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Michael A. Olivas

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Michael A. Olivas†

INTRODUCTION

Elementary and secondary schools are often thought of as defining place. The "neighborhood school" is a fixture of U.S. home buying and educational policymaking, deeply etched into tradition and realtors' steering practices.[1] In a sense, the iconic *Brown v. Board of Education* decision was about place—whether or not Linda Brown and her black classmates could attend a neighborhood school for white children, or whether they would be consigned to geographically inconvenient schoolhouses for black children, physically segregated and stigmatized as inferior.[2] Few persons, however, consider the relationship between higher education institutions and place.

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† William B. Bates Distinguished Chair in Law, University of Houston Law Center, and Director, Institute for Higher Education Law and Governance. I appreciate the assistance of Eric Munoz, Chenglin Liu, and Deborah Jones in this research.

1 *See* Karl E. Taeuber, *Demographic Perspectives on Housing and School Segregation*, 21 WAYNE L. REV. 833, 842–43 (1975) (noting the importance of neighborhood school zones to residential real estate decisions); *see also* James E. Ryan & Michael Heise, *The Political Economy of School Choice*, 111 YALE L.J. 2043, 2093 (2002) (discussing how neighborbood schools reflect the racial composition of the neighborhood).

2 Brown v. Bd. of Educ., 347 U.S. 483, 487–88, 494 (1954); *see* RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 408–09 (1975).

Although *Brown* concerned primary and secondary public education, the road to *Brown* ran through several higher education cases in which black students were denied admission into predominantly white colleges and universities.[3] In these cases, the relevant universities crucially influenced place as states physically excluded blacks from these white public spaces.[4] In response, states erected black colleges,[5] started black law schools,[6] paid for scholarships for blacks to attend colleges or professional schools in other states,[7] or required blacks to sit, eat, and study in designated segregated areas within the university's facilities.[8] A stunning photograph shows G.W. McLaurin, the first black student to attend class at the University of Oklahoma, sitting in an anteroom adjacent to the regular classroom, separated from his white classmates.[9] McLaurin was further assigned "a special desk in the library and a special room in the student union building [to] eat his meals."[10] Clearly, space counts in college, and always has.

I
DESEGREGATION REMEDIES AS CONTROLS OVER PLACE

The original *Adams v. Richards* litigation, which required college desegregation, initiated widespread changes in universities' admissions policies that influenced and continues to influence the racial dynamics of universities.[11] Several southern states acted slowly to implement the holding, particularly addressing white institutions' need to admit black students even though the rise of standardized testing meant that few black students could present satisfactory test scores.[12] Black colleges also had to encourage the enrollment of white students

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3 *See, e.g.*, Sweatt v. Painter, 339 U.S. 629 (1950) (requiring the admission of a black law student to the state law school); State *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938) (same).

4 *See* Gil Kujovich, *Equal Opportunity in Higher Education and the Black Public College: The Era of Separate But Equal*, 72 MINN. L. REV. 29, 30–31 (1987) (describing the history of public black colleges).

5 *See Gaines*, 305 U.S. at 342.

6 *See generally* J. CLAY SMITH, JR., EMANCIPATION: THE MAKING OF THE BLACK LAWYER, 1844–1944, at 33–65 (1993) (tracing the development of black law schools).

7 *See Gaines*, 305 U.S. at 342–43 (quoting Missouri law authorizing the State to pay fees for blacks to take courses at universities in adjacent states rather than allowing them to attend public colleges in Missouri). These "scholarships" were one of the truly pernicious means that white educators used to exclude blacks from attending colleges in their own states of residence.

8 McLaurin v. Okla. State Regents for Higher Educ., 339 U.S. 637, 640 (1950).

9 MICHAEL A. OLIVAS, THE LAW AND HIGHER EDUCATION: CASES AND MATERIALS ON COLLEGES IN COURT 982 (2d ed. 1997).

10 *See id.* (quoting *Negro Attends First Class at University of Oklahoma*, N.Y. TIMES, Oct. 14, 1948).

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

12 *See* Groves v. Ala. State Bd. of Educ., 776 F. Supp. 1518, 1532 (M.D. Ala. 1991).

despite white students not wanting to attend black colleges where historical resource allocations did not make the professional programs of these institutions attractive.[13] When the Supreme Court held that Mississippi had to eliminate the vestige of its dual system of public higher education in *United States v. Fordice*, the issues of remedies played out with dramatic effect in terms of place and location.[14] The Court ordered:

> If the State perpetuates policies and practices traceable to its prior system that continue to have segregative effects—whether by influencing student enrollment decisions or by fostering segregation in other facets of the university system—and such policies are without sound educational justification and can be practicably eliminated, the State has not satisfied its burden of proving that it has dismantled its prior system. Such policies run afoul of the Equal Protection Clause, even though the State has abolished the legal requirements that whites and blacks be educated separately and has established racially neutral policies not animated by a discriminatory purpose.[15]

The district court in the case attempted to apply this standard in several respects: admissions policies, program allocations, and institutional mergers.[16]

A. Admissions Policies

Although the relationship between higher education admissions and desegregation remains one area where extensive litigation and analysis continues, *Fordice*, the Supreme Court case preceding the remedial proceedings in *Ayers*, illustrates the intersection of admissions policies, race, and place. The *Fordice* case is important both for its

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13 *See generally* Michael A. Olivas, *Constitutional Criteria: The Social Science and Common Law of College Admissions Decisions in Higher Education*, 68 U. COLO. L. REV. 1065 (1997) [hereinafter Olivas, *Admissions Decisions*] (discussing various social factors influencing choice of college or professional school); Michael A. Olivas, *Higher Education Admissions and the Search for One Important Thing*, 21 U. ARK. LITTLE ROCK L. REV. 993 (1999) [hereinafter Olivas, *Higher Education Admissions*] (same). When examining efforts to fashion remedies in segregated systems, it remains important to remember that the problems of black and white colleges of admitting diverse students are not symmetrical; whites have always been welcome to attend black institutions, even if the reverse has not been true. *See* Alex M. Johnson, Jr., *Bid Whist, Tonk, and* United States v. Fordice*: Why Integrationism Fails African-Americans Again*, 81 CAL. L. REV. 1401, 1417 (1993) (explaining that society views white colleges—but not black colleges—as an opportunity for "advancement, wealth and power" (citation omitted)). *See generally* Drew S. Days, III, Brown *Blues: Rethinking the Integrative Ideal*, 34 WM. & MARY L. REV. 53, 68 (1992) (discussing the disproportionate burden that blacks and black institutions have borne in desegregation of education). I use the term HBCU to refer to historically black colleges and universities.

14 *See* 505 U.S. 717, 743 (1992), *remanded to* 970 F.2d 1378 (5th Cir. 1992), *remanded to* 879 F. Supp. 1419 (N.D. Miss. 1995).

15 *Id.* at 731–32.

16 *See* Ayers v. Fordice, 879 F. Supp. 1419 (N.D. Miss. 1995), *aff'd* 99 F.3d 1136 (5th Cir. 1996) (table), *aff'd in part, rev'd in part* 111 F.3d 1183 (5th Cir. 1997) (en banc).

status as a belated, post-*Brown* implementation ruling addressing the obligations of white and black institutions of higher education, and for its value in addressing race in the context of higher education admissions. Before remanding the case, the Supreme Court had looked carefully at schools' reliance upon test scores and the racial consequences of differential test score cutoffs.[17] *Fordice*, therefore, is a direct successor to *Regents of the University of California v. Bakke*, the first Supreme Court case brought by a white plaintiff to address race in higher education admissions, and was the only college admissions case in the twenty-five years between *Bakke* and *Gratz v. Bollinger* and *Grutter v. Bollinger*.[18] In *Fordice*, the Supreme Court determined that the reliance upon standardized scores constituted a vestige of de jure segregation that continued to have segregative effects.[19]

Fordice logically extended *Brown v. Board of Education*[20] to address Mississippi's 1963 imposition of an ACT requirement.[21] Mississippi did not employ standardized admissions tests until 1963, after James Meredith's widely publicized denial of admission to the University of Mississippi (UM) in 1962.[22] By using the ACT as an entrance standard, knowing that white students in Mississippi achieved significantly higher ACT scores than black students, UM clearly undertook to provide groundcover for its failure to recruit blacks or admit them into undergraduate programs.[23] After the *Meredith* Court ordered UM to admit Meredith, UM and several other state institutions began to require ACT test scores of fifteen, a number between the state's median black ACT score of seven and the median white score of eighteen.[24] The *Meredith* decision also struck down UM's requirement of recommendation letters from UM alumni, which virtually guaranteed that no black students could present a complete admissions portfolio.[25]

In *Fordice*, the Supreme Court was particularly skeptical of the ACT test requirement because of the segregative history of its use in Mississippi, because the ACT was used as a sole criterion in defiance of the ACT test maker's recommendations, and because even institutions with similar academic missions and state-designated equivalence

17 *See Fordice*, 505 U.S. at 735–38.

