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MCKISSICK V. CARMICHAEL REVISITED: LEGAL EDUCATION IN NORTH CAROLINA THROUGH THE LENS OF DESEGREGATION JURISPRUDENCE

WENDY B. SCOTT*

ABSTRACT

This Article positions the North Carolina campaign for equality in legal education within the larger context of lawsuits decided prior to *Brown v. Board of Education*, the accepted landmark of transition in the constitutional treatment of race. Cases brought between 1938 and 1950 contributed to the momentum to desegregate the University of North Carolina Law School and provided the precedent for the emerging jurisprudence of desegregation. These cases also contributed to the establishment of the North Carolina Central University School of Law. After discussing the policy debates and litigation, the author concludes that the permanence of North Carolina Central University School of Law, and other HBCUs created to resist the end of “separate but equal,” is one of the victories of the campaign to end racial separation mandated or sanctioned by law.

I. INTRODUCTION

The history of legal education in North Carolina¹ has deep roots in the desegregation jurisprudence that culminated in *Sweatt v.*

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1. For a detailed discussion of the length to which North Carolina went to avoid admitting black students to The University of North Carolina Law School, see Davison M. Douglas, *The Rhetoric of Moderation: Desegregating the South During the Decade After Brown*, 89 Nw. U. L. REV. 92, 101 (1994) (discussing the motivation of the North Carolina General Assembly “to undermine the NAACP-sponsored litigation” and avoid federal court intervention); see also Charles E. Daye, *The University of North Carolina School of Law: A Sesquicentennial History*, 73 N.C. L. REV. 675, 679, n. 13 (1995) (paying tribute to the students who integrated UNC Law School and providing details on the parties who filed suit); see also Deborah J. Braswell, A

Painter.² *Sweatt* represents one of several successful challenges to the constitutionality of racial segregation in public institutions that preceded *Brown v. Board of Education*.³ In *Sweatt*, the Supreme Court held that the State of Texas violated the Fourteenth Amendment “separate but equal” doctrine by providing a less than equal law school for African-American students and refusing to admit them to the University of Texas Law School.⁴ Charles Hamilton Houston and Thurgood Marshall led the implementation of the litigation strategy that desegregated the University of Texas Law School and ultimately dismantled the constitutional doctrine of “separate but equal.”⁵ The unprecedented litigation campaign that blossomed in the South to systematically dismantle Jim Crowism⁶ took root in North Carolina as well.

The Houston/Marshall strategy included a strong push to end discrimination in state graduate and professional schools,⁷ even after the Supreme Court suggested in *State of Missouri ex rel Gaines v. Canada*⁸ that states could establish separate graduate programs for African-Americans to satisfy the Fourteenth Amendment equality mandate.

History of North Carolina Central University's Law School, 1939-1968, (1977) (unpublished M.A. thesis, North Carolina Central University) (on file in the James E. Shepard Memorial Library University Archives).

2. *Sweatt v. Painter*, 339 U.S. 629 (1950). Texas Southern University Thurgood Marshall School of Law (“TSU”) celebrated its 60th year in 2010. In total, thirteen black law schools were started to avoid integration. Harold R. Washington, *History and Role of Black Law Schools*, 5 N.C. CENT. L.J. 158, 159-76 (1973-74); Gil Kujovich, *Equal Opportunity in Higher Education and the Black Public College: The Era of Separate But Equal*, 72 MINN. L. REV. 29, 136, n. 393 (1987) (connecting the North Carolina litigation to other cases of the era). TSU, as well as Southern University Law Center in Louisiana, North Carolina Central University School of Law, and Florida A&M School of Law continue to operate.

3. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

4. *Sweatt*, 339 U.S. at 635-636.

5. See *Plessy v. Ferguson*, 163 U.S. 537, 544 (1896) (explaining that requiring or permitting racial separation was “generally, if not universally, recognized as within the competency of state legislatures in the exercise of their police powers.”). For details on the litigation campaign to overturn *Plessy* and end racial segregation, see JACK GREENBERG, *CRUSADERS IN THE COURTS: HOW A DEDICATED BAND OF LAWYERS FOUGHT FOR THE CIVIL RIGHTS REVOLUTION* 54-176 (1994); RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* (1976); LOREN MILLER, *THE PETITIONERS: THE STORY OF THE SUPREME COURT OF THE UNITED STATES AND THE NEGRO* 333-364 (1966); PHILIPPA STRUM, *MENDEZ V. WESTMINSTER: SCHOOL DESEGREGATION AND MEXICAN-AMERICAN RIGHTS* 134 (2010); ROBERT J. COTTRILL, RAYMOND T. DIAMOND & LELAND B. WARE, *BROWN V. BOARD OF EDUCATION: CASTE, CULTURE AND THE CONSTITUTION* 115-116 (2003) (identifying many of the campaign lawyers who made up a “small brain trust of the nation's best attorneys, black and white”).

6. See ARTHUR L. TOLSON, *THE BLACK OKLAHOMANS, A HISTORY: 1541-1972* 124 (1974) (explaining the name “Jim Crow” grew famous, as a reference to segregation, through the work of a white comic).

7. See COTTRILL ET AL., *supra* note 5, at 58; KLUGER, *supra* note 5, at 157; Victoria L. Brown-Douglas, *Is It Time to Redefine The Negro Lawyer?*, 25 ST. JOHN'S J. C.R. & ECON. DEV. 55, 62, n. 56 (2010).

8. *State of Missouri ex rel Gaines v. Canada*, 305 U.S. 337 (1938).

In North Carolina, students at the “Negro” law school, founded after *Gaines*, challenged the state’s refusal to admit them to the University of North Carolina (UNC) Law School.⁹ And while North Carolina Central University (NCCU) School of Law has grown into a recognized leader in legal education,¹⁰ the litigants in *McKissick v. Carmichael*¹¹ argued successfully that the educational opportunities afforded at the time by the law school established at North Carolina College for Negroes at Durham (the predecessor to NCCU) were unequal to those provided at UNC School of Law. The Fourth Circuit Court of Appeals agreed and ruled that *Sweatt* required the admission of black applicants to UNC.¹²

This Article positions the North Carolina campaign for equality in legal education within the larger context of lawsuits decided prior to *Brown v. Board of Education*. Part II explores the policy debates surrounding the development of strategies to end the debilitating effect of racial segregation. The two mainstream views called for the complete dismantling of legal segregation and full integration of African-Americans into mainstream white institutions. On the other hand,

9. Attorney Conrad O. Pearson of Durham, along with Robert Carter and Thurgood Marshall from the NAACP Legal Defense and Education Fund, represented the plaintiffs. *UNC To Face Suit: University Sued For Admission To Its Law School*, CAROLINA TIMES, Oct. 29, 1949, at 1, <http://library.digitalnc.org/cdm4/document.php?CISOROOT=/newspapers&CISOPTR=18687&REC=11>.

10. See Michelle Weyenberg, *Top Law Schools for Clinical Opportunities*, NAT’L JURIST, September 2011, at 24-25, <http://www.nxtbook.com/nxtbooks/cypress/nationaljurist0911/#/24> (ranking NCCU School of Law, offering 12 different clinical programs, as 4th in the nation on a list of “Most Clinical Opportunities”); Michelle Weyenberg, *Best Law Schools for Public Interest*, NAT’L JURIST, January 2011, at 24, 26, <http://www.nxtbook.com/nxtbooks/cypress/nationaljurist0111/#/24> (assigning NCCU School of Law a grade of “A-” in rankings for “Best Public Interest Law School”); Jennifer Pohlman, *Best Bang! For Your Buck*, THE NAT’L JURIST, September 2009, at 27-31, <http://www.nxtbook.com/nxtbooks/cypress/nationaljurist0909/#/26> (noting NCCU School of Law’s position as a number 1 “Best Value Law School” in 2007 and 2009); Karen Dybis, *The Search for the Missing Voices*, NAT’L JURIST, March 2009, at 22, <http://www.nxtbook.com/nxtbooks/cypress/nationaljurist0309/index.php?startid=22#22> (identifying the 174 Best Law Schools, 2009 edition of The Princeton Law Review ranks NCCU School of Law 7th as the “Most Diverse Faculty”); Michelle Weyenberg, *Best in Practical Training*, NAT’L JURIST, September 2008, at 26, 28 <http://www.nxtbook.com/nxtbooks/cypress/nationaljurist0908/index.php?startid=26> (ranking NCCU School of Law 20th in the list “Most Clinical Opportunities Available”); *North Carolina Central University*, NAT’L JURIST, <http://www.nationaljurist.com/law-schools/north-carolina-central-university/rankings> (last visited January 13, 2012) (ranking NCCU School of Law as one of the nation’s “Best Law Libraries” in October 2004); see also *Law School Diversity Index*, U.S. NEWS & WORLD REPORT, <http://grad-schools.usnews.rankingsandreviews.com/best-graduate-schools/top-law-schools/law-school-diversity-rankings> (ranking by U.S. News & World Report that NCCU School of Law has one of the nation’s best on the “Diversity Index”).

