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COLLEGE DESEGREGATION: TOWARD ABANDONING THE INTEGRATIVE IDEAL TO SAVE PUBLICLY FUNDED BLACK INSTITUTIONS OF HIGHER EDUCATION

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I. Introduction

In its landmark decision in *Brown v. Board of Education*,[1] the United States Supreme Court held that the "separate but equal" doctrine, established and maintained by its prior decision in *Plessy v. Ferguson*,[2] was inapplicable within the realm of public education.[3] Reasoning that purposeful segregation inherently denies equal educational opportunities to minority students,[4] the Court held that the operation of dual school systems violated the Fourteenth Amendment.[5] A year later, in a continuation of the decision, the

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[1] 347 U.S. 483 (1954) [hereinafter *Brown I*]. The case represents the culmination of the NAACP Legal Defense Fund's campaign to eliminate state-imposed segregation in public education and stands as Justice Thurgood Marshall's most enduring contribution to the American Civil Rights movement. William M. Treanor, *Introductory Remarks to* Brown v. Board of Education *and its Legacy: A Tribute to Justice Thurgood Marshall*, 61 FORDHAM L. REV. 1, 1 (1992). *Brown I* endures as the first and most important expansion of the rights guaranteed to emancipated blacks by the Fourteenth Amendment. Constance B. Motley, *The Historical Setting of* Brown *and its Impact on the Supreme Court's Decision*, 61 FORDHAM L. REV. 9, 9 (1992).

[2] 163 U.S. 537 (1896). In *Plessy*, the Court held that the social policy of providing "equal but separate accommodations for the white and colored races" did not violate the Fourteenth Amendment's guarantee of equal protection under the law. *Id.* at 550-51.

[3] *Brown I*, 347 U.S. at 493.

[4] *Id.*

[5] *Id.* at 495. The Fourteenth Amendment provides, in relevant part, that:

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

U.S. CONST. amend. XIV, § 1.

Court ordered the elimination of de jure segregation[6] by placing primary responsibility on local school boards to dismantle dual systems, and to replace them with unitary systems in which discrimination was eliminated "root and branch."[7] Federal district courts were instructed to supervise the process under "general equitable principles"[8] to implement desegregation "with all deliberate speed."[9] While the Supreme Court has addressed school desegregation at the primary and secondary levels in numerous decisions,[10] it had never definitively applied *Brown II*'s mandate to the affirmative steps that a state must take to dismantle dual systems of education at the college and university level.[11]

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[6] De jure segregation is defined as that which is "directly intended or mandated by law or otherwise issuing from an official racial classification or in other words . . . segregation which has or had the sanction of the law." BLACK'S LAW DICTIONARY 425 (6th ed. 1990).

[7] Brown v. Board of Educ., 349 U.S. 294, 299 (1955) [hereinafter *Brown II*]. *Brown I* established that segregated educational facilities were inherently unequal, but did not announce the remedial steps states must take to dismantle their dual systems of education until the following year in *Brown II*. Treanor, *supra* note 1, at 1. These two decisions provide two different interpretations of the Constitution. While *Brown I* only required that government decisions be made without regard to race, *Brown II* seemed to require that children of both races attend the same school. Mark Tushnet, *Public Law Litigation and the Ambiguities of* Brown, 61 FORDHAM L. REV. 23, 23 (1992). By focusing on the need to integrate under *Brown II*, *Brown I*'s message of equal educational opportunity has been lost. *Id.* at 24. *Brown II*'s mandate of integration to create racial balancing will hereinafter be referred to as the "integrative ideal." *See* Drew S. Days, III, Brown *Blues: Rethinking the Integrative Ideal*, 34 WM. & MARY L. REV. 53 (1992). The Court has used the word "dual" to define a school system that purposely segregates students by race and "unitary" to describe a school system "which has been brought in compliance with . . . the Constitution." *See* Board of Educ. v. Dowell, 498 U.S. 237, 246 (1991).

[8] *Brown II*, 349 U.S at 300.

[9] *Id.* at 301. District courts were asked to "consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles" under this process. *Id.* at 299.

[10] *See, e.g.*, Milliken v. Bradley, 433 U.S. 267 (1977); Swann v. Charlotte-Mecklenberg Bd. of Educ., 402 U.S. 1 (1971); Green v. County Sch. Bd., 391 U.S. 430 (1968).

[11] Felix V. Baxter, *The Affirmative Duty to Desegregate Institutions of Higher Education—Defining the Role of the Traditionally Black College*, 11 J.L. & EDUC. 1, 2 (1992).

Thirty-eight years later, in *United States v. Fordice*,[12] the Supreme Court finally addressed the legacy of segregation in higher education and defined, for the first time, a state's duty to eliminate all remaining vestiges of de jure segregation in its institutions of higher learning in accordance with *Brown I* and *Brown II*.[13] With only Justice Scalia dissenting,[14] the Court held that the State of Mississippi must take affirmative steps beyond the mere adoption of race-neutral admission policies to dismantle its former dual systems of higher education.[15] The decision marks a major re-examination of the judicial framework applied to school desegregation cases and reaffirms the Court's fundamental commitment to the principles announced in *Brown I*.[16] *Fordice* further provides an unexpected indication that the present Court is prepared to take an active role to fulfill *Brown II*'s mandate.[17]

This Note will examine the Court's decision in *Fordice* in order to place it within the Court's evolving school desegregation framework, and to analyze its effects on higher education. Part I will review the background of the dispute by examining the history of Mississippi's university system, the steps Mississippi had taken to integrate its eight universities, and, finally, the realities of the de facto system of segregation which existed within the university system at the time the suit was filed. Part II will examine the realities of the de facto system of segregation in the eight universities which existed at the time *Fordice* suit was filed. Part II will also examine the evolution of the judicial framework, which eroded the validity of the "separate but equal" doctrine in public education and paved the way for the Court's decision in *Brown I*. Part III will examine the

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[12] 112 S. Ct. 2727 (1992).

[13] *Id.* at 2735-38.

[14] *Id.* at 2746.

[15] *Id.* at 2743.

[16] Ruth Marcus, *Court Sees Broad Duty to Erase College Bias: Justices Set Standard in Mississippi Ruling*, WASH. POST, June 27, 1992, at A1.

[17] *Fordice* puts all states that had previously operated dual systems of higher education on notice that they have an affirmative duty to eliminate all vestiges of prior discrimination traceable to de jure segregation. As of 1992, Alabama, Louisiana, Maryland, Kentucky, and Texas were involved in suits similar to *Fordice*. *Id.* Seven other states have had their university desegregation plans reviewed by the Department of Education. *Id.*

Court's decision in *Brown I*. Part IV will examine the inconsistent and contradictory judicial framework in which the district courts applied *Brown I*'s mandate to public institutions of higher learning in the absence of a clearly defined standard. Part V will examine the Court's decision in *Fordice* and the new standard which it announced. Part VI will discuss the implications of *Fordice* by addressing serious questions regarding the future of publicly funded traditional black schools.

I. Background to the Dispute—The Realities of Higher Education in Mississippi

In 1954, at the time of *Brown I*, Mississippi maintained dual school systems at all levels.[18] All eight of Mississippi's state universities were established before the Supreme Court's landmark decree.[19] Thus, under the Court's mandate in *Brown II*, the State had an affirmative duty to dismantle its dual system of education by eliminating all discriminatory effects that remained as a vestige of its de jure system of segregation.[20] Despite this mandate, Mississippi continued its policy of segregation.[21] Integration in any form did not

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[18] Ayers v. Allain, 914 F.2d 676, 678 n.4 (5th Cir. 1990) (en banc), *vacated sub nom.*, United States v. Fordice, 112 S. Ct. 2727 (1992).

[19] *Fordice*, 112 S. Ct. at 2732. The University of Mississippi was established as an exclusively white school in 1848. *Id.* In 1871, the State opened Alcorn State University as an agricultural school exclusively for black students. *Id.* Mississippi State University was opened in 1880. *Id.* Mississippi University for Women opened in 1885, and the University of Southern Mississippi opened in 1912; both exclusively for white students. *Id.* In 1940, Jackson State was opened as a black teachers college. *Id.* Mississippi Valley State opened in 1950 exclusively for black students wishing to teach at rural black elementary schools. *Id.* Mississippi Valley State also provides vocational instruction. *Id.*

[20] *Ayers*, 914 F.2d at 682. "Mississippi was . . . constitutionally required to eliminate invidious racial distinctions and dismantle its dual system." *Id.* Mississippi did not dispute that it was under such a duty, but maintained that it had fulfilled its constitutional obligation by maintaining good-faith, nondiscriminatory admission policies, faculty hiring and operations. *Fordice*, 112 S. Ct. at 2734.

[21] *Ayers*, 914 F.2d at 695. James P. Coleman, Governor of Mississippi (1955-60), commented in 1981 that "[a]s governor, I certainly took the position [that] our schools and educational institutions would be operated as they always had been." Andrew Reese, *Regional Update*, UPI, Aug. 19, 1981, *available in* LEXIS, News Library, UPI

occur until 1962,[22] when, pursuant to a court order, James Meridith became the first black admitted to the University of Mississippi.[23]

In 1961, in an effort to forestall integration, Mississippi's Board of Trustees of Higher Learning (Board of Trustees) instituted the American College Testing (ACT) requirement for the state's university system.[24] All state residents under the age of twenty-one applying to a state school were required to take the test.[25] The score that an individual received determined an applicant's automatic acceptance or denial of admission.[26] However, only the five traditionally white schools required a minimum ACT score.[27] The effects of the tests were obvious as time stood still in Mississippi.[28] The schools' traditional racial composition remained unchanged as if

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file. Governor Coleman promised that there would be no race mixing in Mississippi's public schools, a promise he kept. *Id.*

[22] *See Ayers*, 914 F.2d at 695.

[23] Meridith v. Fair, 306 F.2d 374, 378 (5th Cir. 1962), *cert. denied*, 371 U.S. 828 (1962), *enforced per curiam*, 313 F.2d 532 (5th Cir. 1962) (en banc), *cert. denied*, 372 U.S. 916 (1963). Official opposition to the court order was so great that federal troops were required to enforce the decision. Constance B. Motley, *From* Brown *to* Bakke*: The Long Road to Equality*, 14 HARV. C.R.-C.L. L. REV. 315, 317 (1979).

[24] *Ayers*, 914 F.2d at 680. Mississippi would later argue that its present educational policies were totally unconnected to its previous segregative policies because admissions were now based on objective tests, devised by an independent organization, rather than on race. Maria L. Marcus, *Learning Together: Justice Marshall's Desegregation Opinions*, 61 FORDHAM L. REV. 69, 102 (1992). Many civil rights advocates believe, however, that reliance on the ACTs has a substantial discriminatory impact because black students are placed at a distinct disadvantage when taking standardized tests due to cultural biases within the tests themselves. *Id.* In addition, reliance on such tests excludes consideration of other important factors, such as high school grades. Linda Greenhouse, *Justices Weigh Bias Legacy at Colleges*, N.Y. TIMES, Nov. 14, 1991, at A13.

[25] *Ayers*, 914 F.2d at 680.

[26] *Id.* at 680; *Fordice*, 112 S. Ct. at 2738-40. In *Fordice*, the Supreme Court stated that the test was never intended to be the sole basis for admission, but was intended to be only one of many criteria considered. *Id.* at 2740.

