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The Most Visible Vestige: Black Colleges After Fordice

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THE MOST VISIBLE VESTIGE: BLACK COLLEGES AFTER *FORDICE*†

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INTRODUCTION

> There exists today a chance for the Negroes to organize a cooperative State within their own group. By letting Negro farmers feed Negro artisans, and Negro technicians guide Negro home industries, and Negro thinkers plan this integration of cooperation, while Negro artists dramatize and beautify the struggle, economic independence can be achieved.[1]

This comment appeared in a series of controversial editorials in 1934 in *The Crisis*, the NAACP's in-house publication. At the time, it was perceived that W.E.B. DuBois' essays advocated black separatism.[2] They provoked an unprecedented storm of controversy within the ranks of the NAACP which eventually culminated in DuBois' resignation. The interpretation that was given—that DuBois was acquiescing in continued segregation—was erroneous. What he advocated was the preservation of black institutions. The same question that DuBois posed in the 1930s has been raised more recently in litigation involving publicly-funded black colleges.[3]

In *United States v. Fordice*, the United States Supreme Court addressed the question of whether states that maintained racially segregated systems of higher education are obligated to take steps beyond adopting race-neutral admission policies to desegregate their educational institutions.[4] The Court rejected a standard that would have

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[1] W.E.B. DuBois, *A Negro Nation Within the Nation*, 42 CURRENT HIST. 265, 270 (1935).

[2] *Cf.* W.E.B. DuBois, *Postscript*, 41 THE CRISIS 20, 20 (1934) (DuBois argues against discrimination, not segregation per se, and argues that blacks should associate together but resist unequal treatment).

[3] *See, e.g.*, United States v. Fordice, 112 S. Ct. 2727 (1992); Knight v. Alabama, 1994 WL 34937 (11th Cir. 1994).

[4] 112 S. Ct. at 2736. For a detailed discussion of the *Ayers v. Allain* litigation and its culmination in *United States v. Fordice*, see Lorne Fienberg, Note, United States v. Fordice *and the Desegregation of Public Higher Education: Groping for Root and Branch*, 34 B.C. L. REV. 803 (1993).

permitted compliance by the adoption of race-neutral policies alone.[5] Although states are obligated to do more, how much more remains unclear. A question implicit in *Fordice* is whether there is a continuing justification for publicly-funded black colleges and whether the operation of these institutions as facilities with a racially-distinct educational perspective can be justified in light of the desegregation principle of *Brown v. Board of Education*.[6] This Article attempts to answer that question.

Section I describes the origins of black colleges during the Reconstruction period.[7] Section II examines the development of the NAACP's legal challenge to segregated education and the graduate school cases that were brought beginning in the mid-1930s.[8] As Section II explains, these cases were part of a gradualist approach which demanded equal educational opportunities within the confines of the "separate but equal" doctrine of *Plessy v. Ferguson*.[9] The success of these cases provided a foundation for the direct challenge that succeeded in *Brown*.

Sections III and IV examine the post-*Brown* era.[10] As the discussion in those sections indicates, higher education cases during this period focused primarily on whether the affirmative duty that applied to primary and secondary schools should extend to colleges and universities. Enrollment in institutions of higher learning is analytically distinguishable from attendance at lower level schools because it is not the product of direct state action. This distinction caused disagreement among the lower courts. After years of debate, the Supreme Court held in *Fordice* that neutral polices will not suffice.[11] The implications for black colleges remain unclear.

Supporters of black colleges believe that these institutions are uniquely effective in educating African-American students.[12] They contend that black colleges should not be closed or otherwise penalized for the states' discriminatory actions. Opponents of this view maintain that black colleges are merely remnants of a discriminatory system that inhibit current efforts to integrate schools. A larger question concerns the meaning of equality under the Fourteenth Amendment, and the

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[5] *Id.*

[6] 347 U.S. 483 (1954).

[7] *See infra* notes 14–22 and accompanying text.

[8] *See infra* notes 23–96 and accompanying text.

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

[10] *See infra* notes 97–109, 110–282 and accompanying text.

[11] 112 S. Ct. at 2737.

[12] For purposes of this Article, the term "black college" denotes institutions that were established as segregated institutions prior to 1954. It should be noted, however, that white students

extent to which desegregation necessarily involves a racial balance of some sort. The paradox of black colleges (in light of their demonstrated efficacy) is whether there is a legal justification for the continued existence of institutions that were originally established to promote segregation. This question is explored in the final sections of this Article.

As discussed in Section IV, black colleges provide a valuable educational experience for African-American students.[13] These institutions provide nurturing environments that are free from the racial tension that is so prevalent on many college campuses in the United States. Black colleges have successfully educated generations of black leaders and they continue to provide an irreplaceable service. The elimination of these institutions would decrease the number of black students attending institutions of higher learning, because it would diminish the range of educational opportunities presently available to them. More importantly, African-American culture and accomplishment are integral components of the educational programs at black colleges. These attributes cannot be replicated at white universities, where black students are an isolated minority and where the curriculum is indifferent to the contributions of black Americans to art, literature and the sciences. Black colleges should not be sacrificed to promote desegregation efforts which define success solely in terms of the percentages of black students enrolled in white institutions. This is too superficial a measure to determine whether true educational equality has been achieved.

I. THE HISTORY OF BLACK COLLEGES

The first black colleges were established in the North before the Civil War by Christian missionaries and church groups who were moved by the lack of educational opportunities available to blacks at the time.[14] The next significant landmark in the creation of black colleges occurred at the close of the Civil War, when large scale efforts were undertaken to provide freed slaves with a basic education. Before the Emancipation Proclamation in 1863, efforts by Christian missionaries to provide educational facilities were discouraged in the South, where

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attend these institutions, the faculties are integrated and they do not have race-exclusive admission policies. The term "white college" refers to institutions which do not satisfy this definition.

[13] *See infra* notes 324–30 and accompanying text.

[14] Cheney College was founded in the 1830s; Lincoln College in 1854; Wilberforce College in 1856. Gil Kujovich, *Equal Opportunity in Higher Education and the Black Public College: The Era of Separate But Equal*, 72 MINN. L. REV. 29, 37 & n.24 (1987).

it was illegal to educate slaves.[15] When this barrier fell with the Confederacy, Northern missionaries became active in the South. Close to one hundred black public and private institutions were established in the late nineteenth and early twentieth centuries.[16] Most of these were established in the seventeen Southern and border states, where nearly all of the freed slaves continued to reside.

Before the Civil War, few colleges were established to serve black students, and not many white colleges would admit African-Americans. At that time, higher education in the United States had been provided primarily by private, sectarian institutions serving the wealthy and professional classes. As a result of the efforts of Vermont congressman Justin Morrill and others determined to make higher education more than an elite private reserve, the First Morrill Act was promulgated in 1862. The Act provided each state with a federal land grant which was to be used to create a perpetual fund to endow institutions whose leading objective would be the promotion of liberal and practical education for the industrial classes.[17] Although the creation of land grant colleges marked the beginning of a revolution in higher education, most of the benefits of the early land grant movement did not reach the black populations of the seventeen segregationist states.[18]

With its enactment in 1890, the Second Morrill Act provided some assurance that blacks would not be denied the benefits of the land grant system.[19] This Act required that states either provide separate educational facilities for black students or admit them to existing colleges.[20] In response, all of the Southern and border states chose to establish separate schools for black students. Six states created new institutions to satisfy the Act. Others merely designated existing schools as those institutions required under the Act, or allocated a portion of federal land grant funds to private black colleges.[21] Nevertheless, the Second Morrill Act eventually led to the establishment of at least one public black college in each of the Southern states.[22] Thus, black public colleges evolved out of the states' desires to secure federal funding and

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[15] JACQUELINE FLEMING, BLACKS IN COLLEGE 4 (1984).

[16] Kujovich, *supra* note 14, at 37–38.

[17] *Id.* at 41.

[18] Only Mississippi, Virginia and South Carolina shared the 1862 federal land grant endowment with colleges that educated black citizens after the First Morrill Act. *Id.* at 42.

[19] *Id.*

[20] Kujovich, *supra* note 14, at 42–43.

[21] *Id.* at 43.

[22] *Id.*

avoid admitting blacks to existing white institutions. The black institutions were demonstrably inferior to the white colleges.

By the turn of the century, under the impetus of the Second Morrill Act and the *Plessy v. Ferguson* doctrine of "separate but equal," the structure of the public higher education system was well established in the former Confederate states. Although the public colleges were separate, they were far from equal. Black colleges were denied the funds necessary to provide educational services at a level equivalent to their white counterparts. This system remained substantially the same until the NAACP mounted its full-scale assault against segregated education.

II. The Pre-*Brown* Graduate School Cases

In the early 1930s, the NAACP embarked on a long-range, carefully planned litigation campaign in which laws requiring racial segregation were systematically challenged in courts across the United States.[23] This effort ultimately resulted in the United States Supreme Court's decision in *Brown v. Board of Education*, where the Court held that segregation in public schools was a violation of the Equal Protection Clause of the Fourteenth Amendment.[24] Before attacking segregation and the *Plessy* doctrine directly, however, the NAACP embarked on a gradualist strategy of insisting that the separate educational facilities provided for black students be equal, physically and otherwise, to those afforded to white students.[25] The "equalization" strategy was intended to force the courts to grapple with the inequities of the segregated system without risking a reaffirmation of *Plessy*. After a series of victories in the United States Supreme Court over a period of several years, an adequate body of precedent was established and the organization was poised to mount a direct challenge to segregation itself.[26] The pre-*Brown* cases involved graduate education, an area where the states were most vulnerable. Several states had established similar separate undergraduate facilities for black students, but almost none had established institutions for graduate or professional training. The NAACP assumed that the elimination of de jure segregation would result automatically in educational equality. This was not to be the case.

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[23] *See, e.g.*, Sipuel v. Board of Regents, 332 U.S. 631 (1948); Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938).

[24] 347 U.S. 483, 495 (1954).

[25] *See, e.g.*, Sweatt v. Painter, 339 U.S. 629 (1950); *Sipuel*, 332 U.S. 631.

[26] *See Brown*, 347 U.S. 483.

A. Missouri ex rel. Gaines v. Canada

The first of the graduate school cases to reach the United States Supreme Court was *Missouri ex rel. Gaines v. Canada*.[27] The plaintiff in that case, Lloyd Gaines, was a 1935 graduate of Lincoln University who wanted to attend law school.[28] After the University of Missouri denied his application, he filed a civil action against the State of Missouri. During the trial, the State admitted that Gaines' admission was denied solely on the basis of his race, but the circuit court of Boone County entered a judgment for the University.[29] The case was later appealed to the Supreme Court of Missouri, which noted that "the established public policy of this State has been, and now is, to segregate the white and negro races."[30]

Gaines' lawyers claimed that the State's actions had violated the Equal Protection Clause of the Fourteenth Amendment. After explaining somewhat cryptically that "color carries with it natural race peculiarities," and that "[t]hese differences create different social relations," the Supreme Court of Missouri relied on *Plessy v. Ferguson* to conclude that "[e]quality, and not identity of privileges and rights, is what is guaranteed to the citizen."[31] Based on this reasoning, the court held that Gaines would not be deprived of any constitutional rights as long as the educational opportunities provided by the State were "substantially equal to those furnished white citizens of the State."[32] The court also found that, because the State had created an out-of-state scholarship fund for black students, "the opportunity offered [Gaines] for a law education in the university of an adjacent State is substantially equal to that offered to white students by the University of Missouri."[33]

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[27] 305 U.S. 337 (1938), *reh'g denied*, 305 U.S. 676 (1939).

[28] For a history of the NAACP's strategy in the *Gaines* trial, see RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 202–04 (1977); GENNA RAE MCNEIL, GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS 143–44 (1983). *See also* Lucille H. Bluford, *The Lloyd Gaines Story*, 32 J. EDUC. SOCIOLOGY 242, 243 (1959); Larry Grothaus, *The Inevitable Mr. Gaines*, 26 ARIZONA AND THE WEST 21 (1984); *University of Missouri Case Won*, 46 THE CRISIS 10, 10 (1939).

[29] State *ex rel.* Gaines v. Canada, 113 S.W.2d 783, 784–85 (Mo. 1937), *rev'd*, 305 U.S. 337 (1938).

[30] *Id.* at 785.

[31] *Id.* at 788 (quoting Lehew v. Brommell, 15 S.W. 765, 766 (Mo. 1891)).

[32] *Id.* at 789.

[33] *Id.* at 790.

