

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

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## I. Introduction

The question of race and its place in American life can appear in the most unpredictable and predictable places. It was unpredictable that we would encounter both the ire and laughter raised in the midst of the Martin Luther King Day 2006 comments of New Orleans Mayor Ray Nagin respecting the will of God in the creation and recreation of New Orleans, Louisiana as a “chocolate city”<sup>2</sup> in the wake of what has been called the worst natural disaster in modern American history - Hurricane Katrina.<sup>3</sup> It was unpredictable that we would witness the immediate post-Katrina pictures of the city of New Orleans across national and international news broadcasts, and that they would be peppered with scenes of the horror of those who did not immediately escape the wrath of the storm. It is true that people from all stripes of life were devastated by the aftermath of the storm. However, the face of the tragedy indelibly etched in the minds of millions was indeed a Louisiana brown, bittersweet chocolate picture.<sup>4</sup> Yet, it was predictable that with the massive exodus of thousands from the city of New Orleans, most of whom were African American, questions of race, as they intersected the social,

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<sup>2</sup>Jarvis DeBerry, *Mayor Steps in It, Totally Deep*, THE TIMES-PICAYUNE, Jan. 20, 2006, at 7. John Pope, *Evoking King, Nagin Calls N.O. ‘Chocolate’ City: Speech Addresses Fear of Losing Black Culture*, THE 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 a 1975 album title “Chocolate City” produced by George Clinton for the funk group Parliament. The lyrics of the song “Chocolate City” were written by George Clinton: “There’s a lot of chocolate cities around. We got Newark, we got Gary. Someone told me we got L.A. But you’re the capital C.C.” Parliament, *Chocolate City*, G. Clinton, W. Collins, B. Worrell, Casablanca Records (1975). The song is about Washington, D.C., where African Americans comprise a majority of the population. However, Clinton’s lyrics suggest that the existence of “chocolate cities” in general 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. *Id.*

<sup>3</sup> See Felicia R. Lee, *After the Flood, the Reckoning*, N.Y. TIMES, Aug. 3, 2006, at E1 (commenting on Spike Lee’s portrayal of despair Hurricane Katrina left upon New Orleans); see also Gary Rivlin, *Some People Return, but Only One in 10 Businesses Has Reopened*, N.Y. TIMES, Apr. 5, 2006, at C1 (discussing difficulties small businesses face in wake of Katrina).

<sup>4</sup> See Leslie Eaton, *Hurricane Aid Finally Flowing to Homeowners*, N.Y. TIMES, July 17, 2006, at A1 (distinguishing hardships Louisiana must endure in drawing back its residents from the lesser troubles affecting Mississippi).

political, economic, and educational future of the city, would arise.<sup>5</sup>

Looming in the wake Hurricane Katrina's wrath was the expiration of the Settlement Agreement in *United States v. Louisiana*,<sup>6</sup> the state's higher education desegregation lawsuit. Concomitantly, in the state of Mississippi, it had not been quite a year since the United States Supreme Court denied certiorari in *Ayers v. Thompson*.<sup>7</sup> The expiration of the Louisiana Settlement Agreement slipped by quietly and was lost in the vortex of the state's tornadic financial crisis caused by Katrina. The impact of expiration of the Settlement Agreement and the pending dismissal of *United States v. Louisiana* from federal court oversight raises questions respecting the future flavor of higher education in the state, but not so brazenly as the Mayor's bizarre comments. Although the questions come *sub voce*, they are present and not unpredictable. This Article seeks to raise some of the predictable questions in the *Louisiana* case, as well as some from the Mississippi case.

The Article will expose the perfect constitutional storm created by the higher educational systems in the nineteen states with prior de jure systems of segregation in higher education. It chronicles the struggles of two states, Mississippi and Louisiana, post-*Brown v. Board of Education*, as they have struggled to reach constitutionally mandated equality of educational services in their respective higher education systems. The Article will specifically compare the histories of the higher education desegregation lawsuits in the states of Mississippi and Louisiana as they traversed decades

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<sup>5</sup> See Michelle R. Smith, *Study: New Orleans Could Lose 80 Percent of Black Population*, BOSTON.COM, Jan. 26, 2006, [http://www.boston.com/news/local/rhode\\_island/articles/2006/01/26/study\\_new\\_orleans\\_could\\_lose\\_80\\_percent\\_of\\_black\\_population](http://www.boston.com/news/local/rhode_island/articles/2006/01/26/study_new_orleans_could_lose_80_percent_of_black_population) (discussing Hurricane Katrina's disproportionate effect on African Americans).

<sup>6</sup> 9 F.3d 1159 (5th Cir. 1993).

<sup>7</sup> See 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, hence the changes in party name reflect this succession: Governors William Allain (1984-1988); Ray Mabus (1988-1992); Daniel Kirkwood

of litigation, and it will compare these states' experiences and progress under settlement agreements. The State of Mississippi has been released from federal court oversight and by the time this Article has been published, it may be as well that the State of Louisiana will have been released from federal court oversight. The populations of the many universities in both states are still largely identifiable as "chocolate" or "vanilla" and so the Article will pose a question not only respecting the implementation of *United States v. Fordice* in both states, but also respecting the value of the "integrative ideal" which sought to convert "chocolate schools" and "vanilla schools" to "just schools."<sup>8</sup>

## **II. The Creation of the Perfect Constitutional Storm: Nineteen States With De Jure Segregation in Education**

The idea of a free and public school education was a new concept for the states of the union during the first half of the nineteenth century.<sup>9</sup> Prior to the Fourteenth Amendment, it was largely a given that if states chose to provide any education for African Americans, it would be provided in separate facilities.<sup>10</sup> The immediate post-Civil War period witnessed the growth and availability of

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(Kirk) *Fordice* (1992-2000); Ronnie Musgrove (2000-2004); Haley Barbour (2004-present). 2004-2008 Miss. Reg. 67.

<sup>8</sup> *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.").

