

UNITED STATES V. FORDICE AND THE DESEGREGATION OF PUBLIC HIGHER EDUCATION: GROPPING FOR ROOT AND BRANCH

For a time, hopes were raised, but eventually the search was abandoned. The children were never found . . . Gradually, all in the community came to realize the tragedy's lamentable lesson. In the monumental school desegregation struggle, the intended beneficiaries had been forgotten long before they were lost.¹

In Derrick Bell's study of the elusive quest for racial justice, *And We Are Not Saved*, his fictional heroine, Geneva Crenshaw, recounts "The Chronicle of the Sacrificed Black Schoolchildren," a fable about the bitter fruits of the attempt to impose a court-supervised remedy upon a segregated public school system.² After years of delay and negotiation to arrive at a plan calling for a "full measure" of racial balance in the schools, implementation day dawned.³ Initially, city officials viewed school desegregation as a panacea for the ills of urban ghetto life: early dropouts; unemployment; teen pregnancy; and too much exposure to crime, drugs and alcohol.⁴ But the plan itself, which would achieve equal racial balance by shutting down dilapidated schools in predominantly black neighborhoods and busing large numbers of black students to schools in mainly white areas that were suddenly the beneficiaries of windfall funding, pleased nobody.⁵ Black parents, whose children attended the W.E.B. DuBois School, which had become a model for black excellence in education for the nation, launched a vigorous protest.⁶ These parents urged that they had implemented their own remedy for inferior black schools and that the court-ordered remedy would be more harmful than requiring students to attend segregated schools.⁷ Only when the black students simply vanished before the plan could be implemented did the citizens realize

¹ DERRICK BELL, *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* 107 (1987).

² *Id.* at 7, 102-07.

³ *Id.* at 102.

⁴ *Id.* at 103.

⁵ *Id.* at 103-05.

⁶ BELL, *supra* note 1, at 104.

⁷ *Id.*

that students and education had become the casualties rather than beneficiaries of the desegregation remedy.⁸

It has been thirty-nine years since the United States Supreme Court declared in its landmark decision in *Brown v. Board of Education* ("*Brown I*") that "in the field of public education the doctrine of 'separate but equal' has no place."⁹ In his second opinion in the *Brown* case ("*Brown II*"), Chief Justice Warren asserted the authority of the courts to use their equitable powers in the fashioning of appropriate remedies to desegregate schools "with all deliberate speed."¹⁰ After *Brown*, judges, usually lower court judges, were invested with the responsibility for a wide range of educational policy decisions, which they doubted they could make without overreaching their areas of competence.¹¹

Although the mandate of *Brown I* and the remedial power of *Brown II* extended to the entire field of *public* education, when the Supreme Court has reviewed desegregation plans in light of these landmark decisions, it has done so chiefly in the context of elementary and secondary school systems.¹² At the elementary and secondary level, the Court has insisted that a school district has an "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."¹³ In the four decades since *Brown*, federal courts have been unanimous in holding that the affirmative duty to dismantle racially segregated school systems also applies in the context of higher education.¹⁴ There has, however, been significant disagreement in the lower courts on the question of whether the scope of this affirmative duty is as broad when applied to colleges and universities as the standard that has been defined in the context of elementary and secondary education.¹⁵

On June 26, 1992, when the Supreme Court handed down its

⁸ *Id.* at 107.

⁹ 347 U.S. 483, 495 (1954).

¹⁰ *Brown v. Board of Educ. of Topeka*, 349 U.S. 294, 300-01 (1955).

¹¹ See, e.g., *Alabama State Teachers Ass'n v. Alabama Pub. Sch. & Coll. Auth.*, 289 F. Supp. 784, 788 (M.D. Ala. 1968).

¹² See *Freeman v. Pitts*, 112 S. Ct. 1430, 1435 (1992); *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526, 529 (1979); *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 301 (1977); *Milliken v. Bradley*, 418 U.S. 717, 721 (1974); *Keyes v. School Dist. No. 1, Denver, Colo.*, 413 U.S. 189, 191 & n.2 (1973); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 6 (1971); *Green v. County Sch. Bd. of New Kent*, 391 U.S. 430, 432 (1968); *Cooper v. Aaron*, 358 U.S. 1, 8 (1958).

¹³ *Green*, 391 U.S. at 438.

¹⁴ *Ayers v. Allain*, 674 F. Supp. 1523, 1551 (N.D. Miss. 1987).

¹⁵ *Id.* at 1552.

opinion in *United States v. Fordice*,¹⁶ it brought to a close a litigation which spanned seventeen years, including twelve years of court-supervised negotiations, a five-week bench trial in the United States District Court for the Northern District of Mississippi, during which the court heard testimony from seventy-one witnesses and received 56,700 pages of evidence, and two opinions by the United States Court of Appeals for the Fifth Circuit.¹⁷ In holding that the State of Mississippi had failed to meet its affirmative obligation to dismantle its prior de jure segregated system of higher education, the Supreme Court established for the first time that the same standard of compliance will apply at all levels of public education.¹⁸ Accordingly, the Court remanded the case to the district court to exercise its authority to mandate appropriate remedial action.¹⁹

Initially, the *Fordice* decision was hailed as a civil rights landmark.²⁰ In recent months, however, Judge Neil Biggers, in compliance with the Supreme Court remand, has been evaluating a state proposal calling for the closing of one historically black college, Mississippi Valley State University, and the merging of another, Alcorn State University, with a historically white institution.²¹ If adopted, the remedy may have the ironic consequence of destroying the very institutions of higher education that sustained black students during segregation in the effort to combat its vestiges.²² The decision in *Fordice* should thus recall Derrick Bell's "Chronicle of the Sacrificed Black School Children," in which well-meaning courts and school boards struggled to achieve racial justice while the intended beneficiaries were forgotten.²³

¹⁶ 112 S. Ct. 2727 (1992).

¹⁷ The three lower court opinions are recorded as follows: *Ayers v. Allain*, 674 F. Supp. 1523 (N.D. Miss. 1987); *Ayers v. Allain*, 893 F.2d 732 (5th Cir. 1990) (panel); *Ayers v. Allain*, 914 F.2d 676 (5th Cir. 1990) (en banc). The opinions will be referred to hereafter as *Ayers I*, *Ayers II* and *Ayers III* respectively.

¹⁸ *Fordice*, 112 S. Ct. at 2732, 2743.

¹⁹ *Id.* at 2743.

²⁰ See, e.g., Ruth Marcus, *Court Sees Broad Duty to Erase College Bias*, WASH. POST, June 27, 1992, at A1. Solicitor General Kenneth W. Starr called the decision "a magnificent victory for the United States." *Id.* David Tatel, a former civil rights official in the Carter administration, described it as a "very strong affirmation of the principles of *Brown*.... I think in the end it's a very, very good development for improving higher education opportunities for blacks in the South." *Id.*

²¹ Transcript of Proceedings Before the Judge Neal B. Biggers, Jr., United States District Judge: Oral Presentation/Status Conference (Oct. 22, 1992) in 2 THE AYERS DECISION (not paginated) (Board of Trustees of State Institutions of Higher Learning) [hereinafter AYERS DECISION]; Stephen C. Halpern, *A Bedeviling and Worrisome Court Ruling on Black Colleges*, CHRON. OF HIGHER EDUC., Nov. 4, 1992, at B1.

²² *Fordice*, 112 S. Ct. at 2746 (Thomas, J., concurring).

²³ BELL, *supra* note 1, at 107.

This Note argues that the courts, in their quest for racial justice in Mississippi higher education, may eventually impose a remedy, the closure of one historically black institution and the loss of identity of a second, which is not only harmful to its intended beneficiaries, but which violates a strong national legislative policy calling for the strengthening of historically black colleges and the distinctive opportunities they provide. Section I discusses the mandate of *Brown v. Board of Education* and the courts' exercise of remedial authority in the context of elementary and secondary education.²⁴ Section II discusses the debate in the lower courts about the applicability of the *Brown* standard to segregated systems of higher education and the uneven enforcement of that standard in different jurisdictions.²⁵ Section III describes the evolution of Mississippi's de jure dual system of higher education and the *Ayers v. Allain* decision, which held that a state meets its affirmative duty to dismantle its segregated system of colleges and universities by adopting good faith race-neutral policies.²⁶ Section IV presents the decision in *United States v. Fordice*, its extension of the *Brown* affirmative duty to higher education, and the limited guidance it offers to lower courts in the crafting of remedies which will meet that standard.²⁷ Section V analyzes two distinct remedial approaches: one mandating administrative measures to achieve a mathematical racial balancing; and the other focusing upon the creation of educational programs and enhanced opportunities for those who have been victimized by segregated school systems.²⁸ Section VI predicts that the closure remedy proposed in *United States v. Fordice* may usher in a new wave of litigation over the desegregation of public higher education, as courts in sixteen other states grope for more equitable remedies than the one provided by the Supreme Court.²⁹ It concludes by proposing that a remedy involving increased access to quality education and the enhancement of the historically black universities will be preferable to efforts to achieve a mathematical racial balance by shutting down institutions that continue to fulfill a vital mission.³⁰

²⁴ See *infra* notes 31-73 and accompanying text.

²⁵ See *infra* notes 74-135 and accompanying text.

²⁶ See *infra* notes 136-201 and accompanying text.

²⁷ See *infra* notes 202-263 and accompanying text.

²⁸ See *infra* notes 264-307 and accompanying text.

²⁹ See *infra* notes 308-324 and accompanying text.

³⁰ See *infra* notes 325-327 and accompanying text.

I. *BROWN* AND ITS PROGENY: THE FASHIONING OF DESEGREGATION REMEDIES IN ELEMENTARY AND SECONDARY EDUCATION

A. *Brown v. Board of Education* and the Supreme Court Mandate

*We conclude that in the field of public education the doctrine of "separate but equal" has no place.*³¹

In the 1954 case of *Brown v. Board of Education* ("*Brown I*") the Supreme Court held that separate educational facilities were inherently unequal, and that children required to attend segregated schools had been deprived of the equal protection of the laws under the Fourteenth Amendment.³² It found precedent for its decision in a number of cases involving unequal programs and facilities in higher education.³³ The Court asserted that separate educational facilities had generated a sense of inferiority in the "hearts and minds" of black schoolchildren, and that it must be the goal of any judicial relief to erase that stigma.³⁴ Because the opinion represented a response to four different cases from Kansas, South Carolina, Virginia and Delaware, premised on different facts and different local conditions, the Court postponed the consideration of "appropriate relief" and invited the submission of briefs on the subject of remedies by the Attorney General of the United States and the Attorneys General of the states that had permitted the segregation.³⁵

In its 1955 opinion in *Brown v. Board of Education* ("*Brown II*"), the Supreme Court vested primary responsibility for evaluating whether local school boards were implementing good faith desegregation plans in the courts that originally heard the cases.³⁶ In fashioning their decrees, the courts were to be guided by "equitable principles":

³¹ *Brown I*, 347 U.S. 483, 495 (1954).

³² *Id.*

³³ *Id.* at 492. See *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938) (Court ordered immediate admission of black student to all-white law school because state did not provide law school for black students); *Sweat v. Painter*, 339 U.S. 629 (1950) (hastily established law school for black students did not provide them with equal protection because the facility was clearly inferior in resources, faculty, reputation and accreditation to the all-white University of Texas Law School); *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950) (black student admitted to previously all-white graduate school, but forced to sit in designated separate seats in library, classrooms and cafeteria was denied equal protection).

³⁴ *Brown I*, 347 U.S. at 494.

³⁵ *Id.* at 495-96. The three cases in addition to *Brown* were: *Briggs v. Elliott*, 98 F. Supp. 529 (E.D.S.C. 1951); *Davis v. County Sch. Bd. of Prince Edward County*, 103 F. Supp. 337 (E.D. Va. 1952); *Belton v. Gebhart*, 87 A.2d 862 (Del. Ch. 1952). *Id.* at 486-88 n.1.

³⁶ *Brown II*, 349 U.S. 294, 299 (1955).

"Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs. These cases call for the exercise of these traditional attributes of equity power."³⁷ Chief Justice Warren suggested that the courts were free to consider a range of problem areas: administration; the physical condition of school plants; the school transportation system; personnel; rezoning of school districts; systems for determining student admission on a nonracial basis; and revision of local laws and regulations.³⁸ Beyond these hints at the exercise of equitable powers, *Brown II* offered neither standards by which to measure compliance with the constitutional principle of *Brown I*, nor a timetable for compliance other than "with all deliberate speed."³⁹

B. "Freedom of Choice" Is Not an End in Itself⁴⁰

Among the most frequently employed forms of southern resistance to active desegregation of school systems were tuition grants to private schools, school closings, student transfer privileges, and above all, the implementation of freedom of choice plans.⁴¹ In the 1968 case of *Green v. County School Board of New Kent County*, the Supreme Court held that the school board's implementation of a freedom of choice plan was an insufficient step to make the transition to a unitary school system in which racial discrimination would be eliminated root and branch.⁴² The fact that the Board had opened the doors of the former "white" school to Negro children, and of the "Negro" school to white children was simply the beginning of the inquiry, not an end in itself.⁴³

The decision in *Green* marked a significant expansion of the mandate in *Brown II* by insisting that the scope of the school board's

³⁷ *Id.* at 300 (footnotes omitted).

³⁸ *Id.* at 300-01.

³⁹ *See id.* at 298-301.

⁴⁰ *Green v. County Sch. Bd.*, 391 U.S. 430, 440 (1968).

⁴¹ Gail M. Epstein, *Desegregation of Public Institutions of Higher Education: Merger as a Remedy*, 56 CHI.-KENT L. REV. 701, 703 & n.13 (1980).

⁴² *Green*, 391 U.S. at 441, 438.

