Desegregation as a Two-Way Street: The Aftermath of United States v. Fordice

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I. INTRODUCTION ........................................ 377

II. PART I: UNITED STATES v. FORDICE ................ 381

III. PART II: COMMENTATORS IN THE WHITE COMMUNITY .... 402

IV. PART III: LDF DESEGREGATION LITIGATION ............ 417

V. PART IV: ALTERNATIVE PROPOSAL ..................... 427

I. INTRODUCTION

Throughout the former de jure segregated states, there still exist public colleges and universities easily identifiable by race as being predominantly white or predominantly black institutions. In almost all cases, the current racial identifiability reflects the historical creation and existence of higher education institutions as being for "black students" or for "white students." This dual system of higher education continues to exist despite the desegregation decisions rendered by the United States Supreme Court beginning in Brown v. Board of Education.

The question of what standard to apply in determining the state's duty to dismantle its dual system of higher education was finally resolved by the United States Supreme Court in United States v. Fordice. In that case, the Court determined that the State of Mississippi had failed to meet its affirmative obligation to dismantle the prior de jure segregated system by adopting race

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2 The terms historically white universities [hereinafter HWU] and historically black universities [hereinafter HBU] shall be used to refer to these institutions.

3 347 U.S. 483 (1954) [Brown I], supplemented, 349 U.S. 294 (1955) [Brown II]; see also Florida ex rel. Hawkins v. Board of Control, 83 So.2d 20 (1955), cert. denied, 350 U.S. 413 (1956) (in denying cert., the Court, in a per curiam opinion, applied the principles of Brown I to higher education and rejected the "all deliberate speed" remedy of Brown II as inapplicable to desegregation in higher education); Green v. County School Board of New Kent County, 391 U.S. 430 (1968) (desegregation means no black schools or white schools but rather "just schools").

4 112 S. Ct. 2727 (1992). This case was originally titled Ayers v. Allain, 674 F. Supp. 1523 (N.D. Miss. 1987). The Supreme Court caption reflects the intervention of the United States and the election of Governor Kirk Fordice.
neutral policies that govern its university system.\textsuperscript{5} The courts below, the Fifth Circuit Court of Appeals and the United States District Court for the Northern District of Mississippi, applied their interpretation of the standard established in \textit{Brown I} and \textit{II} and concluded that the State had fulfilled its duty to disestablish a segregated school system by adopting race-neutral policies in good faith.\textsuperscript{6}

The Supreme Court vacated the Fifth Circuit's decision and remanded the case to the court of appeals and the district court with instructions to apply a new appropriate standard. This standard queries whether the "[s]tate perpetuates policies and practices traceable to its prior system that continue to have segregative effects."\textsuperscript{7} The decision is a landmark one because it affects policymaking in all of the former \textit{de jure} states.\textsuperscript{8} Yet, the \textit{Fordice} decision did nothing more than tell the States what standard to apply. The decision did not explain how the States should address the continuing vestiges of separate and unequal public higher education.

This question of how to address the continuing vestiges of segregation in public higher education is really a microcosm of the same issue in the context of American society. It is a question that America has been grappling with since the decision in \textit{Brown I} sounded the death knell of the separate but equal doctrine announced in \textit{Plessy v. Ferguson}.\textsuperscript{9} The solutions proposed for desegregating the university system of Mississippi mirror those proposed for the desegregation of American society. These proposals range from maintaining the status quo to closing the black institutions to keeping the black institutions exclusively black to simply reaffirming the integrative ideal articulated in \textit{Brown I}.

More specifically, in the white community, some commentators propose the maintenance of the status quo. The argument is that the State no longer segregates by law and once the legal barriers are removed, the State has met its duty to desegregate.\textsuperscript{10} Other commentators propose a solution whereby the

\textsuperscript{5}Id. at 2732.

\textsuperscript{6}Ayers v. Allain, 914 F.2d 676 (5th Cir. 1990), aff'd, 674 F. Supp. 1523 (N.D. Miss. 1987).

\textsuperscript{7}Fordice, 112 S. Ct. at 2727, 2730.


\textsuperscript{9}163 U.S. 537 (1896).

\textsuperscript{10}See, e.g., Mary Ann Connell, \textit{The Road to United States v. Fordice: What is the Duty of Public Colleges and Universities in Former De Jure States To Desegregate?} 62 \textit{Miss. L.J.} 285
HBUs are closed or merged into the HWUs (with the HWUs as the surviving institution) as the most appropriate and expedient way to comply with the mandates of Fordice and Brown. The argument is that under Brown, separate is inherently unequal, thus the continued existence of the HBUs violates Brown. Moreover, given the clear superiority of the HWUs and the proximity of the HBUs to the HWUs, financially and educationally it makes sense to close the inferior schools or merge them into the superior schools in order to comply with Fordice. In short, no more HBUs and no more HWUs, instead "just schools."

I strongly disagree with these commentators because they ignore two critical issues. First, they ignore past discrimination. Second, they ignore the issue of increasing the educational opportunities of black students. Past discrimination in education, particularly at the grade school level, makes college unattainable for many black children because they do not meet the qualifications for admission. Moreover, for those who do meet the admissions requirements there is the consideration of cost. As school budgets decrease, there is a corresponding decrease in available scholarship money and minority scholarships have come under attack as well. HBUs address past discrimination by retaining low admissions standards, offering remedial courses, and are affordable. Thus, to argue for the elimination of the HBUs through either mergers or closures is to effectively eliminate the sole means of access to higher education for many black children and thereby decrease rather than increase educational opportunities for black students.

In the black community, there is a deep ambivalence about desegregation. This ambivalence is captured best by the NAACP Legal Defense and Education (1993) (arguing that once the state discontinues legally enforced segregation, any further segregation must be by "unfettered choice").

11See, e.g., Robert N. Davis, The Quest for Equal Education in Mississippi: The Implications of United States v. Fordice, 62 Miss. L.J. 405 (1993) (presenting fourteen recommendations for compliance with Fordice which include the closure and merger of HBUs with HWUs because the HBUs are inferior); Kenyon D. Bunch and 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) (arguing that "if courts were serious about desegregating HBUs . . . there would have been more mergers of geographically proximate institutions").


Fund, Inc. (LDF)'s desegregation litigation. Over time, this litigation campaign has evoked a variety of responses in the black community. On the one hand, there are those commentators who suggest that the HBUs should stay exclusively black in terms of students, faculty and staff. They assert that the HBUs serve the vital function of educating black students and the desegregation of these schools would seriously undermine the ability of the HBUs to continue to serve this vital function. On the other hand, there are those who firmly believe in the integration ideal. They contend that separate is inherently unequal and as such exclusive black institutions are a step backwards. Finally, some commentators take the middle road by advocating the continued existence of the HBUs, but also advocating financial enhancement of those institutions.

I disagree with the black commentators as well. Those who advocate voluntary separation must realize that, at least politically, no white politician can justify large expenditures on institutions where a large segment of his or her constituency is excluded. If the state does not spend the funds to enhance the HBUs, then separation leaves black students stuck in clearly inferior institutions. Separation, then, does not improve educational opportunity for black students and therefore solves nothing. Those who advocate closure of the HBUs in the name of integration and Brown I ignore the fact that history has demonstrated the remarkable job that HBUs both public and private have done in educating black students. They ignore these accomplishments and place the burden of integration on the very black institutions that have continued to perform well even in these days of "integration." Finally, those that propose mere enhancement of the HBUs fail to realize that enhancement alone will not produce integration because it does not change student choices. White students will continue to attend well-funded HWUs and now, black students can attend well-funded HBUs.

As a result of the problems encountered by these various proposals, I propose a plan of my own that preserves HBUs to the extent that they are desegregated along with the white institutions rather than just eliminated. In this way, the burdens of integration are shared in both communities by both sets of institutions. More specifically, with respect to higher education in Mississippi, I propose the following solution to address the current situation:

15 See, e.g., Kujovich, supra note 12.

16 See, e.g., TOLLET, supra note 12; Derrick A. Bell, Jr., Waiting on the Promise of Brown, 39 LAW & CONTEMP. PROB. 346 (1975); W.E.B. DuBois, Separation and Self-Respect, THE CRISIS, March 1934, at 85.


18 See, e.g., infra notes 221, 281-84, and 290.

19 I focus on Mississippi for several reasons. First, the Fordice case arose in that state. Second, as part of its decision in the case, the Supreme Court remanded the case to the district court in Mississippi where the retrial was concluded on November 3, 1994.
first, Mississippi should close or merge some of the HWUs but not the HBUs for the reasons previously articulated and then adopt a two tier system of classification. Second, course offerings and admission standards will be tied to the classification. Finally, the HBUs and HWUs should adopt affirmative action programs for the minority (i.e., for blacks at HWUs and for whites at HBUs) students, faculty, and administrators. My proposal has as its goal to encourage integration while recognizing the important function served by the HBUs.

This paper is divided into four parts. In the first part, I explain what the Supreme Court held in United States v. Fordice. In the second part, I present and critique the proposals generated in the white community. In the third part, I present and critique LDF's desegregation litigation strategy and the proposals generated therefrom. Finally, in the fourth part, I respond to these various commentators with my own proposal.

II. PART I: UNITED STATES V. FORDICE

The procedural history of the Fordice case demonstrates the difficulties engendered by the issue of desegregation in higher education. In brief, the district court dismissed the plaintiffs' claim, the Fifth Circuit panel reversed the district court, the en banc court vacated the panel decision and affirmed the district court and finally, the Supreme Court rendered a decision.

This lawsuit began in 1975 when a group of black plaintiffs sued the Governor of Mississippi, the Board of Trustees of State Institutions of Higher Learning, and other state education officials, alleging that the defendants were maintaining and perpetuating a racially dual system of public higher education in violation of the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964.

Specifically, plaintiffs claimed that since the time of Brown, the defendants had perpetuated a dual system of higher education in which there were separate institutions for blacks and whites, and in which the black institutions

Finally, during the course of the retrial, Benjamin Chavis, then Executive Director of the NAACP stated that "we are going to lift Mississippi up as an example." Associated Press, NAACP Head Warns of Boycott if Ayers Case isn't Resolved, THE COMMERCIAL APPEAL, May 25, 1994, at 1B. He said the Ayers v. Fordice case will have more implications for Americans than Brown v. Board of Education. Id. Given the impact that any decision in the case is likely to have, it is apropos to focus on Mississippi.

22Ayers v. Allain, 893 F.2d 732 (5th Cir.) [Ayers II], reh'g granted, 898 F.2d 1014 (5th Cir. 1990)(en banc).
25Ayers III, 914 F.2d at 678.
were "markedly inferior" to the white institutions. The complaint alleged that the HBUs remained separate and inferior to the HWUs due to the defendants discriminatory practices on student admissions, employment of faculty and staff, mission designations and funding, and operation of HWUs in close proximity to HBUs. Plaintiffs further asserted that defendants had failed in their affirmative duty to eliminate vestiges of segregation and remained, therefore, under a continuing "legal obligation to eliminate the vestiges of racial dualism 'root and branch'."

Defendants answered the allegations of plaintiffs by contending that a good-faith, nondiscriminatory admission and operation policy with respect to students, faculty and staff had been implemented and that with such a policy designed to insure equality of opportunity, the mere continued existence of institutions with predominantly black and predominantly white student bodies did not represent a denial of equal protection. Defendants further maintained that any racial identifiability was the result of the unfettered freedom of choice of students themselves as they considered varying educational objectives and advantages of the respective institutions.

In 1987, following twelve years of pretrial preparation, the district court conducted a five week trial. The record consisted of testimony from 71 witnesses and 56,700 pages of exhibits. The district court ruled in favor of the defendants on the issue of liability and dismissed plaintiff's case. In arriving at its decision, the district court noted that from the time of Brown and until 1962 when the Fifth Circuit Court of Appeals ordered the University of Mississippi to admit James Meredith as a student, the Board of Trustees had continued to operate a racially dual system of higher education which was "both separate and unequal." According to Judge Neal Biggers, however, "the fundamental issue before the court at this time is whether the defendants are currently committing violations of the Thirteenth and Fourteenth Amendments, Title VI and 42 U.S.C. 1981."

Judge Biggers found that since 1962 defendants had in good faith adopted racially neutral admission policies at all public colleges and universities, had utilized affirmative efforts to recruit and retain other-race students, and had

26 Ayers I, 674 F. Supp. at 1525.
27 Id.
28 Id.
29 Id.
30 Id.
31 Ayers I, 674 F. Supp. at 1526.
32 Id.
33 Id. at 1564.
34 Id. at 1528.
35 Id. at 1551.
satisfied "their affirmative duty to dismantle the former segregated system insofar as the duty pertains to student enrollment."36 "Although the various institutions continue to be identifiable by the racial makeup of the student populations, this is not a substantial result of current admission practices and procedures but is instead the result of a free and unfettered choice on the part of individual students."37

The district court further found that defendants had adopted racially neutral hiring policies with respect to faculty and staff at each university and had expended substantial affirmative efforts each year attempting to attract and employ other-race faculty. The court noted that since 1974, the percentage of blacks hired in faculty and staff positions exceeded the black representation in the qualified labor pool and held that defendants had "satisfied their affirmative duty to dismantle the former segregated system as it pertains to faculty and staff employment."38

Moreover, the court found the mission designations of the respective institutions to be educationally sound, based on nondiscriminatory purposes, and justified by a need to conserve scarce educational resources.39 In summary, the court dismissed the case because it found that the defendants were fulfilling "their affirmative duty to disestablish the former de jure segregated system of higher education"40 and that there was no proof in the record "of current violation of the Constitution or Statutes of the United States by the Defendants."41

In making these factual findings, Judge Biggers rejected the remedial standard articulated in Green v. County School Board42 and instead, applied the

36 Ayers I, 674 F. Supp. at 1558.
37 Id.
38 Id. at 1563.
39 Id. at 1564.
40 Id. at 1561.
41 Ayers I, 674 F. Supp. at 1561.
42 391 U.S. 430 (1968). Green involved the grade school system of New Kent County, Virginia, which contained two schools. Id. at 434. New Kent School a combined elementary/secondary school on the eastern side of the county, was predominantly white; Watkins School, a combined elementary/secondary school on the western side of the county, was totally black. Id. There was no residential segregation in the county, and there were no attendance zones. Id. Each school served the entire county and buses traveled overlapping routes to transport pupils to and from the two schools. Id.

The county's school board continued to maintain totally segregated schools for eleven years after Brown I and modified this practice only after Title VI of the Civil Rights Act of 1964 mandated the cutting off of federal funds to school districts which continued to operate racially segregated schools. Green, 391 U.S. at 434. The school board then adopted a freedom-of-choice plan, which allowed students to choose annually which school to attend. Id. During the plan's three years of operation, no white student had chosen to attend the all-black Watkins school, and only 15% of the black students were
remedial standard set forth in *Bazemore v. Friday* and *Alabama State Teachers Association v. Alabama Public School and College Authority* (hereinafter

enrolled in New Kent School, the formerly all-white school. *Id.* In essence, the freedom-of-choice plan had not worked to dismantle the previously segregated school system. *Id.* at 440.

Justice Brennan's opinion for a unanimous Court emphasized the ultimate goal of "disestablishing" or "dismantling" dual school systems and achieving a "unitary, nonracial system of public education." *Id.* at 435. He stressed the command in *Brown II* to "effectuate a transition to a racially nondiscriminatory school system", *Green*, 391 U.S. at 435, and said that it is in light of that mandate that New Kent County's freedom-of-choice plan must be measured. *Id.*

He further emphasized and admonished the School Board that *Brown II* had placed on school boards and officials "the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." *Id.* at 437. That burden had not changed, the Justice said: "The burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work now." *Id.* While the Court did not assert that freedom-of-choice plans would never work, it made clear that New Kent County's plan was not working where 85% of the black students were totally segregated in an all-black school. *Id.* The Court served notice that in the future "school plans would be judged not on paper or promise, but on performance." *Green*, 391 U.S. at 437.