<sup>9</sup> See JAMES D. ANDERSON, *THE EDUCATION OF BLACKS IN THE SOUTH, 1860-1935* 2 (UNC Press 1988) (noting that it was not until nineteenth century's end that "organization, scope, and role of schooling were 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 "new principle" of "free education for all in public, common schools"); LEON LITWACK, *Education: Separate and Unequal*, *EDUCATION IN AMERICAN HISTORY, READINGS ON THE SOCIAL ISSUES* 253 (Michael B. Katz ed., Praeger 1973) (highlighting North's outraged reaction, and subsequent protesting, to notion of equal opportunity for *all* students in early nineteenth century).

<sup>10</sup> LEON F. LITWACK, *NORTH OF SLAVERY: THE NEGRO AND THE FREE STATES, 1790-1860* 113 (University of Chicago Press 1961) (suggesting that whether or not African Americans should be educated, quality and nature of their education, as well as where they should be educated were issues that had to be resolved simultaneously; however, separation in educational facilities was of immediate importance: "possibility that Negro children would be mixed with white children in the same classroom aroused even greater fears and prejudices than those that consigned the Negro to an inferior place in the church, the theater, and the railroad cars. This indeed constituted virtual amalgamation.").

public schools, largely to the exclusion of African American children.<sup>11</sup> Education was a local matter and within the purview of state authority.<sup>12</sup> However, once, the Fourteenth Amendment was ratified by the states, it became a proxy for the threat of interference in all state prerogatives which had previously supported regimes of separateness. In response to the threat, states enacted positive law on the topic.<sup>13</sup> Moreover, to those which were part of the Confederate movement for secession, the Fourteenth Amendment now represented both the stick and the carrot. It was carrot-like in that it represented an opportunity to rejoin the nation on equal footing. It was stick-like also, in that the state's representation in Congress would only be recognized once the state ratified the Fourteenth Amendment.<sup>14</sup>

And yet, there came a richer and more systemized set of Black Codes and Jim Crow laws which would be fortified by the United States Supreme Court's introduction of the new "equality"

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<sup>11</sup> ANDERSON, *supra* note 9, at 2.

<sup>12</sup> ANDERSON, *supra* note 9, at 2.

<sup>13</sup> *See Report of the Senate Committee on Federal Relations*, 1866 TEX. S.J. 421 (noting that after state of Texas legislature voted to reject ratification of the Fourteenth Amendment in 1866, Senate Committee on Federal Relations reported:

[T]he adoption of the [Thirteenth, Fourteenth and Fifteenth] amendments] to the Constitution of the United States are unnecessary and dangerous to the future peace of the Republic; because they are founded and proceed upon the assumption of two propositions, both of which are believed to be false; because these amendment alter the form and fashion of our Government, because they centralize power in the Federal Congress, making the States mere appendages to a vast oligarchy, at the National Capitol;... and at the same time, and by the act, placing it in the power of Congress to clothe the negro with the election franchise"

*Id.*; *see also* WILLIAM COHEN, *AT FREEDOM'S EDGE: BLACK MOBILITY AND THE SOUTHERN WHITE QUEST FOR RACIAL CONTROL 1861-1915* 216-217 (1991) (discussing laws passed by various states, including Mississippi, South Carolina, Alabama, Louisiana, and Florida, regarding miscegenation, school segregation, transportation, and public accommodations).

<sup>14</sup> *See* 14 Stat. 153 (1867), 15 Stat. 6 (1867), 15 Stat. 30 (1867) (discussing 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; required rebel states to ratify Fourteenth Amendment in order to be readmitted to Union).

which was to dominate the twentieth century.<sup>15</sup> A constitutionalized regime of separateness was now sanctioned under *Plessy v. Ferguson*.<sup>16</sup> As part of this regime, the schoolhouse became the situs of more regimented laws governing the separation of the races.<sup>17</sup> Nineteen states of this country share this common history respecting the provision of educational services to their citizenries. They each share a legacy of de jure segregation in education. State constitutional and statutory provisions required the separation in education based on race, in elementary and secondary education, as well as in higher education.

Everyone knows of the southern states' histories respecting the issue. Of the southern states, Alabama,<sup>18</sup> Arkansas,<sup>19</sup> Florida,<sup>20</sup> Georgia,<sup>21</sup> Louisiana,<sup>22</sup> Mississippi,<sup>23</sup> North Carolina,<sup>24</sup> Oklahoma,<sup>25</sup>

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<sup>15</sup> See C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* 22–29 (Oxford University Press 1974).

<sup>16</sup> 163 U.S. 537 (1896).

<sup>17</sup> WOODWARD, *supra* note 15, at 24 (describing public schools as “most conspicuous” aspect of segregation).

<sup>18</sup> See 1831 Ala. Acts Section 10, p. 16. Teaching African Americans was a crime in the State of Alabama:

[A]ny person . . . who shall endeavor or attempt to teach any free person of color, or slave, to spell, read, or write, shall, upon conviction thereof . . . be fined . . . not less than two hundred and fifty dollars nor more than five hundred dollars.

The state ratified the Fourteenth Amendment under a military district legislature in 1868. In August of 1868, the Alabama legislature’s public school enactment required that “in no case shall it be lawful to unite in one school both colored and white children, unless it be by the unanimous consent of the parents and guardians of such children; but said trustees shall in all other cases provide separate schools for both white and colored children. 1868 Ala. Acts 148. The requirement of separation in education based on race was enshrined in the Alabama state constitution in 1875: “The General Assembly shall establish . . . a system of public schools . . . but separate schools shall be provided for the children of citizens of African descent.” ALA. CONST. OF 1875, art. XIII, § 1. The subsequent Constitution of 1901 maintained the separation under different language: “Separate schools shall be provided for the white and colored children and no child of either race shall be permitted to attend the school of the other race.” ALA. CONST. OF 1901, art. XIV, § 256. This section was invalidated by Title VI of the Civil Rights Act of 1964.