[27] *Ayers*, 914 F.2d at 680.

[28] *See* Sonia Jarvis, Brown *and the Afrocentric Curriculum*, 101 YALE L.J. 1285, 1301 (1979). It was well known that the average black student scored well below the minimum requirement necessary to attend any of the five traditionally white schools. *Id*; *see infra* text accompanying notes 43-48.

Brown I was a piece of fiction rather than the supreme law of the land.[29]

In 1969, in an effort to enforce Title VI of the Civil Rights Act of 1964,[30] the United States Department of Health Education and Welfare (HEW) requested Mississippi to devise and implement a plan to dismantle the remaining vestiges of its formerly segregated university system.[31] Four years later, the Board of Trustees submitted a plan to achieve integration through the implementation of numerical racial formulas, such as diversification of faculty, remedial programs for disadvantaged minorities, and special recruitment programs to attract black students to traditionally white schools.[32] HEW requested further changes because it believed that the plan failed to create a sufficiently diverse university system.[33] The changes were intended to encourage student choices based on the educational opportunities offered by a particular institution rather than on decisons based merely on a school's traditional racial identity.[34]

In response to HEW's request, the Board of Trustees stated that Mississippi's university system complied with Title VI and reluctantly made only minor changes to the plan.[35] This plan was also rejected by HEW.[36] The Board of Trustees decided to implement the plan despite HEW's rejection, but was prevented from

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[29] As of the mid-1980s, 99% of white students in the state university system attended one of the five traditionally white schools while 92% to 99% of the black students in the system attended the historically black schools. Kevin Brown, *Has the Supreme Court Allowed the Cure for De Jure Segregation to Replicate the Disease?*, 78 CORNELL L. REV. 1, 43 (1992). From 1963 to 1975, the five traditionally white schools each admitted at least one black student a year. *Fordice*, 112 S. Ct. at 2732. By 1968, only five white students had attended Alcorn State. *Id.* Jackson State and Mississippi Valley State remained completely segregated. *Id.*; *see* Greenhouse, *supra* note 24, at A13. Alvin O. Chambliss, Jr., who represented the private citizens who initiated the suit against the State of Mississippi, stated that "[a] system rooted in the days of apartheid still exists in Mississippi. Nothing has changed." *Id.*

[30] 42 U.S.C. § 2000d (1988). Title VI denies federal funds to institutions practicing racial discrimination. 42 U.S.C. § 2000d-1 (1988).

[31] *Fordice*, 112 S. Ct at 2732.

[32] *Id.*

[33] *Id.* at 2733.

[34] *Id.*

[35] *Id.*

[36] *Fordice*, 112 S. Ct. at 2733.

doing so by the state legislature's refusal to fund the plan.[37] Despite racially neutral admission standards, each of the eight institutions continued to retain their historical racial identity.[38]

In 1975, private citizens initiated a lawsuit asserting that Mississippi perpetuated the effects of its past de jure segregation by failing to fulfill its affirmative duty to dismantle its dual university system.[39] The United States joined the suit on the plaintiffs' behalf.[40] To avoid litigation, Mississippi entered into negotiations with the plaintiffs and the Justice Department to devise a plan for voluntary dismantlement of the state's segregated university system.[41] Despite these negotiations, the state's actions continued to reinforce the racial identity of the schools.[42]

In 1977, the Board of Trustees extended the minimum ACT requirement for all state institutions by establishing a minimum score of nine as a prerequisite for admission.[43] Black high school students

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[37] *Id.* To this day, school funding in Mississippi remains a barrier to further integration. *Black Universities; Delta Blues*, THE ECONOMIST, Dec. 12, 1992, at 30 [hereinafter *Delta Blues*]. Kirk Fordice, Mississippi's then governor, threatened to "call out the National Guard to fight any court-ordered tax increases to equalize funding at Mississippi's nearly all white and all black universities." L. Darnell Weeden, *Statutory and Equal Protection Remedies to Save Historically Black Colleges From the Effect of Invidious Discrimination*, 18 T. MARSHALL L. REV. 41, 49 (1992).

[38] *Delta Blues*, *supra* note 37, at 30.

[39] Ayers v. Lynch, No. C.A. 75-9-N (N.D. Miss. 1975). The name of the suit was subsequently changed to *Ayers v. Allain* before changing to *United States v. Fordice* as the suit wound its way through the appellate process. *Fordice*, 112 S. Ct. at 2735. The suit was brought by a former sharecropper, Jack Ayers, Sr., on behalf of his son and 21 other black students. *Do Black Colleges Get Fair Funding? Court to Decide Mississippi Suit on Alleged Bias*, ATLANTA J. CONST., June 22, 1992, at C3. Mr. Ayers died in 1986 at the age of 66. *Id.* The original plaintiffs asserted that the State of Mississippi "maintained the racially segregative effects of its prior dual system . . . in violation of the Fifth, Ninth, Thirteenth, and Fourteenth Amendments, 42 U.S.C. §§ 1981 and 1983, and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d." *Fordice*, 112 S. Ct. at 2733.

[40] *Fordice*, 112 S. Ct. at 2733.

[41] *Id.*

[42] *See generally Ayers*, 914 F.2d at 679-80 (finding that the law clearly imposed upon Mississippi an affirmative duty to dismantle its racially dual system of education, but the scope of the duty was not as broad in the context of higher education as it was for primary and secondary education).

[43] *Id.* at 682.

were more liberally exempted from taking core courses considered necessary for success in the ACT.[44] Predictably, the scores received by black students remained consistently below those received by white students.[45] The minimum ACT score required for admission to the five traditionally white schools was set at fifteen, well above the test scores received by the average black student, and far exceeding the minimum score of nine required for admission to the traditionally black schools.[46] While exceptions for students not obtaining the minimum required score remained in place for each school, the number of exceptions for the five white schools were considerably limited in comparison to the number exempted for the three black schools.[47] Through these policies, the Board of Trustees systematically barred the average black student from attending the five traditionally white schools, almost as effectively as they had done under their de jure system segregation prior to 1954.[48]

These discriminatory policies were reinforced in 1981 when the Board of Trustees devised a designation system which assigned one of three "missions" to all eight schools.[49] The mission designations include: "Comprehensive" institutions, which provide the most opportunities to students by a offering a wide variety of degree programs;[50] "urban" institutions, which primarily serve the communities in which they are located;[51] and "regional" institutions, which only provide undergraduate programs.[52] The funding that an institution receives depends entirely on its mission designation.[53] Although two of the white schools were designated comprehensive institutions, none of the traditionally black universities were designated as such, effectively denying the average black student in

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[44] *Id.*

[45] *Id.* at 680.

[46] *Id.*

[47] *Ayers*, 914 F.2d at 679-80.

[48] *Fordice*, 112 S. Ct. at 2733-34.

[49] *Ayers*, 914 F.2d at 681.

[50] *Id.*

[51] *Id.*

[52] *Id.*

[53] *Id.*

Mississippi the opportunity to attend a comprehensive university.[54] The three remaining white schools mirrored the designations of the three black schools, two were regional and one was urban.[55]

By the mid-1980s, the cumulative effect of these policies was clear. As of 1986, the state spent an average of $8,516 for each student attending one of the five traditionally white schools, while spending only $6,038 on each student attending one of the three traditionally black schools.[56] In reality, Mississippi's traditionally black schools "'were never intended to be replicas of the white colleges, and the funding they got reflected it.'"[57] Despite race-neutral admission standards, ninety-nine percent of the state's white students were enrolled in the five traditionally white schools.[58] The student bodies at these schools still remained from eighty to

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[54] *Ayers*, 914 F.2d at 681. The minimum ACT score required to attend any of the five traditionally white schools (15) places admission beyond the reach of the average black student. *Id.* at 679-80. Consequently, the average black high school student has little chance of attending a comprehensive university. *See supra* note 48 and accompanying text.

[55] *Ayers*, 914 F.2d at 682.

[56] Judi Hasson, *The Future on the Line: Black Colleges Watch Desegregation Case*, USA TODAY, Nov. 13, 1991, at A3. This disparity in funding is significant. For example, the library at the traditionally white University of Southern Mississippi contained 836,600 volumes, while the libraries of the three traditionally black schools combined contained only 629,000. *Id.* The disparity in funding is further illustrated by comparing the predominately black Mississippi Valley State College to the overwhelmingly white Delta State University situated less than 50 miles from one another. Aaron Epstein, *Segregation Ruling Slaps Mississippi Universities*, HOUS. CHRON., June 27, 1992, at A1. Delta State offers its faculty higher salaries than Mississippi Valley State College, which has the lowest faculty salaries of any state institution. *Id.* Delta State University also offers four times as many degree programs, and has twice as many volumes in its library. *Id.* The effects of the disparity in funding are not limited to educational opportunities provided to students. As of 1986, less than 5% of the faculty at the three historically white institutions were black while black faculty members accounted for over 66% of the faculty at the traditionally black schools. *See* Brown, *supra* note 29, at 43 n.182. When combined with the funding disparity, this racial imbalance effectively means that, on average, black faculty members may receive lower salaries than their white counterparts. *See generally id.* at 81 (raising the issue of funding inequalities between black and white schools).

[57] Hasson, *supra* note 56, at A3 (quoting David Sansing, professor of history at the University of Mississippi).

[58] *Fordice*, 112 S. Ct. at 2734.

ninety-one percent white.[59] Seventy-one percent of all black students attended the three historically black schools, whose racial compositions ranged from ninety-two to ninety-nine percent black.[60]

By 1987, it was evident that further negotiations were pointless.[61] The case proceeded to trial where Mississippi asserted that it had fulfilled its obligation to dismantle its de jure segregated university system by adopting racially neutral admission standards, despite the overwhelming evidence that its segregative policies were, in fact, still in place.[62] The matter would eventually be decided by the Supreme Court because of a complete absence of an exacting judicial standard to decide whether a state has fulfilled its duty to dismantle its de jure system of segregation at the university level.[63] The fact that the plaintiffs would have to resort to the Supreme Court to end the confusion and contradictions which persisted for thirty-eight years in the lower courts after *Brown I* stands as an indictment of the American judicial system itself, and is a testament to its failure to provide relief to the victims of past discrimination.[64]

II. Undermining Plessy*—The Road to* Brown

Brown I was the first Supreme Court case to focus on segregation in education at the primary and secondary levels.[65] All previous school desegregation cases directly addressed a state's duty to provide equal educational opportunities to minorities at the college and university level within the context of the "separate but equal"

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[59] *Id.* at 2734. This is despite the fact that Mississippi has the largest percentage of black citizens of any state in the union (36%). *Delta Blues*, *supra* note 37, at 58. Out of 58,000 students enrolled at state schools in Mississippi, only 17,000 are black. William Raspberry, *Pyrrhic Victory*, WASH. POST, Jan. 29, 1993, at A23. Only 4,000 of the 17,000 attend the three traditional white schools. *Id.*

[60] *Fordice*, 112 S. Ct. at 2734.

[61] *Id.*

[62] *Id.*

[63] *Id.* at 2735.

[64] *Id.* at 2734.