18 Grutter v. Bollinger, 539 U.S. 306 (2003); Gratz v. Bollinger, 539 U.S. 244 (2003); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

19 *See Fordice*, 505 U.S. at 737–38.

20 For an excellent study of the important cases of *Brown I* and *Brown II*, including the postsecondary issues, see COTTROL ET AL., *Brown v. Board of Education*: Case, Culture, and the Constitution 119–207 (2003).

21 *See Fordice*, 505 U.S. at 734 (reviewing Mississippi's history and practice of using test scores in admissions).

22 *See* Meredith v. Fair, 305 F.2d 343 (1962).

23 *See Fordice*, 505 U.S. at 734.

24 *See id.* at 733–35.

25 *See Meredith*, 305 F.2d at 352–53.

weighted ACT scores differently.[26] For instance, Mississippi University for Women used an automatic cutoff ACT admissions score of eighteen, but the historically black Alcorn State and Mississippi Valley State Universities—also state institutions—required a minimum ACT score of thirteen.[27] Thus, "[t]hose scoring 13 or 14, with some exceptions, are [generally] excluded from the five historically white universities and if they want a higher education must go to one of the historically black institutions or attend junior college with the hope of transferring to a historically white institution."[28] Justice White emphasized that the lower courts did not articulate an educational justification for disparities in ACT entrance requirements or suggest whether such requirements could practicably be eliminated.[29] Justice White further noted that the ACT requirements were traceable to a discriminatory purpose that "seemingly continues to have segregative effects[;] the State has so far failed to show that the 'ACT-only' admissions standard is not susceptible to elimination without eroding sound educational policy."[30]

The *Fordice* Court remanded the case for reconsideration in light of Mississippi's affirmative duty to dismantle its formerly de jure segregated system of higher education.[31] Even after the district court reviewed Mississippi's plan for remediation, historically white institutions maintained their ACT requirement of fifteen; the historically black institutions, however, lowered the bar from a score of thirteen to an eleven, with provisions to admit students in exceptional cases with scores as low as nine.[32] On remand, using language from *Fordice* that struck down actions that would channel students into racially identifiable institutions by their race, the district court determined that differential ACT admission standards would resegregate students by their race.[33] The court then ordered that UM adopt Mississippi's plan, which required higher scores overall, considered students' grade point averages, implemented a community college system with some open admissions with respect to test scores, and offered a summer preparatory program for remediation purposes.[34] The Fifth Circuit affirmed these remedial provisions upon appeal by

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26 *See Fordice*, 505 U.S. at 736–37.

27 *Id.* at 734.

28 *Id.* at 734–35.

29 *Id.* at 735.

30 *Id.* at 738.

31 *See id.* at 743; Ayers v. Fordice, 879 F. Supp. 1419 (N.D. Miss. 1995), *aff'd*, 99 F.3d 1136 (5th Cir. 1996) (table), *aff'd in part, rev'd in part*, 111 F.3d 1183 (5th Cir. 1997) (en banc).

32 *Ayers*, 879 F. Supp. at 1431.

33 *See id.* at 1434.

34 *See id.* at 1477–79, 1482 (discussing various proposed admissions standards and preparatory programs).

the black plaintiffs, but reversed the district court's holding that the use of ACT cutoff scores to award scholarships had no discriminatory purpose, finding such cutoffs traceable to de jure segregation.[35]

B. Program Allocations and Institutional Mergers

In upholding the settlement agreement eventually reached between the private parties, who were supported by the United States in trying to compel desegregation of Mississippi's higher education system and the State of Mississippi, the circuit court reviewed the agreed-upon program duplication efforts and program approval policies.[36] At the operational level, the issue was the extent to which historically black institutions would be permitted to develop high-demand and desirable specializations, such as postbaccalaureate professional schools—engineering, business, law, pharmacy—and doctoral programs.[37] Thus, Jackson State University was awarded attractive programs in allied health professions, engineering, social work, urban planning, and business.[38] For Alcorn State University, the legislature ordered and the court approved the establishment of an MBA graduate program.[39]

These new programs would be prestigious curricular additions and might attract non-black students, whereas whites would not otherwise likely attend black colleges if they had alternative opportunities in non-black colleges.[40] Although there had been a study to determine whether or not a law school or pharmacy school should be established at Jackson State University, state officials determined that existing public college programs in these two prestigious fields were sufficient for Mississippi's needs and purposes.[41] The success of these new programs, of course, depended on adequate funding, and the state agreed to appropriate more than $245 million over seventeen years to fund new programs at the three historically black institutions.[42] The circuit court was impressed by this aggregate amount, characterizing it as "generous,"[43] yet the annual amount divided among several schools and unadjusted for inflation is less than $15 million. Moreover, the state established an endowment for "other-race" marketing and recruitment in the amount of $70 million, to be

35 *See* Ayers v. Fordice, 111 F.3d 1183, 1209 (5th Cir. 1997) (en banc).

36 *See* Ayers v. Thompson, 358 F. 3d 356, 361 (5th Cir. 2004), *cert. denied*, 125 S. Ct. 372 (2004). The denial of certiorari occurred after this article went to print.

37 *See id.* at 364.

38 *Id.* at 363.

39 *Id.* at 364.

40 *See Fordice*, 111 F.3d at 1213–14.

41 *Thompson*, 358 F.3d at 364.

42 *Id.* at 366.

43 *Id.* at 373.

paid over the course of fourteen years, with promised "best efforts" to raise another $35 million from private sources.[44] In the best of worlds, a fully funded $105 million endowment would generate only $4–5 million annually to be split among the three colleges.[45] In response to the testimony that historically black institutions are more able to attract white students where the same programs are not offered at proximate institutions, the court had previously ordered that the State consider merging Delta State University and Mississippi Valley State.[46] The State subsequently determined, however, that such a merger was not efficacious, the Court agreed, and the State added several new academic programs to Mississippi Valley State University instead.[47] The total amount of money for all program allocations, including capital projects, was approximately $500 million over seventeen years.[48] By January 2004, virtually all the technical features of the thirty-year case had been settled, including attorneys' fees, upon the Fifth Circuit's holding that the settlement agreement approved in the district court was valid.[49] The plaintiffs appealed their case to the Supreme Court because they had requested far more than the decree accorded them, but the Court denied certiorari.[50]

Despite the efforts in *Fordice* to address Mississippi's segregated higher education system, the decision has been criticized for its asymmetric result.[51] "*Fordice* fails to mandate equal funding for Mississippi's predominantly or historically black colleges so as to provide African-American students with an educational environment that allows them to rise above their subordinated social status as 'them' and compete with Whites on equal terms within their own black colleges."[52] Given these unequal opportunities, black students receive dissimilar educational experiences at historically black colleges, contrasted with the

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44 *Id.* at 366.

45 *See* Mimi Lord, TIAA-CREF Institute Research Guide, No. 79, Highlights of the NACUBO Endowment Study, at tbl. 8 (Mar. 2004) (showing that, depending upon institutional practice, the annual spending rate from endowments averages between 3.6 percent and 5.3 percent).

46 *See Thompson*, 358 F.3d at 362; Ayers v. Fordice, 111 F.3d 1183 (5th Cir. 1996) (en banc).

47 *Thompson*, 358 F.3d at 362–64.

48 *Id.* at 359.

49 *Id.* at 365–68.

50 *See* Ayers v. Thompson, 125 S. Ct. 372 (U.S. Oct. 18, 2004) (No. 03-10623); Appellant's Petition for Cert., Ayers v. Thompson, 358 F.3d 356 (5th Cir. 2004) (No. 03-10623) (filed May 20, 2004); *Court Denies Latest Appeal in Mississippi Desegregation Case*, BLACK ISSUES IN HIGHER EDUC., Feb. 26, 2004, at 10; Sara Hebel, *Federal Court Upholds Plan to Settle Mississippi Desegregation Case*, CHRON. HIGHER EDUC., Feb. 6, 2004, at A22 (describing how opponents of the settlement agreement believe that the decision 'leaves black students worse off' than before *Fordice*).

51 *See* Johnson, *supra* note 13, at 1468.

52 *Id.*

resources available at Mississippi's predominantly white institutions.[53] *Fordice* also incorrectly assumes that white and black students have similar educational experiences at the same white college.[54] In deciding "that society need only provide whites and African-Americans with one [well-financed,] publicly-financed school system based on the assimilationist model"—even if both sectors were available to members of all races—the court "implicitly rejected the view that true equality can be attained by maintaining predominantly or historically black schools, perhaps out of fear that allowing predominantly or historically black colleges to exist undisturbed would legitimate the existence of all-white schools."[55] This fear would he unfounded if blacks and whites had genuinely free choice to attend predominantly white or predominantly black colleges.[56] Moreover, predominantly white institutions in Mississippi are likely to remain predominantly white, regardless of the result in *Fordice*.[57]

A dozen years after this critique, the result of *Fordice* seems a mixed bag—both sectors will likely remain racially identifiable, allowing black colleges to continue, but with only modestly increased resources. Jackson State clearly benefits and will do so at a higher level with the additional programs and program authority.[58] The infusion of overall resources resulting from *Fordice*, however, is unlikely to substantially alter the trajectories of any of these schools.