In *Bazemore*, the North Carolina Agricultural Extension Service, a division of the School of Agriculture and Life Sciences of North Carolina State University, maintained segregated 4-H and Homemaker Clubs prior to enactment of the Civil Rights Acts of 1964. *Id.* at 407. In response, to the Act, the Service discontinued its segregated club policy and opened the clubs "to any otherwise eligible person regardless of race." *Id.* Nevertheless, there remained many all-white and all-black clubs. *Id.* Consequently, employees and members of 4-H and Homemaker Clubs brought suit against the Service, alleging a pattern and practice of racial discrimination in employment and provision of services in violation of the Constitution and certain federal statutes. *Id.* at 386-87. The United States intervened. *Bazemore*, 498 U.S. at 391.

After a lengthy trial, the district court entered judgment for respondents in all respects and the Court of Appeals for the Fourth Circuit affirmed. *Id.* The private petitioners appealed the rejection of their claim that respondents unlawfully provided services and materials to segregated 4-H and Homemaker Clubs, framing that question as follows: "May North Carolina satisfy its obligation to desegregate the de jure system of 4-H Clubs and Extension Homemaker Clubs by adopting a freedom of choice plan that fails?" *Id.* at 386. The United States did not appeal the decisions of the district and circuit courts on this issue. *Id.* at 393.

The district court found no evidence of any discrimination after 1964 and concluded that any current racial imbalance existing in any of the clubs "was the result of wholly voluntary and unfettered choice of private individuals." *Id.* at 407. The court of appeals upheld the findings of the district court and affirmed. *Bazemore*, 478 U.S. at 407-08. In a 5-4 decision, the Supreme Court also affirmed, saying: "In view of the District Court's findings, this case presents no current violation of the Fourteenth Amendment since the Service has discontinued its prior discriminatory practices and has adopted a wholly neutral admissions policy. The mere continued existence of single-race clubs does not make out a constitutional violation." *Id.* at 408.

Distinguishing the circumstances in *Bazemore* from those in *Green*, the majority noted that membership in the 4-H and Homemaker Clubs "is entirely voluntary," as opposed to compulsory public school education. *Id.* The Court further noted that "while school boards customarily have the power to create school attendance areas and
Judge Biggers, in choosing to apply Bazemore and ASTA rather than Green, measured Mississippi's affirmative duty to dismantle its racially dual

otherwise designate the school students may attend, "there is no statutory or regulatory authority to deny a young person the right to join any Club he or she wishes to join." Id. The Court specifically found Green to be inapplicable to the voluntary associations supported by the Extension Service, stating "however sound Green may have been in the context of the public schools, it has no application to this wholly different milieu." Id. In short, the Court found that discontinuing prior discriminatory practices and adopting neutral admission policies is all the Constitution requires. Bazemore, 478 U.S. at 408.

Petitioners argued that Department of Agriculture regulations required that the Extension Service "take 'affirmative action' to overcome the effects of prior discrimination in its programs." Id. The majority dismissed this position, saying "the Service has taken affirmative action to change its policy and to establish what is concededly a nondiscriminatory admissions system. . . . " Id. Justice White noted the United States position that the Extension Service Clubs had fully complied with the regulation, thus, "in view of the deference due the Department's interpretation of its own regulation, we cannot accept petitioner's submission that the regulation has been violated." Id.

Justice Brennan, joined by Justices Marshall, Blackmun, and Stevens, dissented strongly, criticizing the majority for joining the Extension Service "in winking at the Constitution's requirement that States end their history of segregative practices. . . ." Id. Justice Brennan further criticized Justice White's terse opinion which offered "only feeble excuses for this departure from the Court's historic commitment to the eradication of segregation in this country." Bazemore, 478 U.S. at 409-10.

Questioning the majority's holding that Green did not apply to the Extension Service Clubs, Justice Brennan argued, "[w]hile I agree that the remedy ultimately provided might properly vary in different contexts, I can see no justification in logic or precedent for relieving the State of the overall obligation to desegregate in one context while imposing that obligation in another." Id. at 419. Rejecting the majority's basis for its holding on the non-compulsory nature of the activities in question, he further said,

Nothing in our earlier cases suggests that the State's obligation to desegregate is confined only to those activities in which members of the public are compelled to participate. On the contrary, it is clear that the State's obligation to desegregate formerly segregated entities extends beyond those programs where participation is compulsory to voluntary public amenities such as parks and recreational facilities.

Id. at 418 (citations omitted).

Justice Brennan also addressed the governing regulations for Title VI, which require that "'[i]n administering a program where the recipient has previously discriminated against persons on the grounds of race, . . . the recipient must take affirmative action to overcome the effects of prior discrimination.'" Id. at 412 (citing C.F.R. § 15.3(b)(6)(i) (1985)). Justice Brennan disagreed with the position of the majority that a mere change in policy constitutes affirmative action because "it is absurd to contend that the requirement that States take 'affirmative action' is satisfied when the Extension Service simply declares a neutral admissions policy and refrains from illegal segregative activities." Id. at 414.

44289 F. Supp. 784 (M.D. Ala. 1968), aff'd per curiam, 393 U.S. 400 (1969). ASTA was the first case after Green to address the extent of the affirmative duty of a state to disestablish a dual system of higher education. Plaintiffs sought to prevent the State of Alabama from constructing and operating a four-year degree granting branch of Auburn University in the City of Montgomery. Id. at 785. The proposed site for the branch was close to Alabama State Teachers College, a four year undergraduate institution previously designated for black students. Id. at 786. Plaintiffs argued that
system of higher education by determining whether the state had implemented in good faith nondiscriminatory policies and procedures. He did not impose upon the state the further obligation of achieving any specified degree of racial balance in its public colleges and universities.

The district court rested its decision to apply the ASTA/Bazemore standard upon the element of free choice available in higher education, distinguishing it from the compulsory nature of elementary/secondary schooling:

As is apparent from a contextual reading of Green and subsequent Supreme Court and lower court decisions considering the nature and extent of the state's duty to desegregate at the elementary and secondary level, the affirmative duty as delineated in these cases rests upon the traditional power vested in local school authorities to dictate attendance patterns in compulsory elementary and secondary school systems, that is, to order certain students to attend certain schools. The circumstances in the higher education field, however, are different. Judge Biggers then distinguished the affirmative duty of the state to bring about integration in elementary/secondary schools as opposed to colleges/universities. "Where 'choice' is traditionally controlled by the state, in elementary and secondary education, the state is required to exercise its control in a way which maximizes the racial integration of component institutions." The success or failure of the state in desegregating since the State of Alabama had historically operated a de jure dual system of higher education, which remained largely intact, the precedents from elementary/secondary cases imposed on the State an affirmative duty "to utilize new construction or expansion of [higher education] facilities . . ." to maximize desegregation and effectuate the dismantling of the dual system. Id. at 787. Constructing and operating a branch of predominantly and historically white Auburn University within seven miles of predominantly and historically black Alabama State Teachers College, plaintiffs asserted, would not maximize desegregation, but would serve to increase racial disparity of students and faculty between the two schools. Id.

The three-judge district court judicially noticed that Alabama had traditionally operated a dual system of higher education; found as a fact that the segregated system had not been fully dismantled; and held that the state had an affirmative duty to dismantle the system. ASTA, 289 F. Supp. at 787. The court refused, however, to extend the scope of the duty to desegregate in higher education as far as it had been extended in the elementary/secondary area. Id. Instead, it restricted the affirmative duty to racially neutral admission policies and faculty desegregation. Id. at 789-90. The court held that "as long as the State and a particular institution are dealing with admissions, faculty and staff in good faith the basic requirement of the affirmative duty to dismantle the dual school system on the college level . . . is satisfied." Id. The Supreme Court affirmed the district court opinion with two dissents. Alabama State Teacher's Ass'n v. Alabama Pub. School & College Auth., 393 U.S. 400 (1969).

45 Ayers I, 674 F. Supp. at 1564.
46 Id. at 1552.
47 Id.
DESEGREGATION AS A TWO-WAY STREET

Elementary/secondary schools is then measured by the results achieved because the state has direct official control over attendance decisions.48

"In the college and university education context, however, where individuals have traditionally enjoyed free choice as to whether and when to attend school", courts have not measured the success or failure of a state's efforts to abolish dual systems of higher education by measuring the relative degree of integration in each of its public colleges and universities.49 The wisdom of this approach, said Judge Biggers, rests on the qualitative distinctions existing between post-secondary and elementary/secondary education systems.

Elementary and secondary schools in a single district tend to be fusible in the sense that they generally strive towards uniformity in offerings, facilities and services. The opposite is true in higher education. A special emphasis is placed upon the relative uniqueness of the separate institutions comprising a public system of higher education. Indeed, the uniqueness of size, location, faculty and students found at each institution, explains why freedom of choice is so valued and why the courts have not required the restriction of student choice in higher education.50

Measuring the current actions of the defendants against the remedial standards of ASTA and Bazemore, the district court found that the State of Mississippi had fulfilled its affirmative duty to disestablish the former de jure segregated system of higher education and dismissed the case.51 From this dismissal, plaintiffs appealed.

The Fifth Circuit panel reversed and remanded for remedial proceedings.52 The divided panel specifically rejected the district court's reading of the mandates of Green53 and adopted instead the interpretation applied by the

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48 Id. at 1554.
49 Id.
50 Ayers I, 674 F. Supp. at 1554. Judge Biggers labored over the distinction between higher and elementary/secondary education because of Judge John Minor Wisdom's opinion in United States v. Jefferson Cty. Bd. of Educ., 372 F.2d 836 (5th Cir.1966), corrected, 380 F.2d 385 (5th Cir.1967), cert. denied, 389 U.S. 840 (1967) (per curiam). Judge Wisdom's critical premise in Jefferson County was that school boards had a positive duty to integrate, not merely to stop segregating. Jefferson County, 372 F.2d at 896. A shift from racial to nonracial criteria in admissions and the presence of a few blacks in formerly all-white schools was not sufficient. The purpose of school desegregation was to redress the damage inflicted on the mass of blacks down through the generations by segregated schools. According to Judge Wisdom, what the state had done, it must undo. Appropriate remedies now required "liquidation of the state's system of de jure segregation and the organized undoing of the effects of past segregation." Id. at 866. To escape such a plain mandate for desegregation, Judge Biggers makes an elaborate distinction between elementary/secondary education to which Judge Wisdom's opinion was addressed and higher education, which was the issue in Ayers. Id.
51 Ayers I, 674 F. Supp. at 1564.
52 Ayers II, 893 F.2d at 756.
53 Id. at 744. The Fifth Circuit panel described the district court's application of the law as being based on "an alternative reading of Green," which "requires a state to
Sixth Circuit in Geier v. Alexander, holding that "a state has an affirmative duty to eliminate all of the 'vestiges' of de jure segregation, root and branch, in a university setting."\(^5\)

Writing for the panel majority in Ayers II, Judge Goldberg adopted much of the reasoning of the Sixth Circuit in Geier. He described the message of Brown I to be that "constitutional doctrine must commandeer a social mission to eradicate the stigma conveyed through racial separation by law," \(^5\) and the message of Brown II to be that all effects of de jure segregation must be removed. "Otherwise, the perceptions of black students would remain distorted and the moral aspirations of 'separate is inherently unequal'—the attainment of human

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\(^{54}\)Id. at 744 (quoting Geier v. Alexander, 801 F.2d 799, 804 (6th Cir. 1986). Geier arose after fifteen years of litigation growing out of 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. University of Tenn., 597 F.2d 1056 (6th Cir.), cert. denied, 444 U.S. 886 (1979), a suit filed in 1968 seeking desegregation of public institutions of higher learning in Tennessee. All parties except the United States entered into a consent decree approving the use of preferential "racial quotas" to aid in eliminating residual effects of de jure segregation. 801 F.2d at 800-01. The Department of Justice argued that the quotas deprived nonminority students of equal protection. Id. at 804. The Justice Department also insisted that Green's mandate requiring the elimination of all vestiges of past discrimination "root and branch" did not apply to higher education. Further, "since higher education is a voluntary activity, a state satisfies the Constitution by putting an end to discriminatory practices, and has no obligation to eliminate the vestiges of past discrimination." Id. The principle authority relied upon by the Department of Justice was Bazemore. Id.

The Sixth Circuit declined to find Bazemore controlling and reaffirmed its earlier decision in Geier that Green was the law of the case:

The Green requirement of an affirmative duty applies to public higher education as well as to education at the elementary and secondary school levels. Nothing in the Bazemore decision, where the compelling interest of a state in the education of its citizenry was not involved, requires us to reexamine these holdings.

Id. at 805 (citation omitted).

Rooting its opinion in the distinction between "clubs" dealt with in Bazemore and "education" in Green, the Sixth Circuit said:

[I]t appears fallacious to attempt to extend Bazemore to any level of education. While membership in 4-H and Homemaker Clubs offers a valuable experience to young people and families, particularly in rural areas, it cannot be compared to the value of an advanced education. The importance of education to the individual and the interest of the state in having its young people educated as completely as possible indicate clearly that the holding in Green rather than that of Bazemore applies.

Ayers II, 893 F.2d at 805.

\(^{55}\)Ayers II, 893 F.2d at 749.
dignity for all—would be impugned.\textsuperscript{56} Turning in his analysis to \textit{Green}, Judge Goldberg wrote:

Under \textit{Green} the creation of a unitary school system is the goal, a goal tantamount to the elimination of the effects of \textit{de jure} discrimination, root and branch. If a less demanding standard were adopted, images of inferiority would be memorialized with the force of law, contrary to the vision of \textit{Brown}, because vestiges of discrimination would remain unaddressed. \textit{Brown} commands the application of \textit{Green} in all of its fertility to the public university forum.\textsuperscript{57}

He then sharply criticized the district court’s interpretation of \textit{Green} as requiring only that a state implement in good faith, race-neutral policies and procedures in order to discharge its constitutional responsibilities, and the district court’s holding that the open admissions policy of Mississippi’s public universities satisfied that standard.\textsuperscript{58} It assumes:

Black students possess the same freedom to choose as do white students. Contrary to \textit{Brown}, however, this assumption ignores the effects of past \textit{de jure} segregation . . . \textit{Brown} explicitly recognized that vestiges of \textit{de jure} segregation distort the perceptions of blacks. Blacks do not, therefore, make choices from a tabula rasa. Instead, they choose against a history of racial subjugation with its attendant messages of inferiority.\textsuperscript{59}

The opinion then criticized the district court and the five member majority in \textit{Bazemore} for finding the searching inquiry of \textit{Green} applicable only if attendance at a particular institution is legally compelled. "\textit{Brown} stated that the stigmatizing effects of segregation are not created by legally compelled attendance but rather from the vestiges of legally compelled separation. Thus, the lesson of \textit{Brown} is that the malignancy of apartheid does not vanish in state-sponsored forums simply because attendance is voluntary and admittance race-neutral."\textsuperscript{60}

Following the Fifth Circuit panel’s holding that defendants had not satisfied their affirmative duty under \textit{Green},\textsuperscript{61} the Fifth Circuit Court of Appeals granted defendant’s motion for rehearing en banc.\textsuperscript{62} On rehearing, a divided court vacated the panel decision and affirmed the district court, concluding that "Mississippi has adopted and implemented race neutral policies for operating

\begin{itemize}
  \item \textsuperscript{56} Id. at 750.
  \item \textsuperscript{57} Id.
  \item \textsuperscript{58} Id.
  \item \textsuperscript{59} Id. at 751.
  \item \textsuperscript{60} Ayers II, 893 F.2d at 751.
  \item \textsuperscript{61} Id. at 756.
  \item \textsuperscript{62} Ayers v. Allain, 898 F.2d 1014 (5th Cir. 1990).
\end{itemize}
its colleges and universities and that all students have real freedom of choice to attend the college or university they wish..."63