Gaines was appealed to the United States Supreme Court.[34] The State argued that Gaines was not entitled to admission to the University of Missouri because "if, on the date when [Gaines] applied for admission to the University of Missouri, he had instead applied to the curators of Lincoln University it would have been their duty to establish a law school."[35] The Supreme Court found no such "mandatory duty" because the statute on which the State relied left "to the judgment of the board of curators to determine when it would be necessary or practicable to establish a law school."[36] More importantly, the Court recognized the actual effect of the State's actions, stating that "the fact remains that instruction in law for negroes is not now afforded by the State, either at Lincoln University or elsewhere within the State."[37] Based on these findings, the Court reasoned that the critical issue was "whether the provision for the legal education in other States of negroes resident in Missouri is sufficient to satisfy the constitutional requirement of equal protection."[38]

In the Court's view, the quality of legal education provided by other states was irrelevant.[39] The question to be resolved was "what opportunities Missouri itself furnishes to white students and denies to negroes solely upon the ground of color."[40] The Court found that each state had an independent constitutional obligation to provide equal educational opportunities, and that this requirement could not be shifted by one state to another.[41] The Court also held that the right to equal protection is a "personal one."[42] Therefore, "the State was bound to furnish [Gaines] within its borders facilities for legal education substantially equal to those which the State there afforded for persons of the white race."[43] Because the State had not established a separate law school for black students, the Supreme Court held that Gaines was entitled to admission to the University of Missouri.[44]

Gaines was significant because it provided the NAACP with a much needed organizational lift and it vindicated the organization's litiga-

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[34] *See* 305 U.S. 337 (1938).
[35] *Id.* at 346.
[36] *Id.* at 346–47.
[37] *Id.* at 345.
[38] *Id.* at 348.
[39] *See Gaines*, 305 U.S. at 349.
[40] *Id.*
[41] *Id.* at 350.
[42] *Id.* at 351.
[43] *Id.*
[44] *Gaines*, 305 U.S. at 352.

tion strategy. For the first time, the Supreme Court had ordered the admission of a black student to a segregated university. After *Gaines*, states could not continue to ignore their constitutional obligation to provide higher educational opportunities for black students, even if those opportunities were provided on a segregated basis. The implications were far-reaching and resulted in the immediate enhancement of graduate training opportunities for black students.[45]

After *Gaines*, the NAACP focused its efforts on salary equalization cases in which suits were brought to force the states to equalize the salaries paid to black and white school teachers. The pace of these and other civil rights cases was slowed somewhat by World War II. After the War's conclusion, however, the organization renewed its efforts.

B. Sipuel v. Board of Regents

The first of the post-*Gaines* graduate school cases was filed against the University of Oklahoma in April of 1946.[46] From a field of several potential litigants, the NAACP settled on Ada Louise Sipuel to serve as the plaintiff. Sipuel was an honors graduate of the State College for Negroes in Langston, Oklahoma.[47] She had applied for admission to the University of Oklahoma School of Law but her application was denied on the ground that the school did not admit black students.[48] After receiving the rejection, Sipuel filed a suit in an Oklahoma trial court; the court, however, dismissed Sipuel's case.[49] On appeal, the Oklahoma Supreme Court held that, because Sipuel failed to demand that the State establish a separate law school for black students, she had no right to admission to the school established for white students.[50] The court reasoned that Oklahoma was not obligated to establish a law school for black students until there was a sufficient demand to justify the expenditure of the funds that would be required.[51] Because Sipuel

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[45] Gaines never enrolled in the University of Missouri. He disappeared shortly after the case was remanded to the trial court. Speculation concerning his whereabouts ranged from reports of sightings in Mexico to reports of his death. All that is known is that he was last seen leaving his fraternity house in Chicago. *See* Bluford, *supra* note 28, at 245–46; Grothaus, *supra* note 28; WALTER WHITE, A MAN CALLED WHITE 162 (1948).

[46] *See* MARK V. TUSHNET, THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925–1950, at 121 (1987).

[47] WHITE, *supra* note 45, at 144.

[48] *See* TUSHNET, *supra* note 46, at 120–21.

[49] *Id.* at 121.

[50] Sipuel v. Board of Regents, 180 P.2d 135, 144 (Okla. 1947), *rev'd*, 332 U.S. 631 (1948).

[51] *Id.* at 139.

had not made the necessary demand, she "wholly failed to establish any violation of the Fourteenth Amendment of the Federal Constitution."[52]

The NAACP sought review of the Oklahoma Supreme Court's decision in the United States Supreme Court.[53] Four days after it heard oral arguments, the Court issued a decision which reversed the judgement of the Oklahoma Supreme Court.[54] In a brief opinion, the Court first noted that Sipuel's "application for admission was denied, solely because of her color."[55] The Court then found that:

> The petitioner is entitled to secure legal education afforded by a state institution. To this time, it has been denied her although during the same period many white applicants have been afforded legal education by the State. The State must provide it for her in conformity with the equal protection clause of the Fourteenth Amendment and provide it as soon as it does for applicants of any other group.[56]

Unwilling to retreat from its policy of segregation, the Oklahoma Board of Regents responded by roping off an area in the state capitol building, designating it as the "negro law school," and hiring three black lawyers to serve as the faculty. Sipuel's counsel, Thurgood Marshall, returned to the Supreme Court to request that the Court find that Oklahoma had not complied with the Court's original decision. To the surprise and disappointment of the NAACP, the Supreme Court ruled seven to two in favor of the State of Oklahoma.[57] Over the vigorous dissent of Justice Rutledge, the majority found that the State's actions did not violate the Court's original order.[58]

C. Sweatt v. Painter

At approximately the same time the NAACP was locked in battle with the State of Oklahoma, an identical suit was filed on behalf of another student in Texas. Heman Marion Sweatt, a letter carrier em-

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[52] *Id.* at 144.

[53] Sipuel v. Board of Regents, 332 U.S. 631, 631 (1948) (per curiam).

[54] *Id.* at 631, 633.

[55] *Id.* at 632.

[56] *Id.* at 632–33; *see also Along the N.A.A.C.P. Battlefront*, 55 THE CRISIS 54, 54–55 (1948) (discussing NAACP's role in *Sipuel*).

[57] *See* Fisher v. Hurst, 333 U.S. 147, 151 (1948); *Along the N.A.A.C.P. Battlefront*, 55 THE CRISIS 84, 84 (1948).

[58] *Fisher*, 333 U.S. at 150–51.

ployed by the post office, applied for admission to the University of Texas School of Law at Austin in 1946.[59] Sweatt's application was denied because of his race.[60] On May 16, 1946, suit was filed in Texas state court.[61] In June, the trial court held a hearing and issued an order which gave the State six months to establish a law school for black students.[62]

In response, the State rented a few rooms in Houston and hired two black lawyers to serve as the faculty of the newly established branch of Prairie View University, a school previously established to serve black students.[63] At a status conference held in December of 1946, the trial court found that the facilities at Houston were "substantially equal" to those provided for white students at the Austin campus.[64]

The NAACP appealed the trial court's ruling to the Court of Civil Appeals of Texas.[65] While the appeal was pending, the State took steps to bolster the trial court's finding that the black law school was "substantially equal" to the school established for white students.[66] The location of the black law school was transferred to Austin pending the construction of a permanent facility in Houston. Three rooms in a building across the street from the state capitol were set aside to house the temporary facility. The black law students were given access to the law library located at the state capitol, and professors from the University of Texas were assigned as instructors.[67] The Texas Legislature appropriated three and a half million dollars to construct a black university and designated $100,000 of that fund for the construction of a separate black law school.[68] Because of this change in circumstances, the case was remanded to the trial court for a full evidentiary hearing.[69]

Faced with a weakened case on the issue of physical inequality, Thurgood Marshall chose a different tactic. This new approach became critical to the Supreme Court's decisions in the final series of graduate school cases and would provide the foundation for its holding

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[59] *See* Jonathan L. Entin, Sweatt v. Painter, *the End of Segregation, and the Transformation of Education Law*, 5 REV. LITIG. 3, 7 (1986); *see also Along the N.A.A.C.P. Battlefront*, 54 THE CRISIS 149, 149 (1947).

[60] TUSHNET, *supra* note 46, at 126.

[61] *See Along the N.A.A.C.P. Battlefront*, 54 THE CRISIS 149, 149 (1947).

[62] *Id.*

[63] *See* TUSHNET, *supra* note 46, at 126.

[64] *See Along the N.A.A.C.P. Battlefront*, 54 THE CRISIS, 182, 182 (1947).

[65] *Id.*

[66] *See* TUSHNET, *supra* note 46, at 126.

[67] *Id.*

[68] *See Along the N.A.A.C.P. Battlefront*, 54 THE CRISIS 342, 343 (1947).

[69] *See* TUSHNET, *supra* note 46, at 126.

in *Brown*.[70] At the hearing, Marshall presented the testimony of an array of expert witnesses who testified at length about the harmful effects of segregation on the educational process.[71] One expert testified about the importance to the learning process of interaction among students.[72] A professor, he explained, however well qualified, could not provide those elements of the educational experience that are derived from discussion and interaction among students.[73]

Approximately one month after the trial ended, the court entered a judgment for the defendants.[74] The case was appealed to the Court of Civil Appeals of Texas. On February 25, 1948, that court issued a decision affirming the trial court's ruling.[75] That decision was later appealed to the United States Supreme Court.[76] At the same time, the Court heard the case of *McLaurin v. Oklahoma State Regents*.[77]

D. McLaurin v. Oklahoma State Regents

The last of the major graduate school cases involved a sixty-eight year old black professor at Langston University, George W. McLaurin, who had applied to the graduate school of education at the University of Oklahoma in 1948. After his application was denied, the NAACP filed a suit on his behalf.[78] *McLaurin* was heard by a three-judge panel in the federal district court.[79] That panel eventually ruled in favor of the State of Oklahoma. The case was then appealed directly to the United States Supreme Court.[80]

Sweatt and *McLaurin* reached the Supreme Court at the same time. *McLaurin* was argued on April 3rd and 4th, 1950, and oral arguments in *Sweatt* were heard on April 4th. The decisions in both cases were issued on June 5th.[81] The Court in *Sweatt* declined to consider whether "*Plessy v. Ferguson* should be reexamined in light of contem-

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[70] *See* 347 U.S. 483 (1954).

[71] *Cf.* Thomas I. Emerson et al., *Segregation and the Equal Protection Clause: Brief for the Committee of Law Teachers Against Segregation in Legal Education*, 34 MINN. L. REV. 289, 316–20 (1950) (reprint of amici curiae brief filed on behalf of the committee of law teachers in support of Sweatt); *see also Along the N.A.A.C.P. Battlefront*, 54 THE CRISIS 342, 342–43 (1947).

[72] KLUGER, *supra* note 28, at 264.

[73] *Id.*

[74] Sweatt v. Painter, 210 S.W.2d 442, 443 (Tex. Civ. App. 1948), *rev'd*, 339 U.S. 629 (1950).

[75] *Id.* at 447.

[76] *See* Sweatt v. Painter, 339 U.S. 629 (1950) *reh'g denied*, 340 U.S. 846 (1950).

[77] 339 U.S. 637 (1950).

[78] *Along the N.A.A.C.P. Battlefront*, 55 THE CRISIS 274, 274 (1948).

[79] *Id.*

[80] *McLaurin*, 339 U.S. at 637.

[81] *Along the N.A.A.C.P. Battlefront*, 57 THE CRISIS 444, 444 (1950).

porary knowledge respecting the purposes of the Fourteenth Amendment and the effects of racial segregation."[82] Nevertheless, in two short opinions, the Court came close to adopting the NAACP's position concerning the inherent inequities of state-sponsored segregation.

In *Sweatt*, the Court determined that the facilities available at the newly-established law school were not equal in either quantity or quality to those available at the law school in Austin.[83] The Court noted that, "[i]n terms of number of the faculty, variety of courses and opportunity for specialization, size of the student body, scope of the library, availability of law review and similar activities, the University of Texas Law School is superior."[84] The Court did not limit its analysis to a comparison of physical resources but went on to conclude that the quality of educational instruction was inevitably diminished by forced separation.[85] In the Court's view:

> [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 the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige. It is difficult to believe that one who had a free choice between these law schools would consider the question close.[86]

Responding to the NAACP's expert testimony, the Court recognized in *Sweatt* that there was more to education than bricks and mortar.[87] Much of the educational process, it found, involved interaction among students through discussion and the exchange of ideas.[88] This process could not occur in a system where one group of students was isolated from other students.[89]

The Court reached a similar conclusion in *McLaurin*.[90] *McLaurin* was analytically different from *Sweatt*, because the State of Oklahoma did not attempt to establish a separate facility for black students but

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[82] *Sweatt*, 339 U.S. at 636.