⁴³ *Id.* at 437. New Kent County is a rural county in Eastern Virginia. *Id.* at 432. Its population of about 4,500 in 1968 was equally divided between black and white residents; there was no residential racial segregation. *Id.* Prior to the implementation of the freedom of choice plan, the system had one white combined elementary and high school—New Kent—and one black combined elementary and high school—George W. Watkins. *Id.* The county maintained this segregated system under the compulsion of Virginia constitutional and statutory provisions mandating racial segregation in public education. *Id.* The Court found that after three years of operation under the freedom of choice plan, 85% of the black students remained at Watkins, and that not a single white student had yet elected to attend the all-black school. *Id.* at 441.

affirmative duty was to eradicate every vestige of previous racial discrimination, and to come forward with a desegregation plan that would work *immediately*.⁴⁴ As to the remedies that this and other school boards might employ to meet their affirmative duty, the decision reinforced the district courts' authority to exercise flexible equitable powers according to the circumstances of the case.⁴⁵ The Court insisted that there could be no universal remedy that would do the job in every case, but that each plan must be tailored according to the specific alternatives that would bring relief in each individual situation.⁴⁶ In *Green*, the remedy that the Court offered for consideration was zoning, an administrative approach that realistically promised to fulfill the specific desegregation goal in New Kent County, by creating a system "without a 'white' school and a 'Negro' school, but just schools."⁴⁷

Although the Court in *Green* invalidated the freedom of choice plan in this particular situation, Justice Brennan indicated in dicta that the Court was not prepared to hold that freedom of choice plans were in themselves unconstitutional.⁴⁸ Instead, Justice Brennan suggested that the Court might yet approve of freedom of choice plans in situations where they offered genuine promise of remedying segregation.⁴⁹ After the decision in *Green*, freedom of choice continued to be an ongoing defense for reticent school boards, particularly in the context of higher education where attendance itself was by choice.⁵⁰

C. *The Nature of the Violation Determines the Scope of the Remedy*⁵¹

In two opinions issued in the 1970s, *Swann v. Charlotte-Mecklenburg Board of Education* and *Milliken v. Bradley*, the United States Supreme Court provided a more expansive discussion of the specific remedies that might fall within a district court's equitable powers, as well as a

⁴⁴ See *id.* at 438-39.

⁴⁵ *Id.* at 439.

⁴⁶ *Id.*

⁴⁷ *Green*, 391 U.S. at 442. Because New Kent County was not residentially segregated, it was able to achieve a "unitary, non-racial system" with relative ease simply by dividing the county in two and sending students living in the eastern half to New Kent School and students living in the western half to Watkins. *Id.* at 442 n.6. The petitioners in the case, parents of black schoolchildren, advanced a more efficient remedy, making one facility the elementary school for the whole county and the other facility the secondary school. *Id.* The Court only included this suggestion in a footnote to its opinion. *Id.*

⁴⁸ *Id.* at 439.

⁴⁹ *Id.* at 440.

⁵⁰ See, e.g., *Bazemore v. Friday*, 478 U.S. 384, 407 (1986); *Ayers I*, 674 F. Supp. 1523, 1525 (N.D. Miss. 1987); *Alabama State Teachers Ass'n v. Alabama Pub. Sch. and College Auth.*, 289 F. Supp. 784, 788 (M.D. Ala. 1968) (three-judge court), *aff'd*, 393 U.S. 400 (1969) [hereinafter *ASTA*].

⁵¹ *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971).

limitation upon the scope of the remedial power.⁵² In the 1971 case of *Swann*, the Court held that the varied remedial techniques imposed by a district court order were reasonable, feasible, workable and well within the court's power to provide equitable relief.⁵³ In the Court's view, where there has been a denial of a constitutional right, the judicial power to devise remedies must be broad enough to eliminate the effects of the violation.⁵⁴ In this situation, the Court decided that it was well within the traditional authority of the school board to determine that in order to prepare students to live in a pluralistic society, they should be required to attend schools with a mathematical ratio of black to white students that matched the proportion for the district as a whole.⁵⁵ The Court thus acknowledged the achievement of racial balancing or racial quotas as an appropriate correction for a previously segregated system.⁵⁶ To achieve this end, it approved an array of measures, including: the calculation of mathematical ratios as a starting point in the shaping of a remedy;⁵⁷ the imposition of a burden on the school board to justify the continuing racial identifiability of any school in the district;⁵⁸ the gerrymandering of attendance zones;⁵⁹ a sweeping transportation plan;⁶⁰ and the authority to make recommendations concerning future construction as well as *the closing of existing schools* to achieve racial balance.⁶¹

In the 1974 case of *Milliken v. Bradley* ("*Milliken I*"), the Court invoked the principle that the scope of the remedy was to be deter-

⁵² See *id.* at 22-31; *Milliken v. Bradley*, 418 U.S. 717, 737-47 (1974) [hereinafter *Milliken I*]; *Milliken v. Bradley*, 433 U.S. 267, 269-88 (1977) [hereinafter *Milliken II*].

⁵³ *Swann*, 402 U.S. at 30, 31. The Charlotte-Mecklenburg school system, the forty-third largest in the United States had been segregated by law prior to the decision in *Brown I*. See *id.* at 5-6. In 1965, the school system implemented a court-approved desegregation plan, including geographic zoning and free pupil transfers, to meet its affirmative duty to achieve a unitary school system. *Id.* at 7. By 1969, more than two-thirds of Charlotte's 21,000 black students continued to attend schools that were more than 99% black. *Id.* All parties to the subsequent litigation agreed that the Board of Education had failed to meet its affirmative duty. *Id.*

⁵⁴ See *id.* at 16. The Court went on to evaluate the district court's remedial response to four problem areas: 1) to what extent racial balance or racial quotas may be used as an element in a remedial order to correct a previously segregated system; 2) whether every all-negro and all-white school must be eliminated as an indispensable part of a remedial process of desegregation; 3) what the limits are, if any, on the arrangement of school districts and attendance zones as a remedial measure; and 4) what the limits are, if any, on the use of transportation facilities to correct state-enforced racial segregation. *Id.* at 22.

⁵⁵ *Id.* at 16.

⁵⁶ See *id.* at 22-25.

⁵⁷ *Id.* at 25.

⁵⁸ *Swann*, 402 U.S. at 26.

⁵⁹ See *id.* at 28.

⁶⁰ *Id.* at 29-30.

⁶¹ *Id.* at 20-21 (emphasis added).

mined by the nature and extent of the constitutional violation in order to invalidate an interdistrict desegregation remedy imposed by a district court upon the metropolitan Detroit area.⁶² The Court found ample evidence of de jure segregation in the Detroit schools only; therefore, to impose a consolidation order upon the area's fifty-three other school districts would be an impermissible remedy.⁶³ The Court went on to distinguish the circumstances in the Detroit school system from those addressed in *Green* and *Swann*, where the elimination of racially identifiable schools was an appropriate goal.⁶⁴ Here, the Court urged that school authorities, instead of seeking a mathematical racial balancing of students, should seek remedies that would "restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct."⁶⁵ Three years later, in *Milliken v. Bradley* ("Milliken II"), when the Court evaluated a desegregation plan limited to the Detroit school system, it asserted that on occasion, remedies other than student assignment must be invoked to eliminate the effects of prior discrimination.⁶⁶ Justice Marshall, in his concurring opinion, placed the emphasis not on racial ratios, but upon the ways a segregated system had impaired the academic development of black students.⁶⁷ Accordingly, the Court affirmed the district court's authority to mandate a full range of educational reforms, including: the implementation of thirteen remedial or compensatory programs; the introduction of bilingual education and a multiethnic curriculum; in-service training for teachers on the debilitating effects of racial discrimination; increased counselling and career guidance for students; and a reevaluation of the use of standardized testing procedures which were infected with bias.⁶⁸ The Court reasoned that each of these programs was essential "to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct."⁶⁹

In sum, the United States Supreme Court, in the decades following *Brown I* and *Brown II*, imposed an affirmative duty upon local school boards to implement sweeping desegregation plans at the elementary and secondary levels.⁷⁰ The Court in *Green* also established

⁶² *Milliken I*, 418 U.S. 717, 744, 752 (1974).

⁶³ *Id.* at 745.

⁶⁴ *Id.* at 746.

⁶⁵ *Id.*

⁶⁶ *Milliken II*, 433 U.S. 267, 283 (1977).

⁶⁷ *Id.* at 291 (Marshall, J., concurring).

⁶⁸ *Id.*, at 272-77, 272 n.4.

⁶⁹ *Id.* at 280 (quoting *Milliken I*, 418 U.S. at 746).

⁷⁰ Epstein, *supra* note 41, at 701.

the chief inquiry about whether a state had fulfilled this affirmative duty: had there been a transition to a unitary school system in which racial discrimination had been eliminated root and branch?⁷¹ Both *Swann* and *Milliken* demonstrated the sweep of the district courts' equitable powers to mandate remedies in local school districts.⁷² While these cases did not address the desegregation of colleges and universities, the remedies that they implemented at the elementary and secondary levels laid the foundation for lower court decisions involving the desegregation of public higher education.⁷³

II. THE DESEGREGATION OF PUBLIC HIGHER EDUCATION: A REVIEW OF LOWER COURT DECISIONS

*Higher education is neither free nor compulsory. Students choose which, if any, institution they will attend.*⁷⁴

A. ASTA and Norris: *The Paths Diverge*

In the 1968 case of *Alabama State Teachers Association v. Alabama Public School and College Authority* ("ASTA"), the United States District Court for the Middle District of Alabama declined to exercise its equitable power to impose a desegregation remedy upon a dual system of higher education.⁷⁵ The plaintiffs sought an injunction to prevent the state from constructing and operating a degree-granting branch of Auburn University in Montgomery on the grounds that the expansion of an identifiably "white" institution would have an adverse effect upon the desegregation efforts of predominantly black Alabama State College, also located in Montgomery.⁷⁶ The court acknowledged that the

⁷¹ See *id.* at 703.

⁷² Compare *Swann*, 402 U.S. 1, 22-31 (1971) (use of mathematical quotas, remedial altering of attendance zones and transportation of students to achieve racial balance) with *Milliken II*, 433 U.S. at 269-88 (use of remedial educational programs, curricular reform and teacher training to end discrimination).

⁷³ See Epstein, *supra* note 41, at 703-04.

⁷⁴ *ASTA*, 289 F. Supp. at 788.

⁷⁵ *Id.* at 787. The United States District Court for the Middle District of Alabama had in the previous year heard a case involving segregated colleges. See *Lee v. Macon County Bd. of Educ.*, 267 F. Supp. 458 (M.D. Ala.) *aff'd sub nom. Wallace v. United States*, 389 U.S. 215 (1967). *Id.* But *ASTA* was the first case to challenge the court's preparedness to do more than simply declare segregation in higher education to be illegal and order nondiscriminatory admissions. *Id.*

⁷⁶ *Id.* at 785, 789. The plaintiff, ASTA, was a non-profit corporation whose membership consisted of approximately 10,000 black teachers, a majority of whom were graduates of Alabama State College. *Id.* at 786. The defendant, Alabama Public School and College Authority, had been authorized under Alabama Acts 1967 No. 403 to sell and issue bonds in the amount of \$5,000,000 for the purpose of establishing, constructing and maintaining the new Auburn campus. See *id.*

state was under an affirmative duty to dismantle its dual system of higher education, but rejected the plaintiffs' argument that the *scope* of the duty should be extended as far in public higher education as it had been in the elementary and secondary school context.⁷⁷ The court observed that Auburn University was already complying with a court order to admit all qualified black students consistent with the Equal Protection Clause of the Fourteenth Amendment, and that this good faith effort to ensure race-neutral policies and students' freedom of choice was sufficient to meet the basic requirement of the affirmative duty to dismantle a segregated college system.⁷⁸

The court rested its decision on two arguments: one concerning the fundamental distinction between elementary and secondary schools, and higher education; and the other questioning judicial competence to make sweeping educational policy decisions for colleges and universities.⁷⁹ The court observed that elementary and secondary schools had traditionally been both free and compulsory.⁸⁰ School boards could assign students to specific facilities on the principle that at any given grade level schools substantially resembled each other in their goals, curriculum, physical plant and faculty.⁸¹ In that limited context with relatively fixed standards, the courts could review decisions concerning the construction or expansion of schools when mandated by the Fourteenth Amendment without overreaching their area of competence.⁸² On the other hand, according to the court, higher education was neither free nor compulsory, and colleges and universities were not fungible.⁸³ Students were required to choose which, if any, institution to attend; this freedom to choose from the full array of educational goals, facilities, curricula and living arrangements advanced the beneficial function of matching different students to the right schools for them.⁸⁴ The court concluded that in the state-wide context, with a complicated mix of diverse institutions, judicial review of school construction or expansion decisions to see whether they maximized desegregation would mark an intrusion upon policy areas where the court lacked expertise.⁸⁵ When the United States Su-

⁷⁷ *Id.* at 787.

⁷⁸ *Id.* at 789-90.

⁷⁹ *ASTA*, 289 F. Supp. at 787-88.

⁸⁰ *Id.*

⁸¹ *Id.* at 788.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *ASTA*, 289 F. Supp. at 788, 790.

⁸⁵ *Id.* at 788.

preme Court was asked to review *ASTA* in 1969, it summarily affirmed the decision in a memorandum decision with two Justices dissenting.⁸⁶

By contrast, in the 1971 case of *Norris v. State Council of Higher Education for Virginia*, a three-judge district court held that the Supreme Court's charge to eliminate discrimination in public education root and branch "defined a constitutional duty owed as well to college students."⁸⁷ The court urged that even though the remedies employed to eliminate discrimination in elementary and secondary schools might differ from those invoked in colleges, the state's duty was just as exacting.⁸⁸ Having so stated, the *Norris* court embraced the identical remedy that the *ASTA* court felt was beyond its competence: the review and ultimate injunction against the expansion of an identifiably white institution in close proximity to a historically black college.⁸⁹

Initially, the *Norris* court challenged the precedential value of the Supreme Court's summary affirmance in *ASTA*.⁹⁰ But finally, the *Norris* court distinguished its similar facts from those in the Alabama case.⁹¹ In *ASTA*, the state was seeking to create a new branch campus that would have no history of racial identifiability, whereas in *Norris*, Bland College had a ten-year history as an all-white institution with an all-white faculty.⁹² The court also attempted to distinguish *ASTA* by citing Auburn University's and the state's good faith compliance with the court desegregation order, even though it acknowledged that the State of Virginia was already meeting the identical good faith burden.⁹³ Finally, the court granted the injunction preventing the escalation of

⁸⁶ See *Alabama State Teachers Ass'n v. Alabama Pub. Sch. and College Auth.*, 393 U.S. 400 (Douglas and Harlan, JJ., dissenting) (1969).