II
RACIAL COLLEGE SAGAS AND THE POLITICS OF COLLEGE LOCATION

Novelists suggest that you can never go home again, but for many persons, it is a fact of life that the accident of geography can be a powerful benefit or detriment. If one resides in a benefit-rich environment, the odds of success are immeasurably enhanced, and area residents simply become accustomed to privilege. Its inverse, growing up in a poor area or resource-poor environment can put inhabitants at a clear disadvantage. Metaphors such as being behind at the starting gate, coming from the wrong side of the tracks, digging out of a hole, achieving despite the odds, battling the built-in headwind, swimming against the tide—all of these powerful images invoke the struggle of not being born in a fortunate place, of not being to the manor born, and of having to overcome life's disadvantages. Tomas Rivera

53 *Id.*
54 *Id.*
55 *Id.*
56 *See id.*
57 *Id.*
58 *See* Ayers v. Thompson, 358 F. 3d 356, 363 (5th Cir. 2004).

wrote of the grinding poverty of children and farmworker families in the migrant stream, who were never able to settle into a secure place.[59] Bigger Thomas finds himself unable to extricate himself from the ghetto life into which he is born in *Native Son*.[60]

This notion that place matters is not only a common theme of our poets and novelists, but stock in trade of our most eloquent and accomplished demographers, sociologists, and other scholars. William Julius Williams, for example, has chronicled and measured the serious disadvantages of place and life chances as a result of the devastating effects of poverty and location.[61] Reading the work of Jonathan Kozol situates damaged children in dangerous and hopeless places.[62]

To be sure, people overcome their circumstances every day and escape their fates and low estates. These are the metaphors and life stories that motivate and inspire. But the fact remains that one's place in life is both geographic and poetic, both demographic and folkloric. Much can turn on place and locale.

A. Houston, Texas

Entire states or cities have racial college histories, each with their own ethnic sagas, racial siting decisions, and evolving demographics which turn on place and locale. Consider the college locale decisions of Houston, Texas, a large southern town that grew into a major city in the twentieth century. Houston's first real college, Rice University, was situated in a remote site and was chartered in 1891 as a college for "the instruction of the white inhabitants of the City" that was "to be free and open to all;" this charter provision was interpreted by its trustees to require that no tuition be charged to white students.[63] Seventy-five years later, the University went to court to reconstitute its charter in order to admit nonwhite students and charge tuition.[64] In 1966, a court agreed that the University could do so, reformulating its charter by use of the *cy pres* doctrine, which allows a trust document to be reformulated when its essential attributes are no longer feasible or efficacious.[65]

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59 Tomas Rivera, . . . Y No Se Lo Trago La Tierra/. . . And the Earth Did Not Part (1971); Tomas Rivera: The Complete Works (Julian Olivares ed., 1992).

60 Richard Wright, Native Son (1940).

61 William Julius Wilson, The Truly Disadvantaged: The Inner City, the Underclass, and Public Policy (1987); William Julius Wilson, When Work Disappears: The World of the New Urban Poor (1996).

62 Jonathan Kozol, Death at an Early Age: The Destruction of the Hearts and Minds of Negro Children in the Boston Public Schools (1967); Jonathan Kozol, Rachel and Her Children: Homeless Families in America (1988).

63 *See* Coffee v. William Marsh Rice Univ., 408 S.W.2d 269, 271–72, 282 (Tex. Civ. App. 1966).

64 *See id.* at 274.

65 *See id.* at 285.

In 1931, Houston's school district chartered a junior college that grew into a small private institution open only to whites, until the State of Texas reconstituted the University of Houston (UH) into a public institution in 1963 and began to admit black students.[66] During the 1950s, UH had begun to admit a few Mexican Americans without drawing attention to this practice.[67] The UH Law School, established in 1947, graduated its first Mexican-American student in 1960, its first Asian-American student in 1969, and its first African-American student in 1970.[68] The Law School had been ineligible to join the prestigious Association of American Law Schools until 1966 due to its racially-restrictive practices.[69]

In 1947, Texas established its first public college in Houston as the Texas State University for Negroes (TSUN).[70] The school was created after a black student was rejected from the University of Texas Law School (UTLS) "solely because he [was] a Negro" and successfully challenged the state's law school admissions policies.[71] Heman Marion Sweatt's successful challenge struck down the admissions policy of the State's first public law school, but did not require the State to admit blacks to the school.[72] Rather, the State was required to pro-

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66 *See* AMILCAR SHABAZZ, ADVANCING DEMOCRACY: AFRICAN AMERICANS AND THE STRUGGLE FOR ACCESS AND EQUITY IN HIGHER EDUCATION IN TEXAS 206–07 (2004). The State actually enacted legislation making UH a state institution in 1961, but allowed UH a two year phase-in period. *See id.* at 207.

67 Interview with Edward C. Apodaca, Assistant Vice Chancellor for Enrollment Management, University of Houston (Sept. 2004). Amilcar Shabazz's authoritative work on the desegregation of Texas higher education refers briefly to the interaction between Mexican Americans and African Americans on school desegregation issues. *See* SHABAZZ, *supra* note 66, at 58, 240 n.75. For example, he notes that Thurgood Marshall interacted with George I. Sanchez, who had been involved in *Mendez v. Westminster School District*, 64 F. Supp. 544 (S.D. Cal. 1946), a successful 1946 desegregation case brought by Mexican Americans in California. *See* SHABAZZ, *supra* note 66, at 58, 240 n.75. Shabazz notes that this connection is "heretofore unexamined," but indeed this is not new ground. *See id.* at 240 n.75; *see also* Juan F. Perea, *The Black/White Binary Paradigm of Race: The "Normal Science" of American Racial Thought*, 85 CAL. L. REV. 1213, 1242–50 (1997) (noting the importance of Mexican American desegregation efforts to later segregation cases); Vicki L. Ruiz, *"We Always Tell Our Children They Are Americans":* Méndez v. Westminster *and the California Road to* Brown v. Board of Education, C. BOARD REV., Fall 2003, at 26 (stating that Thurgood Marshall filed an amicus brief on behalf of the NAACP in *Mendez*). It is also clear that civil rights lawyers took note of *Mendez* on the road to *Brown*. *See, e.g.*, Constance Baker Motley, *The Historical Setting of* Brown *and Its Impact on the Supreme Court's Decision*, 61 FORDHAM L. REV. 9, 13–14 (1992) (noting how the *Mendez* decision inspired the "social science" approach used to attack segregation in *Brown*).

68 LEAH GROSS, UNIVERSITY OF HOUSTON LAW CENTER, A HISTORY, 1947–1997 (1997).

69 John Mixon, History of Race Discrimination at University of Houston Law Center (2003) (on file with author) (describing UH Law Center's racial admissions practices from 1952–2003).

70 *See* TEXAS SOUTHERN UNIVERSITY, TSU HISTORY (citing TSUN as the "first state-supported" college in Houston), *at* http://www.tsu.edu/about/history (last visited Nov. 22, 2004).

71 Sweatt v. Painter, 339 U.S. 629, 631 (1950); SHABAZZ, *supra* note 66, at 5.

72 *Sweatt*, 339 U.S. at 632.

vide a "substantially equal" law school open to blacks and therefore established TSUN, an evening law school for blacks in the state capital.[73] Its programs so lacked in quality and resources, however, that the Supreme Court eventually found that there was not "substantial equality in the educational opportunities offered white and Negro law students by the state," and ordered UTLS to admit black students.[74] In the wake of *Sweatt v. Painter*, several black students sought admission to UTLS programs outside of the law school, and Texas's Attorney General opined that *Sweatt* was applicable to all other degree programs not offered at comparable schools.[75] UTLS's first black student to graduate enrolled in 1950 and graduated with a degree in architecture.[76]

TSUN's law school eventually moved 120 miles from the state capital to Houston, where it became a historically black law school. It exists to this day, with approximately one-quarter of its enrollment consisting of Mexican Americans.[77] For a number of years, even as the city grew, TSUN was the only public university in Houston. Ironically, it shared a city street and border with the private white institution established originally by the Houston school district.[78] The district also maintained a K–14 junior college until the 1980s, when it became a local community college with its own publicly elected trustees and independent tax base.[79] By the 1970s, Houston's public uni-

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73 *Id.*

74 *See id.* at 632–36 (noting the vast disparity between UT Law School and TSUN in terms of faculty numbers and quality, library resources, scholarship funds, extracurricular opportunities, reputation, prestige, and tradition).

75 *See* SHABAZZ, *supra* note 66, at 109–10.

76 *Id.* at 110–13.

77 *See* ABA/LSAC OFFICIAL GUIDE TO ABA-APPROVED LAW SCHOOLS 696 (2004); TEXAS SOUTHERN UNIVERSITY, *supra* note 70.

78 *See supra* note 70. The two institutions share Scott Street.