<sup>19</sup> The Arkansas legislature first provided for separate educations for African Americans and whites in 1867 after it voted not to ratify the Fourteenth Amendment. The statute provided that: “[N]o negro or mulatto shall be admitted to attend any public school in [the] state, except such schools as may be established exclusively for colored persons.” 1866–67 ARK. ACTS, No. 25, Section 5, p. 100. The state ratified the Fourteenth Amendment in 1868 after it was established as a military district under the First Reconstruction Act. In the same year, the Arkansas Constitution of 1868 provided for the establishment of a system of free public education without a requirement of racial separation. ARK. CONST. OF 1868, art. IX, § 1 (invalidated by Title VI of the Civil Rights Act of 1964). Pursuant to this constitutional mandate the Arkansas state legislature enacted a statute requiring “the establish[ment of] separate schools for white and colored children and youths.” ARK. CONST. OF 1868, art. IX,

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§ 1.

<sup>20</sup> FLA.STAT. VOL. 11, TITLE 25 § 228.09 (repealed 1965) provided:

The schools for white children and the schools for negro children shall be conducted separately. No individual, body of individuals, corporation, or association shall conduct within this state any school of any grade (public, private, or parochial) wherein white persons and negroes are instructed or boarded in the same building or taught in the same classes or at the same time by the same teachers.

F. S.A. Vol. 11, Title XV, Section 239.01 of 1963, created the system of higher education in Florida admitting white males and white females to the University of Florida in Gainesville, and Florida State University in Tallahassee and Florida Agricultural and Mechanical University in Tallahassee to which Black males and females were admitted.

<sup>21</sup>Subsequent to Georgia's ratification of the Fourteenth Amendment on February 2, 1870, the state's statutory law required separation in public education based on race. The law required that: "the children of the white and colored races shall not be taught together in any sub-district of the State." An Act to Establish a System of Public Instruction, October 13, 1870, Public Laws, 1870, p. 49, at p. 57.

<sup>22</sup>The Louisiana Constitution of 1852 provided the public funds for education be given to "...each parish in proportion to the number of free white children between such [school] ages." LA. CONST. of 1852, Title VIII, art. 136. The Constitution was amended in 1868 in response to the Fourteenth Amendment to state:

The General Assembly shall establish at least one free public school in every parish throughout the State, ... All children of this State, . . . shall be admitted . . . in common without distinction of race, color, or previous condition. There shall be no separate schools or institutions of learning established exclusively for any race by the State of Louisiana.

LA. CONST. of 1868, art. 135. The Louisiana Constitution was amended in 1879 to remove the race neutral admissions provisions and instead provided that there would be schools "for the education of all children in the state...." LA. CONST. of 1879, art. 224. This same Constitution provided for the "establish[ment] in the city of New Orleans a university for the education of persons of color . . ." LA. CONST. of 1879, art. 231. The Constitution was revised again in 1898 after *Plessy v. Ferguson* and provided: "There shall be free public schools for the white and colored races, separately established by the General Assembly throughout the State, for the education of all the children of the State." LA. CONST. of 1898, art. 248.

<sup>23</sup> Mississippi's first legislation creating free public education was passed in 1870:

[A]ll the children of this State between the ages of five and twenty-one years, shall have, in all respects, equal advantages in the Public Schools. And it shall be the duty of the School Directors of any District to establish an additional School in any Sub-District thereof, whenever the parents or guardians of twenty-five children of legal school age, and who reside within the limits of such Sub-District, shall make a written application to said Board for the establishment of the same.

1870 Miss. Laws. Lieutenant Governor Ridgley Powers confirmed that the legislation approved of separate education based on race when he declared, "If the people desire to provide separate schools for white and black, or for good and bad children, there is nothing in this laws that prohibits it." 1879 Miss. Laws. The Mississippi statutory law of 1878 was amended to specifically provide: "schools in each county shall be so arranged as to afford ample free school facilities to all the educable youths in that county, but white and colored pupils shall not be taught in the same schoolhouse, but in separate school-houses." 1878 Miss. Laws 103. Still later the state constitution provided that "[s]eparate schools shall be maintained for children of the white and colored races." MISS. CONST. of 1892, art. VIII, § 207.

<sup>24</sup>The North Carolina State Constitution of 1868 was amended to provide for separate education for African Americans after the state ratified the Fourteenth Amendment. It stated: "children of the white race and the children of the colored race shall

South Carolina,<sup>26</sup> Tennessee,<sup>27</sup> Texas,<sup>28</sup> and Virginia<sup>29</sup> have histories of segregation in education.

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be taught in separate public schools; but there shall be no discrimination in favor of, or to the prejudice of either race." Article IX, Section 2. *See* STATES' LAWS ON RACE AND COLOR 329 ( Pauli Murray ed. 1997). The statutory provision establishing public schools required that: "school authorities of each and every Township . . . establish a separate school or separate schools for the instruction of children and youth of each race . . ." 1868-1869 N.C. Sess. Laws 184.

<sup>25</sup> OKLA. CONST. of 1907, art. XIII, § 3. This section provided: "[s]eparate schools for white and colored children with like accommodation shall be provided by the Legislature and impartially maintained." *Id.*

<sup>26</sup> Although the South Carolina Constitution of 1868 stated that public schools were to be "open to all the children and youths of the State, without regard to race or color," the actual practice throughout the state was separation in schools based on race.

A later constitution of 1895 created a system of free public education based on race: "Separate schools shall be provided for children of the white and colored races, and no child of either race shall ever be permitted to attend a school provided for children of the other race. South Carolina State Constitution of 1895, Article XI, Section 7.