In reaching this result, the court first analyzed the scope of Mississippi's duty to remedy the effects of past de jure discrimination. At the outset, it remarked that a state's "precise constitutional obligation" as to its higher education system had not been "so clearly defined as in cases involving primary and secondary education," where school authorities had been charged by Green with eliminating all vestiges of state imposed segregation and taking whatever steps are necessary to convert to a unitary system.64 Outside the elementary/secondary context, however, a different standard was set forth in Bazemore requiring the governing authorities only to discontinue prior discriminatory practices and adopt in good faith racially-neutral policies.65

The en banc majority determined that, because of the free-choice/non-compulsory nature of education at the post-secondary level, Bazemore provided the proper standard for desegregation of public universities, and that Mississippi had satisfied that standard.66 "We therefore hold that to fulfill its affirmative duty to disestablish its prior system of de jure segregation in higher education, the state of Mississippi satisfies its constitutional obligation by discontinuing prior discriminatory practices and adopting and implementing good-faith, race-neutral polices and procedures."67

Three courts in Mississippi struggled with the question of what is the appropriate standard for a state to determine whether or not it has fulfilled its affirmative duty to desegregate its public colleges and universities. Two of three, the District Court and the en banc court, arrived at the same conclusion: a state fulfills its affirmative duty to desegregate its public colleges and universities once it discontinues its prior discriminatory practices and adopts race neutral policies. The United States Supreme Court finally weighed in with its view in June of 1992 in United States v. Fordice.68

The Supreme Court addressed two major questions in the Fordice decision. First, the Court articulated the appropriate standard to apply in deciding whether Mississippi had fulfilled its obligation to dismantle its prior de jure segregated system of higher education.69 Second, after determining the

63 Ayers III, 914 F.2d at 678.
64 Id. at 682.
65 Id.
66 Id. at 687.
67 Id. Both the private plaintiffs and the United States filed Petitions for Writ of Certiorarit, which the Supreme Court granted; see United States v. Mabus, 499 U.S. 958 (1991) (reflecting the election of Ray Mabus as governor at the time the Petition was filed; the caption was later changed to Fordice due to the election of governor Kirk Fordice).
69 Id. at 2732.

https://engagedscholarship.csuohio.edu/clevstlrev/vol42/iss3/8
appropriate standard, the Court applied the standard to determine whether Mississippi had in fact fulfilled "its affirmative duty to dismantle its prior dual university system."70 The Supreme Court initiated its discussion about the appropriate standard by noting that "[o]ur decisions establish that a State does not discharge its constitutional obligations until it eradicates policies and practices traceable to its prior de jure dual system that continue to foster segregation. Thus, we have consistently asked whether existing racial identifiability is attributable to the State..."71

This theme was considerably different from the Fifth Circuit Court of Appeals decision, below, that the State had met its affirmative duty to disestablish a dual educational system by adopting and implementing race-neutral policies to govern the higher education system. The Fifth Circuit concluded that students in the higher education arena, in contrast to those in elementary and secondary schools, have "real freedom" to choose where they will attend school.72

The Supreme Court agreed that there were major differences between higher education and elementary and secondary schools, but it did not agree that the constitutional duty to desegregate was different. The Court reasoned that attendance at universities is a matter of choice.73 The State does not assign students to universities. Moreover, the "remedies common to public school desegregation, such as pupil assignments, busing, attendance quotas, and zoning, are unavailable when persons may freely choose whether to pursue an advanced education and, when the choice is made, which of several universities to attend."74

The matter of choice discussion, however, was virtually the only part of the Fifth Circuit's opinion with which the Supreme Court agreed. Significantly, the Supreme Court did not agree with either the appeals court or the district court's holding that the adoption of race-neutral policies alone "demonstrate[s] that the State has completely abandoned its prior dual system."75

The Supreme Court focused on the variety of factors that may influence a student's choice. The Court said admissions policies or faculty hiring policies do not solely determine student attendance.76 Moreover, the question of choice has little to do with whether or not race-neutral policies operate to cure a constitutionally invalid system.77 The differences between the remedies

70 Id. at 2735.
71 Id.
72 Fordice, 112 S. Ct. at 2736.
73 Id.
74 Id.
75 Id.
76 Id.
77 Fordice, 112 S. Ct. at 2736.
available to elementary and secondary institutions as compared to institutions of higher education are indeed significant. However, it is constitutionally inconsistent to contend that the element of choice requires a different constitutional standard to determine whether the Brown mandate to remove all vestiges of prior segregated systems is being achieved. The Court emphasized that even if segregative policies are repealed, "there may still be state action that is traceable to the State's prior de jure segregation and that continues to foster segregation." If such policies and practices still exist, they must be eradicated "to the extent practicable and consistent with sound educational practices."79

Both lower courts recognized some debate regarding the appropriate standard to apply. The debate resulted because the Supreme Court had previously adopted several standards from which courts could choose including Green, ASTA, and Bazemore.80 Both the district court and the court of appeals adopted Bazemore and ASTA as the proper standard to apply.

The Supreme Court in Fordice disagreed with the State's argument that the district court and court of appeals properly followed Bazemore.81 The Court distinguished Bazemore from Fordice by citing the district court's factual findings in Bazemore that the Extension Service had completely abandoned its prior policy of segregation. In contrast, the Fordice Court found substantial effects of de jure segregation, with only limited State efforts to remedy the past effects of this segregation.82 In Bazemore, the Supreme Court's analysis determined that Green did not apply only after the Court was convinced that the State had not played a part in perpetuating the racial identifiability of the Clubs.

Given the tension between Bazemore/ASTA and Green, the Court announced a new standard:

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.83

The Court reasoned that had the lower courts applied the proper standard, they would have found several aspects of Mississippi's system of higher

78 Id.
79 Id.
81 Fordice, 112 S. Ct. at 2737.
82 Id. at 2734-37.
83 Id. at 2737.
education constitutionally suspect. The Supreme Court commanded that Mississippi either justify these policies and practices or eliminate them. Among these policies and practices were admissions policies, mission assignments, program duplication, and the existence of eight universities.

The most extended analysis of the four policies came in the examination of student admission. The system uses a single factor for admission—ACT scores. Automatic admission occurs when a student achieves a certain composite score. However, the required scores (at least 13) for admission to the HBUs are different from the scores (at least 15) required at the HWUs. The Court concluded that "[t]he present admission standards are not only traceable to the de jure system and were originally adopted for a discriminatory purpose, but they also have present discriminatory effects." 86

At the district court, the plaintiffs argued that the Board used the ACT as a tool to segregate blacks and whites within the state system of higher education. The plaintiffs contended that the ACT requirement was adopted by the Board as a direct result of the admission application of James Meredith.87 The plaintiffs also argued that the Board’s ACT requirements for different schools channeled blacks to HBUs and whites to HWUs. Moreover, the plaintiffs argued that the Board failed to follow the ACT program policies by not considering both high school grades and ACT test scores.88

The district court found that the ACT "was in fact adopted '... because of, not merely in spite of its adverse effects upon an identifiable group,' [but that] much time has passed since 1962 and much has transpired with respect to the Board of Trustees' student admissions policies."90 The court noted that the Board adopted the minimum ACT scores in 1976 with valid nondiscriminatory reasons.91 The district court said that there were valid concerns by the Board regarding "the level of scholastic preparation of entering freshman."92

In response to the channeling argument raised by the plaintiffs, Judge Biggers found that the Board could not adopt uniform ACT requirements for

84 Id. at 2738.
85 Id.
86 Fordice, 112 S. Ct. at 2738-39.
87 Ayers I, 674 F. Supp. at 1554.
88 Id. at 1565.
89 Id.
90 Id. (quoting Personnel Administrator v. Feeney, 442 U.S. 256, 279 (1979)).
91 Ayers I, 674 F. Supp. at 1555. While the Board did not adopt minimum ACT requirements until 1976, Judge Biggers also determined that in 1961 the Board authorized each institution to adopt its own minimum ACT requirements. In 1963, the three comprehensive institutions adopted ACT minimums of 15. University of Southern Mississippi and Mississippi State University admitted their first black students in 1965 and 1967, respectively. Id. at 1531.
92 Id. at 1555.
all eight universities because of the "deleterious impact upon institutional enrollments, particularly at the three historically black institutions..."93 He said a minimum ACT score of fifteen would "decimate" enrollment at black institutions.94 The district court also found that the difference between ACT scores at HBUs and HWUs had significantly narrowed over the years.95

In response to the plaintiff's argument regarding failure to use both high school grades and ACT scores, Judge Biggers found that the Board had valid concerns about grade inflation and the "lack of comparability in grading practices and course offerings among Mississippi's diverse high schools."96 The district court found that the ACT organization considered the ACT score singly or in conjunction with grades to provide "a sound indicator of the level of preparation and the likelihood of success at the freshman level..."97 Thus, the district court concluded that the Board adopted these practices for "legitimate educational and fiscal concerns..."98

Judge Biggers recognized the differences between ACT scores for Mississippi's black and white students, but noted that the minimum scores were set at very modest levels.99 He stated that ninety-five percent of ACT test takers score nine or above and seventy percent score fifteen or above.100 Thus, the district court concluded that absent any proof of intentional discrimination neither Title VI nor the Fourteenth Amendment required the state to modify its admissions criteria due to a disparate impact on minority students.101 Judge Biggers believed that if the admissions standards were valid, "enjoining [their] use would not...counteract the effects of past segregation, but might simply serve to perpetuate a dual standard...by reinforcing the stereotype that minority students cannot satisfy generally applicable educational standards and by diluting educational benefits offered to all students, black and white."102

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93 Id.
94 Id. Judge Biggers found that nine was the average ACT score of a black high school student applying to college in Mississippi.
95 Ayers I, 674 F. Supp. at 1555.
96 Id. What this lack of comparability suggests is a much larger, statewide education problem at all levels. Almost every other college in the country utilizes a variety of factors in admissions standards, including high school grades. Fordice, 112 S. Ct. at 2740. Professor Robert Davis says, "For Mississippi to dismiss high school grades because of their grading practices is a different way of saying we have no confidence in the job we are doing of educating our young people." Davis, supra note 9, at 433 n. 190.
97 Ayers I, 674 F. Supp. at 1555-56.
98 Id. at 1556.
99 Id.
100 Id.
101 Id.
102 Ayers I, 674 F. Supp. at 1557.
Judge Biggers was not persuaded by the plaintiff's channeling argument. He said the composite score of fifteen at HWUs and thirteen at HBUs did not significantly contribute to "racial identifiability of Mississippi universities." Judge Biggers noted that HBUs were not black because black students were "channeled" to HBUs after failing to achieve the requisite ACT score, and that, "practically all the black students who applied to predominantly white universities in the Fall of 1986 were accepted." Thus, the district court concluded that the Board's admissions policies for the state institutions of higher learning were reasonable and educationally sound.

In the Supreme Court's view, this conclusion missed the mark regarding the disproportionate impact the ACT automatic admission policies had on minority students. The Supreme Court held, "without doubt, these requirements restrict the range of choices of entering students as to which institution they may attend in a way that perpetuates segregation." The Court noted that in 1985 "seventy-two percent of Mississippi's white high school seniors achieved an ACT composite score of fifteen or better, while less than thirty percent of black high school seniors earned that score."

The Supreme Court noted that the "segregative effects" of the automatic entrance policy are particularly troublesome when the HBUs entrance requirements are compared with other regional institutions. For example, Mississippi University for Women and Delta State University are both designated as regional institutions with eighteen and fifteen ACT minimums for automatic admission, respectively. In contrast, Alcorn State University and Mississippi Valley State University, two historically black regional institutions, have a thirteen ACT minimum for automatic admissions. The Supreme Court asserted that the district court basically concluded it is acceptable to maintain lower ACT levels at HBUs because blacks do not perform as well as whites on standardized tests. The courts below did not realize that they endorsed a dual educational system. Many Mississippians are
comfortable with the way things are, and thus believe that the way things are, is the way things should be. Thus, the district court concerned itself with defending why HWUs and HBUs remained as they were, through no fault of the State's admissions policies, rather than questioning the practicality of eliminating the differences in entrance requirements.\textsuperscript{114}

The Supreme Court had difficulty with two additional arguments of the State's admissions policies. First, the Court did not understand why the difference in program missions between institutions necessarily justified different admissions requirements.\textsuperscript{115} The Court was particularly disturbed here because the "differential admission standards are remnants of the dual system with a continuing discriminatory effect, and the mission assignments to some degree follow the historical racial assignments."\textsuperscript{116}

Second, the Court found the disregard for high school grades educationally unsound in making admissions decisions.\textsuperscript{117} The ACT program officials advised against relying solely on the test scores because the test score alone does not present a complete picture of the students' aptitude for college work. Indeed, the Supreme Court cited an ACT program report that said, "it would be foolish to substitute a three or four-hour test in place of a student's high school grades as a means of predicting college performance."\textsuperscript{118} Moreover, the Court noted that the gap between black and white high school grades was much narrower than that between their average ACT scores.\textsuperscript{119}

The Board's concern with grade inflation and disparate grading practices among high schools persuaded the district court and court of appeals. However, the Supreme Court concluded that "because the ACT requirement was originally adopted for discriminatory purposes, the current requirement is traceable to that decision and seemingly continues to have segregative effects."\textsuperscript{120} Thus, "the State needs to demonstrate that the 'ACT-only' admission standard is not susceptible to elimination without eroding sound educational policy."\textsuperscript{121} Therefore, the "ACT-only" admissions policy adopted by the State had its origins in a \textit{de jure} system and was not justified by any good educational reason.\textsuperscript{122}

\textsuperscript{114}\textit{Fordice}, 112 S. Ct. at 2739.
\textsuperscript{115}Id. at 2739.
\textsuperscript{116}Id. The Fifth Circuit Court of Appeals disagreed with the district court and found that the disparities among the schools were reminiscent of the former \textit{de jure} segregated system but that the policies were no longer racially motivated. \textit{Ayers III}, 914 F.2d at 692.
\textsuperscript{117}\textit{Fordice}, 112 S. Ct. at 2740.
\textsuperscript{118}Id.
\textsuperscript{119}Id.
\textsuperscript{120}Id.
\textsuperscript{121}Id.
\textsuperscript{122}\textit{Fordice}, 112 S. Ct. at 2740.
The duplication of undergraduate and graduate programs among HBUs and HWUs also concerned the Supreme Court.\textsuperscript{123} Despite the district court's finding that almost thirty-five percent of the undergraduate programs at HBUs were duplicated by HWUs and ninety percent of the graduate programs at HBUs were duplicated by HWUs,\textsuperscript{124} it concluded that there was no proof that duplication was related to the racial identifiability of the schools.\textsuperscript{125} The district court concluded that the plaintiffs had offered no proof that eliminating program duplication would affect student choice or be educationally justifiable.\textsuperscript{126} Another problem for the Court arose because the district court appeared to place on the plaintiffs the burden of proof to show duplication contributed to the segregative effects.\textsuperscript{127}

The district court's placing the burden of proof on the plaintiffs to meet an unformulated legal standard troubled the Supreme Court.\textsuperscript{128} Brown, however, required that the burden of proof was on the State to establish that it had eliminated its prior \textit{de jure} system.\textsuperscript{129} Thus, the district court improperly shifted the burden of proving the elimination of a constitutional defect from the State to the individual plaintiffs.\textsuperscript{130} The district court acknowledged that this duplication was wasteful but said, "this case is not about the efficiency or the economic wisdom of higher education policies. It is about the charge of racial discrimination in higher education."\textsuperscript{131} The Supreme Court concluded that "it can hardly be denied that such duplication was part and parcel of the prior dual system of higher education—the whole notion of 'separate but equal' required duplicative programs in two sets of schools. . . ."\textsuperscript{132} The Supreme Court also noted that the district court should not have treated the issue of program duplication in isolation from other policies.\textsuperscript{133}

Some of these other policies included the Institutional Mission Designations. On November 19, 1981, the Board of Trustees of State Institutions of Higher

\begin{thebibliography}{99}
\bibitem{123} \textit{Id.}
\bibitem{124} \textit{Id.}
\bibitem{125} \textit{Id.} at 2741.
\bibitem{126} \textit{Id.}
\bibitem{127} \textit{Fordice}, 112 S. Ct. at 2741.
\bibitem{128} \textit{Id.}
\bibitem{129} \textit{Id.}
\bibitem{130} \textit{Id.}
\bibitem{131} \textit{Ayers I}, 674 F. Supp. at 1541.
\bibitem{132} \textit{Fordice}, 112 S. Ct. at 2741.
\bibitem{133} \textit{Id.}
\end{thebibliography}
Learning adopted mission statements for all eight of its universities. The premise of these statements were:

The general purpose of mission statements is to provide appropriate differential roles of various state universities. The general object shall be quality performance of assigned and approved program endeavors. All programs are subject to periodic review by the Board of Trustees in terms of need, viable size and effective performance. Based upon program reviews, the role and scope of any university may be adjusted from time to time.