79 *See* HOUSTON COMMUNITY COLLEGE SYSTEM, HISTORY AND FACTS (describing the history of Houston's community colleges), *at* http://hccs.edu/bond/facts.html (last visited Nov. 22, 2004). For studies of the Houston Independent School District (HISD), which gave birth to the Houston College for Negroes and later became Texas Southern University (1935), the Houston Junior College, which later became the University of Houston (1927), and the Houston Community College System (1989), see WILLIAM HENRY KELLAR, MAKE HASTE SLOWLY: MODERATES, CONSERVATIVES AND SCHOOL DESEGREGATION IN HOUSTON (1999), which describes the origins of Houston's segregated school system, and the city's post-*Brown* desegregation of the Houston Independent School District, and GUADALUPE SAN MIGUEL, JR., BROWN, NOT WHITE: SCHOOL INTEGRATION AND THE CHICANO MOVEMENT IN HOUSTON (2001), which examines the Houston school district's effort to circumvent desegregation by classifying Mexican Americans as "whites." For a self-serving narrative of reform in HISD, see DONALD R. MCADAMS, FIGHTING TO SAVE OUR URBAN SCHOOLS . . . AND WINNING! LESSONS FROM HOUSTON (2000), which discusses an ethnographic study of a Houston inner-city high school, and explores how Anglo educators' concept of "care" affects minority students. The "win" in Houston has been quite contested, especially in light of recent controversies over dropout data being falsified and how "zero tolerance" policies evolved. *See* Rachel Graves, *Backlash Growing Over Zero Tolerance*, HOUSTON CHRON., Apr. 18, 2004, at 1A (reviewing concerns with zero-tolerance discipline

versity had eclipsed the historically black TSUN in size and prestige; it began to add branch campuses in the heart of downtown, in the white suburbs where NASA was built, and in a rural area some distance from the city. These four distinct campuses developed differentiated missions, and the entire system grew to over 50,000 students. The "main," or "central campus" offers doctoral programs, intercollegiate athletic programs, and professional programs, such as law, architecture, optometry, and pharmacology. The upper-division campus near NASA provides for the many students sent from local two-year colleges; an open-door downtown college offers baccalaureate programs and became a predominantly minority student body; and the rural campus shares its location with a rural community college. In addition to the dozens of smaller private colleges and larger public two-year institutions in Houston, the system added suburban learning center sites in growing parts outside of city in the 1990s. These sites are located more than twenty-five miles from the downtown and main campus hubs. These remote higher education facilities do not have their own faculties, but are intended to develop into their own campuses as the state attempts to expand and accommodate the non-urban growth areas.[80]

Racial factors similarly influenced Houston's agricultural college character, as the city grew towards the direction of Texas's agricultural college—Texas A&M University. Rather than admit blacks to A&M, Texas established a rural HBCU in 1876, the Agricultural and Mechanical College of Texas for Colored Youth, which was located between the A&M campus and Houston, and was part of the State's separate-but-equal segregated land grant college system.[81] By the year 2000, the re-named Prairie View A&M University was part of Houston's suburban ring, approximately forty miles from the downtown area, on the same road that leads to the state capital.

Houston's rich and complex college history remains dynamic and changing as the city itself ebbs and flows. Houston's population has increased to over 4.3 million people, becoming the nation's fourth-largest city.[82] Immigration and in-migration have created a larger, di-

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policies); Jason Spencer, *Assistant Principal Files Whistle-Blower Suit*, HOUSTON CHRON, Apr. 17, 2004, at 29A (discussing data fraud in HISD dropout records); Jason Spencer, *HISD Focuses on Achievement Gap*, HOUSTON CHRON., May 16, 2004, at 1A (discussing racial isolation in HISD schools).

80 *See* Jim Parsons, *Growth, Collaboration in Store for System*, DAILY COUGAR, Apr. 6, 2004, at 1 (outlining proposed UH campus growth); Jim Parsons, *UHD to Lead System's Northwest Growth*, DAILY COUGAR, Sept. 21, 2004, at 1 (same).

81 *See* GEORGE RUBLE WOOLFOLK, PRAIRIE VIEW: A STUDY IN PUBLIC CONSCIENCE, 1878–1946, at 27–28 (1962).

82 U.S. Census Bureau, 2002 American Community Survey Profile: Population and Housing Profile: Houston City, Texas, *at* http://www.census.gov/acs/www/Products/Profiles/Single/2002/ACS/Narrative/160/NP16000US4835000.htm (last visited Nov. 22,

verse, and international populace. The 2002 Census data revealed that of Houston's population, African Americans comprise twenty-five percent, Mexican Americans and other Latinos forty percent, Asians six percent, and Anglos twenty-nine percent.[83] As a result, the city's largest public institution, which still shares a street border with the now predominantly black and Chicano HBCU, has become a campus with no single racial group in the majority. It will soon be eligible to become a Hispanic Serving Institution, once Hispanics comprise twenty-five percent of its population.[84] The city's major school district enrolls 211,000 students, of whom fewer than ten percent are Anglo, and there are over a dozen neighboring school districts, each becoming larger and more diverse.[85]

Today, Houston's HBCU is open admission and competes for other open admissions students with the University of Houston's Downtown College (formerly the South Texas Junior College); the two campuses are less than two miles apart, one in a prime downtown location, and the HBCU in a deteriorating mixed residential and light industrial area. The HBCU is sandwiched between the campus that eclipsed it when the state transformed the white-by-practice private college in 1963, and the one that duplicated its mission and overlapped its target population in the 1970s when the state created it in the choice downtown service area. After its birth as an institution designed to keep blacks out of the state capital's white public campus, the population's reactions to the HBCU were mixed; historical records show a slow and grudging integration of the city's public dental and medical schools.[86]

Thus, Houston's racial college character was forged from elements of white private colleges and segregated public institutions. Lo-

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2004); U.S. Census Bureau, American Community Survey 2002 Data Profile, Houston, TX PMSA, *at* http://www.census.gov/acs/www/Products/Profiles/Single/2003/ACS/Tabular/385/38500US336233601.htm (last visited Nov. 22, 2004).

83 *Id.*

84 *See* UHS Chancellor Jay Gogue, Prepared Testimony to Texas Legislative Oversight Committee on Higher Education (Jan. 20, 2004) (concerning UHS enrollment data), *at* http://www.uh.edu/admin/president/gogue/pages/012004lchedu.html (last visited Nov. 22, 2004).

85 HOUSTON INDEPENDENT SCHOOL DISTRICT, FACTS AND FIGURES: JANUARY 2004, *available at* http://www.houstonisd.org/vgn/images/portal/cit_7634/22560382004FactFigures.pdf (last visited Nov. 22, 2004). Perhaps the best indication of demographic changes in Houston is the growth of the undocumented population in the city. *See, e.g.*, Jenalia Moreno, *Building a New Market: As They Construct and Sell the American Dream, Companies Eagerly Seek Out Hispanic Immigrants*, HOUSTON CHRON., Apr. 10, 2004, at 1D (describing the growth of lending services for undocumented families); Jenalia Moreno, *To Some Banks, Undocumented Residents an Untapped Market*, HOUSTON CHRON., Apr. 18, 2004, at 2D (same).

86 *See* SHABAZZ, *supra* note 66, at 78–81. Interestingly, the University of Texas Medical Branch in Galveston admitted its first black student in 1949, but "reconstituted" his admission so his degree was actually from the "Texas State University for Negroes Medical Branch"—a non-existent institution. *See id.*

cale and racial identity gave birth to these campuses, aided by the state, creating separate and unequal institutions, building parallel campuses with adjoining borders and service areas, and spending extraordinary legal and political resources to maintain these insular enterprises. An alternative, parallel world, where Rice University was open tuition-free to all inhabitants, or where the state had built the University of Texas and Texas A&M University as integrated institutions in Austin and College Station, and where blacks were not consigned to Texas Southern University or Prairie View A&M University, would look quite different. Likewise, imagine if the University of Houston was a private institution, open to all, or if Houston's first public institution had been integrated, rather than a TSU born of racial necessity, a UH made public to eclipse the neighboring black institution or a UH-Downtown created by the state to further marginalize TSU and compete with its mission.

B. Nashville, Tennessee

The higher education system in Nashville, Tennessee has a similar racial birthright. For many years, only Tennessee State University, a HBCU, provided public higher education in this southern city, while Vanderbilt University thrived as an exclusively white private college.[87] The public flagship University of Tennessee (UT) in Knoxville also grew up white and privileged. In the late 1960s, UT officials cast their eyes on Nashville where many of their alumni moved and where, like Houston officials, they desired a metropolitan downtown presence. In 1968, UT established a downtown campus (UT-N) to offer business and other programs desirable to Nashville residents. Less than 10 years later, however, both white and black citizens successfully alleged that establishing a Nashville campus further maintained a dual system of higher education.[88] Although by this time all public colleges were legally open to all races, no historically white public college in the state enrolled more than seven percent black students.[89] TSU en-

87 *See* Geier v. Blanton, 427 F. Supp. 644, 645 (M.D. Tenn. 1977); EDWIN MIMS, HISTORY OF VANDERBILT UNIVERSITY (1946). Many other cities have similar racial cartographies. *See* KEVIN GOTHAM, RACE, REAL ESTATE, AND UNEVEN DEVELOPMENT: THE KANSAS CITY EXPERIENCE, 1900–2000 (2002); DAVID SIBLEY, GEOGRAPHIES OF EXCUSION: SOCIETY AND DIFFERENCE IN THE WEST (1995); Amy E. Wells, *Good Neighbors: Distance, Resistance, and Desegregation in Metropolitan New Orleans*, 39 URB. EDUC. 408 (2004).