<sup>27</sup> *See* 1866-67 Tenn. Pub. Acts 39. Tennessee ratified the Fourteenth Amendment in 1866 and at the same time passed an amendment to the state law providing for public schools:

[T]he Civil District Board of Education, in their respective Districts, and the several other Boards of Education and Directors or other officers . . . shall be, and they are hereby, authorized and required to establish within their respective jurisdictions, one or more special schools for colored children, when the whole number by enumeration exceeds twenty-five, so as to afford them, as far as practicable, the advantages of a common school education . . . but in case the average number of colored children in attendance, shall be less than fifteen for any one month, it shall be the duty of said Board of Education . . . to discontinue said school or schools for any period not exceeding five months at any one time. *Id.*

Additional and subsequent statutory law provided for free public education : "white and colored persons shall not be taught in the same school but in separate schools under the same general regulations as to management, usefulness and efficiency." 1873 Tenn. Stat. 46. Tennessee statutory law was codified in 1873 and the codal provisions for education provided : "The schools for white children, and for colored children, shall be kept separate and apart from each other, and the School Commissioners for each District shall strictly observe this requirement". Tennessee Code of 1873, Section 1001a. Tennessee state constitutional law provided for public education beginning in 1834, creating a "common school fund" for children of the state. Tennessee Constitution of 1834, Article XI, Section 10. In 1870, the state constitution was amended to provide: "No school established or aided under this Section shall allow white and negro children to be received as scholars together in the same school." Tennessee Constitution of 1834, Article XI, Section 12.

<sup>28</sup> *See* TEX. CONST. of 1866, art. VII § 7. Prior to its ratification of the Fourteenth Amendment, the state provided separate education for African Americans through state constitutional authority:

The Legislature may provide for the levying of a tax for educational purposes; provided, the taxes levied shall be distributed from year to year . . . ; and provided, that all the sums arising from said tax which may be collected from Africans, or persons of African descent, shall be exclusively appropriated for the maintenance of a system of public schools for Africans and their children . . . .

*Id.* Texas ratified the Fourteenth Amendment, March 30, 1870. Subsequent constitutional provisions established free public school education and separate but equal education for white and African Americans. *See* TEX. CONST. of 1869, art. IX, § 4. This section required the establishment of a "uniform system of public free schools throughout the State." *Id.* *See* also TEX. CONST. of 1876, art. VII, § 7. This section required: "Separate schools shall be provided for the white and colored children, and impartial provision shall be made for both." *Id.*

<sup>29</sup> The state of Virginia ratified the Fourteenth Amendment in its 1869-1870 session of the legislature. In this same legislative

Maryland<sup>30</sup> and Pennsylvania,<sup>31</sup> both mid-Atlantic states, also maintained de jure segregation in education. Four border states: Missouri,<sup>32</sup> West Virginia,<sup>33</sup> Delaware<sup>34</sup> and Kentucky<sup>35</sup> also required

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session, the state permitted separating races in schools, as it read, “white and colored persons shall not be taught in the same school, but in separate schools.” 1869-70 Va. Acts 259, Section 47. The state provided for public education in the 1867 constitution. *See* 1867 Va. Acts art. VIII, Section 3. It was not until 1902 that the constitutional provision required separation by race. *See also* VA. CONST. of 1902, art. I § 140.

<sup>30</sup> *See* MD. CONST. 1867, art. VIII section 1. Maryland State Constitution of 1867 authorized the establishment of public school education. Pursuant to this constitutional authority the Maryland state legislature provided appropriations for public schools in 1868 for white children between six and eighteen years old. 1868 Md. Laws 8, Section 1. The statute allowed tax money paid for schools by African Americans to be “set aside for the maintaining the schools for colored children . . . .” 1868 Md. Laws 9, Section 1.

<sup>31</sup> Prior to Pennsylvania’s ratification of the Fourteenth Amendment in 1867, the state required separate education based on race by mandating “directors or controllers of the several districts of the State, are hereby authorized and required to establish, within their respective districts, separate schools for the tuition of Negro and mulatto children . . . .” 1854 Pa. Laws 623. The state did not repeal this law until 1881. *See* PA. STAT. § 535 (1700-1897).

<sup>32</sup> At one time Missouri criminalized teaching African Americans: “No person shall keep or teach any school for the instruction of Negroes or mulattoes, in reading or writing in this state.” MO. REV. STAT. 1100 (1856). Once this statutory bar was lifted, Missouri constitutions of 1865 and 1875 required separate schools for children of African descent. *See* MO. CONST. of 1865, art. IX § 2. This provision stated “[s]eparate schools may be established for children of African descent.” *Id.* MO. CONST. of 1868, art. XI § 3. Additionally, the state had a long succession of statutory provisions requiring separate education for African American children. *See* 1889 Mo. Laws 226; 1887 Mo. Laws 264; MO. REV. STAT. § 7052 (1879); 1874 Mo. Laws 163–164; 1869 Mo. Laws 86; 1868 Mo. Laws 170; 1865 Mo. Laws 177.

<sup>33</sup> West Virginia’s state constitution of 1863 ensured free public education reading, “legislature shall provide, as soon as practicable, for the establishment of a thorough and efficient system of free schools.” W. VA. CONST. art. X § 2. Pursuant to this constitutional authority the state legislature created a free public school system with the following provisos:

The township Board of Education are hereby, authorized and required to establish . . . one or more separate schools for free colored children when the whole number by enumeration exceeds 30, so as to afford them, as far as practicable under the circumstances, the advantages and privileges of a free school education . . . but in case the average attendance of free colored children shall be less than 15 for any one month, it shall be the duty of the Board . . . to discontinue said school . . . for a period not exceeding six months . . . .

W. Va. Acts 250. The state ratified the Fourteenth Amendment on January 16, 1867 and the ratifying legislature enacted statutory law on February 27, 1867 which provided that “[w]hite and colored persons shall not be taught in the same school . . . .” 1867 W. Va. Acts 117. The same text was incorporated in the new West Virginia state constitution of 1872. W. VA. CONST. of 1872, art. VII § 8. The *Martin* court held that this state constitutional provision does not conflict with the Fourteenth Amendment. *See* *Martin v. Bd. of Educ.*, 26 S. E. 348, 349 (1896).

<sup>34</sup> *See* DEL. CONST. of 1897, Art. X, Sect. 2. Free public school education was established and maintained under the Delaware State Constitution of 1897 through deceptively neutral language:

[N]o distinction shall be made on account of race or color, and separate schools for white and colored children shall be maintained. STATES’ LAWS ON RACE AND COLOR 71 (Pauli Murray ed. ) citing Delaware State Constitution of 1897, Art. X, Sect. 2.

that blacks and whites be educated separately. Finally, Ohio<sup>36</sup> is the only Midwestern state with this history. With the Supreme Court's imprimatur of *separate* as the constitutional measure of *equality* in *Plessy v. Ferguson*,<sup>37</sup> a firm constitutional basis for the development and maintenance of inferior school services for African Americans was inevitable.<sup>38</sup> This constitutional doctrine was not reversed

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<sup>35</sup> KY. CONST. of 1891, § 187 (requiring equal distribution of school fund and separate schools for African Americans and Caucasians).