[65] *Brown I*, 347 U.S. at 487; *see* David Chang, *The Bus Stops Here*, 63 B.U. L. REV. 1, 6 (1983).

doctrine.[66] These earlier decisions initiated the erosion of the "separate but equal" doctrine, thus laying the foundation upon which the *Brown I* Court could declare segregation in education inherently unequal.[67]

The first major case recognizing a constitutional right under the Fourteenth Amendment applicable to higher education was *Missouri ex rel. Gaines v. Canada*.[68] In *Gaines*, the plaintiff was denied admission to the School of Law of the State University of Missouri because of a state policy compelling the segregation of its universities.[69] Although the State did not provide a separate facility for the legal education of black students, it advised the plaintiff that assistance was available if he wished to attend law school in a

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[66] Baxter, *supra* note 11, at 3. The NAACP Legal Defense Fund intentionally adopted the strategy of attacking segregation at the college and university level because these cases could be adjudicated within the "separate but equal" context because separate schools for blacks were rarely provided. Motley, *supra* note 1, at 10-11. Thus, the constitutional validity of segregated education could be undermined without prematurely putting the issue of whether separate could ever be equal before the Court. *Id.* Thurgood Marshall and his associates believed that the southern states would be forced to admit blacks into their graduate schools because providing separate facilities would be too expensive. *Id.* Eventually the validity of segregation per se at all levels could be brought before the Court. *Id.* The strategy's first major victory ironically forced the integration of the University of Maryland Law School, which had once denied Marshall admission because of his race. Dona L. Irvin, *A True Believer on the Supreme Court*, SAN FRAN. CHRON., Jan. 24, 1992, at 9. Marshall called the victory "sweet revenge." *Id.*

[67] Baxter, *supra* note 11, at 3. Justice Clark indicated in a memorandum to his colleagues that he understood the consequences of the Court's decisions in higher education. Tushnet, *supra* note 7, at 23. "'How will I vote when the . . . grammar school cases arise? I do not know . . . .'" Mark Tushnet, with Katya Lezin, *What Really Happened in* Brown v. Board of Education, 91 COLUM. L. REV. 1867, 1891 (1991) (quoting Memorandum (Apr. 1950) (Tom C. Clark papers, Tarlton Law Library, Univ. of Texas Law School, Box A2, folder 3)). "'[But, if] some say this undermines *Plessy* then let it fall as have many Nineteenth Century oracles.'" Dennis J. Hutchinson, *Unanimity and Desegregation: Decision Making in the Supreme Court, 1948-1958*, 68 GEO. L.J. 1, 90 (1979) (quoting Memorandum on *Sweatt* and *McLaurin* from Mr. Justice Clark to the Conference (Apr. 7, 1950) (File 4029, Box 218)).

[68] 305 U.S. 337 (1938).

[69] *Id.* at 342-43.

neighboring state.[70] The Court held that the educational opportunity provided to the black plaintiff was not equal to the opportunities provided to white students because he was denied the opportunity to attend law school within the State of Missouri.[71] Thus, in *Gaines*, the Court established that equal protection under the "separate but equal" doctrine required States to provide equal educational opportunities to minorities, instead of merely requiring the equality of the education actually provided.[72] This is a subtle, yet crucial, distinction which would form the underlying reasoning for the Court's decision in *Brown I* sixteen years later.[73]

In *Sipuel v. Board of Regents*,[74] a qualified black applicant

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[70] *Id.* The Court quoted § 9622 of the Revised Statutes of Missouri (1929) which, in relevant part, provides:

> Pending the full development of the Lincoln University, the board of curators shall have the authority to arrange for the attendance of negro residents of the state of Missouri at the university of any adjacent state to take any course or to study any subjects provided for at the State University of Missouri, and which are taught at the Lincoln University and to pay the reasonable tuition fees for such attendance; provided that whenever the board of curators deem it advisable they shall have the power to open any necessary school or department.

Id.

[71] *Id.* at 342. The ruling was of limited practical value, however, because the Court declined to order Missouri to admit the plaintiff into the all-white law school. The Court merely invalidated the out-of-state scholarship program because it did not provide Mr. Gaines with an equal opportunity to attend law school in Missouri. *Id.* Missouri opted to provide non-whites the opportunity to attend law school in the state by building separate facilities at Lincoln University. *Id.* Mr. Gaines never applied for admission to the all black school. Motley, *supra* note 1, at 11. The allegedly equivalent black law school was housed in a building in St. Louis, which also housed a hotel and a movie theater. REMOVING THE BADGE OF SLAVERY: THE RECORD OF *BROWN V. BOARD OF EDUCATION* xxii-xxiii (Mark Whitman ed. 1993) [hereinafter REMOVING THE BADGE].

[72] *See generally* 305 U.S. at 350 (finding it "impossible to conclude that what otherwise would be an unconstitutional discrimination, with respect to the legal right to the enjoyment of opportunities within the State, can be justified by requiring resort to opportunities elsewhere").

[73] *See generally* Baxter, *supra* note 11, at 3-4 (stating that prior to *Brown I*, federal courts rendered several decisions that laid the foundation for the "express repudiation of the doctrine in the context of elementary and secondary educational systems").

[74] 332 U.S. 631 (1948). *Sipuel* marks the first time that the NAACP Legal Defense Fund relied on experts to demonstrate the psychological harms caused by racial segregation in education. Robert Carter, *Reexamining* Brown *Twenty-Five Years Later:*

was denied admission to the School of Law of the University of Oklahoma, the only state supported law school within the state, solely on the basis of her race.[75] While the State could have complied with the "separate but equal" doctrine by establishing a separate institution for black students, it had not done so, and, thus, denied black students the *immediate* opportunity to study law within the state as was provided for white students.[76] The Court held that until the State provided blacks the opportunity to attend law school "as soon as it does for applicants of any other group," the denial of black applicants to the all white school was inherently unequal and, thus, unconstitutional.[77] In reaching its decision, the Court had once again focused on the equality of opportunity actually provided to black students.[78]

In *Sweatt v. Painter*,[79] the Court for the first time considered the implications of the Fourteenth Amendment as it applied to a state's ability to segregate graduate students on the basis of race where separate facilities had been established.[80] In *Sweatt*, a black applicant was denied admission to the University of Texas Law School solely because of the color of his skin.[81] In reaching its decision, the Court looked beyond quantifiable factors such as the equality of the schools' facilities in order to concentrate on external factors, which directly effect educational opportunities:

Looking Backward Into the Future, 14 HARV. C.R.-C.L. L. REV. 615, 616 (1979). The strategy would be refined and adapted until it yielded ultimate victory in *Brown I* six years later. *Id.*

[75] 332 U.S. at 633.

[76] *Id.* at 632-33.

[77] *Id.*

[78] *Id.*

[79] 339 U.S. 629 (1950). The State opened and maintained the School of Law of the Texas State University for Negroes, which provided an in-state opportunity for the plaintiff to attend law school. *Id.* at 631. At the time of trial, the school was housed in the basement of an Austin office building. *Id.* The school had 4 instructors for 10 students, and a library containing 16,500 volumes as compared to the 65,000 volumes found in the white school's library. *Id.* at 632-33. In *Sweatt*, the Court found that the students attending the all-black school were provided with essentially equal facilities because they were allowed to use the State's white law school's library. *Id.*

[80] *Id.* at 635.

[81] *Id.* at 631.

> [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, to name but a few, include reputation of faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige.[82]

Relying on these findings, the Court held that the black school did not provide equal educational opportunities, as demanded by the Fourteenth Amendment, and ordered that the plaintiff be admitted to the University of Texas Law School.[83] This holding seriously questioned the validity of the philosophical underpinnings of the "separate but equal" doctrine by tacitly acknowledging that separate was rarely ever equal.[84]

Later in the same year that *Sweatt* was decided, the Supreme Court, in *McLaurin v. Oklahoma State Regents for Higher Education*,[85] similarly held that the University of Oklahoma could not restrict a black graduate student from using certain school facilities solely because of his race.[86] While the tangible aspects of the plaintiff's education, such as access to faculty and libraries were equal,[87] the Court relied on less tangible factors, such as the plaintiff's unequal opportunity to engage in a free and open exchange with other students.[88] The Court considered such opportunities fundamental to an education, and concluded that "the conditions

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[82] *Id.* at 634.

[83] *Id.*

[84] *See generally* Baxter, *supra* note 11, at 5-6 (arguing that the Supreme Court, by assessing qualities of an education unable to be quantified, began to erode the "separate but equal" doctrine).

[85] 339 U.S. 637 (1950).

[86] *Id.* at 642. The plaintiff, George McLaurin, was a 68 year old student seeking a doctoral degree in education. REMOVING THE BADGE, *supra* note 71, at xxix-xxx.

[87] *McLaurin*, 339 U.S. at 640-41. In reality, facilities provided to black students admitted to all white schools were rarely equal. For example, Mr. McLaurin was forced to sit in an anteroom immediately outside his classrooms, required to use a library carrel behind a stack of newspapers, and was allowed to use the university cafeteria only after the white students had eaten. *Id.* at 640.

[88] *Id.* at 641.

under which this appellant is required to receive his education deprive[d] him of his personal and present right to the equal protection of the laws."[89]

By recognizing the importance of intangible and esoteric measures in the equality of education in *Sweatt*, and that the separation of the races diminishes the educational opportunities of blacks in *McLaurin*, the Court, without explicitly rejecting the "separate but equal" doctrine, implicitly suggested that separate educational facilities could never be equal.[90] Thus, these decisions seriously eroded the legal and moral validity of the "separate but equal" doctrine in public education, and served as major precursors to the Court's decision in *Brown I*.[91] The Supreme Court would not address a major question concerning segregation in higher education again until *Fordice* forty-two years later.[92]

III. The Decision and Legacy of Brown

While having the unintended effect of eroding the "separate but equal" doctrine, the cases leading up to *Brown I* focused on obtaining equal facilities for blacks at the university level.[93] In *Brown I*,[94] the Court shifted its focus to the primary and secondary

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[89] *Id.* at 642.

[90] *See generally* Baxter, *supra* note 11, at 6 (stating that the Court's decisions hinged on other factors, such as the lack of opportunity to exchange ideas with other students). In reviewing the decisions, the editors of the *Alabama Law Review* concluded that even without directly confronting its prior decision in *Plessy*, "the attitude of the Court must be interpreted definitely to be that segregation is unconstitutional *per se*." REMOVING THE BADGE, *supra* note 71, at xxx (quoting Note, ALA. L. REV 181, 182 (1950)). *The New Republic* similarly commented that segregation "as a way of life is clearly doomed." *Id.* (quoting THE NEW REPUBLIC, June 19, 1950, at 4).

[91] Motley, *supra* note 1, at 9-10.

[92] Linda Greenhouse, *Slim Margin; Moderates on Court Defy Predictions*, N.Y. TIMES, July 5, 1992, § 4, at 1.

[93] Baxter, *supra* note 11, at 2.