Any new program outside the scope of these mission statements required "extraordinary justification" before consideration by the Board.

The plaintiffs argued in the lower court that the 1981 allocation of missions perpetuated the effects of de jure discrimination. They contended that the designated comprehensive institutions were ensured of receiving a greater part of the limited resources. Thus, the plaintiffs asserted that the State should disregard the mission designations and enhance the HBUs programs in order to equalize HBUs with HWUs.

The plaintiffs' argument failed to persuade the district court. Moreover, the argument had strong separate but equal overtones reminiscent of Plessy v. Ferguson. Judge Biggers concluded that the mission statements were legitimately justified as an effort to "conserve scarce educational resources."

The Supreme Court concluded that because the mission designations were based on policies enacted during de jure segregation, the existence of different missions for different universities "limits to some extent an entering student's choice as to which university to seek admittance."

Given the role of each institution in the state prior to 1954, one would have no difficulty in concluding, as the Supreme Court concluded, that the mission assignments and designations continue to perpetuate a racially unequal educa-

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135 Id.
136 Id.
137 Ayers I, 674 F. Supp. at 1560.
138 Id.
139 Id.
140 163 U.S. 537 (1896). In Plessy, the Supreme Court upheld a Louisianan law segregating blacks and whites on railroad cars as a valid exercise of the State's police power and this law did not interfere with interstate commerce. Id. at 548. This decision stamped judicial approval on the doctrine of separate but equal. Id.
141 Ayers I, 674 F. Supp. at 1561.
142 Fordice, 112 S. Ct. at 2742.
This racially unequal system originated with the initial chartering of the schools. Even though the district court found that the 1974 Plan of Compliance assigned institutional missions based on "financial resources," one cannot ignore the historical limitations under which HBUs originally developed.

The final policy examined by the Supreme Court was the Board's maintenance of eight universities. The Court noted that eight universities in the State clearly related to the prior de jure system. The Court also emphasized the district court's recognition that "maintaining all eight universities in Mississippi is wasteful and irrational." The district court stated:

The issues of this case are not about the inefficiency for example of having two state universities only 20 miles apart in the eastern part of the state with separate administrations and duplicating programs, and two state universities on the western side of the state only 50 miles apart, each with separate administrations and duplicating programs. The issues are not about the economic efficiency of funding traditionally black and traditionally white universities which duplicate as many as 75% of each other's baccalaureate programs.... Nor do the issues deal with the attempt by the state to maintain three comprehensive universities which compete with each other for the financial resources available, when larger surrounding states with larger higher education budgets maintain only one premier comprehensive university per state. What the issues of this case are about are the Constitution and the laws of the United States as they apply to the offering of higher education by the State of Mississippi to its citizens and whether any practices or policies of the state in the higher education field are racially motivated to bring about results which deprive black citizens of benefits provided to white citizens.

Thus, Judge Biggers held that the Board adopted race-neutral policies and complied fully with its "affirmative duty to disestablish the former de jure segregated system of higher education." He conceded that the Board funded

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143 Id.
144 Ayers I, 674 F. Supp. at 1539.
145 See Kujovich, supra note 12.
146 Fordice, 112 S. Ct. at 2742.
147 Id.
148 Ayers I, 674 F. Supp. at 1563-64.
149 Id. at 1564.
more schools than for which it had the available resources. However, he said that was a legislative decision that affects the quality of the institutions.150

The Supreme Court, citing United States v. Louisiana,151 said that the record was too incomplete to determine whether closure of one or more schools would be necessary.152 The Court said it may be possible to cure the constitutional violation by eliminating program duplication and changing the admissions requirements.153 The Supreme Court's instructions on this point were clear. The Court said,

[O]n remand this issue should be carefully explored by inquiring and determining whether retention of all eight institutions itself affects student choice and perpetuates the segregated higher education system, whether maintenance of each of the universities is educationally justifiable, and whether one or more of them can be practicably closed or merged with other existing institutions.154

Thus, the Supreme Court concluded that students in Mississippi do not have true free choice in college institutions because of the connection between a prior de jure system and current segregative policies.155 The Court placed the burden on the State to take the necessary steps to dismantle the prior system and ensure that student choice becomes truly free.156 To meet this obligation, the Court held that the "full range of policies and practices must be examined."157

In her concurrence, Justice O'Connor emphasized that the State of Mississippi has the burden to prove that it has undone its prior segregation. "The circumstances in which a state may maintain a policy or practice traceable to de jure segregation that has segregative effects are narrow."158 Using the State's own "good faith" argument, Justice O'Connor suggested: "Where the State can accomplish legitimate educational objectives through less segregative means, the courts may infer a lack of good faith. . . ."159 She concluded with the position that "if the State shows that maintenance of certain remnants of its prior system is essential to accomplish its legitimate goals, then it still must

150Id.

151718 F. Supp. 499, 514 (E.D. La. 1989). The United States District Court ordered a restructuring of Louisiana's higher education system in order to desegregate a prior de jure system. Id. The merger of two state law schools was part of the restructuring. Id.

152Fordice, 112 S. Ct. at 2743.

153Id.

154Id.

155Id.

156Id.

157Fordice, 112 S. Ct. at 2743.

158Id.

159Id. at 2744.
prove that it has counteracted and minimized the segregative impact of such policies to the extent possible."\textsuperscript{160}

Justice Thomas wrote separately to emphasize the difference between the standard announced by the majority and the \textit{Green} standard used in the grade-school context. The differences in the standard would allow the continuation of HBUs: "In particular, because it does not compel the elimination of all observed racial imbalance, it portends neither the destruction of historically black colleges nor the severing of those institutions from their distinctive histories and traditions."\textsuperscript{161}

Calling the remedies used for desegregation of grade-schools "radical", Justice Thomas insisted that the focus of the higher education standard is on the "specific policies alleged to produce racial imbalance, rather than on the imbalance itself."\textsuperscript{162} He noted that "[a]s a practical matter, then, the district courts administering our standard will spend their time determining whether such policies have been adequately justified—a far narrower, more manageable task than that imposed under \textit{Green}."\textsuperscript{163}

Justice Scalia was the lone dissenter. However, he did agree with the majority on the following: First, the Constitution compels Mississippi to remove all discriminatory barriers to its state-funded universities. Second, the Constitution does not compel Mississippi to remedy funding disparities between its HBUs and HWUs. Finally, Mississippi's ACT program requirements need further review.\textsuperscript{164}

His dissent critiqued placement of the burden of proof on all formerly \textit{de jure} public higher education systems which requires them to show that they are in compliance with \textit{Brown I}.\textsuperscript{165} Justice Scalia contended that the burden imposed by the majority on higher education is too similar to that which is prescribed for primary and secondary schools.\textsuperscript{166} He believed that ruling will do more harm than good when he said:

What I do predict is a number of years of litigation-driven confusion and destabilization in the university systems of all formerly \textit{de jure} States, that will benefit neither blacks nor whites, neither predominantly black institutions nor predominantly white ones. Nothing good will come of this judicially ordained turmoil, except the public recognition that any Court that would knowingly impose it

\textsuperscript{160}Id.
\textsuperscript{161}Id.
\textsuperscript{162}\textit{Fordice}, 112 S. Ct. at 2745.
\textsuperscript{163}Id.
\textsuperscript{164}Id. at 2746.
\textsuperscript{165}Id.
\textsuperscript{166}Id.
must hate segregation. We must find some other way of making the
point.\footnote{Fordice, 112 S. Ct. at 2753.}

III. PART II: COMMENTATORS IN THE WHITE COMMUNITY

Many commentators have come forward to propose ways in which states
can desegregate their systems of higher education. Part II examines those
proposals in the white community that respond to the ruling in \textit{Fordice}. In her
article, \textit{The Road to United States v. Fordice: What Is The Duty Of Public Colleges
and Universities In Former De Jure States To Desegregate?}, Mary Ann Connell,
despite the ruling in \textit{Fordice}, argues for maintenance of the status quo.\footnote{See Connell, \textit{supra} note 10.}
As the University Attorney for the University of Mississippi, Connell joined in
the argument for the respondents which rests on the concept of choice and the
inherent differences between elementary/secondary and higher education.\footnote{\textit{Id.} at 285, 289; see Respondent's Brief at 2, United States v. Fordice, 112 S. Ct. 2727 (1992) (No. 90-65888) [hereinafter Respondent's Brief].}
According to Connell, "[This concept] do[es] not diminish the equal education
opportunity mandate of \textit{Brown}, but simply find[s] that the constitutional
obligation is satisfied with good-faith implementation of nondiscriminatory
policies and procedures.\footnote{Connell, \textit{supra} note 10, at 359.}
As such, Connell believes that \textit{Bazemore} is the appropriate standard to apply
in desegregating higher education because it is noncompulsory just as the 4-H
clubs were in \textit{Bazemore}. She says, "The importance the Court placed on factors
of student assignment, the compulsory nature of the activity, and the state's
power to create or designate student attendance clearly indicates that the
differences in elementary/secondary and higher education matter.\footnote{\textit{Id.}}"
Connell's position simply put is an argument for maintenance of the status
quo based on a freedom of choice argument. Her position is misguided for two
reasons. First, the numbers clearly demonstrate that desegregation has failed
in the State of Mississippi.\footnote{See Petitioner's Brief at 10-13, United States v. Fordice, 112 S. Ct. 2727 (1992) (No. 90-65888) [hereinafter Petitioner's Brief].}
Second, the Supreme Court concluded that there is no freedom of choice because the state maintains practices and policies which
fetter choice.\footnote{\textit{Fordice}, 112 S. Ct. at 2736-37.}
The numbers in Mississippi tell the story: Ninety-nine percent of the system's white undergraduate students attended an HWU and
seventy-one percent of the system's black students attended an HBU.\footnote{Petitioners' Brief, \textit{supra} note 172, at 10.} With
respect to administrative staff, the HBUs were over ninety-four percent black
and the HWUs were over ninety-eight percent white with Delta State University, Mississippi University for Women and Mississippi State University having no black staff. In terms of faculty, thirty percent of the faculty employed by the HBUs were white, while only three percent of the faculty employed by the HWUs were black.

These numbers indicate that there is something terribly wrong in the State of Mississippi forty years after Brown I. Insofar as the courts concern themselves with desegregation, in the face of these numbers, maintenance of the status quo woefully fails to address this abysmal situation. The Supreme Court, in Fordice, recognized as much when it determined that Mississippi cannot meet its burden to affirmatively desegregate the State's schools until the State eliminates its policies and practices traceable to the former de jure system that still have segregative effects. In so holding, the Court rejected the freedom of choice position promulgated by Connell and the State of Mississippi.

Professor Wendy Brown attacks this freedom of choice notion as fallacious. She says,

In the case of public colleges, it is clear that acquiescence to individual private judgments serves to mask the state's continued role in perpetuating the system it created. Because racism is endemic rather than a deviation from the American norm, the choice of whites to remain in all-white schools is predictable by the state. Because this choice is predictable, principles of formal equality—such as good faith or neutrality—fail to adequately address the norm of racism; rather, the effect of choice is to perpetuate racial division and deprive blacks of equal protection.

As Professor Brown demonstrates, the problem with the freedom of choice argument is that it ignores the fact that "the state's racially motivated conduct is so inextricably linked with the exercise of individual choice as to be virtually inseparable." In turn, individual choice is influenced by racism. The coercive effects of public and private racism lead to the inescapable conclusion that the exercise of choice by blacks and whites is fettered.
Professor Paul Gewirtz argues that choices are never completely free of constraint. In this context, choice is constrained by past governmental discrimination, and the effects of past discrimination are perpetuated by choice. Under the "corrective model" discussed by Professor Gewirtz, a choice system is deficient when the government's intentional discrimination constrains choice and when the "continuing effects" of government discrimination constrain or "taint" choice.

Connell can argue freedom of choice only by completely ignoring the historic and current limitations placed by the state on the ability of blacks and whites to exercise "free choice" in the context of selecting educational institutions. She erroneously downplays the power and authority that state action gives to the exclusionary effect of the exercise of fettered choice by both blacks and whites. In doing so, she denies the equal protection of the laws to both.

There are several ways in which the state's conduct fetters, or interferes with, the choice of blacks and whites to such an extent that it reveals the state's culpability for continuing racial segregation. The factors that give individual choice the color of state action include: the location of predominantly black and predominantly white colleges in close proximity, the effects of racial segregation in early education, the continued racial identifiability of schools and the chilling effect created on campus by the failure of schools to help correct distorted attitudes about race.

Southern states have blatantly accommodated segregationist patterns by locating two colleges in the same geographic area. Much of the litigation surrounding the desegregation of southern state systems of higher education has revolved around the issue of whether the construction of new schools, or improvements to existing institutions, would exacerbate racial segregation by making it easier for blacks and whites to avoid attending schools predominated by the other race. Moreover, the duplication of programs gives students the

(1987). Professor Brown says, "Because of its pervasive nature, it is often difficult to identify or place exactly in either the public or private sphere. Removing the State from scrutiny, and allowing the composition of each school to be determined on the reasoning that private decisionmaking is not effected by state conduct, leaves black citizens without the protection afforded by formal requirements designed to eliminate the adverse effects of racial prejudice." Brown, supra note 178, at 72. Thus, by advocating that the state need not remove the continuing vestiges of its past sponsored racism "would allow for discretionary private judgments based on racial prejudice" to shape the future of educational opportunities for blacks. Id.

182Id. at 741-42.
183Ayers I, 674 F. Supp. at 1563-64.

https://engagedscholarship.csuohio.edu/clevstlrev/vol42/iss3/8
DESEGREGATION AS A TWO-WAY STREET

opportunity to choose the school where their race predominates. Connell asserts, as did the district court in Ayers, that neither the duplication of programs, nor the existence of eight institutions of higher education nor the creation of branch campuses by Mississippi contributed to the inequities in funding or perpetuated racial identifiability. The Supreme Court, however, implied that the existence of eight universities perpetuated racial segregation in higher education in Mississippi.

In addition to maintaining eight universities, Mississippi also fetters choice through its admissions policies whereby they predicate admission solely on the ACT score. Given the pitiful state of secondary education in Mississippi, especially, in black communities, this admissions policy works to channel black students to the HBUs. The State could easily avoid such channeling by considering grades and other factors in the admissions process. This solution was rejected by the district court. Yet, the American College Testing Program said, "in the case of minority students whose prior educational opportunities have been limited, it becomes especially appropriate to make use of the total scope of information—cognitive as well as non-academic—provided by the ACT assessment."