88 *See Blanton*, 427 F. Supp. at 645.

89 The most recent Southern Regional Educational Board enrollment report shows that in 2001, 18.6% of the state's public four year college enrollees were African American, and that 41.4% of these were in predominantly black institutions, while another 20.6% were in the state's HBCUs. This leaves 38% of the state's 45,449 black undergraduate students enrolled in the predominantly white institutions, or 7% of the total. SOUTHERN REGIONAL EDUCATION BOARD, 2004 FACT BOOK tbl.33 (2004).

rolled virtually all black students.[90] The UT-N campus and the other UT extension centers were slightly more integrated than was UT generally—approximately 80 percent of students were white.[91] UT-N's location in downtown Nashville, however, thwarted any possibility that TSU, located in a less desirable part of town, could diversify its student body by attracting upwardly mobile downtown Nashville professionals, either black or white.[92] Thus, establishing UT-N in Nashville further marginalized the traditionally black university and impeded its ability to foster diversity, while simultaneously extending the reach and influence of the traditionally white institution in the larger polity.[93]

The racially charged turf war in Nashville was not UT's first incursion on another public university's neighborhood. The State of Tennessee had engaged in the same racial politics of location in the 1950s, when UT established a downtown regional center in Memphis, despite Memphis State University's (MSU) prior claim to metropolitan Memphis.[94] The competition favored UT, as a UT degree carried more prestige than did an MSU degree at the time.[95] "For reasons unknown to many but understandable by a few, many University of Tennessee downtown students drove past the Memphis State University campus to take classes."[96] A dozen years later, MSU established its own downtown regional center to thwart UT's attempt to gain "resident center status" and diminish the appeal of UT's Memphis center.[97] Eventually, MSU and UT founded a Joint University Center directed by MSU.[98]

The more racially contentious problem in Nashville, however, would not be so easily resolved. The state finessed the issue for a number of years, undertaking studies and trying to enact cooperative programs, but only succeeded in delaying the resolution of this sensitive and complex political problem.[99] In 1977, this problem came to a head when a district court ordered the merger of TSU and UT-N, noting the state's inability to remedy the dual system of segregated higher education, and further mandated that TSU absorb the down-

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90 *Id.*

91 *Id.* at 652.

92 *Id.* at 652–53.

93 *See id.*; *supra* Part I.A.; *see also* Geier v. Alexander, 801 F.2d 799, 804, 809–10 (6th Cir. 1986) (approving the use of racial quotas to aid in eliminating vestiges of segregation in Tennessee's higher education institutions).

94 *See Blanton*, 427 F. Supp. at 653.

95 *See id.*

96 *Id.* (internal citations and quotations omitted).

97 *See id.*

98 *Id.* MSU has since been renamed the University of Memphis.

99 *See, e.g.*, Geier v. Dunn, 337 F. Supp. 573, 574–76 (M.D. Tenn. 1972) (discussing state measures taken in the years preceding the flurry of lawsuits).

town UT-N facility as its own downtown campus.[100] To those UT partisans who argued that this merger remedy was unfair to the University of Tennessee, the court responded: "Certainly, it cannot be argued that TSU would be overwhelmingly black today if it had not been established as an institution for Negroes. Merger is a drastic remedy, but the State's actions have been egregious examples of constitutional violations."[101]

The United States was back in federal court less than a decade later, attempting to turn back the clock by intervening to argue that merger was not an appropriate remedy.[102] The Department of Justice objected on the grounds that the merger was an impermissible racial remedy and an abuse of the court's discretionary authority.[103] In 1986, the Sixth Circuit rejected this late effort with thinly-veiled disdain:

> All of the parties directly involved in this case agreed to settle it after sixteen years of litigation. In the early years it was the United States that exhorted the court to broaden its remedial orders while the state sought to restrict them. At the very time the state became convinced that its earlier efforts had failed to eliminate the vestiges of its past discriminatory practices, the Department of Justice was urging the court to pull back—a truly ironic situation.
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> The district court rejected the argument that it could not properly conclude from the record that the low minority enrollment in Tennessee's public professional schools resulted from past discriminatory practices. The district court was fully justified in making this determination. Applicants do not arrive at the admissions office of a professional school in a vacuum. To be admitted they ordinarily must have been students for sixteen years. Students applying for post-graduate schooling in the 1983–84 school year would have begun school at age six in 1967 and would have entered college in 1979. The district court had made consistent findings between 1968 and 1984 that the public colleges and universities of Tennessee had not eliminated the vestiges of their years of operation under state-imposed segregation. The district court could also take judicial notice of findings by the district courts and this court that those vestiges had not been eliminated from many of the public school systems of Tennessee, all of which were operated under the same state-imposed system of separate schools for the two races.[104]

Although the merger plan had called for the newly-configured TSU to be approximately half white students and half black students,

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100 *Blanton*, 427 F. Supp. at 659–62.

101 *Id.* at 660.

102 Geier v. Alexander, 801 F.2d 799, 803–04 (6th Cir. 1986).

103 *See id.*

104 *Id.* at 809 (citations omitted).

by 1992–93 its overall racial composition settled at one-quarter white students and three-quarters black students.[105] In contrast, at the flagship campus of the University of Tennessee in Knoxville, the black enrollment in 2002 was a mere seven percent.[106]

The litigation in Tennessee did not exist in isolation. In fact, the U.S. Department of Health, Education, and Welfare (HEW) had been sued by the NAACP Legal Defense Fund in 1970 to require HEW to enforce *Brown* at the higher education level.[107] This litigation strategy was risky, not because it was unwarranted, but because a primarily white, southern judiciary could have reacted to the failure to desegregate with a variety of remedies, not all of them favorable. Judges could react by closing white institutions that had benefited from historical political privilege, merging or reconstituting the activities into a hybrid directed by white institutions, merging or reconstituting the activities into a hybrid directed by black colleges, as in Nashville, or by closing black institutions and forcing white colleges to accommodate the displaced students.[108]

Complicating these alternatives is the fact that the demographics surrounding these institutions were often in flux. An area's growth could be so pronounced that several racially distinct institutions could coexist, which appears to have happened in Houston with Texas Southern University, the University of Houston, and UH-Downtown,[109] or the demography could change so substantially that a college of one race could morph into a college with a different racial character. For instance, Bluefield State College in West Virginia, an historically black school, became a predominantly white institution over time; the University of Houston changed from a private white college to a public institution without a single racial majority.[110] An area's racial calculus could also so dramatically change over time that

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105 TENNESSEE STATE UNIVERSITY, TSU QUICK FACTS (stating 2004 enrollment figures), *at* http://www.tnstate.edu/interior.asp?mid=398&ptid=1 (last visited Nov. 22, 2004).

106 OFFICE OF THE UNIVERSITY HISTORIAN, UNIVERSITY OF TENNESSEE, BRIEF HISTORICAL SKETCH OF THE UNIVERSITY OF TENNESSEE (1995) (describing the student body today as "moderately diverse"), *at* http://web.utk.edu/~mklein/brfhist.html (last visited Nov. 22, 2004); *see also* OFFICE OF INSTITUTIONAL RESEARCH AND ASSESSMENT, UNIVERSITY OF TENNESSEE, UT FACT BOOK 2002–03 (providing Fall 2002 data), *at* http://oira.tennessee.edu/facts/fb/fb02/student.pdf (last visited Nov. 22, 2004).

107 *See* Adams v. Richardson, 480 F.2d 1159, 1161 (D.C. Cir. 1973).

108 The *Geier* case continues to this date. Geier v. Sundquist, 372 F.3d 784 (6th Cir. 2004) (concerning a dispute over attorneys fees).