11. *Epps v. Carmichael*, 93 F. Supp. 327 (M.D.N.C. 1950), *rev’d sub nom. McKissick v. Carmichael*, 187 F.2d 949 (4th Cir. 1951) (holding that North Carolina’s policy of operating two “separate but equal” law schools violated the Fourteenth Amendment as interpreted in *Sweatt v. Painter*).

12. *McKissick*, 187 F.2d at 950.

prominent voices in the African-American community argued for growing and sustaining black institutions of higher education. In the end, both strategies gained currency.

Part III reviews the legal challenges brought to defeat *Plessy* between 1936 and 1950, using the mainstream legal theories discussed in Part II, in cases involving disparities in secondary school facilities and teacher salaries, the state action doctrine and higher education. References from the indispensable coverage of the litigation campaign by the black press provide additional insight into the determination of the African-American community and its supporters to end segregation.¹³ Part IV examines the successful challenge to the dual system of legal education in North Carolina in the context of the larger campaign to gain access to graduate and professional education. The Article concludes that, along with the desegregation victory, the permanence of North Carolina Central University School of Law and other HBCU's created to resist the end of "separate but equal," counts as a victory in the campaign to end legal segregation.

II. THE LEGAL THEORIES DEVELOPED TO END SEGREGATION

The development of the legal theories to end segregation involved the melding of legal arguments with philanthropic, political, academic and popular viewpoints. In the 1920s, the American Fund for Public Service ("the Garland Fund") paid for several research projects to hone legal theories the National Association for the Advancement of Colored People (NAACP) could use to launch judicial challenges to the constitutionality of segregation.¹⁴ I refer to the two mainstream theories that emerged as the *initial strategy of equalization* and the *expanded strategy of frontal assault*. Lawyers employed both strategies to slowly dismantle racial segregation sanctioned by law.

At the same time, however, an influential contingent of black leaders advocated for strengthening separate institutions. In the concluding section of Part II, I discuss how combining all of these theories creates the *empowerment theory*: maintaining black colleges and universities while expanding access to education at formerly segregated schools.¹⁵

13. GENE ROBERTS & HANK KLIBANOFF, *THE RACE BEAT: THE PRESS, THE CIVIL RIGHTS STRUGGLE, AND THE AWAKENING OF A NATION* 12-13 (2006) (examining the role of the Black press in denouncing racism and supporting the litigation campaign).

14. KLUGER, *supra* note 5, at 134. Strategists focused on judicial challenges in light of the absence of civil rights legislation from 1875 until the passage of the 1957 and 1964 Civil Rights Acts.

15. See *infra* Part II.C. and notes 26-30. For a full discussion of this strategy, see also Wendy B. Scott, *Race Consciousness in Higher Education: Does "Sound Educational Policy" Support the Continued Existence of Historically Black Colleges?*, 43 EMORY L.J. 1 (1994); Wendy B. Scott,

A. *Initial Strategy of Equalization*

The initial strategy of equalization called for apparent acquiescence to segregation while demanding complete equality in schools and other public places.¹⁶ In other words, through litigation it would be proven that maintaining separate but *unequal* schools violated the Constitution.¹⁷ The goal was to make segregation so cost prohibitive that the states would have no choice but to end segregation in public spaces.¹⁸ But despite the mounting litigation cost, Southern legislatures retrenched even more into financing “citadels of segregation.”¹⁹ North Carolina fought to maintain segregation “citadels” by attempting to equalize education at all levels and establishing a separate law school for African-American students.²⁰ The equalization strategy ultimately succeeded in revealing the deep financial and emotional investments made in structural segregation.

B. *Expanded Strategy of Frontal Assault*

In a report prepared for the Garland Fund, Nathan Margold offered a more expansive legal strategy intended to challenge segregation itself.²¹ Charles Hamilton Houston and Felix Frankfurter, who mentored both Margold and Houston while at Harvard Law School, selected Margold to draft a report detailing his proposal.²² Margold’s report centered on two questions left unanswered in *Plessy v. Ferguson*. First, what if any remedy would be available to individual African-American citizens if the state failed to equalize facilities? Second, when should the Court hold states accountable for their intentional and habitual failure to provide full equality to African-American citizens?

The Margold Report proposed an expanded litigation strategy that called attention to answering the second question.²³ The Report proposed direct challenges to segregation “if and when accompanied irre-

Desegregation Law and Jurisprudence, 1 DUKE F. FOR L. & SOC. CHANGE 1 (2009) (discussing the continuing need for and vitality of HBCUs to ensure that more African-American students have access to higher education).

16. GREENBERG, *supra* note 5, at 58-59.

17. *Id.*

18. See KLUGER, *supra* note 5, at 132 (explaining the original proposal called for taxpayer suits to “make the cost of a dual school system so prohibitive as to speed the abolition of separate schools; . . . give courage to Negroes to bring similar actions; . . . [cause] cases . . . [to] be appealed . . . causing higher court decisions to cover wider territory; . . . [and] focus as nothing else will public attention north and south upon vicious discrimination”).

19. TOLSON, *supra* note 6, at 175.

20. Douglas, *supra* note 1, at 93 (describing North Carolina as one of a few southern states that pursued “token integration” prior to Brown to avoid desegregation).

21. GREENBERG, *supra* note 5, at 59.

22. *Id.* at 56.

23. *Id.* at 59.

mediably by discrimination.”²⁴ In other words, the goal was to discredit the separate-but-equal doctrine by collecting evidence, case by case, to demonstrate that states had neither the political will, nor the financial resources to halt the “irremediable” discriminatory practices against African-American citizens.

C. *The Empowerment Strategy*

Two common assumptions underlie the *initial* and *frontal assault* strategies. The first assumption was that a judicial order to desegregate a system of education, a business or a public accommodation spelled victory. Later, it would become clear that defining “desegregation” and the enforcement of court orders would not be simple tasks.²⁵ The second assumption was that African-Americans were unified in their support of integration. There were, however, strong sentiments among black leaders for growing and maintaining black institutions.²⁶ Central among those voices that supported African-American schools were the prominent public intellectual Dr. W.E.B. Du Bois and education leader Dr. James Shepard, founder of North Carolina Central University.²⁷ In his seminal work on the subject, *Does the Negro Need Separate Schools?*,²⁸ Du Bois argued that racial prejudice required African-American citizens to develop and flourish in their own institutions.²⁹ Du Bois favored self-reliance as a means of obtaining equality rather than promoting self-reliance to maintain segregation and gain the respect of white Americans.³⁰

Therefore, a fourth approach combines the two mainstream desegregation theories with the DuBois/Shepard emphasis on self reliance and quality education, resulting in what I call the *empowerment theory*. The permanence³¹ of law schools and graduate programs, estab-

24. *Id.*

25. For a brief review of efforts to enforce Brown, see Wendy B. Scott, *Dr. King and Parents Involved: The Battle for Hearts and Minds*, 32 N.Y.U. REV. L. & SOC. CHANGE 543 (2008).

26. See Wendy B. Scott, *Justice Thurgood Marshall and the Integrative Ideal*, 26 ARIZ. ST. L.J. 535 (1994) (discussing the differing views in the black community on the benefits and downsides of integration).

27. KLUGER, *supra* note 5, at 157-58 (detailing how Dr. Shepard resisted efforts to desegregate the college); COTTROL ET AL. *supra* note 5, at 66 (noting how both Shepard and DuBois opposed desegregation as a threat to black institutions).