[83] *Id.* at 633–34.

[84] *Id.*; *see also Along the N.A.A.C.P. Battlefront*, 57 THE CRISIS 444, 446 (1950).

[85] *See Sweatt*, 339 U.S. at 634.

[86] *Id.*

[87] *See id.*

[88] *Id.*

[89] *Id.*

[90] McLaurin v. Oklahoma State Regents, 339 U.S. 637, 641 (1950).

instead gave them access to the same instruction as whites, on a racially segregated basis.[91] In *McLaurin*, however, the Supreme Court was required to determine whether segregation within a university violated the Equal Protection Clause of the Fourteenth Amendment.[92] As the Court's opinion explained:

> [McLaurin] was required to sit apart at a designated desk in an anteroom adjoining the classroom; to sit at a designated desk on the mezzanine floor of the library, but not to use the desks in the regular reading room; and to sit at a designated table and to eat at a different time from the other students in the school cafeteria.[93]

While the case was pending, certain modifications were made in the arrangements to accommodate McLaurin:

> For some time, the section of the classroom in which [McLaurin] sat was surrounded by a rail on which there was a sign stating, "Reserved For Colored," but these have been removed. He is now assigned to a seat in the classroom in a row specified for colored students; he is assigned to a table in the library on the main floor; and he is permitted to eat at the same time in the cafeteria as other students, although here again he is assigned to a special table.[94]

These actions, the Court found, "handicapped [McLaurin] in his pursuit of effective graduate instruction. Such restrictions impair and inhibit his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession."[95] The final, and in some ways most compelling issue was raised by the State of Oklahoma's actions in *McLaurin*. Because McLaurin was allowed to sit in a classroom with and receive the same instruction as white students, the isolation rationale of *Sweatt* did not apply. Yet, by roping McLaurin off in a "colored only" section of the classroom and by setting aside separate tables in the library and cafeteria, the State graphically demonstrated the stigmatizing effects of segregation far more graphically than any expert witness ever could.[96]

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[91] *Id.* at 639.

[92] *Id.* at 642.

[93] *Id.* at 640.

[94] *Id.*

[95] *McLaurin*, 339 U.S. at 641.

[96] While the case was pending, a photograph of McLaurin appeared in newspapers across

By the time the NAACP proceeded with the primary school cases, the thin veneer had been stripped from defenses raised by segregation's supporters. The separate facilities provided for black students were demonstrably unequal. More importantly, the expert testimony in *McLaurin* and *Sweatt* focused the Court's attention on the psychological effects of state-enforced segregation and the detrimental effects that these practices had on the learning process. Once the courts were forced to confront the stigma inflicted by state-sponsored segregation, it became virtually impossible to reconcile segregated education with the equality principle of the Fourteenth Amendment. Yet, when the Supreme Court held state enforced segregation to be unlawful, the remedy that it ordered did not eliminate the inequities that formal discrimination had created.

III. THE POST-*BROWN* ERA

In *Brown v. Board of Education*, the United States Supreme Court held that racial segregation in public schools was inherently unequal and constituted a violation of the Equal Protection Clause of the Fourteenth Amendment.[97] Although nearly forty years have elapsed since *Brown* was decided, educational opportunities for black students are not much better now than they were in 1955, when the Court's implementation decree was issued in *Brown II*.[98] In the Southern states, *Brown* was ignored or actively resisted for at least fifteen years. During that time, delaying tactics prevented all but a handful of school systems from becoming desegregated.[99] By the late 1960s, the United States Supreme Court grew weary of Southern resistance. It abandoned the "deliberate speed" standard of *Brown II* in favor of a standard requiring immediate integration.[100] The Court also held that localities that had maintained de jure systems of segregation could not satisfy their constitutional obligations merely by adopting "freedom of choice" poli-

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the country. The picture shows a classroom at the University of Oklahoma. Sitting in an alcove, McLaurin is leaning forward, peering into the classroom, apparently straining to hear the discussion. Proving the axiom that "one picture is worth a thousand words," the photograph shows just how demeaning segregation was in actual practice. *See* N.Y. TIMES, Oct. 14, 1948, *reprinted in* MICHAEL A. OLIVAS, THE LAW AND HIGHER EDUCATION 908 (1989).

[97] 347 U.S. 483, 495 (1954).

[98] *See generally* Brown v. Board of Educ., 349 U.S. 294 (1955) (Supreme Court's order implementing its judgment in *Brown I*). The Court ordered that desegregation of public schools proceed with "all deliberate speed." *Id.* at 301.

[99] For a detailed description of the State of Alabama's efforts to resist *Brown*, see Knight v. Alabama, 787 F. Supp. 1030, 1104–12 (N.D. Ala. 1991).

[100] *See* Green v. County Sch. Bd., 391 U.S. 430, 438–39 (1968).

cies.[101] The Court found that race-neutral policies such as "freedom of choice" merely perpetuated the status quo.[102] Further actions were required to dismantle the elaborate system of racial segregation that had prevailed during the first half of the twentieth century. Based on this determination, the Court adopted a standard which required states to dismantle segregated school systems "root and branch" until all vestiges of the dual system were eliminated.[103]

It is, of course, impossible to know what results this approach might have produced if it had been used in the implementation decree that was entered in *Brown II*. By the late 1960s, demographic changes made integration in elementary and secondary schools virtually impossible. When *Brown* was decided, residential housing patterns were already racially segregated. At the same time, population distributions were in the midst of a dramatic change. White families previously concentrated in industrial centers of the North and Midwest were moving to the open spaces of the surrounding suburbs. With the advent of school desegregation, the flight to the suburban areas accelerated.

The relocation of white families to outlying areas followed a migration of black families to the cities. During World War I, black families began to migrate from rural areas in the deep South to urban industrial centers, a trend which continued throughout World War II. By the 1960s, the demographic patterns which persist to this day were firmly locked in place. The vast majority of black families resided in urban centers, while white families lived in suburban areas beyond the city limits. Since school attendance was based on zones drawn along the lines of residential districts, student populations in urban and suburban schools reflected the segregated housing patterns that predominated most areas of the nation.[104]

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[101] *Id.* at 440.

[102] *See id.* at 441.

[103] Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15 (1970) (citing *Green*, 391 U.S. at 437–38).

[104] A recent study indicates that racial segregation in housing is far more pervasive than previously believed and is growing rather than diminishing. Douglas S. Massey & Nancy A. Denton, *Hypersegregation in U.S. Metropolitan Areas: Black and Hispanic Segregation Along Five Dimensions*, 26 DEMOGRAPHY 373, 388 (1989). Using the term "hyper-segregation" to label this phenomenon, the authors show that residents of inner city areas are now more isolated than ever before and have drifted further from the mainstream of American society. *Id.* at 389. The findings reported in this article are expanded and explored in greater depth in DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS (1993). The effects of segregation are not limited to families with poverty-level incomes. In a 1991 study, the Department of Housing and Urban Development found that blacks and hispanics encountered some form of housing discrimination in more than half of their visits to inquire

Matriculation at colleges and universities is not based on compulsory attendance zones; nevertheless, the racial tensions at these institutions reflect the fundamental polarization that pervades the United States. Black students attend schools that were formerly attended only by whites, but they do not find the warm and nurturing environments which are conducive to learning. Despite years of recruitment and affirmative action programs, the percentage of black students who attend traditionally white colleges remains low. A much smaller percentage of the students who enroll actually graduate. Black students at white colleges often choose to eat at separate dining tables. Many live in separate dormitories and tend to socialize apart from white students.[105]

Throughout the post-*Brown* era, federal courts have addressed the desegregation obligation of former de jure states in cases involving publicly-funded black colleges.[106] The courts have proceeded from the premise that desegregation requires the elimination of racially identifiable schools.[107] The debate has focused on whether the standard used in primary and secondary school cases applies to higher education, or whether a different standard should prevail. If the standard used in primary and secondary schools is adopted, states would be obligated to implement plans to eliminate all vestiges of racial segregation.[108] The methods available would include eliminating black colleges, merging black schools with white institutions and enrolling sufficient numbers of white students so that formerly all-black colleges are no longer racially identifiable.

By adopting a standard which requires states to eliminate all remnants of racial segregation, the Supreme Court has chosen a path that imperils the existence of publicly-funded black colleges, the most visible vestige of the segregated system. This result is ironic because the long-neglected and drastically under-funded black schools will, in

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about housing. JOHN YINGER, HOUSING DISCRIMINATION STUDY: INCIDENCE OF DISCRIMINATION AND VARIATION IN DISCRIMINATORY BEHAVIOR (1991).

[105] Mel Elfin & Sarah Burke, *Race on Campus*, U.S. NEWS & WORLD REP., Apr. 19, 1993, at 52; Peter R. Pouncey, *Reflections on Black Separatism at American Colleges*, 1 J. BLACKS IN HIGHER EDUC. 57 (1993); *Black vs. White Institutions of Higher Education*, ETHNIC NEWSWATCH, Aug. 27, 1992, at B4; Dennis A. Williams et al., *The Black Mood on Campus*, NEWSWEEK, Nov. 8, 1982, at 107.

[106] *See, e.g.*, Norris v. State Council of Higher Educ., 327 F. Supp. 1368 (E.D. Va. 1971), *aff'd sub nom.* Board of Visitors of the College of William & Mary v. Norris, 404 U.S. 907 (1971); Alabama State Teachers Ass'n v. Alabama Pub. Sch. and College Auth., 289 F. Supp. 784 (M.D. Ala. 1968), *aff'd per curiam*, 393 U.S. 400 (1969).

[107] *See, e.g., Norris*, 327 F. Supp. at 1373; *Alabama State Teachers Ass'n*, 289 F. Supp. at 790.

[108] *See, e.g., Swann*, 402 U.S. at 15; *Green*, 391 U.S. at 437–38.

effect, be penalized, while the institutions which engaged in discriminatory practices will benefit. Moreover, the elimination of black colleges will likely decrease the number of minority students who attend colleges because it will diminish the range of educational opportunities presently available to them. The courts have not given sufficient consideration to this result. As the following Section demonstrates, the success of desegregation has been measured almost exclusively by the percentage of minority students enrolled in white colleges. This is not an appropriate means of determining whether educational parity has been achieved.[109]

IV. THE POST-*BROWN* HIGHER EDUCATION CASES

A. ASTA *and the Neutrality Standard*

In the 1968 case of *Alabama State Teachers Association v. Alabama Public School and College Authority* ("*ASTA*"), an organization of black teachers sought to prevent the establishment of a branch of Auburn University in Montgomery, Alabama.[110] Alabama State Teachers College, a publicly-funded black college, was located in the same city. The plaintiffs in *ASTA* argued that a branch of Auburn located in Montgomery would attract white students who might otherwise elect to attend Alabama State Teachers College.[111] This result, the plaintiffs claimed, would interfere with Alabama's obligation to desegregate its schools.[112]

The United States District Court for the Middle District of Alabama ruled against the plaintiffs after it concluded that the new institution would be operated in a non-segregated manner.[113] The court declined to adopt the standard that the Supreme Court had imposed in elementary and high school cases—that states are obligated to take affirmative steps to eliminate segregation "root and branch" until all vestiges of the dual system have been eliminated.[114] The court opted

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[109] For a discussion of the success of desegregation initiatives in public education, see generally Derrick A. Bell, Jr., *Black Colleges and the Desegregation Dilemma*, 28 EMORY L.J. 949 (1979); Kenyon D. Bunch & Grant B. Mindle, *Testing the Limits of Precedent: The Application of* Green *to the Desegregation of Higher Education*, 2 SETON HALL CONST. L.J. 541 (1992); Drew S. Days III, Brown *Blues: Rethinking the Integrative Ideal*, 34 WM. & MARY L. REV. 53 (1992).

[110] 289 F. Supp. 784, 785–86 (M.D. Ala. 1968), *aff'd per curiam*, 393 U.S. 400 (1969) [hereinafter *ASTA*].

[111] *See id.* at 788–89.

[112] *Id.* at 789.

[113] *Id.* at 789–90.

[114] *See id.* at 787; Green v. County Sch. Bd., 391 U.S. 430, 437–38 (1968).

instead for a less stringent standard. This approach was based on the court's reasoning that a student's choice to attend college was purely voluntary, whereas elementary and secondary education was compulsory.[115] As a consequence, the court found that the implementation of race-neutral admissions and faculty and staff hiring policies were sufficient to satisfy the state's desegregation obligation.[116] After the decision in *ASTA*, other cases were filed and a different standard emerged.