109 *See* Parsons, *supra* note 80 (discussing enrollment growth in UHS institutions). With additional enrollment growth, the public colleges in Houston are bursting at the seams. *See id.*

110 *See* BLUEFIELD STATE COLLEGE, SELF-STUDY REPORT 13 (Dec. 10, 2001), *available at* www.bluefield.wvnet.edu/self-study.pdf (last visited Nov. 22, 2004). Bluefield State College was established as an historically black college in 1895. *Id.* By 2001, its black enrollment had shrunk to seven percent of the total, prompting a self-motivated inquiry about attracting minority students. *Id.* at 19.

its local colleges simply reflected changes in their communities. For example, the rise of Asian student enrollment in California colleges, particularly the University of California at Berkeley, is surely due to changes in immigration policy, Asian academic achievement, and other historical developments in the years following World War II internment practices.[111] Texas Rio Grande Valley institutions such as Laredo State University, Pan American University, and Texas Southmost College became predominantly Mexican American or Mexican, although the original institutions were not historically Hispanic. In addition, each of these institutions was absorbed into a larger institutional system, creating TAMU-Laredo International University, UT-Pan American/Edinburg, and UT-Brownsville.[112] A similar pattern held true for many other community colleges that have become predominantly minority campuses, especially as the urbanization of minority populations affected higher education in the twentieth century.[113]

III

MEXICAN AMERICANS AND THE POLITICS OF REGION, PLACE, AND COLLEGE CHOICE

For Mexican Americans, contesting the politics of college place has taken a different route than that occasioned by the separate-but-equal route of *Brown*. Education was poor and inadequate for Mexican Americans in the twentieth century, and although de jure segregation affected Mexican Americans in ways different than did the racism aimed at blacks in Texas, the end results were very similar.[114] As one example, very few Mexican-origin children graduated from high

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111 *See generally* DANA Y. TAKAGI, THE RETREAT FROM RACE: ASIAN-AMERICAN ADMISSIONS AND RACIAL POLITICS 21–22 (1992) (discussing the Asian-American experience in higher education and with affirmative action generally).

112 In the 1990s, a series of events transformed the colleges in the Rio Grande Valley of Texas. *See* Russell Gold, *College Initiative's Future Will Find Funding Tougher?*, SAN ANTONIO EXPRESS-NEWS, Nov. 25, 1997, at 1A; Russell Gold, *Pork Fattens Border Initiative*, SAN ANTONIO EXPRESS-NEWS, Nov. 24, 1997, at 1A; Russell Gold, *South Texas Universities Make Strides, Still Lag*, SAN ANTONIO EXPRESS-NEWS, Nov. 23, 1997, at 1A [hereinafter Gold, *South Texas Universities*].

113 MICHAEL A. OLIVAS, THE DILEMMA OF ACCESS: MINORITIES IN TWO YEAR COLLEGES 193–203 (1979) (revealing that community colleges in urban areas have higher minority enrollment than those in rural areas).

114 *See* SAN MIGUEL, *supra* note 79, at 19–34. *See generally* THOMAS P. CARTER, MEXICAN AMERICANS IN SCHOOL: A HISTORY OF EDUCATIONAL NEGLECT 65–130 (1970) (discussing the failure of schools to adequately serve Mexican-Americans and the segregation of Mexican Americans); GILBERT G. GONZALEZ, CHICANO EDUCATION IN THE ERA OF SEGREGATION 137–47 (1990) (tracing the development of segregation against Mexican-American students in Santa Ana, California); Jorge C. Rangel & Carlos M. Alcala, Project Report, *De Jure Segregation of Chicanos in Texas Schools*, 7 HARV. C.R.-C.L.L. REV. 307 (1972) (studying educational discrimination against Mexican Americans in Texas).

school or attended college.[115] Few attended professional schools, such as law school, even in large cities such as Houston, Dallas, or San Antonio. Even Catholic institutions performed poorly in serving Mexican Americans, despite the overwhelming majority of Mexican Americans being Catholic.[116]

Since its founding in 1968, the Mexican American Legal Defense and Education Fund (MALDEF) has litigated many cases involving education, voting rights, immigration, language rights, employment discrimination, and other civil rights issues affecting Mexican Americans.[117] With regard to higher education cases, MALDEF has brought two suits involving college location and siting issues, *Richards v. League of United Latin American Citizens (LULAC)*[118] and *Garcia v. California Polytechnic State University, San Luis Obispo (CSU-SLO).*[119] In the first case, decided in 1993, MALDEF brought suit against the State of Texas for its regional inequities in choosing and allocating sites for colleges, as well as allocating higher education resources.[120] In the latter, the suit was brought in California to strike down admissions practices that favor white applicants within CSU geographic "service areas."[121] *Garcia* began in 2004 and is now pending. Both cases are

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115 *See* SAN MIGUEL, *supra* note 79, at 32–33 (citing statistics from certain Texas school districts and the U.S. census).

116 *See* GUADALUPE SAN MIGUEL, JR., "LET ALL OF THEM TAKE HEED": MEXICAN AMERICANS AND THE CAMPAIGN FOR EDUCATIONAL EQUALITY IN TEXAS, 1910–1981, at 8–13 (1987); Lisa Lizette Barrera, Note, *Minorities and the University of Texas School of Law* (1950–1980), 4 TEX. HISP. J.L. & POL'Y 99, 99 (1998).

117 MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, ABOUT US, *at* http://www.maldef.org/about/index.htm (last visited Nov. 22, 2004); *see also* SAN MIGUEL, *supra* note 79, at 169–86 (describing the founding of MALDEF and their involvement in educational desegregation litigation). For a study of earlier Mexican-American legal efforts at eradicating racism, see George A. Martinez, *Legal Indeterminacy, Judicial Discretion, and Mexican-American Litigation Experience: 1930–80,* 27 U.C. DAVIS L. REV. 555 (1994); Ricardo Romo, *Southern California and the Origins of Latino Civil-Rights Activism,* 3 W. LEGAL HIST. 379 (1990). In the interest of full disclosure, the author has served as a MALDEF board member since 2003.

118 868 S.W.2d 306 (Tex. 1993).

119 Complaint, Garcia v. Cal. Polytechnic Univ., San Luis Obispo (Cal. Sup. Ct. 2004) (No. CV 04 0017) [hereinafter Garcia Complaint], *available at* http://www.maldef.org/pdf/CalPolyComplaint.pdf (last visited Nov. 22, 2004).

120 *See Richards,* 868 S.W.2d at 308. In a series of news articles, Russell Gold detailed the effects of the Texas Border Initiative on the regions' colleges. *See supra* note 112. In 2003, Matt Flores followed up with another look at the Initiative a decade after its inception. *See* Matt Flores, *College Economics Test,* SAN ANTONIO EXPRESS-NEWS, Feb. 23, 2003, at 1A [hereinafter Flores, *College Economics*]; *Texas Educators are on Edge at the Top: Most Feel State Budget Cuts will Target Higher Education Significantly,* SAN ANTONIO EXPRESS-NEWS, Feb. 25, 2003, at 1A; *UTSA's Climb to Top-Tier Status is Getting Tougher: State's Shaky Financial Picture Could Frustrate Local University's Ambitions,* SAN ANTONIO EXPRESS-NEWS, Feb. 24, 2003, at 1A.

121 For an analysis of the overall use of geography in determining admissions in the CSU System, see Laura I. Rendón et al., *Testing Race-Neutral Admissions Models: Lessons from California State University-Long Beach,* 28 REV. HIGHER EDUC. 22–24 (forthcoming Winter 2004) (on file with author).

complex and nuanced assaults upon state practices that limit the accessibility of higher education for Mexican-American populations, and turn on issues of where one resides—in other words, the politics of place.

IV
THE POLITICS OF UNIVERSITY ADMISSIONS AND PLACE

A large number of life's advantages and opportunities are parceled out by residence, duration, domicile, and location. There is extensive legal and sociological literature on the legal rights and opportunities that vary by residence, and literally hundreds of relevant court decisions. The concepts of "neighborhood schools,"[122] voting districts,[123] tax obligations,[124] in-state tuition,[125] eligibility for certain resources, exposure to certain regulations,[126] eligibility for office,[127] and many other legal statuses derive from place. Even the same crimes committed in different jurisdictions can have vastly different consequences.[128] Although there is a system of comity among states for reciprocal arrangements and full faith and credit among political entities, there is an important issue of federal jurisdiction that can preempt various state laws, such as a uniform immigration or national security regime that can trump state residency matters.[129]

In higher education, this complex algebra of "place" delegates the statewide coordination of governance of higher education to the institutional boards of trustees and statewide higher education agen-

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122 *See* MEYER WEINBERG, RACE & PLACE: A LEGAL HISTORY OF THE NEIGHBORHOOD SCHOOL 2–7 (1967).

123 *See* Pamela S. Karlan, *Just Politics? Five Not So Easy Pieces of the 1995 Term*, 34 HOUS. L. REV. 289, 304–13 (1997).

124 *See* A. R. Ilersic, *Tax Havens and Residence*, 30 CAN. TAX J. 52, 52 (1982) (explaining that companies can reduce taxes by locating in tax havens).

125 *See* Jeffrey A. Groen & Michelle J. White, *In-State Versus Out-of-State Students: The Divergence of Interest Between Public Universities and State Governments*, 88 J. PUB. ECON. 1793, 1796–97 (2004); Michael A. Olivas, *Administering Intentions: Law, Theory, and Practice of Post-secondary Residency Requirements*, 59 J. HIGHER EDUC. 263, 263–64 (1988).

126 *See* Jonathan D. Varat, *State "Citizenship" and Interstate Equality*, 48 U. CHI. L. REV. 487, 491–93 (1981).

127 *See* Christopher T. Corson, *Reform of Domicile Law for Application to Transients, Temporary Residents and Multi-Based Persons*, 16 COLUM. J.L. & SOC. PROBS. 327, 329 (1981) ("Such [domicile-based] laws govern many public, family and professional affairs and include amenability to service of process when outside the state . . . state voting, income taxation . . . marriage, divorce, child custody, professional licensing and eligibility for certain programs.").