⁸⁷ 327 F. Supp. 1368, 1373 (E.D. Va. 1971) *aff'd sub nom.* *Board of Visitors of the College of William & Mary v. Norris*, 404 U.S. 907 (1971).

⁸⁸ *Id.*

⁸⁹ *Id.*; *ASTA*, 289 F. Supp. at 790.

⁹⁰ *Norris*, 327 F. Supp. at 1372. "We cannot subscribe to the proposition that the Supreme Court represented in a one sentence memorandum decision that it approved every statement in the district court's opinion [R]emoved from its context, it does not furnish a universal definition of a state's obligation to abolish a racially dual system of higher education." *Id.*

⁹¹ *Id.* at 1372. The plaintiffs in *Norris* included students and faculty of historically black Virginia State College near Petersburg. *Id.* at 1369. They sought to enjoin the State Council of Higher Education from expanding predominantly white Richard Bland College, located seven miles away, from a two-year facility to a four-year institution. *Id.* Plaintiffs argued that the duplication of programs at the two schools would frustrate Virginia State's efforts to attract white students and would thus perpetuate the state's racially identifiable dual system of higher education. *Id.* at 1371.

⁹² *Id.* at 1372. The court does mention, but then gives little weight to the fact that Auburn University as a whole was a historically white institution. *Id.*

⁹³ *Id.* at 1372, 1373.

the program at Bland College, but it denied the plaintiff's request for the full merger of Bland's facilities with Virginia State.⁹⁴

The United States Supreme Court affirmed the *Norris* decision in 1971, again without opinion.⁹⁵ In a lengthy dissent to the district court's holding in *Norris*, Judge Walter E. Hoffman observed that the majority was committing the State of Virginia to a doctrine of racial balancing in institutions of higher education that was likely to have harmful consequences to black and white students alike.⁹⁶ He observed that if racial balancing were the only goal to be sought by judicial desegregation remedies, then the simplest procedure for dismantling Virginia's dual system of higher education would be to "phase out" the state's predominantly black colleges and "absorb" the students into the remaining institutions.⁹⁷

B. *Geier and United States v. Louisiana: Merger—
The "Drastic Remedy"*⁹⁸

In the higher education decisions since *ASTA* and *Norris*, federal courts generally have taken the path running from *Green v. County School Board* through *Norris*, which affirms their authority to invoke any remedy that lies within the "traditional bounds of equitable relief."⁹⁹ The *Geier* decisions, spanning eighteen years of litigation over the dual system of higher education in Tennessee, resulted in the merger of Tennessee State University and a branch campus of the University of Tennessee in Nashville, with Tennessee State as the "surviving" institution.¹⁰⁰ The facts in *Geier* are by now familiar; private

⁹⁴ *Id.* at 1373.

⁹⁵ See *Board of Visitors v. Norris*, 404 U.S. 907 (1971). Certainly, the small factual differences between *ASTA* and *Norris* do plausibly justify different holdings that the Supreme Court could affirm without inconsistency. But the fact that the two cases in their reasoning take diametrically opposed views of the affirmative duty to eliminate segregation in public higher education does raise the question of what exactly the Supreme Court "affirms" in its summary opinions and what precedential value should be accorded such opinions. See JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW §2.5 (4th ed. 1991). In any event, the summary affirmances in *ASTA* and *Norris* were not calculated to provide federal district and circuit courts with guidance in the desegregation cases that immediately followed. See Epstein, *supra* note 41, at 707-08.

⁹⁶ *Norris*, 327 F. Supp. at 1374-82 (Hoffman, J., dissenting).

⁹⁷ *Id.* at 1375.

⁹⁸ *Geier v. Blanton*, 427 F. Supp. 644, 660 (M.D. Tenn. 1977).

⁹⁹ See, e.g., *Geier v. Alexander*, 801 F.2d 799, 802 (6th Cir. 1986) (quoting *Geier v. University of Tenn.*, 597 F.2d 1056, 1068 (6th Cir. 1979)).

¹⁰⁰ See *Geier v. Alexander*, 801 F.2d at 800, 801. The other opinions involved in this litigation are: *Geier v. University of Tenn.*, 597 F.2d 1056 (6th Cir. 1979), *cert. denied*, 444 U.S. 886 (1979); *Geier v. Blanton*, 427 F. Supp. 644 (M.D. Tenn. 1977); *Geier v. Dunn*, 337 F. Supp. 573 (M.D. Tenn. 1973); *Sanders v. Ellington*, 288 F. Supp. 937 (M.D. Tenn. 1968).

plaintiffs brought an action seeking to enjoin the University of Tennessee from constructing a new facility to expand its branch campus in Nashville into a degree-granting institution.¹⁰¹ They argued that the expansion would perpetuate the state's dual system of higher education by harming the efforts of Tennessee State University to desegregate its student body and faculty.¹⁰² The court denied the requested relief, but did order the parties to submit plans designed to effect meaningful desegregation of public higher education, with particular attention to Tennessee State University.¹⁰³ When, after eight years of exchanging unsatisfactory plans, the enrollment at Tennessee State remained more than ninety-nine percent black, the court ordered the "drastic remedy" of the merger of the University of Tennessee-Nashville into Tennessee State.¹⁰⁴

The *Geier* court justified the imposition of the merger relying on traditional equitable principles, balancing the various interests involved, evaluating the feasibility of any proposed remedy, but above all tailoring the "gravity" of the remedy to the "gravity" of the constitutional violations to be corrected.¹⁰⁵ Significantly, the defendants in the *Geier* litigation stipulated to the merger and a range of other affirmative obligations before the court issued its decree.¹⁰⁶ In reducing choice in public higher education in Nashville to a single integrated option, the court settled upon an administratively efficient remedy that took racial balancing as its primary goal, but it left important questions of educational policy unanswered.¹⁰⁷ Chief among these were: whether the merger would lead to the dismantlement of the segregated system of public higher education; and whether historically black institutions of higher education such as Tennessee State University could avoid

¹⁰¹ *Geier v. Alexander*, 801 F.2d at 800. The original party plaintiffs included black parents and students, and faculty members from both institutions. *Sanders*, 288 F. Supp. at 939. Shortly after the action commenced, the United States intervened as a party plaintiff requesting that the court order the state to provide a comprehensive plan "calculated to produce meaningful desegregation of the public universities of Tennessee." *See id.*

¹⁰² *Geier v. Alexander*, 801 F.2d at 800.

¹⁰³ *Id.* at 800-01. The court denied the injunction, concluding (incorrectly as it turned out), that the University of Tennessee had no intention of converting the Nashville campus into a degree-granting institution. *Id.* at 800.

¹⁰⁴ *Id.* at 801, 802.

¹⁰⁵ *See id.* at 801-02.

¹⁰⁶ *Id.* at 802. That the court struggled for and achieved this consent marks a significant tempering of discretionary power when compared to the merger proposed in *Louisiana and Fordice*, where there has as yet been no consensus about the remedies. *See infra* notes 256-63 and accompanying text.

¹⁰⁷ *See Epstein, supra* note 41, at 723-28.

deterioration of their facilities and programs only if white students could be compelled to attend them.¹⁰⁸

Similarly, in the 1989 case of *United States v. Louisiana*, the United States District Court for the Eastern District of Louisiana overrode a Special Master's Report and ordered that the Southern University Law Center be merged with the Paul Hebert Law Center at Louisiana State University.¹⁰⁹ While it accepted the Master's general finding that merger of the state's geographically proximate "black" and "white" universities would be an inappropriate remedy, the court created a special exception for legal education.¹¹⁰ In the legal education context, the court asserted, the separation of students by race had had a dramatically detrimental effect upon black students.¹¹¹ Moreover, the administrative difficulties of effecting a merger could be easily overcome.¹¹²

The court emphasized the financial cost of maintaining a dual system of higher education, and the benefits of a merger in eliminating both the educational inefficiency and the economic burden of duplicate programs existing virtually side by side.¹¹³ Accordingly, the court ordered the elimination of duplicate programs at the schools over a five-year period and the gradual implementation of a more stringent admissions standard at the newly merged school than was then in effect at Southern.¹¹⁴ In an effort to ensure that the merger did not disproportionately burden black students seeking to enter law school, the court further imposed a ten percent special admissions category on the newly formed institution.¹¹⁵

In response to motions by the United States and by Southern University, the court rejected the assertion that, even with a special admissions quota, the merger would result in limiting access to legal education in Louisiana to the disproportionate detriment of black applicants.¹¹⁶ It also rejected arguments about Southern University's

¹⁰⁸ See *id.* at 724-25.

¹⁰⁹ See 718 F. Supp. 419, 507, 513-14 (E.D. La. 1989) [hereinafter *Louisiana I*]; 718 F. Supp. 525, 532-34 (E.D. La. 1989) [hereinafter *Louisiana II*].

¹¹⁰ *Louisiana II*, 718 F. Supp. at 533.

¹¹¹ *Id.* at 532. The court observed that because virtually all of the state's black law students attended the institution with the inferior resources, Louisiana was continuing to produce a "secondary class of lawyers unable to compete fully in the professional context." *Louisiana I*, 718 F. Supp. at 514.

¹¹² *Louisiana I*, 718 F. Supp. at 513.

¹¹³ See *id.*

¹¹⁴ *Id.* at 514.

¹¹⁵ See *id.*

¹¹⁶ *Louisiana II*, 718 F. Supp. at 527, 533.

historical mission in educating lawyers in the segregated south and the institutional loyalty of its alumni when weighed against the efficiency of providing equal access to consolidated research, teaching and placement facilities.¹¹⁷ The court asserted that the constitutional deprivation of Louisiana blacks had been particularly great in legal education, and invoked the mandate created by *Swann* that a "court's equitable power to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies."¹¹⁸

C. *Bazemore v. Friday* and "This Wholly Different Milieu"¹¹⁹

The activist view of the affirmative duty to dismantle segregated systems of public higher education would by now have become firmly established as law in the federal courts were it not for the precedential status accorded in the debate to the 1986 United States Supreme Court decision in *Bazemore v. Friday*.¹²⁰ *Bazemore* involved the desegregation of public higher education in the sense that the North Carolina Extension Service, which the plaintiffs had accused of a range of discriminatory practices in employment and the provision of services, was a division of the School of Agriculture and Life Sciences at North Carolina State University.¹²¹ In a concurring opinion that expressed the judgment of the Court, Justice White addressed the specific allegation that the Extension Service continued to operate racially separate 4-H and Homemakers Clubs.¹²² The Court held that although the Extension Service had maintained segregated clubs prior to 1965, it was not currently in violation of the Fourteenth Amendment because it had discontinued its prior discrimination and implemented entirely race-neutral admissions policies.¹²³ Justice White's opinion observed that

¹¹⁷ *Id.* at 533-34.

¹¹⁸ *Id.* at 534 (quoting *Swann*, 402 U.S. at 15).

¹¹⁹ *Bazemore v. Friday*, 478 U.S. 385, 408 (White, J., concurring) (1986).

¹²⁰ See Kenyon D. Bunch, *Patrick Higginbotham's Third Road to Desegregating Higher Education: Something Old or Something New?*, 18 OHIO N.U. L. REV. 11, 15-17 (1991).

¹²¹ *Bazemore*, 478 U.S. at 389, 391.

¹²² *Id.* at 387, 407. Prior to August 1, 1965, the North Carolina Extension Service was divided into two branches. *Id.* at 390. Only the "Negro branch" had a racial designation and it was composed entirely of black personnel and served only the black citizens of the state. *Id.* On August 1, 1965, in response to the Civil Rights Act of 1964, the state merged the two branches of the service. *Id.* at 390-91. The plaintiffs in the case, who included black employees of the Service and parents of 4-H members, complained that vestiges of the former dual system remained. *Id.* at 391. Among these was the continued existence of numerous all-white and all-black Clubs. *Id.* at 407 (White, J., concurring).

¹²³ *Id.* at 407-08.

any racial imbalance remaining in any of the clubs was thus the result of "wholly voluntary and unfettered choice of private individuals."¹²⁴

In the view of Justice White, because the clubs had adopted neutral admissions policies, the fact that many of the clubs remained racially segregated should not be attributable to any prior action of the state, but rather to the unfettered choice of private individuals.¹²⁵ By this standard, there was no current violation of the Fourteenth Amendment.¹²⁶

Having determined that the Extension Service was not currently in violation of the Fourteenth Amendment, Justice White went on to distinguish *Green v. County School Board*.¹²⁷ Even if the Extension Service's voluntary choice program was not sufficient to shield it from liability, in the Court's view, the holding in *Green* that such programs did not adequately meet a public school system's affirmative duty to integrate its student body did not apply here.¹²⁸ The Court observed that schoolchildren must go to school, but there is no compulsion to join 4-H and Homemakers Clubs, and while school boards do have the authority to create attendance zones and to assign students to specific schools, the state has no statutory or regulatory power to dictate to children which, if any, clubs they should join.¹²⁹ *Green*, which was sound law "in the context of the public schools" had no application to "this wholly different milieu."¹³⁰

In sum, the lower court decisions that followed *ASTA* adhered to the principle that a state's affirmative duty to dismantle its segregated system of public higher education extended beyond the adoption of race-neutral policies.¹³¹ The courts in *Norris*, *Geier* and *United States v. Louisiana* looked to the affirmative duty in *Green*, and not to *ASTA*, for guidance in desegregating public colleges and universities.¹³² But the *ASTA* court's reasoning that the scope of a state's duty to desegregate its institutions of public higher education was a limited one retained its vitality, owing in part to the Supreme Court's summary affirmation of the trial court's decision.¹³³ The support lent to *ASTA*'s freedom of choice argument by the *Bazemore* Court fortified its prece-

¹²⁴ *Bazemore*, 478 U.S. at 407 (White, J., concurring).

¹²⁵ *See id.* at 407-08.

¹²⁶ *Id.* at 408.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Bazemore*, 478 U.S. at 408 (White, J., concurring).

¹³⁰ *Id.*

¹³¹ *See Bunch, supra* note 120, at 17.

¹³² *See id.* at 21.