28. See W. E. B. Du Bois, *Does the Negro Need Separate Schools?*, 4 J. NEGRO EDUC. 328 (1935).

29. *Id.* at 328-30; See also Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1990); KLUGER, *supra* note 5, at 91-96 (providing a concise and insightful discussion of Du Bois). For an argument specific to the importance of black law schools, see Washington, *supra* note 2, at 159-60, 176-77 (arguing for the necessity of black law schools to address the shortage of black lawyers especially in the South).

30. KLUGER, *supra* note 5, at 94-95.

31. See generally David H. Getches, *A Philosophy of Permanence: The Indians' Legacy for the West*, 24 J. W. 54 (1990).

lished at black colleges and universities, to resist the integration of historically white colleges and universities³² stand as a testimony to the success of *empowerment* as a strategy. Getches uses the idea of “permanence” to characterize the continued existence of Indian nations and cultures, despite the planned genocide perpetrated against them. Applied in this context, historically black colleges and universities, in North Carolina and throughout the country, exist because of the systemic perpetuation of racial subordination. While the cases discussed in Part III succeeded under the mainstream theories, the outcome in the struggle for equal access to legal education in North Carolina illustrates the viability of the *empowerment theory*.

III. THE LEGAL THEORIES IMPLEMENTED THROUGH LITIGATION

The Houston/Marshall team of lawyers employed the *equalization* and *frontal* attack strategies to challenge segregation in education, transportation, voting, employment and wages. The examples chosen for discussion in this section focus on cases brought to alleviate unequal conditions in secondary school facilities, create parity in teacher salaries, transportation and expand the scope of state action. These cases laid the groundwork for the frontal attack on *Plessy* and displaced the precedent that held segregation in place with precedent designed to discredit the constitutionality of legally sanctioned racial segregation.

A. Secondary School Facilities and Teacher Salaries

The Margold Report predicted that the litigation campaign would “stir . . . the spirit of revolt among blacks.”³³ W.E.B. Du Bois proved the vital role of the black press in stirring that spirit when the circulation of the NAACP magazine *Crisis* soared from 1,000 to 10,000 in one year and to 100,000 in ten years.³⁴ Nowhere was the galvanizing effect of the black press on the African-American community and their supporters in the struggle for equal citizenship rights felt more than on the issue of equalizing teacher salaries and school condi-

32. See Kujovich, *supra* note 2 (discussing the establishment of HBCUs after the Civil War as part of the private philanthropic movement started by churches and businesses in the North, and the subsequent creation of graduate and professional programs by southern state legislators in anticipation of court orders to integrate white programs).

33. *Id.*

34. KLUGER, *supra* note 5, at 98; see also ROBERTS & KLIBANOFF, *supra* note 13, at 14 (documenting the growth in national circulation of *Crisis* and other popular black publications reporting on the litigation campaign to end Jim Crowism).

tions.³⁵ Under Houston's leadership, the litigation campaign aggressively challenged segregation in public tax-supported education.

Starting in the late 1930's, Houston and Marshall successfully targeted a number of school districts in Maryland and Virginia to demand equal salaries and facilities in public schools. Houston relied successfully on both the *initial strategy of equalization* and the *expanded strategy* in the consolidated *Freeman* cases. In *Freeman v. County School Board of Chesterfield County*,³⁶ plaintiffs provided the court with a complete breakdown of the salary schedule to establish the salary disparities between white and black principals and school-teachers.³⁷ The schedule also showed that more black teachers held degrees than white teachers.³⁸ Houston's legal team employed the equalization theory to claim that paying African-American school-teachers less than the salaries paid to comparable white teachers, because of their race, violated the mandate that separate institutions be equal.³⁹ Based on the evidence, the court concluded that "when a

35. See e.g. *Gov. of Maryland Seeks Equal Pay for Teachers*, CLEVELAND CALL & POST, Jan. 6, 1938, at 5 (quoting governor as calling dual teacher salary scale unconstitutional based on advice from Marshall and Houston); *Higher Pay Sought for VA. Tutors*, ATLANTA DAILY WORLD, Jan. 25, 1938, at 1 (chronicling meeting between Marshall, Houston and teachers); *Equal Salaries for All Teachers Being Sought*, NEW J. & GUIDE (Norfolk, Va.), Nov. 5, 1938, at 20 (announcing suit brought by Marshall, Houston and local attorneys); *Maryland Would Replace its Negro Teachers with White Threatens Attorney General*, CLEVELAND CALL & POST, Feb. 2, 1939, at 7 (threatening termination in the face of federal lawsuit for salary equalization); *Newest NAACP School Suit for Virginia*, AFRO-AMERICAN (Baltimore, Md.), Feb. 11, 1939, at 13 (filing of a suit to challenge school conditions); *Equal Salaries Advocated by White Professors, NAACP Presses Fight in Virginia*, CLEVELAND CALL & POST, Mar. 16, 1939, at 12 (noting that salary equalization cases had been filed in Alabama, Georgia, Florida and Louisiana); *County Board Doesn't Discuss Salary Ruling*, AFRO-AMERICAN (Baltimore, Md.), Dec. 16, 1939, at 20 (reporting on the refusal of political leaders to discuss the federal court ruling to equalize teacher salaries).

36. *Freeman v. Sch. Bd.*, 82 F. Supp. 167 (E.D. Va. 1948) (consolidating three cases decided in the District Court for the Eastern District of Virginia in which plaintiffs alleged that the school boards discriminated against the colored pupils on account of their race and color since the public schools maintained for the colored children were greatly inferior in construction, equipment and facilities, instructional personnel, libraries and transportation services than those provided for the white pupils).

37. *Id.* at 169 (considering evidence showing that for the years 1942-1943 and 1945-1946 no white teacher received less than the highest salary received by a colored teacher, and that during the years 1946-1947 only nine percent of the white teachers received salaries lower than the highest salary paid any colored teacher).

38. *Id.* (showing that between 1943 and 1944, the percentage of teachers with degrees was thirty-nine for Black teachers and thirty-five for white teachers, in 1945-1946 fifty-two percent of the colored teachers held degrees compared with twenty-seven percent of white teachers, and in 1946-1947 there was no increase in the number Black teachers who held degrees, but the number of white teachers who held degrees increased to twenty-nine percent).

39. See *id.* at 168 (finding that the defendant school board maintained a salary schedule for white and black teachers and principals, where the salary scale for the black faculty was considerably less than that of the white faculty. In 1940, the teachers and other citizens protested against this pay disparity, which resulted in the school board granting the black teachers a \$100 salary increase per year. Also in response to the teachers' grievances, the school board estab-

state . . . provides at public expense free educational opportunities for its children, those provided for members of one race must be of substantially the same type as those provided for members of another race.”⁴⁰ The court held that discrimination existed solely according to the race and color of the teachers since they consistently received lower salaries than the white teachers over a period of years.⁴¹

In *Smith v. School Board of King George County, VA*, the second of the consolidated cases, the Court found that a marked difference existed between the two high schools in the county: King George for white children and King George Training School for African-American children.⁴² The Court gave great weight to the testimony of the Division Superintendent who admitted that the disparities in instruction existed because the schools equipped white and black children for different types of future employment.⁴³ The Court concluded, based on substantial evidence, that the school system in King George County clearly afforded unequal opportunities to black children in violation of the Fourteenth Amendment.⁴⁴

Ashley v. School Board of Gloucester County, the third of the consolidated cases, focused on the plaintiffs’ claim that the school district discriminated against black children by employing teachers and principals with fewer qualifications than those who taught in white schools.⁴⁵ They introduced evidence of greater turnover among the black teachers due to smaller salaries; the lower quality of the school buildings, heating facilities, and equipment for the black children than those provided to white children⁴⁶ and admittedly unsafe and unhealthy working conditions⁴⁷ as proof of why black schools could not attract teachers with the same qualifications as the white schools.

lished a revised salary schedule for all teachers that made no mention of the race or color of the teacher and appeared to apply to all teachers in the same way).

40. *Id.*

41. *Id.* at 170.

42. *See id.* at 170 (finding that many disparities existed between the two schools: King George School had running water, modern toilets facilities, a central heating plant, a modern cafeteria, and a gymnasium. King George Training School had outside toilets, a cafeteria significantly inferior to its white counterpart, no gymnasium and, instead of central heating, stoves heated the classrooms. The “colored school” also lacked equipment that the white school had for use in science courses).

