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Black, White, Brown, Green, and Fordice: The Flavor of Higher Education in Louisiana and Mississippi

ALFREDA A. SELLERS DIAMOND¹

I. Introduction

The question of race and its place in American life can appear in the most unpredictable and the most predictable places. We could not have predicted our encounter with the ire and laughter raised in the midst of the Martin Luther King Day 2006 comments of New Orleans Mayor Ray Nagin. Mayor Nagin spoke of the will of God in the creation and recreation of New Orleans as a “chocolate city,”² meaning a city populated mostly by African Americans, in the wake of the worst natural disaster in modern American history – Hurricane Katrina.³ Nor could we have predicted that national and

1. Revius O. Ortique Professor of Law, Southern University Law Center, LL.M. Columbia University; J.D., Paul M. Hebert Law Center, Louisiana State University. I would like to thank Professor Raymond T. Diamond for his helpful insights. I gratefully acknowledge the substantial research assistance of Tamesha Bendaw.

2. Jarvis DeBerry, *Mayor Steps in It, Totally Deep*, TIMES-PICAYUNE, Jan. 20, 2006, at 7; John Pope, *Evoking King, Nagin Calls N.O. “Chocolate” City: Speech Addresses Fear of Losing Black Culture*, TIMES-PICAYUNE, Jan. 17, 2006, at 1. The King Day Celebration on Monday, January 16, 2006, will long be remembered for Mayor Ray Nagin’s prediction that a fully restored New Orleans “will be chocolate at the end of the day.” The context of the chocolate he refers to originates from the funk group Parliament’s 1975 album entitled “Chocolate City.” George Clinton wrote the title track: “There’s a lot of chocolate cities around. We’ve got Newark, we’ve got Gary. Somebody told me we got L.A. And we’re working on Atlanta. But you’re the capital C.C.” PARLIAMENT, *Chocolate City*, on CHOCOLATE CITY (Casablanca Records 1975). The song is about Washington, D.C., which has a majority African-American population. However, Clinton’s lyrics suggest that the general existence of “chocolate cities” may be a deserved piece “of the rock” for African Americans because they are proxies for the promised “40 acres and a mule” that failed to materialize as post-Civil War reparations for slavery.

3. See Felicia R. Lee, *After the Flood, the Reckoning*, N.Y. TIMES, Aug. 3, 2006, at E1 (commenting on Spike Lee’s portrayal of the despair Hurricane Katrina left upon New Orleans); see also Gary Rivlin, *Patchy Recovery in New Orleans; Some People Return, but*

international news broadcasts would display the immediate post-Katrina pictures of the city of New Orleans, peppered with scenes of the horror of those who did not immediately escape the storm. While the storm devastated people from all stripes of life, the face of the tragedy indelibly etched in the minds of millions was indeed a Louisiana bittersweet chocolate picture.⁴ Those who left the city of New Orleans, those who were left behind, and those who died were largely African American and poor.⁵

With the massive exodus of thousands from the city of New Orleans, we could have predicted the rise of questions of race and its intersection with the social, political, economic and educational future of the city and state.⁶ The dominance of race as a variable in any discussion of Katrina is an irresistible force. The hurricane constructed a vivid mosaic of the "racial dimension of class" in America.⁷ Most whose homes were destroyed lived in residential communities still segregated by factors of race and class.⁸ Media outlets have shown thousands of images of New Orleans' Ninth Ward as the proxy for what it means to have been poor, African-American, and to have suffered the ultimate loss of home and family at the hands of the storm.⁹ The storm presented an opportunity to observe the salience of the topic of race in twenty-first century America. Most importantly, Katrina exposed the fact

Only One in 10 Businesses Has Reopened, N.Y. TIMES, Apr. 5, 2006, at C1 (discussing the difficulties small businesses face in Katrina's wake).

4. See, e.g., JOHN R. LOGAN, *THE IMPACT OF KATRINA: RACE AND CLASS IN STORM-DAMAGED NEIGHBORHOODS* 1-12 (2006), <http://www.s4.brown.edu/Katrina/report.pdf>.

5. See William P. Quigley, *Obstacle to Opportunity: Housing That Working And Poor People Can Afford in New Orleans Since Katrina*, 42 WAKE FOREST L. REV. 393 (Summer 2007) (stating that "tens of thousands of people who were left behind when Katrina hit, mostly poor renters, were first bussed out to shelters. From shelters, hundreds of thousands of people were moved into temporary housing in trailers, apartments, or hotels".); LOGAN, *supra* note 4.

6. See Michelle R. Smith, *Study: New Orleans Could Lose 80 Percent of Black Population*, BOSTON.COM, Jan. 26, 2006, <http://www.boston.com> (search for "New Orleans Could Lose 80 Percent of Black Population"; then follow "Results" hyperlink) (discussing Hurricane Katrina's disproportionate effect on African Americans).

7. John A. Powell, *The Race and Class Nexus: An Intersectional Perspective*, 25 LAW & INEQ. 355, 360 (Summer 2007) (stating that although the terms "race" and "class" comprise a continuing discourse in America, we do not fully understand the impact of class on the discussion); see William P. Quigley, *Thirteen Ways of Looking at Katrina: Human and Civil Rights Left Behind Again*, 81 TUL. L. REV. 955, 1000 (March 2007) (stating that Katrina provided a lens through which to view the already intertwined inequalities of race, gender, and poverty).

8. See Maya Wiley & John A. Powell, *Tearing Down Structural Racism and Rebuilding Communities*, CLEARINGHOUSE REV. J. OF POVERTY L. & POL'Y 68, 77 (May-June 2006).

9. See URBAN INST., *KATRINA: DEMOGRAPHICS OF A DISASTER* (2005), http://www.urban.org/UploadedPDF/900835_katrina_factsheet.pdf; see also Smith, *supra* note 6.

that whites and blacks continue to live in separate experiential spheres, despite the erasure of state requirements of segregation.

At the time of Hurricane Katrina, it had not been quite a year since the United States Supreme Court denied certiorari in *Ayers v. Thompson*, the Mississippi higher education desegregation case.¹⁰ Additionally, the Settlement Agreement in *United States v. Louisiana*,¹¹ the state's higher education desegregation lawsuit, expired in the wake of Katrina's wrath. The expiration of the Louisiana Settlement Agreement slipped by quietly and was lost in the vortex of the tornadic financial crisis that Katrina caused. The impact of the Settlement Agreement's expiration and the pending dismissal of *United States v. Louisiana* from federal court oversight raise questions respecting the future flavor of higher education in the state, but not so brazenly as Mayor Nagin's bizarre comments. Although the questions come *sub voce*, they are present and predictable. This Article seeks to raise and perhaps answer some of those predictable questions. Specifically, the end of the desegregation cases in Mississippi and Louisiana, like the picture drawn by Katrina, offer a window from which to view the continuing implications regarding race and its impact on remedying racial separation when the scars of *de jure* separation have not healed.

This Article lays the foundation for these questions by chronicling the post-*Brown v. Board of Education*¹² struggles of two states, Mississippi and Louisiana, to develop constitutionally mandated equal educational services in their respective higher education systems. The Article specifically compares the histories of the higher education desegregation lawsuits in the states of Mississippi and Louisiana as they traversed decades of litigation, and compares the experiences and progress of these states under their respective settlement agreements. The State of Mississippi is no longer under federal court oversight; at the time of this Article's publication, the State of Louisiana may have been released from federal court oversight as well. The populations of the many universities in both states are still largely identifiable as "chocolate" or "vanilla," still racially identifiable as African American or

10. 543 U.S. 951 (2004). At the Supreme Court level the case was entitled *United States v. Fordice*, 505 U.S. 717 (1992). The Mississippi higher education case had a long life through a succession of Governors, reflected in the changes of party name: Governors William Allain (1984-1988); Ray Mabus (1988-1992); Daniel Kirkwood (Kirk) Fordice (1992-2000); Ronnie Musgrove (2000-2004); Haley Barbour (2004-present). 2004-2008 Miss. Reg. 67.

11. 9 F.3d 1159 (5th Cir. 1993).

12. 347 U.S. 483, 495 (1954) (holding that the United States Constitution prohibits racial segregation in schools).

white.¹³ In 1992, the United States Supreme Court case of *United States v. Fordice* articulated the constitutional analysis to determine a higher education system's compliance with the Fourteenth Amendment. Therefore, this Article will consider and evaluate the implementation of *United States v. Fordice* in both states. In its evaluation of the implementation of *Fordice*, this Article assesses the value of the "integrative ideal" which sought to convert "chocolate schools" and "vanilla schools" to just schools.¹⁴

II. The Creation of the Perfect Constitutional Storm

A. Widespread *De Jure* Segregation in Education

The idea of a free and public school education was a new concept for the states of the nation during the first half of the nineteenth century.¹⁵ Prior to the enactment of the Fourteenth Amendment, it was largely expected that any education the states chose to provide African Americans would be in separate facilities.¹⁶ The immediate post-Civil War period witnessed the growth and availability of public schools, largely to the exclusion of African-American children.¹⁷ As a local matter, education was within the purview of state authority.¹⁸ However, the Fourteenth Amendment became a proxy for the threat of federal interference in all state

13. See *infra* Part VI.

14. See *Green v. County Sch. Bd. of New Kent*, 391 U.S. 430, 442 (1968) (paraphrasing Justice Brennan's instructions to New Kent County School Board to construct a desegregation plan that would "convert promptly to a system without a 'white' school and a 'Negro' school, but just schools").

15. See JAMES D. ANDERSON, *THE EDUCATION OF BLACKS IN THE SOUTH, 1860-1935*, at 2 (UNC Press 1988) (noting that not until the nineteenth century's end were "the organization, scope, and role of schooling . . . transformed into a carefully articulated structure of free tax-supported public institutions"); see also HARRY GEHMAN GOOD & JAMES D. TELLER, *A HISTORY OF AMERICAN EDUCATION* 132-35 (1973) (discussing a "new principle" of "free education for all in public, common schools"); LEON LITWACK, *Education: Separate and Unequal*, in *EDUCATION IN AMERICAN HISTORY, READINGS ON THE SOCIAL ISSUES* 253, 253-66 (Michael B. Katz ed., Praeger 1973) (highlighting the North's outraged reaction, and subsequent protesting, to the notion of equal opportunity for all students in early nineteenth century).

16. LEON F. LITWACK, *NORTH OF SLAVERY: THE NEGRO AND THE FREE STATES, 1790-1860*, at 113-14 (University of Chicago Press 1961) (noting the "possibility that Negro children would be mixed with white children in the same classroom aroused even greater fears and prejudices than those which consigned the Negro to an inferior place in the church, the theater, and the railroad car. This indeed constituted virtual amalgamation").

17. ANDERSON, *supra* note 15, at 2.

18. *Id.*

prerogatives which had previously supported regimes of separateness.¹⁹ In response to the threat, states attempted to assert their right to maintain the pre-Civil War status quo by enacting positive law on the topic.²⁰ Moreover, to those that were part of the Confederate movement for secession, the Fourteenth Amendment represented both the stick and the carrot. It was the carrot in that it represented an opportunity to rejoin the nation on equal footing. It was also the stick in that a state's congressional representation would only be recognized upon its ratification of the Fourteenth Amendment.²¹

And yet, the states' rich and systemized sets of Black Codes and Jim Crow laws were fortified by the United States Supreme Court's introduction of the new equality, which would dominate the twentieth century.²² With the Supreme Court's imprimatur of *separate* as the constitutional measure of *equality* in *Plessy v. Ferguson*,²³ a firm constitutional basis for the development and maintenance of inferior school services for African Americans was inevitable.²⁴ The schoolhouse became the site of more regimented

19. See, e.g., *Report of the Senate Committee on Federal Relations*, 1866 TEX. S.J. 422-23 (expressing opposition to the Thirteenth, Fourteenth and Fifteenth amendments and characterizing the amendments as "unnecessary and dangerous to the future peace of the Republic; . . . [altering] the form and fashion of our Government; . . . [centralizing] all power in the Federal Congress, making the States mere appendages to a vast oligarchy, at the National Capitol; . . . [involving] the loss of our honor as a people, and our self-respect as individual men").

20. See WILLIAM COHEN, *AT FREEDOM'S EDGE: BLACK MOBILITY AND THE SOUTHERN WHITE QUEST FOR RACIAL CONTROL 1861-1915*, at 216-17 (1991) (discussing laws passed by various states, including Mississippi, South Carolina, Alabama, Louisiana, and Florida, regarding miscegenation, school segregation, transportation, and public accommodations).

21. 14 Stat. 428 (1867); 15 Stat. 2 (1867); 15 Stat. 14 (1867); 15 Stat. 25 ("Reconstruction Acts" of 1867 which declared state constitutions of former secessionist states to be in violation of United States Constitution, separated them into districts governed under military authority and martial law, required them to conduct new constitutional conventions which protected rights of African Americans to vote, and required rebel states to ratify Fourteenth Amendment in order to be readmitted to Union).

22. See C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* 22-29 (Oxford University Press 1974).

23. 163 U.S. 537, 548 (1896).

24. Although *Plessy* does not use the term explicitly, the case is often cited as announcing the "separate but equal" doctrine. Under the *Plessy* court's construction of the Fourteenth Amendment, states could require blacks and whites to attend separate universities as long as the educational services were "substantially equal." The "substantially equal" part of *Plessy* separation was never actualized. *Plessy*-age historically black colleges and universities suffered from a host of problems related to chronic disparities in funding. For example, Hemann Marion Sweatt was denied admission to the University of Texas Law School under a state law that required racial separation in schools. The Supreme Court found that the separate school for African Americans was not substantially equal to the University of Texas School of Law and

laws governing the separation of the races.²⁵ Over one third of states share this common history of *de jure* segregation in elementary, secondary, and higher education.²⁶ Both Louisiana²⁷ and Mississippi²⁸ had laws establishing segregation in education.

The constitutional doctrine of separate but equal was not reversed until the 1954 Supreme Court decision in *Brown v. Board of Education (Brown I)*.²⁹ However, despite the Fourteenth Amendment's command of equality, years of Jim Crow governance of public schools created a perfect constitutional storm whose effects would not readily be reversed. Today, fifty-three years after *Brown*, the Office of Civil Rights for the United States Department of Education is still involved in the oversight of desegregation efforts in Florida, Kentucky, Maryland, Pennsylvania, Texas, Ohio, and Virginia.³⁰ Additionally, the court-ordered higher education decrees of three states have recently expired. The Alabama Settlement Agreement expired on July 31, 2005.³¹ The Louisiana Settlement Agreement expired on December 31, 2005.³² Tennessee's Consent Decree expired on January 4, 2006.³³ Also, on March 29, 2001, Mississippi entered a settlement of its long-running desegregation

Sweatt was ordered admitted. *Sweatt v. Painter*, 339 U.S. 629, 634-636 (1950). Similarly, G. W. McLaurin was admitted to the University of Oklahoma for graduate school under a newly revised law allowing the admission of African Americans to historically white schools when there were no separate historically black schools. Upon his admission, McLaurin was required to sit in a separate classroom, use a separate desk in the library; and eat at a separate time in the cafeteria. The Supreme Court found these practices violated the Equal Protection Clause. *McLaurin v. Oklahoma*, 339 U.S. 637, 640-642 (1950).

25. WOODWARD, *supra* note 22, at 24 (describing public schools as the "most conspicuous" aspect of segregation).

26. *Id.* at 10.

27. See LA. CONST. of 1898, art. 248; LA. CONST. of 1879, arts. 224, 231; LA. CONST. of 1868, art. 135; LA. CONST. of 1852, art. 136.

28. See MISS. CONST. of 1890, art. VIII; 1880 Miss. Laws 776.

29. 347 U.S. 483, 495 (1954). *Brown* involved the consolidation of four desegregation cases from Kansas, South Carolina, Delaware and Virginia. The United States Supreme Court determined that if states chose to provide elementary and secondary public school education to their citizens, the states were required to do so equally without regard to race. The court declared the provision of educational services in a racially segregated environment "inherently unequal." *Id.*

30. See *infra* notes 57-59 and accompanying text.

31. *United States v. Alabama*, 900 F. Supp. 272, 374 (N.D. Ala. 1995).

32. Tenth Annual Evaluation of the Desegregation Settlement Agreement, Implementation of the Settlement Agreement at i, *United States v. State of Louisiana*, No. 80-3300A (Oct. 2005) [hereinafter Tenth Annual Evaluation].

33. See *Geier v. Sundquist*, 128 F.Supp 2d 519, 547 (M.D.Tenn. 2001) (stating that the court "shall retain jurisdiction of this case for a period of five years or for a period of time sufficient to insure compliance with the Agreement's terms").

lawsuit.³⁴ It is disheartening that more than one hundred years after *Plessy v. Ferguson*, at the beginning of the twenty-first century, the country continued to witness four states in ongoing federal court desegregation litigation and seven others in desegregation partnership agreements, struggling with the seemingly intractable problem of race and equality of educational opportunity.³⁵

B. Delay and Deliberation: Resistance to Desegregation Creates Decades of Constitutional Turmoil

Brown v. Board of Education carried the promise and opportunity to improve the status of the historically black college. Although the Court held that separate educational systems based on race were unconstitutional respecting segregated elementary and secondary schools, the case was immediately thought to apply in the higher education context.³⁶ States interpreted the *Brown v. Board of Education II* Court's time-line for desegregation of "all deliberate speed,"³⁷ as permitting delay, thus setting in motion fifty-plus years of constitutional struggle in converting dual educational systems into unitary ones.

After it was clear that state laws could no longer require exclusion of African Americans from white institutions of higher learning, some states employed clever but surreptitious methods to block the admission of black students into previously segregated universities. For example, Louisiana statutory law required Arnease Ludley to obtain a certificate of good character from her high school

34. Settlement Agreement, *Ayers v. Musgrove*, No. 4:75CV9-B-D (N. D. Miss. Mar. 29, 2001) [hereinafter *Mississippi Settlement Agreement*].

35. See *infra* notes 57-59 and accompanying text.

36. *State of Florida ex rel. Virgil D. Hawkins* came before the Court on May 24, 1954, exactly one week after the *Brown* decision. 347 U. S. 971 (1954). Hawkins was denied admission to the University of Florida School of Law. The Court remanded the case to the Florida Supreme Court for consideration in light of the *Brown I* decision. Upon remand, the Florida Supreme Court allowed the university an unspecified amount of time to consider and implement the changes necessary to accommodate an African-American student. *State ex rel. Virgil D. Hawkins v. Bd. of Control*, 83 So. 2d 20, 25 (Fla. 1955) (noting *Brown II*'s imprecise time line for the implementation of desegregation respecting Hawkins' case (citing *Brown v. Board of Education*, 349 U.S. 294 (1955))). Subsequently, the Court vacated this order and entered a new order relying on *Sweatt v. Painter*, 339 U.S. 629; *Sipuel v. Bd. of Regents of Univ. of Okla.*, 332 U.S. 631 (1947); and *McLaurin v. Okla. State Regents for Higher Educ.*, 339 U.S. 637 (1950). *Fla. ex rel. Hawkins v. Bd. Of Control of Fla.*, 350 U.S. 413 (1956). Hawkins was "entitled to prompt admission under the rules and regulations applicable to other qualified candidates." *Id.* at 414.

37. 349 U.S. 294, 301 (1955).

principal for admission to Louisiana State University.³⁸ However, Ludley was unable to obtain the certificate because the same statute required the principal's dismissal for "performing any act toward bringing about integration of the races" in schools.³⁹ Autherine Lucy and Polly Ann Myers were summoned to the office of the Dean of Admissions at the University of Alabama where their applications for admission were personally returned to them.⁴⁰ They were told that the course work that interested them could be found at Alabama State College, the state's historically black institution.⁴¹ Myra Dinsmore's application for admission to the Georgia State College of Business Administration was returned for being incomplete because she did not attach the required certificates of good character furnished by alumni of the institution.⁴²

James Meredith's application to the University of Mississippi was also judged defective because he did not furnish recommendations from alumni attesting to the fitness of his moral character.⁴³ Additionally, the Registrar of the University of Mississippi alleged that he denied the application because he was concerned that Meredith was not seeking admission to the University in good faith, and that Meredith's fear that his application might be denied because of his race "shocked, surprised and disappointed" the Registrar.⁴⁴ The Registrar also claimed that Meredith's request for admission was so "rash" and "unjustified" that it raised grave questions as to Meredith's "ability to conduct himself as a normal person" and "as a harmonious student on the campus of the University of Mississippi."⁴⁵ The Fifth Circuit's determination that Meredith was excluded "solely because he was a Negro," and the court's grant of Meredith's request for injunctive relief, signaled that *Brown I* could not be countermanded by "Fabian polic[ies] of worrying the enemy into defeat while time worked for

38. *Ludley v. Bd. of Supervisors of L.S.U.*, 150 F. Supp. 900, 902 (E.D. La. 1957).

39. *Id.* at 902-03. The court noted that Louisiana's statutes were unconstitutional because they were intended to discriminate and circumvent the Fourteenth Amendment's Equal Protection Clause. *Id.*

40. *Lucy v. Adams*, 134 F. Supp. 235, 237 (N.D. Ala. 1955).

41. *Id.* at 239. The federal court enjoined the Dean of Admissions from denying Lucy, Myers and all others similarly situated, from enrolling in the University of Alabama based on race. *Id.*

42. *Hunt v. Arnold*, 172 F. Supp. 847, 854 (N.D. Ga. 1959). Because all alumni of the institution prior to the plaintiffs' applications were white, the certificates would not have been forthcoming. As only white alumni could provide certification, the federal court held that the certificate requirement violated the Fourteenth Amendment. *Id.* at 857.

43. *Meredith v. Fair*, 305 F.2d 343, 348 (5th Cir. 1962).

44. *Id.* at 350.

45. *Id.*

the defenders.”⁴⁶ The ebb of the first wave of post-*Brown I* higher education equal opportunity cases was now ushering in the second wave: the higher education desegregation lawsuits.

The higher education desegregation lawsuits have been fought on two federal fronts. On one front, plaintiffs sought to compel the Department of Health, Education, and Welfare (“HEW”) to enforce the requirements of Title VI of the Civil Rights Act of 1964. On another front, private plaintiffs and the United States Department of Justice filed suits seeking to dismantle prior systems of segregated higher education. The case of *Adams v. Richardson* followed the HEW’s informal attempts to work with state governments to desegregate their prior *de jure* systems of higher education.⁴⁷ In January of 1969, the HEW found that ten states were operating dual systems of education based on race.⁴⁸ Subsequently, HEW informed Louisiana, Mississippi, Oklahoma, North Carolina, Florida, Arkansas, Pennsylvania, Georgia, Maryland, and Virginia that their dual systems of education rendered them in violation of Title VI, placing them in danger of losing vital federal funds.⁴⁹ Each state was invited to submit a desegregation plan within 120 days. Arkansas, Pennsylvania, Georgia, Maryland, and Virginia submitted plans that HEW determined to be inadequate for dismantling the *de jure* systems of segregation in the states. Florida, North Carolina, Mississippi, Louisiana, and Oklahoma never submitted plans.⁵⁰

HEW did not aggressively seek enforcement of Title VI after

46. *Id.* at 361. Amidst 400 United States deputy marshals and 1,000 federal troops, James Meredith finally enrolled at University of Mississippi on October 1, 1962. See Al Kuettner, *Ole Miss Enrolls Meredith After Riots Kill 2, Injure 75*, UNITED PRESS INTERNATIONAL, Oct. 1, 1962. Judge John Minor Wisdom wrote the opinion in *Meredith v. Fair*. His characterization of Mississippi’s delay tactics referenced the military strategy of the Roman General, Fabius. General Fabius was known for “ke[eping] his army always near Hannibal’s but never attack[ing], harassing Hannibal continually, but never joining battle.” THE NEW COLUMBIA ENCYCLOPEDIA 916 (William H. Harris & Judith S. Levey, eds., Columbia U. Press 1975).