B. Norris: *The Affirmative Duty to Desegregate*

In 1971, the United States District Court for the Eastern District of Virginia enjoined Virginia's plan to expand Richard Bland College from a two-year junior college into a four-year institution after a group of plaintiffs contended that the State's actions would perpetuate Virginia's dual system of higher education.[117] The junior college was located seven miles from Virginia State College, a black college located near Petersburg, Virginia. Like the plaintiffs in *ASTA*, the plaintiffs in *Norris* argued that the new institution would be viewed as a "white" school and would attract students who might otherwise have attended Virginia State College.[118]

The court in *Norris* declined to adopt the holding in *ASTA* that the adoption of race-neutral admission policies was sufficient to satisfy the state's desegregation obligations.[119] Instead, it held that a state's duty in higher education was the same as that which the Supreme Court applied to primary and secondary schools in *Green*.[120] The *Norris* court, therefore, found that the State of Virginia had an affirmative duty to take whatever steps were necessary to convert its segregated schools into a unitary system.[121] In the court's view, the State's plan to establish a new institution in such close proximity to a historically black college violated its desegregation obligation because it would hamper Virginia State's ability to recruit white students.[122] After the *Norris* court applied the *Green* standard to higher education, other courts followed *Norris*' lead.[123]

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[115] *ASTA*, 289 F. Supp. at 787–89.

[116] *Id.* at 789–90.

[117] Norris v. State Council of Higher Educ., 327 F. Supp. 1368, 1369, 1373 (E.D. Va. 1971), *aff'd sub nom.* Board of Visitors of the College of William & Mary v. Norris, 404 U.S. 907 (1971).

[118] *See Norris*, 327 F. Supp. at 1369.

[119] *Id.* at 1372.

[120] *Id.* at 1373 (citing Green v. County School Bd., 391 U.S. 430, 437 (1968)).

[121] *See id.*

[122] *Id.*

[123] *See, e.g.*, Hunnicutt v. Burge, 356 F. Supp. 1227 (M.D. Ga. 1973).

C. *A Perception of Inferiority*

Desegregation litigation has been premised on the assumption that black colleges are inferior to their white counterparts. This presumption was evident in a case brought not long after the *Norris* decision. In 1973, in *Hunnicutt v. Burge*, the United States District Court for the Middle District of Georgia held that the State of Georgia had violated its obligation to desegregate its colleges and universities by allowing Fort Valley State College, a historically black college, to continue to offer a marginal level of instruction.[124] This holding was based on the court's determination that Fort Valley's academic programs were demonstrably inferior to the programs available at nearby white colleges.[125] In the court's view, Fort Valley was so inferior that it was little more than a "diploma mill" for marginal students.[126]

Fearing that the litigation jeopardized the existence of their school, several successful graduates of Fort Valley testified on the institution's behalf.[127] Their testimony was discounted, however, as was the college's argument that it served a population of students who were academically under-prepared by Georgia's still-segregated elementary and high schools.[128] The court in *Hunnicutt* applied the *Green* standard and determined that the State had an affirmative duty to eliminate the racial identity of the college.[129] The adoption of race-neutral admission policies was insufficient. The court thus ordered the State to develop and implement a desegregation plan.[130] The affirmative duty recognized in *Green* continued to be applied in cases that were adjudicated in the years following the *Hunnicutt* decision.

D. *Equality Predicated on Racial Balance*

Federal judges adjudicating desegregation litigation have assumed that historically black colleges stand as obstacles to school desegregation. This assumption was reflected in the decade of litigation involving Tennessee State University which concluded in 1979, when the United States Court of Appeals for the Sixth Circuit affirmed a decision of the United States District Court for the Middle District of Tennessee which

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[124] *Id.* at 1230, 1238.
[125] *Id.* at 1238.
[126] *See id.* at 1230, 1238.
[127] *See id.* at 1236, 1238.
[128] *See Hunnicutt*, 356 F. Supp. at 1236, 1238.
[129] *Id.* at 1230.
[130] *Id.*

ordered the merger of Tennessee State University with the Nashville branch of the University of Tennessee.[131]

Geier v. University of Tennessee commenced in 1968, when a group of plaintiffs attempted to enjoin the expansion of the Nashville branch of the University of Tennessee.[132] Both schools were located in the Nashville area. The University of Tennessee ("UT"), the State's flagship institution, was founded in 1807. Tennessee State University ("TSU") was established in 1912 to serve black students.

The Nashville branch of UT was established in 1947 as an extension college which did not grant degrees. In the late 1960s, the State began to add to the programs offered at UT-Nashville and announced plans to develop degree-granting programs. Like the plaintiffs in *ASTA* and *Norris*, the *Geier* plaintiffs claimed that expanding UT would interfere with TSU's efforts to attract white students.[133] After suit was filed, the United States intervened.[134]

Relying on *ASTA*, the State argued that by adopting race-neutral admissions criteria, it had satisfied its desegregation obligations.[135] The district court rejected this argument and held that the more stringent standard of *Green* applied.[136] The mere adoption of an "open door" policy did not satisfy the State's duty to eliminate its segregated system.[137] The district court declined to grant injunctive relief which would prohibit the expansion of UT-Nashville, but rather held that Tennessee had failed to dismantle its dual system.[138] As a result, the State was ordered to develop a desegregation plan for the court's approval.[139]

After considering a number of proposals during the years following the entry of the original decision, in 1972, the district court held that the defendants were not making satisfactory progress toward implementing the 1968 order to desegregate TSU.[140] The court, there-

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[131] *See* Sanders v. Ellington, 288 F. Supp. 937 (M.D. Tenn. 1968), *enforced sub nom.* Geier v. Dunn, 337 F. Supp. 573 (M.D. Tenn. 1972), *modified sub nom.* Geier v. Blanton, 427 F. Supp. 644 (M.D. Tenn. 1977), *aff'd sub nom.* Geier v. University of Tenn., 597 F.2d 1056 (6th Cir. 1979), *cert. denied*, 444 U.S. 886 (1979).

[132] Sanders v. Ellington, 288 F. Supp. at 939. At the time *Sanders* was brought, Tennessee State University was known as Tennessee Agricultural and Industrial State University. For the purposes of this discussion, the school will be referred to as Tennessee State University.

[133] *See id.* at 943.

[134] *Id.* at 939.

[135] *Id.* at 942.

[136] *See id.*

[137] *Sanders*, 288 F. Supp. at 942.

[138] *Id.* at 941–42.

[139] *Id.* at 942.

[140] Geier v. Dunn, 337 F. Supp. 573, 581 (M.D. Tenn. 1972).

fore, ordered the defendants to develop a plan that would increase the white presence at TSU.[141] During the next few years, several plans were submitted for the court's consideration, but the parties failed to reach an agreement with respect to any of these proposals.[142] At the conclusion of a hearing held in 1977, the district court ordered the State to merge TSU and UT-Nashville.[143] The district court's decision was affirmed by the United States Court of Appeals for the Sixth Circuit.[144]

Endorsing the district court's decision, the Sixth Circuit held that the *Green* requirement of an affirmative duty applies to public higher education as well as to education at the elementary and secondary school levels.[145] It also found that the merger remedy was justified based on "the failure of the defendants to dismantle a statewide dual system, the 'heart' of which was an all-black TSU."[146]

E. *The* Adams *Cases: Recognizing the Educational Value of Black Colleges*

In the early 1970s, a case was decided which was intended to accelerate the desegregation process but also directed the states to preserve and enhance black colleges. In *Adams v. Richardson*, the United States Court of Appeals for the District of Columbia Circuit affirmed a district court order which required the United States Department of Health, Education and Welfare ("HEW") to enforce Title VI of the Civil Rights Act of 1964 by cutting off federal funding to states that had not taken adequate steps to desegregate their public school systems.[147] After finding that HEW had neglected its statutory duty to enforce Title VI, the D.C. Circuit affirmed a far-reaching order of the district court which required HEW to establish compliance procedures and commence enforcement proceedings against several school districts that had not taken adequate measures to desegregate their school systems.[148]

With respect to higher education, the court recognized the contributions of black colleges in providing educational opportunities to

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[141] *Id.*

[142] *See* Geier v. Blanton, 427 F. Supp. 644, 647–49 (M.D. Tenn. 1977).

[143] *Id.* at 661.

[144] Geier v. University of Tenn., 597 F.2d 1056, 1071 (6th Cir. 1979), *cert. denied*, 444 U.S. 886 (1979).

[145] *Id.* at 1065.

[146] *Id.* at 1065, 1067.

[147] 480 F.2d 1159, 1161 & n.1 (D.C. Cir. 1973).

[148] *See id.* at 1164, 1166.

black students.[149] To preserve these institutions, states were required to develop a policy that "takes into account the special problems of minority students and of [b]lack colleges . . . these [b]lack institutions currently fulfill a crucial need and will continue to play an important role in [b]lack higher education."[150] For the first time, a court acknowledged the distinctive value of black colleges. This recognition was prompted in large measure by arguments made in an amicus brief filed by the National Association for Equal Opportunity in Higher Education, a voluntary association of the presidents of 110 predominantly black public and private colleges.[151] After *Adams*, it appeared that black colleges would not be sacrificed on the alter of integration. This view was far too optimistic.[152] Not long after *Adams* was decided, other court decisions placed the status of black colleges in immediate jeopardy.[153]

F. *Judicially Mandated Reorganization as a Response to Continued Segregation*

Much of the current desegregation litigation stems from the states' inability to resolve the desegregation dilemma without drastic federal intervention. In 1981, in *United States v. Louisiana*, the United States District Court for the Eastern District of Louisiana approved a consent decree which called for the reorganization of Louisiana's system of higher education in order to achieve systemic integration.[154] The State of Louisiana operated seventeen institutions of higher learning, four of which had been originally established as black institutions. In 1974, the State amended its constitution and spread the responsibility for governing these institutions among four separate boards. The Board of Regents had general responsibility for planning and reviewing the budgets and program offerings at all of the schools. Direct management authority was divided among the three remaining boards.

In 1974, the United States commenced an enforcement action against Louisiana which sought to compel the State to dismantle its

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[149] *Id.* at 1165.

[150] *Id.*

[151] *See id.* at 1165 & n.11.

[152] For analyses of some of the complex issues raised by the *Adams* litigation, see 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, 20–23 (1982); JEAN L. PREER, LAWYERS V. EDUCATORS: BLACK COLLEGES AND DESEGREGATION IN PUBLIC HIGHER EDUCATION, 189–222 (1982).

[153] *See, e.g.*, United States v. Fordice, 112 S. Ct. 2727, 2743 (1992); Geier v. University of Tenn., 597 F.2d 1056, 1065 (6th Cir. 1979), *cert. denied*, 444 U.S. 886 (1979).

[154] 527 F. Supp. 509, 511, 514 (E.D. La. 1981).

segregated system of higher education.[155] After years of protracted negotiations, the parties devised a consent decree which was approved by the court in 1981.[156] Under the terms of that decree, the State agreed to develop admission and recruitment policies to enhance the enrollment of other-race students at its white and black institutions.[157] The State also promised to address problems related to student retention, to eliminate program duplication, to enhance the State's historically black colleges and to facilitate a more equitable racial balance of faculty and staff among the various institutions.[158]

In 1987, the United States moved for a hearing on whether Louisiana had implemented the 1981 consent decree and had desegregated its dual system of higher education.[159] The court found that the consent decree's structure had not facilitated the disestablishment of Louisiana's dual system of public universities.[160] Although it declined to prepare an alternative remedy, the court recognized that drastic changes might be needed to achieve desegregation.[161]

1. Evidence of Lingering Vestiges of Segregation

The evidence presented at the hearing to vacate the consent decree in *United States v. Louisiana* established that the black colleges were attended primarily by African-American students while the white colleges served white students.[162] These circumstances continued into 1987, six years after the original judgment.[163] The court also noted that the make-up of the four boards which governed Louisiana's twenty institutions of higher learning remained racially identifiable.[164] The members of the boards that governed the black institutions were predominantly African-American, while the boards that governed the other institutions were primarily white.[165]

Evidence presented during a 1989 hearing in this long-running litigation highlighted a number of shortcomings in Louisiana's sys-

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[155] *Id.* at 512.

[156] *Id.* at 513.

[157] *See id.* at 515.

[158] *Id.*

[159] United States v. Louisiana, 692 F. Supp. 642, 644 (E.D. La. 1988).