43. *Id.* at 171-72.

44. *Id.*

45. *Id.* at 168.

46. *Id.* at 172.

47. *Id.* (giving considerable weight to evidence of the disparate value of the buildings and finding that between the year 1943 and 1947, the value of buildings furnished to white children had been “at least twice the value of those provided colored children”). *See also Id.* at 173 (entering a declaratory judgment in favor of the plaintiffs, but making clear that the Court would not supervise or direct the proper authorities as to what steps must be taken to eliminate discrimination in the school system, and defining the scope of the opinion as limited by authority to find from the evidence and legal principles that are applied, whether unlawful discrimination

The growing success of the strategies is further illustrated in *Carter v. School Board*.⁴⁸ The Fourth Circuit Court of Appeals found the Arlington County Virginia school board's policies unconstitutional. In *Carter*, as the *frontal assault strategy* intended, the court highlighted the great expense involved in providing a small group of black students with a separate school, including all courses, equipment and recreational facilities given to white students.⁴⁹ The Court rejected reliance on the notion of substantial equivalence between the black and white schools, and focused instead on the "true reason" that black students were not offered courses available to whites: "the lack of suitable facilities and equipment for instruction."⁵⁰

The *frontal assault strategy* had struck a crucial blow and the tide was beginning to turn against jurisprudence that accepted pretenses of substantial equality and deferred to administrators in resource decisions.

B. *Transportation*

The Houston/Marshall team also brought several challenges to desegregate transportation.⁵¹ In *Morgan v. Virginia*,⁵² the Supreme Court held that railroads could not compel Black passengers to comply with the segregation laws of each state traveled through. Two years later, Michigan sued Bob-Lo Excursions Company for violating the Michigan Civil Rights Act, which required "equal accommodations for all persons on public conveyances as applied to transportation of persons between Michigan and Canadian Island."⁵³

Bob-Lo Excursions owned and operated two steamships for transporting customers of the Bois Blanc Island's attractions, located in Canada, from Detroit and back.⁵⁴ The evidence showed that the appellants also transported residents of the Province of Ontario to

existed and whether the plaintiffs were entitled to injunction against the continuation of the discriminatory acts).

48. *Carter v. Sch. Bd.*, 182 F.2d 531, 535 (4th Cir. 1950).

49. *Id.* at 532 (detailing the experience of black students who wished to attend Washington D.C. schools in order to obtain courses offered only to whites in the Arlington County Schools, applied to the Arlington County School Board to pay their tuition during the 1946-1947 and 1947-1948 school sessions, and then filed suit after the payments ceased for the 1948-1949 school year).

50. *Id.* at 537 (rejecting the District Court's reasoning that certain courses were not given at Hoffman-Boston since they have not been requested or desired by the black students because no such requests were required of white students, since the courses were already available).

51. In a 1946 editorial, The Pittsburgh Courier summarizes the various victories achieved against racial discrimination, including transportation. See *The United States Supreme Court*, PITTSBURGH COURIER (1911-1950), June 15, 1946, at 6.

52. *Morgan v. Virginia*, 328 U.S. 373 (1946).

53. *Bob-Lo Excursion Co. v. Mich.*, 333 U.S. 28 (1948).

54. *Id.* at 29.

Bois Blanc, although they were completely separate trips from those between Detroit and Bois Blanc.⁵⁵ The lawsuit against the appellants came about after Sarah Elizabeth Ray, a black girl, was in attendance with forty white girls who boarded one of the appellant's ships in Detroit that was destined for Bois Blanc Island.⁵⁶ The group of girls paid the fare and entered the ship; however, Ms. Ray was told she could not go along with the group to the island because she was colored.⁵⁷

Evidence showed that in conducting their business the appellant followed the advertised policy that all passengers, "except . . . the disorderly [and] . . . colored people" were welcome aboard.⁵⁸ On the other hand, the Michigan Civil Rights Act made it a misdemeanor for anyone who operated, owned, leased agent, or employee of public conveyances who "directly or indirectly withholds any accommodation . . . on account of race . . . or color . . ." ⁵⁹

The appellants argued that they did not operate a "public conveyance" as a matter of local law.⁶⁰ The Supreme Court of Michigan rejected the claim and ruled in favor of Michigan.⁶¹ Bob Lo Excursions appealed and the case was then heard by the United States Supreme Court.⁶² The Court addressed the question of whether a State can prevent a carrier in foreign commerce from denying a passenger because of his race or color.⁶³ The Court affirmed the Michigan state court's decision and concluded that the Michigan anti-discrimination law did not impose any undue burden on foreign commerce.⁶⁴

C. *Expansion of the State Action Doctrine*

Before moving to the North Carolina experience in desegregating legal education, a review of state action cases is in order because the absence of state action was a defense strategy to avoid liability for denying access to higher education as well.⁶⁵ Therefore, it was necessary in the litigation campaign to broaden the restrictive view of state action announced in the *Civil Rights Cases*.⁶⁶

55. *Id.*

56. *Id.* at 30.

57. *Id.* at 31.

58. *Id.* at 30.

59. *Id.* at 32.

60. *Id.* at 33.

61. *Id.*

62. *Id.*

63. *Id.* at 34.

64. *Id.* at 40.

65. See e.g., *Pearson v. Murray*, 182 A. 590-91 (Md. 1936) (reciting the University defendants' argument that the character and organization of the University of Maryland Law School is not a government agency and thus not required to give equal rights to students of both races).

66. *Civil Rights Cases*, 109 U.S. 3 (1883) (limiting the application of the 13th and 14th Amendment).

Smith v. Allwright,⁶⁷ one of a series of cases known as “the White Primary Cases,” best illustrates the attempt to privatize state action to avoid constitutional scrutiny. Smith, a black citizen of Texas, claimed that election judges denied him a ballot and permission to cast a ballot in the 1940 Democratic primary election for federal and state officials.⁶⁸ Smith alleged this refusal was solely because of his race and color.⁶⁹ The respondents based their refusal to allow black citizens to vote on a resolution adopted by the Democratic Party at a State convention that limited membership in the Party to “white citizens . . . who are qualified to vote under” Texas law.⁷⁰ The question before the Supreme Court was whether the Party operated as a representative of the State in the discharge of Texas’ authority.⁷¹ The Court held that when the privilege of membership in a political party is also the essential qualification for voting in a primary to select nominees for general election, the state caused the action of the party to be the action of the state within the meaning of the Fifteenth Amendment.⁷²

The Court continued to expand the state action doctrine. In *Kerr v. Enoch Pratt Free Library*⁷³ (“Pratt Library”), Louise Kerr, represented by Charles Houston, sued the Enoch Pratt Free Library of Baltimore City for denying her admission to a training class for staff positions at the Central Library and its branches.⁷⁴ The trustees of the Library resolved not to employ Negro library assistants “in view of the public criticism which would arise and the effect upon the morale of the staff and the public.”⁷⁵ Pratt Library had rejected more than two hundred applications from black applicants during the existence of the training classes.⁷⁶ The defendants argued that Kerr was not excluded solely because of her race or color, but rather she was denied admittance because the only positions that were available to black appli-

67. *Smith v. Allwright*, 321 U.S. 649 (1944).

68. *Id.* at 651.

69. *Id.*

70. *Id.* at 656 (quoting a resolution adopted on May 24, 1932 in a State Convention of the Democratic Party).

71. *Id.* at 661.

72. *Id.* at 664-65.

73. *Kerr v. Enoch Pratt Free Library*, 149 F.2d 212 (4th Cir. 1945).

74. *Id.* at 213 (seeking damages under the Civil Rights Act, 8 U.S.C. § 41, a permanent injunction prohibiting refusal of her application and a declaratory judgment to establish her right to have her application considered without discrimination because of her race and color).

75. *Id.* at 214; see also Don Herzog, *The Kerr Principle, State Action, and Legal Rights*, 105 MICH. L. REV. 1, 2-3 (2006) (providing an interesting analysis of the Court’s rationale in that the Enoch Pratt Free Library was not necessarily denying Kerr admittance to the training program, but was rather concerned about their patrons who would not welcome seeing a black person at the library to which they attended, and outlining what he names the Kerr principle: “apparently unobjectionable laws, when coupled with particular facts about private parties, sometimes yield unconstitutional outcomes”).