[94] *Brown v. Board of Education of Topeka* was the formal name given to four separate cases coming from Kansas, South Carolina, Virginia, and Delaware which were consolidated for argument in the Supreme Court. 347 U.S. at 486. *Brown I* itself came out of Topeka, Kansas. *Id.* at 486 n.1. The State of Kansas permitted segregation, but did not require it. *Id.* Delaware, Virginia, and South Carolina constitutionally mandated

levels, and addressed the impact of segregation itself by asking whether separate educational facilities could ever be equal.[95] For the first time, segregation in education itself was on trial.[96] Writing for a unanimous Court, Chief Justice Warren stated:

> In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation . . . . Today education is perhaps the most important function of state and local governments . . . . Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment . . . . Such an *opportunity*, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.[97]

The Chief Justice deftly freed the Court from considerations of the historical intent of the Fourteenth Amendment, as well as the constraints of the framework adopted in *Plessy*, to open the door for a new interpretation of equal protection based on equality of opportunity under the law.[98]

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segregation in public schools. PERRY A. ZIRKEL & SHARON N. RICHARDSON, A DIGEST OF SUPREME COURT DECISIONS AFFECTING EDUCATION 88 (1988). Topeka was Kansas's only city with a sizeable black population in a generally rural state with little mandated segregation. Motley, *supra* note 1, at 13. Kansas entered the Union as a free state. *Id.*

[95] 347 U.S. at 486. Ironically, Linda Brown would renew her claim in 1979, asserting that the Topeka school system had yet to satisfy *Brown II*'s requirements. *See* Brown v. Board of Educ., 892 F.2d 851, 855 (10th Cir. 1989), *vacated*, Board of Educ. v. Brown, 112 S. Ct. 1657 (1992).

[96] *See Brown I*, 347 U.S. at 492.

[97] *Id.* at 492-93 (emphasis added).

[98] *Id. See generally* Motley, *supra* note 1, at 15 (discussing Chief Justice Warren's foward-looking opinion and his disregard for the holding in *Plessy*). Amazingly, Chief Justice Warren's opinion never addressed *Plessy*'s significance. *See Brown I*, 347 U.S. at 492-93.

Applying this new standard, the Court held that separate educational facilities are inherently unequal based on findings that minority children were psychologically damaged by de jure segregation,[99] and, thus, denied equal benefit of educational opportunity in segregated schools:

> To separate . . . [minority children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone . . . in the field of public education the doctrine of "separate but equal" has no place.[100]

While the Court's decision in *Brown I* was confined to the realm of public education, Chief Justice Warren's opinion marked the beginning of the end of de jure segregation in the United States,[101]

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[99] *Id.* at 495. The theory adopted by the Court was based on Dr. Kenneth Clark's research which suggested that segregation adversely affected black children's ability to learn because of the badge of inferiority it conferred on them. Motley, *supra* note 1, at 13. This was a new theory developed specifically to attack the validity of segregation in education. *Id.* It was inspired by Mendez v. Westminister Sch. Dist., 64 F. Supp. 544 (S.D. Cal. 1946), *aff'd*, 161 F.2d 774 (9th Cir. 1947), in which the court held that the segregation of Mexican-American children was unconstitutional because of the perception within the community that the Mexican-American school was inferior to the white school. *See* Motley, *supra* note 1, at 13.

[100] *Brown I*, 347 U.S. at 494. The decision is universally "regarded as the most revolutionary race relations decision in the Court's history." Motley, *supra* note 23, at 316.

[101] *See* Motley, *supra* note 1, at 16; *see also* Ronald Smothers, *Cursed and Praised, Retiring Judge Recalls Storm*, N.Y. TIMES, Nov. 9, 1991, at B3 (illustrating how the principle announced in *Brown I* was extended by district courts to end segregation in parks, restaurants, bus stations, libraries, and museums); Morton J. Horwitz, *The Jurisprudence of* Brown *and the Dilemmas of Liberalism*, HARV. C.R.-C.L. L. REV. 599, 609 (1979) (explaining how the decision in *Brown* served as a catalyst for social change). The sweeping implications of the decision are perhaps best illustrated by the NAACP's lawyers' predictions that their decades-long struggle for equal rights was at the beginning of its end. Symposium, *Race and the American City: The Kerner Commission in Retrospect—An Introduction*, 71 N.C. L. REV. 1289, 1297-98 (1993). On the day after the May 17, 1954 decision, Thurgood Marshall predicted that by the 100th anniversary of the Emancipation Proclamation (1963), segregation in all forms would no longer exist in the United States. Derrick Bell, *Law, Litigation, and the*

by powerfully suggesting that the separation of races predicated on the superiority of whites over blacks could not be tolerated under principles of the Fourteenth Amendment.[102] *Brown I*, thus, serves as the symbolic rejection of the "separate but equal" doctrine.[103] It is important to note, however, that *Brown I* never explicitly repudiated the "separate but equal" doctrine.[104] Had it chosen to, the Court could have accepted Justice Harlan's invitation to declare that "our constitution is color-blind."[105] Had the Court done so, *Brown I* would have expanded the meaning of equal protection under the Fourteenth Amendment to initiate the immediate dismantling of all

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Search for the Promised Land, 76 GEO. L.J. 229 (1987) (reviewing MARK V. TUSHNET, LEGAL STRATEGIES AGAINST SEGREGATED EDUCATION (1987)). Similarly, Judge William Hastie, the first black to sit on the federal bench, counseled a black law student that "the Supreme Court struck down racial segregation laws three years ago, and except for some mopping up, you will find little work to do in the civil rights field." *Id.* at 229. Beyond its pronounced influence over race relations in the United States, the decision also rekindled the ongoing debate over the Court's proper role and function under judicial review. Horwitz, *supra* note 101, at 603.

[102] *See Brown I*, 347 U.S. at 495.

[103] *Id.* at 493. Accepting the idea that segregation itself bestows a sense of inferiority on those minorities separated from the mainstream stands as an implicit rejection of the legal underpinnings on which the separate but equal doctrine rested:

> We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.

Plessy, 163 U.S. at 551.

[104] *See* Chang, *supra* note 65, at 5 (arguing that "*Brown* did not discard the 'separate but equal' doctrine, but reinterpreted its applicability in the realm of public education"). *Plessy* was finally overturned in Gayle v. Browder, 352 U.S. 903 (1956), which affirmed a district court's decision to ban segregation on local buses in Montgomery, Alabama, without hearing the case or writing an opinion. Motley, *supra* note 1, at 15.

[105] *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting). Justice Harlan stated that segregation "proceeded on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens." *Id.* He believed that excluding blacks from coaches set aside for whites illustrated the white race's sense of superiority and dominance in American society. *Id.* "Our Constitution is color-blind, and neither knows nor tolerates classes among citizens . . . . In my opinion, the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made . . . in the Dred Scott case." *Id.*

forms of purposeful governmental segregation.[106] Instead, the Court took an intermediate step by creating a new analytical framework which expanded the "separate but equal" doctrine to require equal educational opportunities rather than merely requiring tangibly equal facilities.[107]

In *Brown I*, the Court declared that tangible facilities were not the only thing that contributed to a child's education, and held that educational benefits provided by public schools must in all respects be the same for black children as they are for white children.[108] The *Brown I* Court found that stigmatizing harms created by segregation caused black children to receive far less educational benefit than white children.[109] *Brown I* thus clearly states that purposeful governmental segregation in education is unconstitutional because the sense of inferiority it creates in the minds of black children deprives them of equal educational opportunities.[110] Historically, the decision

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[106] *See generally id.* at 560 (arguing that state enactments treat one race as inferior which renders permanent peace impossible).

[107] *See* Chang, *supra* note 65, at 5. In fact, the existence of equal educational facilities was a myth. The schools provided for blacks during the *Plessy* era were underfunded and undervalued. Brown, *supra* note 29, at 15. White schools had better paid teachers, longer terms, and better physical facilities. *Id.* For example, in 1929, Mississippi provided nine times the resources for white schools as it did for black schools. *Id.*

[108] 347 U.S. at 493.

[109] *Id.* at 494.

[110] *Id.* at 494-95; *see* Chang, *supra* note 65, at 9-10. Perhaps no one described the process by which segregation humiliates and degrades its victims better than Dr. Martin Luther King, Jr., who stated that:

> [W]hen you suddenly find your tongue twisted and your speech stammering as you seek to explain to your six-year-old daughter why she can't go to the public amusement park that has just been advertised on television, and see tears welling up in her eyes when she is told that Funtown is closed to colored children, and see the ominous clouds of inferiority beginning to form in her little mental sky, and see her beginning to distort her personality by developing bitterness toward white people; . . . when your first name becomes "nigger" and your middle name becomes "boy" . . . your wife and mother are never given the respected title "Mrs."; when you are harried by day and haunted by night by the fact that you are a Negro, . . . when you are forever fighting a degenerating sense of "nobodiness"—then you will understand why we find it difficult to wait . . . . Any law that uplifts human personality is just. Any law

has been read as demanding racial integration in all publicly funded schools, in light of *Brown II*'s mandate for affirmative remedial steps to integrate formerly segregated schools.[111] Ignored in this construction, however, is the central mandate underlying the Court's decison in *Brown I*, which requires States to provide equal educational opportunity to all students regardless of race.[112] By focusing on the implementation of *Brown II*'s mandate to integrate, in almost all subsequent decisions, *Brown I*'s true mandate of equality of educational benefits for all children has all but been forgotten.[113]

Brown II created a constitutionally unique and powerful remedial tool that has enabled district courts to dismantle dual school systems.[114] Of particular importance is the Supreme Court's decision in *Swann v. Charlotte-Mecklenburg Board of Education*,[115] which provided general guidance to the district courts with respect to their remedial powers under *Brown II*.[116] In *Swann*, the Court clearly announced that beyond being merely empowered to eliminate existing legal barriers to integrated schools, district courts were to implement and oversee plans to eliminate the continuing effects of past segregation where local school boards have failed to do so.[117] "The

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> that degrades human personality is unjust. All segregation statutes are unjust because segregation distorts the soul and damages the personality. It gives the segregator a false sense of superiority and the segregated a false sense of inferiority.

MARTIN LUTHER KING, JR., *Letter from a Birmingham City Jail, in* WHY WE CAN'T WAIT 81-82 (1963).

[111] 349 U.S. at 294; *see* Chang, *supra* note 65, at 9-10.

[112] *See* 347 U.S. at 495; *see also supra* text accompanying notes 101-07 (declaring that equal tangible facilities have to be coupled with equal educational benefits).

[113] Derrick A. Bell, Jr., *Black Colleges and the Desegregation Dilemma*, 28 EMORY L.J. 949 (1979); *see supra* note 7 and accompanying text.

[114] Chang, *supra* note 65, at 8.

[115] 402 U.S. 1 (1971).

[116] *Id.* at 6.

[117] *Id.* at 20-21. The Charlotte-Mecklenburg school system operated 107 schools attended by more than 84,000 students. *Id.* at 6. As of June 1969, approximately two-thirds of Charlotte's 21,000 black students attended 21 schools which were 99% black. *Id.* at 7. The Court held that the school board's policies created the segregation and approved the district court's order of a busing plan to integrate the schools. *Id.* at 30. The average bus trip was seven miles, and lasted no longer than 35 minutes. *Id.* The Court warned local authorities that the courts could mandate remedies that were "administratively awkward, inconvenient, and even bizarre, in some situations" to

objective today remains to eliminate from the public schools all vestiges of state-imposed segregation."[118] The remedial power to redress current detriments caused by a previously motivated racist act is unique to the context of education,[119] and sends a clear message that schools which are currently segregated because of a past governmental policy are required to take affirmative steps to desegregate.[120] *Swann* reaffirmed the significance the Court attaches to the central role public education plays in our society.[121] This mandate to eliminate all vestiges of prior segregation is essential to the Court's decision in *Fordice*.