[160] *Id.* at 658.

[161] *Id.*

[162] *Id.* at 644–45.

[163] *Id.* at 645.

[164] United States v. Louisiana, 692 F. Supp. at 646.

[165] *See id.* The governance responsibility for the black colleges was handled by two separate boards. Grambling fell under the jurisdiction of the Board of Trustees for State Colleges and Universities. Southern University at Baton Rouge, Southern University at New Orleans, and

tem.[166] For example, only 33.2% of students who entered Louisiana's colleges actually graduated within six years.[167] The national average for students graduating from public universities within six years was 44.9%.[168] Although the state system as a whole fell short of the national average by several objective measures, there were striking disparities in the performance levels of black and white students.[169]

Approximately ninety percent of the freshmen enrolled in the system were state residents.[170] Twenty-eight percent of the black students who graduated from Louisiana high schools enrolled in colleges.[171] By comparison, forty-two percent the white high school graduates went on to college.[172] There were significant disparities in the grade point averages of black and white students who attended Louisiana's public colleges.[173] The mean high school GPA for black students was 2.54, while that of white students was 2.8.[174] There were also significant differences in scores that black and white students achieved on standardized tests.[175] The mean ACT score for black students was 12.74, while the average score for white students was 18.67.[176] Among the students enrolled in colleges, the racial disparities persisted. For example, 71.7% of the black freshmen were enrolled in remedial courses.[177] By comparison, only 38.5% of the white first-year students participated in remedial programs.[178]

During the period in which the 1981 order was in effect, Louisiana's colleges actually became more segregated than they had been when the decree was entered.[179] As a result, the court declared that the State had not complied with the decree, and entered a far-reaching remedial order which dramatically altered the structure of higher education in Louisiana.[180]

Southern University at Shreveport-Boosier City were governed by the Southern University Board of Supervisors.

[168] United States v. Louisiana, 718 F. Supp. 499, 505–07 (E.D. La. 1989).

[167] *Id.* at 505.

[168] *Id.* at 505–06.

[169] *See id.* at 507.

[170] *Id.* at 506.

[171] United States v. Louisiana, 718 F. Supp. at 506.

[172] *Id.*

[173] *See id.* at 506–507.

[174] *Id.* at 507.

[175] *See id.*

[176] United States v. Louisiana, 718 F. Supp. at 507.

[177] *Id.*

[178] *Id.*

[179] *See id.* at 504.

[180] *See id.* at 505, 515–21.

2. The Remedial Order

With the exception of the law schools at Southern University and Louisiana State University, the court declined to order a merger of the black and white colleges.[181] Rather, the court suggested that such a merger would be the next step if the goals of the 1989 remedial order were not satisfied within five years.[182] The law school at Southern University was ordered to be merged with the law school at Louisiana State University ("LSU").[183] Based on a persistently low bar passage rate and other academic factors, the court found that Southern University was not providing an acceptable level of training to its students.[184] The court also considered the proximity of the two schools, both located in Baton Rouge, and the fact that their programs were identical.[185] To ameliorate the effect of the merger on minority students, the court required LSU Law School to set aside ten percent of the seats in each incoming class for black students to increase racial diversity at the school.[186] The merger was to take place over a five-year period.[187]

With respect to system-wide reforms, the court ordered the complete reorganization of the governing structure.[188] Existing boards were disbanded and their powers were transferred to a single governing authority, consisting of seventeen voting members and one student member.[189] The court also required the State to implement a three-tiered classification scheme which would be based on the availability of graduate programs and the relative selectivity of admission requirements.[190] LSU was to be designated as the flagship institution.[191] The State was ordered to establish an intermediate level of institutions that would offer limited doctoral and other graduate programs.[192] The remaining tier of schools would receive a "comprehensive" designation, which meant that they would offer fewer graduate programs and maintain the most relaxed admission requirements.[193]

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[181] United States v. Louisiana, 718 F. Supp. at 518–19.
[182] *Id.* at 521.
[183] *Id.* at 519.
[184] *Id.* at 513.
[185] *Id.*
[186] United States v. Louisiana, 718 F. Supp. at 514.
[187] *Id.*
[188] *See id.* at 515.
[189] *Id.*
[190] *Id.* at 516–17.
[191] United States v. Louisiana, 718 F. Supp. at 516.
[192] *Id.*
[193] *Id.* at 516–17.

To facilitate a racial mix at the affected institutions, the court required that ten percent of the spots in the entering class of each institution be reserved for other-race students.[194] To maintain integrated enrollments, graduate program duplications were to be eliminated.[195] To ensure the attraction of other-race students to what had been single-race institutions, the court required the State to establish recruitment programs and scholarships, and to develop relationships between colleges and high schools.[196] In a subsequently issued supplemental order, the court ordered the State to desegregate the faculties and staffs of the institutions and to establish affirmative action programs.[197]

3. The Justification for the Remedy

After a petition for rehearing was submitted, the court issued a separate opinion which addressed the issues raised by post-trial motions.[198] The United States argued that, to the extent the order required schools to reserve a specified percentage of the space in their entering classes for other-race students, it established a system of racial quotas which violated the Equal Protection Clause of the Fourteenth Amendment.[199] The court disagreed, finding that the imposition of numerical goals in this case was not arbitrary and therefore satisfied the Equal Protection Clause of the Fourteenth Amendment.[200]

The court reasoned that the remedy was justified by its finding of long-standing discriminatory practices.[201] Moreover, this finding was supported by an ample evidentiary record. The court held that the remedy was narrowly tailored and was not an inflexible quota which required a specific racial balance.[202]

The United States also argued that the court was required to consider race-neutral alternatives before it imposed race-conscious remedies.[203] The court responded by pointing out that race-neutral remedies

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[194] *Id.* at 517–18.

[195] *See id.* at 517.

[196] United States v. Louisiana, 718 F. Supp. at 520.

[197] *Id.* at 521, 524.

[198] *See* United States v. Louisiana, 718 F. Supp. 525, 527 (E.D. La. 1989) (separate opinion on post trial motions).

[199] *Id.* at 530. The United States' argument was based on *City of Richmond v. J.A. Croson Co.*, in which the Supreme Court held that arbitrary racial quotas violate the Equal Protection Clause of the Fourteenth Amendment. *See* 488 U.S. 469, 511 (1989).

[200] *See* United States v. Louisiana, 718 F. Supp. at 530–31 (post trial motions).

[201] *Id.* at 530.

[202] *Id.*

[203] *See id.*

had been established by the 1981 consent decree.[204] The failure of those efforts justified the imposition of race-conscious measures to dismantle the long-standing and persistent segregation that existed in Louisiana's system.[205]

Southern University was one of several segregated law schools that were hastily established by Southern states following the *Sweatt* decision.[206] The states hoped to forestall integration by establishing separate schools for black students. Nevertheless, Southern University argued against the merger remedy, claiming, among other things, that consolidation of the two law schools would penalize minority students by reducing the legal education opportunities previously available to them.[207] In response, the court asserted that, to the extent the merger curtailed educational opportunities, the increased minority presence at LSU and the inadequate level of instruction offered at Southern University combined to offset any diminution in training opportunities that might result.[208]

4. The Appeal

The district court's decision was appealed to the United States Court of Appeals for the Fifth Circuit. In 1993, the Fifth Circuit reversed the district court's decision in light of the Supreme Court's decision in *United States v. Fordice*.[209] The Fifth Circuit evaluated the district court's decision based on the analytical standards announced in *Fordice*.[210] The court found that the trial court's analysis was flawed because the initial liability determination in 1988 was premised entirely on a finding that racial identifiability persisted in Louisiana's colleges

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[204] *See id.* at 531.

[205] *See* United States v. Louisiana, 718 F. Supp. at 530–31 (post trial motions).

[206] *See* Harold R. Washington, *History and Role of Black Law Schools*, 18 HOWARD L.J. 385, 404 (1974).

[207] United States v. Louisiana, 718 F. Supp. at 533 (post trial motions).

[208] *See id.* at 533–34.

[209] United States v. Louisiana, 9 F.3d 1159, 1170–71 (5th Cir. 1993). After the initial district court hearing on the issue of liability in 1988 (692 F. Supp. 642, (E.D. La. 1988)), hearings were held before a special master on the remedy. The district court later ordered the parties to implement the special master's recommendations. United States v. Louisiana, 718 F. Supp. at 515–21. After the United States Court of Appeals for the Fifth Circuit decided *Ayers v. Allain*, 914 F.2d 676 (5th Cir. 1990) (*Ayers* was the style of *Fordice* when the case was pending before the Fifth Circuit), the district court vacated its earlier order and entered a judgment for the defendants. United States v. Louisiana, 751 F. Supp. 606, 608 (E.D. La. 1990). When *Ayers* was reversed by the Supreme Court, the district court eventually ordered its 1988 liability judgment to be reinstated, and it entered a modified remedial order in 1992. *See* United States v. Louisiana, 9 F.3d at 1163.

[210] United States v. Louisiana, 9 F.3d at 1164. See *infra* notes 283–300 and accompanying text for a discussion of the *Fordice* decision.

and universities.[211] In considering the appropriate analytical framework, the court determined that *Fordice* required "that each suspect state policy or practice be analyzed to determine whether it is traceable to the prior de jure system, whether it continues to foster segregation, whether it lacks sound educational justification, and whether its elimination is practicable."[212]

The Fifth Circuit held that certain parts of the district court's findings were sufficiently detailed to satisfy the *Fordice* requirements.[213] These included the district court's 1992 determination of liability based on Louisiana's open admissions policy and unnecessary program duplication.[214] The court of appeals also concluded that the trial court had implicitly determined that these practices lacked a sound educational justification.[215]

The Fifth Circuit held, however, that the trial court did not apply the correct legal standard in holding that the existence of four separate governing boards was unconstitutional.[216] The court explained that, to constitute a violation under *Fordice*, a policy must be traceable to the era of de jure segregation and must have a present segregative effect.[217] Because the governing boards were established by a 1974 amendment to Louisiana's constitution, years after de jure segregation had ended, the *Fordice* standard was inapplicable.[218] As a result, the Fifth Circuit held that any challenge to the structure of the governing boards should be controlled by traditional principles of Equal Protection jurisprudence.[219]

The trial court had also found that the State's open admission policies contributed to the continued segregation of Louisiana's institutions of higher learning.[220] Considering this finding, the Fifth Circuit determined that, like the governing boards, "[t]he open admissions policy was instituted after Louisiana's de jure segregation ended, and the [trial] court failed to address the policy's traceability to the State's prior de jure system."[221] Consequently, the trial court's finding concerning the open admissions policy was remanded for further considera-

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[211] United States v. Louisiana, 9 F.3d at 1164–65.
[212] *Id.* at 1164.
[213] *See id.* at 1165.
[214] *Id.*
[215] *Id.* at 1166.
[216] United States v. Louisiana, 9 F.3d at 1167.
[217] *Id.* at 1164.
[218] *Id.* at 1166–67.
[219] *Id.* at 1167.
[220] *Id.*
[221] United States v. Louisiana, 9 F.3d at 1167.

tion of the traceability of the policy to Louisiana's prior de jure system.[222]

In addition to finding reversible error on the merits of the trial court's application of the relevant legal standard, the Fifth Circuit also found that there were a number of disputed factual issues which warranted the reversal of the trial court's entry of summary judgment.[223] Included among these were disputed questions of fact concerning whether unnecessary program duplication existed, disputed issues of fact regarding the soundness of the educational justification for maintaining duplicate programs and unresolved questions about whether the open admission policy fostered continued segregation.[224] Based on these findings, the Fifth Circuit reversed the district court's judgment and remanded the case for further proceedings in that court.[225]

G. *Beyond Racial Balance: The* Knight *Litigation*

In one of the most recent desegregation cases, the plaintiffs pursued an approach which did not focus exclusively on racial balance in student enrollments.[226] Their more expansive strategy achieved a result that is likely to provide a greater degree of educational equality. In 1983, the United States initiated a Title VI enforcement action against the State of Alabama.[227] A class of private plaintiffs who had filed a separate action were allowed to intervene.[228] At the conclusion of the trial in this action, the district court ordered the defendants to submit to the court a plan to eliminate Alabama's dual system of higher education.[229] The district court's judgement was appealed and ultimately was reversed by the United States Court of Appeals for the Eleventh Circuit.[230] Subsequently, the Eleventh Circuit dismissed the claims without prejudice and ordered the disqualification of the district court judge who had presided over the original trial.[231] On re-

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[222] *Id.*

[223] *Id.* at 1170.