47. *Adams v. Richardson*, 351 F. Supp. 636 (D. D.C. 1972). Title VI of the Civil Rights Act of 1964 provides: “No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” 42 U.S.C. § 2000d. Each agency has been given the power by Congress to make rules to accomplish the statutory goal of non-discrimination. Each agency is also given the power to seek compliance with Title VI by refusing to advance further federal funding after notice and an opportunity to be heard. See generally *id.* This statute seeks to foster voluntary compliance ahead of coercive action. Pursuant to the statute, Congress must be notified prior to the time an agency seeks to withhold funding. *Id.* at § 2000d-5.

48. *Adams*, 351 F. Supp. at 637-38.

49. *Id.* at 638.

50. *Id.*

making its determinations of non-compliance.⁵¹ In response to HEW's lack of diligence in enforcing the requirements of Title VI, Kenneth Adams and other named plaintiffs filed suit against the Secretary of Health, Education, and Welfare and the Director of the Office of Civil Rights, seeking injunctive and declaratory relief to mandate the agency to perform its statutory duty.⁵² The district court granted the relief the plaintiffs sought. Judge John Pratt found that once a recipient of federal educational funds was found in violation of Title VI's non-discrimination requirements and had failed to voluntarily correct non-compliance, the Office of Civil Rights had no discretion to allow a recipient to continue receiving further federal funding.⁵³ Additionally, Judge Pratt determined that HEW was statutorily bound to enforce the requirements of Title VI.⁵⁴

The *Adams* litigation ultimately ended in 1990 with the determination by the Court of Appeals for the District of Columbia that Title VI did not provide a private right of action for HEW's failure to enforce its statutory provisions.⁵⁵ Judge Ruth Bader Ginsburg determined that "the generalized action [that] plaintiffs [sought to] pursue against federal executive agencies lack[ed] the requisite green light from the legislative branch."⁵⁶ Although the *Adams* litigation ended unsatisfactorily, Title VI enforcement by the Department of Education continued into the 1990s and the twenty-first century. After the United States Supreme Court decided *Fordice*, the Office of Civil Rights gave notice that it would conduct a *Fordice* compliance review of the states whose desegregation plans

51. *Id.*

52. *Id.* at 637.

53. *Id.* at 641-42. See also *Adams v. Richardson*, 356 F. Supp. 92, 94 (D. D.C. 1973) ("Having once determined that a state system of higher education is in violation of Title VI, and having failed during a substantial period of time to achieve voluntary compliance, [HEW] has a duty to commence enforcement proceedings."). The court ordered enforcement proceedings to begin against Louisiana, Mississippi, Oklahoma, North Carolina, Florida, Arkansas, Pennsylvania, Georgia, Maryland and Virginia within 120 days. *Id.*

54. *Adams*, 351 F. Supp. at 640 ("HEW and all other federal agencies empowered to grant federal assistance to any program or activity are directed by § 2000d-1 of Title VI to effectuate the provisions of § 2000d.").

55. See *Women's Equity Action League v. Cavazos*, 906 F.2d 742, 747 (D.C. Cir. 1990) (concluding plaintiffs lacked claim against Department of Health, Education, and Welfare because they had alternative remedies for their injuries).

56. *Id.* at 752. The Court determined that nothing in Council of the Blind of Del. Cty. *Valley v. Regan*, 709 F. 2d 1521, 1530, 1531 n.69, (D.C. Cir. 1982), *Adams v. Bell*, 711 F.2d 161 (D.C. Cir. 1983) (en banc), cert. denied, 465 U. S. 1021 (1984), or *Adams v. Bell*, 711 F.2d 161 (D.C. Cir. 1983) evinced that Congress intended to create an implied right of action to pursue a Title VI claim against a federal executive agency. *Women's Equity Action League*, 906 F.2d at 747.

had expired.⁵⁷ As a result of the review, the Office of Civil Rights entered cooperative desegregation partnership agreements with Florida, Texas, Kentucky, Ohio, Pennsylvania, Maryland, and Virginia, resulting in *Fordice* compliant desegregation plans.⁵⁸ As of fiscal year 2005, the Office of Civil Rights was still monitoring the desegregation efforts of these states.⁵⁹

On the second federal lawsuit front, the United States Department of Justice filed suit in Alabama, Mississippi, and Louisiana seeking to dismantle the prior *de jure* systems of higher education, and private plaintiffs also brought lawsuits seeking to secure better funding for historically black colleges and universities.⁶⁰ Because of their aegis in *Plessy*, many of these

57. See U.S. DEP'T OF EDUC., OFFICE OF CIVIL RIGHTS, *Notice of Application of Supreme Court Decision*, Jan. 28, 1994, available at <http://www.ed.gov> (search "Notice of Application of Supreme Court decision"; then follow hyperlink).

58. U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, *Annual Report to Congress, Higher Education Desegregation, FY 2000*; U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, *Annual Report to Congress, Higher Education Agreements, FY 2001-2004*, available at <http://www.ed.gov> (search "annual reports to congress"; then follow "OCR's Annual Reports to Congress" hyperlink; then select year); Maryland Higher Education Commission, OCR Agreement, *Maryland's Report and The Partnership Agreement Between The State of Maryland and the U.S. Department of Education, Office for Civil Rights*, available at <http://www.mhec.state.md.us/higherEd/ocrplan>. See also, Letter of Kevin M. O'Keefe, Chairman, Maryland Higher Education Commission to Wendella P. Fox, Director, Philadelphia Office of Civil Rights, United States Department of Education detailing full compliance with Desegregation Partnership Agreement (June 19, 2006); but see also Coalition for Equity and Excellence In Maryland Higher Education vs. Robert Ehrlich, Jr., No. 24-C-06-008137OG, (Cir. Ct. for Baltimore City Md. filed Oct. 13, 2006) (alleging that the state of Maryland is currently maintaining a dual system of higher education in contravention of *Fordice*). The case was removed to the federal court on October 23, 2006, and an order was signed on January 20, 2007, administratively closing the case. Notice of Removal, Coalition for Equity and Excellence in Md. v. Robert L. Ehrlich, Jr., No. MJG-0602773, (U.S. D.C. Dist. Md. Oct. 23, 2006); Order Staying and Administratively Closing Case, Coalition for Equity and Excellence in Md. v. Robert L. Ehrlich, Jr. No. MJG-0602773, (U.S. D.C. Dist. Md. Oct. 23, 2006).

59. U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, *Annual Report to Congress, Higher Education Agreements, FY 2005*, available at <http://www.ed.gov> (search "annual reports to congress"; then follow "OCR's Annual Reports to Congress" hyperlink; then select "2005").

60. See *United States v. Alabama*, 14 F.3d 1534 (11th Cir. 1994), remanded to 900 F. Supp. 272 (N.D. Ala. 1995). The United States brought an action against the Alabama higher education system and private plaintiffs intervened. *Id.* See *Ayers v. Allain*, 914 F.2d 676 (5th Cir. 1990); *Sanders v. Ellington*, 288 F. Supp. 937, 939 (M.D. Tenn. 1968); *supra* Part IV.B.; see also *United States v. Louisiana*, 527 F. Supp. 509 (E.D. La. 1981); *supra* Part IV A. *Sanders v. Ellington* was brought in 1968 in the United States District Court for the Middle District of Tennessee in order to prevent the University of Tennessee from building a new facility for expansion of its educational program. 288 F.Supp. at 939. The United States Department of Health, Education and Welfare intervened seeking an order to command the state defendants to submit a plan for desegregating its system of higher education. *Id.*

historically black colleges and universities have always had problems securing resource parity with other public institutions within the same state. To these schools, the *Brown I* mandate of equal educational opportunity irrespective of race represented the guarantee of a remedy that would correct years of disparate funding, thereby elevating their status and improving their ability to achieve the goal of equality. Historically black colleges and universities were poised for a change after *Brown I*, but part of that change was unexpected. The institutions that served them well in the world of *Plessy* might actually cease to exist under the same *Brown I* mandate of equal educational opportunity.⁶¹ A most salient question after the *Adams* litigation, as well as after the higher education lawsuits in Alabama, Mississippi, Louisiana, and Tennessee,⁶² is how and under what circumstances historically black colleges could continue to exist. Each case is representative of the difficulty the federal court has had in fashioning a principled standard by which the *Brown* mandate could be measured and enforced in the higher education context.

The desegregation sagas in Louisiana and Mississippi are two of the longest running and most recently settled higher education desegregation cases. More importantly, they are representative of the problem with the *Brown II* remedy of dismantlement with "all deliberate speed."⁶³ The *Brown II* remedy became a proxy for delay and entrenchment, resulting in the accentuation of problems created by *Plessy* educational regimes. The higher education litigation in Louisiana and Mississippi demonstrate the rocky path each system traversed while their respective federal district courts struggled to establish a principled standard for constitutional compliance. In each of these cases the federal court had to decide whether race-neutral admissions practices were sufficient or whether the United States Constitution required more affirmative actions to satisfy the *Brown I* mandate of equal educational opportunity.

61. See *infra* Part IV.E.

62. See *infra* notes 144-47.

63. *Brown v. Board of Education II*, 349 U. S. 294, 300-01 (1955).

III. Development of the Two Cases

A. The Mississippi Case: *Ayers v. Allain*

The state of Mississippi is home to eight public four-year colleges. Alcorn State University, Jackson State University, and Mississippi Valley State University are the state's historically black colleges.⁶⁴ The remaining four-year institutions, University of Mississippi, Mississippi State University, Mississippi University for Women, University of Southern Mississippi, and Delta State University, are historically white universities.⁶⁵ Prior to *Brown I*, the state of Mississippi required segregation in higher education pursuant to state constitutional and statutory law.⁶⁶ Those holding the political reins in the state did not welcome *Brown I*.⁶⁷ The Court's decision in *Brown I* came during the same year as the Mississippi higher education system's Brewton Report, a self-examination of the status of higher education in the state.⁶⁸ The report revealed disparities in facilities, deficits in funding, and weaknesses in programmatic offerings at the historically black

64. *Ayers v. Allain*, 674 F. Supp. 1523, 1527-29 (N.D. Miss. 1987). Alcorn State University was originally established in 1871 as a trade-school-like-college for African-American males. It is located in Alcorn, Mississippi. *Id.* Mississippi Valley State University was established in 1946 by Act of the Mississippi state legislature as a vocational school for African American students. *Id.* It is located in Itta Bena, Mississippi. *Id.* Jackson State University was established in 1946 to train African-American teachers. It is located in Jackson, Mississippi. *Id.*

65. *Id.* All of the State of Mississippi's historically white four-year universities were mandated under law to be *Plessy* institutions. *Id.* The University of Mississippi was established in 1844 and opened in 1854. *Id.* Mississippi State University was established in 1878, opened in 1880 and is located near Starkville, Mississippi. *Id.* at 1527. The Mississippi University for Women was established to educate white women in 1884 and it is located in Columbus, Mississippi. *Id.* The University of Southern Mississippi was established in 1910, opened in 1912 and is located in Hattiesburg, Mississippi. *Id.* at 1527-28. Delta State University was established in 1924, opened in 1924 and is located in Cleveland, Mississippi. *Id.* at 1528.

66. See MISS. CONST.; 1880 Miss. Laws, *supra* note 28.

67. See John N. Popham, *Reaction of South: 'Breathing Spell' for Adjustment Tempers Region's Feelings*, N.Y. TIMES, May 17, 1954, at 1 (highlighting that Governor Hugh Lawson White reportedly urged a "go slow" approach and stating he said that "he would move for an early meeting of the Mississippi Legal Education Advisory Committee [to study] methods to maintain school segregation if the [Supreme Court] outlawed it."); William S. White, *Ruling to Figure in '54 Campaign: Decision Tied to Eisenhower-Russell Leads Southerners in Criticism of Court*, N.Y. TIMES, May 17, 1954 at 1 (quoting Senator James O. Eastland of Mississippi as saying: "The South will not abide by nor obey this legislative decision by a political court.").

68. See Brief of Petitioners at 14, *Ayers v. Mabus*, No. 90-65-6588 (5th Cir. 1991) (citing *Brewton, Higher Education in Mississippi* (1954)) (describing equal educational opportunity goal as being "still very distant").

institutions.⁶⁹ Despite this knowledge, the State of Mississippi continued to engage in practices intended to thwart the entry of African-Americans into its historically white universities.⁷⁰

While the Title VI litigation instituted by HEW against Mississippi and other states was pending in the federal courts, Jake Ayers and other black citizens of the state of Mississippi filed suit in the United States District Court for the Northern District of Mississippi alleging that the state of Mississippi was maintaining a dual system of higher education based on race.⁷¹ The suit was filed on January 28, 1975, naming as defendants Governor William A. Allain, the Board of Trustees of State Institutions of Higher Learning, the State Department of Education, and the State Superintendent of Education. The United States intervened on April 21, 1975, alleging Fourteenth Amendment Equal Protection and Title VI violations. The United States claimed that state continued to operate a dual system of higher education based on race after the Supreme Court's decision in *Brown I*, in that the state's historically black colleges and universities were subjected to disparate funding and maintenance.⁷² The defendants denied all Fourteenth Amendment violations. The position of the defendants throughout the litigation was that the existence of essentially one-race institutions in the system of higher education was the result of the free choice of individual students as opposed to any actions of the state which perpetuated segregated institutions and that *Brown I* required no further action by the State.⁷³

69. See Brief for The Alcorn State University National Alumni Association, as Amicus Curiae Supporting Petitioners, *Ayers v. Mabus* 505 U.S. 717 (1992) (No. 90-1205). In support of their argument that the state of Mississippi was responsible for current segregative effects, the alumni of Alcorn University cited to the historical funding practices of the state of Mississippi. *Id.* at 12. Expenditures for Alcorn from 1934-1943 were reported to have averaged \$94,000 per funding year, whereas it was \$273,000 for Mississippi State University per funding year according to the Brewton Report. *Id.* For funding year 1947-1952, \$433,000 was appropriated for Alcorn whereas 1.9 million was appropriated for Mississippi State University according to the Brewton Report. *Id.* The Alcorn State University Alumni Association cited the Brewton Report which stated: "Educational opportunities for blacks were limited to undergraduate training in teacher education, agriculture, mechanical arts, and the practical arts and trades while white students enjoyed extensive offerings at the undergraduate, graduate and professional levels." *Ayers v. Allain*, 674 F. Supp. 1523, 1528 n.2 (N.D. Miss. 1987).

70. See *supra* Part II.B.

71. *Ayers*, 674 F. Supp. at 1525.

72. *Id.* Plaintiffs claimed that both African-American faculty and students were denied equal educational opportunities because of the disparities in the institutional missions of the historically black colleges, the quality and quantity of academic offerings, the quality of the academic personnel, the lack of land grant funding available to the historically black colleges, and fiscal and facilities disparities. *Id.*

73. *Id.* at 1525-26. The state of Mississippi relied heavily on the argument that "good

The case went to trial before Judge Neal Brooks Biggers, Jr. in April of 1987.⁷⁴ After a trial that lasted five weeks, Judge Biggers made findings of fact and conclusions of law as to admissions and student enrollment,⁷⁵ student recruitment,⁷⁶ faculty recruitment,⁷⁷ institutional missions and academic programs,⁷⁸ funding to the universities,⁷⁹ and facilities.⁸⁰ After articulating the standard that the state had an affirmative duty to disestablish its dual system of higher education, Judge Biggers concluded that the state of Mississippi had met that duty.⁸¹ According to Judge Biggers's

faith non-discriminatory and non-racial admissions" implemented on a state-wide basis indicated that the state had fulfilled any responsibilities it had respecting the provision of equal educational opportunity. *Id.* The state maintained that its higher education system was unitary and "untainted by discriminatory actions or purposes." *Id.*

74. *Id.* at 1523. Judge Neal Brooks Biggers, Jr. was appointed to the federal district court for the Northern District of Mississippi in 1984 by President Ronald Reagan and he presided over all trial phases of *Ayers* through its settlement in 2001. Federal Judicial Center, Judges of the United States Courts, <http://www.fjc.gov/history/home.nsf>.

75. *Ayers*, 674 F. Supp. at 1530-31, 1536-39, 1556 (determining that although the ACT was not adopted as a criterion for entry in any university or college in the state until after James Meredith sought admission to the University of Mississippi, the system's current policies and practices were "reasonable, educationally sound, and racially neutral").

76. *Id.* at 1558 (finding that student recruitment practices suggested that the system was dedicated to encouraging "minority participation in the system").

77. *Id.* at 1537 (finding that there was a substantial presence of other-race faculty members at the historically black colleges and universities but not at the historically white colleges and universities). Judge Biggers attributed the lack of African-American professors at the historically white universities to a shortage in the pool of qualified individuals, as well as to the difficulties presented in retaining them. *Id.* He found that the state of Mississippi met its constitutional duty to dismantle the prior *de jure* system responsible for the current disparity in the presence of other-race faculty by adopting race-neutral procedures for hiring. *Id.* at 1564.

78. *Id.* at 1538, 1561. The court evaluated whether the current mission assignments of the historically white and the historically black colleges were tied to their prior *de jure* status and whether that history unconstitutionally tainted their current status. The historically white universities designated as "comprehensive" institutions were earmarked for funding at a higher level under state law and the court found no intent to discriminate. *Id.* at 1561. Judge Biggers also rejected the argument unnecessary program duplication placed the historically black colleges and universities at a disadvantage in attracting a white student population, stating that there was no evidence that the elimination of program duplication would have any effect on a student's choice. *Id.*

79. *Id.* at 1546-48 (concluding that differential funding was not intentionally discriminatory, but was instead connected to institution's mission within system of higher education).

80. *Id.* at 1548, 1561-62 (finding that although facilities at historically black universities at one time had been disparately impacted by inequities in state funding, improvements demonstrated by state between 1970 and 1986 suggested "good faith affirmative effort on the part of the defendants to provide adequate facilities at the historically black institutions in accordance with their defined mission").

81. *Id.* at 1564.

findings, students were recruited and admitted to each of the state's universities on a race-neutral basis, and faculty, staff, and fiscal allocations were made on a race-neutral basis.⁸² Having established that the higher education system was administered on a race-neutral basis, Judge Biggers found no constitutional violations and the case was dismissed.⁸³

On appeal, the Fifth Circuit Court of Appeals determined that the state of Mississippi had not met its burden to dismantle its dual system of education. In an opinion written by Judge Irving L. Goldberg,⁸⁴ the court agreed that Judge Biggers had correctly selected *Green v. County School Board of New Kent County, Virginia*⁸⁵ as the measure for determining whether the state met its burden for dismantling the prior *de jure* segregation in education.⁸⁶ However, Judge Goldberg found that Judge Biggers' reading and application of *Green* was incorrect.⁸⁷ While Judge Biggers correctly recognized that *Green* placed an "affirmative duty" on the states to dismantle segregated systems of higher education, he failed to value the "root and branch" element of *Green* which required the state to eliminate all vestiges of *de jure* segregation.⁸⁸ Instead, Judge Biggers' interpretation of *Green* required only that the State of Mississippi implement "good faith race neutral policies and procedures" in order to meet its constitutional responsibility.⁸⁹

Judge Bigger's application of *Green* was based on the analysis of *Green* in *Alabama State Teachers Association (ASTA) v. Alabama Public School and College Authority* and *Bazemore v. Friday*.⁹⁰ The Court of

82. *Id.*

83. *Id.*

84. Judge Irving Loeb Goldberg was appointed to the Fifth Circuit in 1966 by President Lyndon B. Johnson. He served on the Fifth Circuit until his death in 1995. Federal Judicial Center, Judges of the United States Courts, <http://www.fjc.gov/history/home.nsf>.

85. *Green v. County Sch. Bd. of New Kent County, Va.*, 391 U.S. 430 (1968).

86. *Ayers v. Allain*, 893 F.2d 732, 743 (5th Cir. 1990).

87. *Id.* at 743-44.

88. *Id.* at 750. The Fifth Circuit carefully explained how and why the rule of *Green* had to be understood and interpreted in the context of the *Brown I* mandate of equal educational opportunity and the *Brown II* remedy of desegregation: "Under *Green* the creation of a unitary school system is the goal, a goal tantamount to the elimination of the effects of *de jure* discrimination, root and branch. If a less demanding standard were adopted, images of inferiority would be memorialized with the force of law, contrary to the vision of *Brown*, because vestiges of discrimination would remain unaddressed. *Brown* commands the application of *Green* in all of its fertility to the public university forum." *Id.*

89. *Id.*

90. *Ayers v. Allain*, 674 F. Supp. 1523, 1552 (1987) *rev'd*, 893 F.2d 732. In *ASTA* the plaintiffs challenged the decision of the State of Alabama to open a four-year branch campus of Auburn University in the physical proximity of Alabama State University, a

Appeals, however, held that the district court's application of *Green* was erroneous and in turn adopted the interpretation of *Green* from the Sixth Circuit's decision in *Geier v. Alexander*.⁹¹ Accordingly, the Fifth Circuit evaluated the various admissions policies of the state universities,⁹² the composition of the university faculties,⁹³ the missions and academic programs of the institutions,⁹⁴ and funding,⁹⁵ and determined that the defendants had not met their duty under *Green*. The state's use of race-neutral policies was not enough to transform its dual systems of higher education into a unitary system of higher education.⁹⁶ On remand, the district court was instructed to take its guidance from the Fifth Circuit's interpretation of *Green* hoping that "any sortie on remand will not be long or bitterly fought."⁹⁷

A speedy resolution of the *Ayers* case was not to be. An en banc vote of the Fifth Circuit⁹⁸ resulted in a rehearing of the case and a

historically black university. 289 F. Supp. 784, 785-86 (M.D. Ala. 1968). They argued that the creation of the new branch of Auburn University would have perpetuated a dual system of education by reducing the ability of the historically black college to compete for students in the same geographic area. *Id.* The district court concluded that "as long as the State and a particular institution are dealing with admissions, faculty and staff in good faith, the basic requirement of the affirmative duty to dismantle the dual school system on the college level, to the extent that the system may be based upon racial considerations, is satisfied." *Ayers*, 674 F. Supp. at 1552 (citing *ASTA*, 289 F. Supp. 784, 789 (M.D. Ala. 1968)). In *Bazemore*, the United States Supreme Court reviewed an attack on two North Carolina high school clubs which were segregated under law, but which were presently composed of students admitted on a race-neutral basis. 478 U.S. 385, 388-91 (1986). The clubs were still largely identifiable by race. *Id.* at 391. The United States Supreme Court determined that the *Green* duty to desegregate all vestiges of prior *de jure* segregation in a compulsory education system was inapplicable to clubs where memberships were voluntary. *Id.* at 409 (White, J., concurring).

91. *Ayers*, 893 F.2d at 744 (citing 801 F.2d 799 (6th Cir. 1986)).

92. *Ayers*, 893 F.2d at 735-36 (discussing admission policies from 1976-1986 and effect of minimum ACT score as requirement for admissions).

93. *Id.* at 736-38 (discussing relative composition of faculties, by observing percentages of races in level of education of professors, salaries, and number of administrators at each university).

94. *Id.* at 738-39 (highlighting universities' institutional missions and academics).

95. *Id.* at 741-42 (outlining funding of universities and calculating differences in average total education and general income per student and average total education and general expenditures per student among universities).

96. *Id.* at 753. The Fifth Circuit concluded: "Vestiges of *de jure* segregation permeate the public university system of Mississippi. Admissions policies, the racial composition of the faculty and administration, funding practices, academic offerings, and mission designations all perpetuate a stigma of inferiority. Contrary to the mandates of *Brown* and *Green*, a unitary system has not been achieved." *Id.*

97. *Id.* at 756.