IV. Implementing Brown*: Confusion in the Lower Courts*

In *Florida ex rel. Hawkins v. Board of Control*,[122] the Supreme Court immediately extended the principles announced in *Brown I* to insitutions of higher education.[123] No such pronouncement was ever made relating to *Brown II*.[124] While the Supreme Court gave considerable attention to the affirmative efforts taken to desegregate primary and secondary schools at the local level, it ignored the issue at the university and college level.[125] The lower courts were left to adapt and develop the Court's pronouncements into a judicial framework, which would define a state's duty to

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eliminate vestiges of state-imposed segregation. *Id.* at 28. In defending these extraordinary measures, Chief Justice Burger stated that "all things being equal, with no history of discrimination, it might well be desirable to assign pupils to schools nearest their homes. But all things are not equal in a system that has been deliberately constructed and maintained to enforce racial segregation." *Id.*

[118] *Id.* at 15.

[119] Chang, *supra* note 65, at 14.

[120] *Swann*, 402 U.S. at 15-16. *See generally Brown II*, 349 U.S. at 300-01 (demanding that schools desegregate, taking whatever steps necessary, including revising local laws).

[121] 402 U.S. at 20-21. *See generally* Chang, *supra* note 65, at 15-16 (suggesting that educational rights must be placed in a different constitutional context because of its paramount importance in today's society).

[122] 347 U.S. 971 (1954).

[123] *Id.* (remanding the case "for consideration in the light of *Brown* [*I*]").

[124] *See* Baxter, *supra* note 11, at 7.

[125] *Id.*

dismantle dual systems of higher education.[126] As could be predicted, confusion, disorder, and contradiction were the order of the day.[127]

The earliest significant case to reach the lower courts was *Lee v. Macon County Board of Education*,[128] in which the plaintiff argued that the State of Alabama operated a dual system of higher education in direct violation of the principles announced in *Brown I*.[129] The district court found ample evidence that the state operated its institutions "as if *Brown v. Board of Education* were inapplicable in these areas."[130] The court ordered the implementation of system-wide desegregation, but limited the State's remedial duty to a guarantee of freedom of choice.[131] One year later in *Green v. County School Board*,[132] the Supreme Court rejected this approach for primary and

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[126] *Id.* at 7-18.

[127] *Id.*

[128] 267 F. Supp. 458 (M.D. Ala 1967).

[129] *Id.* at 461, 464.

[130] *Id.* at 474 (emphasis added).

[131] *Id.* at 479. The court held that:

> No person shall be denied admission to any trade school, junior college, or state college administered by the Alabama State Board of Education upon the ground of race, nor shall he be subjected to racial discrimination in connection with his application for enrollment in or his attendance at such trade school, junior college, or state college. Dual attendance zones based on race for such trade school, junior colleges and state colleges shall be abolished.

Id. at 484. The court also ordered the Alabama Department of Education to take affirmative steps to recruit, hire, and assign teachers to achieve desegregated faculties at these schools by September, 1967. *Id.*

[132] 391 U.S. 430 (1968). New Kent was a county in rural Virginia with no residential segregation, and one white school and one black school. *Id.* at 432. Twenty-one buses were required to transport the students to their racially assigned school. *Id.* The suit brought on behalf of the black students forced the school board to adopt a freedom of choice plan which allowed the individual students to choose between the two schools. *Id.* at 433. The plan read in part: "[E]very student, regardless of race may 'freely' choose the school he will attend." *Id.* at 437. Students who did not choose were assigned to the school they last attended. *Id.* at 434. The Court rejected the plan because it did not result in substantial desegregation. *Id.* at 441. After three years, the traditionally black school remained all-black, while only 15% of all black students chose to attend the white school. *Id.* The Court determined that, despite the plan, "the school system remain[ed] a dual system," and ordered the school board to "come forward with a plan that promises realistically to work, and promises realistically to work *now*." *Id.* at 439, 441.

secondary education by holding that the mere adoption of freedom of choice plans[133] did not discharge a state's affirmative duty to dismantle dual school systems.[134] *Green*'s holding would not be explicitly extended to institutions of higher learning until the Court's decision in *Fordice* twenty-four years later.[135]

The next major case examining a state's duty to desegregate its institutions of higher learning was *Alabama State Teachers Association v. Alabama Public Schools and College Authority (ASTA)*.[136] In this case, the Alabama State Teachers Association challenged the State's plans to construct a branch of Auburn University in close proximity to the formerly all-black Alabama State Teachers College.[137] The district court held that the State had an

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[133] In *Green*, the school board contended that their good faith efforts to allow students to freely choose the school they would attend satisfied *Brown II*'s mandate to dismantle their dual systems. *Id.* at 437. The school board asserted that any lingering segregation resulted from free choice, and not from a government mandated policy. *Id.* The Court rejected this argument specifically because the plan in question did not result in any appreciable desegregation. *Id.* Other southern school districts attempted to dismantle their dual school systems by adopting plans in which students simply chose the school they wished to attend. *See* Bowman v. County Sch. Bd., 382 F.2d 326 (4th Cir. 1967); Kemp v. Beasley, 389 F.2d 178 (8th Cir. 1968). Mississippi would use the same argument in asserting that it had met its duty to dismantle its state university system. *See infra* text accompanying notes 195-204. It is important to note that freedom of choice plans per se do not violate *Brown II*'s mandate to dismantle dual school systems. *Green*, 391 U.S. at 439-40. Had the plan resulted in measurable racial balancing, the district's duty to dismantle its dual system would have been met. *Id.* at 440-41. The fallacy behind freedom of choice plans is that in the face of intimidation, resentment, and scorn, blacks never really had a free or uncoerced choice to attend the traditionally all-white schools just as whites would never consider entering traditionally black schools. *See* Diane Ravitch, *Desegregation, Varieties of Meaning*, *in* SHADES OF *BROWN*: NEW PERSPECTIVES ON SCHOOL DESEGREGATION 38 (Derrick Bell ed., 1980).

[134] 391 U.S. at 437-38.

[135] *See Fordice*, 112 S. Ct. at 2736. In his opinion, which concurred and dissented in part, Justice Scalia stated that "the Court is essentially applying to universities the amorphous standard adopted for primary and secondary schools in *Green*." *Id.* at 2748-49.

[136] 289 F. Supp. 784 (M.D. Ala. 1968).

[137] *Id.* at 786-87. The plaintiffs asserted that building a branch of Auburn University in such close proximity to Alabama State Teachers College violated Alabama's affirmative duty to desegregate because it did not maximize desegregation efforts. *Id.* They also argued that the new college was built to provide a school for white students in the area, thereby promoting segregation. *Id.* at 787-88.

affirmative duty to dismantle its dual system,[138] but defined this duty by merely requiring the State to adopt race-neutral admission policies (essentially a freedom of choice plan) and to integrate faculty at state schools to the fullest extent possible.[139] The court revealed its contempt towards court ordered desegregation by noting the differences between the compulsory nature of primary education and the voluntary nature of higher education, and warned against judicial intervention in a state's higher education policy decisions.[140] These arguments would re-emerge as the basis of Mississippi's position in *Fordice*.[141]

In *Sanders v. Ellington*,[142] a Tennessee district court provided a remarkably different remedy. The plaintiffs in *Sanders*, with the support of the United States Justice Department, challenged the University of Tennessee's plan to build a new facility in Nashville, arguing that it would impede efforts to desegregate the traditionally black Tennessee Agricutural & Industrial University.[143] The court denied the plaintiffs' request to halt construction of the new facility because it found no evidence that the facility was intended to provide programs comparable to Tennessee Agricultural & Industrial University.[144] However, the court made broad-based findings that, despite the adoption of race-neutral admission policies, Tennessee had made very little progress in desegregating its traditionally black universities.[145] The court ordered the State to take further affirmative steps to desegregate Tennessee's university system.[146] Three years

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[138] *Id.* at 787.

[139] *Id.* at 789. The restrictive and limited reading of a state's duty to dismantle traditionally segregated colleges and universities will hereinafter be referred to as the *ASTA* doctrine.

[140] *Id.* at 787-88.

[141] *See Fordice*,112 S. Ct. at 2734.

[142] 288 F. Supp. 937 (M.D. Tenn. 1968).

[143] *Id.* at 939. The plaintiffs asked the court to compel the State to "present a plan calculated to produce meaningful desegregation of the public universities of Tennessee." *Id.*

[144] *Id.* at 941.

[145] *Id.*

[146] *Id.* at 943. The court in *Sanders* observed that:

> [T]he failure to make A & I a viable, desegregated institution . . . in the near future is going to lead to its continued deterioration as an

later, in *Norris v. State Council of Higher Education*,[147] a Virginia district court announced an even broader formulation of a state's duty to eliminate the vestiges of segregation at the university level.[148] In *Norris*, the plaintiffs challenged a proposal to turn the predominately white Richard Bland College from a two-year institution into a four-year college.[149] The State asserted that it had satisfied its requirements under the *ASTA* doctrine by adopting race-neutral admission standards and implementing faculty integration.[150] The court rejected the State's argument, stating that the holding in *ASTA* applied only to the particular facts of that case and should not be construed as creating a universal approach.[151]

The *Norris* court defined a state's duty as taking the same "steps . . . necessary to convert to a unitary system in which racial discrimination would be eliminated 'root and branch'" at the university level as would be required at the primary level.[152] However, the court rejected the plaintiffs' request that the two schools be merged, based on concerns raised in the dissent with respect to the detrimental effects such a merger may impose on black students.[153] Instead, the court prevented the State from implementing its plans to expand the college.[154] Just as the court had rejected the *ASTA* doctrine as applying to all situations, the court carefully warned

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> institution of higher learning . . . . [I]t is clearly apparent on the record that something must be done for that school and that the one thing that is absolutely essential is a substantial desegregation of that institution by whatever means can be devised by the best minds that the State of Tennessee can bring to it.

Id. Ironically, the court observed that regarding the integration of the historically white schools "it appears genuine progress is being made." *Id.* at 942.

[147] 327 F. Supp. 1368 (E.D. Va. 1971).

[148] *Id.* at 1372-73.

[149] *Id.* at 1369. The plaintiffs claimed that the move would be destructive to the predominately black Virginia State College's efforts to attract white students. *Id.* at 1370-71.

[150] *Id.* at 1372.

[151] *Id.*

[152] 327 F. Supp. at 1373 (quoting Green v. County Sch. Bd., 391 U.S. 430, 437 (1968)). This standard for a state's duty to dismantle formerly segregated colleges and universities will hereinafter be referred to as the *Norris* doctrine.

[153] *Id.* at 1375.