[224] *Id.*

[225] *Id.* at 1171.

[226] *See* United States v. Alabama, 828 F.2d 1532, 1534–35 (11th Cir. 1987), *cert. denied sub nom.* Board of Trustees of Ala. State Univ. v. Auburn Univ., 487 U.S. 1210 (1988).

[227] United States v. Alabama, 628 F. Supp. 1137, 1140 (N.D. Ala. 1985), *rev'd*, 828 F.2d 1532 (11th Cir. 1987).

[228] *Id.*

[229] *Id.* at 1173.

[230] United States v. Alabama, 828 F.2d at 1552.

[231] *Id.*

mand, a new trial was held which resulted in a second judgment for the plaintiffs on the merits.[232]

1. Segregated Education in Alabama

Critical to the result in *Knight v. Alabama* was the court's focus on the long and tragic history of segregation in Alabama.[233] The opinion in *Knight* begins with a detailed history of the century-long struggle of Alabama's black citizens to obtain equal opportunities in state-supported higher education.[234] The court's synopsis begins in the Reconstruction era, when the first schools were established to educate black students. During the same period, former Confederates were engaged in an intense struggle to suppress the civil rights of black citizens, and the establishment of educational opportunities for black citizens was at odds with their campaign to maintain the white-dominated social and economic order. The State acquiesced in the development of segregated educational facilities for black students, however, in a semblance of an effort to comply with the "separate but equal" standard of *Plessy v. Ferguson*. One critical aspect of the compromise was an implicit understanding that any opportunities provided for black students could not interfere with the development of a superior system for white students. Eventually, industrial and normal schools were established to serve black students. These nineteenth-century schools were hardly institutions of higher learning. They were, in reality, little more than high schools where black students were permitted to pursue training in teaching and those trades to which blacks were relegated by the segregated system.

By the beginning of the twentieth century, segregation was firmly entrenched in every aspect of political, economic and social relations in Alabama. Black voters were disenfranchised, and educational opportunities for blacks were limited to a small number of separate and demonstrably unequal colleges. These circumstances continued until the late 1930s, when Alabama and other Southern states were stunned by the Supreme Court's decision in *Missouri ex rel. Gaines v. Canada*, which held that the segregated system had to afford equal opportunities for blacks and whites.[235] Alabama considered upgrading its pub-

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[232] *See* Knight v. Alabama, 787 F. Supp. 1030, 1377–78 (N.D. Ala. 1991), *aff'd in part and rev'd in part*, 14 F.3d 1534 (11th Cir. 1994). See *supra* notes 260–82 and accompanying text for a discussion of the Eleventh Circuit's decision in *Knight*.

[233] *See id.* at 1065–1153.

[234] *See id.*

[235] *See* 305 U.S. 337, 350 (1938).

licly-funded black colleges and established scholarships for graduate and professional training at out-of-state institutions. This trend continued until the Supreme Court handed down the *Brown* decision in 1954.

After *Brown*, Alabama pursued a policy of resisting all efforts to enforce the desegregation decisions of the federal courts. During the 1960s, Governor Wallace defied a federal court order when he attempted to prevent a black student from enrolling in the University of Alabama.[236] Eventually, the Supremacy Clause of the Constitution prevailed, and formal resistance gave way following a constitutional standoff between the state and federal governments.

However, the elimination of formal racial barriers did not result in equal educational opportunities for black students. In the years following the admission of the first black students to the historically white Alabama colleges, the percentage of African-American students attending formerly segregated institutions remained negligible. The black schools remained single-race institutions, and they suffered from continued under-funding and neglect. These circumstances persisted until the plaintiffs initiated the *Knight* litigation.

2. The Present Effects of Past Discrimination

After concluding its lengthy discussion of the history of discrimination in Alabama's system of higher education, the court in *Knight* made a number of findings. It found, among other things, that Auburn University's admission requirements excluded a disproportionate number of black applicants.[237] Accordingly, the court concluded that Auburn's admission requirements violated both Title VI and the Fourteenth Amendment.[238] The court also held that the prevalence of white control within the administrative structures of the white institutions was a clear manifestation of the prior de jure system.[239] The plaintiffs also contended that the low percentage of black faculty at the formerly white institutions contributed to the continuing segregation within the system.[240] The court noted in response that some of the colleges had instituted adequate faculty recruitment programs.[241] Other schools (par-

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[236] *See Knight*, 787 F. Supp. at 1105.

[237] *Id.* at 1165–66. Auburn University is the one of the two major institutions in the state's system.

[238] *Id.* at 1166.

[239] *Id.* at 1191–92.

[240] *Id.* at 1172–73.

[241] *Knight*, 787 F. Supp. at 1190.

ticularly Auburn), however, had established recruitment programs but failed to implement them, and this was held to be a violation of the state's desegregation obligation.[242]

The operational funding levels and the condition of facilities had, in the court's view, a direct impact on students' choices of which institution to attend.[243] The evidence established a long history of disproportionate funding between the black and white institutions.[244] Yet, the "State of Alabama [had] made no effort to overcome the effects of years of discriminatory funding as to the [historically black universities]."[245] The court also found that the State had not adequately funded capital development at its black colleges.[246]

In a departure from earlier cases, the plaintiffs in *Knight* claimed that the content of the curriculum offered at the white institutions perpetuated segregation.[247] They argued that the curriculum reflected a Eurocentric bias, and that the failure to offer courses reflecting a broader, multicultural view discouraged black students from attending white institutions.[248] Although the plaintiffs offered extensive expert testimony to support their contentions, the court declined to enter the battle over curricular content.[249]

After an exhaustive recitation of its findings of fact, the court defined the applicable legal standard: "[w]here a state has previously maintained or established by law a dual school system based upon race, the Fourteenth Amendment requires the state to take the necessary steps 'to eliminate from the public schools all vestiges of state-imposed segregation.'"[250] The court rejected the State's argument that a different and less stringent standard applied in the context of higher education.[251] It also found that the decision to attend a particular institu-

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[242] *See id.* at 1190–91.

[243] *Id.* at 1209, 1272.

[244] *See id.* at 1192–1270.

[245] *Id.* at 1270.

[246] *Knight*, 787 F. Supp. at 1281.

[247] *Id.* at 1333.

[248] *See id.*

[249] *See id.* at 1332–33. The heated debate over Afrocentrism, multiculturalism and curriculum reform currently occupies center stage in academic circles. Critics of the traditional curriculum contend that it promotes a white male hierarchy which excludes the ideas and contributions of women and minorities. *See generally* Sonia R. Jarvis, Brown *and the Afrocentric Curriculum*, 101 YALE L.J. 1285 (1992). Opponents argue that multiculturalism will lead to fragmentation and deepening divisions within society. *See generally* ARTHUR SCHLESINGER, THE DISUNITING OF AMERICA: REFLECTIONS ON A MULTICULTURAL SOCIETY (1991).

[250] *Knight*, 787 F. Supp. at 1356 (quoting Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15 (1971)).

[251] *Id.* at 1360.

tion was not the result of unfettered student choice.[252] The court concluded that "in Alabama there continue to survive some vestiges of segregation that impede and unduly restrict the exercise of student choice on the basis of race."[253]

3. The Remedy

The court's remedial order required Alabama to enhance the presence of minorities on faculties and within the administrative structures of the historically white institutions.[254] The State was ordered to alter its funding formula to assure that the historically black colleges received an equitable share of the resources allocated to higher education.[255] Alabama was also required to redirect capital expenditures to improve the buildings and other facilities at the black colleges.[256] Admissions policies were to be altered at Auburn.[257] The court also ordered Alabama to create a committee to eliminate unnecessary program duplication.[258] Alabama State University, an historically black institution, was ordered to develop plans to recruit white students.[259]

4. The Appeal

Despite the victory that the plaintiffs obtained in the district court, they were not satisfied with elements of the trial court's decision. An appeal was filed. On February 24, 1994, the United States Court of Appeals for the Eleventh Circuit issued a decision which reversed certain aspects of the district court's ruling.[260] The issues on appeal included the mission designations of two of the black colleges, control of land grant funding, the curricula at the white colleges and the campus environments maintained by the white colleges.[261]

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[252] *Id.*

[253] *Id.*

[254] *Id.* at 1378.

[255] *Knight*, 787 F. Supp. at 1378–79.

[256] *See id.*

[257] *Id.*

[258] *Id.* at 1379–80.

[259] *Id.* at 1380.

[260] *See* Knight v. Alabama, 14 F.3d 1534, 1556–57 (11th Cir. 1994). The appeal was decided after the Supreme Court's decision in *Fordice* but the court of appeals found that the trial court "anticipated in considerable measure the standards later set out by the Court in *Fordice*." *Id.* at 1540.

[261] *Id.* at 1540.

The plaintiffs argued that two of the black colleges, Alabama State University ("ASU") and Alabama A & M ("A&M"), had inferior mission designations that were traceable to the era of de jure segregation.[262] They sought an order that would require the sharing of "flagship" and other high-prestige programming with the historically black institutions.[263] The Eleventh Circuit found that the trial court had addressed the question of whether mission assignments were vestiges of a discriminatory system, but did not determine whether ASU or A&M's limited mission designations continued to have a segregative effect on student choice.[264] As a result, the Eleventh Circuit remanded the case to the trial court to determine whether the mission assignments do indeed have a segregative effect and, if so, whether there are sound policies that would reduce or eliminate the segregative effects of those practices.[265]

The plaintiffs also claimed that Auburn University's control of a disproportionate share of land grant funding was a vestige of Alabama's discriminatory system that continued to have segregative effect.[266] The Eleventh Circuit observed that the district court had found that the disproportionate allocation of land grant funding was the result of discriminatory practices, but even if discrimination had not been involved, Alabama would probably have chosen to place the funding under the control of a single institution, and that institution, in all likelihood, would have been Auburn.[267]

The Eleventh Circuit reversed this finding because it disagreed with the trial court's analysis of causation.[268] The Eleventh Circuit found that "it simply does not logically follow that the vestige of segregation about which plaintiffs complain would have occurred notwithstanding the discriminatory state actions."[269] Consequently, the Eleventh Circuit remanded this issue with instructions that the trial court consider whether the current funding allocation has a continuing segregative effect.[270] If such a finding is made, the trial court will be obligated to determine whether the segregative effects can be remedied with sound educational practices.[271]

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[262] *Id.* at 1543.
[263] *Id.* at 1544.
[264] *Id.*
[265] *Knight*, 14 F.3d at 1546.
[266] *Id.* at 1547.
[267] *Id.* at 1549.
[268] *Id.* at 1549, 1551.
[269] *Id.* at 1550.
[270] *Knight*, 14 F.3d at 1551.
[271] *Id.*

The plaintiffs also claimed that climates of racial hostility existed on the campuses of Alabama's historically white colleges.[272]The Eleventh Circuit noted that the trial court found no evidence that any institution had a policy or practice of maintaining a racially inhospitable climate.[273] This ruling was affirmed by the Eleventh Circuit.[274]

Finally, in what was likely the most significant ruling on appeal, the Eleventh Circuit vacated and remanded the trial court's ruling on the issue of curricular content.[275] During the trial, the plaintiffs argued that African-American thought, culture and history were not adequately represented in the curricula of the white institutions.[276] They claimed that this deficiency was traceable to the era of de jure segregation and that it continued to have a segregative effect.[277] The trial court had found that curricular content was a matter protected by the principle of academic freedom which was best left to the discretion of the institutions.[278]

When the Eleventh Circuit addressed this issue, it found that some deference was owed to academic institutions to determine what would be taught, but academic freedom does not constitute an absolute bar to judicial intervention when a violation of a constitutional right is at stake.[279] Thus, the trial court's finding was reversed and remanded for reconsideration in light of the Eleventh Circuit's decision.[280] The trial court was specifically directed to:

> [D]etermine whether the curricula at the different HWIs [(Historically White Institutions)] are indeed deficient in the degree to which they incorporate black thought, culture, and history. The court should then proceed to determine whether that marginalization, if any, is traceable to Alabama's past regime of segregation and discrimination and, if so, whether, by itself or in combination with other vestiges of segregation, it has continuing segregative effects on student choice. Finally, if the court concludes that any identified vestigial deficiencies indeed have such an effect, it should evaluate the full

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[272] *Id.* at 1553.

[273] *Id.*

[274] *Id.* The Eleventh Circuit held that the district court's finding that the white institutions were doing all they could do to combat racial hostility was not clearly erroneous. *Id.*

[275] *See Knight*, 14 F.3d at 1553.