98. The coalition of judges writing for the majority and those writing for the minority broke down across solidly partisan lines characterized by the Presidents who appointed them. Judge John Duhe (1988-Reagan), who previously dissented in the

subsequent affirmation of Judge Biggers' previous decision.⁹⁹ En banc, the Fifth Circuit court agreed with the district court's original reading of *Green* and determined that the state of Mississippi had indeed satisfied its constitutional obligation under *Brown I* and *Green* by "discontinuing prior discriminatory practices and adopting and implementing good-faith, race-neutral policies and procedures."¹⁰⁰ It was September 28, 1990, and the Mississippi case was poised for the United States Supreme Court to grant it certiorari.

opinion of the three judge court, wrote for a majority which determined that the *Green* standard as interpreted by *ASTA* was correct. He was joined by Judges Thomas Gee (1973-Nixon), Will Garwood (1981-Reagan), E. Grady Jolly (1982-Reagan), W. Eugene Davis (1983-Reagan), Edith Jones (1985-Reagan), Jerry E. Smith (1987-Reagan), Jacques Wiener (1990-G.H.W. Bush) and Rhesa Barksdale (1990-G.H.W. Bush). Federal Judicial Center, Judges of the United States Courts, <http://www.fjc.gov/history/home.nsf>. Writing for the minority was Judge Goldberg. He reiterated his support of the affirmative duty standard to dismantle the desegregated system announced in the prior three-judge court decision. He was joined by Judges Henry Politz (1979-Carter), Carolyn Dineen King (1979-Carter), Samuel D. Johnson (1979-Carter). Judge Patrick Higginbotham (1982-Reagan) concurred in part and dissented in part. Federal Judicial Center, Judges of the United States Courts, <http://www.fjc.gov/history/home.nsf>.

99. *Ayers v. Allain*, 914 F. 2d 676, 677 (5th Cir. 1990).

100. *Id.* at 687. The Fifth Circuit sitting en banc disagreed with the panel's adoption of the *Geier* standard. *Id.* at 686. Rather, it held that the appropriate standard for determining whether the state of Mississippi met its duty to dismantle its formerly segregated system of education was the *ASTA/Bazemore* standard. *Id.* According to the Fifth Circuit, application of the *Green* standard as interpreted in *Geier* in the higher education context would frustrate the goal of disestablishment of desegregation in colleges and universities because of the different nature of the function of choice in the decision to attend a university. *Id.* at 686-87. Additionally, the court determined that the application of the *Green* standard as interpreted in *Geier* would frustrate the goal of diversity that is sought in higher education. *Id.* Judge Higginbotham, however, observed that the Fifth Circuit failed to properly articulate the various issues present in the case:

I reject *Green's* application to university education because I do not believe the Fourteenth Amendment supports a substantive right to a particular racial mix, certainly in the absence of mandatory and state controlled attendance. I am persuaded that in this context the command of the Fourteenth Amendment translates to fair process and here find some common ground with the majority. When a system of higher education presents every person with a truly equal and free choice among schools, that system will be constitutional. Well and good, but the long years of separatism have worn long deep traces so deep that declarations of freedom of choice draped over them are not so easily translated to real choice. The force of this reality led to the much debated constitutional rule in *Green*, fourteen years after *Brown v. Board II*, and although I maintain that its restatement of *Brown* is not applicable to higher education, it yet informs the present question whether Mississippi is discharging its duty.

Id. at 964 (Higginbotham, J., concurring in part and dissenting in part).

B. The Louisiana Case: *United States v. Louisiana*

The state of Louisiana is home to eleven public four-year colleges and universities.¹⁰¹ Southern University¹⁰² and Grambling University¹⁰³ are the state's historically black universities. The remaining institutions: Louisiana State University,¹⁰⁴ University of New Orleans,¹⁰⁵ Louisiana Tech University,¹⁰⁶ McNeese State University,¹⁰⁷ Nicholls State University,¹⁰⁸ Northwestern State

101. See Final Annual Evaluation of the Desegregation Settlement Agreement, Implementation of the Settlement Agreement at 1-2, *United States v. State of Louisiana*, No. 80-3300A (February 2006) [hereinafter Final Annual Evaluation]. The Louisiana State Board of Regents coordinates the organization and functioning of the higher education system. Under its supervision, the four-year institutions are part of three different "systems" within the higher education structure. *Id.* Grambling, Louisiana Tech, McNeese, Nicholls, Northwestern, Southeastern, University of Louisiana at Lafayette, and Monroe Universities comprise the University of Louisiana System. *Id.*

102. Southern University in Baton Rouge, New Orleans was created pursuant to Act 87 of the Louisiana General Assembly of 1880 for the education of "colored" people. Southern University, History of Southern University, <http://www.subr.edu/historysubr.html>. Southern University A & M, Southern University, New Orleans, Southern University, Shreveport/Bossier, Southern University Law Center and Southern University Agricultural Research Center comprise the Southern University System. See Final Annual Evaluation, *supra* note 101, at 1-2.

103. Grambling State University, located in Grambling, Louisiana, first opened as an industrial school for children in 1900. Grambling State University, History, <http://www.gram.edu/about/history.asp>. Act Number 33 of July 4, 1946 renamed the four-year college Grambling College. *Id.*

104. All of Louisiana's historically white universities were mandated under law to be Plessy institutions. See LA. CONST., *supra* note 27. Louisiana State University ("LSU") received land grants from the United States government in 1806, 1811, and 1827 and opened in 1860 as an institution of learning for white seminarians. Louisiana State University, History of LSU, http://www.lsu.edu/about_ht.htm. LSU Agricultural Center, LSU Alexandria, LSU A & M, LSU Eunice, LSU Law Center, LSU Health Sciences Center-New Orleans, LSU Health Sciences Center-Shreveport, LSU Shreveport and University of New Orleans comprise the LSU System. See Final Annual Evaluation, *supra* note 101, at 1-2.

105. The University of New Orleans was established originally as a New Orleans campus of Louisiana State University pursuant to 1894 La. Acts 68, §§ 2432-38. University of New Orleans, UNO History, <http://www.uno.edu/history.cfm>. In 1974 it was renamed as the University of New Orleans. *Id.*

106. Louisiana Tech University first opened in 1894 as Louisiana Polytechnic Institute in Ruston, Louisiana as an "industrial institute and college for the education of the white children of the State of Louisiana in the arts and sciences." 1894 La. Act 68, §§ 1-7, *cited in* STATE'S LAWS ON RACE AND COLOR: STUDIES IN THE LEGAL HISTORY OF THE SOUTH 179 (Pauli Murray ed., 1951).

107. McNeese University was originally a two-year campus of Louisiana State University located in Lake Charles, Louisiana, which opened in 1939. McNeese State University, History of McNeese, <http://www.mcneese.edu/parents/history.asp>.

108. Nicholls State University opened as a junior college division of Louisiana State University in 1948 pursuant to 1884 La. Acts 51. Nicholls State University, About

University,¹⁰⁹ Southeastern State University,¹¹⁰ the University of Louisiana, Lafayette,¹¹¹ and University of Louisiana, Monroe¹¹² are historically white universities. Prior to the United States Supreme Court decision in *Brown I*, the state of Louisiana required separation in higher education pursuant to its state constitutional and statutory law.¹¹³ Post-*Brown I*, and before the higher education desegregation litigation, the state engaged in practices designed to prevent African Americans from entering its historically white colleges and universities, thus setting the stage for what was to be over fifty years of effort, many of them not well spent, in the quest to achieve, and sometimes to avoid, *Brown I* equality of opportunity in higher education.¹¹⁴

The higher education desegregation litigation in Louisiana has been long, arduous, and protracted. Louisiana was one of ten states targeted for enforcement of Title VI of the Civil Rights Act of 1964 by the Department of Health Education and Welfare. The original lawsuit was filed in 1974 in the United States District Court for the Eastern District of Louisiana. The lawsuit targeted both Title VI and Fourteenth Amendment Equal Protection violations resulting from the state's maintenance of a dual system of education.¹¹⁵ The defendants in the lawsuit were the Governor David Treen, the Louisiana State Board of Education, the Louisiana State Board of

Nicholls, History and Purpose, <http://www.nicholls.edu/about/history.html>. *Id.* It became a four-year institution in 1956. *Id.*

109. Northwestern State University opened in 1884 as the Louisiana State Normal School and had as its primary mission the training of public school teachers. It was open to white males and females. Northwestern State University, Profile, <http://www.uls.state.la.us> (follow "UL System" hyperlink; then follow "Universities" hyperlink; then follow "Northwestern State University" hyperlink).

110. Southeastern State University, opened in 1928 for the purpose of the "higher education in the arts and sciences of white children of the State." 1928 La. Acts 136.

111. The University of Louisiana, Lafayette opened in 1900 as the Southwestern Louisiana Industrial Institute. University of Louisiana at Lafayette, University History: General, <http://www.ull.edu/AboutUs/History/General.shtml>.

112. The University of Louisiana Monroe, formerly, Northeast Louisiana State University, opened as a junior college in 1931 and began offering a four-year degree in 1950. University of Louisiana Monroe, University Relations Historical Sketch, <http://www.ulm.edu/universityrelations/sketch.html>.

113. See LA. CONST., *supra* note 27.

114. See *supra* Part II.B.

115. *United States v. Louisiana*, 527 F. Supp. 509, 512-13 (E.D. La. 1981). In its complaint, the United States alleged that it tried to seek voluntary compliance from the State without success. *Id.* The Fourteenth Amendment suit was waived by the United States after a standing challenge was raised in the case. *United States v. Louisiana*, 9 F.3d 1159, 1162 (5th Cir. 1993). However, since the standard for prevailing on a Title VI case is the same as that for prevailing in a Fourteenth Amendment case, the Title VI challenge was allowed to proceed. *Id.* (citing *United States v. Louisiana*, 692 F. Supp. 642 (E.D. La. 1988) and *United States v. Fordice*, 505 U.S. 717 (1992)).

Regents, the Board of Supervisors for Louisiana State University, and the Board of Supervisors for Southern University. Six years passed before the first pretrial conference was set in the case.¹¹⁶

Subsequent to an eight-day pre-trial conference in 1980, the parties entered settlement negotiations resulting in a proposed consent decree, which was ultimately accepted by the court on September 8, 1981.¹¹⁷ In an opinion written by Judge Charles Schwartz,¹¹⁸ a three-judge court found that the Consent Decree met the requisites for federal court approval.¹¹⁹ Crucial to the court's approval were the parties' promises to direct their efforts towards the recruitment and admission of other-race students to the previously historically white and historically black institutions, the reduction of attrition of African-American students at historically white institutions, the reduction of program duplication created by the dual system, the preservation and enhancement of historically black colleges and universities, and increasing the presence of other-race members in institutional staffing, faculties and supervisory boards.¹²⁰

Pursuant to the Consent Decree terms, on December 29, 1987, the United States requested a hearing to measure the state's compliance with the 1981 agreement.¹²¹ Upon cross motions for summary judgment by the parties, the United States Court for the Eastern District of Louisiana determined that the State was liable for violations of Title VI because it had not met its responsibilities under the agreement: the State still maintained a dual system of higher education.¹²² Judge Schwartz's opinion was critical of the parties' primary focus on the remedial phase of the lawsuit, which he found to have resulted from a misunderstanding of the standard

116. See *United States v. Louisiana*, 527 F. Supp. at 513. Although the Court's involvement remained relatively limited between 1974 and 1980, during this period the parties were engaged in discovery, the disposition of several overlapping cases and with certain issues of intervention.

117. See *id.* at 515.

118. President Gerald Ford appointed Judge Charles Schwartz to the Eastern District of Louisiana federal bench in 1976. Federal Judicial Center, Judges of the United States Courts, <http://www.fjc.gov/public/home.nsf/hisj>.

119. *United States v. Louisiana*, 527 F. Supp. at 515. "In summary the Court finds that the consent decree which it approved . . . embodies a reasonable and specific system-wide desegregation plan which promises realistically to work." *Id.*

120. *Id.*

121. *United States v. Louisiana*, 692 F. Supp. 642, 647 (E.D. La. 1988).

122. *Id.* at 653-57. (stating that while the mere existence of schools of predominantly one race or another is not a violation of the Fourteenth Amendment without a showing that this condition resulted from intentionally segregative actions on the part of the state, Louisiana's freedom of choice policy, allowing students to choose which college to attend, was insufficient to demonstrate that the state was not operating a racially based dual college education system).

by which the state's liability for constitutional violations was to be measured.¹²³

The United States and the state of Louisiana argued that the appropriate measure of the state's duty was that set by the United States Supreme Court in *Bazemore*.¹²⁴ Specifically, the United States argued that the *Bazemore* standard would only require the higher education system to adopt race-neutral practices in all facets of its operations in order to meet the *Brown I* requirement of equal educational opportunity.¹²⁵ Judge Schwartz's opinion entered the fray of this hotly debated constitutional question, as had the Sixth Circuit in *Geier v. University of Tennessee*,¹²⁶ as would the federal court for the Northern District of Alabama court in *Knight v. Alabama*,¹²⁷ and ultimately, as would the United States Supreme Court in *United States v. Fordice*.¹²⁸ Similar to the Mississippi case, *Ayers v. Allain*, Judge Schwartz determined that the standard established by *Green* was the appropriate standard for *Brown I* compliance.¹²⁹ Use of the standard announced in *Green* would require higher education systems to "eliminate all of the 'vestiges' or effects of *de jure* segregation, root and branch."¹³⁰ This meant that the state of Louisiana had to "eliminate from [its higher education system] all vestiges of state-imposed segregation."¹³¹ Accordingly,

123. *Id.* at 654.

124. *Id.*

125. *Id.* See STEPHAN C. HALPERN, ON THE LIMITS OF THE LAW: THE IRONIC LEGACY OF TITLE VI OF THE 1964 CIVIL RIGHTS ACT 191 (The Johns Hopkins University Press 1995). Halpern describes how by the time the Louisiana case was on its way to the Fifth Circuit the policy of the Civil Rights Division of the Reagan Justice Department was infused with "color blind" rhetoric. Affirmative action policies were commonly attacked as "reverse discrimination" and some within the administration criticized the Office of Civil Rights as "overly intrusive in the affairs of state and local governments." *Id.* This characterization of the Office of Civil Rights in 1988 is wholly consistent with the United States' support of using the *Bazemore* standard of constitutional compliance.

126. 597 F.2d 1056 (6th Cir. 1979).

127. 787 F. Supp. 1030 (N.D. Ala. 1991).

128. 505 U.S. 717 (1992).

129. *United States v. Louisiana*, 692 F. Supp. at 656.

130. *Green v. County Sch. Bd. of New Kent*, 391 U.S. at 438.

131. *United States v. Louisiana*, 692 F. Supp. at 653 (citing *Milliken v. Bradley*, 433 U.S. 267, 289-90 (1977)). Judge Schwartz stated:

The rationale in *Green* for finding that racially neutral admissions policies may at times be insufficient to satisfy the constitutional mandate to achieve unity [sic] systems of public education carries the same force in the higher education context as it does in the primary and secondary education context; all deliberate speed to achieve non-racially identifiable colleges is a must, just as it is for primary and secondary schools. When open admissions alone fail to disestablish a segregated school system, be it primary/secondary school system or a college system, then something more is required Had the Supreme Court held in *Green* or elsewhere that the remedies beyond open admissions

the state's higher education system could not merely adopt race-neutral criteria in matters concerning admissions, recruitment, programming, and staffing. The system was required to take "affirmative" measures toward dismantling the effects of the prior *de jure* system of segregation.¹³² Judge Schwartz criticized the state's performance under the 1981 Consent Decree for "merely enhancing the State's black schools as black schools rather than towards converting its white colleges and black colleges to just colleges."¹³³ The district court did not decide on a remedy at this juncture, but it strongly suggested that an appropriate remedy would target program duplication, the implementation of a junior college system, the abandonment of open admissions policies, and the elimination of multiple university governing boards.¹³⁴

Because the court had already determined the state's liability, the case was scheduled for trial to begin on September 22, 1988, on the limited issue of remedy.¹³⁵ However, the matter lingered on the docket for the Eastern District for the remainder of 1988 and for a significant portion of 1989. To assist in the resolution of the litigation, the court appointed a Special Master during the interim. The Special Master's report was ultimately adopted by the district court as its own order on the issue of remedy.¹³⁶ The report required consolidation of the multi-board university system into a single board system.¹³⁷ The single governing board was tasked with the job of implementing the court's order regarding the abandonment of open admissions policies, the creation of a tiered system of universities wherein they were classified according to mission status, the development of a comprehensive community college system, and the thorough review of all programmatic offerings to remedy the problem of unnecessary program duplication created by proximate universities.¹³⁸ The two most

policies were limited to policies of mandatory student assignments to particular schools or programs, then this Court would be more inclined to follow the approach in *Ayers*. Such, however, is not the case. This distinction between primary/secondary education and higher education simply means that the appropriate remedy may well differ in the two contexts.

Id. at 656.

132. *Id.* at 653.

133. *Id.* at 658 (quoting *Norris v. State Council of Higher Ed. for Va.*, 327 F. Supp. 1368, 1373 (E.D. Va. 1971)).

134. *See id.* at 658.

135. *See id.* at 644.

136. *See United States v. Louisiana*, 718 F. Supp. 499, 515-21 (E.D. La. 1989).

137. *See id.* at 515.

138. *Id.* at 516-19. "Geographic proximate institutions" are created by the state when historically black and historically white institutions are established within close geographic proximity of each other. *See United States v. Louisiana*, 9 F. 3d 1159, 1165

controversial pieces of the Special Master's report, which required a single educational governing board, and the merger of Southern University Law Center into LSU Paul M. Hebert Law Center, destined the case for a return visit to the Fifth Circuit.¹³⁹

While the Louisiana case was pending on appeal, the Fifth Circuit decided the Mississippi case, determining that *Brown I* compliance required only that a state abandon its *de jure* system of segregation and replace it with race neutral practices.¹⁴⁰ Based on this opinion, the district court's remedial order was vacated and summary judgment was granted for the state defendants.¹⁴¹ By October 30, 1990, the Fifth Circuit's *Bazemore* standard had been applied in both the Mississippi and Louisiana cases.

C. Starting Over With a Standard to Measure Unitary Status: Applying *United States v. Fordice* in Mississippi and Louisiana

The United States Supreme Court granted certiorari in *Ayers v. Mabus* on April 15, 1991, (the Mississippi case)¹⁴² while the higher education suits in Louisiana,¹⁴³ Tennessee,¹⁴⁴ and Alabama¹⁴⁵ were still in the federal district and circuit courts. In an opinion delivered by Justice White and joined by Chief Justice Rehnquist, Justices

(5th Cir. 1993).

139. *United States v. Louisiana*, 718 F. Supp. at 519; see Part IV.E.

140. *Ayers v. Allain*, 914 F. 2d 676, 687 (5th Cir. 1990) (holding that "to fulfill its affirmative duty to disestablish its prior system of *de jure* segregation in higher education, the state of Mississippi satisfies its constitutional obligation by discontinuing prior discriminatory practices and adopting and implementing good-faith, race neutral policies and procedures").

141. *United States v. Louisiana*, 751 F. Supp. 606, 608 (E.D. La. 1990) (stating the Court "finds that *Ayers* is both binding and controlling").

142. 499 U. S. 958 (1991). See *Ayers*, *supra* note 10 for an explanation of the change in party names.

143. See *supra* Part III.B.

144. See *Geier v. University of Tennessee*, 597 F. 2d 1056 (6th Cir. 1979), *cert denied*, 444 U. S. 886 (1979). In 1979, well in advance of the Fifth Circuit, the Sixth Circuit concluded that the "Green requirement of an affirmative duty applies to public higher education as well as to education at the elementary and secondary school levels." *Id.* at 1065.

145. See *United States v. Alabama*, 787 F. Supp. 1030 (N.D. Ala. 1991). On December 30, 1991, the United States District Court for the Northern District of Alabama determined that the duty of the State of Alabama was to "eliminate vestiges of discrimination root and branch to the extent practicable." *Id.* at 1357. Citing the standard from *Board of Education v. Dowell*, 498 U.S. 237 (1991), the court announced that the elimination of the vestiges of discrimination, root and branch, could be accomplished in the state of Alabama without "harm[ing] the unique characteristics of higher education in Alabama." *Id.*

Blackmun, Stevens, O'Connor,¹⁴⁶ Kennedy, Souter, and Thomas,¹⁴⁷ the Supreme Court settled a disagreement among the circuits as to the constitutional measure of a higher education system's compliance with the Fourteenth Amendment when segregative effects and racial identifiability remain after *de jure* segregation has been eliminated. The Court held that in some contexts courts should not judge the compliance of a state's system of higher education with the Fourteenth Amendment by the mere fact that students have freedom to choose their schools.¹⁴⁸ Justice White applied the standard of "affirmative action" from *Green* and placed the burden of proof on the state to demonstrate that it had dismantled its prior dual system of racial segregation.¹⁴⁹ The Court determined that if the

state perpetuate[d] policies and practices traceable to its prior system that continue[d] to have segregative effects whether by influencing student enrollment decision or by fostering segregation in other facets of the university system and such policies [were] without sound educational justification and [could] be practicably eliminated, the State had not satisfied its burden of proving that it has dismantled its prior system.¹⁵⁰

The Court identified four practices in the Mississippi system to be evaluated upon remand to the district court. It instructed the district court to review the system's admission standards,¹⁵¹

146. Justice O'Connor wrote a concurring opinion in which she sought to establish that "it is Mississippi's burden to prove that it has undone its prior segregation, and that the circumstances in which a State may maintain a policy or practice traceable to *de jure* segregation that has segregative effects are narrow." *United States v. Fordice*, 505 U.S. 717, 743-44 (1992) (O'Connor, J. concurring), *cert. granted* as *Ayers v. Mabus*, 499 U.S. 958 (1991). See *Ayers*, *supra* note 10 for an explanation of the change in party names.

147. Justice Thomas wrote a concurring opinion in which he emphasized the value of the historically black college or university:

[W]e do not foreclose the possibility that there exists 'sound educational justification' for maintaining historically black colleges as such. Despite the shameful history of state-enforced segregation, these institutions have survived and flourished. Indeed, they have expanded as opportunities for blacks to enter historically white institutions have expanded. Between 1954 and 1980, for example, enrollment at historically black colleges increased from 70,000 to 200,000 students while degrees awarded increased from 13,000 to 32,000.

Id. at 745 (Thomas, J., concurring).

148. *Id.* at 730-32.

149. *Id.* at 743 (placing the burden on the state to take affirmative action to eliminate all vestiges of past *de jure* segregation and directing district court to consider its remedial measures in light of the standards set by the Court).

150. *Id.* at 731.

151. *Id.* at 733-38. The Court found the differential admissions requirements between universities with dissimilar programmatic missions to be inadequately justified. It

program duplication,¹⁵² institutional mission assignments,¹⁵³ and continued operation of all eight public universities.¹⁵⁴ The district court was tasked with determining whether the practices contributed to the racial identifiability of the institutions, whether they were educationally unsound, and if so, whether they could practicably be eliminated.¹⁵⁵

1. *The Mississippi Case Post-Fordice*

Judge Biggers had presided over this case for more than seven years by the time it was remanded. The current status of the state's higher education admissions standards, programmatic offerings, institutional mission assignments, and the number of public universities suggested to Judge Biggers that vestiges of the prior segregated system of higher education remained.¹⁵⁶ After a two-month trial on the merits, Judge Biggers' remedial decree permanently enjoined the state from "maintaining remnants and vestiges of the prior *de jure* system" and he set up a Monitoring Committee to oversee the implementation of the terms of the court's judgment.¹⁵⁷ The remedial decree created specific requirements of the system of higher education with respect to new admissions standards for first-time freshmen to be implemented in 1995-1996 and it redefined the institutional missions of some universities.¹⁵⁸ It is important to note that his remedial decree did not require the merger or closure of any institutions.¹⁵⁹

viewed these as "remnants of the dual system with a continuing discriminatory effect." *Id.* at 736.

152. *Id.* at 738-39. Unnecessary program duplication occurs when "two or more institutions offer the same nonessential or non-core program." *Id.* at 738.

153. *Id.* at 739-41. A university's institutional mission assignment is its academic purpose, "what an institution sees itself to be in a broad philosophical sense, including its major goals [and] the way it sees its major responsibilities." *Id.* The Court found that the institutional mission assignments adopted in 1981 had as precursors, the policies previously enacted to further racial segregation. *Id.* at 740.

154. *Id.* at 741-42. The Court directed the lower courts to consider "whether retention of all eight universities itself affects student choice and perpetuates the segregated higher education system, whether maintenance of each of the universities is educationally justifiable, and whether one or more of them can be practicably closed or merged." *Id.* at 742.

155. *Id.* at 743.

