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LAWYERS V. EDUCATORS: CHANGING PERCEPTIONS OF DESEGREGATION IN PUBLIC HIGHER EDUCATION

JEAN PREER*

Efforts to desegregate public higher education have historically embodied two concerns: the need to overturn legally enforced segregation and the need to maximize educational opportunities for black students. While overlapping, the two are not identical. The first is primarily a question of law; the second, a question of educational policy. With the passage of the Morrill Act of 1890,¹ however, questions of legal right in higher education were inextricably bound to definitions of equal opportunity. Congressional sanction and financial support for separate Negro colleges created a recurring educational and legal dilemma.

From the earliest days of segregation, lawyers and educators concerned about the condition of black people in this country have had to work together: first, to secure funds to support separate Negro colleges, then, to overturn legal segregation altogether, and now, to bring life to the promised equality of the *Brown v. Board of Education*² decision. But even among lawyers and educators struggling to achieve equal educational opportunities for blacks, different professional outlooks have shaped varying perceptions of the problem, workable strategies, and desirable goals. Also, the perceptions of each group have been altered by experience and by changes in the judicial process and in higher education. We shall examine when and how the concerns of lawyers and educators have diverged, when they have coincided, and the implications of these varying perceptions for the meaning of desegregation in public higher education.

The relationship between legal right and educational opportunity has produced unexpected complexity and tension. For the purpose of analysis we shall examine how lawyers and educators have brought their unique perspectives to bear on three issues reflecting this tension. From the formative era of segregation, we shall examine the Morrill Act of 1890 for its contradictory legal and educational consequences. From the period of the National Association for the Advancement of

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1. Ch. 841, 26 Stat. 417.

2. 347 U.S. 483 (1954).

Colored People's (hereinafter referred to as NAACP) sustained litigation campaign against educational inequality, we shall examine the reactions of civil rights lawyers and educators to the regional educational compact of the 1940's. From the post-*Brown* era, we shall examine the legal and educational paradoxes of the 1970's, illustrated in the case of *Adams v. Richardson*.³

Keeping in mind that neither group speaks with a single voice, nor adheres to unchanging verities, we shall seek some general observations on the differing perceptions of lawyers and educators involved in the process of desegregating higher education.

Educational opportunity took priority over the advancement of legal right in the post-Reconstruction era. Before the color line of segregation was firmly drawn at the turn of the century, important precedents of Negro higher education had been set. Education was recognized as fundamental to the uplift of the freedman, and black colleges were established to meet what were perceived as his peculiar educational needs. The founding of Howard University in 1867 reflected both those needs and the responsibility of the federal government in meeting them. The birth of federal involvement in higher education, with the passage of the Morrill Act of 1862,⁴ closely coincided with the emancipation of the slaves. The role of Congress in higher education and in civil rights evolved simultaneously.

Inequality in higher education has included race discrimination of several varieties: inequality of access barred Negro students from state universities on the basis of race; inequality of kind meant that separate Negro colleges lacked the full range of graduate and professional courses; inequality of support insured that Negro colleges were ill-equipped to perform even the educational tasks assigned them. In this early period, lawyers and educators sympathetic to the Negro cause saw the law as a means to reduce inequality of educational offerings and support, rather than as a way to overcome the inequality of access to state universities. Educators debated the best way to educate Negroes as a race. Lawyers and educators agreed that the peculiar needs of Negro students could justify separate Negro schools.

It is the greatest of many ironies in public higher education that the earliest efforts to provide equal educational opportunities for Negroes came to be viewed as an impediment to legal equality. Passage of the Morrill Act of 1890 embodied the dilemma. Nothing in the Morrill Act of 1862 required the establishment of Negro colleges nor barred Negroes from sharing its benefits. In fact, four Negro colleges were desig-

3. 356 F. Supp. 92 (D.D.C. 1973), *modified*, 480 F.2d 1159 (D.C.Cir. 1973).

4. Ch. 130, 12 Stat. 503.

nated recipients of land-grant funds.⁵ Negro colleges, however, received no funds under the Hatch Act of 1887⁶ that created agricultural experiment stations attached to land-grant institutions. The 1890 amendments to the Morrill Act were seen by legislators who enacted them and educators who supported them primarily as a means to insure Negro participation in the land-grant movement and only incidentally as a congressional endorsement of segregation.⁷ In a compromise repeated in the 1940's and again in the 1960's, even legislators sympathetic to the Negro cause put the advancement of educational opportunities ahead of legal rights.

The 1890 proviso, which denied funds to states whose land-grant colleges distinguished in admissions criteria on the basis of race, not only permitted compliance by the creation of "such colleges separately for white and colored," but also required that funds be divided between separate colleges on a just and equitable basis.⁸ Both conditions proved immediately important to black higher education. In order to get any aid under the new law, states had to take some action for Negro education. By sanctioning separate Negro colleges, Congress gave its imprimatur to educational segregation six years before the Supreme Court approved segregation in public transportation. Strangely, however, the *Plessy v. Ferguson*⁹ decision, which relied heavily on segregation precedents in education, failed to mention the Morrill Act of 1890.

More important for our present consideration, however, the Morrill Act of 1890 was regarded as an advance for Negro educational opportunity. The Secretary of the Interior, who administered the act, expressed pleasure that so few states had chosen to comply by establishing separate schools.¹⁰ Although the law provided no criteria for a "just and equitable" division, the Secretary generally approved allocations in accordance with a ratio of black and white children in the public school population.¹¹ For one state, South Carolina, where Negroes outnumber whites, Congress passed a special law limiting the

5. The four colleges are as follows: Alcorn A. & M. (Mississippi); Claflin University (South Carolina); Hampton Normal & Agricultural Institute (Virginia); Kentucky Normal & Industrial Institute for Colored Persons. See, Davis, *The Participation of Negro Land-Grant Colleges in Permanent Federal Education Funds*, 7 J. NEGRO EDUC. 282 (1938).

6. Ch. 314, 24 Stat. 440.

7. For an argument linking the Morrill Act of 1890 and the black studies controversy, see Avins, *Black Studies, White Separation, and Reflected Light on College Segregation and the Fourteenth Amendment from Early Land Grant Policies*, 10 WASHBURN L.J. 181 (1971).