[276] *Id.* at 1552.

[277] *Id.*

[278] *Id.*

[279] *Id.* at 1552–53.

[280] *See Knight*, 14 F.3d at 1553.

> range of possible alternative remedies to determine whether any alternative is practicable and educationally sound.[281]

What distinguishes *Knight* from the earlier cases is the plaintiffs' innovative approach to articulating their claims and presenting their evidence. The *Knight* plaintiffs viewed the situation in Alabama not simply in terms of racial balance in the student population. Rather, they emphasized administration and faculty composition, infrastructure disparities and curricular content. The detailed presentation of the longstanding and deeply rooted history of racial subordination enabled the court to link century-old events to the current state of education in Alabama. The plaintiffs demonstrated how these events combined to produce gross disparities in the present system. Because of this approach, the plaintiffs established that discriminatory practices were not, as the Supreme Court had found in other contexts, societal discrimination, which is too "amorphous" a basis for imposing liability.[282] Rather, the State's conduct and the resulting injuries were sufficiently immediate and palpable to justify the far-reaching remedies that the district court ordered. Every aspect of Alabama's higher education was challenged, including the key areas of curriculum, administration and faculty composition. This strategy struck at the heart of the white-dominated hierarchy that existed within the educational establishment, and it may serve as a model for future desegregation litigation. Unfortunately, this multifaceted approach was not utilized in the case that finally reached the United States Supreme Court.

V. *UNITED STATES V. FORDICE*: THE NEUTRALITY STANDARD REJECTED

In *United States v. Fordice*, the United States Supreme Court finally addressed the obligation of former de jure states to desegregate their institutions of higher education.[283] *Fordice* was filed in 1975, after the State of Mississippi failed for several years to submit an acceptable desegregation plan to HEW.[284] The State operated eight separate institutions, three of which, Alcorn State University, Jackson State University and Mississippi Valley State University, were established prior to *Brown* as separate schools for black students.

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[281] *Id.*

[282] *See* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 276 (1986) (Justice Powell objecting to an assertion of "societal discrimination" as a basis for ordering race-conscious remedies).

[283] 112 S. Ct. 2727, 2732 (1992).

[284] *Id.* at 2732–33.

After years of unsuccessful negotiations, the United States District Court for the Northern District of Mississippi held, in 1987, that Mississippi had not violated its obligation to desegregate its colleges and universities.[285] Rejecting the applicability of the *Green* standard, the trial court reasoned that "the affirmative duty to desegregate does not contemplate either restricting choice or the achievement of any degree of racial balance."[286] The court concluded that the desegregation obligation was satisfied when policies and practices adopted by a state were race-neutral, adopted in good faith and did not contribute to the continued racial identifiability of a particular institution.[287] After protracted deliberation, the United States Court of Appeals for the Fifth Circuit, sitting en banc, agreed with the district court's holding that because universities differ fundamentally from secondary and elementary schools, the *Green* standard did not apply.[288] The Fifth Circuit found that Mississippi had satisfied its obligation to desegregate its prior de jure system by implementing race-neutral policies governing the operation of its schools.[289]

The Fifth Circuit relied upon the holding in *Bazemore v. Friday* to permit the adoption of race-neutral criteria as the standard for determining whether a state had satisfied its desegregation obligation.[290] In *Bazemore*, the United States Supreme Court found that the continued existence of segregated Four-H clubs in North Carolina was the product of voluntary choices made by individual members.[291] Because the continuing segregation was the result of voluntary choices, and the Four-H admissions policy was facially neutral, the Court found that the continued existence of single-race clubs did not violate the Equal Protection Clause of the Fourteenth Amendment.[292]

Extending the *Bazemore* reasoning, the Fifth Circuit, in *Ayers v. Allain*, found that the decision to attend a particular college was a voluntary choice made by an individual student.[293] This distinguished higher education cases from the elementary and high school context

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[285] Ayers v. Allain, 674 F. Supp. 1523, 1564 (N.D. Miss. 1987), *aff'd*, 914 F.2d 676 (5th Cir. 1990) (en banc), *vacated sub nom. and remanded*, United States v. Fordice, 112 S. Ct. 2727 (1992).

[286] *Id.* at 1553.

[287] *See id.* at 1554.

[288] Ayers v. Allain, 914 F.2d 676, 686 (5th Cir. 1990) (en banc), *vacated sub nom. and remanded*, United States v. Fordice, 112 S. Ct. 2727 (1992).

[289] *See Ayers*, 914 F.2d at 692.

[290] *Id.* at 682 (citing 478 U.S. 385, 408 (1986) (White, J., concurring)).

[291] *See* 478 U.S. at 408 (1986) (White, J., concurring). The Court adopted the reasoning of this part of Justice White's concurrence by reference. *Id.* at 387.

[292] *Id.* at 408 (White, J., concurring).

[293] 914 F.2d at 686–87.

where school attendance was mandatory.[294] Applying this reasoning, the court held that continued segregation in Mississippi's public colleges did not violate the Equal Protection Clause, because it was not the result of racially motivated state policies.[295]

When *Fordice* reached the United States Supreme Court, the Court rejected the standard which the Fifth Circuit had applied and held that the implementation of race-neutral policies alone does not satisfy a state's obligation to dismantle formerly segregated systems.[296] The Court also noted that when "policies traceable to the de jure system are still in force and have discriminatory effects, those policies too must be reformed to the extent practicable and consistent with sound educational practices."[297]

Although it declined to embrace the precise contours of *Green*, the Court categorically rejected the application of the neutrality standard of *ASTA* and the freedom of choice premise of *Bazemore*.[298] The Court proceeded to apply its newly formulated standard to Mississippi's actions, in order to determine whether policies adopted during the era of segregation contributed to the current condition of Mississippi's public universities.[299] The Court found that four policies continued to have a segregative effect.[300]

A. *Vestiges of De Jure Discrimination*

Included among the policies that the Court found to have a continuing segregative effect were the differing admission policies used at the eight institutions.[301] The trustees of the university system had adopted an admissions standard which was based entirely on the ACT scores of the high school graduates who applied. The historically white institutions required much higher minimum scores than the black colleges. Meanwhile, in Mississippi, seventy-two percent of the white high school graduates achieved a composite score of fifteen or better while fewer than thirty percent of the black graduates achieved a score of fifteen or better.[302] The standardized test requirement was adopted in 1963 when Mississippi was actively resisting school desegre-

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[294] *See id.*
[295] *Id.* at 692.
[296] *Fordice*, 112 S. Ct. at 2736.
[297] *Id.*
[298] *See id.* at 2737 & n.5.
[299] *Id.* at 2738.
[300] *Id.*
[301] *See Fordice*, 112 S. Ct. at 2738–39.
[302] *Id.* at 2739.

gation. The test's exclusionary effect on black students was known at the time it was implemented.[303] Based on this evidence, the Court found that the differential admission requirements were "remnants of the dual system with a continuing discriminatory effect."[304]

In addition to the differential admission requirements, the Court also found that there was widespread duplication of programs among Mississippi's eight colleges.[305] The Court was also critical of the State's mission classifications.[306] The white schools that served as the flagship institutions of the system were designated as "comprehensive" facilities. They received the lion's share of funding and other resources. None of the three black colleges received the "comprehensive" designation. By comparison, they continued to receive a disproportionately small share of the total funding and resources that Mississippi allocated to higher education.

The Court found that the schools' mission designations combined with admission policies and program duplication perpetuated a segregated system.[307] The Court was also critical of Mississippi's decision to operate eight separate institutions, when it seemed clear that doing so was "wasteful and irrational."[308] Although it did not compel Mississippi to take any actions to ameliorate this inefficiency, the Court indicated that "closure of one or more institutions would decrease the discriminatory effects of the present system."[309]

B. *The Denial of the Equalization Remedy*

Although the United States prevailed in *Fordice*, in reality Jake Ayers and the other private plaintiffs lost.[310] The individual plaintiffs sought an order which would have required upgrading the historically black colleges.[311] What they wanted, in effect, was an equalization remedy reminiscent of the relief sought in the pre-*Brown* cases.

The Supreme Court made it clear, however, that it would not endorse this approach.[312] It found that perpetuating a separate but

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[303] *See id.* at 2738–39.

[304] *Id.* at 2739.

[305] *Id.* at 2740.

[306] *Fordice*, 112 S. Ct. at 2741–42.

[307] *Id.* at 2738.

[308] *See id.* at 2742.

[309] *Id.* at 2742–43.

[310] *See generally* Wendy R. Brown, *The Convergence of Neutrality and Choice: The Limits of the State's Affirmative Duty To Provide Equal Educational Opportunity*, 60 TENN. L. REV. 63 (1992) (criticizing Supreme Court's decontextualized and ahistoric approach to *Fordice*).

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

[312] *See id.*

"more equal" system would not satisfy Mississippi's duty to dismantle its segregated educational system.[313] Although it rejected the private plaintiffs' request to allow the black schools to remain as "publicly financed, exclusively black enclaves by private choice,"[314] the Court seemed to leave the door open for the continued operation of the black schools. At the conclusion of its opinion, the Court indicated that an increase in funding for black schools might be necessary to achieve complete disestablishment of the segregated system, but left that issue for the district court to address on remand.[315] This suggests that the Supreme Court would endorse upgrading black colleges only if doing so would attract white students and operate to eliminate the racial identifiability of the schools.

C. *The Impact of* Fordice *on Publicly-Funded Black Colleges*

The standard announced in *Fordice* leaves the future of publicly-funded black colleges in considerable doubt. The Supreme Court rejected an analytical framework that would have permitted states to comply by adopting race-neutral admission policies, and instead obligated states to do more. The extent of this obligation remains unclear. After *Fordice,* practices which are traceable to a de jure system and perpetuate segregation must be justified or eliminated.

The most visible vestiges of de jure segregation are the black public colleges that were established during the "separate but equal" era. These institutions are traceable to state enforced racial segregation; they contribute to the persistence of segregation to the extent that they attract black students who would otherwise attend white colleges. In fact, in *Geier v. University of Tennessee,* the United States Court of Appeals for the Sixth Circuit found that black public institutions were at the "heart" of the segregated system.[316] It would appear, therefore, that *Fordice* requires the elimination of black colleges, unless there is a sound educational justification for their continued existence.

In other contexts, however, the courts and the federal government have recognized the educational justification for black colleges and have encouraged states to ensure their preservation. Congress enacted legislation which, among other things, provides for direct financial assistance to black colleges.[317] In *Adams v. Richardson,* the United States

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[313] *Id.*

[314] *Id.*

[315] *See id.*

[316] *See* 597 F.2d 1056, 1065 (6th Cir. 1979), *cert. denied,* 444 U.S. 886 (1979).

[317] 20 U.S.C. §§ 1060–1063c (1989 & Supp. 1993).

Court of Appeals for the District of Columbia ordered the United States Department of Health, Education, and Welfare to require states to develop desegregation plans that would preserve black institutions.[318]

Moreover, it is important to note that most of the litigation involving black colleges was brought by supporters seeking to forestall actions which posed a danger to the continued existence of a particular institution. The *ASTA* plaintiffs wanted to preserve Alabama State Teachers College. The *Geier* plaintiffs were seeking to protect and improve Tennessee State University. Similarly, the *Norris* plaintiffs wanted to protect Virginia State College, another publicly-funded black college. Finally, the plaintiffs in *Fordice* were not seeking admission to the University of Mississippi. What they wanted was a remedy which would require Mississippi to upgrade Alcorn State, Jackson State and Mississippi Valley State. Nevertheless, in *Fordice* and other cases, the arguments made by the black plaintiffs have been met with a deaf ear. When they urged the courts to grant a remedy which would enhance the quality of black schools, the courts questioned the sincerity of the plaintiffs' motives and were unwilling or unable to comprehend the concerns of the parties who had the greatest stake in the litigation.

D. *The Department of Education's Reaction to* Fordice

On January 31, 1994, the United States Department of Education issued a "Notice of Application of Supreme Court Decision" in the Federal Register.[319] The notice announced the impact of *Fordice* on the procedures that the Department of Education will follow when it investigates states with a history of operating de jure segregated systems of higher education.[320] The Department of Education found that the *Fordice* decision was consistent with existing Department of Education regulations which require an examination of a broad range of factors to determine whether state policies or practices tend to perpetuate a formerly de jure system of segregation.[321] After noting that *Fordice* ratified the Department's longstanding position that states have an affirmative duty to dismantle their formerly de jure systems, the Department stated, "OCR [the Office for Civil Rights] will apply the standard set out in *Fordice*, requiring the elimination of the vestiges of prior de jure segregation, to all pending Title VI evaluations of state-

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[318] *See* 480 F.2d 1159, 1165 (D.C. Cir. 1973).