By rejecting the ACT's own recommendation for how to use its scores, the State forecloses an avenue of access to the HWUs for many black students. This policy also contributes to the continued racial identifiability of the eight universities in Mississippi. Furthermore, the underfunding of the HBUs continues their racial identifiability as well. The lack of funding and other "tangible" support is directly attributable to the State. Other concrete vestiges of the regime of de jure segregation include the name of the school, school customs and programs and special events honoring people based on their contribution to their race. Due to the continued resource disparities and cultural differences between HWUs and HBUs, whites will choose to attend...
the better endowed white colleges and both blacks and whites will continue to choose schools with cultural atmospheres similar to their own.\textsuperscript{191}

The desire of whites to attend better funded institutions\textsuperscript{192} coupled with the difficult and biased admissions standards of the HWUs that prevents blacks from attending HWUs, precludes blacks and whites from attending school together and thereby channels their choices in a way that perpetuates a dual system of education. Not surprisingly, the State intended this result. For example, at trial, in \textit{Ayers}, the president of an HWU admitted that the university did not publicize its affirmative action programs.\textsuperscript{193}

As summarized by the Fifth Circuit panel: "The badge of inferiority that marks black institutions has not been removed. As such, there remains . . . vestiges of discrimination which distorts the perceptions of black students. The racial composition of the student body is not simply the result of student choice."\textsuperscript{194} To be untainted by discrimination, a choice system must offer options that do not reflect the effects of discrimination; this becomes "impossible" if at the time of choice the schools already have a racial identity that was created by \textit{de jure} segregation.\textsuperscript{195}

The continued segregation of students in Mississippi's schools manifests itself in the racist attitudes displayed towards blacks on predominantly white campuses. At trial in \textit{Ayers}, six black former students of the University of Mississippi testified about verbal harassment by faculty and students, which

\textsuperscript{191}Evidence introduced at trial in \textit{Ayers I} showed that whites tended to avoid predominantly black colleges, even when more convenient geographically, "because of the continued racial identifiability and stigma of inferiority originally imposed by the state." See Motion for Leave to File Brief of the NAACP Legal Defense and Education, Inc., American Civil Liberties Union and The National Conference of Black Lawyers as Amici Curiae in Support of Petitioners at 58 n. 88, United States v. Fordice, 112 S. Ct. 2727 (1992) (No. 90-6588) (letters from whites avoiding Jackson State because of perceived inferiority and racial identity) [hereinafter LDF Brief].

\textsuperscript{192}Whites can hardly be blamed for wanting to attend better funded institutions who wouldn't? The state continues to fetter choice by spending funds on the HWUs and allowing the HBUs to rot. For example, Mississippi Valley State University and Delta State University are only 35 miles apart. Yet in terms of resources, they are more like 3.5 million miles apart. At Mississippi Valley, "classrooms go unpainted, roofs leak, steps crumble, the sewage system stops up, one dorm is boarded up, and buildings are mostly stark cinderblock with none of the manicured shrubbery that sprawls across predominantly white Mississippi State, Ole Miss or University of Southern Mississippi campuses." \textit{Black Universities; Delta Blues}, THE ECONOMIST, Dec. 12, 1992, at 30. Moreover, Mississippi's predominantly white campuses have legions of graduate courses and research labs: Mississippi Valley has just one master's course and no doctoral programs. \textit{Id.} Since the State controls the funding of its institutions (in 1992 the State spent over $200 million on the HWUs and only $25.5 million on the HBUs, \textit{id.}), allowing Mississippi Valley to exist in such a dilapidated condition, while continuing to spend only on the HWUs clearly fetters choice.

\textsuperscript{193}See Ayers II, 893 F.2d at 735 n. 12.

\textsuperscript{194}\textit{Id.} at 752.

\textsuperscript{195}Gewirtz, supra note 173, at 744.
included racial slurs and denigrating blacks as a people, discrimination in the availability of a variety of services and programs, unfair grading practices and inaction by the campus police and by the chancellor regarding safety issues. 196

Along with actual physical duress, black students who do choose to attend predominantly white colleges are faced with overcoming the distorted attitudes that society and the state have perpetuated about them. Moreover, by absolving itself from having influenced choice, the state permits the individual who elects to cross the color line to become the target of hostility. 197 Professor Brown says, "the combined power of white choice and state neutrality to perpetuate segregation is further exacerbated when the state does little to assuage the burden this places on black students as they attempt to . . . advance their constitutionally guaranteed right to educational opportunity. Therefore, many blacks consciously avoid predominantly white schools to avoid the academically and socially adverse consequences of racial bias and harassment." 198

It appears that the State plays a major role in fettering the school choices of both black and white students. This fettering results in continued segregation as black students "choose" HBUs and white students "choose" HWUs. Insofar as desegregation is the goal, state fettering of student choice precludes its achievement. Consequently, to argue for maintenance of the status quo, as does Mary Ann Connell, is misguided, and the State ought to try other approaches.

Professor Robert Davis, in his article, The Quest for Equal Education in Mississippi, 199 offers a radically different approach. He professes the desire to create a solution that will "comply with constitutional requirements and provide a quality education for all of [Mississippi’s] citizens, black and white." 200 To this end he presents a total of fourteen recommendations to

196 See Motion of Former Black Students of the University of Mississippi for Leave to File Brief Amicus Curiae in Support of Petitioners and Brief, at 8-12, Fordice (No. 90-65888) [hereinafter Motion of Former University of Mississippi Black Students].

197 Samuel Meyers, President of the National Association for Equal Opportunity in Higher Education (members are presidents of predominantly black colleges), remarked that "mounting racial tensions at white colleges may prompt black students to enroll at black colleges." Alex Poinsett, What Blacks Can Expect in the 90s, EBONY, Jan. 1990, at 54, 58; see also Isabel Wilkerson, Racial Harassment Altering Blacks’ Choice in College, N.Y. TIMES, May 9, 1990, at A1; U.S. COMISSION ON CIVIL RIGHTS, BIGOTRY AND VIOLENCE ON AMERICAN COLLEGE CAMPUSES (1990).

198 Brown, supra note 178, at 100.

199 Davis, supra note 11. The Mississippi Board of Trustees [hereinafter MBOT] offered their own proposal. Ronald Smothers, Desegregation Plan Offered in Mississippi, HOUSTON CHRON, Oct. 23, 1992, at 16. In it, they advocate the enhancement of Jackson State to comprehensive status, closing Mississippi Valley and merging Alcorn State into Mississippi State University. Id. The MBOT proposal appeared in October, 1992 while Davis’ article appeared in winter, 1993. As a result, Davis incorporates the MBOT proposal into his own and therefore, I discuss them together.

200 Davis, supra note 11, at 452.
"provide for quality education in Mississippi for all." His recommendations are as follows: First, Mississippi needs to make education its number one funding priority. Without proper funding no amount of reform can be effective. Second, the State should eliminate five of its eight universities through mergers, consolidations and closures. Third, the State should finance three comprehensive universities which are geographically divided by north, south and central. Instead of being racially identifiable, these institutions would pull all students from the represented regions.

Fourth, the State should establish a commission to determine which schools should be closed. In Professor Davis' view, two of three HBUs are "prime candidates for merger, consolidation or closure based on facilities, student population, and budgets." Jackson State University, the only other black school, survives the axe solely because it is in the capital of the state. It should be enhanced to make the school attractive to white students. Fifth, after acknowledging that the HBUs play a critical role in educating black students, Professor Davis goes on to say that a degree from an HBU is a handicap in the job market and is therefore of little value. However, if the HBUs want to continue to operate, they should do so without public funds. Sixth, Mississippi University for Women should be taken off the tax roles for the same reason.

Seventh, the Governor, the State Board of Institutions of Higher Learning and the parties should restructure the graduate and professional degree programs to eliminate unnecessary duplication in course offerings. Eighth, the Governor should establish a State Education Committee comprised of a cross-section of Mississippians to monitor the following areas at the system's three institutions: racial composition of the student body; racial composition of the faculty and administration; changes in admissions policies; changes in

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201 Id. at 489.
202 Id. at 493-99.
203 Id. at 493.
204 Id. at 494.
205 Davis, supra note 11, at 494.
206 The MBOT advocates maintenance of four comprehensive universities. They keep all three HWU comprehensives and would add an upgraded Jackson State to make four comprehensives. Professor Davis would upgrade Jackson State because it is in the state's capital. Id. So, he would close one of the current HWU comprehensives.
207 Davis, supra note 11, at 495.
208 Id. at 496.
209 Under the MBOT proposal, Mississippi University for Women would be merged into University of Southern Mississippi.
210 Davis, supra note 11, at 497.
tenure requirements; new facilities construction; new appointments to the State College Board; and any changes in program development.\textsuperscript{211}

Ninth, the university system should adopt a preparatory skills program at each regional school to prepare students for college or enhance the junior college system with a possibility of transfer to a regional school.\textsuperscript{212} In conjunction, recommendation ten urges the adoption of flexible admissions requirements that reflect a combination of ACT, GPA, work and life experiences.\textsuperscript{213} Those who do not meet the admissions requirements will be allowed to enroll at a junior college with the possibility of transfer to a regional school.\textsuperscript{214}

Eleventh, try to utilize closed facilities or if not, sell them to raise money for the rest of the system.\textsuperscript{215} Twelfth, to the extent possible try to incorporate the best teachers and administrators from any institution that is merged or closed. Those displaced can possibly be accommodated by providing them with alternative employment within the system or placement assistance outside the state.\textsuperscript{216} Thirteenth, the State legislature should redirect all revenue expended on the closed five institutions to the university system and since merger, consolidation or closure may be more expensive than the current system, the needed funds ought to be raised.\textsuperscript{217} Finally, the university system should develop incentives that will attract and keep a top quality faculty at its institutions.\textsuperscript{218}

I agree with some of Professor Davis' proposals. For instance, it is critical for the State to make education its number one funding priority.\textsuperscript{219} I also agree that some schools need to be closed, that there should be a multi-racial Board of Governors created to guide the Mississippi university system, that preparatory skills classes need to be offered, available space should be either utilized or sold, and that the system should try to attract top quality faculty. However, I also have some serious difficulties with his other recommendations.

Although I believe some schools should be closed, I think it should be the HWUs not the HBUs. As I articulated in the Introduction, the HBUs serve the vital function of correcting for past discrimination in education in that they are

\textsuperscript{211}Id.
\textsuperscript{212}Id.
\textsuperscript{213}The MBOT proposal advocates using a mix of ACT and grade point averages.
\textsuperscript{214}Davis, supra note 11, at 497-98.
\textsuperscript{215}Id.
\textsuperscript{216}Id. at 498.
\textsuperscript{217}Id.
\textsuperscript{218}Id. at 498-99.
\textsuperscript{219}Mississippi's state legislature apparently disagrees because it has reduced educational spending for the '93-'94 school year by $7.4 million. Black Universities; Delta Blues, supra note 192, at 30.
accessible because of their admissions requirements, remedial programs and affordability. In *Adams v. Richardson*, the National Association for Equal Educational Opportunity in Higher Education [hereinafter NAFEO] filed an amicus curiae brief in which they argued that black people should not be forced to give up the tangible educational opportunities at black colleges for the intangible and yet to be realized advantages of a unitary system:

The black institutions of higher education have served and continue to serve as the bridge between a crippling and debilitating elementary and secondary educational system to which *Brown* itself was directed because of the experience with the equal education cases from *Murray* to *Sweatt* in the field of higher education. This experience demonstrated that equality of educational attainment could not be achieved until the feeder system of the secondary and elementary levels had been improved for black students. Eighteen years after *Brown*, with a general consensus that this feeder system has not been improved—and maybe has lost ground, . . . the assimilation of the black institutions of higher learning would be to remove the wooden beam in order to replace it with a steel or cement support before the new beam is in place, leaving the structure unsupported at all.

Professor Gil Kujovich expands on this theme by exploring the affirmative action service HBUs provide. He says, "[D]isestablishment addresses one effect or vestige of the separate but equal era—racial duality in public colleges. In its concern with the structural vestige of segregation, however, the remedy affords little relief for the far-reaching effects past discrimination had on the black population. . . . [Green's command for 'just schools'] threatens to deny black colleges their continuing role in affording higher education to blacks while *Bakke* limits the ability of other institutions to assume that function." Echoing Professor Kujovich, Kenneth S. Tollet states that "Black higher educational institutions are quintessentially affirmative action organizations which assist the United States in reversing the effects of societal discrimination against Blacks." Tollet argues that in order to serve their affirmative action function, HBUs need to be exclusively black. I do not go that far. But, I do feel that Professor Davis' proposals ignore the affirmative action function

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220480 F.2d 1159 (D.C. Cir. 1973).
222 Kujovich, *supra* note 12, at 152.
223 *Id.* at 169-70.
225 *Id.* at 40.
DESEGREGATION AS A TWO-WAY STREET

served by the HBUs. Professor Davis tries to address the past discrimination argument by proposing the implementation of remedial programs and flexible admissions criteria at the three regional schools.

While this is an attractive solution, it is not adequate because it may reduce the overall educational opportunities for black students. Professor Davis’ flexible admissions requirements include the use of test scores, GPA and life experience. These admissions criteria are not particularly "flexible" compared to most HBUs where the admission criteria usually results in automatic admission for all who apply. Professor Davis says that if students are not admitted they can go to a junior college and possibly transfer. I think most would agree that the environment provided by the HBUs as documented by the NAFEO brief, Tollet and Professor Kujovich is preferable to a junior college. Another problem with Professor Davis’ proposal is that it would seem that those who need the remedial programs are being turned away and sent to junior colleges. Whereas the HBUs admit most people and provide the remedial courses because they know that these students have no where else to go.

Professor Davis’ proposals also ignore the role black faculty and administrators play in the education of black students. Although the United States Supreme Court has rejected the role model theory as constitutionally required or protected, many have commented that it is sound educational policy. The most Professor Davis can promise is that after the best faculty and administrators are skimmed off, the rest will be given relocation assistance. There are several problems with this recommendation. First, since most faculty and administrators at HBUs do not possess the terminal degree and are still de facto segregated from their white colleagues in academic circles, very few will find jobs in the three regional universities. Second, most black college and

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226Mississippi Valley has produced 11,000 graduates the past four decades, many of whom might never have attended college elsewhere. The college operates a remedial learning center for freshmen who need tutoring. Without it many could never meet more stringent entrance requirements elsewhere. Tom Watson, Black Colleges, USA TODAY, Jan. 28, 1993, at 1.

227See, e.g., Kujovich, supra note 12, at 90.

228Davis, supra note 11, at 498.

229See, e.g., discussion of Bakke, infra note 342.


231Edgar Epps argues, "In hiring new faculty, selection committees—typically composed primarily of white males—generally rank candidates largely on the basis of the prestige of the institutions from which they obtained their principal degrees." Id.; see also, National Research Council, Rise in Number of Black Ph.D.’s Is Reported, N.Y. TIMES, May 5, 1992 (twelve HBUs responsible for 40% of Black college and graduate school graduates). Thus, if selection committees are looking for candidates from only the
graduate school graduates who teach, teach at HBUs. Consequently, elimination of the HBUs reduces the number of employed black faculty and thereby reducing role models for black students. As Professor Kujovich says, "if the demise of separate but equal meant the demise of black public colleges, one of the two major employers of black academics would be eliminated." Finally, the suggestion that the State provide relocation assistance is similar to the out-of-state scholarships provided black graduate students which were thoroughly discredited in Pearson v. Murray and Missouri ex rel. Gaines v. Canada.

Professor Davis' recommendations are also insulting and allow the state to capitalize on its own prior discrimination. In his fourth and fifth recommendations he asserts that degree holders from black colleges are "crippled" in the job market because no one respects their degrees. The built in assumption, of course, is that if granted degrees from one of the three regional (white) schools, black job seekers would have an easier time. Even if this proposition were true, it ignores the racism perpetrated by the State which has resulted in the inferior resources of the HBUs which adds to their stigma and thereby makes it difficult for its graduates to attain jobs.