<sup>36</sup> A succession of Ohio statutory laws required separate schools based on race. *See* 1847 Ohio Laws 81, 1848 Ohio Laws 17, 1874 Ohio Laws 81.

<sup>37</sup> 163 U.S. 537, 548 (1896).

<sup>38</sup> Although *Plessy* does not use the term explicitly, the case is often cited as announcing the "separate but equal" doctrine. It would not present any problem under the Fourteenth Amendment for states to require that blacks and whites 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 and states were willing to adopt extraordinary measures to maintain separation. For example, some states willingly provided tuition grants to blacks to attend college in states where there were no legal barriers to integrated higher education. The plaintiff in *Pearson v. Murray* wanted to attend law school at the University of Maryland, his home state, but the state law would not allow it. 169 Md. 478, 485 (C.A. Md. 1936). Instead, the state would have been willing to send him to Howard University in Washington, D. C. *Id.* at 485. The plaintiff in *Gaines v. Canada*, wanted to attend law school at the University of Missouri, however, a state statute authorized the Board of Curators of Lincoln University to pay black Missourians' fee for attendance at the law school in an adjacent state. 342 Mo. 121, 130 (S.C. Miss. 1938). Ada Lois Sipuel, a resident of the State of Oklahoma, wanted to attend law school at the University of Oklahoma, but the Oklahoma statutory law would not allow it. Instead, Oklahoma would instead pay for her to go to law school outside the state. The United States Supreme Court ordered Ms. Sipuel to be provided with an equal legal education and remanded the case to the trial court stating that there were two choices: admit her to the University of Oklahoma Law School or immediately establish a black law school. *Sipuel* at 632-633. Rather than admit Miss Sipuel to the University of Oklahoma School of Law, the state quickly ordered the establishment of a separate law school for African Americans. *See* RICHARD KLUGER, *SIMPLE JUSTICE*, 259-260 (1975). The Supreme Court denied Sipuel's writ of mandamus seeking to compel the state's compliance with its order. *Fisher v. Hurst*, 333 U. S. 147 (1948). Sipuel was subsequently admitted to the University of Oklahoma School of Law and graduated in 1951. ADA SIPUEL & DANNEY GOBLE, *A MATTER OF BLACK AND WHITE: THE AUTOBIOGRAPHY OF ADA LOIS SIPUEL FISHER* (1996). In *Sweatt v. Painter*, 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 Sweatt was ordered admitted. *Sweatt v. Painter*, 339 U. S. 629 at 634-636 (1950). G. W. McLaurin sought admission to the graduate school at the University of Oklahoma and was met with the application of the same state law as Sipuel. After the *Gaines* decision, the Oklahoma legislature amended its statutory law to allow 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 violative of the Equal Protection Clause. *McLaurin v. Oklahoma*, 339 U. S. 637, 640-642 (1950). The law of *Plessy*, however, was not destroyed by any of these this rulings.

until the Court's decision in *Brown v. Board of Education*.<sup>39</sup> Now, another fifty-one years after *Brown v. Board of Education*, the United States Department of Education's Office of Civil Rights is still involved in the oversight of desegregation efforts in Florida, Kentucky, Maryland, Pennsylvania, Texas, Ohio, and Virginia.<sup>40</sup> Additionally, three states' court ordered higher education decrees have recently expired. The Alabama Settlement Agreement expired on July 31, 2005.<sup>41</sup> The Louisiana Settlement Agreement expired on December 31, 2005.<sup>42</sup> Tennessee's Consent Decree expired on January 4, 2006.<sup>43</sup> The state of Mississippi recently entered a Settlement Agreement on March 29, 2001.<sup>44</sup> It is notable that over one hundred years after *Plessy v. Ferguson*, the beginning of the 21<sup>st</sup> century has witnessed 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.<sup>45</sup>

### **III. Delay and Deliberation: The Problem of Resistance Creates Decades of Constitutional Crisis**

*Brown v. Board of Education* carried the promise and opportunity for the improvement of the status of the historically black college. Although the Court held that separate educational systems

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<sup>39</sup> 347 U.S. 483, 493 (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 its citizens, the states were required to do so equally without regard to race. The provision of educational services in a racially segregated environment was "inherently unequal." *Id.* at 495.

<sup>40</sup> See note 70 *infra*.

<sup>41</sup> *United States v. Alabama*, 900 F. Supp. 272 (N. D. Ala. 1995).

<sup>42</sup> Tenth Annual Evaluation of the Desegregation Settlement Agreement, Implementation of the Settlement Agreement *United States v. State of Louisiana*, No. 80-3300A, at I (Oct. 2005).

<sup>43</sup> Consent Decree, *Geier v. Sundquist*, E. Miscellaneous, I. Court Jurisdiction and Term of Agreement, No. 5077, at 26, 51 (Jan. 4, 2000) (stating, "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.").

<sup>44</sup> Final Judgment, *Ayers v. Musgrove*, No. 4:75CV009-B-D, at 1 (Feb. 15, 2002) (joining in approval of Settlement Agreement dated March 29, 2001).

based on race were unconstitutional respecting segregated elementary and secondary schools, the case was immediately thought to apply in the higher education context.<sup>46</sup> When the *Brown v. Board of Education II* court gave the time line for implementation of “all deliberate speed,” the message heard by the states was delay, thus setting in motion part of the reason for fifty years of constitutional crisis in converting dual educational systems into unitary educational systems.