128 *See* Marguerite A. Driessen & W. Cole Durham, Jr., *Sentencing Dissonances in the United States: The Shrinking Distance Between Punishment Proposed and Sanction Served*, 50 AM. J. COMP. L. 623, 626 (2002).

129 *See* Michael A. Olivas, *IIRIRA, the DREAM Act, and Undocumented College Student Residency*, 30 J. C. & UNIV. L. 435, 437 (2004); Michael A. Olivas, *Preempting Preemption: Foreign Affairs, State Rights, and Alienage Classifications*, 35 VA. J. INT'L L. 217, 217–18 (1994).

cies who execute the legislative and corporate requirements to establish and locate colleges.[130] And where a college is located can apportion access in a way that benefits or harms certain citizens.

A. *Richards v. LULAC*

For Mexican Americans in Texas, "place" counts, especially in determining who goes to local colleges. Forty-one counties form the border between Texas and Mexico, from El Paso in the west to Brownsville in the east, where the Gulf Coast begins.[131] This swath is hundreds of miles long and stretches from Ciudad Juarez to Matamoros, along the Rio Grande River; it is widely referred to as "the Borderlands" or "la Frontera."[132]

The plaintiffs in *Richards* charged that state authorities denied equitable higher education funds to the border area, thereby denying the predominantly Mexican-American population equal access to college as compared to the rest of the state's population, which was predominantly of Anglo or non-Mexican origin.[133] The trial court agreed with the plaintiffs, and the court found that under the state's reasons, this misdistribution violated Article I, Section 3 of the Texas State Constitution and Section 106.001 of the Texas Civil Practice and Remedies Code.[134]

During an extensive jury trial in state court, the plaintiffs entered into the record "certain statistical matters" that showed substantial disparities in the higher education resources available to the area's re-

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130 Michael A. Olivas, *State Law and Postsecondary Coordination: The Battle of the Ohio Board of Regents*, 7 REV. HIGHER EDUC. 357 (1984). This statement does not refer to various zoning or local taxation issues concerning colleges, which are another interlocking and extensive concern.

131 *See* Richards v. League of United Latin Am. Citizens (LULAC), 868 S.W.2d 306, 308 (Tex. 1993).

132 *See* GLORIA ANZALDUA, BORDERLANDS/LA FRONTERA, THE NEW MESTIZA 3–13 (1987). *See generally* Juan F. Perea, *A Brief History of Race and the U.S.-Mexican Border: Tracing the Trajectories of Conquest*, 51 UCLA L. REV. 283 (2003) (detailing how the U.S. conquest of Mexico led to a consistent denial of political power to the conquered Mexicans).

133 *See Richards*, 868 S.W.2d at 308–10.

134 *See id.* at 310. Article I, Section 3, the equal rights clause of the Texas Constitution, provides that "[a]ll free men, when they form a social compact, have equal rights, and no man, or set of men, is entitled to exclusive separate public emoluments, or privileges, but in consideration of public services." TEX. CONST. art. I, § 3. Section 3(a) specifies that "[e]quality under the law shall not be denied or abridged because of sex, race, color, creed, or national origin. This amendment is self-operative." *Id.* art. I, § 3a. And Section 106.001 of the Texas Civil Practice and Remedies Code states that

> [a]n officer or employee of the state or a political subdivision of the state who is acting or purporting to act in an official capacity may not, because of a person's race, religion, color, sex, or national origin: . . . (5) refuse to grant a benefit to the person; [or] (6) impose an unreasonable burden on the person.

TEX. CIV. PRAC. & REM. CODE ANN. § 106.001 (Vernon 2004).

sidents.[135] The court noted that although twenty percent of all Texans live in the border area, the area only receives approximately ten percent of the state's funds for public universities in that region.[136] Fifty percent of the public university students in the border area are Hispanic, as compared to seven percent in the rest of Texas, and border-area students travel nearly 200 miles—significantly further than the average university student—to reach the nearest public university that offers a broad range of masters and doctoral programs, programs that are rarely offered at border universities.[137] After noting that "these disparities exist against a history of discriminatory treatment of Mexican Americans in the border area (with regard to education and otherwise), and against a present climate of economic disadvantage for border area residents,"[138] the trial court held that the Texas system of higher education discriminated against Mexican Americans, depriving them of equal educational opportunity by spending less state resources in areas significantly populated by Mexican Americans, particularly the border area.[139]

The Texas Supreme Court unanimously reversed the trial court decision, holding that a claim for equal rights violation based upon a "geographical classification" could not be sustained; nor could a claim based on race or national origin classification.[140] The Texas Supreme Court denied the trial court's reasoning, holding that the plaintiffs "failed to establish that the Texas university system policies and practices are in substance a device to impose unequal burdens on Mexican Americans living in the border region."[141] The court determined that the plaintiff's theory was both underinclusive and overinclusive:

> Whatever the effects of the Texas university system policies and practices, they fall upon the *entire region* and everyone in it, not just upon Mexican Americans within the region. Conversely, they do not fall upon Mexican Americans outside the region. The same decisions that plaintiffs allege show discrimination against Mexican Americans in the border area serve, at the same time, to afford greater benefits to the larger number of Mexican Americans who live in metropolitan areas outside the border region.[142]

Although the plaintiffs were unsuccessful in the Texas Supreme Court, the war was won in the Texas Legislature, where border-area legislators directed substantial resources to horder colleges, including

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135 *Id.* at 309, 311–14.
136 *Id.* at 309.
137 *Id.*
138 *Id.*
139 *Id.* at 310.
140 *Id.* at 312.
141 *Id.* at 312.
142 *Id.* at 314.

doctoral and other graduate programs and a pharmacy school, and substantially upgraded facilities and programs. Unlike the one-time infusion of dollars and modest increases involved in the *Fordice* settlement, this initiative brought substantial program resources, program authorization, and political prestige to the border-area institutions.[143] For example, the colleges that had been small institutions with their own boards of trustees were admitted into the larger and more powerful flagship University of Texas and Texas A&M University systems.[144] A dozen years later, it seems clear that the region has benefited from the political settlement, even if the case originally seemed lost.

B. *Garcia v. California State Polytechnic University*

In a second case turning on geography, MALDEF filed suit in 2004 challenging the admissions practices of California State Polytechnic University, San Luis Obispo (CSU-SLO), which combines standardized test scores and regional criteria based upon residence in certain geographic "service areas."[145] The plaintiffs have charged CSU-SLO with using a "rigid mathematical formula" that heavily weights the SAT and awards points for living in chosen neighborhoods. The complaint alleges that CSU-SLO awards "250 points to students living within a specific geographic area around the CSU-SLO campus—its so-called 'service area.'"[146] The complaint further states that

> Cal Poly SLO's geographical preference for applicants living within its "service area" also results in an adverse disparate impact against Latino, African American, and Asian American students. For high school aged individuals residing within Cal Poly SLO's designated "service area," whites are overrepresented, while Latinos, Asian Americans, and African Americans are underrepresented in comparison to their populations statewide. Therefore, Latinos, Asian Americans, and African Americans are eligible for the "service area" bonus at lower rates than whites. These differential rates result in a discriminatory effect on Latinos, African Americans, and Asian Americans.[147]

The data reveal that the chosen "service area" is disproportionately white. Of high school age students in California, 37.5 percent are white (55.0 percent in the CSU-SLO service area), 40.1 percent are Latino (35.3 percent), 10.8 percent are Asian (3.4 percent), and

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143 *See* Flores, *College Economics*, *supra* note 120.

144 *See* Gold, *South Texas Universities*, *supra* note 112 (noting the success of the Border Initiative but also commenting that "South Texas absorbed the $500 million like a desert does a brief rain, leaving the schools shortchanged in many ways").

145 *See* Garcia Complaint, *supra* note 119.

146 *See id.* at 7, ¶ 26.

147 *Id.* at 7, ¶ 27.

7.0 percent are black (2.4 percent).[148] In the designated service area, 1.9 percent of all statewide white students reside, 1.2 percent of all statewide Latino students, 0.5 percent of all African Americans, and 0.4 percent of all Asians.[149] Because the plaintiffs in this case only recently filed, it is difficult to assess how the trial judge will consider these disparities.

As with the "geographical classification" strategy attempted in Texas, political factors undoubtedly underpin the admissions cartography at CSU-SLO.[150] Those designated schools in the San Luis Obispo service area may or may not have been chosen for their racial characteristics, but it is hard to imagine that race was not a factor. High-achieving schools are not necessarily predominantly white or Asian; the complex calculus of high school attendance line drawing is rarely race-free, just as race is often a factor in the checkerboard of housing patterns.[151] In virtually every state, a relatively small number of feeder high schools routinely send their graduates to certain colleges, and this channeling process has a powerful racial and ethnic influence as well.[152] Texas acknowledged this "channeling" effect and its enactment of the Top Ten Percent Plan has broadened the number of high schools that send graduates to the State's flagship public colleges.[153] Moreover, the colleges have broadened their recruitment efforts beyond the traditional schools to reach a wide array of schools with promising applicants.[154] This result has drawn substantial fire from some parents and others, but it is clearly in the interest of colleges to recruit from a broader pool and assure a wider stream of applicants.[155]

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148 *Id.* ("Percentage of California High Schoolers in Service Area" Table).