[319] Notice of Application of Supreme Court Decision, 59 Fed. Reg. 4271 (1994).

[320] *See id.* at 4272.

[321] *See id.* (citing 34 C.F.R. § 100 (1993)).

wide higher education systems with OCR-accepted desegregation plans that have expired."[322]

Significantly, the Department re-affirmed its commitment to preserving black colleges; a commitment that it had established in the wake of the *Adams* litigation. The notice provides that:

> States may not place unfair burdens upon black students and faculty in the desegregation process. Moreover, the Department's "Revised Criteria" recognize that State systems of higher education may be required, in order to overcome the effects of past discrimination, to strengthen and enhance traditionally or historically black institutions. The Department will strictly scrutinize State proposals to close or merge traditionally or historically black institutions, and any other actions that might impose undue burdens on black students, faculty, or administrators or diminish the unique roles of those institutions.[323]

This interpretation, which was issued by the federal agency which has primary responsibility for the enforcement of Title VI of the Civil Rights Act, has profound implications for the continued existence of publicly-funded black colleges. It ratifies an earlier federal commitment to the preservation of black colleges and implicitly acknowledges the importance of these institutions in providing educational opportunities to black students. The Department of Education's position is consistent with the views of supporters of black colleges and rejects the notion that the burden of desegregation must be borne by black institutions.

VI. The Educational Justification for Black Colleges

Supporters of black colleges believe that these institutions possess "qualities which are incapable of objective measurement" and provide a valuable educational experience to black students.[324] Unlike white colleges, black colleges have never engaged in race-exclusive admission practices. They provide, among other things, nurturing environments that are free from the racial tension that is so prevalent on many campuses in the United States. Black schools afford opportunities to serve in leadership capacities that are limited at white colleges.

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[322] *Id.*

[323] *Id.*

[324] Sweatt v. Painter, 339 U.S. 629, 634 (1950).

These institutions have a long tradition of excellence which is grounded in the civil rights movement. Years before the civil rights struggle became the mass movement of the 1960s, lawyers at Howard University developed and implemented the legal strategy to combat segregation which ultimately resulted in the Supreme Court victories of the 1940s and 1950s.[325] An important element of this strategy involved training and developing a generation of black lawyers who served as leaders in the effort to secure the constitutional rights of black Americans. During the 1930s and 1940s, Howard University law students were inculcated with a special sense of mission that enabled them to accomplish the enormous task that they confronted as lawyers. Under the leadership of Charles Houston and others, this vision became an integral component of the legal training at Howard. A generation later, students at black colleges provided the leadership for the protest marches, sit-ins and voter registration drives of the 1960s.[326] These traditions survive at the black colleges, which continue to produce the majority of black leaders.[327]

Perhaps most importantly, African-American culture and accomplishment are essential ingredients in the curriculum at black colleges. These attributes cannot be replicated at white universities where black students are marginalized and the program of study ignores the contributions of African-Americans to art, literature and the sciences.

The paradox of the arguments made in favor of black colleges is that they seem in some ways to be the same as claims that were made by defenders of segregation when *Brown* was argued. They could be

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[325] *See generally* Leland Ware, *A Difference In Emphasis: Charles Houston's Transformation of Legal Education*, 32 HOWARD L.J. 479 (1989) (discussing contributions of Howard University School of Law to the Civil Rights Movement).

[326] *See generally* TAYLOR BRANCH, PARTING THE WATERS: AMERICA IN THE KING YEARS, 1953–1963 (1988); DAVID J. GARROW, BEARING THE CROSS: MARTIN LUTHER KING, JR., AND THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE (1986).

[327] In a recent article reflecting sentiments within the black community, two commentators expressed grave concerns about the survival of black colleges. *See* Jammie Briggs & Lori S. Robinson, *Black Colleges Under Fire*, EMERGE, Sept. 1993, at 27. With respect to the continuing need for black colleges, the authors pointed out that:

> While [historically black colleges and universities (HBCUs)] enroll less than 18 percent of the 1.3 million blacks attending college, they award 34 percent of the baccalaureate degrees. Black colleges were the undergraduate source for nearly 50 percent of the country's black Ph.D.s from 1986–1992, according to the United Negro College Fund. The National Urban League stated in one of its "State of Black America" reports that HBCUs produce 70 percent of the black elected officials, 80 percent of the black lawyers and judges, and 85 percent of the black doctors. These numbers show that black colleges are just as vital now as they were when blacks were barred from white schools.

Id.

construed as accepting the *Plessy* rationale that separate but equal schools for black students would be preferable, or at least as good as receiving an education in an integrated environment. These arguments may seem to be at odds with the integrationist principle of *Brown*, but the plaintiffs in *Fordice* were not seeking a return to segregation. What they desired was something fundamentally different—the preservation of black institutions.

The *Brown* litigation aimed at eliminating the relegation of students to a separate and under-funded system of segregated institutions. Institutions established during the era of segregation managed to educate thousands of black students, even with the considerable constraints imposed by limited resources. The success of these colleges is a testament to their capacity to prevail against tremendous odds. The elimination of de jure segregation does not mean that these institutions are no longer needed.

Despite the fact that hundreds of white institutions are eager to increase their minority enrollment, a rapidly increasing portion of the pool of college-bound African-American students are opting to attend black colleges.[328] One reason for this decision is the perception that black colleges have a firmly established track record of successfully educating black students. There is a profound dissonance in the way these institutions are viewed by African-Americans and the way they are perceived by other groups. Much of the abundant literature on black colleges focuses on objective features: the number of professors who possess Ph.D.s, the number of volumes in the library, the size and condition of the physical plant, and the average test scores of entering freshmen. In one relatively recent article, the author examined, in painstaking detail, the history of publicly-funded black colleges.[329] After an exhaustive examination of the data, the author concluded that black colleges were inferior to white colleges with respect to funding, the availability of academic programs, the quality of instruction, the research facilities and virtually every other objective measure. The author's intent was to demonstrate that former de jure states were still operating separate and unequal systems of higher education. The author's conclusion—that black colleges are neglected and grossly under-funded—is a fact that no one can seriously dispute. This neglect and under-funding has been demonstrated time and time again, be-

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[328] In 1980 there were 185,780 black students enrolled in black colleges. By 1991 that number had increased to 213,904. This is occurring at a time when enrollment rates at white colleges are declining. *On the Superiority of Black Colleges*, 1 J. BLACKS IN HIGHER EDUC. 60, 65 (1993).

[329] *See* Kujovich, *supra* note 14.

ginning with the NAACP's equalization litigation in the 1930s. The question which has not been adequately explored by researchers is how these neglected and grossly under-funded institutions were able to perform so well for so long under such adverse conditions. One wonders what more impressive results are likely to be produced with adequate resources.

State governments, university administrators and other educational policy makers are understandably confused by the conflicting signals they are receiving from the courts and from federal agencies. On the one hand, courts order them to eliminate all vestiges of discrimination. On the other, supporters of black colleges demand the preservation and enhancement of black schools.

It is, of course, difficult to raise minority enrollments at white colleges when a substantial number of minority candidates are electing to attend black colleges. From a policy perspective, states would be better served by taking actions to increase the pool of minority college students. This could be accomplished by creating programs that would improve the preparation minority students receive in elementary and high schools. College is the continuation of a long-term educational process, where it is difficult to remedy problems that have developed at earlier stages. The focus should be on elementary and high schools in urban areas, where the vast majority of black students attend school, and where the quality of educational services is most lacking. The economic disparities between urban and suburban school districts are at the heart of the nation's failure to educate minority children.[330]

To the extent that inner-city children are able to overcome the inadequacies of urban schools, black colleges may be one of the best environments in which to make the transition from the isolation of the inner-cities to careers in a larger society. All educational policy-making should proceed from the premise that the vast majority of black children are being educated in poor, isolated and hyper-segregated communities. The residents of these communities often dress differently, speak a dialect other than Anglo-American English and have different cultural norms. Poverty and violence are part of the landscape in these areas, but what policy-makers fail to recognize is that this pool of students includes thousands of potential professionals and entrepreneurs who merely lack adequate training. Black colleges have trained generations of African-American leaders who emerged from similar

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[330] *See generally* JONATHAN KOZOL, SAVAGE INEQUALITIES: CHILDREN IN AMERICA'S SCHOOLS (1991); SHADES OF *BROWN*: NEW PERSPECTIVES ON SCHOOL DESEGREGATION (Derrick Bell ed., 1980) (discussing the difficulties of educating minority children).

backgrounds. These institutions are a precious and irreplaceable asset which should not be sacrificed to promote a superficial form of desegregation which measures success solely by the percentage of black students enrolled in white colleges. This will never substitute for true educational parity.

VII. Conclusion

Shortly after *Brown* was decided, W.E.B. DuBois sounded a somber note of caution:

> [In racially] mixed schools, [black children will] suffer for years from southern white teachers and white hoodlums who sit beside them and under school authorities from janitors to superintendents who hate and despise them . . . . The best Negro teachers will largely go because they will not and cannot teach what many white folk will long want taught. Much teaching of Negro history will leave the school and with it that brave story of Negro resistance.[331]

The fact that what DuBois anticipated came to pass should not be a complete surprise. The main failure of school desegregation efforts was that federal courts conceptualized equality exclusively in terms of racial balance within educational institutions. Federal judges presumed that demands for an end to racial discrimination were prompted by the desire of African-Americans to assimilate into the majority's culture. By the 1960s, however, black activists recognized the flaws in this assumption and began to encourage African-Americans to develop an appreciation for the unique contributions of their own culture.

This goal has not yet been accomplished. The current approach to education fails to acknowledge the actual basis of American culture. It is not entirely the product of European antecedents. In reality, it reflects infusions from the various groups that have combined to create that which is truly "American." For example, to the extent that there is a uniquely American form of music, it consists of jazz, rhythm and blues, and the various adaptions made by white musicians to music originally developed by black artists. Similarly, numerous inflections of American speech echo the rhythms of the African-American idiom. There are many other examples, but the point is that the accomplish-

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[331] W.E.B. DuBois, *Two Hundred Years of Segregated Schools*, Jewish Life Anthology 1946–1956, at 201–06 (1956), *reprinted in* Philip S. Foner, W.E.B. DuBois Speaks: Speeches and Addresses 283 (1970).

ments of the dominant group within the population have been emphasized, while the considerable contributions of people of color have been consistently discounted.

What is missing is an educational system which acknowledges the critical role of black Americans and other people of color in the development of American culture. An unstated yet unmistakable assumption of white superiority is being communicated to both black students and white students in "integrated" schools. The stigma that results is no different from the harm that the Supreme Court found so injurious in *Brown*. What is needed within the educational establishment is a redefinition of American culture: one that celebrates all those important aspects that have been studiously ignored for so many years. There may come a time when white institutions become fully integrated in terms of curriculum, equality and educational perspective. But even if that occurs, there will still be a justification for the continued existence of black colleges.

The dilemma of the cultural relationships between white and black Americans was captured by playwright August Wilson, who, when asked why he demanded a black director for the film version of his Pulitzer Prize winning play *Fences*, stated the following:

> As Americans of various races, we share a broad cultural ground, a commonality of society that links its diverse elements into a cohesive whole that can be defined as "American."
>
> We share certain mythologies. A history. We share political and economic systems and a rapidly developing, if suspect, ethos. Within these commonalities are specifics. Specific ideas and attitudes that are not shared on the common cultural ground. These remain the property and possession of the people who develop them, and on that "field of manners and rituals of intercourse" (to use James Baldwin's eloquent phrase) lives are played out.
>
> At the point where they intercept and link to the broad commonality of American culture, they influence how that culture is shared and to what purpose.
>
> White American society is made up of various European ethnic groups which share a common history and sensibility. Black Americans are a racial group which do not share the same sensibilities. The specifics of our cultural history are very much different.
>
> We are an African people who have been here since the

> early 17th century. We have a different way of responding to the world. We have different ideas about religion, different manners of social intercourse. We have different ideas about style, about language. We have different esthetics.
>
> Someone who does not share the specifics of a culture remains an outsider, no matter how astute a student or how well-meaning their intentions.[332]

When educators begin to value the differences to which August Wilson referred, we may begin to approach an answer to the problem of educating black students.

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[332] August Wilson, *I Want a Black Director*, N.Y. TIMES, Sept. 26, 1990, at A25.