[154] *Id.* at 1373.

that its own actions should not be applied regardless of the particular facts of a given case.[155] Clearly, the *ASTA* and *Norris* doctrines represented diametrically opposed viewpoints on a state's duty to dismantle segregated systems of higher education.[156] Seventeen years after *Brown I*, a clear judicial doctrine defining a state's duty to desegregate its university system had yet to be developed, much less be addressed, by the Supreme Court.[157]

Many of these same issues were addressed two years later in *Honnicutt v. Burge*,[158] in which the plaintiffs asked a district court to compel the State of Georgia to take affirmative measures to desegregate and improve the academic performance of Fort Valley State College.[159] The court found that the school remained essentially an all-black institution despite a token presence of white students and faculty.[160] Despite this finding, the Georgia Board of Regents argued that they had acted in "good faith" to desegregate the college.[161] The court rejected the argument, stating that "[the] Board of Regents has abdicated its legal responsibility to take affirmative action to desegregate this state college by adopting a so called 'open-door policy' and permitting the administration and faculty of the individual colleges to implement this policy with no direction from above."[162]

Honnicutt also specifically departed from *Norris*. When the *Norris* court ordered remedial action to further integrate Virginia State College, it stressed the importance attached to the school's

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[155] *Id.*

[156] *Compare ASTA*, 289 F. Supp. at 787-89 (holding a state to a limited affirmative duty to dismantle a segregated higher education system) *with Norris*, 327 F. Supp. at 1373 (holding that a state must take "the same steps . . . necessary to convert to a unitary system in which racial discrimination would be eliminated 'root and branch'" at the university level as would be required at the primary level).

[157] *See* Marcus, *supra* note 24, at 74.

[158] 356 F. Supp. 1227 (M.D. Ga. 1973).

[159] *Id.* at 1230. In reaching its conclusion, the court determined that the hiring of 25 white faculty members, all assigned to inconsequential teaching or committee positions, did not meet the constitutional duty to dismantle segregation in good faith. *Id.*

[160] *Id.* at 1238.

[161] *Id.* at 1230.

[162] *Id.*

independence and traditional identity.[163] In *Honnicutt*, the court approached the continuing role of the traditionally black school by strictly interpreting the Supreme Court's analysis in *Brown I*.[164] The court proclaimed that the "Supreme Court by holding in *Brown I* that separate educational facilities are inherently unequal in reality held as a matter of law that educational programs designed explicitly for the black minority, and thus designed to attract just the black minority, are inherently unequal."[165] By simplistically and rigidly applying *Brown I*'s mandate without consideration of its underlying rationale, the *Honnicutt* court completely ignored concerns over the ability of traditionally black schools to continue providing unique and beneficial educational opportunities to the black community without any finding of stigmatizing harm resulting from the denial of equal educational opportunity.[166] Concern over the future of historically black schools formed the basis of Justice Thomas' concurrence and Justice Scalia's dissent in *Fordice*, and remains one of the most difficult questions within the constitutional framework of school desegregation at the college and university level.[167]

In *Geier v. Blanton*,[168] the issue of merger as an acceptable solution to segregation was again examined.[169] The district court

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[163] 327 F. Supp. at 1372. The *Norris* court rejected the merger partly because of the detrimental effects it would have to the traditionally black school which provided educational opportunities to its black students not available at the historically white schools. *Id.* at 1373.

[164] 356 F. Supp. at 1238.

[165] *Id.* In reaching this conclusion, the court relied on a report prepared by the Carnegie Commission, which found that "America's colleges and universities founded for Negroes historically have been the central institutions in an isolated system of education developed explicitly to serve the black minority." *Id.* at 1231.

[166] *See, e.g.*, Baxter, *supra* note 11, at 24-25 (1982) (discussing Federal Agencies and Black Colleges, a report of the Federal Interagency Committee on Education, revised January, 1971).

[167] *See Fordice*, 112 S. Ct. at 2744, 2746; *see also infra* part V.D-E.

[168] 427 F. Supp. 644 (M.D. Tenn. 1977).

[169] *Id.* at 646. The court ordered Tennessee State University to merge with the traditionally all-white University of Tennessee-Nashville Center after a prior order to implement joint, cooperative, and exclusive programming failed to integrate either school. *Id.* at 657. Students, faculty members of both universities, and the federal government had requested the merger. *Id.* at 657-59. The Board of Trustees opposed the plan. *Id.* at 656-57. Black college officials voiced concerns for the future of

found that Tennessee had historically operated a dual system, that Tennessee State University (TSU) had been established explicitly as a black institution,[170] and that the proposed expansion of the University of Tennessee (UT) would frustrate the efforts of TSU to desegregate because the schools were within such close proximity to one another.[171] The district court relied on a factual analysis of the affects of the policies put in place and determined that TSU had not been desegregated.[172] Thus, under the *Norris* doctrine, further affirmative steps were necessary.[173] Accordingly, the court ordered the two schools to merge, considering it to be the most feasible and effective means to achieve integration.[174]

The court of appeals affirmed the district court's decision, after noting serious concerns over what it characterized as a "radical" judicial remedy.[175] The court's willingness to affirm was largely dependent on the fact that it was the court, and consequently the solution, of last resort.[176] Considerable efforts to integrate the faculty, improve TSU's campus, recruit white students to TSU, and eliminate TSU's traditional role as an all-black school had failed.[177] The court of appeals viewed the merger as "the only reasonable alternative" in light of the Supreme Court's ruling in *Green*.[178]

Tennessee State University and identified a lack of representation in administrative positions and on governing boards as the systemic problem which needed to be addressed. *Id.* at 657.

[170] *Id.* at 652.

[171] *Id.* The State had argued that its affirmative duty had been discharged under the *ASTA* doctrine. *Id.* At the appellate level, Judge Engel, in dissent, questioned whether TSU's desire to retain its black identity was the real reason the school had not attracted white students. Geier v. University of Tenn., 597 F.2d 1056, 1074-77 (6th Cir. 1979) (Engel, J., dissenting).

[172] *See Geier*, 427 F. Supp. at 647, 652 (noting that 99.7% of the undergraduates and 99.9% of the entering freshmen were black).

[173] *Geier*, 427 F. Supp. at 652.

[174] *Id.* at 657, 659.

[175] *Geier*, 597 F.2d at 1068-69.

[176] *Id.*

[177] *Id.* at 1061.

[178] *Id.* at 1065. Over the 10 year period following the merger, total enrollment at TSU declined 36.8%, in contrast to a 6.9% decline in enrollment system-wide. L. Tiffany Hawkins, *Recognizing the Nightmare: The Merger of Louisiana State University and Southern University Law Schools*, 50 LA. L. REV. 557, 567 n.38 (1990).

Relying on the *Norris* doctrine, the court of appeals rejected the State's assertion that *Green* only applied to primary and secondary schools, and held that the State's duty within the university context is equally exacting.[179]

It is also important to note that the *Geier* court's decision to affirm the merger was prompted by the *failure* of the State's efforts to integrate the schools.[180] If the State's efforts had been successful, its affirmative duty would have been satisfied.[181] There is nothing intrinsic in the decision that mandates universities, which have been operated separately under a dual system, to merge when converting to a unitary system.[182] Instead, *Geier* established that a state has an affirmative duty to remove all vestiges of prior discrimination in traditionally black schools which retain racially identifiable characteristics.[183]

The next major case addressing the issue of merger reached the exact opposite conclusion. In *Artis v. Board of Regents of Georgia*,[184] the plaintiffs asked a district court to compel the State to merge Savannah State College with Armstrong State College.[185] The court denied the request because it found no evidence that the independent status of the two schools impeded efforts to desegregate either school.[186] The plaintiffs next asked the court to compel the State to end the duplication of programs in the schools in order to help foster desegregation.[187] The court once again refused to grant the plaintiffs' request.[188] Instead, the court held that the schools' current racial composition was a product of free choice and not the

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[179] *Geier*, 597 F.2d at 1065. Extending *Green* to higher education is an important development, and a precursor to the Supreme Court's analysis in *Fordice*. *See infra* text accompanying notes 191-208.

[180] *See Geier*, 597 F.2d at 1065; Baxter, *supra* note 11, at 14.

[181] *Geier*, 597 F.2d at 1065. *See generally* Baxter, *supra* note 11, at 14-15 (stating that the district court endorsed the State's efforts as sufficient action to eliminate the role of TSU as a traditionally black institution).

[182] *Geier*, 597 F.2d at 1070.

[183] Baxter, *supra* note 11, at 16.

[184] Civ. No. CV479-251 (S.D. Ga. Feb. 2, 1981) (LEXIS, Genfed library, Dist file).

[185] *Id.* at *1.

[186] *Id.*

[187] *Id.*

[188] *Id.*

result of an unconstitutional policy of segregation.[189] The court in *Artis*, thus, ruled that freedom of choice plans satisfy a state's duty to dismantle dual school systems, and implicitly rejected *Geier*'s extension of *Green* to the context of higher education.[190] The basic contradiction inherent in the competing standards, and the open question as to applying *Greene* to desegregate colleges and universities, presented fundamental issues to be decided by the Supreme Court in *Fordice*.

V. United States v. Fordice

A. Fordice *in the Lower Courts*

All of the parties involved in *Fordice*[191] agreed that a state's affirmative duty to dismantle segregated school systems at the primary and secondary levels extends to the context of higher education.[192] However, they disagreed over whether Mississippi had complied with this duty.[193] Thus, the fundamental issue to be resolved was the standard to be applied to measure a state's compliance under the law and whether Mississippi had met the standard.[194]

The District Court for the Northern of Mississippi, relying on *Bazemore v. Friday*,[195] disagreed with the plaintiffs' assertion that the Supreme Court's rejection of freedom of choice plans to desegregate primary and secondary schools in *Green* extends to the context of higher education.[196] The court then applied the *ASTA* doctrine, and concluded that "the affirmative duty to desegregate does not contemplate either restricting choice or achievement of any degree of

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[189] *Artis*, Civ. No. CV479-251 at *1.

[190] *Id.* at *5.

[191] *See supra* part I. (discussing the factual background to the dispute).

[192] 112 S. Ct. at 2734.

[193] *Id.* at 2735.

[194] *Id.* at 2732.

[195] 478 U.S. 312 (1986). For a discussion of *Bazemore*, see *infra* text accompanying notes 206-07.

[196] Ayers v. Allain, 674 F. Supp. 1523, 1554 (N.D. Miss. 1987).

racial balance."[197] The court noted the importance of patterns of enrollment and faculty hiring, but placed a greater emphasis on the examination of current education policy, and its role in determining the racial identifiability of the institution.[198] If race-neutral educational policies were developed and implemented in good faith, then the State had met its burden.[199] After applying this standard to determine whether Mississippi's efforts had met this test, the court concluded that: "[C]urrent actions on the part of the defendants demonstrate conclusively that the defendants are fulfilling their affirmative duty to disestablish the former de jure segregated system of higher education."[200]

The Court of Appeals for the Fifth Circuit affirmed.[201] "Mississippi was . . . constitutionally required to eliminate invidious racial distinctions and dismantle its dual system."[202] The court of appeals held that Mississippi had met these requirements by adopting race-neutral policies and providing all students with the "freedom of choice" to attend the college or university they wish.[203] Any remaining racial identities among the institutions were the result of free choice, and not the remnants of past invidious racial discrimination.[204]

The plaintiffs filed writs of certiorari with the Supreme Court.[205] Thirty-eight years after *Brown I*, the Supreme Court had the opportunity to end the confusion in the lower courts by enunciating a clear standard of a state's duty to dismantle a formerly segregated system of higher education.[206] At the heart of the appeal was the basic contradiction between the standards announced in *Norris* and *Geier*, which applied the Court's decision in *Green* to higher education, and the doctrines enunciated in *Artis* and *ASTA*,

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[197] *Id.* at 1553.