76. *Id.* at 214.

cants, were filled at the time of Kerr's application.⁷⁷ Defendants reasoned that, since there were other colored persons available for appointment who were already adequately trained, it would be useless for Kerr to wait for a vacancy at the training school.⁷⁸ In arguing for reversal of the trial court's conclusion to the contrary, Houston invoked the state action doctrine by arguing that the library was a government entity that was subject to the constitutional prohibition against race discrimination.⁷⁹

The Fourth Circuit reversed, having "no difficulty in concluding that" the library was an instrumentality of the State of Maryland.⁸⁰ First, Enoch Pratt, the original donor, and Andrew Carnegie, a major benefactor of the library, both sought aid from the State of Maryland to found the public institution and perpetuate it.⁸¹ The organization of the library was such that it was to be owned and supported by the city, but operated by a board of trustees so as to avoid political manipulation.⁸² Second, the powers and responsibilities of the trustees were conferred by the state at the beginning of the library's creation.⁸³ Third, over the sixty-year history of the library, the city's interests had greatly extended and increased, such that it was completely dependent on the city's financial support.⁸⁴ Thus, finding that the library was an entity of the state, the Court held that the charter of the library should not be interpreted as allowing it the power to discriminate between the people of the state based on race.⁸⁵ Further, the Court outlined the issue not to be determined by the technical rules of the law of principal and agent, but whether the library and its branches had become "organs of the state itself, the repositories of official power."⁸⁶ The Court found that it was such a repository, and therefore it fol-

77. *Id.* at 213-14.

78. *Id.* at 214.

79. *Id.* Defendants included the Mayor and City Council of Baltimore. Along with the Library's board of trustees, they argued that the library was a private corporation that performed no public function as a representative of the State. The district court sided with the defendants and Kerr appealed.

80. *Id.* at 219; For several papers that reported the court victory, see *Appeals Court Reverses Library Decision*, NEW J. & GUIDE (Norfolk, Va.), April 21, 1945, at A1; *Race Bias Banned in Baltimore Library, U.S. Court of Appeals Rules Lily-White Class Illegal; NAACP Wins*, AFRO-AMERICAN (1893-1988) (Baltimore, Md.), April 28, 1945, at 16; *Supreme Court Declines to Review Verdict in Baltimore Library Case*, NEW J. & GUIDE (Norfolk, Va.), October 20, 1945, at A9.

81. *Kerr*, 149 F.2d at 215-217.

82. *Id.* at 216-17.

83. *Id.*

84. *Id.* at 217.

85. *Id.* at 218.

86. *Id.* at 219 (quoting *Nixon v. Condon*, 286 U.S. 73, 89 (1932)).

lowed that the library was subject to the restraints of the Constitution and could not be allowed to discriminate on the basis of race.⁸⁷

Along with challenges to school conditions, teacher salaries and exclusion from higher education, the NAACP also launched a campaign to end residential restrictions that was widely reported in the Black press.⁸⁸ Among the cases challenging restrictive covenants was the most celebrated of the three state action cases brought during the desegregation campaign: *Shelley v. Kraemer*.⁸⁹ The question before the Supreme Court was whether the Equal Protection Clause prohibited the courts from enforcing restrictive covenants.⁹⁰ The Court flatly stated this determinative distinction: private actors had developed and implemented restrictive covenants, but the covenants could not be enforced without state participation.⁹¹ Therefore, the restrictive covenants standing alone would not warrant finding a violation of the Fourteenth Amendment; however, the purposes of the agreements could only be secured by state judicial enforcement.⁹² The Court found state action in that “the State made available to such individuals the full coercive power of government to deny to petitioners, on the grounds of race or color, the enjoyment of property rights in premises which petitioners are willing and financially able to acquire and which the grantors are willing to sell.”⁹³ On this basis, the Court reversed the Michigan and Missouri Supreme Court rulings.⁹⁴

The claim in *Powell v. Utz*⁹⁵ was based upon a restaurateur’s refusal to serve Hazel Powell, a well known actress, singer, and pianist, and the wife of Congressman Adam Clayton Powell, Jr., and “another lady of the Negro race” when they visited a restaurant in Pasco, Washington.⁹⁶ Under the State’s civil rights statute, anyone operating a facility of public accommodation that denied privileges to a person on the basis of race was guilty of a misdemeanor.⁹⁷ Thus, the issue before the District Court was whether a restaurant is a facility of public accom-

87. *Id.* (reversing the ruling below).

88. See e.g., *National Drive on Covenants*, PITTSBURGH COURIER, June 15, 1946, at 1 (“Plans to smash restrictive covenants throughout the Nation were outlined here . . . during the two day conference of the NAACP’s legal committee . . .”); See also *id.* at 4 (“The conference revealed that there are now about twenty restrictive covenant cases pending in California, five in Detroit and several [in Pittsburgh].”), available at <http://www.proquest.com/en-US/>.

89. See *Shelley v. Kraemer*, 334 U.S. 1, 4-7 (1948) (detailing operation of the restrictive covenant and the experiences of persons who owned property subject to restrictive covenants).

90. *Id.* at 7-8.

91. *Id.* at 12-13.

92. *Id.* at 13-14.

93. *Id.* at 19.

94. *Id.* at 23.

95. *Powell v. Utz*, 87 F. Supp. 811 (E.D. Wash. 1949).

96. *Id.*

97. *Id.* at 813 (citing then current statute).

modation within the meaning of the state statute.⁹⁸ The Court found that the restaurant was held out to the general public within the meaning of the state statute and denied the defendant's motion to dismiss.⁹⁹ Eventually, in *Burton v. Wilmington Parking Authority*,¹⁰⁰ the U.S. Supreme Court would reach the same conclusion under the Fourteenth Amendment.¹⁰¹

The expansion of the State Action Doctrine undergirded much of the success of the Houston/Marshall legal campaign to end separate but equal. The next section explores in depth a particular focus of the legal campaign: the inequality in access to legal education.

IV. THEORIES APPLIED TO EXPAND LEGAL EDUCATIONAL OPPORTUNITIES

Before *Brown*, few states offered the opportunity for a legal education to African-American citizens.¹⁰² Therefore, the Houston/Marshall team set out to challenge the denial of equal opportunity for legal education.¹⁰³ The challenge addressed two approaches taken by states resistant to admitting black students to state law schools. First, in lieu of integration, Maryland¹⁰⁴ and Missouri¹⁰⁵ offered to educate African-American students at graduate and professional schools in other states. Cases brought to challenge this approach successfully relied on both the *equalization* and the *frontal assault* strategy. Second, when the Supreme Court foreclosed states from sending African-American students to out-of-state programs, separate law schools opened to avoid integration.¹⁰⁶ Even when states began to build separate programs, lawyers employed the *frontal assault* to prove the inability of the states to provide equal programs.¹⁰⁷

98. *Id.*

99. *Id.* at 816.

100. *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961).

101. *Id.* at 725 (holding that "...when a State leases public property in the manner and for the purpose shown to have been the case here, the proscriptions of the Fourteenth Amendment must be complied with by the lessee as certainly as though they were binding covenants written into the agreement itself").

102. ALBERT P. BLAUSTEIN & CLARENCE CLYDE FERGUSON, JR., *DESEGREGATION AND THE LAW: THE MEANING AND EFFECT OF THE SCHOOL SEGREGATION CASES 108-10* (1957); see generally PAULI MURRAY, *STATES' LAWS ON RACE AND COLOR* (1951).

103. COTTRILL ET AL., *supra* note 5, at 58-59 (explaining the rationale for choosing to target professional schools).

104. See *Pearson v. Murray*, 182 A. 590 (Md. 1936).

105. See *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938).

106. Douglas, *supra* note 1, at 101, n. 44 (discussing the rational for creating law schools for black citizens in North Carolina and elsewhere).

107. COTTRILL ET AL., *supra* note 5.

This Section will take a closer look at the North Carolina experience after discussing the development of the precedent relied on to open the UNC School of Law to African-American students.

