Black, *supra* note 46, at 17.
57 Wechsler, *Toward Neutral Principles of Constitutional Law,* in PRINCIPLES, POLITICS, AND FUNDAMENTAL LAW: SELECTED ESSAYS 3 (1961). Professor Wechsler presented his position and posed the problem this way:

> I put it to you that the main constituent of the judicial process is precisely that it must be genuinely principled, resting with respect to every step that is involved in reaching judgment on analysis and reasons while transcending the immediate result that is achieved. To be sure, the courts decide, or should decide, only the case they have before them. But must they not decide on grounds of adequate neutrality and generality, tested not only by the instant application but by others that the principle imply? Is it not the very essence of judicial method to insist upon attending to such other cases, preferably those involving an opposing interest, in evaluating any principle avowed? *Id.* at 21.

mendable concept.[58] However, whether "diversities among comprehensively similar situations" should be treated analogously requires a value choice.[59] Furthermore, it has been stated

> that neutrality, save on a superficial and elementary level, is a futile quest; that it should be recognized as such; and that it is more useful to search for the values that can be furthered by the judicial process than for allegedly neutral or impersonal principles which operate within that process.[60]

There are diversities between the "comprehensively similar" higher educational system and the elementary and secondary educational system, therefore, a decision to treat them analogously requires another value choice. Justice Miller articulated in the *Slaughter-House Cases* values to be furthered by the judicial process in interpreting the Reconstruction amendments, particularly the equal protection clause of the fourteenth amendment.

Although *Brown* unquestionably requires that the admission of students and hiring of faculty should not operate upon a racially discriminatory basis, *Alabama State Teachers Ass'n v. Alabama Pub. Sch. & Col. Au.*[61] found diversities between higher education and elementary and secondary education such that it would not enjoin a bond sale for the construction of a branch of Auburn University in Montgomery, Alabama where the predominantly Black Alabama State College was already located. The plaintiffs argued that constructing the Auburn branch would perpetuate the dual system in higher education. The court conceded that Alabama "has traditionally had a dual system of higher education" and "that the dual system in higher education has not been fully dismantled."[62] However, the court thought the affirmative duty to dismantle imposed upon an elementary and secondary school system was different from the affirmative duty imposed upon a higher educational system because the former was free and compulsory whereas the latter was neither free nor compulsory. Furthermore, as to elementary and secondary schools, "in principle at least, one school for a given grade level is substantially similar to another in terms of goals, facilities, course offerings, teacher training and salaries, and so forth."[63] However, as to higher education there is a "full range of diversity in goals, facilities, equipment, course offerings, teacher training and salaries, and living arrangements, perhaps only to mention a few."[64] The court concluded "that as long as the State and a particular institution are dealing with admissions, faculty and staff in good faith the basic requirement of the affirmative duty to dismantle the dual school system on the college level, to the extent that the system may be based upon racial considerations, is satisfied."[65]

58 *See generally* Tollett, *supra* note 47. Therein is set forth a conceptualistic and legalistic perspective of law which is generally very congenial to the concept of neutrality of principle. *But see* Tollett, *Political Questions and the Law*, 42 U. DET. L. J. 439, 465-66 (1965).

59 Tollett, *Political Questions, supra* note 58, at 457.

60 Miller and Howell, *The Myth of Neutrality in Constitutional Adjudication*, 27 U. CHI. L. REV. 661 (1960).

61 289 F. Supp. 784 (M.D. Ala. 1968), *eff'd per curiam*, 393 U.S. 400 (1969).

62 *Id.* at 787.

63 *Id.* at 788.

64 *Id.*

65 *Id.* at 789-90.

District Judge Johnson correctly articulated diversities between higher and elementary and secondary education; yet it may be questioned whether this absolved the court from concerning itself with the impact of site selection for new construction or expansion upon the desegregation of higher education. Courts certainly do concern themselves with site selection in elementary and secondary education cases. Integration should not be a one-way flow of Blacks into white institutions, but should be a two-way flow with white students going to predominantly Black institutions. Indeed, some observers believe, this writer included, that the only way to guarantee the equalization of per pupil expenditures is to place a significant number of whites in predominantly Black institutions. This is the major practical justification for busing white suburban students into Black ghetto schools. Furthermore, an injunction in the *Alabama* case may have been a means of realizing the fourth standard[66] set forth above for integrating more effectively Black public higher educational institutions. The value choice made here was not designed to secure and protect the interests and rights of Blacks, but to secure and protect the desire of whites to attend a predominantly white public higher educational institution in Montgomery, Alabama.