[198] *Id.* at 1554.

[199] *Id.*

[200] *Id.* at 1564.

[201] Ayers v. Allain, 914 F.2d 676, 692 (5th Cir. 1990).

[202] *Id.* at 682.

[203] *Id.* at 678.

[204] *See id.* at 692.

[205] *Fordice*, 112 S. Ct. at 2735.

[206] *Id.*

which rejected the applicability of *Green* to higher education.[207] Thus, the central question before the Court in *Fordice* was whether the mere adoption of race-neutral admission policies discharged a state's duty to dismantle a formerly segregated university system or whether states must take additional affirmative steps to desegregate racially identifiable institutions where race-neutral admission policies alone have failed to do so.[208]

B. The Standard Announced—Justice White's Majority Opinion

In an opinion delivered by Justice White,[209] the Court vacated the court of appeals.[210] Justice White clearly stated that by adopting *Bazemore* and rejecting *Green*, the court of appeals had applied the wrong legal standard.[211] The issue, according to Justice White, was whether the racial identifiability of a school is attributable to a state policy, regardless of whether race-neutral admission policies have been adopted:

> Our decisions establish that a State does not discharge its constitutional obligations until it eradicates policies and practices traceable to its prior *de jure* dual system that continue to foster segregation. Thus we have consistently asked whether existing racial identifiability is attributable to the State and examined a wide range of factors to determine whether the State has perpetuated its formerly *de jure* segregation in any facet of its institutional system.[212]

Thus, the Court's analysis focused on Mississippi's efforts to eradicate vestiges of its de jure system.

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[207] *See supra* text accompanying notes 147-57, 168-83.

[208] *See supra* text accompanying notes 136-41, 184-90.

[209] *Fordice*, 112 S. Ct. at 2732. Justice O'Connor filed a concurring opinion, *id.* at 2743, as did Justice Thomas, *id.* at 2744, while Justice Scalia concurred in the judgment in part and dissented in part, *id.* at 2746.

[210] *Id.* at 2743.

[211] *Id.* at 2737-38.

[212] *Id.* at 2735 (citations omitted).

In *Fordice*, the State argued that *Green*[213] should be rejected because of the voluntary nature of higher education.[214] At the primary and secondary level, education is compulsory and the courses are for the most part uniform.[215] However, higher education is not compulsory, and each institution offers the student unique educational opportunities.[216] The decision to seek higher education and the selection of an institution is always one of free choice.[217] Thus, once race-neutral policies are in place, the racial composition of universities are the complete product of free choice, and do not correspond to current or past discrimination.[218] As summarized by the court of appeals:

> If an aspiring student may freely choose to attend college, if he may freely choose among all institutions in the state, and if no authority exists to deny him the right to attend the institution of his choice, he is done a severe disservice by remedies which in seeking to maximize integration, minimize diversity and vitiate his choices.[219]

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[213] In *Green*, New Kent County adopted a freedom of choice plan to dismantle its dual school system. 391 U.S. at 433. Students could choose to go to either the formerly all white school or the formerly all black school. *Id.* at 433-34. Only 15% of the black children chose to attend the white school. *Id.* at 441. No white children chose to attend the black school. *Id.* The Supreme Court rejected the freedom of choice plan because it proved ineffective in dismantling the racial identity of the schools. *Id.* While the intentional discrimination had been eliminated, vestiges of the de jure system remained. *Id.* The past effects of intentional discrimination constrained choices so that they were not really free. As such, freedom of choice had not dismantled segregation as much as it merely dressed it in new clothes. *Id.*

[214] *Fordice*, 112 S. Ct. at 2736. A state has different interests in higher education than it does in education at the primary and secondary levels. Hawkins, *supra* note 178, at 560. Admission standards must be set to ensure that those admitted will most likely succeed. *Id.* In addition, there is a limited amount of space and not everybody can be admitted. *Id.* Consequently, states must be given broad discretion to formulate admission policies. *Id.*

[215] *Fordice*, 112 S. Ct. at 2736.

[216] *Id.*

[217] *Id.*

[218] *Id.*

[219] *Ayers*, 914 F.2d at 687.

While Justice White agreed that higher education is fundamentally different from primary and secondary education because of its voluntary nature, he disagreed that the adoption of race-neutral admissions policies alone relieve the State of its affirmative duty to dismantle formerly segregated university systems.[220] "In a system based on choice, student attendance is determined not simply by admissions policies, but also by many other factors. Although some of these factors clearly cannot be attributed to state policies, many can be."[221] Implicitly, Justice White had extended *Green* to higher education.[222]

Justice White next rejected the lower court's adoption of the *ASTA* doctrine by distinguishing the facts in *Fordice* from those in *Bazemore*.[223] In *Bazemore*, the Court addressed whether financial and administrative assistance provided to 4H clubs was permissible under the Equal Protection Clause because of the racial identifiability resulting from the voluntary choices of the club members.[224] The *Bazemore* Court held *Green* inapplicable to the 4H clubs because it determined "any racial imbalance [in the 4H chapters] resulted from the wholly voluntary and unfettered choice of private individuals."[225] The lower courts, relying on *Bazemore*, held *Green* inapplicable in *Fordice* on similar grounds, and, thus, were able to invoke *ASTA* to declare that the affirmative steps taken by Mississippi to adopt race neutral admissions policies constituted constitutional compliance.[226] Justice White expressly rejected this reasoning, and stated that the

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[220] *Fordice*, 112 S. Ct. at 2736, 2743.

[221] *Id.* at 2736. Justice White's opinion instructed the lower court to determine whether the universities' admission standards, program duplication, institutional mission designations, and geographic proximity affect student choice thereby perpetuating segregation, and whether such policies are educationally justifiable. *Id.* at 2742-43; *see* Marcus, *supra* note 16, at A1.

[222] *See Fordice*, 112 S. Ct. at 2748-49 (Scalia, J., concurring in the judgment in part and dissenting in part). "[T]he court is essentially applying to universities the amorphous standard adopted for primary and secondary schools in *Green*." *Id.* at 2748.

[223] *Id.* at 2737.

[224] 478 U.S. at 493

[225] *Id.*

[226] *Ayers*, 914 F.2d at 686-87; Ayers v. Allain, 674 F.Supp. 1523, 1552-53 (N.D. Miss. 1987).

Court only approved the voluntary choice program in *Bazemore*:

> [A]fter satisfying ourselves that the State had not fostered segregation by playing a part in the decision of which club an individual chose to join. *Bazemore* plainly does not excuse inquiry into whether Mississippi has left in place certain aspects of its prior dual system that perpetuate the racially segregated higher education system.[227]

Thirty-eight years after the Court's decision in *Brown I*, Justice White finally announced a coherent judicial framework applicable to a state's affirmative duty to dismantle formerly segregated university and college systems:

> If the state perpetuates policies and practices traceable to its prior system that continue to have segregative effects—whether by influencing student enrollment decisions or by fostering segregation in other facets of the university system—and such policies are without sound educational justification and can be practicably eliminated, the State has not satisfied its burden of proving that it has dismantled its prior system. Such policies run afoul of the Equal Protection Clause, even though the State has abolished the legal requirement that whites and blacks be educated separately and has established racially neutral policies not animated by a discriminatory purpose.[228]

The case was remanded to the District Court for the Northern District of Mississippi to determine whether Mississippi has met these requirements.[229] Justice White did not spell out the specific remedial measures which would have to be taken should Mississippi fail to

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[227] *Fordice*, 112 S. Ct. at 2737.

[228] *Id.*

[229] *Id.* at 2743.

meet the new standard.[230] Justice White did, however, point to the following four specific policies the State would have to justify or eliminate: (1) The disparity in minimum composite ACT scores which remain higher for the traditionally white schools;[231] (2) the "mission designations" under which no black school has been assigned as a "comprehensive" university;[232] (3) the unnecessary duplication of programs at black and white universities which inhibit desegregation;[233] and (4) the continued operation of all eight universities.[234]

C. Justice O'Connor's Concurrence

In a concurring opinion, Justice O'Connor emphasized that the state maintains the burden of proof when policies traceable to prior segregation are questioned, and that "[w]here the State can accomplish legitimate educational objectives through less segregative means, the courts may infer lack of good faith."[235]

D. Justice Thomas's Concurrence

Justice Thomas's concurring opinion stressed two points.[236]

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[230] Justice White conclusively held that if "the State has not met its affirmative obligation to dismantle its prior dual system, it shall be adjudged in violation of the Constitution and Title VII and remedial proceedings shall be conducted." *Id.*

[231] *Id.* at 2738-39.

[232] *Fordice*, 112 S. Ct. at 2741-42.

[233] *Id.* at 2740-41.

[234] *Id.* at 2742-43. It is important to note that Justice White made it clear that this list was not exhaustive, and that all aspects of Mississippi's university system are open to examination. *Id.* at 2738.

[235] *Id.* at 2744 (O'Connor, J., concurring). Under *Brown* and subsequent decisions, school boards bear the burden of proving that the existence of racially identifiable schools is not the result of discrimination when policies are questioned. Jarvis, *supra* note 28, at 1295. The purpose of Justice O'Connor's opinion was to stress that in the context of higher education, this burden remains on the state. *Id.*

[236] *Fordice*, 112 S. Ct. at 2744 (Thomas, J., concurring). Justice Thomas was participating in his first school desegregation case after removing himself from the other two segregation cases decided during the 1991-92 term. *Review of Opinions on Individual Rights From the 1991-92 Term*, U.S. L.J., Aug. 7, 1992, at 65. Justice

First, Justice Thomas addressed concerns that the decision might jeopardize the continued existence of historically black schools by stating that the decision does "not foreclose the possibility that there exists 'sound educational justification' for maintaining historically black colleges . . . open to all on a race-neutral basis, but with established traditions and programs that might disproportionately appeal to one race or another."[237]

Second, Justice Thomas noted that this decision deviated from *Green* in that *Green* presumed that present discriminatory intent in the post de jure era must be proven.[238] Under Justice White's new standard, one must only show that a policy, intact from the de jure era, produces current adverse impacts without sound educational justification.[239] This marks a significant expansion of the district court's remedial power.[240]

E. Justice Scalia's Dissent

Justice Scalia alone dissented with grave warnings concerning the unintended consequences of the decision.[241] Justice Scalia did not share Justice Thomas's optimism and unhappily predicted that the holding would result in "the elimination of predominantly black institutions."[242] Justice Scalia thought that the Court's reliance on *Green* in the context of higher education was misplaced, and constituted an "all or nothing" approach in which the Court completely eliminated the opportunity for blacks, as a consequence of private choice, to attend schools serving their community.[243]

Thomas appropriately began his opinion by quoting W.E.B. Du Bois: "We must rally to the defense of our schools. We must repudiate this unbearable assumption of the right to kill institutions unless they conform to one narrow standard." *Fordice*, 112 S. Ct. at 2744 (Thomas, J., concurring).

[237] *Fordice*, 112 S. Ct. at 2746 (Thomas, J., concurring).

[238] *See id.* at 2744 (Thomas, J., concurring).

[239] *Id.* at 2745 (Thomas, J., concurring).