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 seeking to block the admission of black students. In this first wave of post *Brown I* higher education equal opportunity cases, states employed a variety of measures intended to thwart African American students' entry into its previously segregated universities. For example, Louisiana statutory law required Arnease Ludley to obtain a certificate of good character from her high school principal for admission to Louisiana State University.<sup>47</sup> However, she was unable to obtain the certificate because the same statute required the principal's dismissal for providing the certificate.<sup>48</sup> Autherine Lucy and Polly Ann Myers were summoned to the offices of the Dean of Admissions at the University of Alabama where

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<sup>45</sup> See note 70 infra and accompanying text.

<sup>46</sup> After the Court decided *Brown* on May 17, 1954, *State of Florida ex rel. Virgil D. Hawkins* came before the court on May 24, 1954. See *State of Florida ex. rel. Virgil D. Hawkins* 347 U. S. 971 (1954). Hawkins was denied admission the University of Florida School of Law. The Court remanded the case to the state of Florida for consideration in light of the Court's decision in *Brown I*. Upon remand, the state of Florida determined that it would have consider whether changes were necessary at the university level in order to accommodate an African American student, citing *Brown II's* imprecise time line for the implementation of desegregation respecting Hawkins' case. See *Brown v. Board of Education*, 349 U. S. 294 (1955).

See *State ex rel. Virgil D. Hawkins v. Bd. of Control*, 83 So.2d 20 (Fla. 1955). Subsequently, the Court recalled, vacated this order and entered a new order relying on *Sweatt v. Painter*, 339 U.S. 629, (1950); *Sipuel v Board of Regents of Univ. of Ok.*, 332 U.S. 631 (1947); and *McLaurin v. Oklahoma State Regents for Higher Educ.*, 339 U.S. 637 (1950). Hawkins was “entitled to prompt admission under the rules and regulations applicable to other qualified candidates.” *State of Florida ex rel. Virgil D. Hawkins v. Bd. of Control*, 350 U.S. 413 (1956).

<sup>47</sup> See *Ludley v. Bd. of Supervisors of L. S. U.*, 150 F. Supp. 900, 901 (E.D. La. 1957).

<sup>48</sup> See *id.* at 903 (noting statutes were unconstitutional because intent behind their creation was to discriminate and circumvent

their applications for admission were personally returned to them.<sup>49</sup> They were told that the course work that interested them could be found at Alabama State College, the historically black institution.<sup>50</sup> Myra Dinsmore's application for admission to the Georgia State College of Business Administration was returned incomplete because she did not attached the required certificates of good character furnished by alumni of the institution.<sup>51</sup> 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.<sup>52</sup> Additionally, the registrar of the University expressed concerns that Mr. Meredith "was not seeking admission to the University of Mississippi in good faith for the purpose of securing an education," and that "Meredith's fear that his application might be denied because of his race 'shocked, surprised and disappointed'" the Registrar.<sup>53</sup> His 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."<sup>54</sup> The Fifth Circuit's remand, ordering Meredith's injunctive relief and its determination that Meredith was excluded "solely because he was a Negro," was a signal that the demand of *Brown I* was real and could not be countermanded by "Fabian polic[ies] of worrying the enemy into defeat while time worked for

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the Fourteenth Amendment's Equal Protection Clause).

<sup>49</sup> See *Lucy v. Adams*, 134 F. Supp. 235, 237 (N.D. Ala. 1955).

<sup>50</sup> See *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.*

<sup>51</sup> See *Hunt v. Arnold*, 172 F. Supp. 847 (N.D. Ga. 1959). All alumni of the institution prior to the applications of the plaintiffs were white and therefore the applications would not have been forthcoming. The federal court enjoined the defendants' actions requiring certification that only white alumni could give. *Id.* at 857.

<sup>52</sup> *Meredith v. Fair*, 305 F.2d 343, 348 (5th Cir. 1962).

<sup>53</sup> *Id.* at 350.

<sup>54</sup> *Id.*

the defenders.”<sup>55</sup> The ebb of the first wave of post *Brown I* higher education equal opportunity cases was now ushering in the second - the higher education desegregation lawsuits.

The higher education desegregation lawsuits have been fought on two federal fronts. Plaintiffs sought to compel HEW to enforce the requirements of Title VI of the Civil Rights Act of 1964 on one federal court front and private plaintiffs and the United States Department of Justice filed suits seeking to dismantle prior systems of segregated higher education on another. Respecting the first front, *Adams v. Richardson*<sup>56</sup> succeeded informal attempts of the Department of Health, Education, and Welfare (“HEW”) to work with state governments to desegregate their prior de jure systems of higher education.<sup>57</sup> In January of 1969, the HEW made a finding of fact that ten states were operating dual systems of education based on race.<sup>58</sup> Subsequently, HEW sent correspondence to the governors of Louisiana, Mississippi, Oklahoma, North Carolina, Florida, Arkansas, Pennsylvania, Georgia, Maryland and Virginia informing them that their states were out of compliance with Title VI and in danger of losing vital federal funds because they maintained dual systems of education.<sup>59</sup> Each state

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<sup>55</sup> *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 Kuettnner, *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, who 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 1974).

<sup>56</sup> *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 original, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” *Id*. 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 42 U.S.C. § 2000d. 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.

<sup>57</sup> See *id*.

<sup>58</sup> See *id*. at 637–38.

<sup>59</sup> See *id*. at 638.

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.<sup>60</sup> HEW did not aggressively seek enforcement of Title VI after the determinations of non-compliance were made.<sup>61</sup> Because of 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.<sup>62</sup> The district granted the relief sought by plaintiffs. Judge John Pratt found that once a recipient of federal educational funds was found in violation of Title VI's non-discrimination requirements and has failed to voluntarily correct non-compliance, the Office of Civil Rights had no discretion to allow a recipient to continue receiving further federal funding.<sup>63</sup> Additionally, Judge Pratt determined that HEW was statutorily bound to enforce the requirements of Title VI.<sup>64</sup> The Federal Court of Appeals for the District of Columbia affirmed the district court's findings of fact and conclusions of law, but determined that the states required more time for compliance.<sup>65</sup> Another four years passed with no satisfactory progress made in

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<sup>60</sup> *See id.* at 638.

<sup>61</sup> *See id.* at 638.

<sup>62</sup> *See id.* at 637.