¹³³ *See supra* note 86 and accompanying text.

dential value.¹³⁴ When the United States District Court for the Northern District of Mississippi evaluated the state's efforts to desegregate its prior de jure system in *Ayers v. Allain*, it faced alternative conceptions of a state's duty: one that held that race-neutral policies and practices were sufficient; and another that mandated extensive remedial measures to undo the vestiges of past discrimination.¹³⁵

III. PUBLIC HIGHER EDUCATION IN MISSISSIPPI AND *AYERS V. ALLAIN*

A. History and Overview

In 1954, when the Supreme Court issued its decision in *Brown v. Board of Education* declaring an end to the principle of "separate but equal," higher education in Mississippi was both separate and unequal.¹³⁶ At that time, the Board of Trustees of State Institutions of Higher Learning ("the Board of Trustees") had plenary power over a statewide system consisting of eight colleges and universities.¹³⁷ The University of Mississippi (founded in 1844), Mississippi State University (1878), Mississippi University for Women (1884), University of Southern Mississippi (1910), and Delta State University (1924) were restricted to white persons only by act of the state legislature; Alcorn State University (1871), Jackson State University (1940) and Mississippi Valley State University (1946) were specifically designated by the legislature to serve the state's black population.¹³⁸

The great watershed in the history of Mississippi's desegregated system occurred on February 1, 1961, when James H. Meredith, a black man, applied to the Registrar of the University of Mississippi for admission to the Spring 1961 session.¹³⁹ After denying Meredith's application on the grounds of "overcrowded conditions," the Board of Trustees adopted a variety of new admissions policies.¹⁴⁰ These included the requirement that all students achieve a minimum score on tests devised by the American College Testing Program (ACT) and the reaffirmation of an alumni voucher requirement that required applicants to submit at least five letters of recommendation as to strong

¹³⁴ See *Ayers I*, 674 F. Supp. 1523, 1553 (N.D. Miss. 1987).

¹³⁵ See Bunch, *supra* note 120, at 12.

¹³⁶ *Ayers I*, 674 F. Supp. at 1528.

¹³⁷ *Id.* at 1526.

¹³⁸ *Id.* at 1526-29. For a more complete description of the evolution of Mississippi's dual system of higher education, see *id.* at 1526-28.

¹³⁹ See *id.* at 1530.

¹⁴⁰ *Id.* at 1530-31.

moral character from alumni of the institution to which they were applying.¹⁴¹ In 1962, in the case of *Meredith v. Fair*, the United States Court of Appeals for the Fifth Circuit issued an order striking down the alumni voucher requirement as unconstitutional and calling for the immediate admission of Meredith to the University of Mississippi.¹⁴²

The decade following the *Meredith* decision witnessed the protracted struggle to break down the Board of Trustees' discriminatory policies in the areas of student admissions, faculty hiring, programs and funding.¹⁴³ In 1969, as these preliminary efforts were intensifying, the United States Department of Health, Education and Welfare ("HEW") sent a letter to the State of Mississippi and the Board of Trustees urging them to submit within 120 days a cohesive desegregation plan that would dismantle the former de jure system.¹⁴⁴ Five years later, the Board of Trustees replied by submitting a plan of compliance that expressed a basic objective of improving educational opportunities for all citizens and outlining certain goals related to opposite-race student admissions, the equalizing of funding and the upgrading of facilities at the three historically black universities.¹⁴⁵ HEW's rejection of the plan of compliance precipitated the lawsuit in *Ayers v. Allain*.¹⁴⁶

B. *Ayers v. Allain in the Federal District Court*

Private plaintiffs commenced the class action in *Ayers v. Allain* on January 28, 1975, alleging that the defendant State of Mississippi and the Board of Trustees were maintaining a racially dual system of public higher education.¹⁴⁷ On April 21, 1975, the United States intervened

¹⁴¹ *Ayers I*, 674 F. Supp. at 1531.

¹⁴² See *Meredith v. Fair*, 298 F.2d 696, 701, 703 (5th Cir.), cert. denied, 371 U.S. 828 (1962).

¹⁴³ See *Ayers I*, 674 F. Supp. at 1529. Even token admissions in each of the five historically white institutions were not achieved until five years after *Meredith* with the enrollment of a black student at the University of Southern Mississippi in 1967. *Id.* The process of enrolling white students in the historically black universities was even more protracted. See *id.* Similar evidence emerged in *Ayers I* of the reticence of the universities to hire opposite-race faculty: Mississippi Valley State University did not hire its first full-time white faculty member until 1968; Mississippi State University did not hire a full-time black instructor until 1974. *Id.*

¹⁴⁴ See *id.* at 1530.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Ayers I*, 674 F. Supp. at 1524. The plaintiffs alleged that the state was in violation of the Fifth, Ninth, Thirteenth and Fourteenth Amendments to the Constitution, 42 U.S.C. §§1981 and 1983, and Title VI of the Civil Rights Act of 1964, 42 U.S.C. §200d, et seq. *Id.* On September 17, 1975, the plaintiff class was certified in the United States District Court for the Northern District of Mississippi and defined as: "All black citizens residing in Mississippi, whether students, former students, parents, employees, or taxpayers, who have been, are, or will be discriminated against

as a party plaintiff.¹⁴⁸ The plaintiffs alleged that the State of Mississippi had maintained its prior *de jure* segregated system of higher education through policies and practices governing student admissions, and through the imposition of institutional mission statements that perpetuated disparities between historically black and historically white institutions.¹⁴⁹ The plaintiffs emphasized in their contrast the number and quality of academic programs, the quality of instructional staff, allocation of land grant functions, quality of physical plant and the distribution of financial resources.¹⁵⁰ The defendants contended that the mere continued existence of universities with predominantly white and predominantly black student bodies was not by itself a violation of the plaintiffs' equal protection rights.¹⁵¹ On the contrary, the state argued that it was currently implementing good faith race-neutral admissions procedures and operating a fully integrated, unitary system of higher education, which was at that time "wholly untainted by discriminatory actions or purposes."¹⁵²

For twelve years after the filing, the court supervised attempts by the parties to achieve a consensual resolution of their differences through the voluntary dismantling by the state of its prior segregated system.¹⁵³ This process included the assignment by the Board of "Mission Statements" to each of the institutions, so that unnecessary program duplication could be eliminated and resources could be allocated more efficiently.¹⁵⁴ When, after eleven years of negotiations, over ninety-nine percent of the white students continued to be enrolled in

on account of race in receiving equal educational opportunity and/or equal employment opportunity in the universities operated by [the] Board of Trustees." *Id.* at 1526.

¹⁴⁸ *Id.* at 1524. The United States intervened pursuant to the Fourteenth Amendment, §§ 601 and 602 of Title VI and § 902 of Title IX of the Civil Rights Act of 1964. *Id.*

¹⁴⁹ *Id.* at 1525.

¹⁵⁰ *Id.*

¹⁵¹ *Ayers I*, 674 F. Supp. at 1525.

¹⁵² *Id.* at 1525-26.

¹⁵³ *United States v. Fordice*, 112 S. Ct. 2727, 2733 (1992).

¹⁵⁴ *See id.* at 2741-42. These "missions" were clustered in three categories: comprehensive, urban and regional. *Id.* at 2742. "Comprehensive" universities were those with the greatest resources and program offerings, and the Board authorized them to continue their leadership in research and the granting of graduate and professional degrees. *Ayers I*, 674 F. Supp. at 1539. The three institutions designated as "comprehensive," University of Mississippi, Mississippi State and Southern Mississippi, were all exclusively white under the prior *de jure* segregated system. *Id.* at 1526-28. Jackson State, previously all-black, was the only "urban" university, and it was assigned a more limited research and degree-granting function. *Fordice*, 112 S. Ct. at 2742. Finally, the Board used the designation "regional" to encompass the remaining institutions that would focus upon undergraduate education. *Id.* In the previously segregated system, two—Delta State and Mississippi University for Women—had been exclusively white, and two—Alcorn State and

historically white institutions, and seventy-one percent of the black students were enrolled in the historically black institutions, the parties proceeded to trial in the United States District Court for the Northern District of Mississippi.¹⁵⁵

The plaintiffs argued that because the effects of *prior* state action persisted, Mississippi remained under a continuing obligation to eliminate the *vestiges* of racial dualism, "root and branch."¹⁵⁶ The court held, however, that Mississippi was not currently in violation of the Constitution or the statutes of the United States because it had fully met its affirmative duty by adopting race-neutral admissions policies and good faith procedures in the administration of its higher education system.¹⁵⁷ The court thus accepted the state's contention that its educational policies and procedures were untainted by any discriminatory purpose.¹⁵⁸

This holding rested on the distinction made in *ASTA* between a state's duty in the area of elementary and secondary education, and its more limited obligation in the higher education context.¹⁵⁹ It was buttressed by the Supreme Court's decision in *Bazemore*, which held that in the context of extension service clubs, where participation was voluntary, the state fulfilled its obligation to "disestablish segregation" simply by adopting a policy allowing all young people to choose freely which club to join.¹⁶⁰ By emphasizing freedom of choice as the factor that made universities more like 4-H and Homemaker Clubs than like elementary and secondary schools, the *Ayers I* court was able to side with the *ASTA* court in holding that good faith implementation of nondiscriminatory policies satisfied the state's affirmative duty to desegregate a higher education system.¹⁶¹ The focus upon freedom of choice also enabled the court to view its decision as essentially harmonious with the decision in *Green*.¹⁶² The *Ayers I* court viewed *Green* as standing for the limited proposition that where "choice" was traditionally controlled by the state, in elementary and secondary education, then the state was required to assert its power to maximize the racial

Mississippi Valley State—had been exclusively black. *Id.* at 2742. The Supreme Court would devote close attention to the effects of these "Mission Statements." *See id.* at 2741–42.

¹⁵⁵ *See Ayers II*, 893 F.2d at 735.

¹⁵⁶ *Ayers I*, 674 F. Supp. at 1525.

¹⁵⁷ *Id.* at 1564.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 1552–53 (citing *ASTA*, 289 F. Supp. at 788–90).

¹⁶⁰ *Id.* at 1553 (citing *Bazemore*, 478 U.S. at 408).

¹⁶¹ *See Ayers I*, 674 F. Supp. at 1553–54.

¹⁶² *Id.* at 1553.

integration of the component schools.¹⁶³ But where individuals have traditionally been free to choose whether and where to attend school, as in the higher education context, it would be inappropriate to evaluate a state's compliance with its duty simply by measuring the relative degree of integration that had actually been achieved.¹⁶⁴

Judge Biggers, who issued the opinion of the lower court, advanced two additional lines of analysis.¹⁶⁵ He remarked that the disposition of the *Ayers* lawsuit was anomalous because it did *not* depend upon *retrospective* analysis, the adjudication of facts existing prior to the filing of the complaint.¹⁶⁶ Rather, it required an evaluation of the state's policies and procedures as they existed in the present—some twelve years after Jake Ayers had actually initiated the suit.¹⁶⁷ In each of the areas of educational policy under inquiry, the court recognized that the state had once maintained thoroughgoing segregative policies.¹⁶⁸ Nevertheless, the opinion held that Mississippi was not *currently* in violation of its constitutional or statutory duties because of its good faith policies.¹⁶⁹

Finally, Judge Biggers asserted that the *Ayers* lawsuit was not about the "efficiency or the economic wisdom of higher education policies" but rather about the charge of racial discrimination in higher education.¹⁷⁰ Despite this assertion, the opinion did remark upon the economic inefficiency of segregation, particularly in an impoverished state.¹⁷¹ It concluded by linking the issues of economy and efficiency with the historic facts of segregation when it asserted that the State of Mississippi had, because of its policy of racial separation, undertaken to fund more institutions of higher learning than were justified by the resources available.¹⁷²

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 1554.

¹⁶⁵ *See id.* at 1551, 1554.

¹⁶⁶ *Ayers I*, 674 F. Supp. at 1551.

¹⁶⁷ *Id.*

¹⁶⁸ *See id.* at 1554–63. The opinion adopted this procedure in its analysis of the following areas of inquiry: the use of ACT scores in student admissions, *id.* at 1554–57; the recruitment of other-race students at individual institutions, *id.* at 1557–58; the Mission Statements assigned to each institution by the Board of Trustees in 1981, *id.* at 1558–61; unnecessary program duplication, *id.* at 1561; facilities and financing, *id.* at 1561–62; land grant activities, *id.* at 1562–63; faculty and staff employment, *id.* at 1563.

¹⁶⁹ *See id.* at 1557, 1558, 1561, 1563.

¹⁷⁰ *Id.* at 1541.

¹⁷¹ *See Ayers I*, 674 F. Supp. at 1560, 1563, 1564.

¹⁷² *Id.* at 1564.

C. *Ayers v. Allain in the United States Court of Appeals
for the Fifth Circuit*

Upon appeal to the Fifth Circuit, the *Ayers* lawsuit generated two opinions: one authored by Judge Goldberg for a three-judge panel which reversed the district court's decision ("*Ayers II*");¹⁷³ and the other by Judge Duhe for the court rehearing the appeal en banc, which reinstated the judgment of the district court ("*Ayers III*").¹⁷⁴ Both opinions recurred to the exhaustive fact-finding of the district court and reproduced portions of the recorded data.¹⁷⁵ But the *Ayers III* majority recognized that the plaintiffs did not argue upon appeal, as is usually the case, that the findings were clearly erroneous.¹⁷⁶ Rather, the plaintiffs' allegations of error rested upon the contention that the district court had applied the incorrect remedial duty.¹⁷⁷ They argued that the district court had focused, improperly, upon the race-neutrality of the state's higher education policies, rather than viewing them in light of an affirmative remedial obligation to undo the harms of past discrimination.¹⁷⁸

The opinions of the three-judge panel and the en banc majority as to the correct remedial duty diverged upon the nature of *Green's* affirmative duty and its applicability to the higher education context.¹⁷⁹ For the panel majority in *Ayers II*, the application of *Green* to the public university context demanded the achievement of a unitary system by removing "all vestiges of de jure segregation root and branch."¹⁸⁰ The opinion found the vestiges of past discrimination in the areas of student admissions requirements, the racial composition of faculty and administration at the historically white institutions, disparities in academic programs, funding practices and mission designations.¹⁸¹ For this reason, the panel majority held that the defendants had not satisfied their affirmative duty under *Green*.¹⁸²

On the other hand, the en banc majority affirmed the district court's reliance upon *ASTA* and *Bazemore*, and held that Mississippi

¹⁷³ See *Ayers II*, 893 F.2d 732, 756 (panel) (5th Cir. 1990).

¹⁷⁴ See *Ayers III*, 914 F.2d 676, 692 (en banc) (5th Cir. 1990).