156. *Ayers v. Fordice*, 879 F. Supp. 1419, 1493-94 (N.D. Miss. 1995). Judge Biggers found that although all four aspects of educational system were vestiges of prior discrimination, not that all continued to have segregative effects.

157. *Id.* at 1494.

158. *Id.* at 1494-96.

159. *See id.* at 1493-96. In a subsequent ruling, Judge Biggers rejected the private

Since Judge Biggers' initial post-*Fordice* ruling in 1995, the Fifth Circuit has made only one significant ruling in the case.¹⁶⁰ The Fifth Circuit heard the plaintiffs' appeal challenging portions of the decree regarding the adoption of uniform admissions standards,¹⁶¹ admissions designations of universities within the system,¹⁶² program duplication issues which might result in the merger of historically black and historically white colleges,¹⁶³ the state's funding formula for universities,¹⁶⁴ facilities disparities between

plaintiffs' objection to the expansion of programmatic offerings at a branch of the University of Southern Mississippi, but enjoined the Board of Trustees' institution of differential admissions standards at this campus. *Ayers v. Fordice*, 40 F. Supp. 2d 382, 387-88 (N.D. Miss. 1999). While the court did not agree with the plaintiffs' argument that adding a lower division to the curriculum of the University of Southern Mississippi-Gulf Coast would impede the implementation of the desegregation decree, it determined that a race-based admissions standard allowing the entering class at the new University of Southern Mississippi branch to reflect the area population would be incompatible with the goal of eliminating the vestiges of *de jure* segregation under the *Fordice* standard. *Id.* See also *infra* Part IV.E.

160. *Ayers v. Fordice*, 111 F.3d 1183 (5th Cir. 1997) (affirming most of district court's findings of fact and remedial decree).

161. *Ayers*, 879 F. Supp. at 1434. Judge Biggers concluded that the 1987 admissions standards that required higher ACT scores for the historically white colleges and lower scores for historically black colleges were facially neutral, but had continuing discriminatory and segregative effects. The "channeling effect" of different ACT requirements combined with numerous racially identifiable institutions with duplicative course offerings in close geographic proximity to each other compounded the problem. *Id.* Judge Biggers ordered the adoption of uniform admissions standards, which would become effective during the 1995-1996 academic year. *Id.* at 1494. Additionally, Judge Biggers determined that the practice of using an ACT cutoff score as the basis for the award of alumni scholarships at the historically white colleges did not contribute to the racial identifiability of the colleges. *Id.* at 1434.

162. *Id.* at 1494-95. Judge Biggers' remedial decree required a site-evaluation study of existing programs at Jackson State University, designated programmatic enhancements for Jackson State University and Alcorn State University, development of practices to increase racial diversity at Jackson State University, increased fiscal funding for Jackson State University, creation of an Endowment Trust whose income would support other-race recruitment and other-race scholarships for Jackson State and Alcorn State University students. *Id.*

163. *Id.* at 1494. Judge Biggers found continued and pervasive program duplication in the Mississippi system, but determined that program duplication did not necessarily have present segregative effects. *Id.* After ordering a study of the program duplication between Jackson State University, a historically black college and other colleges in the system, as well as between Delta State University and Mississippi Valley State University (located within a few miles of each other), Judge Biggers declined to order a merger of Delta State University and Mississippi State University. *Id.*

164. *Id.* at 1453. The trial court found no constitutional defect in the system's current funding policies and practices, stating "[a]ttainment of funding 'equity' between the HBIs and HWIs is impractical and educationally unsound. It can neither be attained within our lifetime, nor... does it realistically promise to guarantee further desegregation." *Id.*

historically black and historically white colleges,¹⁶⁵ hiring and salary disparities between historically black and historically white colleges,¹⁶⁶ land grant assignment disparities,¹⁶⁷ and the racial composition of higher education governing boards.¹⁶⁸ The Fifth Circuit affirmed the trial court's implementation of the uniform admissions standards within the system, determined that the trial court was in error when it declared that the use of minimum ACT scores for the award of scholarships at historically white universities was not traceable to the prior *de jure* system of segregation, and remanded on four other issues respecting the implementation of the remedial decree.¹⁶⁹

2. *The Louisiana Case Post-Fordice*

Seven months after the Court's decision in *Fordice*, Judge Schwartz reinstated the August 2, 1988, remedial order in *United States v. Louisiana*, granting summary judgment to the plaintiffs.¹⁷⁰

165. *See id.* at 1457-58. The trial court found no vestiges of past *de jure* segregation in facilities at historically black and historically white colleges because both faced similar maintenance and repair problems. *Id.*

166. *Id.* at 1462. The trial court recognized the existence of racial identifiability at the faculty and administrative levels of the historically white colleges, but did conclude that the racial identifiability was not wholly traceable to the prior *de jure* system of segregation. *Id.* Judge Biggers seemed to revert to a neutral practices analysis that allowed for his recognition of the "sincere and serious efforts to increase the percentages of African American faculty and administrators at these institutions." *Id.* Judge Biggers commented that all universities in the country are similarly situated because of the small size of the qualified pool of African Americans in the professoriate. *Id.*

167. *Id.* at 1464-66. The trial court found that Alcorn State University, a land grant institution, experienced limited progress as a research institution and suffered because of the prior *de jure* system of segregation. *Id.* Nevertheless, the court found that an attempt to apportion academic and research facilities between Mississippi State University and Alcorn State University would be educationally unsound. *Id.*

168. *Id.* at 1473. The trial court found no evidence of practices which "den[ied] or dilut[ed] the representation of black citizens on the governing board," nor was there evidence of any "arbitrar[y] limit on the activities of the administrators of HBLs in a way that impede[d] their ability to protect the rights of their students." *Id.*

169. *Ayers v. Fordice*, 111 F. 3d 1183, 1195, 1228 (5th Cir. 1997). The Fifth Circuit approved of the uniform admissions standards but remanded on the issue of remedial developmental courses, which had been largely eliminated under the trial court's remedial decree. On remand, the district court was directed to further evaluate the Board of Trustees' position on the possibility of merger between Mississippi Valley State University and Delta State University, order an evaluation of the propriety of enhancing programs at Alcorn State University and increasing white enrollment there, evaluate the accreditation attainment status of business programs at Jackson State University, and make further findings respecting equipment funding disparities. *Id.*

170. 1992 U.S. Dist. LEXIS 19854, at *29 (E.D. La. Dec. 23, 1992).

On appeal, the Fifth Circuit determined that Judge Schwartz's grant of summary judgment on the issue of liability was improvident.¹⁷¹ The court found genuine issues of material facts on the matters of unnecessary program duplication and whether definable educational justifications for the duplicative programs in geographically proximate institutions existed.¹⁷² Furthermore, the court found genuine and material issues of fact regarding the various open admissions programs and whether they were responsible for the continuing segregative effects.¹⁷³ Upon remand to the trial court for the application of *Fordice* in light of the Fifth Circuit's reversal of summary judgment, Judge Schwartz made it clear to the parties that this higher education case was not a "back to the starting block matter."¹⁷⁴ Because there was a substantial record in the case, the court would only hear the disputed issues of fact defined by the Fifth Circuit.¹⁷⁵

IV. Structuring, Implementing and Evaluating Higher Education Desegregation Plans: Were the Mississippi and Louisiana Plans Designed for Success?

The parties in the Mississippi and Louisiana cases were constitutionally bound to enter settlement agreements that complied with the requirements of *Fordice*, and the only accountability measures for the assurance of constitutional compliance were Judges Biggers and Schwartz. Given the multiple areas for remediation after the *Fordice* decision, the parties in both cases should have been tremendously motivated to settle the lawsuits amicably. The crafting of a remedy by a federal judge could have yielded harsh outcomes.¹⁷⁶ Two years after the State Supreme Court decision in *Fordice*, in February of 1994, settlement negotiations in the Louisiana case resumed, culminating in a new Settlement Agreement in November of that year.¹⁷⁷ The Mississippi case,

171. *United States v. Louisiana*, 9 F.3d 1159, 1171 (5th Cir. 1993) (vacating remedial order).

172. *Id.* at 1168-69 (discussing different expert opinions and stating that evidence leaves room for different inferences).

173. *Id.* at 1166, 1170.

174. *United States v. Louisiana*, 1994 WL 374210, at *2 (E.D. La. July 13, 1994).

175. *Id.*

176. *See infra* Part IV.E.

177. Settlement Agreement, *United States v. Louisiana*, No. 80-3300A (Nov. 4, 1994) [hereinafter 1994 Louisiana Settlement Agreement].

which provided the Supreme Court with the opportunity to define and clarify the measure for *Brown I* compliance in higher education, would not settle for another seven years.¹⁷⁸

Settlement negotiations in the Mississippi case began in June of 2000.¹⁷⁹ On March 29, 2001, some of the private plaintiffs and the defendants entered into a Settlement Agreement and Judge Biggers entered a final judgment in the case on February 15, 2002, dismissing the case with prejudice, thus ending the *Ayers* litigation.¹⁸⁰ When other private plaintiffs disapproved of the settlement's terms and appealed Judge Biggers' order, the Fifth Circuit found no abuse of discretion in the trial court's decision and approved the Agreement.¹⁸¹ Unlike the Settlement Agreement in *United States v. Louisiana*, the Mississippi Settlement Agreement failed to state a period of time within which the state's progress under the Agreement would be monitored for compliance with the standards under *Fordice*. Rather, the Agreement declared that its goal was to "[achieve] the finality of the *Ayers* litigation."¹⁸² With Judge Biggers' approval of the Agreement came the release of the Board of Trustees and all other defendants from all constraints of the court's remedial decree and federal court oversight.¹⁸³

The expiration of the Louisiana Settlement Agreement and the release of the Mississippi system from federal court scrutiny provide an opportunity for a *Fordice* retrospective on both systems. The requirements of *Fordice* are not merely aspirational. They set the

178. Mississippi Settlement Agreement, *supra* note 34.

179. *Ayers v. Musgrove* No. 4:75CV009-B-D, 2002 U.S. Dist. LEXIS 1973, at *7 (N.D. Miss. Jan. 2, 2002) (noting that while trial court was implementing its remedial plan, officials of both the state of Mississippi and United States announced that they were beginning negotiations to settle *Ayers* case). See *Mississippi Plaintiffs Make First Proposal In College Desegregation Case*, BLACK ISSUES IN HIGHER EDUCATION, October 12, 2000; Gina Holland, *Nicholson: Ayers Case Needs To Be Over College Board Wants To Settle Case*, SUN HERALD, June 14, 2000, at A4.

180. *Ayers v. Musgrove*, No. 4:75CV009-B-D, slip. op. (N. D. Miss. Feb. 15, 2002). Before he approved the parties' Settlement Agreement, Judge Biggers required a concurrent resolution from the Mississippi legislature indicating their support for the costly settlement proposal. *Ayers v. Musgrove*, No. 4:75CV009-B-D, 2002 U.S. Dist. LEXIS 1973, at *14-16 (N.D. Miss. Jan. 2, 2002). The Mississippi State House of Representatives and Senate assented to the parties Settlement Agreement during the 2002 regular legislative session. House Concurrent Resolution No. 28, Mississippi Legislature, 2002 Session.

181. *Ayers v. Thompson*, 358 F.3d 356, 375 (5th Cir. 2004), *cert. denied*, 543 U.S. 951 (2004).

182. Mississippi Settlement Agreement, *supra* note 34, at 3.

183. Mississippi Settlement Agreement, *supra* note 34, at 3-4 ("When this Agreement becomes final, the Board will be free to fulfill its constitutional and statutory duties and responsibilities under Mississippi law wholly unfettered by the *Ayers* litigation except as specified in this Agreement.").

minimum criteria for measuring whether a higher education system has disestablished its dual system of higher education.¹⁸⁴ Therefore, post-*Fordice* success requires a concerted focus on “sound educational practices,” and it is only through this focus that states may “disentangle” race from education thereby transforming “white colleges” and “black colleges” to “just colleges.”¹⁸⁵

The Settlement Agreement in *United States v. Louisiana* targeted ten areas for action under its ten-year plan. Governance, classification of proximate institutions, admissions criteria, community colleges, enhanced programmatic offerings at historically black colleges, capital outlay funding, two geographically proximate *Plessy* law schools, and other-race recruitment and employment provided the structure for the implementation of *Fordice* evaluation in *United States v. Louisiana*.¹⁸⁶ In contrast, the Mississippi Settlement Agreement focused on five areas for desegregation implementation, all involving changes at the state’s historically black colleges and universities. Summer developmental education, enhanced programmatic offerings at historically black colleges, structured endowments for the benefit of historically black colleges, capital improvement expenditures for historically black colleges, and legislative commitment for operational and capital improvement needs were the areas for action and implementation under the Mississippi Settlement Agreement.¹⁸⁷ The parties did not carve out any areas of responsibility for the state’s historically white colleges.

Some cognitive dissonance exists respecting the complete dismantling of prior *de jure* systems under *Fordice* and the standard for successful performance under any settlement agreement. Intuitively, one might think that complete dismantlement under *Fordice* should require 100% compliance with the terms of an agreement. However, the courts have resolved the dissonance by interpreting settlement agreements in desegregation lawsuits as contracts.¹⁸⁸ As contracts, the standard for successful performance is substantial compliance rather than 100% compliance with the

184. *United States v. Fordice*, 505 U.S. 717, 728 (1992) (“[A] State does not discharge its constitutional obligations until it eradicates policies and practices traceable to its prior *de jure* [sic] dual system that continue to foster segregation.”).

185. *See Green*, *supra* note 14.

186. 1994 Louisiana Settlement Agreement, *supra* note 177, at 2-24.

187. Mississippi Settlement Agreement, *supra* note 34, at 4-13 (describing both financial and academic terms of the settlement).

188. *See Ayers v. Musgrove*, No. 4:75CV009-B-D, 2002 WL 91895, at *3 (N.D. Miss. Jan. 2, 2002) (stating that Mississippi’s obligations under the Proposal are equally enforceable as obligations under any other contract).

terms of an agreement.¹⁸⁹ Now that the Louisiana Settlement Agreement has expired under its own terms and the higher education system in Mississippi has been released from federal court supervision, a commentary on the structure of each Agreement and the states' progress to date is valuable in determining whether the states' substantial compliance has allowed its universities to reach the standard of "just colleges," erasing their racial identifiability. Moreover, this critique is valuable in questioning whether the "just colleges" standard requires a conclusion that the universities be racially non-identifiable, whether racial non-identifiability is truly desirable, or whether racial non-identifiability is even possible.

Critiquing the end result under the Louisiana Settlement

189. Good faith implementation of obligations to desegregate under a consent decree may relieve a party to that decree of its duties and entitle said party to termination of subsequent litigation. See, e.g., *Lee v. Auburn City Bd. of Educ.*, No. 70-T-851-E, 2002 WL 237091 (M.D. Ala. Feb. 14, 2002). It was the intent of the drafters of the Louisiana Settlement Agreement that substantial performance under the Settlement Agreement meant that the State would have complied with the requisites of *Fordice* necessary as a predicate for a declaration of unitary status. 1994 Louisiana Settlement Agreement, *supra* note 177, at 29-30. The text of the Agreement provides guidance in this area and illustrates that the Louisiana Agreement cannot derogate the requirements of *Brown I*, *Green* or *Fordice*. The Agreement specifically states that program duplication matters will be settled under the *Fordice* standard. 1994 Louisiana Settlement Agreement, *supra* note 177, at 31. All other subjects covered by the Agreement purportedly will be governed by the question of whether the State of Louisiana has performed its promises under the Agreement. The Agreement specifically states that if a court finds that Louisiana has complied with the Louisiana Agreement, the Court shall dismiss the suit with prejudice and if Louisiana has not complied, the Court shall order compliance by specifically stating which actions Louisiana must take in order to comply with the Agreement. *Id.* at 31-32. There is no authoritative case law in the higher education context on the question of whether the State of Louisiana can be released with less than complete performance under the Agreement. However, there is case law in the context of elementary and secondary desegregation which suggests that Louisiana can be released without having rendered complete performance. In an opinion written by Justice Rehnquist the Supreme Court considered whether the Board of Education of Oklahoma City could be released from federal court oversight after its substantial, but not complete, performance under a desegregation decree. *Bd. of Educ. of Okla. City Pub. Sch. v. Dowell*, 498 U.S. 237, 249-50 (1991). The Court determined that the appropriate question to be considered on remand was "whether the Board had *complied in good faith* with the desegregation decree since it was entered, and whether the vestiges of past discrimination had been eliminated *to the extent practicable*." *Id.* (emphasis added). A reviewing Court could borrow from *Dowell* in order to give content "to the extent practicable," if it is inclined to do so, and find that substantial compliance with *Fordice* will suffice and release the system from oversight. Here, a reviewing federal court is unlikely to be trapped by language relating to "unitary" or "dual status" in evaluating implementation of the Louisiana Settlement Agreement because the *Dowell* Court's holding would guide a federal court, insofar as it states "it is a mistake to treat words such as 'dual' and 'unitary' as if they were actually found in the Constitution." *Id.* at 245.

Agreement and the current progress under the Mississippi Settlement Agreement can be accomplished by analyzing the states' progress along a continuum of ten variables identified by a Southern Education Foundation report as necessary for effective desegregation of a higher education system. Thorough and complete dismantlement of a prior *de jure* system requires:

A) creation and implementation of an effective long range state-wide plan; B) implementation of the state-wide plan at the institutional level; C) creation and implementation of individual institutional missions, each of which focuses on minority access; D) creation of a specific plan for student retention and continued matriculation; E) valuing community colleges as an integral part of equal educational opportunity; F) valuing, structuring and placement of the historically black college as an integral part of a diverse system of higher education; G) using merger and closure of the historically black institution as a last resort; H) use of public and private sectors in developing effective strategies for implementing the desegregation plan;¹⁹⁰ I) ensuring adequate financing for implementation of the desegregation plan; and J) accountability for measurable outcomes for success and failure.¹⁹¹

A. The Long Range State-Wide Plan

The concept of using a state-wide problem-solving approach to higher education desegregation was first enunciated by the Court of

190. S. EDUC. FOUND., REDEEMING THE AMERICAN PROMISE, REPORT OF THE PANEL ON EDUCATIONAL OPPORTUNITY AND POSTSECONDARY DESEGREGATION xvi-xvii (1995). "Collaborative leadership" should be the goal when a state seeks to draw from the strength of all its resources in formulating a comprehensive and effective desegregation plan. One supportive element creating a successful desegregation effort involves reliable enforcement and oversight of desegregation efforts from the Civil Rights Division of the United States Department of Justice. *Id.* at 51. For a critical analysis of variances in the aggressiveness of the Justice Department's Title VI enforcement concomitant with changes in Presidential administrations, see HALPERN, *supra* note 126. Additionally, private business sector and private non-profit organization involvement as co-community partners is indispensable to a successful desegregation effort. S. EDUC. FOUND., at 51-52. Interests of the state, the private business and the private non-profit sectors should converge with those of the community at large respecting the development of an educated citizenry. *Id.* This dynamic is extraordinarily valuable in creating an "opportunity-driven vision of public higher education." *Id.* Of these collaborative factors, the only one visible to any measurable respect in either the Louisiana or the Mississippi plan is the creation of the private sector endowment in the Mississippi Settlement Agreement. Mississippi Settlement Agreement, *supra* note 34, at 9-12.

191. S. EDUC. FOUND., *supra* note 190, at xvi-xvii.

Appeals in *Adams v. Richardson*¹⁹² in 1973 and embraced as policy by HEW in 1978.¹⁹³ An effective desegregation plan cannot attempt to remedy current *de facto* effects of prior *de jure* segregation on a "school-by-school basis."¹⁹⁴ Of course, each institution within a system would necessarily have a role in implementing a sound desegregation plan.¹⁹⁵ A well-structured and comprehensive *statewide* plan, "embodying those specific affirmative, remedial steps which [would] prove effective in achieving significant progress toward the disestablishment of the *structure* of the dual system, [addressing] the problem of *system-wide* racial imbalance," allows a dual higher education system to successfully convert to a unitary one.¹⁹⁶

The desirability of the state-wide long range plan stems from the common sense realization that systemic racism and racial discrimination in higher education systems evolved both under law and later under practices and policies. Hence, a sea-change in the higher education system structure cannot occur in an instant. In order to cure these ills, a state must first demonstrate a sincere commitment to dismantlement. In turn, a sincere commitment to change requires a structured plan wherein parties approach problem solving by envisioning the education system as a whole. The settlement history in the Louisiana case reflects the absence of this approach, as well as the difficulty experienced by the parties in crafting a desegregation plan that had a realistic possibility of dismantling a prior *de jure* system of segregation, root and branch.

The 1974 litigation in *United States v. Louisiana* culminated in its first Consent Decree on September 8, 1981.¹⁹⁷ Judge Charles Schwartz approved the agreement after several years of litigation, citing the court's preference for allowing parties to "voluntar[ily] com[ply] with the law."¹⁹⁸ The Consent Decree addressed six specific matters of concern to the court: 1) admissions processes of institutions; 2) achieving successful matriculation of other-race students in historically white and historically black institutions; 3) program duplication in geographic proximate institutions; 4) status of historically black colleges and universities; 5) hiring policies and

192. *Adams v. Richardson*, 480 F.2d 1159, 1164-66 (D.C. Cir. 1973); see also Part II.B.

193. See *Adams*, 480 F.2d at 1164-66; see also HALPERN, *supra* note 125, at 162-66.

194. See *Adams*, 480 F.2d at 1164.

195. See *id.* at 1164-65.

196. Revised Criteria Specifying the Ingredients of Acceptable Plans To Desegregate State Systems of Public Higher Education, 43 Fed. Reg. 32, 6659 (Feb. 15, 1978); see also *Adams*, 480 F.2d at 1164-67 (reiterating need for structured state-wide plan in order to effectively achieve desegregation).

197. *United States v. Louisiana*, 527 F. Supp. 509 (E.D. La. 1981).

198. *Id.* at 511.

practices of all universities respecting other-race staff and faculty; and 6) the structure of the governing boards of colleges and universities.¹⁹⁹ Because the Consent Decree addressed each of these factors, the court concluded it represented a lawful, reasonable, and equitable remedy, which was not in derogation of public policy, and it received the approval of the court.²⁰⁰

The 1981 Consent Decree remained operable until its expiration on December 31, 1987.²⁰¹ Annual reports evaluating the progress under the agreement were generated for each year beginning on August 15, 1982.²⁰² On December 29, 1987, the United States moved to determine whether the State of Louisiana had successfully performed under the Consent Decree.²⁰³ At a hearing on the matter, Judge Schwartz concluded that in implementing the Consent Decree, the State had not met its duty under *Brown I*.²⁰⁴ The United States was also critical of the state's implementation of the agreement. Specifically, it was the position of the United States that the State's failure lay in its refusal to spend money in support of desegregation as it had promised under the agreement.²⁰⁵ However, Judge Schwartz refocused the discussion by finding fault with the "entire structure of the consent decree":

If money were the sole problem, then there should still be improvement, though perhaps an insufficient improvement for constitutional purposes, in the desegregation of Louisiana's public universities. The consent decree as implemented was directed more towards merely enhancing the State's black schools as black schools rather than towards convert[ing] its white colleges and black colleges to just colleges.²⁰⁶

I suggest that Judge Schwartz's criticism was in need of further fine-tuning. The 1981 Agreement was defective in two respects. The plan's structure focused on institutional initiatives that were only aspirational in nature and voluntary in practice. Moreover, it focused on institutional initiatives operable under freedom of choice

199. *Id.* at 515 (discussing commitments made by consent decree).

200. *See id.*

201. Consent Decree at 29, *United States v. Louisiana*, No. 80-3300 (Sep. 8, 1981) [hereinafter 1981 Louisiana Consent Decree].

202. *Id.* at 27.

203. *United States v. Louisiana*, 692 F. Supp. 642, 647 (E.D. La. 1988).

204. *Id.* at 657 (finding that the state continued to foster "polarization and separation on a racial basis").

205. *Id.* at 658.