A. *Defeat of the Out-of-State Solution*

In *Pearson v. Murray*,¹⁰⁸ Donald Murray challenged the practice of providing scholarships to attend out-of-state law schools.¹⁰⁹ The court agreed that the practice amounted to a denial of equal protection and ordered that Murray be admitted to the University of Maryland Law School.¹¹⁰ An article marking his graduation notes, “Murray’s graduation recalls the successful fight waged three years ago by Dr. Charles Houston and Thurgood Marshall, NAACP attorneys, to have the color bar at the institution removed.”¹¹¹

Like Maryland, Missouri sought to fulfill the separate-but-equal standard by offering to pay the tuition fees for African-American citizens to attend law school in another state.¹¹² The Missouri legislature gave the Board of Curators for Lincoln University, an African-American institution, the discretion to establish a law school.¹¹³ In *State of Missouri ex rel. Gaines v. Canada*,¹¹⁴ Charles Houston represented Gaines in an action for mandamus to compel the state defendants to admit him to the University of Missouri Law School.¹¹⁵ The Supreme Court reviewed the denial of the petition by the Missouri Supreme Court and held that denying Gaines admission was a violation of the Equal Protection Clause.¹¹⁶ Justice Hughes observed that it is “a denial of the equality of legal right to the enjoyment of the privilege which the State has set up, and the provision for the payment of tuition fees in another State does not remove the discrimination.”¹¹⁷ Additionally, the Court concluded that it is “the obligation of the State to give the protection of equal laws performed within its own jurisdic-

108. *Pearson*, 182 A. at 590.

109. *Id.* at 590.

110. *Id.* at 594.

111. Peyton Gray, *Treated OK, Says Md. U. Law Grad*, *AFRO-AMERICAN* (Baltimore, Md.), Jun. 11, 1938, at 1; see also Bill Weaver & Oscar C. Page, *The Black Press and the Drive for Integrated Graduate and Professional Schools*, 43 *PHYLON* 15, 16-28 (1992) (providing an account of the Black press’s contribution to the success of the litigation campaign).

112. *Gaines*, 305 U.S. at 343.

113. *Id.* at 342-43.

114. *Id.* at 337.

115. *Id.* at 342.

116. *Id.* at 352.

117. *Id.* at 349-50.

tion.”¹¹⁸ Citing *Pearson*, the Court reversed the denial of the petition and remanded the case for further proceedings.¹¹⁹

However, the Court did not reject the establishment of a separate, black law school as an unconstitutional means of providing equal protection to black applicants, stating, “We are of the opinion that . . . the petitioner was entitled to be admitted to the law school *in the absence of other and proper provisions for his legal training within the State.*”¹²⁰ (*emphasis added*) The failure to foreclose the option of “other and proper provisions” opened the door for North Carolina and other states to open separate in state law and graduate schools for black citizens.¹²¹

Following the 1938 Supreme Court ruling in *Gaines*, North Carolina established a law school at the North Carolina College for Negroes (College Law School) in 1939.¹²² The legislature had responded to the Court’s suggestion in *Gaines* that “the absence of other and proper provisions for . . . legal training within the State”¹²³ could be remedied by establishing a separate law school. African-American students attended the new law school but within less than a decade launched a *frontal assault* on the state policy of excluding African-American applicants from the UNC School of Law.

B. *Frontal Assault in Earnest*

Despite the push back from states after the *Gaines* decision, the litigation campaign forged ahead. In 1946, the NAACP initiated an action of mandamus to compel the University of Oklahoma to admit Adam Lois Sipuel into its law school.¹²⁴ The writ filed by Marshall was refused by the District Court and the Supreme Court of Oklahoma affirmed this judgment.¹²⁵ Citing *Gaines*, the Court reversed the Oklahoma Supreme Court, ruling that Sipuel was entitled to secure a legal education and that the State must provide it to her in conformity with the Fourteenth Amendment.¹²⁶ However, there was no explicit rejection of the establishment of a separate law school as

118. *Id.* at 350.

119. *Id.* at 352. *See also* COTTRILL ET AL., *supra* note 5, at 65 (discussing the mixed commentary on *Gaines* from majority press and law reviews).

120. *Gaines*, 305 U.S. at 352.

121. Douglas, *supra* note 1, at 101 (noting the establishment of graduate and professional programs in North Carolina for African-American citizens after *Gaines*).

122. *Id.*

123. *Gaines*, 305 U.S. at 352.

124. Sipuel v. Bd. of Regents of Univ. of Okla., 332 U.S. 631, 632 (1948) (*per curiam*).

125. *Id.*

126. *Id.* at 632-33; *see generally* GEORGE LYNN CROSS, BLACKS IN WHITE COLLEGES: OKLAHOMA’S LANDMARK CASES (1975); TOLSON, *supra* note 6, at 173-175 (describing litigation campaign to desegregate higher education in Oklahoma).

the remedy. So within days of the Supreme Court's remand, the Oklahoma Supreme Court ordered the state to establish Langston Law School for black citizens seeking a legal education.¹²⁷

The State refused to admit Sipuel (now Ada Fisher) into the University of Oklahoma Law School and Fisher refused to attend Langston Law School.¹²⁸ Marshall returned to the Court and moved for leave to file a petition for a writ of mandamus¹²⁹ to compel compliance with the *Sipuel* mandate to provide the "legal education afforded by the state."¹³⁰ In another *per curiam* opinion, the Court affirmed the right of the state to deny Fisher admission to the University of Oklahoma "if such a separate law school is so established and ready to function."¹³¹

Marshall employed the *frontal assault* in earnest,¹³² gaining the support of Justice Wiley B. Rutledge who wrote a dissent criticizing the majority's acceptance of the idea that Langston Law School could be equal to the long-established University of Oklahoma Law School.¹³³ Rutledge wrote, "It is possible [under the order in *Sipuel*] for the state's officials to dispose of petitioner's demand for a legal education equal to that afforded to white students by establishing overnight a separate law school for Negroes" but "the equality required [by the Equal Protection Clause] was equality in fact, not in legal fiction."¹³⁴ He went on to write, "Obviously no separate law school could be established . . . overnight capable of giving petitioner a legal education equal to that afforded by the states long-established and well-known state university law school."¹³⁵

C. The Frontal Assault Succeeds

In 1950, two years after the *Sipuel* decision, *Sweatt v. Painter*¹³⁶ and *McLaurin v. Oklahoma State Regents for Higher Education*¹³⁷ arrived

127. COTTRILL ET AL., *supra* note 5, at 75-76.

128. *Id.* at 76.

129. *Fisher v. Hurst*, 333 U.S. 147 (1948).

130. *Sipuel*, 332 U.S. at 632.

131. *Fisher*, 333 U.S. at 149.

132. COTTRILL ET AL., *supra* note 5, at 76 (noting the use of the argument in *Fisher* that separate is inherently unequal).

133. *Fisher*, 333 U.S. at 151-52 (Rutledge, J., dissenting).

134. *Id.*

135. *Id.* at 152.

136. *Sweatt v. Painter*, 339 U.S. 629 (1950). Heman Marion Sweatt, represented by Thurgood Marshall, along with local counsel W.J. Durham, sought a mandamus to compel the Texas Board of Regents, the Dean of the University of Texas Law School, and the University Registrar to admit him to the law school. *Id.* at 631.

137. *McLaurin v. Okla. State Regents for Higher Ed.*, 339 U.S. 637 (1950); *see also* *McLaurin v. Oklahoma*, 87 F. Supp. 528, 530 (1949) (*per curiam*), *rev'd*, 339 U.S. 637 (1950) (quoting plaintiff's argument that segregated schools denied him equal educational facilities because "his required isolation from all other students, solely because of the accident of birth . . . creates a

before the Supreme Court as companion cases on the apex of the litigation campaign spearheaded by the NAACP.¹³⁸ The state court acknowledged that Texas had deprived Heman Sweatt of equal protection of the law by denying him the right to a legal education “solely because he is a Negro” but, pursuant to *Gaines*, gave the State time to establish a separate-but-equal law school for African-American students as a remedy to the constitutional violation.¹³⁹ After six months, the Texas trial court found that the opportunities for a legal education at the new law school were the “substantial equivalent to those offered . . . to white students.”¹⁴⁰ The Supreme Court of the United States granted certiorari to review the state court of appeals ruling affirming the trial court decision.¹⁴¹

Courts generally granted relief to African-American litigants based on the *initial strategy* of proving substantial inequality between white and black schools. In *Sweatt*, for instance, state court Judge Roy Archer ordered the defendants to establish and make available within six months of the order a course for legal instruction substantially equivalent to that offered at the University of Texas.¹⁴² On appeal, the court identified the controlling question to be whether the State made available to Mr. Sweatt, “a course of instruction in law as a first-year student, the equivalent or substantial equivalent in its advantages to him of that which the State was then providing in the University of Texas Law School.”¹⁴³

The expanded *frontal attack strategy* had also placed before the Texas courts the question of “whether it is possible to have the equality required by the Fourteenth Amendment” when a school system “relegates citizens of a disadvantaged racial minority group to separate schools.”¹⁴⁴ In the Texas Court of Civil Appeals, Sweatt’s attorneys wrote, “The expert testimony produced at trial establishes that there is no rational justification for segregation in professional education and that substantial discrimination is a necessary consequence of any separation of professional students on the basis of color.”¹⁴⁵

mental discomfiture, which makes concentration and study difficult, if not impossible” and that the enforcement of these regulations places upon him a “badge of inferiority which affects his relationship, both to his fellow students, and to his professors”).