Professor Davis also asserts that the HBUs are "prime candidates" for closure because they are so poor in resources compared to their HWU neighbors. J. Clay Smith, a Professor of Law at Howard University who filed a brief in the Fordice case on behalf of NAFEO, asserted that the decision to close historically black schools in Mississippi and elsewhere has been driven by "a devaluation mentality... the schools received inadequate funding because they were black. Then they have been targeted for closure because they are inadequate from lack of funding." Again, I contend that some of the HWUs are "prime candidates" for closure because of the important function that the HBUs serve.

prestigious schools and public HBUs because of their historical deprivation, are not considered prestigious, then those faculty have very little chance of being hired in the HWUs.

232Id.

233Kujovich, supra note 12, at 95.

234182 A. 590 (Md. 1936).

235305 U.S. 337 (1938).

236Davis, supra note 11, at 491.

237In fact, Professor Davis gives no evidence to support this assertion.

238See, e.g., PREER, supra note 12; Kujovich, supra note 12, for a detailed history of the financial, educational and other resource discrimination and degradation forced upon the HBUs before and after Brown I and II.

239Davis, supra note 11, at 491.

Finally, Professor Davis' proposals completely ignore financing a college education. One of the most attractive features of HBUs is that they are affordable. They price themselves for their constituency. How would financial aid work at these three new colleges? The American Council on Education stated that "access by minorities to higher education is in peril because of the imbalance between federal loans and grants, the impending cut in the maximum Pell Grant award and tight state fiscal conditions." So, by eliminating the HBUs, Professor Davis' proposal effectively reduces educational opportunities for those black students who cannot afford to attend one of the three new schools.

Professor Davis offered his recommendations as a way to increase educational opportunities for all of Mississippi's students. Yet, his recommendations will have the effect of reducing, rather than increasing, educational opportunities for black students. They also have the added burden of reducing employment opportunities for black faculty and thereby reducing role models for the black students in the State.

Kenyon D. Bunch and Grant B. Mindle present an argument that merges the thinking of Connell and Professor Davis. They argue two points. First, like Connell, the authors contend that Green is not the appropriate standard for higher education. For if it were, States would be forced to eliminate their HBUs via mergers with the HWUs. Second, like Professor Davis, they argue that the HWUs would be the surviving institutions because they are better and white students would not attend HBUs.

Not surprisingly, their whole argument turns on the continued existence of the HBUs and the problems their continued existence presents. They make it clear that if the HBUs were merged or closed, desegregation would be accomplished. Lamenting the fact that the Office of Civil Rights [hereinafter OCR] of the Department of Education (formerly in the Department of Health, Education and Welfare) required specific desegregation goals for HW-Us only, the authors state that "desegregation of HWUs is to be accomplished primarily by increasing the enrollment rate of black high school graduates rather than by significantly reducing black enrollment at HBUs." Later in the article they assert that "by insulating HBUs from the burden of desegregation, the courts have deprived them of any incentive to recruit white students, faculty and staff. Moreover, the absence of significant numbers of


242 Bunch & Mindle, supra note 11.

243 Id. at 543; see also Davis, supra note 11, where he argues that the HBUs are "prime candidates" for merger or closure because they are so inferior to the HWUs. Cf. Schmidt, supra note 240, where J. Clay Smith argues that this position allows the State to profit from its own racism because it purposely underfunded the HBUs and now wants to close them for lack of funding.

244 Bunch & Mindle, supra note 11, at 543.
white students can always be cited to justify their request for additional institutional resources on the grounds that still more resources are necessary to bolster their academic reputation within the white community." 245 Finally, the authors conclude that "if courts were serious about desegregating HBUs—and they are not—there would have been more mergers of geographically proximate institutions." 246

The authors criticize the proportionality requirement because it provides no incentive to help the "second and third tier black students, students who are unlikely to enroll, let alone succeed, in higher education without additional assistance." 247 Instead, the system provides incentives to engage in a "bidding war for talented black students and faculty . . ." 248 It appears that the authors are concerned about two things: 1) that the second and third tier students are ignored and 2) the present system only provides educational opportunities for a selected few. Yet, by attacking the HBUs, the authors exacerbate the very problem they are writing to correct.

The HBUs typically attract the so-called "second and third tier students". Since these students are ignored by the HWUs, without the existence of the HBUs, they would have no college to attend. Also, without the HBUs, only those black students who could meet the admissions requirement of the HWUs and who could afford the HWUs tuition would attend those schools. Thus, the authors would merely replace one system for another, but with the same effects of ignoring the lower tier students and providing educational opportunities to a select few.

The authors make this mistake because they equate equal access to the HWUs with equal opportunity to an education. This equation was first established in Brown I. In oral argument,249 Thurgood Marshall relied on the graduate school cases to argue that separation was inherently unequal.250 Yet,

245 Id. at 572.

246 Id. at 573.

247 Id. at 570.

248 Id.


250 Id. at 201. The graduate school cases leading to Brown I involved the following: in Missouri ex rel. Gaines v. Canada, 305 U.S. 337 (1938), the Supreme Court held that Missouri's out-of-state tuition grants for black students were not equivalent of in-state instruction for white students and did not satisfy the constitutional requirement of equal protection; in Sipuel v. Board of Regents, 332 U.S. 631 (1948), the Court relied exclusively on the Gaines decision and required that the State of Oklahoma provide Sipuel with a law school education in conformity with the equal protection clause; in Sweatt v. Painter, 339 U.S. 629 (1950), the Court held the law school provided Sweatt was not substantially equivalent to the law school of the University of Texas in terms of tangible factors such as facilities and faculty and intangible factors such as reputation and alumni support; in McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950), the Court held that once
the graduate school cases had all involved segregation in fact. The records of each one of those cases were filled with minute factual comparisons between the black and white schools. Now, however, Marshall was trying to use these cases to assert a new principal that separate was not just unequal in fact, but that it was inherently unequal.251

Justice Frankfurter seized on the apparent inconsistency: "Am I wrong in thinking that you must reject the basis of the decision in McLaurin for purposes of this case?"252 The question was designed to smoke out whether Marshall was trying to argue that racial classifications in education were inherently invalid or whether the factual comparisons in each case were relevant. Justice Frankfurter continued:

The basis [of McLaurin] was whether each got the same thing. Your position in these cases is that is not arguable, that you cannot differentiate, you cannot enter the domain of whether a black child or a white child gets the same educational advantages or facilities or opportunity. You must reject that, do you not?253

Marshall finally gave up on the Delaware case which, like the other higher education cases, was grounded in a minute comparison of educational offerings. Marshall agreed with Justice Frankfurter that for purposes of this case, comparisons between white and black schools was irrelevant for two reasons, "one, it is not in this case because we agreed that equality is outside the case, and [two,] our argument is deliberately broad enough to encompass a situation regardless of facilities, and we make no issue about it."254

Justice Frankfurter responded, "I understand that, but what will be a ground on which the series of cases in the McLaurin case—the point of my question is that I think we are dealing with two different legal propositions: McLaurin is one and what you are tendering the Court is another."255 Of course, Justice Frankfurter was right. Marshall and the NAACP had argued the separate but equal doctrine previously and now were arguing separate as inherently unequal.

Although the Court adopted the standard offered by the NAACP, that standard is questionable today.256 The primary concern is that by saying separate is inherently unequal, that implies that the corollary is true: that not admitted to a white school, the state could not segregate within the school or otherwise treat that student differently based solely on race.

251FRIEDMAN, supra note 249, at 199.
252Id. at 202.
253Id.
254Id. at 203.
255Id.
separate or integration is inherently equal. In other words, once the barriers to education have been removed, the black students will attend the white schools because they are better and better facilities equal a better education. Therefore, integration, equal access, provides equal opportunity to education.

Yet as I demonstrated in critiquing Professor Davis’ proposals and now in critiquing Bunch and Mindle, equal access to the white schools is good insofar as they have the best resources and better resources usually do equal a better education. While, this argument works at the grade school level, it is more difficult to apply at the graduate school level. As Jean Preer has written, "the subsequent failure of the Court to consider the question of difference of schools between the elementary and secondary level and the college level hampered both the immediate and long-range application of the Brown decision to higher education." 257

The difficulty lies in the fact that separate is not inherently unequal at the higher education level. Rather, as the McLaurin line of cases demonstrated, separate was unequal in fact, in terms of access to resources and the State is directly and purposefully responsible for that predicament. 258 Moreover, according to Drew S. Days, today, many black people are questioning the integrative ideal. 259 He says,

Several developments in recent years suggest that growing numbers of blacks are turning away from the integrative ideal. Four examples of this shift are worth noting: first, black parents now express support for school board efforts to end desegregation plans that involve busing, favoring instead a return to neighborhood schools, even though the result would be all-black schools in the inner-city; second, at the urging of black parents, school boards in a number of major cities have attempted to create all-black male academies; third, black students, faculty, administrators and alumni have joined with southern state officials to resist desegregation plans of historically black colleges; and fourth, black students on predominantly white college campuses have urged administrators to provide special facilities for black students’ social and cultural events. 260

Furthermore, with only 16 percent of the black college population, HBU’s continue to graduate 40 percent of black degree holders. 261 Enrollment at HBUs

257 Preer, supra note 12, at 134.
258 See, e.g., Kujovich, supra note 12.
259 Days, supra note 14, at 54.
260 Id.
increased 3.1 percent in 1992.\textsuperscript{262} These examples demonstrate that HBUs continue to serve the following: those who cannot meet the admissions standards of the HWUs; those who meet the admissions standards but cannot afford to attend; those who meet the admissions requirements, can afford to attend, but who do not end up graduating from the HWUs;\textsuperscript{263} and those who for reasons of safety and psychological comfort deliberately chose HBUs.\textsuperscript{264} I do not dispute that opening the doors of the HWUs to black students increases educational opportunity. It obviously does insofar as opening those doors provides black students with more educational options. My point is that the process of opening those doors should not include the elimination of the HBUs, as Professor Davis, Bunch and Mindle propose. The HBUs continue to provide education to those who otherwise cannot attend or will not graduate from an HWU. So, any process that has as its goal the increase of educational opportunity for black students, but also requires the elimination of the HBUs, actually will create a net loss in educational opportunities for black students. Professor Kujovich says, "[F]or many black undergraduates the black public colleges provided opportunities that would not be available in a racially unitary system offering only 'equal treatment.'"\textsuperscript{265}

### IV. PART III: LDF DESEGREGATION LITIGATION

Professor Kujovich's observation represents one of the three traditional responses in the black community to the issue of desegregation in higher education. Professor Kujovich's position that the HBUs must continue to exist and be enhanced because a unitary system would actually underserve the black community is the most popular.\textsuperscript{266} Other responses include the notion that HBUs as instruments of affirmative action may take race into account in admission and hiring decisions (i.e., remain \textit{de facto} predominantly/exclusively black).\textsuperscript{267} Finally, in stark contrast, there is the response, largely articulated by the NAACP Legal Defense and Education Fund, Inc. [hereinafter LDF], until

\begin{itemize}
\item \textsuperscript{262}Id. at 2. Moreover, HBUs "are widely held to teach blacks what white colleges cannot: self-esteem and leadership. Enrollment in them has gone up by 15% since 1986." \textit{Black Universities; Delta Blues, supra} note 192, at 30.
\item \textsuperscript{263}If HBUs only have 16 percent of the black college population yet continue to graduate 40 percent of all black degree holders, then many black students who attend HWUs are not graduating from the HWUs. Of those, the statistics suggest that some must continue their education at HBUs.
\item \textsuperscript{264}See, e.g., Motion of Former University of Mississippi Black Students, \textit{supra} note 196, at 8-12.
\item \textsuperscript{265}Kujovich, \textit{supra} note 12, at 160.
\item \textsuperscript{266}Id.; see also, infra notes 299-301, 308 and \textit{supra} note 236.
\item \textsuperscript{267}See, e.g., \textit{TOLLET, supra} note 12.
\end{itemize}
rather recently, that the HBUs should be abolished in favor of establishing a unitary system of education.268

The story of LDF's litigation strategies to desegregate higher education is a fascinating one precisely because, over time, it has evoked all three of these responses. The LDF litigation in this area has occurred in three time periods: pre-Brown cases,269 Brown to Adams cases,270 and finally, the Adams case. In the pre-Brown cases, LDF sought to overcome restricted access to education by demonstrating the inferiority of the HBUs. This conservative legal approach sought to guard against the potential harm of judicial reaffirmation of the Plessy doctrine if the Supreme Court rejected an outright attack on segregation. In theory, claims for equal access to education could be made apart from the quality of educational offerings on either side of the color line; claims for equal opportunity to an education required ignoring or disputing the positive educational role of the HBUs. Even after LDF switched to a frontal assault on segregation itself, it offered arguments based on the inferiority of the HBUs.

This attack on segregation generated serious divisiveness in the black community. W.E.B. DuBois objected to attacks on segregation that took HBUs and black teachers as their targets. For DuBois, only the HBUs could train the race's 'Talented Tenth', those "standing conspicuously among the best of their time," to undertake the highest intellectual pursuits and to emerge "as leaders of thought and missionaries of culture among their people."271 DuBois was not in favor of segregation. Just the opposite, he was strongly opposed to it. Yet, he felt that, in order to make progress, black people would need to "internally self-organize for self-respect and self-defense."272 Thus, DuBois saw the problem as two-fold: to "pound at the closed gates of opportunity and denounce caste and segregation" but also to insure that the separate black school "is the best possible school; that it is decently housed and effectively taught by well-trained teachers."273 DuBois urged that blacks demand control of the finances and curriculum of the separate school. He distinguished between segregation and separation. He viewed segregation that was legally imposed as an evil hindrance to black advancement, but separation that was voluntary as a potential benefit to the race.274


269See infra note 312.

270Discussion of Green, supra note 42; discussion of ASTA, supra note 44; discussion of Sanders, supra note 54; discussion of Norris, supra note 184.


273Id.

The NAACP leadership stood on the other side of this debate. For DuBois, the HBUs were a continuing source of educational opportunity for black students, while for the NAACP leadership, the HBUs were a continuing symbol of legally imposed racial separation.

Despite the on-going debate, the NAACP pursued their integration strategy which culminated in the Brown decision. As noted earlier, the Supreme Court, in Brown held that the separate, but equal doctrine had no place in public education, not because racial classifications are constitutionally invalid, but because separate educational facilities are inherently unequal. This approach emphasized the undeniable weaknesses of separate black schools at the expense of their past significance and future role. Despite the elimination of legal barriers, enrollment patterns at HBUs and HWUs stayed segregated mostly due to the violent resistance of whites to integration, but also due to academic, economic and cultural factors.

As a result of this post-Brown resistance to school desegregation, the LDF litigated Green, ASTA, Sanders and Norris. In each case, they pursued the "just schools" rationale articulated by Justice Brennan in Green. The Supreme Court in Green adopted the "just schools" approach for elementary/secondary education and the Fourth Circuit Court of Appeals adopted the "just schools" approach for higher education in the Norris case. However, in ASTA the Fifth Circuit rejected this approach for higher education as did the Sixth Circuit in Sanders.

The struggle over desegregation of higher education in the courts mirrored the struggle occurring in the black community over the "just schools" approach. The NAACP relied heavily on a report issued by sociologist James Coleman entitled Equality of Educational Opportunity in their litigation during this time period. The report focused exclusively on the short-comings of the HBUs concluding "that faculties in these colleges receive lower pay, that laboratories are less well-equipped, that fewer faculty members hold the earned doctorate, that teaching loads are heavier, and that library holdings may be meager." In relying on this report, LDF ignored the report's reminder that there exists "huge gaps in our knowledge about the complex sorting process by which students do or do not attempt higher education, and arrive on one campus or another." The study examined both tangible and intangible aspects of schooling and concluded that the performance of black students improved in schools and classrooms with a significant proportion of whites. Since this

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275 See, e.g., Cooper v. Aaron, 358 U.S. 1 (1958); Meredith v. Fair, 305 F.2d 341 (5th Cir.), cert. denied, 371 U.S. 828 (1962).

276 91 U.S. 430 (1968); see supra note 38.