206. *Id.* (quoting *Norris v. State Council of Higher Ed. for Va.*, 327 F. Supp. 1368, 1373 (E.D. Va. 1971)).

plans.²⁰⁷ When the focus of the 1981 Consent Decree became the "black college problem" focusing primarily on enhancement criteria for historically black colleges, the opportunity for a systemic approach to problem solving was lost.²⁰⁸ The problem in the plan lay in its failure to conceptualize the remaining vestiges of segregation in Louisiana higher education properly as a systemic state-wide problem, requiring a systemic state-wide approach under the Adams/HEW formulation.²⁰⁹ In *Fordice*, the Court explained that vestiges of segregation in particular universities informed the conclusion that the *whole system* was unconstitutional. This clearly articulated standard for unitary status brought comprehensibility to the 1994 settlement process and stimulated the structure of the 1994 Agreement as a state-wide plan. Additionally, the ten-year term of the Agreement seemed to provide a suitable framework within which the desegregation effort could be addressed.

At the time *United States v. Louisiana* settled in 1994 and *Ayers v. Fordice* settled in 2001, both Judge Schwartz and Judge Biggers were faced with parties who were contenders in two of the longest running higher education desegregation cases on record.²¹⁰ The protraction of these pieces of litigation speaks to the intractable nature of solving firmly entrenched segregative practices post-*Brown I* and *II*. Further, it demonstrated why the parties could not

207. *Id.* at 657-59.

208. 1981 Louisiana Consent Decree, *supra* note 201, at 17-26. The 1981 Louisiana Consent Decree provided various enhancements at the historically black colleges and universities; however, at the expiration of the agreement, the historically black colleges had not progressed. They did not have the same state support or quality of facilities as the historically white colleges. See *United States v. Louisiana*, 692 F. Supp. at 657. Student recruitment, increased access initiatives and other-race employee initiatives were left to individual institutions to implement without the guidance of a system-wide structure, or accountability.

209. The problem of the "black college" as the focus of what is "wrong" with a system of higher education existed in minds of the primary governmental actors during the 1970s-80s litigation in Louisiana. See generally *Louisiana*, 692 F. Supp. 642. The failure to view the higher education system as whole, consisting of historically white colleges and historically black colleges which were both unconstitutional products of a prior *de jure* system, prevented the state from successfully confecting and implementing the Consent Decree of 1981. This viewpoint has currency today. One need only look at the post-Hurricane Katrina discussion concerning the propriety of rebuilding the totally devastated campus of Southern University, New Orleans. This historically black college can only be so readily dismissed as a valueless, disposable remnant of a segregated past because of the lack of psychological ownership of the institution by a system refusing to recognize itself as an unconstitutional whole. See *SUNO Repair Not Reasonable*, ADVOC. (Baton Rouge, La.), Oct. 17, 2005, at 6B; Will Sentell, *SUNO Officials Tout Service School Offers To Underserved*, BATON ROUGE ADVOC., Oct. 22, 2005, at 1B; Coleman Warner, *Housing Called Critical To Recovery at SUNO; Officials Envisions FEMA Trailer Park*, TIMES-PICAYUNE, Oct. 8, 2005, at A01.

210. See *supra* Part II.B.

easily come to an amicable, constitutional settlement amongst themselves.

A very important facet of both the Mississippi and Louisiana Settlement Agreements was the requirement that they be calculated to operate for a sufficient length of time, thus producing the desired long-range effects. A well-structured plan must prescribe the length of time within which the higher education system will be monitored for compliance with the terms of the decree, thus setting a baseline for when the systems may seek a Declaration of Unitary Status from the court. One incentive for full and timely compliance with the directives under the Louisiana Settlement Agreement was the hope of certain release from federal court oversight within some definitive and foreseeable period of time.

As a creation of recent history, the effectiveness of the Mississippi Settlement Agreement has yet to be proven. With the Supreme Court's denial of certiorari in *Ayers* on October 18, 2004, the Agreement became effective and the federal court released the system from oversight and retained jurisdiction only to enforce the terms of the Agreement.²¹¹ The federal court's supervisory powers extend solely to enforcement of several of the funding provisions, which are to be provided over a period of several years.²¹² However, several provisions within the Agreement cannot be fully evaluated until their funding timelines expire.²¹³ In some instances, the state of Mississippi will require a minimal period of seventeen years before a full evaluation can be made respecting the effectiveness of its desegregation efforts, even though it has been released from federal court supervision.²¹⁴ The theoretical question that remains is whether the higher education system should have been released until all of the *Ayers* funding ended.

Finally, there exists a question regarding the failure of both plans to comprehensively view their public school systems and their

211. See *Ayers v. Thompson*, 543 U. S. 951 (2004).

212. The summer development programs were established and are to be continually funded for a period of eight years. These funds were to be provided over and above all financial assistance that was available at the time of 1995 Settlement Agreement. Mississippi Settlement Agreement, *supra* note 34, at 15. The publicly and privately funded endowments were established and are to be continually funded over a fourteen-year period. *Id.* at 9-12. Capital outlay projects for Alcorn State University, Jackson State University, and Mississippi Valley State University were authorized for a period of five years from the date of implementation of the agreement. *Id.* at 12-14. The Settlement Agreement required the Mississippi legislature to create special *Ayers* funding over and above the funding previously identified in the Agreement for specific academic programs at Alcorn State University, Jackson State University and Mississippi Valley State University for a period of seventeen years. *Id.* at 14-16.

213. See *id.*

214. See *id.*

higher education systems as a gestalt. Both Mississippi and Louisiana have histories of *de jure* segregation in their elementary and secondary public schools.²¹⁵ Problems in eliminating vestiges of segregation in a prior *de jure* system of higher education are inextricably bound to problems of prior *de jure* segregation in public school education.²¹⁶ Necessarily, many problems related to the availability of equal educational opportunity in higher education owe their origins to inadequacy of both opportunity and outcomes in elementary and secondary education. An effective state-wide plan for dismantling the prior *de jure* segregation in the higher education systems of both states should have accounted for any vestiges of segregation that lingered in the public education system. The Louisiana plan did not address the college preparation problems that existed in the state respecting the transition from high school to the university.²¹⁷ The Mississippi Settlement Agreement addressed the matter, but only to a limited degree by authorizing state financial support for summer school pre-university enhancement programs for African-American students.²¹⁸

B. Institutional Implementation of the State-Wide Plans and Making Access An Institutional Mission

Although the higher education systems in the states of Mississippi and Louisiana are viewed by the courts as one entity, their respective desegregation plans should have required each university in the system to perform an active role in eliminating the vestiges of the prior *de jure* system of segregation in order to be successful. In its plan of implementation, each university should have focused on access to quality higher education for students whose opportunity at their respective institution was formally

215. See *supra* notes 27-28.

216. S. EDUC. FOUND., *supra* note 190, at xvi-xvii (discussing problems with *de jure* segregation and some proposed solutions).

217. The 1994 Louisiana Agreement addressed high school-university relations for the sole purpose of acclimatizing the high school student to the other-race university environment. 1994 Louisiana Settlement Agreement, *supra* note 177, at 21 (stating that the programs "shall be designed to reduce the strangeness and alienation students often associate with other race institutions").

218. The summer program was designed to bridge the gap between twelfth grade and freshman year in college. The program was first proposed as a remedy of the court in 1995 and it was incorporated into the 2001 Settlement Agreement to be funded for ten years. Mississippi Settlement Agreement, *supra* note 34, at 4-5. See also the Summer Program as it was originally submitted in the remedial proposal of the court in *Ayers v. Fordice*, 879 F. Supp. 1419, 1478-79 (N.D. Miss. 1995).

foreclosed under the *de jure* system of segregation.²¹⁹ Each institution should have paid more than lip service to access for students of color and historically disadvantaged students as an institutional goal. In the Louisiana Settlement Agreement, each university was tasked to perform a particular role in desegregating the system.²²⁰ In the Mississippi Settlement Agreement, however, the fulcrum of the agreement regarding institutional implementation and access rested heavily on historically black colleges and universities.²²¹ Maintaining and enhancing the programmatic offerings and the facilities at the historically black colleges was the entire focus of the Agreement.²²² The Agreement contained no terms placing new institutional commitments on the historically white colleges for eliminating vestiges of prior *de jure* segregation.²²³ The court ordered each historically black college or university within the system to “develop, implement, strengthen, review and modify certain programs in accordance with the requirements of *Fordice*.”²²⁴ Additionally, the income generated

219. See S. EDUC. FOUND., *supra* note 190, at xviii (discussing proposed implementation plans).

220. See 1994 Louisiana Settlement Agreement, *supra* note 177, at 20-24 (describing institutional responsibility for recruitment and retention of students and university employees).

221. Mississippi Settlement Agreement, *supra* note 34, *passim*. Other-race presence at many historically white institutions within the system was much higher than at historically black institutions. See Sum, *infra* note 363; see also Am. Ass’n of Univ. Professors, *Historically Black Colleges and Universities: Recent Trends* (2007), available at <http://www.aaup.org> (follow “Publications & Research-Academe” hyperlink; then follow “2007 Issues” hyperlink; then follow “January-February 2007” hyperlink; then follow “Reports Posted Elsewhere on Other Sections of the AAUP Website” hyperlink) (stating that “[t]erms of [the] agreement apply only to the three historically black universities in Mississippi, since the five historically white universities have surpassed the minimum of 10 percent for nonwhite enrollment”).

222. Mississippi Settlement Agreement, *supra* note 34, *passim*.

223. According to the Mississippi Settlement Agreement, the status of the historically white universities at the time of the Settlement Agreement was frozen when the Agreement became effective and “[t]he only obligations of the Board [of Trustees], and other defendants, arising out of or related to the Ayers litigation [were] those specified in [the] Agreement.” *Id.* at 4.

224. The Mississippi Settlement Agreement required the Alcorn State University to apply this standard to develop, implement, strengthen, review or modify its: Masters of Business Administration (Natchez); Master of Accounting (Natchez); Bachelor of Finance (Lorman); Masters of Finance (Natchez); Physician Assistant Masters (Natchez or Vicksburg); Biotechnology Masters (Lorman); Bachelor of Computer Networking (Vicksburg); and Bachelor of Environmental Science (Lorman). Mississippi Settlement Agreement, *supra* note 34, at 6. The Jackson State University was ordered to develop, implement, strengthen or review its: Ph.D. in Business; Masters in Urban Planning; Ph.D. in Urban Planning; Ph.D. in Social Work; Bachelor in Civil Engineering; Bachelor of Computer Engineering; Bachelor of Telecommunications Engineering; Masters of Public Health; Bachelor of Healthcare Administration; Masters in Communicative

from the Public and Private Endowments created by the Agreement for the benefit of Alcorn State University, Jackson State University and Mississippi Valley State University were specifically designated for "other-race marketing and recruitment, including employment of other-race recruiting personnel and award of other-race student scholarships."²²⁵

A significant focus of the Louisiana Settlement Agreement was on the *Fordice* program duplication factor.²²⁶ The Agreement was designed to provide programmatic enhancements and differentiation at the historically black colleges.²²⁷ The three historically black colleges agreed to establish and implement new programs for the express purpose of "attracting other race students."²²⁸ Prior to the effective date of the Agreement, each proximate geographic pairing of historically white universities and historically black universities were operating under agreements which offered joint degree programs, dual degree programs or cooperative programs wherein cross-registration between universities was allowed.²²⁹ All of these programs were continued and some were expanded under the 1994 Agreement.²³⁰ Each

Disorders; Ph.D. in Higher Education; and Ph.D. in Public Health. *Id.* at 6-7. The Mississippi Interinstitutional Pharmacy Initiative as well as Jackson State's School of Allied Health, School of Public Health, and School of Engineering were also subject to this provision of the plan. *Id.* at 7. Lastly, Mississippi Valley State University was ordered to develop implement, strengthen or review the: Bachelor of History; Masters in Special Education; Bachelor of Special Education; Masters of Computer Science; Masters in Bioinformatics; Masters in Leadership Administration; and Masters in Business Administration. *Id.* The development, implementation, strengthening or reviewing of the programs must be in concert with "sound educational practices" and "resources available over time." *Id.* at 5. The federal court expects substantial implementation and enhancement of these programs over the seventeen-year period of funding. *Id.*

225. *Id.* at 9-10. The Settlement Agreement defined other-race as "persons who are not African-American." *Id.* at 10 n.2.

226. See 1994 Louisiana Settlement Agreement, *supra* note 177, *passim*.

227. *Id.*

228. *Id.* at 10. The Louisiana Agreement defined other-race students as "white persons at predominately black institutions and black persons at predominately white institutions." *Id.* at 8 n.4. During the term of the Settlement Agreement, Southern University in Baton Rouge agreed to develop and implement programs missing in their curricula including seven doctoral degree programs, five Masters Degree programs, and four Baccalaureate/Associate Degree programs. *Id.* at 10-11. Southern University in New Orleans agreed to implement the Masters Degree in Criminal Justice that had previously been approved by the Board of Regents. *Id.* at 11-12. Southern University, New Orleans also agreed to develop and implement Masters Degrees in Transportation, Substance Abuse, Teaching, and Computer Information Systems. *Id.* Grambling State University agreed to develop and implement a Doctoral Degree in Education program, two Masters Degree programs and four baccalaureate/associate degree programs. *Id.* at 12-13.

229. *Id.* at 16.

230. *Id.* at 16-17. Louisiana State University, the flagship historically white college,

university in the system agreed to "develop a comprehensive program for recruitment and retention of other-race students, faculty, administrators, and staff."²³¹ Finally, the Louisiana Settlement Agreement required each university within the system to create and develop a program to recruit and retain other-race students, faculty, administrators, and staff.²³²

C. Student Retention and Persistence as the Measure of Success

Statistics suggest that the retention rates for white students in college tend to be higher than retention rates of African-American students.²³³ The trial court's findings in *Ayers v. Fordice* support the truthfulness of this statement.²³⁴ A successful desegregation plan must not only focus on access to equal educational opportunity but must also make student retention and student persistence the focus of its measure of achieving success. Just as student persistence is the indicator of the individual's success and performance,²³⁵ student retention is the indicator of the institution's success and performance.²³⁶ Each is a measurable outcome. Research also shows that there exists a direct proportional relationship between retention and a student's academic ability.²³⁷ Moreover, the student's ability to persist from the first to the second year is one of

and Southern University agreed to structure undergraduate and graduate degree programs to encourage graduates of the respective institutions to enter graduate degree programs at the accepting institution as "other-race" students.

231. *Id.* at 20-22.

232. *Id.* at 23-24.

233. See, e.g., *Ayers v. Fordice*, No. 4:75CV009-B-O, 1995 WL 1945428, at *44 (N.D. Miss. Mar. 7, 1995).

234. *Id.*

235. Randi S. Levitz, Lee Noel & Beth J. Richter, *Strategic Moves for Retention Success*, 108 NEW DIRECTIONS FOR HIGHER EDUC. 31 (1999). "Student persistence to the completion of educational goals is a key indicator of student satisfaction and success. . . . If information on students' goals is collected, preferably at the beginning of each [academic] term, then whether an individual student persists to the completion of his or her educational goals can be measured." *Id.*

236. According to Levitz:

Retention . . . is not the primary goal [of the university], but it is the best indicator that an institution is meeting its goal of student satisfaction and success. It is a measure of how much student growth and learning takes place, how valued and respected students feel on campus, and how effectively the campus delivers what students expect, need, and want. When these conditions are met, students find a way to stay in school, despite external financial and personal pressures. In sum, retention is a measure of overall "product."

Id. at 31-32.

237. *Id.* at 33.

the most important factors influencing the institution's graduation rate.²³⁸ In general, in national graduation statistics, Mississippi and Louisiana rank well below the top ranked states reporting six year graduation statistics for four-year institutions.²³⁹ In both states, six year graduation rates at the historically black institutions tend to lag behind historically white institutions, but tend to be somewhat similar to institutions within their same Carnegie Classification.²⁴⁰ Six year graduation rates for African-American students at the historically white colleges in both states tend to be lower than those of white students.²⁴¹ As a matter of sound educational policy and

238. *Id.* at 35-36.

239. Six year graduation statistics for the state of Mississippi were at 41% in 1992 and 51% for 2006 in contrast with the state of Louisiana where the six year graduation statistics were 33% in 1992 and 39% in 2006. The National Center For Public Policy And Higher Education, *Measuring Up 2006: The State Report Card on Higher Education, Mississippi*, at 10, available at <http://measuringup.highereducation.org> (select "State Reports"; then select "Download State Report Cards in pdf"; then select "2006" and "Mississippi"); The National Center For Public Policy And Higher Education, *Measuring Up 2006: The State Report Card on Higher Education, Louisiana*, at 10, available at <http://measuringup.highereducation.org> (select "State Reports"; then select "Download State Report Cards in pdf"; then select "2006" and "Louisiana"). The top ranked states in 2006 reported six year graduation statistics of 64%. *Id.*

240. The Education Trust, *College Results Online*, <http://www.collegeresults.org> (follow "Enter College Results Online" hyperlink; then follow "Customized Search by Institution/Student Characteristics" hyperlink; then search for 6-year graduation rates over time for the years 1997 through 2004). The 1997-2004 six-year graduation rates at Louisiana's historically black colleges were (Carnegie Classification indicated in parenthesis): Grambling State University (Master's Medium), 37.7%; Southern University (Master's Large), Baton Rouge 26.6%; and Southern University (Master's Medium), New Orleans, 11.7%. *Id.* The 1997-2004 six-year college graduation rates at Louisiana's historically white colleges were: Louisiana State University (Research, Very High), Baton Rouge, 55.8%; Louisiana Tech University (Doctoral/Research), 51.5%; University of Louisiana, Lafayette (Research High), 32.3%; Northwestern State University (Master's Large), 31.1%; McNeese State University (Master's Large), 29.4%; University of Louisiana (Master's Large), Monroe 27.3%; Nicholls State University (Master's Medium), 26.6%; Southeastern Louisiana University (Master's Large), 25.3%; University of New Orleans (Research High), 24.5%; Louisiana State University (Master's Medium), Shreveport, 13.3%. *Id.* The 1997-2004 six-year graduation rates at Mississippi's historically black colleges were: Alcorn State University (Master's Medium), 42.7%; Mississippi Valley State University (Master's Small), 40.5%; Jackson State University (Research High), 39.7%. *Id.* The 1997-2004 six-year graduation rates for the historically white colleges were: Mississippi State University (Research High), 57.7%; University of Mississippi (Research High), 54.4%; University of Southern Mississippi (Research High), 48%; and Mississippi University for Women (Master's Small), 36.9%. *Id.* See also Alexander C. McCormick & Chun-Mei Zhao, *Rethinking and Reframing The Carnegie Classification*, 37 CHANGE No. 5 50 (Sept./Oct. 2005).

241. The Education Trust, *College Results Online*, <http://www.collegeresults.org> (follow "Enter College Results Online" hyperlink; then follow "Customized Search by Institution/Student Characteristics" hyperlink; then search for 6-year graduation rates over time for the years 1997 through 2004). The 1997-2004 six-year graduation rates for

service to the citizenry of the states, both desegregation plans represented an opportunity to address the academic aspects of retention toward the ultimate goal of increasing the six-year graduation rates for not only for African-American students, but for all students enrolled in the state universities. The Mississippi Settlement Agreement addressed the academic component of retention; however, the Louisiana plan was inadequate in this respect.

Prior to the 1995 remedial order in *Ayers* each of the eight public universities in Mississippi offered remedial course work as a means to supplement students who were deficient in some area of core freshman study.²⁴² Judge Biggers' 1995 order eliminated the greater portion of these remedial courses and substituted an intense summer developmental program.²⁴³ Judge Biggers found that African-American student retention rates were lower than those of white students system-wide.²⁴⁴ As a response, he adopted the

African American students (AA) compared to white students (W) at the historically white colleges in Louisiana were: Louisiana State University, Baton Rouge (AA, 44.6%, W, 57.1%); Louisiana Tech University (AA, 35%, W, 54.3%); Northwestern State University (AA, 23.5%, W, 34.5%); University of New Orleans (AA, 20.3%, W, 26%); University of Louisiana, Monroe (20.3%, W, 31%); University of Louisiana, Lafayette (AA, 19.9%, W, 36.6%); McNeese State University (AA, 19.3%, W, 31.9%); Southeastern Louisiana University (AA, 18.6%, W, 26.5%); Nicholls State University (AA, 9.7%, W, 31.1%); Louisiana State University, Shreveport (AA 7.9%, W, 14.6%). *Id.* The 1997-2004 six-year graduation rates for African American students (AA) compared to white students (W) at the historically white colleges in Mississippi were: Delta State University (AA, 44.6%, W, 47.3%); Mississippi State University (AA 44.4%, W, 61.6%); University of Southern Mississippi (AA 41.6%, White, 50.5%); and Mississippi University For Women (AA, 32.5%, W, 36.7%). *Id.*

242. *Ayers v. Fordice*, 111 F. 3d 1183, 1201 (5th Cir. 1997) (discussing previous arrangement for providing remedial education).

243. The Court of Appeals ordered a remand on the propriety of the elimination of the remedial courses at Mississippi universities. *Id.* at 1202, 1228.

244. Judge Biggers reported the following statistics in his opinion respecting retention rates for white students and African American students measuring from the 1985 academic year through 1991: 47.7% white students entering college in the 1985 academic year graduated after four years, while only 29.4% African American students entering college in 1985 graduated after four years. The opinion also stated that retention and graduation rates for African American students were higher in the historically white universities. The respective African American/white student retention rates for specific universities within the system measuring from the 1985 academic year were: Alcorn State University, 27.2% African American, 62.5% white; Jackson State University, 27.3% African American, 11.1% white; Mississippi Valley State University, 24.1% African American, 48.8% white; Mississippi State University, 37.3% African American, 52.4% white; University of Mississippi, 42.1% African American, 48.8% white; University of Southern Mississippi, 39.7% African American, 40.3% white; Delta State University, 34.7% African American, 47.3% white; Mississippi University for Women, 40% African American, 41.5% white. *Ayers v. Fordice*, 879 F. Supp. 1419, 1469, 1470 n.253 (N.D. Miss. 1995).

Board of Trustees uniform admissions program that provided for a spring placement process for high school seniors, coupled with a summer developmental program for qualifying students.²⁴⁵ The subsequent Agreement in *Ayers* did not abandon the focus on retention initiatives. It provided for the maintenance and implementation of a summer developmental education program that had been established under a prior Consent Decree.²⁴⁶ The program offered summer preparation for *any* student who sought admission to a Mississippi college or university, but whose indicators suggested that the student might be at risk respecting the student's ability to successfully matriculate at the university.²⁴⁷

Much of the student-oriented text in the Louisiana Settlement Agreement focused on the financial aspect of recruiting and retaining other-race students, to the detriment of a more balanced approach, which should have also focused on the academic implications of retention.²⁴⁸ According to the text of the Agreement, each university's plan of implementation had to include provisions for other-race admissions officers, equal opportunity statements, public information efforts, developing relationships between high schools and colleges, and other-race scholarships for graduate students.²⁴⁹ The Agreement's limited requirements for academic retention efforts permitted each university to choose whether to address these issues in its individual plan of implementation.²⁵⁰ The reports of the Monitoring Committee reflected this shortcoming. In each of the ten yearly reports, the Monitoring Committee addressed the recruitment efforts of the various state universities but none of the reports revealed implementation of any retention programs.²⁵¹

245. *Id.* at 1478.

246. *Id.* In 1995, Judge Biggers ordered adoption of the Board of Trustees' 1995 admissions standards for admission to Mississippi colleges. *Id.* at 1478, 1494. The new admission standards eliminated the existence of open admission for any Mississippi university and provided spring evaluations of high school seniors who failed to qualify for admission under the regular admission standards. *Id.* at 1478. If students passed the spring academic screening process, they would be admitted to the university. *Id.* If a student's performance on the academic screening test was unsatisfactory, a summer development program was available to bridge gaps between a student's high school preparation and skills needed for success in the freshman year. *Id.* at 1478-79. The 2001 Agreement ordered Board of Trustee funding for the summer developmental program in the amounts of \$500,000 for fiscal years 2002-2006 and \$750,000 for fiscal years 2007-2011. Mississippi Settlement Agreement, *supra* note 34, at 4-5. These appropriations are designated for use by students who qualify for admission to the summer developmental program. *Id.*

247. *Ayers*, 879 F. Supp. at 1478.