138. *Sweatt*, 339 U.S. at 631.

139. *Id.* at 631-32.

140. *Id.* at 632.

141. *Id.*

142. *Id.* at 632-33 (explaining that “the state trial court recognized that the action of the State in denying petitioner the opportunity to gain a legal education while granting it to others deprived him of equal protection of the laws guaranteed by the Fourteenth Amendment”).

143. *Sweatt v. Painter*, 210 S.W.2d 442, 445 (Tex. Civ. App. 1948), *rev’d*, 339 U.S. 629 (1950) (quoting brief for Sweatt).

144. *Id.*

145. *Id.*

On appeal, the Supreme Court of the United States declined to engage in a *frontal assault* of *Plessy*, despite evidence offered by plaintiff of “contemporary knowledge respecting the purposes of the Fourteenth Amendment and the effects of racial segregation.”¹⁴⁶ Eventually, however, the mounting evidence in campaign cases like *Sweatt* gave the Court no choice but to overrule *Plessy* and agree that separate could never be equal.¹⁴⁷ The painstaking gathering and presentation of evidence by the Houston/Marshall team of attorneys lead to the inescapable conclusion that separate is “inherently” unequal,¹⁴⁸ and broke the back of Jim Crow for millions of people of color.¹⁴⁹

Sweatt is also the first case in which the Supreme Court fully embraced the argument that certain intangible, qualitative aspects of equality could never be replicated in a regime of segregation. The Court compared the quantitative measures of educational opportunity, such as the faculty, student body size, course offering and the library, and concluded:

[T]he University of Texas Law School possesses to a far greater degree those qualities which are incapable of objective measurement but which make for greatness in a law school. Such qualities . . . include reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, tradition and prestige.¹⁵⁰

Just as *Brown v. Board of Education* represented the successful culmination of the Houston/Marshall legal campaign to end Jim Crow, *Sweatt* represents the culmination of that phase of litigation attacking segregation in higher education. One year after *Sweatt* entered the University of Texas Law School, the NAACP, under Marshall’s leadership, filed cases in South Carolina, Kansas, Delaware, Virginia and the District of Columbia seeking to extend the intangibles test to primary and secondary schools.¹⁵¹ The test would illustrate the impossibility of achieving constitutional equality in segregated school systems. After extensive trials and appeals, the Supreme Court consolidated the five cases under the name of *Brown*.¹⁵² The expanded strategy of *frontal assault* finally proved successful in convincing the Court to rule that separate is “inherently” unequal.¹⁵³

146. *Sweatt*, 339 U.S. at 636.

147. *Brown v. Bd. of Educ.*, 347 U.S. 483, 494-95 (1954).

148. *Id.* at 495.

149. STRUM, *supra* note 5, at 134.

150. *Sweatt*, 339 U.S. at 634.

151. MILLER, *supra* note 5, at 342.

152. *Brown*, 347 U.S. at 486.

153. *Id.* at 494.

V. THE NORTH CAROLINA EXPERIENCE

*Epps v. Carmichael*¹⁵⁴ was filed following *Sweatt* and before *Brown* to desegregate UNC School of Law. North Carolina Central University School of Law, born to avoid admitting African-American students to UNC School of Law, has a rich and brilliant history¹⁵⁵ of racial segregation, adversity, triumph, transition, growth, diversity and development. In 1939, the North Carolina General Assembly authorized the North Carolina College for Negroes to provide African-Americans with an opportunity for a legal education. At the time, African-Americans had no in-state opportunities for a formal legal education. Although the school was scheduled to open in 1939, its opening was postponed until the following year due to initial insufficient enrollment. Nevertheless, the Law School formally opened for the study of law in 1940.¹⁵⁶ The entering class was comprised of four students. In 1944, the school admitted its first women.¹⁵⁷ After the Supreme Court rulings in *Sweatt* and *McLaurin*, opening the closed doors of UNC Law School to African-Americans seemed inevitable. However, victory in North Carolina was not swift.

In *Epps*, Marshall argued that there could be no equality of opportunity under the Equal Protection Clause if segregation continued to exist.¹⁵⁸ *Epps* sought an injunction to prohibit the President of UNC, the Dean of the Law School and others from continuing to refuse admission of African-American students to the UNC School of Law because of their race and color.¹⁵⁹ The UNC School of Law (referred to by the Court as the “University Law School”) was established by the state around 1900 and, at the time of the trial, enrolled 280 students with a faculty of 10 professors, including the Dean.¹⁶⁰ The separate law school for African-American students (College Law School) was set up by the Dean of the University Law School.¹⁶¹ The curricula,

154. *UNC To Face Suit: University Sued For Admission To Its Law School*, CAROLINA TIMES, Oct. 29, 1949, at 1, <http://library.digitalnc.org/cdm4/document.php?CISOROOT=/news&CISOPTR=18687&REC=11>; see also *Epps v. Carmichael*, 93 F. Supp. 327 (M.D.N.C. 1950), *rev'd sub nom. McKissick v. Carmichael*, 187 F.2d 949 (4th Cir. 1951).

155. The James E. Shepard Memorial Library houses this rich history in the University Archives.

156. *Negro Law School Will Open Tuesday*, N.Y. TIMES, Sept. 14, 1940, at 59. In the 10th anniversary year book, the stated mission of the Law School was “to prepare young men and women of intelligence, industry and character for careers of public service in the administration of justice. . . to make more proficient those persons engaging in business or other pursuits in which the knowledge of law is a valuable asset.” APOCRISARIUS 10th ANNIVERSARY (1950).

157. History, N.C. CENT. UNIV. SCH. OF LAW, <http://law.nccu.edu/about/history/> (last visited January 15, 2012).

158. *Id.* at 330.

159. *Id.* at 328.

160. *Id.*

161. *Id.*

teaching methods and facilities were patterned after those at UNC and the original faculty was composed of professors from the UNC and Duke University law schools.¹⁶² In 1945, a full time African-American dean and faculty was secured for the College Law School.¹⁶³ The enrollment reached twenty-eight students by around 1949.¹⁶⁴

At trial, the court heard testimony on the advantages to plaintiffs of attending the University Law School and disadvantages of attending the College Law School.¹⁶⁵ After hearing testimony, the trial court found that the College Law School provided adequate legal education to prepare students for the bar and practice of law.¹⁶⁶ The Court concluded that "it would be no substantial advantage to Negroes to admit them to the North Carolina University Law School, and disadvantages at College Law School for Negroes were more than offset by the disadvantages existing at the University Law School."¹⁶⁷ According to the Court, many of the advantages of attending the University Law School also existed at the College Law School, including comparable facilities,¹⁶⁸ accreditation and memberships,¹⁶⁹ degree conferred¹⁷⁰

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.* at 329 ("The inferiorities were testified to by the Dean of the Harvard Law School, a Professor from the Chicago University and a Professor from Howard University at Washington, D.C. The equality of opportunity for a legal education was testified to by Mr. Harvey, Counsel for the Section of the American Bar Association on Legal Education who was Dean of Temple University Law School for approximately 17 years and of the law school of the University of Oklahoma until he entered the practice of law; by ex-Judge Spears and former professor of Duke University Law School; Dr. Lake and Professor Soule of the Wake Forest Law School; ex-Justice of the Supreme Court Varsar and President of the Board of Bar Examiners since 1933 and other members of the bar.").