8. Morrill Act of 1890, ch. 841, 26 Stat. 417.

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

10. U.S. BUREAU OF EDUCATION, REPORT OF THE COMMISSIONER FOR 1890-91, at 620 (1894).

11. *Id.* at 621. This formula gave a slight advantage to the Negro colleges since black students comprised a larger proportion of the public school than of the college student population.

division to an equal split.¹²

Educational and legal rationales coincided to support this pragmatic solution. In the legal parlance of the day, the law condoned race distinctions, which connoted "a difference and nothing more," but not race discrimination that necessarily implied "partiality and favoritism."¹³ The peculiar educational needs of the Negro seemed to constitute a permissible legal distinction. The 1910 legal commentary of Thomas Stephenson reflected the influence of Booker T. Washington's educational theory:¹⁴

Identity of accommodation is not essential to avoid the charge of discrimination. . . . The course of study need not be the same. If scientific investigation and experience show that in the education of the Negro child emphasis should be placed on one course of study, and in the education of a white child, on another, it is not a discrimination to emphasize industrial training in the Negro school, if that is better suited to the needs of the Negro pupil, and classics in the white school if the latter course is more profitable to the white child. There is no discrimination so long as there is equality of opportunity, and this equality may often be attained only by a difference in methods.¹⁵

Stephenson praised separate Negro schools for enabling black students "to pursue, unhampered by requirements prescribed for the more developed race and unembittered by continuous manifestations of race prejudice, a curriculum especially adapted to their own needs."¹⁶

The coincidence in thrust between the land-grant laws and the educational philosophy of Booker T. Washington circumscribed the role of the public Negro college for generations. While the Morrill Act of 1862 encouraged a liberal interpretation of the agricultural and mechanical arts, its 1890 amendments, providing only instructional assistance, were more narrowly drawn. Thus, the private Negro schools, which were hastily transformed into land-grant colleges to comply with the law, sacrificed educational freedom for financial security. Lawyers historically have been insensitive to the diverse roles fulfilled by institutions of higher education; this has been particularly true of their vision of public Negro colleges. With the Morrill Act and state funds, southern states created a variety of publicly supported universities, normal schools, and land-grant colleges to meet the varied educational needs of white students. Generally, one public Negro college was expected to satisfy the demand for liberal arts instruction, teacher training, agricultural and mechanical courses, all on negligible funds. Early reports of the Bureau of Education, however, criticized the Negro land-grant col-

12. Act of July 26, 1892, ch. 254, 27 Stat. 271.

13. G. STEPHENSON, RACE DISTINCTIONS IN AMERICAN LAW 2 (1910).

14. See Washington, *Industrial Education for the Negro*, in NEGRO PROBLEM 9-29 (1969).

15. See G. STEPHENSON, *supra* note 13, at 2.

16. *Id.* at 358.

leges for straying from the gardens of agricultural pursuits to sample the forbidden fruit of liberal arts. As late as the 1930's, Negro colleges were reprimanded for their lack of fidelity to their land-grant origins.¹⁷

Although Washington, his educational adherents, and his philanthropic supporters have been criticized for sacrificing the Negro's legal rights in order to protect their own view of educational advancement, the increasingly hostile racial climate of the time forced even the staunchest opponents of segregation to make similar compromises.¹⁸ Even the NAACP muted its opposition to Jim Crow education during the debate on the 1914 Smith-Lever bill.¹⁹ At issue was whether federal funds to states for cooperative extension work would be divided on a just and equitable basis, as in the Morrill Act of 1890, or at the discretion of state legislatures. Experience under the two types of requirements substantiated Stephenson's analysis that "with race feeling as it is, if such [race] distinctions were not recognized and enforced, the stronger race would naturally appropriate the best for itself and leave the weaker race to fare as it could."²⁰ According to figures compiled by the fledgling NAACP, colleges for black students had received only eight and one-half percent of the 1862 Morrill Act funds, but under the "just and equitable distribution" clause of the 1890 act and its 1907 amendment,²¹ the Negro colleges had received twenty-eight percent.²² The NAACP secured the aid of Washington Senator Wesley L. Jones²³ who offered an amendment, drafted by the Association's counsel, which closely followed the "just and equitable" language of the 1890 act.²⁴

Viewed in retrospect, the prolonged debate on the amendment abounds with irony. Overshadowing all others is the anomalous position of the NAACP, most outspoken foe of segregation and foremost ideological rival of Booker T. Washington, advocating legislation to support separate Negro agricultural and mechanical colleges. Senator Jones, on behalf of the NAACP, argued the virtues of Negro schools staffed by Negro teachers, while segregationist Senator Hoke Smith of

17. U.S. OFFICE OF EDUCATION, SURVEY OF LAND-GRANT COLLEGES AND UNIVERSITIES 845 (1930).

18. C. KELLOGG, NAACP: A HISTORY OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, 1909-1920 (1967).

19. Smith-Lever Act of 1914, ch. 79, 38 Stat. 372; R. LOGAN, THE BETRAYAL OF THE NEGRO (1965).

20. See G. STEPHENSON, *supra* note 13, at 357.

21. Nelson Amendment of 1907, ch. 2907, 34 Stat. 1281.

22. 51 CONG. REC. 2929 (1914).

23. Jones made a forceful presentation on behalf of the NAACP. When asked about the rights of the Japanese living in his home state of Washington, however, he responded that they deserved different treatment because they were not citizens, and he hoped they never would be. 51 CONG. REC. 2934 (1914).

24. C. KELLOGG, *supra* note 18, at 192.

Georgia opposed unnecessary duplication of programs. Senator Jones stated:

I believe the colored people like to be taught by people of their own race. I believe they like to be educated and led by people of their own race rather than by those of another race. I think that is not only in accordance with human principles and human character, but also in accordance with experience.²⁵

Senator Smith objected generally to dividing the cooperative extension work between two colleges and specifically objected to any Negro college participation. "If we gather into that school scientists equal to those that we have in the other college it would be an enormous economic waste; there would be duplication of work."²⁶

The power of federal funding to dictate educational policy was already a major issue in race relations and higher education. Jones' amendment gave responsibility for approving state proposals for allocating funds to the Secretary of Agriculture rather than to the Secretary of the Interior as under the 1890 act. The southern dominance in the Wilson administration, however, made it unlikely that either Secretary would approve a division of funds based on population. Supporters of Jones' amendment argued that the national government should have some say in the distribution of its funds. On the other side, Senators Smith, Vardaman, and others objected to any arrangement that might give funds to Negro colleges, even though their governing boards were white, and thus diminish state legislative control. Senator Vardaman thought it "would be a very unfortunate condition of affairs if Negroes were permitted to manage their public educational institutions."²⁷ Jones' amendment was defeated on a vote of twenty-three yeas, thirty-two nays, and forty not voting.²⁸ Two other amendments passed the Senate, one to bar racial discrimination, and one requiring the approval of the governor, rather than the state legislature, and the Secretary of Agriculture, were removed by a joint congressional conference committee.²⁹

Finally, appalling ignorance about Negro higher education characterized the arguments of both the supporters and opponents of Jones' amendment. Senator Cummings of Iowa, a staunch supporter of the amendment, was shocked and incredulous at the ten-to-one disparity of federal funds going to the white and Negro land-grant colleges in Georgia, although the figures were readily available in the annual re-

25. 51 CONG. REC. 2935 (1914).

26. *Id.* at 3118.

27. *Id.* at 2935.

28. *Id.* at 3124.

29. *Id.* at 7309, 7645.

ports of the Commissioner of Education.³⁰ Apparently none of the Senators knew that a population ratio had generally been used to apportion 1890 funds. Even Senator Vardaman professed ignorance of funds going to Mississippi's Negro college, although the Commissioner's report showed that Alcorn A. & M. received money under the 1862 act as well as under the 1890 act.³¹

Attitudes toward the Morrill Act of 1890 serve as a bellwether of changing perceptions toward law and equal educational opportunity. Once hailed as a means to expand educational offerings for Negroes, the just and equitable distribution was overshadowed by the provision for separate schools. The act became symbolic of congressionally approved segregation. NAACP lawyers sought means to use the formulation as a basis for litigation; in Congress, civil rights supporters sought ways to repeal it. In his report planning the NAACP litigation campaign, Nathan Margold reviewed the Morrill Acts and concluded that there was no basis for any kind of suit against discrimination in the use of funds dispersed at state discretion.³² As to 1890 funds, Margold concluded that a mandamus or injunction proceeding might be brought against the Secretary of the Interior "where it is very clear that state officials have misapplied funds received by them for the use of a colored college." Finding no evidence of misappropriation, he recommended against litigation and suggested that political pressure be applied to the Interior Secretary instead.³³ In the late 1940's, lawyers Herbert O. Reid and James Nabrit researched the distribution of Morrill and other federal funds and emphasized the way in which Negro schools were chronically shortchanged.³⁴ Apparently the NAACP took no action on their recommendations for suits seeking writs of mandamus or injunctive relief to remedy the inequities.