<sup>63</sup> *Adams v. Richardson*, 351 F. Supp. 636, 641-42 (D. D.C. 1972). *See 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.* at 94.

<sup>64</sup> *See 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 . . . ."

<sup>65</sup> The Court of Appeals for the District of Columbia issued another request to the states in non-compliance to submit plans within 120 days. If suitable plans were not forthcoming within an additional 180-day period, compliance procedures were to

any of the states subject to Title VI compliance review. In 1977, the trial court ordered that Arkansas, Florida, Georgia, North Carolina, Oklahoma, and Virginia be given notice that their plans were insufficient. HEW was to provide “final guidelines or criteria specifying the ingredients of an acceptable higher education desegregation plan.”<sup>66</sup>

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.<sup>67</sup> 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.”<sup>68</sup> Although the *Adams* litigation ended unsatisfactorily, Title VI

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ensue. *Adams*, 480 F. 2d at 1165. The court noted that solving higher education cases required different strategies than those problems solved in elementary and secondary school districts:

The problem of integrating higher education must be dealt with on a statewide rather than a school-by-school basis. Perhaps the most serious problem in this area is the lack of state-wide planning to provide more and better trained minority group doctors, lawyers, engineers and other professionals. A predicate for minority access to quality post-graduate programs is a viable, coordinated state-wide higher education policy that takes into account the special problems of minority students and of Black colleges . . . Black institutions currently fulfill a crucial need and will continue to play an important role in Black higher education.

*Id.* at 1164–65.

<sup>66</sup> *Adams v. Califano*, 430 F. Supp. 118, 121 (D. D.C. 1977). At this time the Maryland higher education desegregation case was pending before the Fourth Circuit on the issue of whether or not HEW had followed statutorily mandated voluntary compliance procedures and Pennsylvania was in active settlement negotiations with HEW. *Id.* at 120. See *Women’s Equity Action League v. Cavazos*, 906 F.2d 742, 746 (D.C. Cir. 1990). Across the years, the class of plaintiffs represented in the litigation grew, however, the core piece to the litigation was maintained: the allegation that certain states maintained dual systems of higher education. *Id.* In 1982, defendants moved to vacate the 1977 order and the motion was denied by the district court. *Id.* at 747. A subsequent challenge to plaintiffs’ standing to sue was raised and resolved in plaintiffs’ favor. *Women’s Equity Action League v. Bell*, 743 F. 2d 42, 44 (D.C. Cir. 1984); *Women’s Equity Action League v. Cavazos*, 879 F. 2d 880, 881 (D.C. Cir. 1989). See generally STEPHEN C. HALPERN, ON THE LIMITS OF THE LAW: THE IRONIC LEGACY OF TITLE VI OF THE 1964 CIVIL RIGHTS ACT 190–97 (The Johns Hopkins University Press 1995). Under the administration of President Ronald Reagan, the Justice Department took a less aggressive posture in pursuing the enforcement of Title VI against the states. *Id.*

<sup>67</sup> See *Women’s Equity Action League v. Cavazos*, 906 F.2d 742, 746 (D.C. Cir. 1990) (concluding plaintiffs lacked claim against Department of Health, Education, and Welfare because they had alternative remedies for their injuries).

<sup>68</sup> *Id.* at 752. The Court determined that nothing in Council of and for the Blind, 709 F. 2d 1521, 1530, n. 69, *Adams v. Bell*,

enforcement by the Department of Education continued into the 1990s and the twenty-first century. After the United States Supreme Court decided the *Fordice*, the Office of Civil Rights gave notice that it would conduct a *Fordice* compliance review of the states whose desegregation plans had expired.<sup>69</sup> 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.<sup>70</sup> As of fiscal year 2005, the Office of Civil Rights was still monitoring the desegregation efforts of these states.<sup>71</sup>

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 have also brought lawsuits seeking to secure better funding for historically black colleges and universities.<sup>72</sup> Because of their aegis in *Plessy*, many of these historically black colleges

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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.

<sup>69</sup> See U.S. DEP'T OF EDUC., OFFICE OF CIVIL RIGHTS, *Notice of Application of Supreme Court Decision*, Jan. 28, 1994.

<sup>70</sup> 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*, <http://www.ed.gov/about/report/annual/ocr/annrpt2004/>; 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, et al vs. Robert Ehrlich, Jr, No 24-C-06-0081370G, Circuit Court for Baltimore City Maryland, filed October 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. See *Coalition for Equity and Excellence in Maryland v. Robert L. Ehrlich, Jr., et al.* Civil Action NO. MJG -06-2773, (U. S. D. C. Dist. Md.), Notice of Removal (10/23/2006) and Order Staying and Administratively Closing Case (10/30/2007).

<sup>71</sup> U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, *Annual Report to Congress, Higher Education Agreements, FY 2005*, <http://www.ed.gov/about/report/annual/ocr/annrpt2005>.

<sup>72</sup> See *United States v. Alabama*, 14 F.3d 1534 (11th Cir. 1994), on remand, 900 F. Supp. 272 (N.D. Ala. 1995). The United

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 education represented an opportunity to receive funds to improve their status in the world or higher educational opportunity. 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.<sup>73</sup> A most salient question after the *Adams* litigation, and as well as after the lawsuits in *Knight v. Alabama/United States v. Alabama*, *Ayers v. Allain*, *United States v. Louisiana*, and *Sanders v. Ellington*,<sup>74</sup> was how and under what circumstances could historically black colleges 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 four 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.”<sup>75</sup> The *Brown II* remedy became the proxy for delay and entrenchment, resulting in the accentuation of problems created by *Plessy* educational regimes. The higher education litigation in Louisiana and Mississippi

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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) and Section IV-B; *see also* *United States v. Louisiana*, 527 F. Supp. 509 (E.D. La. 1981) and Section IV-A; *see also* *Sanders v. Ellington*, 288 F. Supp. 937, 939 (M.D. Tenn. 1968). *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. 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.*

<sup>73</sup> *See infra* Section V(E).

<sup>74</sup> *See supra* note 72.

demonstrate the rocky path each system traversed while their respective federal district courts struggled with establishing 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.