248. 1994 Louisiana Settlement Agreement, *supra* note 177, at 20-22.

249. *Id.*

250. *Id.*

251. Ninth Annual Evaluation of the Desegregation Settlement Agreement,

However, respecting the two geographic proximate state law schools in Baton Rouge, Louisiana, the Agreement contained specific requirements concerning retention efforts.²⁵² LSU Law Center, the historically white institution, was required to create and implement a plan for recruiting and retaining more African-American students.²⁵³ Southern University Law Center, the historically black institution, agreed to provide academic support activities for students at risk for attrition.²⁵⁴

Implementation of the Settlement Agreement at 37-39, United States v. State of Louisiana, No. 80-3300A (May 2004) [hereinafter Ninth Annual Evaluation]; Eighth Annual Evaluation of the Desegregation Settlement Agreement, Implementation of the Settlement Agreement at 33-35, United States v. State of Louisiana, No. 80-3300A (May 2003) [hereinafter Eighth Annual Evaluation]; Seventh Annual Evaluation of the Desegregation Settlement Agreement, Implementation of the Settlement Agreement at 29-31, United States v. State of Louisiana, No. 80-3300A (May 2002) [hereinafter Seventh Annual Evaluation]; Sixth Annual Evaluation of the Desegregation Settlement Agreement, Implementation of the Settlement Agreement at 29-31, United States v. State of Louisiana, No. 80-3300A (May 2001) [hereinafter Sixth Annual Evaluation]; Fifth Annual Evaluation of the Desegregation Settlement Agreement, Implementation of the Settlement Agreement at 32-34, United States v. State of Louisiana, No. 80-3300A (May 2000) [hereinafter Fifth Annual Evaluation]; Fourth Annual Evaluation of the Desegregation Settlement Agreement, Implementation of the Settlement Agreement at 29-30, United States v. State of Louisiana, No. 80-3300A (May 1999) [hereinafter Fourth Annual Evaluation]; Third Annual Evaluation of the Desegregation Settlement Agreement, Implementation of the Settlement Agreement at 32-33, United States v. State of Louisiana, No. 80-3300A (May 1998) [hereinafter Third Annual Evaluation]; Second Annual Evaluation of the Desegregation Settlement Agreement, Implementation of the Settlement Agreement at 27-29, United States v. State of Louisiana, No. 80-3300A (May 1997) [hereinafter Second Annual Evaluation]; First Annual Evaluation of the Desegregation Settlement Agreement, Implementation of the Settlement Agreement at 18-19, United States v. State of Louisiana, No. 80-3300A (May 1996) [hereinafter First Annual Evaluation].

252. 1994 Louisiana Settlement Agreement, *supra* note 177, at 19.

253. *Id.* The Agreement was to contain: admissions exceptions for applicants with reasonable likelihood of success in academic programs; a comprehensive plan for contacting potential applicants; significant financial assistance; a special admissions officer responsible for recruitment, and pre-enrollment preparatory programs. *Id.* The LSU plan was implemented effective the 1995-1996 academic year. *See* First Annual Evaluation, *supra* note 251, at 14-16. The reports of the Monitoring Committee acknowledged improved retention rates at LSU Law Center for African-American students since the implementation of the Settlement Agreement. Ninth Annual Evaluation, *supra* note 251, at 34. For the reporting year 1999 through 2002, LSU Law Center reported retention rates for first year students: 1) 1999, African-American students, 61%, all first year students, 79%; 2) 2000, African-American students, 82%, all first year students 82%; 3) African American students, 74%, all first year students, 88%; 4) 2002, African-American students, 83%, all first year students, 92%. *Id.* LSU Law Center implemented and continues to maintain a Pre-Law Legal Methods Program for all students considered at risk for first year attrition. *Id.* at 33.

254. 1994 Louisiana Settlement Agreement, *supra* note 177, at 20. In accordance with Agreement requirements, Southern University Law Center implemented an academic support program for students effective the 1993-1994 academic year. First Annual

D. The Community College System as a Component of Equal Educational Opportunity

A key component to developing and implementing an effective higher education desegregation plan requires states to increase access to their institutions. Community colleges can serve this function well. However, under prior *de jure* systems of higher education, community colleges were not used towards this end, thus not realizing their full potential. Effectively, they were a shield, a tracking mechanism protecting some institutions in the higher education system from desegregation.²⁵⁵ A comprehensive and effective desegregation plan, however, uses the community college system in a manner that recognizes it as a full partner, a sword in the desegregation effort. The community college can achieve its place in fulfilling access to equal educational opportunity, if it is organized to foster easy articulation between the system's two-year colleges and four-year institutions. And if true student choice is fostered rather than the creation of an institutional tracking system whose purpose is to divert African-American students away from four-year colleges, then the community college has the potential to become a full participant in the equal educational opportunity project.²⁵⁶

When the Louisiana case was originally filed in 1974, there was no separate state-wide community college system.²⁵⁷ Three community colleges were named as defendants in the lawsuit, but there was no "system" to name as a defendant or to address remedially.²⁵⁸ Nevertheless, recognizing the need to remediate the

Evaluation, *supra* note 251, at 16. For the 1995-1996 reporting year, Southern University Law Center's Academic Assistance Program consisted of a Pre-Law Summer Program open to students considered at risk for attrition during the first year; an Academic Assistance Program during first year of law school for all students irrespective of at-risk status; and an Academic Counseling Service. *Id.*

255. S. EDUC. FOUND., *supra* note 190, at 30. Twelve states, formerly operating dual systems of education, had community colleges systems which were largely populated by minority students because of the institution's lower admission standards. *Id.* Statistics for first time, full time freshman African-American students enrolled in two-year institutions in 1991 were: Alabama, 56%; Florida, 78 %; Georgia, 45%; Kentucky, 28%; Louisiana 25%; Maryland, 40%; Mississippi, 58%; North Carolina, 37%; Pennsylvania, 33%; Tennessee, 37%; Texas, 39%; Virginia, 21%. *Id.*

256. *See id.* (noting concern regarding rates of transfer between two and four-year colleges).

257. *United States v. Louisiana*, 718 F. Supp. 499, 503 (E. D. La. 1989).

258. *Id.* One community college was named as an original defendant and two others were subsequently named as defendants in amended complaints. *See United States v. Louisiana*, 692 F. Supp. 642, 645, 647 (E. D. La. 1988) (stating that Delgado Community College was named as defendant in original suit and Bossier Community College (BPCC) and St. Bernard Parish Community College (SBPCC) were named as defendants

state's significant high school drop-out rate as well as the need to increase accessibility to four-year colleges, Judge Schwartz's 1989 remedial order mandated the establishment of a community college system in the state.²⁵⁹ However, the Fifth Circuit's subsequent 1990 decision in *Ayers* required Judge Schwartz to grant summary judgment for all Louisiana defendants and vacate his prior remedial order which included the creation of the community college system.²⁶⁰ When the parties drafted their 1994 Settlement Agreement, post-*Fordice*, they saw no need to incorporate the community college desegregation partnering plan as broadly as had been defined by Judge Schwartz in his 1989 order and Judge Schwartz approved the Agreement without its inclusion.²⁶¹ The final 1994 plan partnered with the community college in its four-year college desegregation effort, but only to a very limited extent. The plan required only the creation of a community college in Baton Rouge in an effort to foster better retention and matriculation at the four year colleges in the area.²⁶² This narrow community college

in amended complaints). At the time, both institutions were supervised by the Board of Elementary and Secondary Education (BESE) and the Bossier Parish School Board (BPSB). *Id.* at 658. In 1988, the trial court granted summary judgment to BESE and BPSB on the issue of liability because neither of the community colleges under their supervision had any "history of segregation and [no evidence was produced to prove that they] have operated on anything but a fully integrated basis and their supervising boards, which [were] wholly separate from Louisiana's four higher education boards, [had] discriminated in any fashion against minorities." *Id.* at 658.

259. *United States v. Louisiana*, 718 F. Supp. at 510, 518. The trial court ordered the creation of a system of community colleges with open admissions standards. *Id.* at 518. The community college system was to incorporate the existing community colleges organized under one Board. *Id.* By the 1993-94 academic year, the community colleges were to assume all responsibility for higher education remedial programming, thereby eliminating remedial educational programming from all four-year institutions. *Id.* at 518.

260. See *United States v. Louisiana*, 751 F. Supp. 606, 608 (E.D. La. 1990); see also *United States v. Louisiana*, 718 F. Supp. 499; *Ayers v. Allain*, 914 F.2d. 676 (5th Cir. 1990).

261. The Louisiana State legislature ultimately provided the vehicle through which a community college system was created. See S. 1, 1998 Leg., 1st Extraordinary Sess. (1998). S. 2, 1998 Leg., 1st Extraordinary Sess. (1998) (providing for a voter initiative to amend the Louisiana State Constitution to create a community college system); see also *Regents Chief Lauds Voter Backing on Education*, TIMES-PICAYUNE, Nov. 23, 1998, at B4; Ed Anderson, *Community College Plan Top Amendment on Ballot 18 Changes Proposed For State Constitution*, TIMES-PICAYUNE, Sept. 23, 1998, at A3; Ed Anderson, *Foster Quietly Signs Community College Bill*, TIMES-PICAYUNE, May 8, 1998, at A3.

262. 1994 Louisiana Settlement Agreement, *supra* note 177, at 8-9. The Agreement required the community college's curriculum to emphasize: remedial education courses to prepare academically disadvantaged students for the opportunity to pursue baccalaureate and higher programs at other institutions. *Id.* at 9. Additionally, the Agreement required an articulation agreement between the community college and the four-year institutions. *Id.* The Baton Rouge Community College was established

focus suggests that parties can, in fact, settle within narrower constitutional parameters, than might be identified by a judicially crafted remedy.

The Mississippi Settlement Agreement is totally lacking in community college desegregation partnering. Although Mississippi has a substantial community college system,²⁶³ the parties declined to include its community college system in its desegregation effort. The previous 1995 remedial order in *Ayers* recognized the value of the community college system as a co-partner in desegregation problem solving, but the final Agreement contained no collaborative coordination between community colleges and the state's four-year institutions.²⁶⁴ The failure represents a missed opportunity to foster better retention and improved graduation statistics at the state's four-year institutions.

E. The Historically Black College as an Integral Part of a Diverse System of Higher Education: Merger and Closure as a Last Resort

Tension exists between the historically black college as an integral part of a diverse system of higher education and the *Fordice* standard that to dismantle a prior *de jure* system of higher education a state must eliminate all vestiges of segregation. The words of Justice White in *Fordice* ring loud and clear respecting the remedial relief sought by the private plaintiffs in the case:

If we understand private petitioners to press us to order the upgrading of Jackson State, Alcorn State, and Mississippi Valley State solely so that they may be publicly financed, exclusively black enclaves by private choice, we reject that request. The State

pursuant to La. R. S. 17: 3222 in 1995 and opened with the beginning of the 1998-1999 academic year. See Baton Rouge Community College Foundation, Quick Facts, <http://www.brcc.cc.la.us/foundation/facts.php>. The institution has an open admissions policy as mandated by the Settlement Agreement. 1994 Louisiana Settlement Agreement, *supra* note 177, at 4. It provides transfer degree programs with the Associate of Liberal Arts, Associate of General Studies and the Associate of Science in General Science degrees. Ninth Annual Evaluation, *supra* note 251, at 18.

263. See IHL Miss. Bd. of Tr. of State Inst. of Higher Learning, Miss. Pub. Univ., <http://www.ihl.state.ms.us/cjc/>; see also Mississippi Settlement Agreement, *supra* note 34.

264. *Ayers*, 879 F. Supp. at 1475-76 (stating that "the State, it appears is losing a valuable resource in not coordinating the admissions requirements and remedial programs between the community colleges and the universities. Such coordination has not been proposed to the court, but the court will direct the Board to study this area and report to the Monitoring Committee."). *Id.*

provides these facilities for *all* its citizens and it has not met its burden under *Brown* to take affirmative steps to dismantle its prior *de jure* system when it perpetuates a separate, but “more equal” one.²⁶⁵

Justice White’s admonition might sound like the death knell for historically black colleges, but his words must be understood in context. Whether all universities within a system of higher education can continue to exist requires a careful evaluation of the general principle of *Fordice*. Within the *Fordice* analysis, it must be considered whether the racial identifiability of universities within a system, is a vestige of the prior *de jure* system, thereby channeling student choice and continuing the prior *de jure* effect. If so, there must be a determination as to whether the continued existence of all universities within the system is educationally justifiable. Closure or merger of any racially identifiable institution is not a required *Fordice* remedy if its continued existence is educationally justifiable.²⁶⁶

Politically and fiscally, however, historically black colleges and universities are particularly vulnerable under the “educationally justifiable” portion of the *Fordice* analysis. Years of inequitable state funding for hiring faculty, capital improvements, and competitive programmatic offerings hampered the educational competitiveness of historically black colleges.²⁶⁷ Inadequate funding also had an effect on student teacher ratio in the classroom, as well as the ability of the institutions to effectively recruit the best students.²⁶⁸ With these factors in mind, a sound, fair and equitable desegregation plan should not expect historically black institutions to bear the full brunt of desegregation remedial orders through their merger and closure.²⁶⁹ Neither the Louisiana nor the Mississippi Settlement

265. *United States v. Fordice*, 505 U. S. 717, 743 (1992) (emphasis added).

266. *Id.* at 743 (determining that the fact that “an institution is predominantly white or black does not in itself make out a constitutional violation”).

267. *Responding to the Needs of Historically Black Colleges and Universities: Hearing Before the H. Subcomm. on 21st Century Competitiveness and the H. Subcomm. on Select Educ. of the Comm. on Educ. and the Workforce*, 107th Cong. 10 (2002) (opening statement of Rep. Robert Scott); *Id.* at 39-41 (statement of Michael Lomax on capital improvement and funding problems of HBCUs); LORENZO MORRIS, *ELUSIVE EQUALITY: THE STATUS OF BLACK AMERICANS IN HIGHER EDUCATION* 193-98 (1979).

268. See FRANK BOWLES & FRANK A. DE COSTA, *BETWEEN TWO WORLDS: A PROFILE OF NEGRO HIGHER EDUCATION* 235 (1971) (noting poor conditions in black colleges and universities with respect to education); see generally *Responding to the Needs of Historically Black Colleges and Universities*, *supra* note 267; see also Michael Nettles et. al, *Student Retention and Progression: A Special Challenge for Private Historically Black Colleges and Universities*, in *PROMISING PRACTICES IN RECRUITMENT, REMEDIATION, AND RETENTION: NEW DIRECTIONS FOR HIGHER EDUCATION* 52 (Gerald H. Gaither ed., 1999).

269. In *Fordice*, Justice Thomas speaks to the educational value of the historically black

Agreement resulted in the closure of any historically black institution. Whether the plans have resulted in "black enclaves by private choice" or institutions which are now "just universities," requires a critique. Some theorize that the very existence of the historically black college is antithetical to the existence of a unitary system of higher education.²⁷⁰ If *Brown* said that "separate is inherently unequal," the logic follows that a *Plessy* created historically black school would be an unconstitutional entity. To the contrary, the existence of historically black universities within a system of higher education is no more unconstitutional than is the existence of historically white universities. Rather, the question is whether the state's current policies are deeply "rooted in prior officially segregated system[s] that serve to maintain the racial identifiability of its universities [and whether those policies] can practicably be eliminated without eroding sound educational policies."²⁷¹ Having been transformed through the lens of *Fordice*, historically black colleges can command their rightful place as part of an array of higher educational choices offered by the state.

A proper focus on the *Fordice* construct suggests that those drafting the Louisiana and Mississippi plans should have been extremely hesitant to consider merger or closure as a viable remedy

college in a concurring opinion:

[Historically black colleges] have succeeded in part because of their distinctive histories and traditions; for many, historically black colleges have become "a symbol of the highest attainments of black culture."... Obviously, a State cannot maintain such traditions by closing particular institutions, historically white or historically black, to particular racial groups. Nonetheless, it hardly follows that a State cannot operate a diverse assortment of institutions—including historically black institutions—open to all on a race-neutral basis, but with established traditions and programs that might disproportionately appeal to one race or another. No one, I imagine would argue that such institutional diversity is without sound educational justification, or that it is even remotely akin to program *duplication*, which is designed to separate the races for the sake of separating the races.

Fordice, 505 U.S. at 748-9 (Thomas, J., concurring).

270. See Robert Davis, *Diversity: The Emerging Modern Separate But Equal Doctrine*, 1 WM. & MARY J. WOMEN & L. 11, 49-51 (1994) (characterizing *Fordice* as "[holding] open the separate but equal door . . . to provide educational justifications for maintaining [racially identifiable] institutions for the sake of diversity."). But see, Wendy Scott Brown, *Race Consciousness in Higher Education: Does "Sound Educational Policy" Support the Continued Existence of Historically Black Colleges?*, 43 EMORY L. J. 1, 17-8 (1994) (challenging the notion that historically black colleges can not survive after *Fordice*). Professor Scott Brown suggests that a proper conceptualization of the *Brown* mandate of equal educational opportunity, as interpreted by *Fordice*, centers the discussion on the needs of African-American students and the Black community, thus harmonizing the tension between the development of sound educational policies and the achievement of equal educational opportunity. *Id.*

271. *Fordice*, 505 U.S. at 743 (O'Connor, J., concurring).

for resolving lingering effects of prior discrimination. A truly progressive and effective desegregation plan in both states should have accounted for the successes the historically black institutions experienced despite the disparities in funding they lacked. The settlement processes in both states reflect these considerations. Both plans valued the contribution of their respective historically black institutions by defining their institutional missions consistent with *Fordice*, thereby exposing the institutions' educational justifiability and eliminating the necessity of mergers or closures. Once the *de jure* segregative missions of the institutions were properly deconstructed, all of the retained institutions and programs necessarily required enhancement. At this juncture, the Mississippi and Louisiana historically black colleges could join as full partners in joint and cooperative relationships with other universities within the states' respective higher education systems. Hence, their educational justification was fulfilled.²⁷²

The Louisiana Settlement Agreement was very interesting concerning the question of the maintenance of its historically black colleges as important constituents in a diverse assortment of institutions within its system of higher education. Under the terms of the Settlement Agreement, the court retained jurisdiction in order to enforce the terms of the agreement.²⁷³ The court *was not* authorized to order "any remedial action different from that set forth in the Settlement Agreement."²⁷⁴ A careful analysis of the Agreement, however, reveals a requirement that the *Fordice* formulary was to be applied to the program duplication factor.²⁷⁵ Therefore, if the system is found out of compliance with the *Fordice* standard respecting program duplication, the court has the power to design its own remedy for compliance. Until the district court releases the system from oversight, a merger remedy like the one previously proposed but rejected by Judge Schwartz, is still available to the court, irrespective of the terms of the Agreement.

In crafting the 1989 Master Plan for desegregation in Louisiana, the Special Master focused on program duplication in evaluating the presence of two state-supported law schools in Baton Rouge, Louisiana as a target for remedial action. This was three years ahead of the Supreme Court's identification of the factor as relevant in *Fordice*.²⁷⁶ The Special Master identified the duplicate programs

272. S. EDUC. FOUND., *supra* note 190, at xvii (suggesting advancements in black institutions to enhance education levels).

273. 1994 Louisiana Settlement Agreement, *supra* note 177, at 30-31.

274. *See id.* at 31.

275. *See id.*

276. *United States v. Louisiana*, 718 F. Supp. 499, 513-514 (E. D. La. 1989). The Special Masters Report stated:

as a vestige of the prior *de jure* system and the remedy selected and ultimately adopted by the court was the merger of Southern University Law Center into the LSU Law Center with the LSU Law Center as the surviving institution.²⁷⁷ This proposal of merger is an example of a common perception of the effects of desegregation remedies stemming from the elementary and secondary cases, as well as the higher education context. The criticism is a simple one evolving from desegregation efforts during the early years of *Brown* implementation which recognizes that the "costs and burdens of desegregation [were] often disproportionately borne by African-American communities."²⁷⁸ In this light, the loss of a *professional school* as a result of the Southern/LSU merger would be an even greater reminder the early post-*Brown* years.²⁷⁹ This merger remedy became the lightning rod for a very contentious debate between the

In cataloguing the problems associated with unwarranted duplication of programs, legal education in Louisiana looms large. There are two state supported law schools in Louisiana, Southern Law Center and the LSU Paul Hebert Law, both located in Baton Rouge. In terms of racial identifiability and academic achievement, they present remarkably different pictures. Southern Law Center is desegregated, with a student body 58 percent black and 42 percent white and a faculty, which is virtually 50/50. LSU Law Center on the other hand has a minuscule percentage of black students during the period of the Settlement Agreement, it ranged from 1.9% to 0.8%. In 1988, it was only three percent. Moreover, the Louisiana bar passage rate at LSU Law Center has averaged about 90% over the last five years, whereas at Southern Law Center it is under 50 percent. LSU Law School is a more successful law school from that perspective, but Louisiana blacks are largely educated at the *inferior* school. Yet, competitive, quality legal education for blacks is particularly important because the ratio because the ratio of black lawyers to the black population is very low, and law degrees are often recognized as an access point to political and economic power.

Id. at 513 (emphasis added). The report suggested an affirmative action program of a "ten percent category of admissions exceptions" in order to "increase the diversity of LSU Law School," as well as scholarships for black students and serious recruitment efforts. *Id.* at 513-14; see also, Susan Finch, *Desegregation Saga Spans Four Decades*, TIMES-PICAYUNE, Dec. 24, 1992, at A1. (chronicling the decades old Louisiana higher education desegregation case). The trial court appointed Paul Verkuil, then President of the College of William and Mary, and former Dean of the Law School at Tulane University Law School, as Special Master in the Louisiana case. *Id.*

277. *United States v. Louisiana*, 718 F. Supp. at 514. The Special Master reported: "[A]s long as the two institutions of disparate quality exist, the State will continue to produce a *secondary class* or lawyers unable to compete fully in the professional context [O]ver the next five years, the Board must develop a plan of merger of the two schools." *Id.* (emphasis added). The court's final order required the merger of "Southern Law Center into the LSU Law Center." *Id.* (emphasis added).

278. Alfreda A. Sellers Diamond, *Becoming Black in America*, 67 MISS. L.J. 427, 458 n.133 (1997).

279. The immediate post-*Brown* period witnessed the reassignment or dismissal of scores of black educators. In 1955 it was reported that as many as 6,000 black teachers and principals were dismissed from public schools in southern states. See *id.*

parties because the African-American legal community was vehemently opposed to it.²⁸⁰ Fortunately, after hearing further evidence in the matter, the trial court reversed itself on the merger order.²⁸¹ Nevertheless, within the confines of the implementation of the Agreement, it has become incumbent on Southern University Law Center to pay particular attention to this *Fordice* factor, because it is largely perceived as the "duplicate school."

Like other historically black institutions, the casting of Southern University Law Center as the "inferior school . . . produc[ing second class lawyers]" by the Special Master and its historical inferior treatment by the state, continued as a background premise, producing calls for justification by the school's detractors and defensive-minded suspicion by its supporters.²⁸² Although the *Fordice* question considers the entire higher education system, popular perception suggests that the subordinated entity, in this case Southern University Law Center, would be the most vulnerable of the two geographically proximate state law schools. Thus, educational justifiability has become the linchpin of its remedial focus. The Agreement required Southern University Law Center to "provide additional opportunities to enhance the skills of at risk students and to provide opportunities for law school attendance presently not available in the Baton Rouge area."²⁸³ The state

280. When the merger of the two law schools was originally announce as a remedy, the Louis A. Martinette Legal Society wrote to the district court incensed with the court's characterization of Southern University Law Center as "an inferior school that produces a secondary class of lawyers." John LaPlante, *Black Lawyers Liken Judges' Reasoning on Law School Merger to That of Bigots*, BATON ROUGE ADVOC., July 27, 1989, at 1B; John LaPlante, *Judges Get First Formal Bids to Halt Colleges Merger*, BATON ROUGE ADVOC., Aug. 1, 1989 at 1A; *Court Nixes SU Appeal on 1 Board*, BATON ROUGE ST. TIMES, Aug. 5, 1989, at 1A. But see Lisa Frazier, *La. Rights Group Calls For Universities' Merger*, TIMES-PICAYUNE, Sept. 22, 1992, at B4; Scott Dyer, *Judge Appears To Be Retreating From Merger*, BATON ROUGE ADVOC., Nov. 6, 1992, at 1-2B; Joe Gyan, Jr. *Caucus Opposes Closing Historically Black Colleges*, BATON ROUGE ADVOC., Dec. 5, 1992, at 9D, 9S.