¹⁷⁵ See *Ayers III*, 914 F.2d at 678-82; *Ayers II*, 893 F.2d at 733-42.

¹⁷⁶ *Ayers III*, 914 F.2d at 688.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 691.

¹⁷⁹ See *Ayers III*, 914 F.2d at 682-87; *Ayers II*, 893 F.2d at 750-51.

¹⁸⁰ *Ayers II*, 893 F.2d at 752.

¹⁸¹ *Id.* at 752-53.

¹⁸² *Id.* at 753.

had satisfied its constitutional obligation to disestablish its previously segregated higher education system by discontinuing prior discriminatory practices and adopting race-neutral policies in good faith.¹⁸³ The opinion placed particular emphasis upon the element of freedom of choice which made a "wholly different milieu" of the higher education context, and distinguished the scope of the affirmative duty from that required in elementary and secondary schools.¹⁸⁴ It also determined that the freedom of choice that race-neutral policies in Mississippi had created was not inconsistent with *Green*, because *Green* did not invalidate all freedom of choice plans.¹⁸⁵ Rather, freedom of choice might prove itself in operation, particularly where no alternative methods were available.¹⁸⁶ Because the full range of remedial options available at lower education levels, such as pupil assignment, busing, zoning and attendance quotas, were not available in the university context, the court reasoned that a freedom of choice plan provided the best alternative for fulfilling the *Green* mandate.¹⁸⁷

The *Ayers III* majority rejected the plaintiffs' argument that the Board of Trustees' admissions standards and mission designations were infected with a discriminatory intention and thus perpetuated the prior de jure segregated system.¹⁸⁸ It did acknowledge, however, that in the areas of faculty hiring, and disparities in programs and facilities, the inequalities between the historically black and historically white institutions were "reminiscent" of the prior segregated system.¹⁸⁹ Nevertheless, the defendants' current policies were not racially motivated and, in the opinion of the majority, there were no current constitutional violations.¹⁹⁰

On appeal, the plaintiffs had advanced three different remedies of their own: the merger of branch centers of historically white institutions with nearby historically black institutions; the elimination of certain duplicate programs, so that they would only be offered at the

¹⁸³ *Ayers III*, 914 F.2d at 687.

¹⁸⁴ *Id.* at 685 (citing *Bazemore*, 478 U.S. at 408).

¹⁸⁵ *Id.* at 685.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 686-87.

¹⁸⁸ See *Ayers III*, 914 F.2d at 688-91. The court asserted that it was not required to pass on the financial wisdom or the educational efficiency of the mission designations, only on whether they denied plaintiffs their equal protection rights. *Id.* at 690. Similarly, the court insisted that its only concern was whether the admissions policies, in particular the use of ACT scores without high school grades, was discriminatory, not whether such a policy might be "narrow, inaccurate, and educationally unsound." *Id.* at 690-91.

¹⁸⁹ *Id.* at 692.

¹⁹⁰ *Id.*

historically black institutions; and the enhancement of programs at the historically black schools to create equal educational opportunities at those institutions.¹⁹¹ The *Ayers III* court rejected the first two on the grounds that, in the Fifth Circuit where courts had taken great pains to open the doors to educational opportunity, these remedies actually reduced student choice by eliminating programs.¹⁹² The court argued that all students would be done a disservice by remedies that sought to maximize integration by minimizing diversity of opportunities and vitiating choice.¹⁹³ In rejecting the plaintiffs' request to mandate a remedy calling for the enhancement of programs at historically black universities, the court cited the limitations created by financial conditions in Mississippi.¹⁹⁴ More than this, the court insisted that it could not adjust the inequities under principles of equal protection without reattaching legal significance to the designations "Black School" and "White School."¹⁹⁵ By declaring with the force of law that funding, offerings and facilities at the black schools should at all times remain equal, the court would in effect be signalling a return to the "revolving principle" of separate but equal, whose source it declined to cite.¹⁹⁶

In a dissenting opinion, Judge Patrick E. Higginbotham argued that by focusing on the absence of any current discriminatory purpose, the *Ayers III* court was denying the importance of *perpetuation*.¹⁹⁷ Once the court had found the "deep traces" of prior segregation in the present higher education system, the dissent maintained that it was required to find the state in violation of its duty to undo the wrong: "This case is about remedy—detecting present effects of the earlier wrong and defining the remedial response."¹⁹⁸ In determining the nature of that response, Judge Higginbotham rejected the application of *Green* to the higher education context.¹⁹⁹ The dissenting opinion asserted that the Fourteenth Amendment itself supported no substantive right to a particular racial mix and it rejected *Green* if it demanded absolute racial balancing as the goal of remedial action in education.²⁰⁰ Although Judge Higginbotham advanced no remedies of his own, he urged that the state could fulfill its constitutional duty to eliminate the

¹⁹¹ *Id.* at 687.

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ See *Ayers III*, 914 F.2d at 690.

¹⁹⁵ *Id.* at 692.

¹⁹⁶ *Id.*

¹⁹⁷ See *id.* at 694 (Higginbotham, J., dissenting).

¹⁹⁸ *Id.*

¹⁹⁹ *Ayers III*, 914 F.2d at 694 (Higginbotham, J., dissenting).

²⁰⁰ *Id.*

vestiges of segregation without requiring absolute racial balancing, by striving instead for real choice and educational opportunities that were "truly equal."²⁰¹

IV. *UNITED STATES V. FORDICE*: THE *AYERS* DECISION IN THE UNITED STATES SUPREME COURT

A. *The Proper Legal Standard*

In its decision in *United States v. Fordice*, the United States Supreme Court enunciated for the first time in the nearly four decades since *Brown* the proper legal standard for evaluating whether a state has met its obligation to dismantle a prior de jure segregated system of higher education.²⁰² The Court held that Mississippi's current race-neutral policies had failed to meet the affirmative duty after applying the following test to the state's conduct:

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.²⁰³

In so holding, the Supreme Court shifted the burden from the aggrieved plaintiffs onto the State of Mississippi either to justify any constitutionally suspect remnants of its prior segregated system or to eliminate them.²⁰⁴ The Court thus vacated the judgment of the Fifth Circuit and remanded the *Ayers* case to the District Court for the Northern District of Mississippi for proceedings to consider appropriate remedial action.²⁰⁵

Speaking for an 8-1 majority, Justice White attributed the lower courts' error in ruling that Mississippi had brought itself into compliance with the Equal Protection Clause to its improper reliance upon the decisions in *ASTA* and *Bazemore*.²⁰⁶ Justice White noted that the district court derived from *ASTA* a test that emphasized "current"

²⁰¹ *Id.*

²⁰² See *United States v. Fordice*, 112 S. Ct. 2727, 2732 (1992).

²⁰³ *Id.* at 2737.

²⁰⁴ *Id.* at 2738, 2741.

²⁰⁵ *Id.* at 2743.

²⁰⁶ See *id.* at 2734-37.

race-neutral policies and procedures as the gauge of a state's compliance.²⁰⁷ Its inquiry instead should have been whether policies traceable to the de jure system were still in force and continued to have discriminatory effects.²⁰⁸ According to the Court, if the perpetuation of these effects was directly attributable to state action, then the state remained in violation of the Constitution.²⁰⁹ On those grounds, the lower court's use of *Bazemore* to buttress its reasoning was inappropriate, because in that case the Court determined that the existing racial imbalance in the membership of the 4-H and Homemaker's Clubs was the result of the free choice of the individuals rather than any coercive action on the part of the state.²¹⁰

B. *Application of the Proper Legal Standard*

Justice White argued that if the lower courts had applied the correct legal standard to the factual findings of the district court, they would have determined that several constitutionally suspect elements survived from Mississippi's prior segregated system.²¹¹ Even though the state's policies appeared to be neutral on their face, they had the effect of substantially restricting students' choices in admissions, even as they perpetuated the racial identifiability of the eight institutions in the public university system.²¹² The Court proceeded to uncover the traces of segregation in its analysis of four areas: admissions standards; duplication of programs; mission statements; and the existence of eight higher education institutions.²¹³ In identifying four principal "remnants" of the prior de jure system that Mississippi was required to justify or eliminate, the opinion warned that the Court was making no effort to identify all the aspects of the higher education system that the district court would be required to review on remand.²¹⁴

In 1963, in the aftermath of *Meredith v. Fair* and the enrollment of the first black student at the University of Mississippi, the Board of Trustees implemented a requirement that all students admitted to the three larger historically white universities earn a minimum score of fifteen on the ACT tests.²¹⁵ The district court had found a clear "dis-

²⁰⁷ *Fordice*, 112 S. Ct. at 2735.

²⁰⁸ *Id.* at 2736.

²⁰⁹ *Id.* at 2735.

²¹⁰ *See id.* at 2737.

²¹¹ *Id.* at 2738.

²¹² *Fordice*, 112 S. Ct. at 2738.

²¹³ *See id.* at 2738-43.

²¹⁴ *Id.* at 2738.

²¹⁵ *Id.*

criminatory taint" to this requirement, given that the average ACT score for white students at that time was eighteen and the average score for blacks was seven.²¹⁶ Despite this finding, the district court concluded, and the en banc court of appeals agreed, that the continued use made of ACT scores actually derived from policies enacted in the 1970s as a response to the problem of student unpreparedness.²¹⁷ The Supreme Court, however, reasoned that this mid-passage justification for policies originally enacted to discriminate against black students did not make the current use of the ACT tests any less constitutionally suspect.²¹⁸ The Court was struck by the fact that schools such as MUW and Mississippi Valley State, with ostensibly the same "regional" mission to provide quality undergraduate education, had widely varying admissions standards.²¹⁹ The majority found that such disparate admissions standards were not only traceable to the previously segregated system and had originally been adopted for a discriminatory purpose, but that they continued to have discriminatory effects by restricting students' choices of schools in ways that perpetuate segregation.²²⁰

The Court was particularly critical of the state's failure to consider an applicant's high school grades in addition to ACT scores, especially because the American College Testing Program itself discouraged the use of test scores alone as a predictor of college success.²²¹ The lower courts had accepted the Board of Trustees' good faith explanation that the use of ACT scores as the sole admissions criterion stemmed from a concern for grade inflation and a lack of comparability between the grading standards among the state's high schools.²²² But the Supreme Court found that this rationale could not withstand the application of

²¹⁶ *Id.*

²¹⁷ See *Ayers III*, 914 F.2d, 676, 679 (5th Cir. 1990) (en banc); *Ayers I*, 674 F. Supp. at 1531. In 1992, all Mississippi residents were required to score at least 15 for automatic admission to any of the historically white institutions, except Mississippi University for Women which required an 18. *Fordice*, 112 S. Ct. at 2739. By contrast, a score of 13 qualified a student for automatic admission to the three historically black universities. *Id.* Because 72% of white high school students in Mississippi achieve a score of at least 15, while only 30% of black students attained that standard, the Court found it unsurprising that Mississippi's universities remained predominantly identifiable by race. *Id.*

²¹⁸ *Fordice*, 112 S. Ct. at 2738.

²¹⁹ *Id.* at 2739.

²²⁰ *Id.*

²²¹ *Id.* at 2740. The ACTP has been particularly sensitive to the disparity between the test scores achieved by black and white students, and to the perception that standardized tests such as the ACT may be racially biased. *Id.* For this reason, the ACTP has suggested that a combination of test scores and high school grades provides a better predictor of a student's ability to do college-level work. *Id.* The vast majority of states that require the ACT test had adopted the Program's recommendation. See *id.*

²²² *Id.*

the correct legal standard; because the "ACT-only" admission standard had clear segregative effects, Mississippi would be required on remand to demonstrate that it could not be eliminated without "eroding sound educational policy."²²³

The district court classified a duplication of academic programs as "unnecessary" any time two or more universities offered the same nonessential or noncore program.²²⁴ Based on this definition, the trial court found that 34.6 percent of the undergraduate programs and 90 percent of the graduate programs at historically black universities were "unnecessarily duplicated" at the historically white institutions.²²⁵ When the Supreme Court applied the correct legal standard, it found that the duplication of programs was integral to the prior segregated system because the very notion of "separate but equal" required duplicative programs in black and white schools, and that the present duplication of programs help to perpetuate that system.²²⁶ Because the trial court had observed that the duplication could not be justified "economically or in terms of providing quality education," the Supreme Court urged that the state be required on remand to provide educational justification for such duplication or to eliminate as many programs as would be practicable.²²⁷

In 1981, the Board of Trustees assigned mission designations to Mississippi's eight institutions of public higher education.²²⁸ These designations tended to reinforce the more limited academic functions that had been assigned to the exclusively black universities during the prior de jure segregated system, in that only three historically white institutions received the "comprehensive" designation reserved for schools that were to receive the highest level of funding to support the most diversified programs.²²⁹ The court of appeals differed from the district court in its recognition that "inequalities among the institutions largely follow[ed] the mission designations, and the mission designations to some degree follow[ed] the historical racial assignments."²³⁰ Because the Supreme Court found that the current mission statements interfered with student choice and tended to perpetuate aspects of the

²²³ *Fordice*, 112 S. Ct. at 2740.

²²⁴ *Id.* (quoting *Ayers I*, 674 F. Supp. at 1540). The Supreme Court observed that this expansive definition would include all duplication of nonbasic liberal arts and science courses at the bachelor's level and all duplication of graduate and professional programs. *See id.*

²²⁵ *Id.* at 2740-41 (citing *Ayers I*, 674 F. Supp. at 1541).

²²⁶ *Id.* at 2741.

²²⁷ *Id.* (citing *Ayers I*, 674 F. Supp. at 1541).

²²⁸ *See supra* note 154 and accompanying text.

²²⁹ *Fordice*, 112 S. Ct. at 2741-42. *See also supra* note 154 and accompanying text.