The ghost of the 1890 Morrill Act stalked the halls of Congress in the early 1960's when Representative Adam C. Powell, chairman of the House Education and Labor Committee, convened a special subcommittee on Integration in Federally Assisted Public Education Programs. Among the bills under consideration was H.R. 9824 introduced by Representative Edith Green to amend the Second Morrill Act of 1890

30. *Id.* at 2932.

31. See U.S. BUREAU OF EDUCATION, REPORT OF THE COMMISSIONER FOR THE YEAR ENDED JUNE 30, 1910, at 1010 (1911).

32. Margold, *Preliminary Report to the Joint Committee Supervising the Expenditure of the 1930 Appropriation by the American Fund for Public Service to the N.A.A.C.P.* (NAACP Papers, Library of Congress, Washington, D.C.). See also J. GREENBERG, RACE RELATIONS AND AMERICAN LAW 34 (1959); J. GREENBERG, CASES AND MATERIALS ON JUDICIAL PROCESS AND SOCIAL CHANGE: CONSTITUTIONAL LITIGATION 63 (1977).

33. *Id.*

34. Reid & Nabrit, *Remedies under Statutes Granting Federal Aid to Land Grant Colleges*, 17 J. NEGRO EDUC. 410 (1948).

by eliminating those provisions authorizing federal contributions for the maintenance of schools of higher education in which racial segregation was practiced.³⁵ Representative Green fought doggedly to bring the plight of the Negro land-grant colleges to the attention of her congressional colleagues and administration officials. As drafted, however, her bill would have exorcised the one provision that had consistently channeled funds to Negro higher education. Statutes that had provided nothing to Negro colleges were ignored.

On the general question of withholding federal funds, Kennedy administration witnesses joined the ranks of early northern philanthropists and Booker T. Washington in concluding that educational opportunity could not be sacrificed to the enforcement of legal right. Secretary of Health, Education and Welfare (hereinafter referred to as HEW) Abraham Ribicoff, explaining why he opposed anti-discrimination riders on proposed federal programs, declared, "Opposed as I am to discriminatory practices in any form, I recognize that precipitous action to end such practices may on occasion do far more harm than good."³⁶ Representing the Justice Department, Burke Marshall expressed reservations about the use of federal fund cut-offs to speed desegregation.³⁷

On the particular question of the Morrill Act, however, administration officials unanimously opposed its support of separate colleges. This position, a triumph of legal form over educational substance, revealed again the abysmal lack of understanding of the financial and legal status of the public Negro colleges and obscured consideration of the broader question. Burke Marshall announced that the proviso "expressly contemplates grants to institutions operated in a plainly unconstitutional fashion."³⁸ Ribicoff admitted that his department had no control over equalizing offerings at white and Negro land-grant colleges and had made no study of how Morrill Act funds were distributed.³⁹ The Commissioner of Education confessed that he had had no contact with any Negro colleges, but offered the opinion that they could hardly be equal to white ones.⁴⁰

H.R. 9824 threatened to put 1890 funding on the same footing as other land-grant funds.⁴¹ A substitute version attempted to insure that

35. *Hearings on H.R. 6890, 9824, 10056, 10783 Before the Subcomm. on Integration in Federally Assisted Public Education Programs of the House Comm. on Education and Labor*, 87th Cong., 2d Sess. ii (1962) [hereinafter cited as *Subcommittee Hearings*].

36. *Id.* at 15.

37. *Id.* at 602.

38. *Id.* at 606.

39. *Id.* at 26.

40. *Id.* at 76.

41. See *Subcommittee Hearings*, *supra* note 35.

Negro public colleges would continue to receive federal funds.⁴² Neither was enacted, but the omnibus Civil Rights Act passed in 1964 included, in Title VI, procedures for cutting off federal funds from programs which discriminated on the basis of race.⁴³ Senator Hubert Humphrey, floor manager for the bill, specifically cited the separate but equal clause of the 1890 Morrill Act as voided by Title VI.⁴⁴ Humphrey's own position showed how times and perceptions had changed. In the late 1940's, Humphrey had opposed anti-segregation clauses which jeopardized federal aid to education legislation, arguing that as much as he hated segregation, he loved education more.⁴⁵ In the 1960's, a strict enforcement of Title VI against black land-grant colleges threatened to sacrifice educational opportunities for black students in order to foster legal equality. Finally in 1977, Congress passed legislation to insure participation by black land-grant colleges in funding for agricultural experiment stations and cooperative extension programs. Continuing a piecemeal consideration of issues affecting higher education, the lengthy debate on the Food and Agriculture Act of 1977⁴⁶ included no discussion of how its provisions might affect desegregation efforts in higher education.

We see in the changing perceptions of the Morrill Act of 1890, the complex interplay between the need to establish legal equality in access to higher education and the need to expand educational opportunities for black students. In the increasingly hostile racial climate of their times, supporters of the 1890 proviso and of the Jones amendment in 1914 of necessity attached a higher priority to educational opportunity even if provided in a segregated setting. As the color line was drawn, and access closed off even to white private schools that had previously admitted Negro students, the continued support of black colleges was vital. The NAACP assumed a compromise stance although its members failed to comment on the irony of its position. The Association's early lobbying effort was praised despite its ultimate failure. Paradoxically, when W.E.B. DuBois and other NAACP leaders acquiesced to segregated training camps for Negro officers during World War I, the compromise position was widely denounced, although the rationale for supporting separate camps paralleled almost exactly the Association's position supporting funds for separate Negro colleges. In this early period, the demand for educational opportunity overrode efforts to over-

42. *Id.*

43. 42 U.S.C. § 2000d (1964); HOUSE COMM. ON EDUC. AND LABOR, 87 Cong., 2d Sess., REPORT OF THE SUBCOMM. ON INTEGRATION IN FEDERALLY ASSISTED PUB. EDUC. PROGRAMS 96 (Comm. Print. 1962).

44. 110 CONG. REC. 6544 (1964).

45. *Segregation Ban in Schools Beaten*, N.Y. Times, May 4, 1949, at 22, col. 3.