281. *United States v. Louisiana*, 811 F. Supp. 1151, 1160 (E. D. La. 1993). The district court reversed the merger order after receiving evidence that Southern University was one of the most desegregated institutions in the state's higher education system. *Id.* "[T]he evidence submitted to the Court demonstrated that: (1) the school is fully integrated with a current student racial composition of 53% blacks and 47% whites; (2) the student/faculty ratio, 17:1, is within acceptable limits; (3) there has been a marked improvement in the bar passage rate among Southern law students; (4) the library facilities are in compliance with ABA standards; and (5) the physical facilities are undergoing extensive renovation." *Id.* at 1160 n.54.

282. *United States v. Louisiana*, 718 F.Supp. at X (adopting Special Master's Report as its order); see also *infra* Part VI.

283. 1994 Louisiana Settlement Agreement, *supra* note 177, at 19-20. Respecting program duplication and program differentiation, the Louisiana Settlement Agreement required Southern University Law Center to institute a four-year part-time Juris Doctorate Program. *Id.* at Appendix H, 11-12. The establishment of this program not

promised to “(1) improve the quality of [its] physical facilities and academic offerings; (2) articulate fundamental differences in the mission of the [two law schools]; [and] (3) increase access to LSU Law Center.”²⁸⁴ With respect to the other historically black institutions within the Louisiana higher education system, the plan addressed the program duplication of proximate institutions by redefining their missions and by implementation of the four-step plan contained in the Board of Regents 1993 Master Plan.²⁸⁵

only manages the *Fordice* factor of program duplication, it also differentiates Southern University Law Center’s mission from that of the Paul M. Hebert Law Center at Louisiana State University. The implementation history of the Settlement Agreement over the last nine years suggests that Southern University Law Center will have met its responsibilities under the Settlement Agreement at the running of the term of the Settlement Agreement. In 1996, the Monitoring Committee commended Southern University Law Center’s progress in removing its probationary accreditation status with the American Bar Association. See Second Annual Evaluation, *supra* note 251, at 27-29. The Monitoring Committee has made no comments in its Conclusions and Recommendations on Southern University Law Center’s progress under the Settlement Agreement since 1996. The text of the 1996-1997 Monitoring Committee’s report acknowledges Southern University Law Center’s progress with regard to faculty salaries and faculty hiring, bar examination preparation, curriculum expansion, capital outlay improvements, and academic assistance for at risk students. *Id.* Southern University Law Center has differentiated its program offering from LSU Law Center through the institution of a part-time day program in 2000 and a part-time evening program in 2004, thus creating the only state-supported part-time law school offering. Interview with Elaine Simmons, Registrar, Southern University Law Center in Baton Rouge, Louisiana (Jan. 22, 2007); see also Catalog, Southern University Law Center, 2006-2008 at 40.

284. 1994 Louisiana Settlement Agreement, *supra* note 177, at Appendix H, 1.

285. *Id.* at 17-18. The CIP (Classification of Instruction Programs) is the organizational classification system used by the National Center for Educational Statistics in collecting, organizing and reporting survey data. See NATIONAL CENTER FOR EDUCATION STATISTICS, Classification of Instructional Programs: 2000, <http://nces.ed.gov/pubs2002/cip2000>. There are six categories of Southern Regional Education Board classifications for four-year universities and colleges and they are very important within the state’s assignment of a university’s mission status. S. REGIONAL EDUC. BD., EDUC. DATA, INST. CATEGORIES, <http://www.sreb.org> (follow “Post-secondary Education” hyperlink; then follow “Institutional Categories” hyperlink; then follow “Criteria and Definitions” hyperlink). The Four-Year 1 category is the highest ranking; the Four-Year II University is the second-highest rating, and so on. *Id.* Under the plan, the state aspired to move Southern University, Baton Rouge from a Four-Year III University to a Four-Year II University. 1994 Louisiana Settlement Agreement, *supra* note 177, at 4. This goal required Southern University to end its open admissions policy in the year 2000. *Id.* The Southern University campus at Shreveport/Bossier City is a Two-year I College and it was allowed to maintain its open admissions status under the Settlement Agreement. *Id.* at 6. By contrast, Louisiana State University maintained its status as a Four-Year I institution and the state’s flagship university. *Id.* at 3-4. Under the Agreement, Grambling State University was a Four-Year IV University and it was allowed to maintain its open-admissions status under the Settlement Agreement. *Id.* at 6; see also Ninth Annual Evaluation, *supra* note 251, at 5. Southern University, New Orleans is a Four-V University and it was allowed to maintain its open-admissions status under the Settlement Agreement. *Id.* at 5. But see BD. OF REGENTS STATE OF LA., MASTER PLAN FOR

F. Financial Support for Implementation

The settlement process in *Ayers* was contentious and resulted in no unanimous viewpoint on its funding provisions.²⁸⁶ The Agreement was one large funding package binding the State of Mississippi to the terms of the Agreement for another seventeen years. Criticisms were numerous: the Agreement was too expensive;²⁸⁷ the funding requirements would restrict the future choices of state policymakers as to structural changes to the state's higher education system;²⁸⁸ the funding decisions within the plan were the result of a politicization of the litigation process, rather than the result of sound educational planning;²⁸⁹ expansion of the budgets for the historically black colleges supported program duplication in derogation of the law of *Fordice*;²⁹⁰ and finally, the state's fiscal situation in the future might result in an inability to comply with funding mandates under the plan.²⁹¹ The Agreement was appealed by some of the private plaintiffs, alleging that the state of Mississippi had not complied with Title VI in its attempts to dismantle its prior *de jure* system of higher education.²⁹² The appellants' primary criticism of the Agreement was its insufficient financial support for historically black colleges.²⁹³ Additionally, appellants were critical of the requirement that ten percent other-

PUBLIC POST-SECONDARY EDUC. (2001), available at <http://www.regents.state.la.us/pdfs/Planning/masterplan2001.pdf>, regarding Louisiana Board of Regents Master Plan modification of open admissions status of Grambling State University and Southern University New Orleans.

286. *Ayers v. Musgrove*, No. 4:75CV009-B-D, 2002 WL 91895, at *3 (N.D. Miss. Jan. 2, 2002). Judge Biggers' opinion reflected the general contentiousness of the Agreement:

"University professors and administrators have testified in favor of the Proposal. University professors and administrators have testified against the Proposal. Members of the Mississippi Legislature have testified in favor of the Proposal. Members of the Mississippi Legislature have testified in opposition to the Proposal. Education experts from outside the State, with no vested interest in any of the universities in this State, have testified in favor of and in opposition to the Proposal. Ordinary citizens of the State who hold no elected or appointed offices and who are not in the field of education, but who are interested as citizens and taxpayers, have expressed strong views on the issue."

Id.

287. *See id.*

288. *See id.* at *4. For example, should the state of Mississippi decide that it would want to close or merge institutions based on current fiscal necessity, the Settlement Agreement in *Ayers v. Musgrove* would prevent it from doing so until a passage of seventeen years from the implementation of the Agreement. *See id.*

289. *See id.*

290. *See id.* at *4 n.7.

291. *Id.* at *4.

292. *Ayers v. Thompson*, 358 F.3d 356, 359-60 (5th Cir. 2004).

293. *See id.* at 370.

race student enrollment must be achieved and maintained by the historically black colleges before the institutions could receive control of the public endowment.²⁹⁴ The Fifth Circuit subsequently determined that the district court had not abused its discretion in approving the Agreement.²⁹⁵

Again, the entire focus of the Mississippi Settlement Agreement was the enhancement of historically black colleges in Mississippi in order to create incentives for a greater presence of other-race students. The Ayers Endowment Trust was created for this express purpose.²⁹⁶ Pursuant to the Agreement, if any historically black college or university "attain[ed] a total head count other-race enrollment of ten percent and sustain[ed] such a ten percent other-race enrollment for a period of three consecutive years," that college or university would assume control of its pro-rata share of the endowment principal.²⁹⁷ The Agreement provided funding for the

294. *Id.*

295. *Id.* at 376.

296. *Id.* The Ayers Endowment Trust was created under the settlement and it provides for \$70 million in publicly funded money to be created over a 14-year period. The income from the public endowment is to be spent by Alcorn State University, Jackson State University and Mississippi Valley State University for other-race marketing and recruitment, including employment of other-race recruiting personnel and award of other-race student scholarships. Mississippi Settlement Agreement, *supra* note 34, at 9-10. The Agreement ordered the creation of a \$35 million privately funded endowment to be used by Alcorn State University, Jackson State University and Mississippi Valley State University for the same purposes as the public endowment. *Id.* at 10. A committee staffed by the Presidents of the three historically black colleges, Commissioner of Higher Education, two Board of Trustee Members, and an additional designated member manages the Endowment. The Board of Trustees maintains control of the Endowment until other-race enrollment goals are met by the historically black colleges. *Id.* at 9-12. If the targeted enrollment figures are not reached by the 2018, a yearly evaluation reflecting the good faith efforts to reach the target will allow the colleges to receive the endowment income. *Id.* at 11-12.

297. *Id.* at 10. Once the historically black college attains control over the endowment principal, it attains the discretion to invest the principal and spend the income for sound academic purposes such as faculty compensation, academic program enhancements and student scholarships. *Id.* Nowhere in the Settlement Agreement, however, do the parties indicate how they arrived at a 10% other-race enrollment level as a benchmark for historically black colleges to reach in order to gain control over the principal of the Ayers Public and Private Endowments. African Americans accounted for 9% of all students in universities in 1980 and 11% of all students in universities in 2000. NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T. OF EDUC., STATUS AND TRENDS IN THE EDUC. OF BLACKS 92 (2003), available at <http://nces.ed.gov/pubs2003/2003034.pdf>. In the 1970s, the Office of Civil Rights believed that it was important that a state-wide desegregation plan have as one of its goals an increase in the number of white students attending historically black colleges. See Revised Criteria Specifying the Ingredients of Acceptable Plans To Desegregate State Systems of Public Higher Education, 43 Fed. Reg. 32, 6656-64 (Feb. 15, 1978). The parties to the Mississippi Settlement Agreement could have used the comparable numbers of African-American students on historically white campuses as a

improvement of academic²⁹⁸ and special summer programs,²⁹⁹ capital improvement funding,³⁰⁰ special Ayers Funding from the state legislature spanning a seventeen-year period,³⁰¹ and an elevation in status for Jackson State University.³⁰²

The funding provisions in the Louisiana Settlement Agreement were obligatory upon the state only for the duration of the Agreement. Therefore, with the expiration of the Agreement in 2005 came the expiration of all Agreement-mandated funding of its special programs.³⁰³ The funding structure supported programmatic enhancements for the historically black colleges, and it supported other-race graduate scholarships at historically white colleges as well.³⁰⁴ All funding provisions in these categories which

benchmark for the number of white students to set as a target goal on historically black campuses. The relative percentage of African-American students at historically white universities has varied over the last several years from single digit lows at Mississippi University for Women to well over half the student body at Delta State University:

	2002	2003	2004
Delta State University	54%	57%	69%
Mississippi State University	23%	24%	24%
Mississippi University for Women	4%	4.5%	4.9%
University of Mississippi	15%	16%	16%
University of Southern Mississippi	32%	33%	36%

See IHL Miss. Bd. of Tr. of State Institutions of Higher Learning, Miss Pub. Univs., Fall 2006 Enrollment Fact Book & Ten-Year Enrollment Comparison & Selected Information on Diversity (2006), available at <http://www.ihl.state.ms.us> (follow "Research & Planning" hyperlink; then follow "The Fall Enrollment Factbook-2006 Fall Factbook"). Comparatively, white enrollment at the historically black colleges during the same period did not approach the same percentages. *Id.*

298. The state promised to spend \$246 million for new academic programs at Alcorn State University, Jackson State University and Mississippi Valley State University. These programs are mandated to comply with the *Fordice* requirement of sound educational justification and the desegregation goals *Ayers v. Fordice*. Mississippi Settlement Agreement, *supra* note 34, at 5-8.

299. This portion of the settlement provides \$6.25 million to be spent for qualifying students to attend summer developmental education classes. *Id.* at 4-5.

300. The state promised to spend \$75 million for new construction and physical renovations at Alcorn State University, Jackson State University and Mississippi State University. *Id.* at 12-14; see Michael A. Fletcher, *Mississippi Reaches \$500 Million Settlement in Desegregation Case*, WASH. POST, Apr. 24, 2001, at A1.

301. "[S]pecial Ayers funding" is required for implementation of every facet of the agreement as well as the funding of the summer developmental programs, academic programs, public endowment and capital improvements required under the Settlement Agreement. Mississippi Settlement Agreement, *supra* note 34, at 14-17.

302. *Id.* at 17-18. The Settlement Agreement provided that Jackson State University be designated a "comprehensive university." *Id.* at 18.

303. See Tenth Annual Evaluation, *supra* note 32, at i.

304. See 1994 Louisiana Settlement Agreement, *supra* note 177, at 13-14, 21-22. Under the Louisiana Agreement, the state legislature committed \$48 million in spending for

have not become self-sustaining are at risk for discontinuance.³⁰⁵

G. Accountability Measurements and Overall Assessment to Date

The Settlement Agreement in *United States v. Louisiana* completed its ten-year term under the supervision of a Monitoring Committee.³⁰⁶ The Committee produced ten annual evaluations of the implementation of the Agreement.³⁰⁷ The parties to the Mississippi Settlement Agreement maintain contractual rights to seek specific performance of the contract pursuant to the terms, but no independent non-partisan monitor evaluates progress under the Agreement. The only semblance of an accountability measure is the annual disclosure provided by the Mississippi Board of Trustees of State Institutions of Higher Learning to the private plaintiffs and counsel for the United States.³⁰⁸ The annual report is a factual disclosure detailing compliance with the critical portions of the Agreement.³⁰⁹ It is not evaluative, reflective or critical. As of the

programs in the ten-year plan. The Southern University Board of Supervisors was allocated \$34 million for programmatic enhancement, development and implementation with an annual allowance of \$4.1 million. The University of Louisiana system was allocated \$14 million for programmatic enhancement, development, and implementation for Grambling State University. *Id.*

305. The Louisiana higher education system suffered significant budget cuts because of the significant economic downfall suffered by the state because of Hurricane Katrina. The full effect of these cuts and their effects on programs implemented under the Settlement Agreement are not known as of the submission of this article. *See id.* at 13-17, 20-24, 27. Louisiana lawmakers approved a bill imposing large budget cuts on higher education. Karin Fischer, *Louisiana Legislature Imposes \$77-Million in Cuts on State's Colleges and Students*, THE CHRON. OF HIGHER EDUC., Nov. 23, 2005. In the *Final Evaluation of the Desegregation Settlement Agreement* the Monitors stated:

If Louisiana can continue to fund its institutions of higher education adequately, and assuming that the equitable patterns of funding established during the period of the Settlement Agreement are sustained, students will get good educational opportunities where ever they go But there is a wildcard, and its name was Katrina In our judgment, these questions should not be addressed in evaluating the actions taken under the terms of the Settlement Agreement.

Final Annual Evaluation, *supra* note 101, preface.

306. *See, e.g.*, Tenth Annual Evaluation, *supra* note 32, at i-ii.

307. *Id.*

308. *Id.* at 24.

309. Disclosure requirements mandated by the Agreement include disclosure of "line items" reflecting: "(i) *Ayers* bond revenues and settlement funds requested; (ii) *Ayers* bond revenues and settlement funds obtained; (iii) *Ayers* bond revenues and settlement funds expended; (iv) institutional enrollments by race at each public university; (v) by race and university, the number of participants in the summer program, the number of participants satisfactorily completing the program, and the number of successful

completion of this article, only one report has been generated under the Mississippi Settlement Agreement.³¹⁰

The 1994 Louisiana Settlement Agreement differed from its 1981 predecessor in that the 1994 Agreement contained no numerical goals for proportional enrollment of other-race enrollment in the historically black and the historically white institutions.³¹¹ Similarly, the 2001 Mississippi Settlement Agreement contained no numerical goals but focused on institutional enhancements and incentives for attracting other-race students to historically black campuses.³¹² The attainment of specific enrollment numbers was eschewed in both Agreements because the parties saw them as a hindrance to the successful implementation of a plan. Since the standard for performance under both Agreements hinges on a determination of substantial performance, a challenge to a defendant's performance is not definable with any numerical precision. As long as no party to the agreement complains, the racial identifiability of many of the

participants enrolling in the following fall term; (vi) by race and university, the number of persons receiving funding pursuant to section II of this Agreement, the total amount of funding received by each university and the standards used in distributing the funds; (vii) by university, the facilities projects receiving funding under section V of this Agreement, together with identification of those projects completed; (viii) by university, the academic programs receiving funding under section VI(b) of this Agreement; and (ix) the amount of private endowment raised and the amounts of public and private endowment income distributed to each university pursuant to section IV of this Agreement. Such annual disclosures will address the specified items regarding the immediately preceding fiscal year and will also include a cumulative summary of such items to date." Mississippi Settlement Agreement, *supra* note 34, at 24. Judge Biggers' previous remedial order of 1995 established a three-person committee charged with oversight of implementation. He later reduced the committee to a single monitor responsible for supervising implementation of the court's order. *Ayers v. Thompson*, 358 F.3d 356, 361 n.6 (5th Cir. 2004).

310. See Bd. of Trustees, Institutions of Higher Learning St. of Miss., *AYERS ACCOUNTABILITY MANUAL*, Sept. 15, 2005.

311. Compare 1981 Louisiana Consent Decree, *supra* note 201, at 3-4 (stating: (1) "the proportion of black high school graduates throughout the state who enter public institutions of higher education shall be equal to the proportion of white high school graduates throughout the State who enter such institutions," thus closing a 6.5% statewide differential; (2) the "proportion of qualified black Louisiana residents who graduate from undergraduate institutions in the state system and enter state graduate or professional schools shall be equal to the proportion of qualified white state residents who graduate from state institutions and enter state graduate an professional schools;" (3) Southern University in Baton Rouge and New Orleans as well as Grambling State University were to achieve a white student enrollment of 13.5% by 1987-1988; (4) Louisiana State University in Baton was to achieve an African American student enrollment of 18% by 1987-1988) with 1994 Louisiana Settlement Agreement, *supra* note 177, at 20-22 ("Each state institution shall develop a comprehensive program for recruitment and retention of other-race students.").

312. Mississippi Settlement Agreement, *supra* note 34, *passim*.

institutions in both states can remain with a wink and a nod of the parties. In addition, the aggressive Department of Justice that instituted the Title VI enforcement against the states in the 1960s has been replaced by one that is motivated to clear these cases from the docket.³¹³

The Louisiana Monitoring Committee's tenth report confirms that many important Settlement Agreement initiatives were accomplished. New program implementation at historically black colleges has resulted in the award of 603 degrees during the ten-year period.³¹⁴ Historically black colleges awarded more than \$750,000 in other-race scholarships.³¹⁵ However, all historically black universities within the system reported very low numbers of other-race students actually enrolled.³¹⁶ Other-race scholarships at historically white universities resulted in the award of ninety-seven doctoral degrees during the term of the Agreement.³¹⁷ Most capital outlay projects promised under the Agreement projects were completed.³¹⁸ Program duplication review by the State Board of Regents was completed during the term of the Agreement, resulting in ninety-six programs in the system being merged, consolidated, or terminated.³¹⁹ Program enhancements at the state's historically black colleges were completed during the term of the Settlement Agreement.³²⁰ As mandated by the Agreement, the Louisiana State Board of Regents completed a full evaluation of program duplication in 2001 as part of the plan to end open admissions in four year institutions.³²¹ Open admissions for all four-year

313. HALPERN, *supra* note 125.

314. Tenth Annual Evaluation, *supra* note 32, at i.

315. *See id.* (specifying scholarships were to SUBR and SUNO).

316. *See id.* at 16 (providing statistical chart of "other" race students from 1995 through 2004 attending Louisiana universities).

317. *See id.* at i.

318. *See id.*

319. Second Annual Evaluation, *supra* note 251, at 19. Statewide, seventy-nine programs were terminated and fifty programs were targeted for collaborative liaison between campuses. *Id.* The Settlement Agreement mandated the maintenance of current programs, and the development of new "joint, dual and cooperative" programs between Louisiana State University and Southern University in Baton Rouge, New Orleans and Shreveport. *See* 1994 Louisiana Settlement Agreement, *supra* note 177, at 16-17. These programs were successfully developed during the Settlement Agreement. Tenth Annual Evaluation, *supra* note 32, at i; *see* Second Annual Evaluation, *supra* note 251, at 1, 27.

320. *See* 1994 Louisiana Settlement Agreement, *supra* note 177, at 10-13 and Tenth Annual Evaluation, *supra* note 32, at i. Only one program targeted for development was abandoned. *Id.*

321. *See* BD. OF REGENTS STATE OF LA., MASTER PLAN FOR PUBLIC POST-SECONDARY EDUCATION, (2001), available at <http://www.regents.state.la.us/pdfs/Planning/masterplan2001.pdf>.

institutions will end in 2010 when Grambling State University and Southern University in New Orleans, two historically black colleges, will be the last four-year institutions to institute selective admissions requirements.³²²

Significant aspirational goals under the Louisiana Settlement Agreement, however, were not met. Although the state provided funds for historically black colleges in Baton Rouge and New Orleans to improve their Southern Regional Education Board classification during the ten-year term of the Agreement, this goal was not met.³²³ The Agreement provided funding incentives for other-race student enrollment and employment rather than setting numeric goals in these areas.³²⁴ Unfortunately, across the ten-year period, the numbers of entering freshman percentages in universities with selective admissions requirements in many institutions remained largely unchanged.³²⁵ The employment statistics have also remained relatively unchanged.³²⁶

322. After the Board of Regents four step review, the decision was made to eliminate all open admissions requirements in four year institutions. *See id.* at 25-26, 42, 50. Under the original terms of the Settlement Agreement, Grambling State University was allowed to retain its open admissions policy. 1994 Louisiana Settlement Agreement, *supra* note 177, at 6. The question left open by the end of open admissions in four-year colleges in Louisiana is whether this will negatively impact African-American student access to four year institutions. Douglas Laycock, *The Broader Case for Affirmative Action: Desegregation, Academic Excellence, and Future Leadership*, 78 TUL. L. REV. 1767, 1783-84 (2004). *See generally*; Alfred Dennis Mathewson, *The Picture of Equality*, 16 U. FLA. J.L. & PUB. POL'Y 299 (2005).

323. 1994 Louisiana Settlement Agreement, *supra* note 177, at 3-5; Tenth Annual Evaluation, *supra* note 32, *passim*. Geographically proximate, historically white and historically black institutions maintained specific missions under the Louisiana Agreement. In order to eliminate current *de jure* effects of the prior *de jure* system, the historically black schools in two geographical proximate pairings (Southern University, Baton Rouge and LSU, Baton Rouge; Southern University, New Orleans, University of New Orleans), were provided the necessary financial support to move toward a higher SREB classification. *See* Tenth Annual Evaluation, *supra* note 32, at i. Neither university accomplished this goal within the ten-year period. Tenth Annual Evaluation, *supra* note 32, at 3. In the Grambling State University, Louisiana Tech University geographic proximate pairing, Louisiana Tech was committed to changing its SREB status from SREB Four Year III to II status and it reached its goal. *Id.* at 3; 1994 Louisiana Settlement Agreement, *supra* note 177, at 3-5.

324. 1994 Louisiana Settlement Agreement, *supra* note 177, at 20-22.