²³⁰ *Id.* at 2742 (quoting *Ayers III*, 914 F.2d at 692).

prior de jure system, it instructed the district court on remand to apply the standard of sound educational practice to determine whether the discriminatory effects of the mission assignments could be eliminated.²³¹

The Supreme Court emphasized that Mississippi would never have founded as many as eight public institutions of higher education were it not for state laws mandating the separation of the races.²³² It cited the district court's finding that Mississippi currently undertook to fund more universities than were justified by the financial conditions in the state and that such a practice was both "wasteful and irrational."²³³ Although the Supreme Court acknowledged that a larger number of institutions enhances the number of options for students, it issued the following mandate to the district court: to determine on remand 1) whether the maintenance of all eight universities affected student choices and perpetuated a segregated system of higher education; 2) whether the retention of each of these institutions could be educationally justified; and 3) whether one or more of the state's public universities could be practicably closed or merged with other existing institutions.²³⁴

The majority opinion concluded by instructing the district court upon remand to address several additional concerns about funding.²³⁵ Like the court of appeals, the Supreme Court rejected what it perceived to be a request by the private petitioners to order increased funding to upgrade the three historically black institutions.²³⁶ It echoed the reasoning of the lower court that the affirmative duty to dismantle a prior de jure system has not been met when a state perpetuates "separate" institutions, even if they are "more equal."²³⁷ Nevertheless, the majority's opinion concluded by leaving the district court the option to consider whether enhanced funding of the historically black institutions might be necessary to eradicate the effects of prior segregation.²³⁸

²³¹ *Id.* at 2742.

²³² *Id.*

²³³ *Id.* (citing *Ayers I*, 674 F. Supp. at 1563-64).

²³⁴ *Fordice*, 112 S. Ct. at 2743. In a footnote, Justice White rejected as inappropriate in the higher education context the "radical" remedies, such as reassignment of students, adopted in *Green*. *Id.* at 2736 n.4. In his dissent, Justice Scalia observed that this rejection of mandatory student assignment had effectively deprived district court judges of the most efficient desegregation remedy. *Id.* at 2753 (Scalia, J., dissenting).

²³⁵ *Id.*

²³⁶ *Id.* See *supra* note 191 and accompanying text.

²³⁷ *Id.*

²³⁸ *Id.*

C. *Justice Thomas, Concurring; Justice Scalia, Dissenting*

Both Justice Thomas in his concurring opinion and Justice Scalia in his dissent expressed reservations about the *effects* which the majority's opinion would have, not only upon the district court's efforts to generate appropriate remedies in Mississippi's higher education system, but upon the sixteen other states where the vestiges of prior de jure systems might also be found.²³⁹ Justice Thomas wrote separately to urge that the standard that the Court had applied to the higher education context in Mississippi was not the same standard that the *Green* Court had adopted in the elementary and secondary schools because it did not compel the elimination of any detected racial imbalance in the schools.²⁴⁰ In explicitly rejecting the "radical" remedies such as student reassignment which had prevailed in the *Green* Court's mandate, the Court had, in Thomas's view, instructed the district court to focus upon the eradication of discriminatory *policies* rather than the *imbalance* directly.²⁴¹

Justice Thomas insisted that the Supreme Court's decision portended "neither the destruction of historically black colleges nor the severing of those institutions from their distinctive histories and traditions."²⁴² With the majority's emphasis upon "sound educational practices," "sound educational justification," and "sound educational policy," Justice Thomas urged the district court to recognize that sound educational justification did exist for the continued vitality of the historically black colleges.²⁴³ While Justice Thomas, like the majority, rejected the remedy of creating special enclaves for one particular racial group, he did envision a constitutionally approvable system of higher education that operated a diverse array of schools, including historically black institutions, open to all students on a race-neutral basis, but with traditions and programs that might appeal to one race more than another.²⁴⁴

Unlike Justice Thomas, Justice Scalia perceived that the majority opinion had in fact adopted the *Green* affirmative duty and with it a

²³⁹ See *Fordice*, 112 S. Ct. at 2744-46 (Thomas, J., concurring); *id.* at 2746-53 (Scalia, J., concurring in the judgment in part and dissenting in part). Justice O'Connor wrote a separate concurrence to emphasize the heavy burden placed upon Mississippi, especially in light of its long history of discrimination, to justify any remnant of its de jure segregated system or to eliminate it. See *id.* at 2743-44.

²⁴⁰ *Id.* at 2744 (Thomas, J., concurring).

²⁴¹ *Id.* at 2745.

²⁴² *Id.* at 2744.

²⁴³ *Id.* at 2745-46.

²⁴⁴ *Fordice*, 112 S. Ct. at 2746.

requirement of compelled racial balancing.²⁴⁵ Moreover, according to Justice Scalia, the lower courts had been correct in their reliance upon the freedom of choice argument of *Bazemore* and upon the standard for dismantling a dual system which that decision had generated: discontinuation of discriminatory policies and the adoption of race-neutral admissions.²⁴⁶ Justice Scalia not only regretted the majority's failure to accord precedential value to the Court's own reasoning in *Bazemore*, a case that he found parallel in all relevant respects, he observed that the majority's standard was actually two different tests without significant guidance to lower courts as to how they should be applied.²⁴⁷ He referred to the addition to the announced standard that the state would be required to justify or eliminate any policy that "substantially restrict[ed] a person's choice of which institution to enter."²⁴⁸ In the majority opinion, Justice Scalia found no guidance for the lower courts as to the way restriction of choice was to be measured, and he observed that if the state adopted the Court's recommendation to eliminate programs or to close schools, the remedy itself would have the effect of restricting choice.²⁴⁹ Finally, Justice Scalia predicted that years of litigation, confusion and destabilization would result in every formerly de jure state that would be required to apply the Court's standard in *Fordice*.²⁵⁰

At the conclusion of his dissent, Justice Scalia echoed Justice Thomas in a concern for the effect that the majority's ruling might have on the historically black universities.²⁵¹ Justice Scalia observed that the citizens of a state might conclude that it was desirable to fund institutions used predominantly by blacks on an equal basis with institutions used predominantly by whites, even though the Constitution did not require such equal funding.²⁵² And yet, to concede a "sound educational justification" to fostering schools in which blacks receive their education in a "majority" setting would contradict what Justice Scalia saw as the compulsory-integration philosophy underlying

²⁴⁵ *Id.* at 2751, 2753 (Scalia, J., concurring in the judgment in part and dissenting in part). Justice Scalia agreed that the Constitution compelled Mississippi to remove discriminatory barriers in its public universities. *Id.* at 2746. He also agreed with the portion of the majority opinion calling for a further review of Mississippi's use of ACT scores in its admissions process. *See id.*

²⁴⁶ *Id.* at 2750.

²⁴⁷ *Id.* at 2747, 2750.

²⁴⁸ *Id.* at 2747 (quoting the majority, *id.* at 2738. *See also id.* at 2739, 2741, 2742-43).

²⁴⁹ *Fordice*, 112 S. Ct. at 2747.

²⁵⁰ *Id.* at 2753.

²⁵¹ *See id.* at 2751-52.

²⁵² *Id.* at 2752.

Green.²⁵³ The standard adopted by the Court could only have the effect of eliminating the historically black universities, a result that, according to the dissent, was not required by the Constitution, and which flew in the face of statutorily expressed policies to enhance those very institutions.²⁵⁴ Justice Scalia specifically referred to the passage of an act by Congress, entitled "Strengthening Historically Black Colleges and Universities," which authorized increased government subsidies to historically black colleges as a remedy for the effects of discrimination by state and federal governments against these institutions.²⁵⁵

D. *The Ayers Decision on Remand to Judge Biggers*

On September 24, 1992, Judge Neal B. Biggers, Jr., United States District Judge for the Northern District of Mississippi issued an order setting a status and scheduling conference for October 22, 1992.²⁵⁶ The parties were ordered to be prepared at that time to propose remedies to resolve the state's liability pursuant to the Supreme Court's opinion in *United States v. Fordice* in the following areas: 1) whether the state should continue to maintain eight universities; 2) whether admissions policies should be revised; 3) whether the state should continue duplicative programs at some of its universities; 4) funding and staff for the state universities.²⁵⁷ At the hearing, the Board of Trustees issued a one-hundred-page published report on "proposed remedies."²⁵⁸ While the proposal devoted several paragraphs to a revision of admissions standards and reduced program duplication, its thrust was the reorganization of the state system into four institutions with a shared mission.²⁵⁹ This system would result in the closure of one historically

²⁵³ *Id.*

²⁵⁴ *Fordice*, 112 S. Ct. at 2752-53.

²⁵⁵ See 20 U.S.C. §§ 1060-1063c (1988). The statute states in pertinent part: "[T]he current state of Black colleges and universities is partly attributable to the discriminatory action of the States and the Federal Government and this discriminatory action requires the remedy of enhancement of Black postsecondary institutions to ensure their continuation and participation in fulfilling the Federal mission of equality of educational opportunity..." *Id.* at § 1060(3). The federal regulations devised to implement the statute recognize the three historically black public institutions in Mississippi as eligible recipients of federal enhancement funds. See 34 C.F.R. § 608.2(b) (1991).

²⁵⁶ See Order Setting Status and Scheduling Conference (Sept. 24, 1992), in 1 *AYERS DECISION*, *supra* note 21.

²⁵⁷ *Id.*

²⁵⁸ See Defendant Board of Trustees of State Institutions of Higher Learning's *Proposed Remedies* (October 22, 1992), in 1 *AYERS DECISION*, *supra* note 21.

²⁵⁹ *Id.*

black institution, Mississippi Valley State University, and the merger of another, Alcorn State, with Mississippi State University.²⁶⁰ At the hearing, Nathaniel Douglas, an attorney representing the Department of Justice, contended that the presentation of formal proposals was premature, because substantial disagreement remained among the parties about the actual problems any remedy would address.²⁶¹ Attorneys for the plaintiffs did, however, respond to the Supreme Court's recommendation on the closing of institutions by saying that "the very last thing we want to see happen is that schools be closed."²⁶² If the goal of the *Ayers* lawsuit had been to increase access for minority students, plaintiffs' attorneys wondered how this could be achieved by "closing schools that are now meeting the needs of educating minority students."²⁶³

V. JUDICIAL REMEDIES IN THE DESEGREGATION OF PUBLIC HIGHER EDUCATION—AN ANALYSIS

When the Supreme Court remanded the *Ayers* decision to the United States District Court for the Northern District of Mississippi, it enunciated for the first time the heavy burden that states bear to eliminate the vestiges of their prior dual systems of public higher education.²⁶⁴ But the disagreement between Justices Thomas and Scalia in their opinions about the role of *Green* as the source for the majority's standard, and about what remedial action that affirmative duty requires suggests that the process of definition is far from complete. The opinion in *Fordice* does strongly reinforce the Supreme Court's determination that the moral imperative of *Brown v. Board of Education* will apply with equal vigor at all levels of public education. But like both

²⁶⁰ See *id.* The proposal also calls for the merger of Mississippi University for Women with the University of Southern Mississippi. *Id.* The story of the opposition to the current proposal on the part of supporters of the historically single-sex institution parallels the opposition of supporters of the historically black institutions and has resulted in an unusual alliance of forces. *Id.* See also Joyce Mercer, *Plan to Desegregate Higher Education in Mississippi Unites State's Colleges, Black and White Alike*, CHRON. OF HIGHER EDUC., Nov. 4, 1992, at A23-24.

²⁶¹ See Transcript of Proceedings Before the Judge Neal B. Biggers, Jr., United States District Judge, 13-16 (Oct. 22, 1992), in 2 *AYERS DECISION*, *supra* note 21.

²⁶² *Id.* at 21.

²⁶³ *Id.* William F. Goodman, Jr., attorney for the Board of Trustees, pointed out that the state had never requested permission to close any institutions of higher learning; rather the Supreme Court had commanded the state to consider that option. *Id.* at 23. Goodman also pointed out that the Supreme Court had not required the state to spend any additional funds for the enhancement of programs at the historically black institutions. *Id.* at 23-24. Finally, he accused the plaintiffs of "running from the decision they obtained." *Id.* at 24.

²⁶⁴ *Fordice*, 112 S. Ct. at 2737.

Brown decisions, *Fordice* has left the states uncertain about the precise goals they must achieve, and the district courts largely without guidance as to the actions they may mandate.

A. "Root and Branch": What Remedies Does Green Mandate/Allow?

Although the *Brown* decisions continue to exert their strong symbolic authority in the debate over the desegregation of public higher education, the courts' search for substantive guidance in the mandating of remedies has always begun with *Green v. County School Board of New Kent*. In *Green*, Justice Brennan expressed the formative standard that the courts would apply by charging states with 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."²⁶⁵ The phrase "whatever steps might be necessary" established the broad discretion of the courts to exercise their equitable powers. The metaphor of "root and branch" suggested that courts would address themselves not only to the current visible manifestations of segregation but to the sources of those effects in a state's prior *de jure* system.²⁶⁶ It is less clear, however, whether the transition to a "unitary" system could be effected only by a process of "compelled integration" and the achievement of absolute racial balancing, or whether racial *discrimination* could be eliminated through alternative remedies.

In the specific context of the prior *de jure* dual system in New Kent County, Virginia, the *Green* court found that rezoning was a relatively simple administrative remedy that would eliminate racial discrimination through a process of integration. Although the opinion did not name any other remedies that might have been suitable, it acknowledged that there was no universal solution to the complex problems involved in dismantling a *de jure* dual system.²⁶⁷ Accordingly, it urged a contextual approach in which courts should be encouraged to weigh differing alternatives against the particular circumstances presented by each case.²⁶⁸

B. Swann and Milliken: Two Remedial Approaches

The remedies approved by the Supreme Court in *Swann v. Charlotte-Mecklenburg Board of Education* and in *Milliken v. Bradley* demon-

²⁶⁵ *Green*, 391 U.S. at 437-38.

²⁶⁶ *Id.*

²⁶⁷ *Id.* at 439.