46. 7 U.S.C. § 1281 (1977).

come legal segregation, but the dilemmas created by the 1890 Morrill Act dogged lawmakers and educators even after the *Brown* decision invalidated the separate but equal doctrine. In the post-Reconstruction era, perceptions of lawyers and educators converged on the major problem of the day and the way to attack it.⁴⁷

Faced with a similar choice between the competing demands of legal right and educational opportunity in the late 1940's, the NAACP took an uncompromising stand against a plan for cooperative regional higher education in the southern states. Well into its litigation campaign, the Association saw the submission of the compact for congressional approval as an attempt to avoid Supreme Court decisions defining equality in higher education. Although the compact made no mention of race, the political configuration behind it and the timing of the proposal made apparent its segregationist intent. The NAACP mounted a massive lobbying effort to thwart it.⁴⁸ Complicating the question, however, and making it of interest here, was the economic salvation the compact offered to financially starved Meharry College. Many black educators lined up with the NAACP, but those associated with efforts to save Meharry rallied to the other side for the sake of educational opportunities for Negro students.⁴⁹

Interest in a cooperatively supported regional university, which had developed during the 1930's, was dampened by the Supreme Court's decision in *Missouri ex rel. Gaines v. Canada*⁵⁰ in 1938. In February, 1948, long-standing interest was sparked again, when nine southern governors formally signed a regional education pact.⁵¹ Observers reported that the governors felt the situation was "acute," and that pressures of Supreme Court decisions made it "imperative to find a solution in line with Jim Crow."⁵² Although early proponents of the plan had stressed the benefits of regional cooperation in solving the race problem, the trend of Supreme Court decisions now made it politic to stress the educational advantages for both races of regional cooperation.

Dispassionate analysis of the educational merits of the proposal was complicated by the role of Meharry Medical College in the scheme, the timing of the pact, and efforts to secure congressional approval. Meharry, a private Negro medical school in Nashville, produced, along with Howard University, the bulk of the nation's black doctors. School officials claimed Meharry faced a drop in income which threatened its very existence. Under the proposed compact, Meharry was to turn over

47. C. KELLOGG, *supra* note 18, at 255.

48. See text accompanying notes 64-67 *infra*.

49. *Id.*

50. 305 U.S. 337 (1938).

51. *Regional Colleges Charted for South*, N.Y. Times, Feb. 9, 1948, at 15, col. 1.

52. Saveth, *Jim Crow and the Regional Plan*, 85 SURVEY 476 (1949).

its lands, buildings, equipment, and the net income from its endowment to the southern states to be operated as a regional institution for medical, dental, and nursing education.⁵³

The NAACP swiftly denounced the plan and announced its intention to block it legally. "If such a plan becomes a reality," it declared, "the immediate result will be the beginnings of a new pattern of segregation, which in effect will perpetuate the separate but equal educational myth and destroy all present gains of intercultural understanding in education."⁵⁴ Leaders of the compact sought to dissociate the issue from the civil rights debate. Governor Millard F. Caldwell of Florida declared the plan was "not connected with the political situation that prevails nationally and the racial problem."⁵⁵ Possibly because of the NAACP's charges, the interim Regional Council took steps to increase Negro participation in the effort. On the eve of Senate Judiciary Committee hearings on the compact, the Council recommended that each governor name an outstanding Negro leader from his state to work with the Council. When three Negro college presidents were admitted to the Council's closed executive session, the *New York Times* hailed "a virtual coup de grace to the traditional segregation pattern, as far as top-level educational policy deliberations were concerned."⁵⁶ The tension between fighters for legal equality and champions of educational opportunity reached a high pitch as a regional NAACP conference at Tuskegee (of all places) on March 21, 1948 again condemned the plan and denounced "collaboration between some Negro educators and Southern governors."⁵⁷

At the Senate hearings, southern governors and senators, testifying on behalf of the compact, skirted specific racial arrangements of regional cooperation and emphasized its benefits for "all the people of the South." Governor Caldwell professed a lack of concern about institutions for Negroes and dismissed the situation at Meharry as "a wart on the side of the whole question."⁵⁸ But for M. Don Clawson, president of Meharry Medical College, the future of Meharry was crucial to continued educational opportunities for Negroes. Clawson found himself trapped by financial exigencies between the economic security proffered by the regional compact and the condemnation of fellow Negroes for acquiescing in a scheme which threatened to perpetuate, if not extend, segregation. Charles Thompson, of Howard Uni-

53. *Regional Education Interstate Compact: Hearings before Subcomm. of the Senate Comm. on the Judiciary*, 80th Cong., 2d Sess. 28 (1948) [hereinafter cited as *Hearings*].

54. Popham, *Negro Schools Opposed*, N.Y. Times, Feb. 13, 1948, at 32, col. 4.

55. *Ask Negro Advice on South's Schools*, N.Y. Times, Mar. 5, 1948, at 19, col. 3.

56. *Id.*

57. *Negro Conference Resists Dixie Bans*, N.Y. Times, Mar. 22, 1948, at 24, col. 2.

58. See *Hearings*, *supra* note 53.

versity, for example, expressed sorrow that Meharry could not have been saved some other way than by "selling their birthright for a mess of pottage."⁵⁹ Thompson predicted that Meharry's seduction by the southern governors would solve the problems of neither.⁶⁰

On its face, however, the compact made no allusion to race, except the reference implicit in the mention of Meharry itself. Clawson eschewed politics and declared, "There is nothing directed at the perpetuation of segregation. There is perpetuation of opportunity, not the perpetuation of segregation."⁶¹ Other educators lined up behind the scheme claimed a lack of expertise as to its legal implications. Dr. John Dale Russell, Director of the Division of Higher Education, United States Office of Education, sought to avoid discussing the effects of the plan on segregation. He first expressed hope that the compact would protect individual rights; then he declared that the pact as written did not change individual rights; finally he conceded that the plan might be administered in a way that interfered with constitutional rights.⁶² Since the Supreme Court had not specifically considered or condemn a regional university for Negroes, and had not invalidated the segregation laws on which it would be based, uncertainty as to its legal status provided reasons both for and against its approval.⁶³

Spearheading the well-organized opposition to the regional compact was NAACP counsel, Thurgood Marshall, whose testimony revealed the extent to which the NAACP had abandoned its equalization strategy in favor of a direct challenge to segregation. Several NAACP suits had prompted establishment of new separate Negro schools, which Marshall had acknowledged as a gain for educational opportunity, if not for equal right of access.⁶⁴ On the question of regional education, however, he was steadfastly opposed to anything suggesting the extension of segregation. Marshall objected to Congress approving what the Supreme Court seemed to have invalidated. He did not see the compact as a means to save Meharry, but as a means to set up inferior schools for Negroes. "All of us like to brag about going to a better school," he said, "but Negroes can never brag about this in a Negro school, because there is no Negro school that is equal."⁶⁵ When Sena-

59. Thompson, *Extension of Segregation through Regional Schools*, 17 J. NEGRO EDUC. 101, 105 (1948).

60. *Id.*

61. *Hearings*, *supra* note 53, at 31.

62. *Id.* at 56.

63. For a late article defending the constitutionality of the plan, see Ball, *Constitutionality of the Proposed Regional Plan for Professional Education of the Southern Negro*, 1 VAND. L. REV. 403 (1948).

64. Marshall, *An Evaluation of Recent Efforts to Achieve Racial Integration in Education through Resort to the Courts*, 21 J. NEGRO EDUC. 316, 319 (1952).