325. *See, e.g.*, Jessica Fender, *College Decree Results Meager*, THE ADVOCATE, Dec. 4, 2005, at A1, (commenting that "despite court-mandated scholarships, academic programs and recruiting efforts, LSU and Southern University are about as black or white as they were in 1995, when a review panel began tracking their progress.").

326. Tenth Annual Evaluation, *supra* note 32, at 43. In the Tenth Annual Evaluation, the Monitoring Committee commented that "[m]ovement toward increasing the diversity of employees continues to remain minimal." *Id.* A comparison of employees demonstrates largely white employee staffs at historically white colleges and largely black staffs at historically black colleges:

V. Release from Federal Court Oversight: Availability of *Grutter* Affirmative Action in Louisiana and Mississippi

The Settlement Agreement in *United States v. Louisiana* was designed to remedy the vestiges of the state's dual system of higher education by focusing specifically on its university admissions standards, program duplication, and institutional mission assignments. The Settlement Agreement in *Ayers v. Musgrove* focused largely on incentives for the state's historically black institutions to attract other races. The federal court in the Mississippi case has released the state of Mississippi from oversight and the parties in *United States v. Louisiana* look forward to a Declaration of Unitary Status, which will signify closure to the lawsuit and bring final assurance that there are no current effects of past *de jure* segregation causally linked to the prior *de jure* system.

At the point of the Declaration of Unitary Status, the federal court is no longer empowered to issue any orders continuing remedial measures under the Agreement.³²⁷ For example, under the Louisiana Settlement Agreement, the federal court had the power to order race-specific or race-conscious remedial measures to provide other-race scholarships and to hire other-race staff, employees and faculty, and such measures would have been wholly appropriate. Unitary status, however, is antithetical to any arguments that present effects of prior *de jure* discrimination exist. *Race qua race*

Institution	1995			2004		
	White	Black	Other	White	Black	Other
Grambling	74	966	54	83	648	44
La. Tech.	895	203	25	27	212	58
LSU A&M	4356	1149	321	4327	1225	467
LSU-S	265	53	9	287	60	13
UNO	972	288	127	1010	348	104
ULL	1100	356	95	1154	407	103
McNeese	579	132	1	576	150	31
Southeastern	905	169	32	1097	185	53
Nicholls	587	46	14	634	86	24
Northwestern	564	94	21	698	103	31
ULM	992	258	24	870	203	47
Southern A&M	105	86	82	98	1472	71

See Second Annual Evaluation, *supra* note 251, at Appendix G; Tenth Annual Evaluation, *supra* note 32, at 43-44.

327. See Tenth Annual Evaluation, *supra* note 32, at I, 47.

initiatives would most certainly be unconstitutional.³²⁸ The only constitutional use of race outside of a court-ordered desegregation agreement would be its use in *Grutter* affirmative action programs.³²⁹

The United States Supreme Court has said that the attainment of "diversity" in a university student body is laudable, that it can serve as a compelling state interest.³³⁰ The Louisiana Monitors spoke to this issue in their final conclusions and recommendations:

Diversity is important. We trust that all institutions adhere to the admissions criteria framework outlined in the Master Plan requiring that institutions have 15 percent of its entering class set aside for admissions exceptions in compliance with the Settlement Agreement and continue and to pay particular attention to the more aggressive recruitment efforts with respect to other-race faculty, staff, administration and students.³³¹

However, in the state of Louisiana, the use of race-specific student, faculty and employee initiatives post-Declaration of Unitary Status also requires an analysis under Louisiana state constitutional law. I predict that the next round of higher education litigation in the state of Louisiana will include the cases that seek to address a university's attempt to implement *Grutter* diversity initiatives.

Under the Louisiana State Constitution of 1974, a *Grutter* affirmative action program that considers race would raise serious state constitutional questions. The Louisiana Constitution provides:

No person shall be denied the equal protection of the laws. No law shall discriminate against a person because of race or religious ideas, beliefs, or affiliations. No law shall arbitrarily, capriciously, or unreasonably discriminate against a person because of birth, age, sex, culture, physical condition, or political ideas or affiliations.³³²

This provision has been interpreted as exemplary of the concept that "a state constitutional provision can . . . be intended to afford and construed as affording greater protection than its federal

328. See *Regents v. Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

329. *Grutter v. Bollinger*, 539 U.S. 306, 328-340 (2003). In *Grutter*, the Supreme Court found the University of Michigan Law School's admissions program constitutional. Using race as a one of many factors, the plan was narrowly tailored towards to accomplishment of the compelling state interest of diversity. *Id.*

330. *Id.* at 328.

331. Tenth Annual Evaluation, *supra* note 32, at 46.

332. LA. CONST. art. I, § 3 (1974) (emphasis added).

counterpart.”³³³ While the use of race as criteria in an affirmative action program must withstand an evaluation under strict scrutiny under the United States Constitution,³³⁴ Article I Section 3 of the Louisiana State Constitution provides that any use of race results in a complete repudiation of the law.³³⁵ If *Louisiana Associated General Contractors v. State of Louisiana* is authoritative in the context of higher education, for example, the Paul M. Hebert Law Center’s attempt to achieve diversity by using race as a factor in admission would likely result in a finding that the admissions process is constitutionally invalid.³³⁶ Thus, now that the Settlement Agreement has expired, African-American enrollment at the flagship law school would be wholly dependent upon race-neutral criteria in the admissions selection.³³⁷

333. *La. Associated Gen. Contractors, Inc. v. La.*, 669 So.2d 1185, 1196 (La. 1996).

334. *Adarand v. Peña*, 515 U.S. 200, 227 (1995) (providing “all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests.”).

335. *La. Associated Gen. Contractors*, 669 So.2d at 1196.

336. In *La. Associated Gen. Contractors*, the Louisiana Supreme Court found the Louisiana Minority and Women’s Business Enterprise Act unconstitutional. 669 So.2d at 1202. The Act contained a set-aside provision allowing a 10% set aside for minority business enterprises and 2% for women’s business enterprises with the concurrence of the commissioner of administration. LA. REV. STAT. ANN. § 39:1955 (1992). Additionally, the Act required each agency to submit strategic plans of compliance and if the agency failed to do so, the Division of Administration was empowered to formulate a strategic plan of compliance for the Agency. LA. REV. STAT. ANN. § 39:1956 (1992). Holding the Act unconstitutional, Justice K. Kimball wrote:

[T]he act provides to members of certain designated races and excludes from members of non-designated races the opportunity to bid on certain contracts and the opportunity to match the lowest bid made by a non-minority bidder and thereby obtain the contract on certain other projects. The set-asides and preferences under the Act clearly discriminate against a person on the basis of race, and the Act, to that extent, is unconstitutional under La. Const. Art. I, Sec. 3.

La. Associated Gen. Contractors, 669 So.2d at 1201.

337. Professor John Devlin of the Paul M. Hebert Law Center of Louisiana State University has critiqued the state Supreme Court’s interpretation of the State Constitution’s equality provision:

[I]n Louisiana . . . the prospect for robust independent state constitution based ‘voice’ in civil rights is poor. There is little organic tradition of constitutional protection of civil rights in this state [T]he Louisiana Constitution as interpreted in [*Louisiana Associated General Contractors*], not only provides no truly independent contribution to debate over civil rights but also, I am sorry to say, creates an additional obstacle to achievement of real world equality for traditionally disfavored groups.

John Devlin, *Louisiana Associated General Contractors: A Case Study in the Failure of a State Equality Guarantee to Further the Transformative Vision of Civil Rights*, 63 LA. L. REV. 887, 889 (2003).

The viability of *Grutter* diversity initiatives in the state of Mississippi, post-Settlement Agreement, is not so clear. The state of Mississippi is one of thirty-five states of the nation whose state constitutions do not contain an equal protection provision.³³⁸ However, the non-existence of an express equal protection constitutional text would not prevent a state from finding an implied understanding of equal protection within another constitutional text. Thus, most states have determined that some source within the state's statutory law or constitution creates a right to equal protection.³³⁹ The state of Mississippi is one of two states where this determination has not been made.³⁴⁰ The Mississippi State Supreme Court has not interpreted the state of Mississippi's due process provision as containing an equal protection component.³⁴¹ Therefore, the question of whether a *Grutter* diversity program violates Mississippi law remains unanswered.

338. See MISS. CONST. art. 3, §§ 5-32. The state constitutions of California, Connecticut, Georgia, Hawaii, Louisiana, Maine, Michigan, Montana, Nebraska, New Mexico, New York, North Carolina, Rhode Island and South Carolina contain equal protection provisions similar to that contained within the United States Constitution; the remaining states do not. See Jeffrey M. Shaman, *The Evolution of Equality in State Constitutional Law*, 34 RUTGERS L.J. 1013, 1055 n.292 (2003).

339. See *Bolling v. Sharpe*, 347 U. S. 497 (1954). *Bolling* was the companion case to *Brown v. Board of Education* wherein the Supreme Court required the District of Columbia public schools to desegregate and established that the Fifth Amendment to the United States Constitution contained an Equal Protection component:

[T]he concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The 'equal protection of the laws' is a more explicit safeguard or prohibited unfairness than 'due process of law,' and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process.

Id. at 499.

340. Randal S. Jeffrey, *Equal Protection in State Courts: The New Economic Equality Rights*, 17 LAW & INEQ. 239, 251 n.57 (1999) (asserting "Delaware and Mississippi are the only two states whose courts have not held that their constitutions guarantee equal protection.").

341. *Id.*

VI. Epilogue: Justice Scalia's Prediction in *United States v. Fordice*: Racial Identifiability, the Integrative Ideal and the Limits of the Law

*If you build it . . . they might not come!*³⁴²

Justice Antonin Scalia was the lone dissenter in *United States v. Fordice*.³⁴³ His dissent has been largely ignored by scholars, possibly because of the strength of the 8-1 opinion. Justice Clarence Thomas suggested that there could be no serious debate respecting the authoritativeness and appropriateness of the Court's decision.³⁴⁴ However, Justice Scalia's opinion suggested that the *Green* standard, as applied by the majority, was inappropriate in the higher education context.³⁴⁵ According to Justice Scalia:

Green . . . has no proper application in the context of higher education, provides no genuine guidance to States and lower courts, and is as likely to subvert as to promote the interests of those citizens on whose behalf the present suit was brought.³⁴⁶

Justice Scalia speculated that the majority's application of *Green* to the higher education context would result in various problems: "[Y]ears of litigation-driven confusion and destabilization in the university systems of all the formerly *de jure* States, that will benefit neither blacks nor whites, neither predominantly black institutions nor predominantly white ones."³⁴⁷

Indeed, Justice Scalia pondered whether the application of *Green* might, in fact, result in detriment to historically black colleges.³⁴⁸ His comment was both perceptive and insightful. System-wide dismantlement poses a very real threat for both historically black and white institutions. While historically black institutions are thought to be the most vulnerable when program

342. See *infra* note 365.

343. See *Fordice*, 505 U.S. at 749 (Scalia, J. concurring in part and dissenting in part). Justice Scalia agreed with the majority that states operating under a prior *de jure* system of segregation in higher education were constitutionally required to "remove all discriminatory barriers to its state-funded universities." *Id.* He also agreed that the State of Mississippi was not constitutionally "compel[led] . . . to remedy funding disparities between its historically black institutions (HBI's) and historically white institutions (HWI's)." *Id.*

344. *Id.* at 749 (Thomas, J., concurring).

345. *Id.* at 749-750.

346. *Id.*

347. *Id.* at 762.

348. See *id.* at 760

merger or closure is used to achieve *Fordice* dismantlement, the elimination of a geographically proximate historically white institution does not necessarily mean that a historically black institution will attract the former's student constituency.³⁴⁹ As between the choice of the *Bazemore* standard and the *Green* standard as announced in *Fordice*, *Green* would have been the only constitutional route through which a true integrationist ideal could be achieved. However, neither whites, nor African Americans want integration, if integration means the loss of institutions either group reveres. And if Justice White's words concerning "black enclaves by private choice" from *Fordice* were anything, they were a signal to those who represented the interests of historically black colleges in both Mississippi and Louisiana that *Fordice* as a tool in the hands of a federal court judge could be risky business for those who were proponents of those interests.³⁵⁰ The litigants in both cases sought to avoid the unpredictability of a judicially drawn remedy.

Regarding the Mississippi case, Justice Scalia may have correctly predicted the results of the desegregation lawsuit. Once the case was remanded to the district court, another nine years passed before the parties reached a settlement.³⁵¹ At the expiration of the Louisiana Settlement Agreement, and approximately five years into the funding provisions of Mississippi Settlement Agreement, many of both states' universities are still substantially identifiable by race.³⁵² Whether erasing the effects of *de jure*

349. See *id.* In the Tennessee desegregation case, the University of Tennessee campus located in Nashville, Tennessee was geographically proximate to the historically black Tennessee State University. As part of the judicially designed remedial plan for desegregation, the court ordered the Nashville campus of University of Tennessee merged into Tennessee State University. White students who had previously attended University of Tennessee, Nashville, opted instead to drive many additional miles to attend Middle Tennessee State University. See *Geier v. Blanton*, 427 F. Supp. 644, 652-53 (M.D. Tenn. 1977); *Geier v. Univ. of Tenn.*, 597 F.2d 1056, 1064 (6th Cir. 1979), *vacated sub nom.*, *Geier v. Richardson*, 881 F.2d 1075 (6th Cir. 1989). See also Matt Pulle, *White Out: The TSU Audits Didn't Focus on Another Problem: The School's Lack of White Kids*, NASHVILLE SCENE, May 6, 2004, where the author notes that although TSU was growing, "white students flocked to MTSU," and Liz Murray Garrigan, *Lightening Up*, NASHVILLE SCENE, Nov. 6, 1997, for a discussion on how TSU administration seem unable to stem the tide of Nashville students who now drive to Middle Tennessee State University in Murfreesboro.

350. See *supra* Part IV E; see *Fordice supra* note 265 and accompanying text.

351. See *Ayers v. Fordice*, 879 F.Supp 1419, 1428 (N.D. Miss. 1995), *aff'd*, 358 F.3d 356, 365 (5th Cir. 2004).

352. In Louisiana:

	2004		
Institution	White	Black	Other
La Tech	68.0%	15.7%	16.2%
LSU A&M	80.9%	8.8%	10.2%
LSU-S	60.2%	30.9%	8.9%
UNO	51.0%	30.5%	18.5%
ULL	74.3%	19.1%	6.6%
McNeese	74.0%	21.4%	4.6%
Southeastern	75.0%	18.9%	6.1%
Nicholls	68.8%	24.7%	6.5%
Northwestern	51.4%	37.7%	10.9%
ULM	74.3%	19.1%	6.6%
Southern A&M	.3%	96.5%	3.3%

Tenth Annual Evaluation, *supra* note 32, at 14-16. In Mississippi:

Institution	Ethnicity	Fall 2003	Fall 2004
Alcorn State University	White	327	25
	Black	2,955	3,080
	Other	0	2
	Not Identified	0	0
Delta State University	White	2,445	2,333
	Black	1,401	1,601
	Other	56	47
	Not Identified	0	0
Jackson State University	White	342	291
	Black	7,310	7,756
	Other	54	72
	Not Identified	0	0
Mississippi State University	White	12,124	11,921
	Black	2,945	2,970
	Other	400	446
	Not Identified	704	597
Mississippi Valley State University	White	96	103
	Black	3,353	3,415
	Other	8	11
	Not Identified	49	92
University of Mississippi	White	11,298	11,737
	Black	1,822	1,917
	Other	319	364
	Not identified	365	479
University of Mississippi Medical Center	White	1,416	1,575
	Black	196	266
	Other	161	162
	Not Identified	152	167
University of Southern Mississippi	White	10,765	10,586
	Black	3,581	3,887
	Other	552	613
	Not Identified	152	167

segregation or creating racial non-identifiability in higher education under the *Fordice* formula was ever attainable is perhaps an unanswerable question considering all the variables. The numbers are most disparate at the historically black colleges and universities. White students still do not readily choose to attend historically black undergraduate universities in any significant numbers when historically white alternatives are available.³⁵³ That many of these universities are still essentially racially identifiable suggests that there may be limits to what higher education desegregation law may achieve as a result of an agreement between the parties and perhaps even at the hand of a federal court judge.

A study conducted in 2004 suggested several reasons why Mississippi's historically black colleges and universities may not experience the significant integration or desegregation sought in its settlement agreement.³⁵⁴ The report was based on the responses of participants in several focus group studies from which white student perceptions of historically black colleges and universities were drawn.³⁵⁵ The responses suggested that the populations surveyed generally perceived the historically black college or university negatively. They voiced concerns about institutional quality,³⁵⁶ academic credibility,³⁵⁷ white minority status on

Bd. of Trustees Institutions of Higher Learning St. of Miss., *AYERS ACCOUNTABILITY MANUAL*, Sept. 15, 2005. Although the effective date of the Mississippi Settlement Agreement was October 18, 2004, after the United States Supreme Court denied certiorari, funding draws based on the Settlement Agreement began in 2002. *See id.*

353. The statistics are different at the only historically black professional school within either the Louisiana or Mississippi system, suggesting that when educational resources are scarce and therefore considered more valuable, white students will compete for limited places and choose to attend historically black institutions. Southern University Law Center is one of the most desegregated institutions within either the Louisiana or Mississippi higher education systems. The Law Center has graduated a total of 3056 students since it opened in 1947. Interview with Elaine Simmons, Registrar, Southern University Law Center in Baton Rouge, La. (Jan. 22, 2007). Of these graduates, 1999 have been African American and 1057 have been white. *Id.* The first white law student graduated from the Law Center in May, 1972. *Id.* However, the total white student graduation statistic represents 34.5% of the Law Center's graduating population and this has been attained within the last 34 years of the Law Center's existence. *Id.*

354. *See* Paul E. Sum, et al., *Race, Reform, and Desegregation in Mississippi Higher Education: Historically Black Institutions after United States v. Fordice*, 29 *LAW & SOC. INQUIRY* 403, 411-16 (2004) (discussing reasons such as perceived quality and academic credibility; social discomfort and minority status; reverse discrimination; and parent and peer pressure).

355. *See id.* at 414.

356. *Id.* at 416 (quoting a focus group participant, "predominantly black schools do not have a reputation in the white community").

357. *Id.* at 417 (finding that "white high school and community college participants generally felt that quality of education was low at the HBIs").

historically black college campuses,³⁵⁸ discriminatory treatment at the hands of African-American students,³⁵⁹ and finally, parental or peer disapproval of the choice of an historically black college.³⁶⁰ The writers commented that the exclusive remedial focus on the historically black colleges might jeopardize the desegregation effort if these attitudes hold true across time.³⁶¹

The results of the 2004 study also suggested the *Fordice* settlement might be premised upon the incorrect assumption that current African-American student choice of historically black institutions is necessarily connected to the prior *de jure* segregation;³⁶² that the responsibility for desegregation may be unfairly and disproportionately borne by the historically black colleges;³⁶³ and that resultant failure to achieve projected settlement other-race percentages may portend danger for Mississippi historically black colleges in the future.³⁶⁴ These observations may not only be germane to the future of black colleges in Mississippi. They may pose important questions about the future of the historically black college in general, but only if historically black institutions view themselves as passive actors, waiting for other-race students to realize their presence, their value, and their importance as a one of many actors in their state's diverse array of offerings of colleges and universities.

If diversity in the student body is an important goal for the historically black college, then the observations of the study can be the foundations of another conversation. Perhaps the historically black college can take the last breath of *Fordice* as the moment within which it re-conceptualizes, redefines, and moves itself forward. The "Field of Dreams" approach for diversity enhancing initiatives at historically black colleges under *Fordice* probably does not work and the experiences of the historically black colleges under both Agreements are probably evidence of this conclusion.³⁶⁵ In the

358. *Id.* at 419 (quoting focus group participant who described friend's experience of attending historically black institution, "[h]e said he was like the only white person there, and he felt so stupid").

359. *See id.* at 422-23 (describing general sentiment among focus group participants were that white students would not be welcomed by black students at historically black colleges).

360. *See id.* at 424-25 (quoting focus group participant, "I don't have a problem with black people, but the people I'm around do.").

361. *See id.* at 433.

362. *See id.* at 429.

363. *See id.* at 430-431.

364. *See id.* at 432-433.

365. The 1989 movie, *Field of Dreams* opens with Ray Kinsella's dream voice telling him that if he builds a baseball diamond in his cornfield, the Chicago Black Sox team, and more specifically, the much maligned Shoeless Joe Jackson, will come and play: "If

twenty-first century, where *Fordice* is ending, and *Grutter* diversity work may begin, the efforts of Alcorn State University under the Mississippi Settlement Agreement may demonstrate how the mandatory requirements under *Fordice* might inform promising future *Grutter* work.

Alcorn State University is the only historically black university in the state of Mississippi which has successfully met the three year attainment of ten-percent other-race student enrollment, thereby entitling it to receive its pro-rata share of the principal existing under the public endowment pursuant to the Agreement.³⁶⁶ It was able to accomplish this goal through aggressive marketing and recruitment.³⁶⁷ However, Alcorn State University did not conceive of its other-race recruitment goal as narrowly as the parties to the agreement may have intended. It did not target the same pool of students as had those who conducted the focus group and who seemed to be so negatively predisposed to the idea of attending a historically black college. Its other-race students are not only from the state of Mississippi, they also hail from Australia, Canada, and Russia. As the university converts its *Fordice* work into a diversity project, it moves towards a future where its recruiters also plan to seek out more Hispanic students.³⁶⁸ Alcorn's creative approach to its desegregation work reflects an ultimate truth in the words of the Louisiana Monitors as they closed the Tenth Interim Report to Judge Kurt Englehardt:

[A] Desegregation Settlement Agreement is just another step in the long process of achieving a more just and equitable society. Its effects, and the very substantial financial commitments made by [a state] will prove beneficial only if the behavior that has been engendered during the [agreement] becomes the normative

you build it . . . he will come." *FIELD OF DREAMS* (Universal Pictures 1989).

366. Mississippi Settlement Agreement, *supra* note 34, at 10.

367. See *Alcorn State's Benefits from Ayers Fund Begin: Alcorn State University, Dining Hall Construction*, 22 *DIVERSE ISSUES IN HIGHER EDUC.* 20, 20, Dec. 15, 2005 (stating Alcorn State successfully reached its 10% other-race student goal); see also *Historically Black Alcorn State Univ. Takes Pride in its Growing 'Minority' Enrollment*, *JOHNSON PUB. CO.*, at 22, Apr. 28, 2003 (recruiting international students actively had strong positive effect on meeting desegregation goals).

368. See Kay Mills, *A Mixed Blessing?: Critics Object to Mississippi's Settlement of a 1975 Anti-Segregation Lawsuit Involving the State's 'Historically Black Universities'*, *NAT'L CROSSTALK*, Summer 2004, at 8, available at <http://www.highereducation.org/crosstalk> (follow "Back Issues" hyperlink; then follow "Summer 2004" hyperlink); Sara Hebel, *Alcorn State Meets Nonblack Enrollment Goal Under Desegregation Settlement*, *THE CHRON. OF HIGHER EDUC.*, Nov. 25, 2005, at A33; see also Alcorn State University Five-Year Strategic Plan FY 2008 Through 2012, submitted to: St. of Miss. Bd. Of Tr. of State Inst. of Higher Learning, submitted By: Dr. Clinton Bristow, Jr., President Alcorn State University, Alcorn State, Mississippi 39096-7500, Aug. 1, 2006, at 2-3.

behavior for all those responsible for higher education in [the state].³⁶⁹

But the Monitors' statement may be informed by a fear that fifty-three years after *Brown*, the lack of substantial change in the college racial profiles in many universities in Mississippi and Louisiana might mean that it is impossible to achieve and maintain real integration in the state's institutions of higher learning. Their statement contains sentiments of both hope and doubt. The Monitors hope that the state and its citizens understand that a truly desegregated higher education system, one that is representative of equality of opportunity, is a reflection of the success the project of integration has had in the society of its locus. Their doubts about the normalization of integrative behavior are grounded in the stormy realities witnessed by all of us post-Katrina. The fear is a real one and it is centered on the failures of the interests of the citizenry to converge outside the negative influences of race and class.

369. Tenth Annual Evaluation, *supra* note 32, at 47.