166. *Id.*

167. *Id.* at 331.

168. *Id.* at 328-29 ("The present facilities of the two law schools, in the way of housing, are inadequate but funds have been appropriated and plans are being executed for radical changes at both institutions. At the University Law School an addition is being made to its present Law Building, while at the College Law School the present Library building is being converted into a Law Building. When these changes are completed during the year the housing facilities at each of the institutions will be substantially equal for the number of students likely to attend the institutions. So far as the present housing facilities are concerned the Law Building at the University is severely overcrowded and in some instances the class enrollment is as high as 120. At the College Law School class rooms are large enough to accommodate far more students than the school has, although the building is a wooden structure.")

169. *Id.* at 329 ("The Law School at the University of North Carolina is approved by the American Bar Association and the Association of American Law Schools; the College Law School is approved by the American Bar Association and has filed its application for the admission to the Association of American Law Schools; the investigation has been made, the requirements have been met and approval will likely be given at the next meeting of its authorities. Both law schools are approved by the North Carolina Board of Examiners.")

170. *Id.* at 329 ("Both institutions confer the L.L.B. degree . . .").

and bar passage rates.¹⁷¹ The court also found that other advantages for plaintiffs included attending law school with their potential clients¹⁷² and receiving individual attention from the faculty.¹⁷³

The Court conceded that inequalities existed between the libraries,¹⁷⁴ student activities¹⁷⁵ and advance degree opportunities.¹⁷⁶ The Court also acknowledged that, "There are certain differences of facilities existing at the University Law School not present at the College Law School but such disparities as do exist are either overcome or equalized by advantages which the plaintiffs would enjoy at the College Law School."¹⁷⁷ Nonetheless, the Court found that, even though the education system was segregated by race, the system did not discriminate in favor of either race.¹⁷⁸ The decision distinguished *Epps* as "quite different" from *Sweatt*, *Sipuel* and *Gaines* because North Carolina had established the College Law School "without a law suit or the threat of a law suit . . . to provide equal facilities for the Negroes with those furnished to the white students" at the University Law School.¹⁷⁹

171. *Id.* at 330.

172. *Id.* at 329 ("The evidence disclosed that the Negro lawyers of the state derive their practice from members of their race and there was no evidence to show that any member of their race ever represented a white client. In the opinion of some of the witnesses the advantages which the plaintiffs would derive from attending the College Law School, by reason of their contacts and acquaintances of the members of their race attending the College from all parts of the state, would far exceed any advantages which might accrue to them if they attended the Law School at the University of North Carolina.").

173. *Id.* at 329-30 ("It also appears that they are receiving individual attention and instruction as students at the College Law School and that it is an efficient law school, staffed by an efficient faculty, with an excellent library and that the work of the law school is not one of anticipation but it is securely established and has been in operation for 10 years.").

174. *Id.* at 329 ("While the library at the University Law School contains approximately 64,000 volumes, two-thirds of these are crated up and not available for use. Many of them are duplicate sets. There are 17 complete sets of the North Carolina Reports, not to mention the broken sets. The library at the College School contains 30,000 volumes and contains a variety of books which makes it a first rate library.").

175. *Id.* ("The University Law School has a Law Review and a Chapter of the Order of the Coif; the College Law School has neither.").

176. *Id.* ("Both institutions confer the LL.B. degree but the University Law School also confers the S.J.D. degree.").

177. *Id.* (providing further that the "North Carolina College was taken over from Dr. Shepard in 1925 at which time it was made a state normal with an enrollment of 100 as late as 1926 but its growth has been remarkable and its enrollment last year was 1300. It is open to boys and girls and is a member of recognized Associations of Colleges and Universities. The legislature of North Carolina at its last session appropriated for buildings and improvements on the campus in excess of \$4,000,000 and its appropriations for its annual operating budget is in excess of \$1,000,000.").

178. *Id.* at 330-31 (relying on *Gong Lum v. Rice*, 275 U.S. 78 (1927), which found that requiring a Chinese student to attend a "colored" school was not unconstitutional so long as the segregated education system afforded equal educational facilities to both classes).

179. *Id.* at 330.

On appeal, the Fourth Circuit Court of Appeals, relying on *Sweatt v. Painter*, reversed and remanded the decision in *Epps*.¹⁸⁰ The opinion focused on the “intangibles” identified in *Sweatt*—the reputation of the faculty,¹⁸¹ student interaction with members of the profession,¹⁸² courses offered,¹⁸³ experience of the administration, alumni, standing of the institution in the community, tradition and prestige¹⁸⁴—rather than the tangibles focused on by the district court. In reversing the district court, the Court of Appeals found that, “The situation differs in circumstance but not in principle” from the decision in *Sweatt*.¹⁸⁵

VI. CONCLUSION

While skeptics suggest that HBCU’s are now anathema to the times,¹⁸⁶ these institutions of higher education remain vital to providing opportunities for African-Americans to obtain a post secondary, professional and advanced degrees. Moreover, HBCU’s have become an option for all Americans seeking higher education. But despite the

180. *McKissick v. Carmichael*, 187 F.2d 949, 950 (4th Cir. 1951) (holding that “the undisputed facts of the case convinces us that the Negro School is clearly inferior to the white, and that the judgment must therefore be reversed in accordance with the decision in *Sweatt v. Painter* rendered prior to the trial of the pending case in the District Court”).

181. The court concluded that the “undisputed facts furnish abundant support for the opinion freely expressed by witnesses of outstanding experience and eminence in the law school field that the faculty of the University is superior to that of the College Law School.” *Id.* at 951. In particular, the court focused on the opportunity afforded faculty to serve as advisors on legislative commissions and to publish in the Law Review. “Colored students of the Colored Law School do not share in this opportunity.” *Id.* at 950-51. “The Law School and its faculty have achieved no reputation in legal circles.” *Id.* at 951.

182. “The practice of law is indeed a highly competitive occupation . . . and it is imperative that a student, who is taking the first steps in his life work shall learn as soon as possible the complexities of human nature and the influences which govern it. Moreover, it is of specific value that the students form acquaintance with the persons who will later occupy positions of influence and power in the profession and in the public life of the State. . . . It is a definite handicap to the colored student to confine his association in the law school to people of his own class. In the Negro School, the handicap is heightened by the small size of the classes which average only eight or nine students, too small for efficient work in any event, and yet larger than would probably be the case if the government assistance to war veterans should be withdrawn.” *Id.* at 952.

183. “It seems quite clear . . . that certain courses, such as federal jurisdiction, which are separately taught at the University, could not be adequately treated as incidental to any other course; but it is more important that the members of the smaller faculty at the College are obliged to teach a greater variety of subjects than the professors at the University, and therefore are less able to increase their efficiency and their command of the subjects entrusted to them.” *Id.* at 952.

184. “The University Law School, its faculty and its Law Review, enjoy a fine reputation in legal circles in the United States.” *Id.* at 950.

185. *Id.* at 954.

186. See e.g., Jason L. Riley, *Black Colleges Need a New Mission*, WALL ST. J., October 28, 2010, at A21.

numerous threats to their very existence, most of the HBCU law schools born during the era of segregation survived and thrive.

Time has afforded the HBCU law schools the opportunities to develop “those qualities which are incapable of objective measurement but which make for greatness in a law school.”¹⁸⁷ The reputation of the faculty, experienced administrators, influential and well-positioned alumni, good standing in the local and national community and the “traditions and prestige”¹⁸⁸ make HBCU law schools attractive to students of all races and gender today.¹⁸⁹ These are the qualities that enhance the academic experience. These are the qualities that, according to the Supreme Court in *Sweatt*, make a great law school.

187. *Sweatt v. Painter*, 339 U.S. 629, 634 (1950).

188. *Id.*

189. See Exec. Order No. 13,532, 75 Fed. Reg. 9,749 (Mar. 3, 2010) (recognizing historic and on-going contributions of HBCUs and establishing the White House Initiative on HBCUs to “work with executive departments, agencies, and offices, the private sector, educational associations, philanthropic organizations, and other partners to increase the capacity of HBCUs to provide the highest-quality education to a greater number of students, and to take advantage of these institutions’ capabilities in serving the Nation’s needs”).