65. See *Hearings*, *supra* note 53, at 77.

tor Howard McGrath of Rhode Island, ranking minority member, suggested that Marshall was advocating a policy which would deprive Negroes of educational opportunities, Marshall countered that quotas, not ability, kept Negroes out. He asked that Negroes be given the same chance to measure up as anybody,⁶⁶ and proposed that the compact be amended to guarantee that there would be no distinction as to race, creed, color, or sex, as to students, faculty, and administrative officers.⁶⁷

On behalf of the Conference of Presidents of Negro Land-Grant Colleges, Howard University law professors James Nabrit and George Johnson condemned the compact. Their testimony made clear the difficult position of black college presidents. On one hand, they were working to make their segregated institutions as efficient as possible. On the other, as Johnson testified, they were "absolutely opposed to segregation in all forms, and certainly in education."⁶⁸ When Senator Holland of South Carolina suggested that segregated higher education provided Negro educators opportunities to advance that they otherwise would not have, Nabrit responded:

No Negro at this date and time who has thought in this matter at all would give any support to the proposition inherent in your question—that it is better to have some Negro presidents than to have civil rights guaranteed by the Constitution. . . . And I think that would be my answer: That I would rather see no Negro presidents and no Negro law teachers, and just let us be citizens, with all the rights and attributes there are.⁶⁹

When Holland suggested that the end of segregated education would be the death blow to the chances of Negroes to work for the advancement of their race, Nabrit reminded him that Negroes had historically been so shortchanged that what they held was a position in a worthless educational structure.⁷⁰ The prepared statement adopted by the Conference of Presidents of Negro Land-Grant Colleges and submitted for the record, however, stopped short of endorsing Thurgood Marshall's suggestion that a non-discrimination clause be added to the regional compact.⁷¹

After an initially favorable reception in Congress, the plan encountered increasing opposition as doubts about its constitutionality lingered and threatened to raise broader civil rights questions. The Senate Judiciary Committee approved the plan, as did the House of Representatives.⁷² But in the face of strong opposition led by Wayne

66. *Id.* at 82.

67. *Id.* at 73.

68. *Id.* at 147.

69. *Id.* at 148.

70. *Id.* at 149.

71. *Id.* at 151.

72. *Id.*

Morse of Oregon, the Senate voted thirty-eight to thirty-seven to recommit the proposal for consideration of its constitutionality. By the one vote margin, the Senate effectively killed congressional approval of the plan, but not the plan itself.

Undaunted, southern governors proceeded. As implemented, the plan was more modest than earlier envisioned, and the governors more outspoken about its segregated character. Rather than building new schools, the Regional Council designated existing schools as part of the regional program, with states contracting to provide support on a pro rata basis. White students would attend programs at designated white state universities; Negroes would attend programs at existing Negro colleges. Because Negro higher education suffered not only from inequality of funds but also inequality of program offerings, educational deprivation of Negro students continued. The NAACP's new strategy sought to circumvent the manifest inequalities of Negro higher education. The NAACP had crossed the Rubicon between equalization and the total elimination of segregation. Following a December, 1948 meeting of southern governors and educators to implement the compact, the NAACP declared, "Regional institutions are false economy contrived to make the public believe that equality is attainable within the framework of segregation. . . . Equality is attainable only through unrestricted access to identical facilities."⁷³

As planned, the NAACP mounted a court test of the regional compact in *McCready v. Byrd*.⁷⁴ Under the compact, the state of Maryland contracted with the Board of Control for Southern Regional Education for three Maryland students to take the first year nursing course at Meharry. Petitioner Esther McCready declined the offer of a place at Meharry and sought a writ of mandamus to compel University of Maryland officials to act on her application without regard to race. Testimony revealed that neither the compact nor the contract mentioned race, and that Meharry's nursing facilities and living conditions were superior to those of the University of Maryland. The Baltimore City Court dismissed the case. The Maryland Court of Appeals, citing *Gaines*⁷⁵ and *Sipuel v. University of Oklahoma*,⁷⁶ reversed and remanded with instructions to issue the writ. The Supreme Court denied certiorari.⁷⁷

The NAACP was joined by an unexpected ally. The Southern Regional Education Board (hereinafter referred to as SREB) supported its argument that the regional education program could not be used by

73. *Negro Unit Fights Governors' Plan*, N.Y. Times, Dec. 15, 1948, at 30, col. 3.

74. 73 A.2d 8, 195 Md. 131 (1950), cert. denied, 340 U.S. 827 (1950).

75. 305 U.S. 337 (1938).

76. 332 U.S. 631 (1948).

77. 340 U.S. 827 (1950).

states to avoid their duty to provide educational opportunities within state borders for Negroes if and when such opportunities were offered whites. Maryland, which offered nursing training for whites, but not for Negroes, sought to use its participation in the compact as a defense. The full executive committee of southern governors signed the SREB objection to this position.⁷⁸ Board director, Dr. John E. Ivey, Jr., praised the *McCready* decision for preventing misuse of the cooperative program and sought to stake out neutral territory. The Board followed the individual practices of each participating state and made no effort to influence states to abolish or extend segregation.⁷⁹ The *McCready* case assured that the compact could not undermine the *Gaines* and *Sipuel* decisions. The legal question left unanswered by *Gaines* was now settled. As a practical result, Negro educational opportunities were probably enhanced. In 1949-50, 233 white and 231 Negro students crossed state lines for higher education at state expense totaling \$1,736,000.⁸⁰

By the late 1940's, lawyers conducting the NAACP fight against inequality in education had concluded that equality of educational opportunity could only be achieved by admission to white state universities. This conclusion led to the strategic decision to base their attack on the undeniable inequalities forced on public black colleges by underfinancing and legislative inattention. Seeing its legal campaign on the eve of fruition in *Sweatt v. Painter*,⁸¹ the NAACP rejected any compromise stance on the regional education question. Short-term gains in educational opportunity had to be sacrificed for long-term gains that the end of legal segregation seemed to hold. The move against segregation gathered momentum. In 1950, the Supreme Court upheld the right of Herman Sweatt to enter the law school of the University of Texas over the crumpled form of the separate but equal doctrine.⁸²

In the era of "separate but equal" education, lawyers and educators were forced by growing racial hostility to unite behind efforts to aid Negro land-grant colleges. In the transitional era of the NAACP litigation campaign, the emphasis in priority shifted from securing "substantial equality" to ending legal segregation altogether. The legal strategy of this period was shaped by two perceptions that have critically affected desegregation in public higher education since *Brown v. Board of Education*.⁸³ Both were foreshadowed in the regional compact controversy: first, that legal equality was the foremost means to achieve

78. Stoney, *In Defense of the Regional Plan*, 86 SURVEY 300, 302 (1950).

79. Ivey, *Regional Education: An Experiment in Democracy*, 10 PHYLON 381 (1949).

80. See Saveth, *supra* note 52, at 480.

81. 339 U.S. 629 (1950).