278 Id. at 368.

279 Id.
conclusion vindicated the "just schools" approach of the LDF, its lawyers, such as Robert Carter, incorporated these findings in new desegregation suits.

Yet, by the end of the 1960's, the LDF was under heavy attack for use of such findings and even James Coleman himself later questioned the validity of his conclusions.280 Black educators were keenly aware that their schools suffered from lack of funds and power. This was related to their schools' racial identity but was not necessarily synonymous with it. As such, black colleges began to organize themselves. In 1968, they established the Office for Advancement of Public Negro Colleges to increase the visibility of those colleges and to attract financial support from the private sector.281 A year later, the presidents of both public and private black colleges formed the National Association for Equal Opportunity in Higher Education to challenge the Nixon administration's lack of support for black higher education.282 This group appeared at the congressional hearings on amendments to the Higher Education Act of 1965. There, the group advocated for the continued existence of the HBUs on the basis that the schools provide access to education to students who would otherwise not have access to college.283

Vivian W. Henderson, President of Clark College in Atlanta, summarized the feelings of NAFEO members when she said,

I am not a black nationalist or black power advocate, but I do raise questions as to whether a college has to be white to be good and to be good enough for everybody. I raise a fundamental question at this point. What is wrong with Negro colleges continuing to be Negro Colleges? They are going to be just that for a long time to come and perhaps it wouldn't be a bad idea for them to remain Negro colleges through eternity. A second fundamental question to be faced in higher education is this: What is wrong with whites going to Negro colleges?284

LDF responded to both of President Henderson's questions by filing a lawsuit against OCR in 1970.285 Like ASTA, Sanders and Norris, plaintiffs did not allege specific discriminatory policies or acts. Unlike its predecessors,


281SOUTHERN EDUCATION FOUNDATION, SMALL CHANGE: A REPORT ON FEDERAL SUPPORT FOR BLACK COLLEGES 7 (1972).

282Id. at 16-17; Miles M. Fisher IV, National Association for Equal Opportunity in Higher Education: Crusader for the Black College, 3 CIVIL RIGHTS DIGEST 18 (1970).


however, it did not concern a particular state system or even the scope of the affirmative duty to desegregate. Rather, it charged the federal government with "general and calculated default" and cited a 1970 report of the Commission on Civil Rights that there had been a "major breakdown" in the enforcement of civil rights laws. Plaintiffs called for an injunction requiring OCR to exert stronger efforts in enforcing the laws.\textsuperscript{286} The goal of the litigation was to increase desegregation in higher education (i.e., increasing the rate at which black students attended white colleges).

At trial, LDF used the same strategy from the \textit{pre-Brown} cases and questioned witnesses on every minute aspect of comparison between white and black colleges. The purpose of the questions was to demonstrate the inferiority of the HBUs and thereby the need to expedite desegregation, so that black students would no longer need to waste time attending the HBUs.\textsuperscript{287} The trial court focused on whether or not OCR was enforcing desegregation laws and found that it had not. The court, therefore, ruled for the plaintiffs. Although LDF prevailed at trial, it was not clear what they had won. While enforcement of the desegregation laws is obviously a good thing, LDF did not consider what effect this enforcement might have on the continued existence of the HBUs, nor did they consider what would happen to the students, faculty and staff at the HBUs were they no longer in existence. LDF ignored these concerns because they did not consult with any educators when formulating their litigation strategy.

As a result of being ignored at trial, NAFEO filed an amicus curiae brief on appeal.\textsuperscript{288} The filing of this brief marked the first time that black educators openly and formally opposed LDF in court and signaled a significant break with the past.\textsuperscript{289} On the equal access to education side of the equation, NAFEO challenged three of LDF's basic premises: whether public school precedents provided suitable standards for higher education; whether black colleges could be implicated in systemwide discrimination; and whether eliminating the racial identity of state colleges realistically promised to enhance educational opportunities for black youth.\textsuperscript{290} NAFEO argued that black colleges were not the perpetrators of segregation, but its victims, and could not be sacrificed in an effort to achieve integration.\textsuperscript{291}

On the educational opportunity side of the equation, NAFEO argued that black colleges had the most experience and expertise in dealing with the educational needs of black students.\textsuperscript{292} While LDF equated educational

\textsuperscript{286}Id. at 93.
\textsuperscript{287}\textit{PreER, supra} note 12, at 201.
\textsuperscript{288}NAFEO Brief, \textit{supra} note 221, at 19.
\textsuperscript{289}\textit{PreER, supra} note 12, at 3.
\textsuperscript{290}NAFEO Brief, \textit{supra} note 221, at 16.
\textsuperscript{291}Id.
\textsuperscript{292}Id. at 17.
opportunity with shifts in enrollment patterns and the elimination of racial identity, the black college presidents went beyond statistics to the substance of the educational process. They objected to the contention that black colleges were responsible for maintaining educational duality and should therefore be "assimilated into the white unitary system where there is presumptively, equal educational opportunity, independent of, and maybe contrary to, the State's wishes to establish and maintain a 'special purpose' Institution of Higher Education." In essence, NAFEO argued that black people should not be forced to give up the tangible educational opportunities at black colleges for the intangible and yet to be realized advantages of a unitary system.

The appellate court upheld the district court order finding that OCR had not fulfilled its obligations to enforce Title VI. The court agreed with LDF that the goal should be a unitary system of higher education, but it also agreed with NAFEO when it said, "a predicate for minority access to quality post-graduate programs is a viable, co-ordinated state-wide higher education policy that takes into account the special problems of minority students and of Black colleges." This ruling was a mixed victory for both sides. The court wanted OCR to force states to create a unitary system, but not at the expense of the HBUs.

The future of black colleges was widely debated outside the courtroom. In 1972 Dr. James Cheek, President of Howard University, criticized the assumption made by many white and black Americans that quality education could only occur through integration that involved the destruction or closing of black colleges and the enrollment of black students at predominantly white colleges. The first National Black Political Convention, meeting in Gary, Indiana, in March of 1972, took a stand against the merger of black and white colleges in the South, and in 1973 Operation PUSH, headed by the Reverend

293Id. at 19.
294Adams, 480 F.2d at 1164.
295Id.

The D.C. Circuit's ruling in Adams is similar to the rulings of many courts in the affirmative action context. Courts have struggled with the desire for a "color-blind" society (i.e., a unitary system), on the hand, but not at the expense of rectifying past discrimination on the other. They typically settle on mandating color-blindness except where an affirmative action scheme is designed to remedy documented/specific past discrimination as opposed to general past societal discrimination. See, e.g., City of Richmond v. J.A. Croson Co., 448 U.S. 469 (1989); University of Regents v. Bakke, 438 U.S. 265 (1978); Metro Broadcasting, Inc. v. FCC, 110 S. Ct. 2997 (1990); Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986); Local 28 of the Sheet Metal Workers Int'l Assoc. v. EEOC, 478 U.S. 421 (1986); United States v. Paradise, 480 U.S. 149 (1987).

Jesse Jackson, sponsored Black Expo, with the theme "Save the Black Colleges." 299

The debate raged within the NAACP itself. At the Association's 1973 annual meeting the national leadership introduced a resolution calling for mergers to achieve desegregation. After spirited debate, the title of the resolution was changed from "Merger of State Supported Colleges" to "Desegregation of State Supported Systems." The NAACP lacked a firm definition of desegregation in higher education. After he agreed to the revised rewording, Roy Wilkins remarked, "There is nothing at variance in association policy in calling for desegregation of state supported systems. Under desegregation, any kind of operation that would desegregate those facilities would be acceptable." 300

While recognizing the hostility of many blacks to further desegregation, the NAACP, in 1974, backed a Louisiana plan that would merge black Southern University with white Louisiana State University and black Grambling College with white Louisiana Tech University with the white institutions as the surviving institutions. 301

In The Crisis, educator Estelle Taylor wrote that many blacks were puzzled by the ineffectiveness of the Brown decision and, in fact, believed that integration had proved disastrous for a large segment of the black population. 302 Professor Derrick Bell concluded that, "As a legal principle, it should now be clear that Brown can neither integrate our schools nor insure that those minority children within such schools obtain an effective education." 303 Like DuBois, he argued that either integrated or separate schools could serve the educational interests of black children and that the power to influence basic educational decisions was more important than racial identity. 304 Kenneth S. Tollet took Professor Bell's idea one step further and argued that only separate schools properly educated black students and as such HBUs operated as instruments of affirmative action. Accordingly, HBUs could legally take race into account in admissions and hiring decisions. 305

Dissatisfaction with LDF's position came not only from legal scholars and educators, but also from plaintiffs. Disappointed with the way LDF was handling the Adams litigation, a group of Mississippi residents sued the state

299PUSH, HUD Fail to Communicate, 4 RACE RELATIONS REPORTER 5 (1973).


301Paul Delaney, N.A.A.C.P. Opening New Orleans Parley, N.Y. TIMES, July 1, 1974, at 57.


304Bell, Waiting on the Promise of Brown, supra note 16.

305Tollet, supra note 12, at 54-67.
on their own in 1975. This became the Ayers suit. As discussed above, the plaintiffs took a completely different stance from the one articulated by LDF, arguing that the elimination of racial identifiability was inimical to the interests of black students, faculty and colleges in the state. They accused the United States government, plaintiff-intervenor in Ayers and LDF of ignoring pervasive and deep-seated evils of racism that "dismantling dual segregated system of education" or "eliminating institutional racism" would leave untouched. The plaintiffs argued that enhanced black access to formerly all-white colleges should not replace but supplement the educational opportunities offered by black institutions.

By the time Ayers grew into Fordice and reached the Supreme Court seventeen years later, LDF had completely changed its position. In its amicus curiae brief, LDF argues "there are many remedial measures that advance disestablishment of a segregated and discriminatory regime and encourage legitimate diversity among institutions and student choice." The brief refers to the desegregation criteria that the Adams court required OCR to adopt to support its contention that uniformity in state systems of higher education is not required,

Nothing in the [OCR] guidelines suggests or encourages a structure of uniformity in state systems of higher education. In fact, the opposite is encouraged as the Criteria urge the elimination of unnecessary program duplication and the development of unique program offerings at HBIs [Historically Black Institutions] to attract white students.

To fully demonstrate their change in position, LDF goes so far as to argue that it would be unconstitutional to close the HBUs. They state that "no discussion of potential remedies can ignore the suggestions made throughout this litigation that the appropriate remedy would be simply to close or neglect the HBIs. Amici strongly urge the Court to reject that notion as offensive to the Constitution." Incredibly, LDF supports this proposition by citing the Adams case in which they argued that the HBUs should be closed in favor of a unitary school system. They say, "in Adams v. Richardson [cite omitted], the en banc Court of Appeals for the District of Columbia Circuit unanimously recognized

306 Ayers v. Waller, Civil Action No. GC 75-9-B (N.D. Miss. 1975).
308 Id. at 17.
309 LDF Brief, supra note 191, at 61.
310 Id. at 62.
311 Id. at 62-63.

https://engagedscholarship.csuohio.edu/clevstlrev/vol42/iss3/8
DESEGREGATION AS A TWO-WAY STREET

the crucial role played by the HBIs in higher education and the need to 'take into account the special problems of minority students and Black colleges.'"312

Finally, LDF closes their brief with the following admonition to the Court,

Fulfillment of Brown II's mandate of a 'racially nondiscriminatory school system' requires that old forms of discrimination not be replaced with new ones. A remedy that abandons or neglects the HBIs, the only institutions that consistently show a commitment to redressing the educational deficits visited upon the black citizens of Mississippi, will further limit equal educational opportunity for black citizens. That would be a perverse remedy for the victims of Mississippi's discrimination.313

Although it is not clear why LDF so dramatically changed its position, several factors could be at work. First, as demonstrated above, there was a high amount of opposition to desegregation in the black community—LDF's constituency. Second, the Adams court did say that any desegregation remedy must be sensitive to the plight of the HBUs thereby implicitly rejecting LDF's abolitionist approach. Finally, taking its hint from the D.C. Circuit in Adams, OCR, in formulating desegregation criteria, made it clear that just simply abolishing the HBUs was not an appropriate way for a state to dismantle its dual system of higher education.314

The LDF shift in its position on desegregation of systems of higher education exemplifies the ambivalence towards this issue in the black community. Black responses to LDF litigation in this area have ranged from complete separation to complete integration with most responses falling somewhere in the middle of these two extremes. Yet, are these positions any more considered than those advocated by commentators in the white community?

Until recently, LDF advocated abolition of the HBUs. It sought the "just schools" rhetoric espoused by Professor Davis, Bunch and Mindle. However, as explicated above, this is a myopic position because it ignores the impact this approach will have on black students, faculty and staff. LDF, at one point, assumed that black students, faculty and staff would simply be absorbed by

312 Id. at 63.

313 Id. at 63-64.

314 See Revised Criteria Specifying the Ingredients of Acceptable Plans to Desegregate State Systems of Higher Education, 43 Fed. Reg. 6658-64 (1978). The criteria distinguished between desegregation in higher education and in elementary/secondary education. Differences in institutional roles, organization and governance required different remedies. The criteria also reaffirmed the important continuing function of black public colleges and required commitments to upgrade them, but did not exempt them from the obligations of Title VI. Finally, the criteria included both measures to increase the access of black students to traditionally white colleges and to enhance the educational opportunities available at traditionally black colleges.
the white institutions. This assumption is unrealistic because the current numbers in Mississippi demonstrate that desegregation is not that easy. There are several problems including the lack of secondary schooling preventing most black students from qualifying for admission to the HWUs, lack of black faculty holding the Ph.D. degree, and racism. For his part, at least Professor Robert Davis is honest and admits that in integrating the HWUs there will be casualties and since the HBUs' students, faculty and facilities are inferior to those of the HWUs', the casualties will all be suffered in the black community.

To prevent these casualties in the black community, other commentators urge that the HBUs be protected from elimination and enhanced. This position does not radically differ from the position expressed by Connell. She advocates maintenance of the status quo, a do nothing approach, while these black commentators urge maintenance of the status quo, but more funding. They claim this approach is appropriate because enhancement, among other things, will attract white students and thereby encourage integration. However, there are at least two problems with this approach. First, the Supreme Court made it clear in Fordice that enhancement of the HBUs so that they can become separate, but more equal enclaves for black students, faculty and staff is illegal.

Second, even if this were a legally permissible action, it does not really solve the problem for the following reason: Currently, there are two universities proximately situated to one another. One, the HBU, is clearly inferior to the other, the HWU. Enhancing the HBU to be the clear equal of the HWU does

315 See Petitioners Brief, Adams v. Richardson, 480 F.2d 1159 (D.C. Cir. 1973), reprinted in HAYNES, supra note 221.

316 During the 1991-92 school year the HWUs received approximately $132 million from the State while the HBUs received approximately $30 million. In fact, the total received by the HBUs was $5 to $10 million less than the appropriation for University of Mississippi ($35 million), Mississippi State University ($43 million) and University of Southern Mississippi ($38 million). See Andy Kanengiser, Funding Answer to Problems, Say Black Colleges, THE CLARION-LEDGER (Jackson, Miss.), June 27, 1992, at 10A Col. 1.

317 Less than 30% of the black students scored 15 (the score needed to gain admission to the HWUs) or better on the ACT. Fordice, 112 S. Ct. at 2739.

318 Id. at 2742.

319 See, e.g., Brown, supra note 178, at 72; Motion of Former University of Mississippi Black Students, supra note 196, at 8-12.

320 Davis, supra note 11, at 489.

321 See, e.g., Petitioner's Brief, supra note 172; NAFEO's Brief, supra note 221; LDF Brief, supra note 191; Bell, Waiting on the Promise of Brown, supra note 16.

322 Id.

323 Id.

324 Fordice, 112 S. Ct. at 2743.
not change the choices students have to make. The only change is that now white students will attend a quality HWU and black students will attend a quality HBU. In fact, those black students thinking about attending the HWU because of its superior quality, may now actually attend the equally quality HBU! This situation is hardly what the Supreme Court had in mind in *Fordice*.