²⁶⁸ *See id.*

strated the varied and divergent approaches that school boards might take at the elementary and secondary school level to meet the affirmative duty mandated by *Green*. In *Swann*, the courts compelled the integration of each institution within the school district.²⁶⁹ The remedies that the courts approved, the establishing of required mathematical ratios, the implementation of a rezoning plan that would assign students according to the fixed ratios, and the imposition of a burden on the school district to justify the continuing racial identifiability of any school in the district, are more sweeping than those applied in *Green*.²⁷⁰ But they reflect a similar understanding that a "unitary" system is a racially balanced system, one in which there are no white schools and no black schools, "but just schools."²⁷¹ Significantly, the Court also specified judicial authority to make recommendations concerning the closing of existing schools, establishing that one effective means of compelling integrated schooling would be to eliminate single-race options.²⁷²

On the other hand, the Court in *Milliken II* focused less on the requirement of a "unitary system" and more on the mandate to eliminate racial discrimination "root and branch." It had been constrained in its remedial authority by the holding in *Milliken I* that had invalidated an ambitious program of rezoning and student assignment, because it involved an incorporation of school districts surrounding the city of Detroit where no constitutional violations had been found. The *Milliken II* court's alternative approach was to approve thirteen new remedial and compensatory programs, and the enhancement of educational opportunities "to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct."²⁷³

While *Swann* and *Milliken* undoubtedly spurred district courts to broader and more creative exercise of their equitable powers, the decisions taken together offer a contradictory view of the precise results required by desegregation remedies. The result-oriented view of the pupil assignment remedy in *Swann*, with its use of mathematical ratios, suggests that any desegregation plan may be open to attack if it

²⁶⁹ See *Swann*, 402 U.S. at 23. Although the district court ordered that "efforts should be made to reach a 71-29 ratio in the various schools so that there will be no basis for contending that one school is racially different from the others," it acknowledged that variations "from that norm may be unavoidable." *Id.*

²⁷⁰ See *id.* at 22-31.

²⁷¹ *Green*, 391 U.S. at 442.

²⁷² *Swann*, 402 U.S. at 20-21.

²⁷³ *Milliken II*, 433 U.S. at 280 (quoting *Milliken I*, 418 U.S. at 746).

fails to achieve racial balancing and the elimination of racially "identifiable" schools. On the other hand, in eschewing a sweeping pupil assignment remedy and focusing on quality education and reform within schools that remain largely segregated, *Milliken* held out the prospect that the enhancement of "separate" educational institutions may meet the requirements of the Equal Protection Clause, if that remedy has the effect of restoring the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct.

C. *An Analysis of Judicial Remedies in Higher Education*

Swann and *Milliken* take different paths to the fulfillment of the mandate to eliminate racial discrimination in education. But either option will produce ambiguous results in the higher education context. The focus upon educational enhancement in *Milliken* challenges educators and the courts to make creative reforms in what institutions of higher education teach and the way they teach it. Moreover, educational reform is costly and requires financially hard-pressed states to make a crucial redefinition of fiscal priorities. On the other hand, the focus on racial balancing is economically efficient in that it offers states the prospect that they may achieve constitutional compliance in their education systems by cutting programs and limiting racially identifiable options. But, as Justice Scalia's dissent in *Fordice* observed, these steps impinge upon the crucial role choice plays in students' decisions about the kinds of education they will pursue. The choice between these two positions is of immense significance in cases involving the desegregation of public *higher* education, and it is crucial to the fate of the historically black institutions in the remedy mandated by the Court in *United States v. Fordice*.²⁷⁴

The Supreme Court's school desegregation decisions in the decades following *Brown* neither expressly included institutions of higher education nor exempted them; they spoke simply of *public* education.²⁷⁵ But the Court seemed reticent to extend its remedy-making power beyond the primary and secondary schools where local school boards were already invested with power to create school attendance zones and designate which schools students might attend.²⁷⁶ This re-

²⁷⁴ See *Fordice*, 112 S. Ct. at 2743.

²⁷⁵ See, e.g., *Green*, 391 U.S. at 436 ("a unitary, nonracial system of public education"); *Brown I*, 347 U.S. at 495 ("in the field of public education").

²⁷⁶ See *Bazemore v. Friday*, 478 U.S. 385, 408 (White, J., concurring) (1986). This professed reluctance to extend the specific remedies of the *Green*, *Swann* and *Milliken* line of cases to the

luctance to pronounce upon the application of *Brown* principles to higher education was further striking because the very cases that the *Brown* court cited as the foundation for its landmark ruling all involved segregation in higher education.²⁷⁷ As a result, federal district and circuit courts were left to adjudicate complaints of segregation in higher education with no genuine guidance from the Supreme Court and often with conflicting results.

1. The Scope of the Remedial Power in Higher Education

Initially, in the higher education context, the debate over alternatives concerned not a choice among available remedies, but a conflict over the *scope* of the duty itself. While the court in *ASTA* acknowledged that the affirmative duty to dismantle a dual system of education extended to colleges and universities, the scope of the duty in the higher education context was not so great.²⁷⁸ The court arrived at this conclusion at least in part because it interpreted the affirmative duty in *Green* to mandate compelled integration and racial balancing in a statewide system of higher education. In elementary and secondary school districts where education was compulsory and local school boards traditionally created attendance zones and assigned students, racial balancing was an administratively feasible goal.²⁷⁹ The court could competently assist in achieving this result by reviewing decisions about school construction or expansion.²⁸⁰ But the court decided that it could not make a similar determination about the segregative effects that the proposed construction of the branch campus of Auburn University would have on Alabama's system of higher education. The distinguishing features of higher education were its voluntary nature and the freedom of students to choose from among a range of diverse alternatives.²⁸¹ In that context, the court determined that the preservation of diverse options involved educational policy decisions that properly lay beyond its expertise. The authority of the court extended only to guaranteeing that the state and its institutions of higher education had implemented good faith race-neutral policies.²⁸²

university setting survives even in *United States v. Fordice*, in which Justice White takes it for granted in a footnote that nobody would seriously argue for "radical" remedies such as student reassignment in higher education. 112 S. Ct. at 2736 n.4.

²⁷⁷ See *Brown I*, 347 U.S. at 492.

²⁷⁸ *ASTA*, 289 F. Supp. at 787.

²⁷⁹ *Id.* at 788.

²⁸⁰ *Id.*

²⁸¹ *Id.*

²⁸² *Id.*

When the Supreme Court summarily affirmed the district court's ruling, its reluctance to issue an opinion left uncertain the status of the ASTA court's distinction between lower and higher education, and the differing scope of the duty at different educational levels.²⁸³ Whatever the rationale of the Court's silent majority, the district court decision in *ASTA* instantly became a judicial obstacle to be overcome by district courts more willing to exercise their remedial power in the area of segregated higher education. On the other hand, the court in *Ayers I* adopted *ASTA* as one of its controlling standards in asserting that the Mississippi universities and colleges had met their affirmative duty by implementing "good faith nondiscriminatory policies."²⁸⁴

This argument for a limited obligation in the context of higher education was buttressed by the language that the Supreme Court used in *Bazemore v. Friday* to distinguish the duty to adopt race-neutral admissions policies for 4-H and Homemaker's Clubs from the more stringent measures required by *Green*.²⁸⁵ Interpreting the duty in *Green* as one that compelled integration and racial balancing, the Court determined that such a mandate had no application to "this wholly different milieu."²⁸⁶

The Court never defined what it meant by "this wholly different milieu."²⁸⁷ If the Court was using the term "public education" to mean education at all levels, then the affirmative duty of *Green* still applied to colleges and universities. On the other hand, if the court was making a distinction between compulsory elementary and secondary education, and the voluntary nature of club membership, then the rule of *Bazemore*, rather than the rule of *Green*, must apply in the context of voluntary higher education where students are free to choose which if any college to attend.

The extension of this argument is that in any higher education situation where the vestiges of a prior de jure segregated system persist, the state may take refuge from constitutional scrutiny in the current adoption of race-neutral policies that give applicants freedom of choice. The courts that ruled upon the state of Mississippi's efforts to desegregate its institutions of public higher education adopted just this

²⁸³ See *ASTA*, 393 U.S. 400 (1969). Justice Douglas in his one-paragraph dissent expressed "amazement" at the assertion of a different duty to desegregate in lower and higher education, given that the very precedents *Brown I* relied upon in issuing its desegregation mandate were cases involving segregated institutions of higher education. *Id.* at 402 n.2 (Douglas, J., dissenting).

²⁸⁴ *Ayers I*, 674 F. Supp. at 1552 (quoting *ASTA*, 289 F. Supp. at 789-90).

²⁸⁵ *Bazemore*, 478 U.S. at 408.

²⁸⁶ *Id.*

²⁸⁷ See Bunch, *supra* note 120, at 16.

approach in *Ayers I* and *Ayers III*.²⁸⁸ It was left to the Supreme Court in *United States v. Fordice* to establish that good faith race-neutral policies and freedom of choice would not be sufficient to meet the affirmative duty to desegregate public higher education; rather, states such as Mississippi would be mandated to uproot the vestiges of prior de jure segregation root and branch.²⁸⁹

2. The Limited Application of the *Green* Affirmative Duty

Prior to *United States v. Fordice*, the courts in *Norris*, *Geier* and *United States v. Louisiana* held that the affirmative duty to eliminate racial discrimination in public education root and branch "defined a constitutional duty owed as well to college students."²⁹⁰ In all three cases, the courts sought, either by enjoining the expansion of an identifiably white institution in proximity to an identifiably black school, or by merging two such institutions, to eliminate educational options that perpetuated a prior segregated system. Their remedies were different from the methods of pupil assignment used in the elementary and secondary school context, such as the setting of mathematical ratios, attendance zones and mandatory busing. But they reflected the courts' inclination to interpret the "unitary system" mandated by *Green* strictly in terms of achieving racial balance through compelled integration.

Judge Hoffman's dissent in *Norris* warned that the practice of limiting educational options as a means of achieving a particular racial balance in higher education could be carried to harmful extremes.²⁹¹ He observed that if racial balancing were the only goal to be sought by judicial desegregation remedies, then the simplest procedure for dismantling the dual system of higher education in the state would be to "phase out" the state's predominantly black colleges and "absorb" the students into the remaining institutions.²⁹² In the interest of equity, Judge Hoffman allowed that Virginia might choose, instead, the less efficient option of "phasing out" its thirteen predominantly white institutions and sending all the white students to Virginia State and Norfolk State.²⁹³ Although the dissent's two Swiftian proposals were advanced chiefly to urge the adoption of the freedom of choice rea-

²⁸⁸ See *Ayers III*, 914 F.2d at 686-87; *Ayers I*, 674 F. Supp. at 1553.

²⁸⁹ See *Fordice*, 112 S. Ct. at 2737.

²⁹⁰ *Norris*, 327 F. Supp. at 1373.

²⁹¹ *Id.* at 1374-82 (Hoffman, J., dissenting).

²⁹² *Id.* at 1375.

²⁹³ *Id.*

soning in *ASTA*,²⁹⁴ they offered evidence for two broader truths: 1) in the effort to achieve desegregation in public higher education the federal district courts did possess a reservoir of untapped equitable power that extended to the merger and closure of well-established institutions as a means of achieving a numerical goal of racial balancing; and 2) the Equal Protection mandate of *Brown* might be better fulfilled by a more creative application of equitable power to the enhancement of educational opportunities for the benefit of all students.

The limitations of the "drastic remedy" of merger to reduce educational choice to a single integrated option emerge in both *Geier* and *United States v. Louisiana*. While the merger between Tennessee State University and the University of Tennessee-Nashville which the *Geier* court ordered had the salutary effect of enhancing the physical plant and financial resources of a historically black institution, it is less certain that it actually effected the desegregation that was its intent.²⁹⁵ The two circuit court decisions also sidestepped a statement in the trial court opinion in *Sanders v. Ellington* that Tennessee State University was suffering from a deterioration that could only be halted by the "substantial desegregation of that institution."²⁹⁶ The assertion seems to imply that the educational viability of a historically black institution depends upon an increase in its white student body.²⁹⁷ Finally, in its reference to TSU as the "surviving" institution, the *Geier* court barely acknowledges that the "merger" remedy usually involves the erasure of

²⁹⁴ *Id.* at 1382.

²⁹⁵ *Norris*, 327 F. Supp. at 724. Because there were two other historically white institutions, Middle Tennessee State University and Austin Peay State University, within commuting distance of the Nashville area, there remained opportunities for white full-time students to exercise a choice to attend predominantly white schools. *Id.* at 725. In the ten years following the merger, Tennessee State University actually experienced a decline of 36.8% in student enrollment. There were significant declines in both black and white enrollment. See L. Tiffany Hawkins, *Recognizing the Nightmare: The Merger of Louisiana State University and Southern University Law Schools*, 50 LA. L. REV. 557, 568 n. 38 (1990) (citing Motion and Memorandum of Board of Regents on Summary Judgment at 449a, *Louisiana I*, 718 F. Supp. 419, 499 (E.D. La. 1989)). This decline in enrollment suggests that the remedy may actually have deprived its intended beneficiaries, the victims of prior segregation, of educational opportunities, because an integrated TSU somehow provided a less desirable academic environment than it previously had. Moreover, because students who want a majority-white educational environment are always likely to find it, the enrollment decline suggests that there might well be better ways of achieving *Brown*'s equal protection mandate than by shrinking educational opportunities to maneuver students into integrated institutions.

²⁹⁶ 288 F. Supp. 937, 943 (M.D. Tenn. 1968).

²⁹⁷ See Epstein, *supra* note 41, at 725-26. More to the point, the assertion conceals a likely truth that state legislatures and the taxpayers who elect them are reluctant to channel financial resources into colleges or universities unless they have significant white enrollments.

identity of a non-surviving institution.²⁹⁸ In *Geier*, the erased institution was a relatively young one, without traditions, a distinctive educational mission, or influential alumni to rally to its defense.²⁹⁹ But where the remedy threatens the identity or existence of a long-established black institution with a tradition of service to society and generations of loyal alumni, the courts must begin to weigh the benefit of conformity to a constitutional norm against the educational, social and cultural costs.

When such a situation emerged in *United States v. Louisiana*, the court adhered closely to justifications based upon economics and efficiency, even though both parties rejected the mandated merger of Southern University Law School and the Louisiana State University Law School on educational and social grounds. In response to motions by the United States and by Southern University, the court rejected the assertion that, even with a special admissions quota, the merger would limit access to legal education in Louisiana to the disproportionate detriment of black applicants.³⁰⁰ It also rejected arguments about Southern University's historical mission in educating lawyers in the segregated south and the institutional loyalty of its alumni, when weighed against the efficiency of providing equal access to consolidated research, teaching and placement facilities.³⁰¹ Against the claim that the intended beneficiaries would end up paying the price for an administratively efficient remedy, the court reiterated the mandate created by the *Green-Norris-Geier* line of cases that a "court's power to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies."³⁰² The decision in *United States v. Louisiana* thus exposed the inherent difficulty, even where a court attempts to enforce the affirmative duty to end a dual system of public higher education, of unravelling the knot of segregation, economics, efficiency and sound educational policy in a way that will not make the intended beneficiaries the victims of the remedy.