82. *Id.*

83. 347 U.S. 483 (1954).

equality of educational opportunity; second, that Negro colleges in a segregated system were necessarily inferior. Experience and disenchantment with public school desegregation under *Brown* and its progeny, growing black pride, and waning support for the civil rights movement subtly altered each of these perceptions. The case of *Adams v. Richardson*,⁸⁴ filed by the NAACP Legal Defense Fund in 1970, illustrates in its early stages the widening gap of perception between lawyers and educators concerned with maximizing legal rights and educational opportunities for black students in higher education. In the 1940's, NAACP lawyers warned that an ostensible move to enhance educational opportunities jeopardized efforts to secure full legal access to public higher education.⁸⁵ In the 1970's, black educators signaled that a mechanical application of public school desegregation precedents threatened to diminish higher education opportunities for black students in black public colleges.⁸⁶

Changes in the law and changes in higher education affected the perceptions with which lawyers and educators regarded the *Adams* case. The meaning of desegregation was still in flux, with important questions yet to be answered. Although the *Brown* decision rested on higher education precedents and was applied almost immediately to higher education cases, the relationship between the desegregation requirements for public schools and for public colleges was not clear. In *Florida ex rel. Hawkins v. Board of Control*,⁸⁷ the Court recognized that different legal duties might be appropriate. In May, 1954, the Supreme Court had remanded the *Hawkins* case, involving a black applicant to the University of Florida law school, for consideration in light of the school segregation cases and "the conditions that now prevail."⁸⁸ Two years later, when *Hawkins* had still not been admitted, the Court held that the implementation concerns of the second *Brown* opinion were not applicable at the graduate and professional school level. In order to secure *Hawkins*' admission, his lawyers stressed the differences between elementary and secondary schools and higher education. The Court recognized two crucial distinctions: that public school desegregation involved complex administrative problems not found in higher education, and, that in higher education the right of the qualified student to admission was personal and immediate.⁸⁹

An article by Jack Greenberg in the late 1950's stressed that constitu-

84. 356 F. Supp. 92 (D.D.C. 1973), *modified*, 480 F.2d 1159 (D.C. Cir. 1973).

85. *Id.*

86. *Id.*

87. 347 U.S. 971 (1954), *rehearing denied*, 350 U.S. 413 (1956).

88. *Brown v. Board of Education*, 349 U.S. 294 (1955).

89. *Florida ex rel. Hawkins v. Board of Control*, 347 U.S. 971 (1954), *rehearing denied*, 350 U.S. 413 (1956).

tional rights were asserted on behalf of individual rather than group interests. The *Brown* decision, he wrote, meant that persons should be treated as individuals, not as a member of a racial group; before *Brown*, the law viewed the Negro interest in eliminating discrimination as a group interest.⁹⁰ Greenberg, director of the NAACP Legal Defense Fund, summarized the goal of civil rights activities: "But civil rights groups do not aim to perpetuate their group interest since the group interest itself is to eliminate the socially enforced group identity. Their rhetoric often invokes the image of the day when happily the groups can dissolve."⁹¹ As an aside, he noted that even after the end of all legal and social discrimination based on race disappears, minority group members might be bound by ties of sentiment, common history, and shared social concerns.⁹² But the implementation of the *Brown* decision had involved the courts in systemic changes in order to effectuate personal rights. Lower federal courts found themselves increasingly enmeshed in the administrative aspects of governance. Despite Greenberg's emphasis on individual rights, the pull of the law was toward the assertion of group interests. As rules governing standing to sue broadened, a new breed of plaintiffs asserted new group rights and requested ever more complex forms of relief.⁹³ By the late 1960's then, civil rights lawyers no longer perceived desegregation in higher education as solely a personal right, but as a group right, and emphasized its similarity to the public school situation.

Developments in education similarly affected the perceptions of the black educators who ultimately opposed the position of the Legal Defense Fund in the *Adams* suit. Higher education was undergoing an organizational transformation. The trend in higher education was toward administrative consolidation, functional grouping of state supported colleges with unified boards of governance, and a differentiation of institutions to provide the broadest range of offerings for a diverse student clientele.⁹⁴ Thus, the organization of higher education into systems brought the administrative aspects of desegregation into closer alignment with the administrative complexities of public school desegregation. Superficial comparisons, however, could be misleading. The roles and offerings of state colleges, universities, and community colleges presented a diversity of institutions not paralleled in public school systems. State colleges, to use a legal term, are not fungible.

Black colleges and black educators were bombarded with changes

90. Greenberg, *Race Relations and Group Interests in the Law*, 13 *RUTGERS L. REV.* 503, 504 (1959).

91. *Id.* at 503.

92. *Southern State University Systems*, Sch. and Soc'y, Mar. 7, 1964, at 94.

93. Gilbert, *The Shaping of Public Policy*, 426 *ANNALS* 124 (1976).

94. *Southern State University System*, *supra* note 92.

from several fronts. Now part of higher educational systems, which in law were no longer organized on racial lines, black public colleges needed to define institutional roles beyond educating black students. Although the role of black public colleges in integrated systems of higher education had been debated in scholarly journals even before the *Brown* decision, few black colleges took the initiative and even fewer received state support to do so.⁹⁵

With *Brown*, the major thrust in desegregation shifted from higher education to the public schools. The downgrading of black principals and the dismissal of black teachers that often accompanied desegregation provided chilling precedents. Even the small-scale desegregation efforts in higher education indicated that legal equality could be implemented in ways which jeopardized the educational opportunities of black students and the professional opportunities of black educators. On the eve of the *Brown* decision, when Louisville Municipal College for Negroes was closed, only one of its faculty members was hired by the University of Louisville. The number of Negro high school graduates going on to college dropped sharply.⁹⁶ A similar drop of black enrollment followed the closing of Florida's black junior colleges.⁹⁷

By the time the *Adams* suit was filed, the perception of black educators of their own role and of the role of black colleges had undergone a profound transformation. Once viewed as a necessary evil, black colleges in the 1960's were recognized as the major source of educational opportunity for black higher education. The lawsuits of the 1940's had emphasized the inferior offerings of separate Negro colleges. In the 1960's black educators marveled at how much their institutions had accomplished with such paltry resources. As the wave of black consciousness flooded the campuses, black colleges were recognized, and saw themselves, as reservoirs of black culture and centers of black political power. As cultural pluralism replaced the integrationist ideal, black college presidents saw a continuing role for their institutions.⁹⁸ President Vivian Henderson of Clark College, speaking in 1967, challenged the idea that integration was the only means to educational excellence and cautioned that overconcentration on racial composition detracted from the question of educational quality:

"I am not a black nationalist or black power advocate, but I do raise questions as to whether a college has to be white to be good and to be

95. See Atwood, *The Public Negro College in a Racially Integrated System of Higher Education*, 21 J. NEGRO EDUC. 352 (1952); Payne, *The Role of the Negro College in Light of Integrative Trends*, 22 J. NEGRO EDUC. 80-83 (1953).

96. Cox, *Vested Interests Involved in the Integration of Schools for Negroes*, 20 J. NEGRO EDUC. 112 (1951).

97. J. EGERTON, *BLACK PUBLIC COLLEGES: INTEGRATION AND DISINTEGRATION* 16 (1971).

98. Henderson, *The Role of the Predominantly Negro Institution*, 36 J. NEGRO EDUC. 266 (1967).

good enough for everybody. . . . I raise a fundamental question at this point. What is wrong with Negro colleges continuing to be Negro colleges? They are going to be just that for a long time to come and perhaps it wouldn't be a bad idea for them to remain Negro colleges through eternity. A second fundamental question to be faced in higher education is this: What is wrong with whites going to Negro colleges?"⁹⁹

Just as the important historical role of black colleges was finally acknowledged and a new role in a culturally pluralistic society beginning to evolve, the trend of the law in public school desegregation seemed to threaten their very existence.