Moreover, the *Sanders* case[67] recognizes more explicitly the affirmative duty in higher education to integrate as set forth in *Green,* but again the value served is mainly the same one served in the *Alabama* case, namely, the desire of whites to attend a predominantly white public higher educational institution. The *Sanders* case grew out of a situation similar to the *Alabama* case. Plaintiffs filed an action on May 21, 1968 seeking to enjoin the construction of the proposed Nashville Center of the University of Tennessee on the grounds that it would tend to perpetuate Tennessee State University as an identifiably Black school while duplicating its courses and services in an identifiably white institution. The court refused to grant the injunction but required the defendants to submit by April 1, 1969 "a plan designed to effect such desegregation of the higher educational institutions of Tennessee, with particular attention to Tennessee A & I State University, as to indicate the dismantling of the dual system now existing."[68]

The April 1, 1969 report placed heavy emphasis upon the individual efforts of the various public institutions to recruit Black faculty and students for the white institutions and white faculty and students for Tennessee State. Further, the institutions would promote cooperative efforts such as joint faculty appointments and the complete transfer of course credits from one institution to another to avoid duplication. On December 28, 1969 the court entered an order stating it could neither approve nor disapprove the proposal and noted the proposed plan lacked specificity. In pursuance of this order the defendants filed another report on April 1, 1970. It reported, exclusive of Tennessee State, Black student enrollment had increased 42.2 per cent in public institutions between 1968-69 and 1969-70—2,720 students to 3,869. Tennessee State made practically no gain. However, the percentage of Black faculty members among the predominantly

66 *See* text accompanying note 45 *supra.*
67 Sanders v. Ellington, 288 F. Supp. 937 (M.D. Tenn. 1968).
68 *Id.* at 942.

white public institutions rose from .4 per cent to .9 per cent. Plaintiffs continued to press for dismantling the dual system.

On June 14, 1971, defendants filed another report emphasizing the efforts each institution had made to increase the pace of desegregation. In a memorandum and order on February 3, 1972,[69] the court reconsidered the application of the "affirmative duty to dismantle" doctrine to higher education, reviewed the *Alabama* case and the *Norris*[70] case, reaffirmed its espousal of the affirmative duty doctrine, expressed satisfaction with progress being made at all state institutions except Tennessee State, and ordered defendants "submit to the court by March 15, 1972, a plan to be implemented at the beginning of the 1972 academic year, such plan to provide, *as a minimum,* for the substantial desegregation of the faculty at TSU and the allocation to the campus of TSU of programs which will *ensure,* in the opinion of defendants, a substantial 'white presence' on the campus."[71] Because Tennessee State University's student body was 99.7 percent Black and the faculty was 81 percent Black in 1970-71, the court ominously ordered the defendants to consider "additional methods for the accomplishment" of a nonracial unitary higher educational system and report thereon to the court by August 1, 1972. It ended the memorandum and order with this language:

> Such study and report should include the feasibility and non-feasibility of a *merger* or *consolidation* of Tennessee State and U.T.-Nashville into a single institution, possibly with two campuses, under the aegis and control of either the Tennessee Board of Education, the Board of Trustees of the University of Tennessee, or a combination of the two, the feasibility or non-feasibility of curriculum consolidation of undergraduate and graduate programs of the State's colleges in the general Nashville area, and such other matters as the defendants deem pertinent to the solution of the problem. (Emphasis added.)[72]

Although the court is obviously wrestling with a difficult and complex problem, several things should be noted about the case and the memorandum and the order. First, it does not indicate what percentage of the predominantly white school enrollment is Black, except to commend a 42.2 percent Black increase. Second, it acknowledges that less than two percent of the majority of predominantly white faculties is Black. It states that a good faith effort had been made to obtain Black faculty members but "more attractive employment opportunities are available elsewhere"[73] for Blacks. And third, although it distinguishes the *Alabama* case from the *Norris* case on the grounds that the former "merely refused to enjoin certain construction, on the basis of the facts before it," it fails to recognize the extent to which it prejudiced Tennessee State's position by refusing to enjoin, contrary to the *Norris* case, the establishment of a competing predominantly white institution in the same community.