Because racially identifiable schools are the most conspicuous vestiges of a state's prior de jure segregated system, it is not surprising that the remedies mandated by courts to desegregate public systems of higher education have had as their goal the correction or reduction of racial imbalance.³⁰³ When the lower courts have mandated measures, such as the refusal to allow expansion of facilities or the merger of

²⁹⁸ *Geier v. Alexander*, 801 F.2d 799, 801 (6th Cir. 1986).

²⁹⁹ See *id.* at 800-01.

³⁰⁰ *Louisiana II*, 718 F. Supp. at 533.

³⁰¹ *Id.* at 533-34.

³⁰² *Id.* at 534 (citing *Swann*, 402 U.S. at 15).

³⁰³ See Bunch, *supra* note 120, at 26.

institutions, which *reduce* educational choice as a means of *increasing* integration, they have invoked administrative efficiency and the need to adopt measures that will not strain already limited education budgets.³⁰⁴ Courts, such as the *United States v. Louisiana* court, have been reluctant to balance efficiency and economics against values such as educational quality or the importance of culturally diverse options.³⁰⁵ No majority decision in the context of the desegregation of higher education has cited the precedent of *Milliken II*. There, the Supreme Court established that the affirmative duty of *Green* to eliminate racial discrimination root and branch may be fulfilled by a variety of creative alternatives that enhance educational opportunity, rather than enforcing integrated options. Only Judge Higginbotham, in his dissent in *Ayers III*, bypassed the question of what precise remedies *Green* would require in higher education, to assert that the Equal Protection Clause of the Fourteenth Amendment established a substantive right, not to a "particular racial mix," but to an education where choice is truly free and opportunities are "truly equal."³⁰⁶ While his opinion offered no specific remedies, Judge Higginbotham anticipated one line of reasoning that the Supreme Court would take in *Fordice* by arguing that the correct goal ought to be to devise programs that would redress not only racial imbalance but the other debilitating present *effects* of a past de jure dual system.³⁰⁷

VI. JUDICIAL REMEDIES AND THE AYERS DECISION

A. Will *United States v. Fordice* Mark a New Direction?

The decision in *United States v. Fordice* sends an unmistakable signal to Mississippi and to sixteen other states that they must do more to eradicate the effects of their prior segregated systems of higher education than open the doors of all colleges and universities on a non-discriminatory basis. But Justice White's opinion emits conflicting messages about what that something "more" must be. As Justice Scalia observed in his dissent, the legal standard that the Court had enunciated amounted to "something-for-all, guidance-to-none," a granting of "virtually standardless discretion" to lower court judges in the devising of remedies.³⁰⁸

³⁰⁴ See, e.g., *Louisiana I*, 718 F. Supp. at 513.

³⁰⁵ See *Louisiana II*, 718 F. Supp. at 533-34.

³⁰⁶ *Ayers III*, 914 F.2d at 694 (Higginbotham, J., concurring in part and dissenting in part).

³⁰⁷ *Id.*

³⁰⁸ *Fordice*, 112 S. Ct. at 2753 (Scalia, J., dissenting).

Certainly, there is substantial flexibility in the standard that the Court has set. The lower courts are to identify policies and practices traceable to the prior system that continue to have segregative effects.³⁰⁹ But a state is required to eliminate such practices only if "such policies are without sound educational justification."³¹⁰ Nothing in the test requires the adoption of "radical" remedies to achieve racial balancing in a state's higher education system.³¹¹

But having devised a standard that seems to say to the lower courts that they may remedy the effects of prior de jure segregation in several ways, much of the rest of the opinion closes off alternatives. After decades of judicial debate about the applicability of *Green* in the context of higher education, the Court addresses *Green*'s "affirmative duty" only in a footnote.³¹² There, the opinion rejects as "inappropriate" in higher education the remedies associated with student reassignment and racial balancing that the Court had applied in *Green*.³¹³ At the other extreme, the Court refuses to make specific recommendations about increasing funding for Jackson State, Alcorn State and Mississippi Valley State for fear of making those institutions more attractive as "exclusively black enclaves by private choice," and thus countenancing a return to a "separate but equal regime."³¹⁴

Finally, the Court makes guarded recommendations to the federal district court as to its proper course on remand. The opinion does call for inquiry into ways of eradicating discriminatory effects in the areas of admissions, the institutional mission assignments and duplication of programs, as was the case in *Geier* and *United States v. Louisiana*. But the Court advances its most controversial recommendation in recognition of the fact that Mississippi "undertakes to fund more institutions of higher learning than are justified by the amount of financial resources available to the state."³¹⁵ While it does not state that the closure of one or more institutions would be constitutionally required, the Court observes that the elimination of racially identifiable choices would certainly be a way of decreasing one category of discriminatory effects.³¹⁶ Finally, although the *Fordice* Court has announced a new legal

³⁰⁹ *Id.* at 2737.

³¹⁰ *Id.*

³¹¹ *See id.* at 2744-45 (Thomas, J., concurring).

³¹² *See id.* at 2736 n.4.

³¹³ *Id.*

³¹⁴ *Fordice*, 112 S. Ct. at 2743.

³¹⁵ *Id.* at 2742 (quoting *Ayers I*, 674 F. Supp. 1523, 1563-64 (N.D. Miss. 1987)).

³¹⁶ *Id.*

standard, its most substantive recommendation to the district court on remand evinces a limited and conventional understanding of the means by which the rights of the Equal Protection Clause will be enforced in the area of higher education.

During the October 22, 1992 Status Conference, William F. Goodman, Jr., attorney for the Board of Trustees, attempted to create the impression that the closure remedy was one that the Supreme Court had forced upon an unwilling state.³¹⁷ Moreover, Goodman argued, the Supreme Court did not require the state to spend additional funds for the enhancement of programs at the historically black institutions.³¹⁸ Repeatedly, defense counsel accused plaintiffs of "running from the decision they obtained."³¹⁹ It is ironic that under color of a federal court order to dismantle its prior de jure segregated system, Mississippi will be able to fulfill two major priorities: it will have a justification for allocating an even larger proportion of scarce economic resources to the historically white institutions that have always received disproportionate funding; and, it will have a rationale for closing the book on a portion of its morally blighted history by erasing two of the three universities it created to promote the separation of the races. Meanwhile, the plaintiffs with their victory will witness, not so much the dismantling of a segregated system of public higher education, but the elimination of institutions that in 1993 continue to fulfill a bona fide educational need for Mississippi's under-served black students.³²⁰

B. *An Alternative Proposal to Desegregate Public Higher Education in Mississippi*

As public hearings on the fate of Mississippi's system of public higher education continue, Judge Biggers and the Board of Mississippi would do well to recall that the *Ayers* lawsuit was originally filed to secure for black students equal access to the full range of academic opportunities provided by a college education. "Sound educational justification," not economics and efficiency, should be the hallmark of the remedy that Judge Biggers finally orders. Nothing in the prior

³¹⁷ See Transcript of Proceedings Before Judge Neal B. Biggers, Jr., at 23 (Oct. 22, 1992), in 2 *AYERS DECISION*, *supra* note 21.

³¹⁸ *Id.* at 23-24. In fact, Justice White's opinion did not commit the Court to either the closure of institutions or increased funding as a constitutional matter, but suggested that *both* must be considered on remand. See *Fordice*, 112 S. Ct. at 2743.

³¹⁹ *Id.* at 24.

³²⁰ See Halpern, *supra* note 21, at B1.

education desegregation cases, or in the Supreme Court's ruling in *Fordice*, mandates racial balancing or the closure of institutions to compel integration. In considering genuine remedies, Judge Biggers might well be guided in the exercise of his equitable authority by two critical signposts. The first is the Supreme Court's decision in *Milliken v. Bradley* (*Milliken II*), which approved the creation of programs and the enhancement of educational opportunity as the means of fulfilling the equal protection goal of restoring "victims of discriminatory conduct to the position they would have occupied in the absence of such conduct."³²¹ The second is the federal policy mandate reflected in the congressional act "Strengthening Historically Black Colleges and Universities," which calls not only for the preservation of historically black institutions, but their enhancement through increased governmental funding.³²²

To that end, the judicial order that Judge Biggers hands down in Mississippi should mandate the elimination of unnecessarily duplicative programs *without* the closure of any of Mississippi's institutions of higher learning. Programs involving professional or technical training in areas such as agriculture and engineering should be distributed among the state's institutions. If there is to be only a single program in dairy science or electrical engineering, for example, it is essential that it be a quality program, whether it is provided at a historically black institution or a historically white school. The state will be required to repose some faith in the belief that integration will be enhanced when a student who wishes to pursue a specialized professional course of study is attracted by the quality of a program unaffected by the racial history of the institution that provides it.

The elimination particularly of duplicative professional and graduate programs will serve both efficiency and economic goals. But the State of Mississippi should acknowledge that education reform requires a shifting of financial priorities, not as a punishment for past segregation, but because excellence in education is a sound future investment. In the enhancement of educational programs for all students, Jackson State University ought to be the linchpin of any remedial action that Judge Biggers authorizes. Located in a metropolitan area of 300,000 people that is the center for the state's government, banking and business, Jackson State is more than ninety miles from the nearest other significant research facility. Clearly, were it not for

³²¹ *Milliken II*, 433 U.S. at 280.

³²² See 20 U.S.C. §§ 1060-3c.

the state's prior de jure segregated system, Jackson State would have achieved an equal status with Mississippi's other research institutions.³²³

A priority in any desegregation remedy in Mississippi should be the development of Jackson State University as a focal point for programs in public policy, administration, urban planning and communications that are vital to the populace in a state capital and that will not be offered at any other institution.

Finally, Judge Biggers should give consideration to the enhancement of educational programs that focus on and celebrate cultural diversity as a means of eliminating racial discrimination.³²⁴ The "unitary system" prescribed by the Supreme Court in *Green* need not be one in which race is eliminated as a vital human concern or as a subject of study. Rather, "unitary" may refer to an educational system that accords equal respect to all cultural perspectives by offering courses that give all students an understanding of the value of diversity in their society. One of the moral ambitions of *Brown v. Board of Education* was to eliminate the stigma and sense of inferiority attaching to race in segregated education. To achieve that end, Judge Biggers might mandate the allocation of funds to enhance programs that focus on the history, culture and arts of African-Americans. Curricular reform that gives black students a sense of empowerment, and pride in their own origins and achievements may be one of the most effective means of reaching the deeply buried roots and inaccessible branches of racial discrimination in Mississippi's segregated system.

CONCLUSION

*We must rally to the defense of our schools. We must repudiate this unbearable assumption of the right to kill institutions unless they conform to one narrow standard.*³²⁵

In *United States v. Fordice*, the Supreme Court has established that in the context of public higher education a state must provide a sound educational justification for any policies or procedures traceable to its prior system that continue to have segregative effects, or eliminate them. Although this is a powerful moral assertion, the decision leaves

³²³ See Proceedings Before Judge Neal B. Biggers, Jr., at 60 (Oct. 22, 1992), in 2 AYERS DECISION, *supra* note 21.

³²⁴ See, e.g., Sonia R. Jarvis, *Brown and the Afro-Centric Curriculum*, 101 YALE L.J. 1285 (1992).

³²⁵ *Fordice*, 112 S. Ct. at 2744 (Thomas, J., concurring) (quoting W.E.B. DuBots, *Schools*, in 13 THE CRISIS 111, 112 (1917)).

to the federal district courts the exercise of broad equitable authority to mandate appropriate remedies. In Mississippi, the federal district court has responded by giving its most serious consideration to a proposal to achieve a more integrated system by closing one historically black university and merging a second with a historically white institution. This proposal effectively seeks to achieve a mathematical balance of students by eliminating racially identifiable choices. In the process, however, this reduction of options may defeat the original goal of the *Ayers* lawsuit, to create greater access and enhanced educational opportunities for black students. Moreover, the closure of historically black institutions that continue to serve a vital function in the education of Mississippi's citizens will have the ironic consequence of forcing those citizens who have been most hurt by the segregated system to pay the price of the remedy.

Judge Biggers has the opportunity to consider other means of fulfilling the mandate of the *Fordice* decision and securing for black citizens of Mississippi their equal protection rights in the area of higher education. These include: the elimination of duplicative programs in a way that equitably distributes single programs among historically black and historically white institutions; the enhancement of funding for distinctive academic programs at Jackson State University, so that institution can fulfill its vital role in service to the state's governmental and business center; and the implementation of curricular reforms that recognize that a "unitary system" is one that gives equal value to the cultural experiences of all races and fosters diversity as a source of pride.

The Supreme Court's decision has already begun a chain reaction in Louisiana; in December, U.S. District Court Judge Charles Schwartz issued a court order mandating the consolidation of that state's seventeen public colleges and universities as a starting point for the process of desegregation.³²⁶ But as was the case with *Brown v. Board of Education*, the impact of the Supreme Court's ruling may become apparent only in the lengthy process in which the federal district courts seek appropriate remedies to eliminate racial discrimination in public higher education. The judicial order that Judge Biggers hands down will be anticipated, not only in Mississippi, but in sixteen other states that are in or border the South, all of which operated de jure segregated systems of higher education.³²⁷ For this reason, Judge Biggers

³²⁶ See Mark Mayfield & Tom Watson, *Cover Story: Quest for Fair Share Backfires*, U.S.A. TODAY, Jan. 28, 1993, at A1.

³²⁷ Mary Jordan, *In Mississippi, An Integration Uproar: Judge Weighs Plan That Would Mean*

would do well to go beyond the economically efficient negative step of closing schools and eliminating choice to compel racial balancing. He must invoke the full creative potential of his equitable powers to mandate a stronger role for Mississippi's historically black institutions, and the enhancement of programs that will increase the access to and the value of higher education for students of all races.

LORNE FIENBERG

Closure of 2 of 3 Black Colleges, WASH. POST, Nov. 17, 1992 (final edition), at A1. The states that could be affected by the *Fordice* decision and by Judge Biggers' court order are: Texas, Louisiana, Alabama, Georgia, Florida, South Carolina, North Carolina, Virginia, Delaware, Pennsylvania, Kentucky, Missouri, Oklahoma, Arkansas, Tennessee and West Virginia. See *Landmark Bias Ruling Expanded to Colleges*, ARIZ. REPUBLIC, June 27, 1992, at A5.