Adams v. Richardson recognized the increasingly systemic qualities of higher education, but in its early stages failed to acknowledge that desegregation might diminish educational opportunities for black students. Calling for enforcement of Title VI in public higher education, *Adams* continued to measure educational opportunity in terms of enrollment statistics. Its failure to deal with educational substance from the outset reflected the widening gap of perceptions between lawyers and educators. *Adams* was an unusual suit in many respects. First, unlike the well-publicized desegregation suits of the 1950's and early 1960's, the defendant was not a state university, but the United States Department of Health, Education and Welfare. Second, the relief sought was not the admission of qualified black students to white universities, but an order that HEW enforce Title VI of the 1964 Civil Rights Act. Third, under the umbrella of Title VI, the suit gathered together public elementary and secondary school districts as well as state systems of higher education. As the case proceeded, other aggrieved interest groups seeking enforcement of Title VI attached their claims to the *Adams* suit, like barnacles to the side of a great ship. Fourth, the diversity of the plaintiffs gave the Legal Defense Fund a degree of control over its course, unusual even in public interest cases. On the higher education aspects of the suit alone, nominal plaintiffs included students, faculty members, and taxpayers from several states. Thus, plaintiffs lacked either the organizational cohesion of the plaintiffs in *Alabama State Teachers Ass'n v. Alabama Public School and College Authority*¹⁰⁰ or the geographical cohesion of the plaintiffs in *Norris v. State Council of Higher Education*¹⁰¹ and *Sanders v. Ellington*.¹⁰²

While the two adversaries in court could hardly be expected to reflect the concerns of the many interests affected by the higher education question alone, the case was framed in such a way as to make those

99. *Id.*

100. 289 F. Supp. 784 (M.D. Ala. 1968), *aff'd mem.*, 393 U.S. 400 (1969).

101. 327 F. Supp. 1368 (E.D. Va. 1971), *aff'd per curiam*, 404 U.S. 907 (1971).

102. 288 F. Supp. 937 (M.D. Tenn. 1968).

concerns irrelevant to the outcome. Plaintiff's complaint reflected another crucial perception of its framers: that the meaning of the law in this area was certain, requiring only that HEW enforce it. The legal duties of the states and the definition of the unitary system of higher education were assumed rather than defined. The Amended Complaint for Declaratory and Other Relief, filed by the Legal Defense Fund in October, 1970,¹⁰³ emphasized the failure of HEW to take action against racially identifiable state colleges. Black as well as white colleges were implicated in the continuing race patterns. Plaintiffs asked that HEW be required to take "action to discontinue Federal financial assistance to all public colleges and universities practicing racial segregation or discrimination."¹⁰⁴ With its emphasis on procedure, the complaint was barren of legal or educational substance.

The *Adams* suit relied heavily on desegregation precedents evolving in the context of elementary and secondary education. It also acknowledged that merely dropping the legal restrictions barring access to state universities had not produced radical shifts in enrollment patterns. The strategy leading to the *Brown* decision had minimized the role of black public colleges, except to establish their non-competitive status. Not surprisingly, white students continued to attend white state universities. But when black students continued to seek their higher education at traditionally Negro colleges, it became clear that a greatly enlarged definition of equal educational opportunity was required. Having rebuilt the legal framework of public higher education, lawyers turned to educators to provide content to the concept of equality of educational opportunity. NAACP counsel, Robert L. Carter, acknowledged in 1968, "Whatever was believed or hoped for in 1954, we now know that a mere correction of the *Brown*-type deprivation, without more, will not insure equal educational opportunity."¹⁰⁵ Carter seemed to put the burden for new substantive definitions on educators:

One problem courts have in addressing themselves to this issue is that educators do not themselves seem to know what ingredients are needed to insure equal educational opportunity for Negro children. . . . Therefore, if educators were to determine with some specificity the particulars needed to accord the underprivileged Negro equal educational opportunity in fact - in resources and result - the courts would be able to incorporate those ingredients in the constitutional concept of equal education and require such state action. Indeed, courts would be required to flesh out the constitutional guaranty with those elements.¹⁰⁶

103. L. HAYNES, A CRITICAL EXAMINATION OF THE ADAMS CASE: A SOURCE BOOK (1978).

104. *Id.* at A-18.

105. Carter, *The Law and Racial Equality in Education*, 37 J. NEGRO EDUC. 205 (1968).

106. *Id.* at 211.

The thrust of social science findings and the direction of public school Title VI guidelines suggested that predominantly black schools were targeted for elimination. Lawyers, like Carter, accepted the conclusion of the Coleman report¹⁰⁷ that racially mixed classrooms were a crucial determinant of educational quality.

The guidelines formulated by HEW for public school compliance with Title VI reflected similar thinking. The 1965 guidelines¹⁰⁸ emphasized that the Title VI discrimination encompassed the racial composition of faculties as well as student bodies. The 1966 guidelines made clear that the way to eliminate discrimination was to eliminate the racial identity of previously segregated schools. While using colorblind language, the guidelines seemed to point to majority black schools when calling for the closing of racially identifiable schools or small, inadequate schools.¹⁰⁹ The HEW guidelines quickly received federal court approval. Decided in the context of public school desegregation, the thrust of *United States v. Jefferson County Board of Education*¹¹⁰ was clearly threatening to the public Negro college. Seeing faculty desegregation as even more important than student desegregation, Judge Minor Wisdom declared that faculty segregation had produced "inferior Negro teaching," "inferior education of Negroes as a class," and concluded: "A Negro faculty makes a Negro school; the Negro school continues to offer inferior educational opportunities; and the school system continues its psychological harm to Negroes as a class by not putting them on an equal level with white children as a class."¹¹¹ The decision was affirmed on appeal, and the Supreme Court denied certiorari. In 1968, however, the Supreme Court, in the case of *Green v. County School Board* ruled that school boards were required to fashion steps which promised realistically to convert to a unitary school system without a white school and a Negro school, but "just schools."¹¹²

The Legal Defense Fund, which had represented the plaintiffs in *Green* in securing the "just schools" ruling, sought in *Adams* to apply the same logic to higher education. Legal Defense Fund lawyers, who had depended on educators to provide substance to the meaning of equal educational opportunity, found themselves opposed in court by black college presidents with quite different perceptions of how best to achieve it in higher education. The framing of the *Adams* case and the lower court's finding for the plaintiffs on a motion for summary judg-

107. J. COLEMAN, *EQUALITY OF EDUCATIONAL OPPORTUNITY* (1966).

108. 30 Fed. Reg. 9981 (1965).

109. Statement of Policies for School Desegregation Plans under Title VI of the Civil Rights Act of 1964, 45 C.F.R. § 181 (1967).

110. 372 F.2d 836, *cert. denied*, 389 U.S. 840 (1967).

111. *Id.* at 892.