69 Geier v. Dunn, 337 F. Supp. 573 (M.D. Tenn. 1972).
70 Norris v. State Council of Higher Education, 327 F. Supp. 1368 (E.D. Va. 1971).
71 Geier v. Dunn, 337 F. Supp. 573, 581 (M.D. Tenn. 1972).
72 *Id.* at 581-82.
73 *Id.* at 576.

The percentage of Black students enrolled in public institutions, excluding Tennessee State, is less than 6 per cent, and a large proportion of them are at Memphis State University. The 19 per cent non-Black faculty at Tennessee State indicates substantial integration of its faculty, certainly far more so than at the predominantly white public institutions. Permitting the construction of the Nashville Center of the University of Tennessee, although it is essentially an evening division school, practically guaranteed that Tennessee State would have difficulty attracting significant numbers of whites. Consolidation or merger would almost inevitably transform Tennessee State from a predominantly Black into a predominantly white institution, undermining the four functions[74] of Black institutions which secure and protect the interests and rights of Blacks. Finally, an honest intent to expand Tennessee State's white enrollment obviously required its expansion, certainly not the establishment of a competing white public institution.

The *Norris* decision is a much sounder application of the *Green* doctrine. *Norris* enjoined the escalation of a predominantly white college (Richard Bland College) from a two-year to a four-year institution in competition with its neighbor, the predominantly Black, Virginia State College in Petersburg, Virginia. The purpose and effect of the proposed escalation were to provide a four-year college for white students who resided nearby. However, the court did not find evidence to support the plaintiffs' request to merge Richard Bland College into Virginia State College.

The affirmative duty to operate a "unitary nonracial school system" should not mean in higher education that it is improper for a higher educational institution to be predominantly Black. However, it does mean Black institutions may not exclude whites where such exclusion will preclude a significant representation of non-Blacks in their student body. However, freely opening doors to whites may result, in special circumstances, in predominantly Black institutions becoming predominantly white as was the case with Lincoln University in Missouri and Bluefield State College and West Virginia State College in West Virginia. The Black percentage of their enrollments is respectively 49.2, 31, and 26.7.

However, once barriers are dropped it is not imperative that a substantial number of whites attend a predominantly Black school, although it would be improper for a state to adopt policies or construction programs which discouraged such attendance. Even elementary and secondary schools should not be closed simply because white parents refuse to send their children to schools in Black neighborhoods.[75] Moreover, what this writer has articulated in defense of predominantly Black law schools applies with equal, if not greater, force to predominantly Black public higher educational institutions:

> One must not confuse the reasons for beginning an institution with the reasons for discontinuing it. To determine whether an institution should survive, it must be judged by what it has become. Most predominantly black institutions were begun because of segregation. They came into

74 See text accompanying note 38, *supra*.

75 Bell v. West Point Municipal Separate School District, 446 F.2d 1362 (5th Cir. 1971); Gordon v. Jefferson Davis Parish School Board, 330 F. Supp. 1119 (W.D. La. 1971).

existence because whites failed or refused to serve the needs of blacks. Blacks were brought to the United States as slaves to provide cheap labor. Because slavery has lost its moral, legal, and economic acceptability is surely not an impressive argument for sending blacks back to Africa or exterminating us. Likewise, because a law school no longer serves the ends of segregation, it is no reason to abandon the legitimate need for training black attorneys as an evolutionary step toward guaranteeing full citizen participation for all blacks.[76]

V. Conclusion

America is a multi-ethnic pluralistic society. Predominantly Black public higher educational institutions are providing higher educational opportunities for more than 100,000 Blacks, most of whom probably would not have a reasonably fair chance of attending and graduating from any other four-year higher educational institutions. It would be a blatant corruption of the equal protection clause if the *Brown* and *Green* decisions were construed as requiring the merger, consolidation, or elimination of these schools. So long as there is no forced separation, Blacks have an interest in and right to predominantly Black higher educational institutions which serve as creditable models, psycho-socially congenial educational settings, special-group-oriented enclaves, and as insurance against a possible declining interest in educating Blacks. The affirmative duty to convert legally established dual higher educational systems does not require eliminating indentifiably Black public higher educational institutions. In applying any doctrine which is a gloss on the equal protection clause it 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.

76 Tollett, *Making It Together: Texas Southern University*, 35, J. AM. JUD. SOC. 366, 368-69 (April-May 1970).