[240] *Id.*

[241] *See Fordice*, 112 S. Ct. at 2751 (Scalia, J., concurring in judgment in part and dissenting in part).

[242] *Id.* at 2752 (Scalia, J., concurring in judgment in part and dissenting in part).

[243] *Id.*

Justice Scalia predicted "years of litigation-driven confusion and destabilization in the university systems of all the formerly de jure states, that will benefit neither blacks nor whites."[244] While recognizing the importance of reaffirming the Court's hatred of segregation, Justice Scalia insisted that the Court "must find some other way of making the point."[245]

VI. The Reaction, the Aftermath, and the Future of Publicly Funded Black Institutions of Higher Learning

Most commentators praised the decision, seeing it as a major reaffirmation of the principles first announced in *Brown I*, and a significant victory in the fight for equal educational opportunity at the university level.[246] However, the Court refused to order more funding to strengthen the traditionally black schools as asked for by the plaintiffs,[247] and even hinted that these schools continued existence

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[244] *Id.* at 2753 (Scalia, J., concurring in judgment in part and dissenting in part).

[245] *Id.*

[246] The NAACP released a statement praising the decision:

> Today's decision sends a clear message to state supported colleges and universities that they must do much more than pay lip service to desegregation. They have to act aggressively to erase the remaining residue of segregation . . . . We, of course, will of course continue to advocate the continuance of all these institutions with adequate funding and diversity of student body, faculty and staff, and meeting all requirements of Brown v. Board of Education.

Statement by NAACP on Supreme Court Ruling in U.S. v. Fordice, PR Newswire, June 26, 1992, *available in* LEXIS, News Library, Current File (quoting Dr. Benjamin Hooks, executive director). The decision was a "'very strong reaffirmation of the principles of Brown v. (Board of Education). It applies them to higher education in the South . . . and I think in the end it's a very, very good development for improving higher education opportunities for blacks in the South.'" Marcus, *supra* note 16, at A1 (quoting David Tatel, a former civil rights official in the Carter administration who had filed a brief in the case). Solicitor General Kenneth Starr, who had participated in the suit on the side of the plaintiffs called the ruling "a magnificent victory for the United States." *Id.*

[247] *Fordice*, 112 S. Ct. at 2743. The lawyer for the plaintiffs stated that:

> "We won the case but the court didn't do what we wanted. We wanted them to declare liability and then remand for remedy . . . . We haven't even had a trial on liability [for differential funding, college attendance rates and governance]. The way the court sent

may not be economically viable.[248] Some commentators viewed this as a failure by the Court to appreciate the importance of the black institutions,[249] and voiced concern over their future.[250]

> the case back down, with an order for the state to come up with a plan, this thing has taken on a life of its own."

Raspberry, *supra* note 59, at A23 (quoting Alvin Chambliss).

[248] *Fordice*, 112 S. Ct. at 2743.

[249] There are 47 historically black state-run colleges, most of which are in the South. Julie J. Oxford, *Are Black Colleges Worth Saving?*, TIME, Nov. 11, 1991, at 81. Despite being underfunded and ignored they remain an invaluable resource to the black community. *Id.* While the number of blacks attending college has steadily decreased over the last decade, the enrollment of these black schools has increased 13.2% from 1986 to 1989. *Id.* Black colleges have educated civil rights leader Dr. Martin Luther King, Thurgood Marshall, former Virginia Governor Douglas Wilder, and Pulitzer Prize winning author Toni Morrison among others. Eric Harrison, *Black Colleges Fear Litigation Means Loss of Control, Identity*, DALLAS MORNING NEWS, Nov. 4, 1992, at 4A. Without these schools, the needs of black students would probably be left unmet at the predominately white schools. *Id.* W.E.B. Du Bois observed that:

> Starting with the present conditions and using the facts and knowledge of the present situation of American Negroes, the Negro [college] expands toward the possession and the conquest of all knowledge . . . . [Without it] the American Negro . . . is doomed to be a suppressed and inferior caste in the United States for incalculable time.

W.E.B. Du Bois, The Field and Function of a Negro College, Speech Delivered at the Annual Alumni Reunion at Fisk University (June 1933), *in* Du Bois, *The Negro College*, 40 THE CRISIS 175, 176 (Aug. 1933).

"Black colleges . . . play an important role in preserving and proselytzing cultural heritage, history, and traditions . . . . [B]lack colleges can play [an indispensable role] in alleviating the impact of this country's long and continued history of racial oppression." Bell, *supra* note 113, at 981.

[250] Frank Mathews, publisher of *Black Issues In Higher Education*, commented that:

> [B]lack colleges are fixing to go the same way that secondary schools did as a result of *Brown*. Given the history of race relations in the South, I think what will happen is that the black colleges will eventually be merged out of existence or will be closed in the name of integration.

Lynn Duke, *Integration Agreements Could be Reexamined; Fate of Historically Black Colleges Muddied*, WASH. POST, June 27, 1992, at A11. Janell Byrd of the NAACP Legal Defense and Educational Fund echoed these feelings:

> The concerns about the risks for the historically black colleges are very real. It would have been helpful to have language that, as they desegregate, states ought to be careful not to disproportionately burden the (black) plaintiffs in devising remedies . . . . That's always been the threat in these cases: 'You ask for more, we'll wipe

Those critical of the decision fear that, as states are ordered to desegregate their systems of higher education, plans to provide more money to traditionally black schools to improve educational opportunities, in accordance with the principles first announced in *Brown I*, may take a backseat to plans merely seeking desegregation through racial balancing in accordance with *Brown II*'s integrative model.[251] In this way, the cure for segregation is not found in the elimination of discrimination against blacks, but on the reliance of a misguided integrative model, which will destroy black institutions by requiring that they merge with white institutions, unless they can attract a sufficient number of white students and faculty.[252]

The integrative model, thus, puts black colleges in a "no win" situation. By definition, an integrated school is predominately white.[253] A school that is mainly black is considered racially identifiable,[254] and must be integrated without any thought as to whether equal educational opportunities are denied because of the racial makeup of the school or because of the lack of adequate funding due to discriminatory policies.[255] To receive additional funding, a traditionally black school must either be absorbed into a white school, which will inevitably destroy the unique advantages it affords black students, or attract a sufficient number of white students which is unlikely as long as it is considered inferior due to underfunding.[256] If the traditional black college cannot attract a sufficient white presence, it will most likely be closed or merged with a white school.[257] By emphasizing racial balancing, rather than the expansion of educational opportunities on the black campus,

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out the historically black colleges.

Marcus, *supra* note 16, at A1. These concerns are not unfounded; the burdens of desegregation in education usually fall disproportionately on blacks. *See* Days, *supra* note 7, at 55. Desegregation resulted in black teachers and administrators losing their jobs, and black students were more likely than white students to be bussed outside their own neighborhoods. *Id.*

[251] Bell, *supra* note 113, at 966.

[252] *Id.* at 966-67.

[253] *Id.* at 951.

[254] *Id.*

[255] *Id.* at 955.

[256] Bell, *supra* note 113, at 955.

[257] *See* Days, *supra* note 7, at 65.

traditionally black schools, which have historically sustained the black community, are inevitably destroyed.[258] Based on this model of equal opportunity, one is left wondering whether the remedy provided by *Brown II*'s integrative model is truly better than the disease it was intended to cure.

On October 22, 1992, Mississippi submitted its desegregation plan to the Federal District Court in Oxford, Mississippi.[259] The proposal confirmed critics' worst fears.[260] Rather than increasing the funding received by traditionally black institutions to upgrade their programs and increase their standing, the plan, predictably relying on the integrative model, called for racial balancing through mergers and closings.[261] Black leaders quickly condemned the plan: "'They seem to define desegregation as the systematic movement of all things black to all things white when we prefer to see it as the emphatic movement of all things wrong to all things right.'"[262] The plans complete failure to address the racial makeup of the Board of Trustees, the racial imbalance of administration and faculty throughout the system, and the fate of the State's junior college system was of particular concern to the plaintiffs' attorneys.[263] The plan does provide for a new admission policy which includes consideration of high school student's academic performance rather than relying solely on ACT scores.[264] Judge Neal B. Biggers, Jr. has yet to make a final determination regarding the plan.[265]

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[258] Bell, *supra* note 113, at 961.

[259] Ronald Smothers, *Plan to Desegregate Universities in Mississippi is Met With Anger*, N.Y. TIMES, Oct. 22, 1992, at A1.

[260] *See id.*

[261] *Id.* Alcorn State would become a satellite campus of Mississippi State. *Id.* Delta State and Mississippi Valley State would merge under the new name Delta Valley Mississippi State and be controlled by the University of Mississippi. *Id.* Mississippi University for Women would merge with the University of Southern Mississippi by becoming a branch campus. *Id.* at A23.

[262] *Id.* (quoting Rev. Joseph Lowery, president of the Southern Christain Leadership Conference).

[263] *See id.*

[264] Smothers, *supra* note 259, at A23. Any student in college preparatory programs with a 3.2 grade point average or above would be admitted to any state school, as would any student in preparatory programs earning either a 2.5 or better and an ACT score of at least 16, or students with a 2.0 or better and an ACT above 18. *Id.*

[265] *Id.* at A1.

Conclusion

The Supreme Court's ruling in *Fordice* undoubtedly ushers in a new day and will extend opportunities to blacks in the context of higher education that are long over due. Discriminatory educational policies that deny equal access to institutions of higher learning can no longer be justified or excused by the rallying cry of "freedom of choice."

Although *Fordice* stands as a major reaffirmation of the principles first announced in *Brown v. Board of Education*, it leaves many troubling questions unanswered. Justice Scalia's warnings and dire predictions are well-founded and heed serious attention, but need not become self-fulfilling prophecies. The fate of traditionally black public colleges and universities hangs in the balance.

If one were to take a step back, however, and concentrate on *Brown*'s substantive constitutional principle of equality of educational opportunities rather than on *Brown II*'s remedial integrative ideal, one can see that the Constitution does not require the traditional black school to provide an integrated setting but merely that it provide equal educational opportunities to all whom may wish to attend.

The constitutional evil addressed in *Brown I* was the degradation segregation imposed on black children. Implicit in the decision, was the dismantling of state-imposed dual systems which bestowed a sense of inferiority on the black children, who in essence were being told they were not worthy of attending school with white children. Where black college students have a real opportunity to attend any state school they wish and freely choose to attend a traditionally black school, however, no such badge of inferiority is bestowed on them. To the contrary, black colleges have served as a tremendous resource to the black community. The traditional black college is perhaps the only place young black students can study the contributions of their culture to American society without the experiences being marginalized or devalued. To destroy what instills a sense of pride and self-esteem in blacks by blindly following an integrative ideal, which means well, but is misplaced, stands as a negation of the principles expressed in *Brown I*, rather than their affirmation. Thus, by concentrating on *Brown I*'s substantive constitutional principle of equality of educational opportunities, rather than on *Brown II*'s remedial integrative ideal, one can see that the

Constitution does not require the traditional black school to provide an integrated setting but merely that it provide equal educational opportunities to all whom may wish to attend.

Forty years after its decision in *Brown* I, the Supreme Court need no longer look at what makes blacks second class citizens, but what prevents blacks from becoming full participants in Amercian society. A new judicial framework concentrating on equality of educational opportunity, rather than racial balancing, is needed to achieve that goal.

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