112. 391 U.S. 442 (1968).

ment precluded a full and public examination of the issue in the early stages of litigation. A spirited debate on the future of black public colleges was carried on in scholarly and popular publications,¹¹³ but the issue was not squarely before the court until the National Association for Equal Opportunity for Higher Education (hereinafter referred to as NAFEO) submitted its *amicus* brief to the District of Columbia Circuit Court of Appeals.¹¹⁴

The initial NAFEO brief was grounded in a legal definition of desegregation that Legal Defense Fund lawyers had already discarded as insufficient, that race could not be used as the basis for rejecting a qualified student from a state supported institution. It argued that black colleges were not the perpetrators of segregation, but its victims, and could not be sacrificed in an effort to achieve integration. On the educational opportunity side of the equation, NAFEO argued that Black colleges had the most experience and expertise in dealing with the peculiar educational needs of black students, who often suffered from poor public school training. While the Legal Defense Fund equated educational opportunity with shifts in enrollment patterns, the black college presidents went beyond statistics to the substance of the educational process.¹¹⁵

Thus, while lawyers offered an advanced legal definition of equality, educators contributed an expanded concept of educational opportunity. The two definitions seemed to conflict on the future role of black public colleges in unitary systems of higher education. The Court of Appeals accepted the Legal Defense Fund's perception of the problem as a systemic one, requiring coordinated state-wide efforts to correct. But it heeded as well the crucial role of black colleges in providing educational opportunities for black students. In contrast to the long experience of black colleges, the Court noted HEW's unfamiliarity with the problem, acknowledging that higher education could not be equated with public elementary and secondary education.¹¹⁶

NAFEO had challenged in court three of the Legal Defense Fund's fundamental perceptions of the case: whether public school precedents provided suitable standards for higher education, whether black colleges could be implicated in systemwide discrimination, whether elimi-

113. Pierce, *Integration: Negro Colleges' Newest Challenge*, *Ebony*, Mar., 1966, at 36; *The Future of the Black Colleges*, 100 DAEDALUS, No. 3 (1971); Tollett, *Black Institutions of Higher Learning: Inadvertent Victims or Necessary Sacrifices?*, 3 BLACK L.J. 162 (1973); Blake, *Future Leadership Roles for Predominantly Black Colleges and Universities in American Higher Education*, 100 DAEDALUS 745 (1971). See also J. EGERTON, *supra* note 97.

114. For a brief history of NAFEO, see SOUTHERN EDUCATION FOUNDATION, *SMALL CHANGE: A REPORT ON FEDERAL SUPPORT FOR BLACK COLLEGES* 16-19 (1972).

115. L. HAYNES, *supra* note 103.

116. *Adams v. Richardson*, 356 F. Supp. 92 (D.D.C. 1973), *modified*, 480 F.2d 1159 (D.C. Cir. 1973).

nating the racial identity of state colleges realistically promised to enhance educational opportunities for black youth. The NAFEO brief played a crucial role in altering the court's perception of the problem.

While the adversary setting of litigation is not necessarily the best forum for the discussion of complex educational issues, testimony offered by educator Dr. Elias Blake, then President of the Institute for Services to Education, provided substantive guidance for appraising state higher education desegregation plans. Although called as an expert witness by the Legal Defense Fund, Blake, in a deposition taken a year after the *Adams* suit was filed, presented a strong case for the continued importance of the black public college.¹¹⁷ Blake's testimony made clear that the problems in higher education required more than merely shifting enrollments. He stressed the diverse nature of institutional roles and the importance of increasing the access of black students and faculty to all components of higher educational systems.¹¹⁸ As a prerequisite to greatly expanded black participation in higher education, Blake recommended the inclusion of blacks on governing and planning boards that would formulate and implement state desegregation plans.¹¹⁹ Blake cautioned that unless a state could show that its plan would increase both the number and proportion of blacks throughout the system, "then you run the risk of desegregating a system and at one and the same time possibly diminishing the number of places in the system that there are now for blacks, and this could happen."¹²⁰

In a final irony, then, an educator's perception of equal opportunity steered the *Adams* case closer to its legal origins. Blake perceived that racial identification of institutions was not the problem, but merely a symptom of the more fundamental question of access. Black colleges remained because they provided access to higher education for students who might otherwise not attend college. When asked about the future of predominantly black colleges, Blake replied:

Well, it seems to me that you're focusing in on an issue of racial identifiability of the institutions. I think I am more concerned about the issue of equal access and equal participation in a system of higher education, and to have that goal be the primary goal that one is trying to reach in getting the systems to reorganize themselves.¹²¹

At the heart of *Brown* is the concept of access, that access to opportunities in public education cannot be conditioned on race. Each of the criteria suggested by Blake, and which have subsequently evolved into

117. Deposition of Elias Blake, Jr. (Nov. 9, 1971).

118. *Id.*

119. *Id.*

120. *Id.* at 90.

121. *Id.* at 181.

formal HEW criteria,¹²² point to increased access of black students and faculty to every level and aspect of higher education. When defined in terms of eliminating institutional racial identity, desegregation seemed to threaten rather than enhance educational opportunities for blacks. When defined in terms of enlarging access, both numerically and proportionately, desegregation promises both better opportunities for individual students, a more rational distribution of systemwide resources, and the institutional development of black public colleges.

The gaps in perceptions between lawyers and educators have varied with the pressures of the times as well as with the changing nature of the judicial process and systems of higher education. In the first period discussed, we saw that the peculiar educational needs of Negroes, coupled with increasing racial hostility, forced questions of educational opportunity to take precedence over the advancement of legal access to higher education. The NAACP and its legislative sympathizers acceded to a compromise in advocating ways to insure federal funding for separate Negro higher education.

In the second period, the NAACP rejected the regional educational compact as a means to enhance educational opportunity because it conflicted with its challenge to legally separate education itself.

In the third period, the needs of educational opportunity are again in ascendancy, with lawyers and educators initially in disagreement as to the best way to achieve it. Ironically, lawyers in the *Adams* suit advocated the elimination of racial identity just as educators perceived the positive aspects of the historically important work of the black college. By shifting the focus of the courts and the administration back to the concept of access as the way pointed by *Brown* to equal opportunity, educators brought the *Adams* suit closer to its legal antecedents.

In our three historical periods we have isolated a variety of issues on which the perceptions of lawyers and educators may diverge or coalesce. Among these are whether the primary goal is the attainment of educational opportunity or the establishment of a legal right. A second perception centers on education itself: the ways in which public school and higher education present similar administrative and legal problems and in which ways they are unique. Both *Hawkins* and *Adams* suggest that courts can make appropriate distinctions. A third perception centers on the respective realms of law and education. Events suggest that lawyers may have overestimated their own capabilities and underestimated the problems involved in higher education. Educators, on the other hand, may have been too slow to assert the importance of their

122. L. Haynes, III, *An Analysis of the Effects of Desegregation upon Black Public Colleges* 97 (1975) (unpublished Ph. D. dissertation in Ohio State Library).

own perspectives and to take the initiative in shaping their institutions' roles.

Both lawyers and educators need to expand their vision. Lawyers must resist a tendency to sue first and ask questions later. They need to consider the wider implications of lawsuits and to involve educators in the earliest planning stages. Educators must develop a new perception of themselves and their schools as integral parts of a system of higher education. They need to take advantage of the new interest in their institutions generated by the *Adams* case.¹²³ The perceptions of both are crucial to long-range plans.

Problems of legal right and educational opportunity are not identical, but the legal access provided by *Brown* was the essential prerequisite to the achievement of educational equality. Educators, working with lawyers, now need to devise techniques to increase the number and proportion of black students and faculty in all parts of higher education in order to fulfill the promise of the law.

123. *Id.*