149 *Id.*

150 *See* Richards v. League of United Latin Am. Citizens (LULAC), 868 S.W.2d 306, 311–12 (Tex. 1993).

151 *See* Charles R. Lawrence, III, *Segregation "Misunderstood": The* Milliken *Decision Revisited,* 12 U.S.F. L. REV. 15, 15–16 (1977); Leland Ware, *Race and Urban Space: Hypersegregated Housing Patterns and the Failure of School Desegregation,* 8 WIDENER L. SYMP. J. 55, 55–57 (2002).

152 *See generally* Rendón et al., *supra* note 121 (discussing various factors racial disparities in college admissions).

153 *See* Olivas, *Higher Education Admissions, supra* note 13, at 1004; Gerald Torres, Grutter v. Bollinger/Gratz v. Bollinger*: View from a Limestone Ledge,* 103 COLUM. L. REV. 1596, 1596 (2003).

154 *See* MARTA TIENDA ET AL., CLOSING THE GAP? ADMISSIONS & ENROLLMENTS AT THE TEXAS PUBLIC FLAGSHIPS BEFORE AND AFTER AFFIRMATIVE ACTION, at 2 (Office of Population Research, Princeton University, Working Paper No. 2003-01), *available at* http://www.opr.princeton.edu/papers/opr0301.pdf (last visited Nov. 22, 2004).

155 *See* Torres, *supra* note 153, at 1604 ("[T]he efforts of the University of Texas . . . have yielded a more qualified entering class of students than conventional admissions programs and conventional affirmative action policies.").

CONCLUSION

All these technical issues aside, university admissions have been a front-burner issue in recent years, with race chief among the topics. Although race and college admissions intersect at the institutional level, it remains important not to lose sight of the individualized impact of these important policy choices. *Breaking Away*, the wonderful 1979 film about the "cutters" in Bloomington, Indiana, illustrates the consequences of college location choices for communities and individuals.[156] In the movie, the students at Indiana University, located in a quintessential Midwestern college town, feel and act superior to the locals or children of residents.[157] The more advantaged outsiders who attend IU disparagingly refer to the locals as "cutters," or stone-cutters, as the local quarries provide the building blocks and foundation for construction projects all over the world.[158] In the movie, the local resident cutters resent the outsider college students and rarely attend college themselves.[159]

I do not personally resonate or fully identify with issues of place and college; I attended a local hometown college in Santa Fe, New Mexico (the College of Santa Fe), but not because of its location. In fact, "place" per se never drove my choice of higher education institutions; rather, other personal choices and considerations led me to the venues I entered, and I was fortunate to have had a wide range of options, all of them affirmative and within my unsure grasp. I attended CSF because I was a student for the Catholic priesthood and that is where my Archbishop assigned me. I was admitted and I received a scholarship. After my first year, the Archbishop assigned me to a more national seminary, the Pontifical College Josephinum in Worthington, Ohio, where I graduated in 1972 after studying eight years to become a priest. I then left these studies and undertook graduate work at Ohio State University, a campus that enrolled more students than the number of persons who lived in Santa Fe at the time, and then attended Georgetown University Law Center—a school I chose because it was Catholic, because friends had attended, and because it allowed me to attend at night and work while earning my J.D.

Nevertheless, I certainly can appreciate how geography affects opportunity. I probably chose the seminary route because of the influence of priests in my neighborhood parochial schools. After my parents had six children, my liquor store clerk father was able to attend the local college (the University of New Mexico in Albuquerque), transforming our family's life as he became a successful

156 BREAKING AWAY (Twentieth Century Fox 1979).
157 *See id.*
158 *See id.*
159 *See id.*

accountant and as our family grew with four more children.[160] My father could not have done all this in Tierra Amarilla, the small northern New Mexico town where my grandfather grew up. "Place" would have made it impossible for my family to transform itself. Immigrant families in New York City had the opposite opportunity structure, as the City University campuses extended extraordinary tuition-free opportunities to many poor children. Rice University in Houston offered the same, at least to the "white inhabitants" of the city.[161] So I understand that place counts, location counts, even if it did not do so directly for me.

The importance of place and location in higher education will probably continue, at least for the foreseeable future, beyond *Grutter* reaffirming the affirmative action practices allowed after *Bakke*. This will be so, particularly if states remain strapped for funds or choose not to support colleges at reasonable levels. For example, competition and cutbacks in the California system, the largest and most extensive higher education system in this country, will affect equity and college enrollment in ways not yet fathomed or discernable.[162] And race, as always, is a fugue that runs through these politics.[163] Alex Johnson's arguments concerning *Fordice* go directly to the crux of the issue:

> What is lacking in the Court's approach is some recognition that secondary and post-secondary educations are related. Tremendous dissonance is created by the fact that African-Americans are forced to take part in a segregated, predominantly African-American educational and social system at the elementary and secondary level, and then channeled into a different segregated, post-secondary educational system that employs the cultural norms of the white community from which the African-American student is otherwise disassociated.
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> This dissonance is exacerbated by the Court's failure to recognize the costs incurred in the transition from one system to the other, a failure which stems from its flawed view of the white system of post-secondary education as the ideal integrationist system. Of

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160 Michael A. Olivas, *Professor Graglia, Meet My Father*, 23 BIL. REV./REV. BIL. 106 (1998).

161 *See* Coffee v. William Marsh Rice Univ., 408 S.W.2d 269, 271–72, 282 (Tex. Civ. App. 1966).

162 For a sample of stories about recent cuts in the California higher education budget, the country's largest college system, see Sara Hebel, *Schwarzenegger Strong-Arms Colleges*, CHRON. HIGHER EDUC., Apr. 9, 2004, at A21; Peter Y. Hong, *Cuts Will Detour Some Students Bound for UC, Cal. State*, L.A. TIMES, Mar. 7, 2004, at B1.

163 For example, in states such as Michigan, anti-*Grutter* referendum movements have begun to surface, such as the one led by Jennifer Grätz. *See* Alyson Klein, *Affirmative-Action Opponents Suffer Setbacks in Colorado and Michigan*, CHRON. HIGHER EDUC., Apr. 9, 2004, at A23; Robert E. Pierre, *Affirmative Action Foes Seek Mich. Referendum: Initiative Would Amend State's Constitution*, WASH. POST, Mar. 5, 2004, at A3.

> course, that system is not truly integrationist. The brand of integration mandated by *Fordice* and practiced in America merely requires assimilation of African-Americans into white culture and does not integrate the cultures and *nomos* of the African-American and white communities into each other.[164]

The moral force and eloquence of *Brown* should not be forgotten, but nor should the massive resistance to its true implementation.[165] There is a natural human tendency, one to which we are all subject, to view things as being better and more understandable than their reality. In truth, college admissions is a simple concept but an enormously complex transaction.[166] The role of residence, location, and locale is an understated factor in this phenomenon, one that is an important determination in the scheme of luck and merit that ultimately results in our children making their ways to college classrooms. *Brown* was in one important sense about place. And place matters.

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164 *See* Johnson, *supra* note 13, at 1469.

165 *See* DERRICK BELL, SILENT COVENANTS: *BROWN V. BOARD OF EDUCATION* AND THE UNFULFILLED HOPES FOR RACIAL REFORM 160–179 (2004); SHERYLL CASHIN, THE FAILURES OF INTEGRATION: HOW RACE AND CLASS ARE UNDERMINING THE AMERICAN DREAM 213–18 (2004); COTTROL ET AL., *supra* note 20, 183–84; CHARLES J. OGLETREE, JR., ALL DELIBERATE SPEED, REFLECTIONS ON THE FIRST HALF CENTURY OF *BROWN V. BOARD OF EDUCATION* (2004); Derrick A. Bell, Jr., Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 525–27 (1980).

In a truly ironic fashion, after states have neglected to adequately finance HBCUs, white legislators point to poor finances as reasons to close them. *See* Robert Gullick, *Hobby Backs Takeover of TSU: Wants It Closed*, HOUSTON CHRON., Aug. 25, 1999, at A1 (documenting the Texas Lieutenant Governor insisting that Texas Southern University should be closed); Ron Nissimov, *Scholarly Struggle: Black Colleges Still Feel Impact of Segregation*, HOUSTON CHRON., Feb. 18, 2001 (same).

166 *See* ELIZABETH A. DUFFY & IDANA GOLDBERG, CRAFTING A CLASS: COLLEGE ADMISSIONS AND FINANCIAL AID, 1955–1994, at 34–70 (1998) (describing the evolution of the college admissions process); RONALD G. EHRENBERG, TUITION RISING: WHY COLLEGE COSTS SO MUCH 34–75 (2000) (same); Olivas, *Admissions Decisions*, *supra* note 13, at 1071–80 (discussing the complex social science of admissions decisions).