To confirm that this situation would be the result of an enhancement strategy, one need look no further than Mississippi’s neighbor, Louisiana. After the *Adams* litigation, Louisiana entered into a consent decree with OCR which provided that Louisiana would take steps to enhance the HBUs to make them attractive enough to whites that whites would start desegregating the HBUs. Between 1981 and 1987, Louisiana spent $200 million on enhancing the HBUs and still, the white people did not come. The district court judge found that "the consent decree as implemented has proved no viable solution. If anything, the consent decree has exacerbated the segregation; many of the schools are more racially polarized now than they were just before the consent decree was implemented in 1981."

As the situation in Louisiana poignantly demonstrates, mere enhancement of the HBUs is not enough to dismantle a dual system of segregation or even to encourage desegregation. More is required and should be undertaken to fulfill the state’s obligation as articulated by the Court in *Fordice*. Since I find that the responses in both the black and white communities fall short, in the final part of this paper, I propose my own remedy.

V. PART IV: ALTERNATIVE PROPOSAL

I would address the continuing vestiges of separate and unequal public higher education in Mississippi and states like it by adopting policies and practices that encourage integration while increasing the educational opportunities for black students. To this end, I make three recommendations.

First Recommendation: Mississippi should adopt a two-tier classification system: comprehensive and regional. It should then close or merge some of the HWUs. Finally, it should designate one HBU and two HWUs as comprehensive and then designate the other two HBU’s and one other HWU as regional.

Second Recommendation: Program offerings and admissions would be tied to the two classifications. The comprehensive schools, which will offer a wide variety of undergraduate and graduate courses and degrees, will be the most competitive in admissions. While the regional schools, which will offer less of a variety of both and will offer remedial courses, will be less competitive in admissions. Also, each regional school will have a speciality in a particular area.

Third Recommendation: All schools in the system should develop an affirmative action policy for faculty, staff, administration and students.


327 *Id.*
Furthermore, each school should have scholarships available for minority students (i.e., scholarships for blacks at HWUs and for whites at HBUs).

My proposal presents several benefits in that it addresses the concerns of the Supreme Court and it is educationally justifiable. First, it is legally valid because maintenance of the HBUs is a sound educational policy. In his concurrence in *Fordice*, Justice Thomas found that 1) HBUs have expanded as opportunities to go to white schools have expanded; 2) HBUs are still regarded as a source of pride, leadership and upward mobility especially in the South; 3) states can operate a diverse assortment of institutions including HBUs, open to all on a race-neutral basis, but with established traditions and programs that might disproportionately attract one race or another; and 4) existence of the HBUs does not constitute the kind of program duplication the majority wanted eliminated. Justice Thomas, therefore, concluded that, "Although I agree that a State is not constitutionally required to maintain its [HBUs] as such, . . . I do not understand our opinion to hold that a State is forbidden from doing so."  

Second, this plan addresses the Court’s concern with maintenance of all eight public universities. The Court found that the maintenance of all eight schools was a remnant of dual segregation. The District Court found that this policy was wasteful and irrational. Under my proposal two schools are closed. Since the HBUs serve a sound educational policy, there is no legal nor educational impediment to closing only the HWUs.  

Third, my proposal addresses the Court’s trouble with the admissions requirements and program duplication. With respect to admissions, the Court found that the ACT cut-off score of 15 was initiated and maintained to perpetuate segregation. Also, the Court found no educational justification for schools with the same mission designation having different admissions requirements. My proposal meets the Court’s test in two ways. First, the admissions requirements are tied to the mission designations, so that the three comprehensive schools have the same admissions requirements and the three regional schools have the same admissions requirements. Second, the mission statements have not been assigned in a way that is tied to the past *de jure* system,  

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329 *Id.* (emphasis in original).

330 *Id.* at 2742.

331 *Id.*

332 In footnote 11, the Court points to a letter sent to Mississippi officials by the Department of Education saying that the “overall objective” is to have students chose schools on “other than racial criteria.” *Id.* at 2743 n.11. The letter went on to say however, that the closing of a HBU “would create a presumption that a greater burden is being placed upon the black students and faculty in Mississippi.” *Id.*

333 112 S. Ct. at 2738. At the time the cut-off score was adopted whites were averaging 18 on the test while blacks were averaging 7.

334 *Id.* at 2739.
DESEGREGATION AS A TWO-WAY STREET

and since the admissions requirements are tied to the mission assignments, the admission requirements are no longer tied to the past system.

Fourth, my proposal speaks to the Court's problem with the mission statements. The Court found that during de jure segregation, the state funding and curriculum decisions were based on the purposes for which the institutions were established. The subsequent mission statements adopted in 1981 were based on the past policies and practices and therefore designed to perpetuate segregation. Yet, the Court said that "We do not suggest that absent discriminatory purpose the assignment of different missions to various institutions in a State's higher education system would raise an equal protection issue where one or more of the institutions become or remained predominantly black or white." My plan meets this standard because the mission statements are not assigned on the basis of any past de jure system. In fact, it creates a comprehensive university out of one of the HBUs where currently none of the HBUs are designated as comprehensive. Moreover, if, despite these new assignments, the schools stay predominantly white or black because there is no discriminatory purpose, the schools would not violate the equal protection clause.

My proposal also addresses program duplication. The Court defined program duplication as "those instances where two or more institutions offer the same nonessential or noncore program." The Court found that this kind of program duplication was necessary to maintain a segregated system. Under my proposal, the comprehensive and regional schools will offer different nonessential and noncore programs. Furthermore, my proposal requires that each regional school specialize in a particular area, similar to magnet schools on the secondary school level, which will eradicate much of the program duplication found today. Finally, since the mission statements, which define what courses are offered at a particular institution, are no longer traceable to a system of de jure segregation, the program duplication concern has largely been eliminated.

Finally, my program encourages integration of students and staff through affirmative action. In University of California Regents v. Bakke and again in City

335 Id. at 2741.
336 Id. at 2742.
337 Id.
338 112 S. Ct. at 2742.
339 Id. at 2741.
340 438 U.S. 265 (1978). In Bakke, the Supreme Court struck down an affirmative action plan at the University of California at Davis medical school whereby the medical school reserved 16 places in a 100 person class for minorities. Bakke, a white student, sued under the equal protection clause of the Fourteenth Amendment to the United States Constitution, claiming that he was discriminated against because he was white. No more than a plurality emerged for each opinion. Four justices felt that race could never be used in the admissions process. Four other justices felt that the quota did not violate the
of Richmond v. J. A. Croson, the Supreme Court held that quotas in admissions violate the equal protection clause. Nonetheless, Justice Powell's opinion in Bakke makes it clear that using race as one factor in the admissions process is valid. An argument can be made that under Croson, such an affirmative action policy that includes race as a factor is still subject to strict scrutiny. However, in Croson, Justice O'Connor held that race conscious remedies will survive strict scrutiny where there is specific evidence that the university has discriminated on the basis of race. The Supreme Court found that the admissions policies in Mississippi discriminated on the basis of race. So, an affirmative action plan in admissions in Mississippi would probably survive a Croson challenge.

With respect to staff, the Supreme Court agreed in Wygant v. Jackson Board of Education that public employers may sometimes voluntarily embark upon a race-conscious scheme for remedying past employment discrimination. Similar to the reasoning in Croson, the Court reasoned here that a state could adopt an affirmative action program where there was at least a "strong basis in evidence" that remedial action was necessary. My proposal meets this legal standard because one, it advocates the adoption of a voluntary affirmative action program and two, the Supreme Court itself found a "strong basis in the Constitution. Justice Powell provided the fifth vote striking down the quotas, but upholding the use of race as a consideration in the admissions process.

341488 U.S. 469 (1989). In Croson, the Supreme Court struck down an affirmative action plan in the City of Richmond, Virginia, which set-aside 30% of the total dollar amount of city contracts for minority business enterprises. The plaintiff in Croson was a white-owned prime contractor seeking a city contract who claimed that he could not find a minority owned business who could supply 30% of the work at a reasonable cost. He sued the city claiming that the set-aside violated his right to equal protection of the law. Justice O'Connor wrote for the Court holding that government imposed racial classifications were subject to strict scrutiny whether they were designed to benefit minorities or designed to discriminate against minorities.

342 Bakke, 438 U.S. at 311-12 (Powell, J.). Powell says, "The attainment of a diverse student body... clearly is a constitutionally permissible goal for an institution of higher education." Id.

343 488 U.S. at 486.


345 Wygant concerned lay-offs in a public school district. The school district had recently hired several black teachers to remedy its racial imbalance in teachers. However, once the lay-offs started, seniority dictated that the first hired should be the first fired. Knowing that this procedure would wipe out the gains the district had made in hiring black teachers, it implemented a modified lay-off procedure which required laying off the same percentage of black and white teachers. The Court found that this procedure violated the equal protection rights of the white teachers with seniority. The Court applied strict scrutiny to the lay-off procedure. They also found that the role model theory was not a compelling state interest nor was remedying past discrimination in general.

346 Id. at 277.
evidence" that Mississippi discriminated on the basis of race in the hiring of faculty and administration at the HWUs and the HBUs.

Educationally, my proposal presents several benefits. First, by bringing HBUs into a unified system as either comprehensive or regional ensures that they will receive the funding necessary to fulfill their missions. The receipt of appropriate funding will allow them to better serve their historical constituency as well as a new constituency of white students who will be attracted by the improved facilities and course offerings. 347

Unlike the status quo approach of Connell or the enhancement approach of petitioners in Fordice or the amicus briefs of LDF and NAFEO in Fordice, this proposal will create integration because it couples enhancement with the closing of a proximate university. Compare what happened in Louisiana where HBUs were enhanced with no concomitant closure of proximate schools with what happened in Tennessee. In that state, Tennessee State University [hereinafter TSU] was located in Nashville as was an extension branch of the University of Tennessee [hereinafter UT]. In Geier v. University of Tennessee, 348 the Sixth Circuit required the closing of UT coupled with the enhancement of TSU. At the time of the order, in 1979, TSU was over 90% black and UT was over 90% white. 349 Today, after spending $112 million on upgrading TSU's facilities, the school is 30% white and has a faculty that is 50% white. 350

While some at TSU are unhappy with such successful desegregation, 351 I assert that TSU should serve as a model for desegregation of a state's system of higher education. TSU received the funds it needed to provide a quality education to all, the school has attracted white students and it has managed to desegregate in a way that maintains many of the benefits that HBUs provide such as a comfortable atmosphere, role models, affordability, and admission standards that reflect the kind of secondary education its historical constituency has received.

A second educational benefit of my proposal is that by increasing the admissions standards and the program offerings at the HBUs, they will attract the brightest of both races. Professor Davis claimed that he wanted to implement "flexible" admission criteria. 352 These admission criteria would include GPA, test scores and life experience. These are good admissions standards for the comprehensive schools. Under my proposal, one HBU would

347 The Mississippi State Legislature has proposed upgrading Jackson State into a comprehensive university. Black Universities; Delta Blues, supra note 192, at 30.


349 Id.


351 Id. Many black students are concerned that the school may be losing its cultural heritage and want the school to resist any more desegregation.

352 Davis, supra note 11, at 491.
become a comprehensive school with no nearby HWU. Thus, if what happened at TSU happens in Mississippi, the comprehensive HBU will attract the brightest of both races.

A third educational benefit of my proposal is that by designating some HWUs as regional, requiring them to offer remedial programs, and implementing a less stringent admissions policy, they will attract black students. Professor Davis proposed that students not qualified for the comprehensive schools go to junior colleges with a possibility of transfer. Under my proposal, however, those students academically unprepared for the comprehensive schools will be admitted to the regional schools which will have remedial courses and other programs designed to ensure that they too receive a quality education. Since, there will only be one regional school in each region, these schools should attract students of both races who need these special programs.

Finally, by developing a speciality at each regional school, students of both races interested in that speciality will attend that school. In discussing the placement of new programs on campuses in Southern states, the Southern Regional Education Board advocates that the program should have the following characteristics: "A likelihood of student demand, a likelihood of societal need to absorb graduates, the ability to build upon the strength already existing within the institution, and the opportunity to draw upon local or regional resources to supplement the growth of the program."

Developing a speciality at each school would have saved Louisiana a lot of time had they adopted such a strategy early on in the desegregation movement. But they chose not to and now face another round in the federal district court as the Department of Justice continues to press Louisiana to meet the Fordice standard.

This is an "ought to" proposal because I am not an educator nor am I a Mississippi resident and facing the political and economic choices people in that state will have to make. As a result, I recognize the limitations of my proposal. For instance, how to decide which HBU to upgrade to comprehensive, which two HWUs to downgrade to regional and which two HWUs to close? As another example, how much money can the State afford to spend on upgrading the HBUs? Another question is how to upgrade the black

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353 SOUTHERN REGIONAL EDUCATION BOARD, EDUCATIONAL FACTORS RELATED TO FEDERAL CRITERIA FOR THE DESEGREGATION OF PUBLIC POSTSECONDARY EDUCATION (1981).

354 When he first became governor in 1972, Edwards told LSU faculty that he was offered an opportunity to settle the brewing dispute by shifting all engineering programs to Southern and all history programs, for example, to LSU. "I said no because I refused to preside over the dismantling of two great institutions," he said. Jack Wardlaw, Desegregation Dispute Likely Headed for Trial, TIMES-PICAYUNE, Mar. 8, 1994., at 1.

355 Id.

DESEGREGATION AS A TWO-WAY STREET

faculty since most do not have Ph.D’s, and those that do have them in education? These are a few of the limitations of my proposal. Yet Tennessee faced some, if not all of these questions, and the State was able to answer them sufficiently to make TSU a desegregation success.

Ultimately, my proposal is one for desegregation/integration. I think integration is a positive goal. My primary concern in this paper has been to demonstrate that there is no necessary correlation between integration and increased educational opportunities. In other words, any plan for desegregating higher education should not decrease the net educational opportunities for black students. My plan encourages integration and provides for increased educational opportunity for black students. The most important way it achieves this balance is by ensuring that integration does not flow all one way: shutting down the HBUs and requiring the black students to go to the HWUs. By ensuring that integration is a two way street, it spreads the benefits and burdens equally between both races and institutions.

This benefit and burden sharing is important educationally and psychologically. For, to place the burden of integration solely on black students and black institutions would be extremely unfair. As Justice Thomas said in his concurrence in Fordice "it would be ironic, to say the least, if the institutions that sustained blacks during segregation were themselves destroyed in an effort to combat its vestiges."

357 Currently in Mississippi, the state legislature is considering a proposal that closes MVSU, merges Alcorn State with MSU and only retains Jackson State. So, in effect, the legislature is considering a form of Davis’ proposal whereby the HBUs are eliminated and the HWUs maintained. "This is genocide," said Alvin Chambliss, a lawyer fighting the state of Mississippi in its effort to close the Mississippi Valley State University campus and merge another traditionally black university. Ernie Freda, Traditionally Black Schools Call Court Ruling ‘Genocide,’ ATLANTA J. & CONST., Apr. 8, 1993, at 4. "It’s a political war that if we lose, black folks in America will go back to the cotton patch." Id. While Chambliss’ comments overstate the situation, the bottom-line is that this kind of one way integration is ineffective and unfair because not only does it fail to increase educational opportunities for blacks, but actually decreases educational opportunity.

358 Mississippi Congressman Mike Espy, in responding to calls for blacks and whites to fight each other over desegregation in his home state, dispatched the following letter which said in part: "In my opinion, education must not be a ‘zero-sum game,’ in which Blacks and Whites are pitted against one another. If that is the case then we all will lose." Quoted in Does Decision To Close Black University in Miss. Doom State-Supported Black Colleges And Universities?, JET, Nov. 30, 1992, at 4.

359 Fordice, 112 S. Ct. at 2746 (Thomas, J., concurring).