#### **IV. The Two Cases Before the Supreme Court Decision in *United States v. Fordice***

##### **A. The Louisiana Case: *United States v. Louisiana***

The state of Louisiana is home to eleven public four-year colleges and universities.<sup>76</sup> Southern University<sup>77</sup> and Grambling University<sup>78</sup> are the state's historically black universities. The remaining institutions: Louisiana State University,<sup>79</sup> University of New Orleans,<sup>80</sup> Louisiana Tech University,<sup>81</sup>

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<sup>75</sup>*Brown v. Board of Education II*, 349 U. S. 294, 300-01 (1955).

<sup>76</sup>*See* Final Annual Evaluation of the Desegregation Settlement Agreement, Implementation of the Settlement Agreement *United States v. State of Louisiana*, No. 80-3300A, at 1- 2 (February 2006). The Louisiana State Board of Regents coordinates the organization and functioning of 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.*

<sup>77</sup>*See History of Southern University*, <http://www.subr.edu/historysubr.html> . 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. *Id.* 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 of the Desegregation Settlement Agreement, Implementation of the Settlement Agreement *United States v. State of Louisiana*, No. 80-3300A, at 1-2 (February 2006).

<sup>78</sup>*See Grambling State University – History*, <http://www.gram.edu/about/history.asp>. Grambling State University, located in Grambling, Louisiana, first opened as an industrial school for children in 1900. Act Number 33 of July 4, 1946 renamed the four-year college Grambling College.

<sup>79</sup>*See History of LSU*, [http://www.lsu.edu/about\\_ht.htm](http://www.lsu.edu/about_ht.htm). All of Louisiana’s historically white universities were mandated under law to be *Plessy* institutions. *See supra* note 22. Louisiana State University 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. *Id.* LSU Agricultural Center, LSU, Alexandria, LSU A & M, LSU Eunice, LSU Law Center, LSU HSC-N. O., LSU HSC-S, LSU-Shreveport and UNO comprise the LSU System. *See* Final Annual Evaluation of the Desegregation Settlement Agreement, Implementation of the Settlement Agreement *United States v. State of Louisiana*, No. 80-3300A, at 1- 2 (February 2006).

McNeese State University,<sup>82</sup> Nicholls State University,<sup>83</sup> Northwestern State University,<sup>84</sup> Southeastern State University,<sup>85</sup> and the University of Louisiana, Lafayette,<sup>86</sup> and University of Louisiana, Monroe<sup>87</sup> are the historically white universities. Prior to the United States Supreme Court's decision in *Brown v. Board of Education I*, the state of Louisiana required separation in higher education pursuant to its state constitutional and statutory law.<sup>88</sup> Post-*Brown v. Board of Education 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.

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

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<sup>80</sup> See *UNO History*, <http://www.uno.edu/history.cfm>. The University of New Orleans was established originally as a New Orleans campus of Louisiana State University pursuant to 1894 La. Acts 68, § 2432–2438. In 1974 it was renamed as the University of New Orleans.

<sup>81</sup> 1894 Act 68 §§1-7 as cited in STATE'S LAWS ON RACE AND COLOR 179 (Pauli Murray ed.) 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." *Id.*

<sup>82</sup> See *History of McNeese*, <http://www.mcneese.edu/parents/history.asp>. McNeese University was originally a two-year campus of Louisiana State University located in Lake Charles, Louisiana which opened in 1939.

<sup>83</sup> See *About Nicholls, History and Purpose*, <http://www.nicholls.edu/about/history.htm>. Nicholls State University opened as a junior college division of Louisiana State University in 1948 pursuant to 1884 La. Acts 51, § 1. It became a four-year institution in 1956.

<sup>84</sup> Northwestern State University, opened in 1884 as the Louisiana State Normal College and had as its primary mission the training of public school teachers. It was open to white males and females.

<sup>85</sup> See 1928 La. Acts 136, § 1–4. Southeastern State University, opened in 1928 for the purpose of the "higher education in the arts and sciences of white children of the State." *Id.*

<sup>86</sup> See *UL Lafayette, University History: General*, <http://www.ull.edu/AboutUs/History/General.shtml>. The University of Louisiana, Lafayette opened in 1900 as the Southwestern Louisiana Industrial Institute.

<sup>87</sup> 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.

<sup>88</sup> See LA. CONST. 1879, art. 231 which provided for the "establish[ment] in the city of New Orleans a university for the

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 violations in respecting the state's maintenance of a dual system of education.<sup>89</sup> The defendants in the lawsuit were the Governor David Treen, the Louisiana State Board of Education, the Louisiana State Board of 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.<sup>90</sup> 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.<sup>91</sup> In an opinion written by Judge Charles Schwartz, a three-judge court found that the Consent Decree met the requisites for federal court approval.<sup>92</sup> Crucial to the court's approval was the Consent Decree's promise to direct its efforts towards the recruitment

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education of persons of color . . . .”

<sup>89</sup> *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. The Fourteenth Amendment suit was waived by the United States after a standing challenge was raised in the case. 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. *See also* 42 U.S.C. § 2000d et seq; *United States v. Louisiana*, 9 F. 3d 1159, 1162 citing *United States v. Louisiana*, 692 F. Supp. 642 and *United States v. Fordice*, 505 U. S. 717 (1992).

<sup>90</sup> *See U.S. 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.

<sup>91</sup> *See id.* at 515. In evaluating the agreement, the Court also found that the timetables provided for implementation were “reasonable, specific, and realistic.” *Id.* The Court also determined that the consent decree's system-wide reporting format would:

- (1) promote compliance with the plan; (2) make the process of monitoring the system's progress simple and inexpensive for both state and federal government personnel; and (3) provide all the parties, as well as the general public, a quick and sure means of evaluating the merits of the plan as implemented, and to correct any unsuspected inadequacies which might be revealed thereby.

*Id.*

<sup>92</sup> *U.S. v. Louisiana*, 527 F. Supp. at 515. “In summary the Court finds that the consent decree which it approved in its order of September 5, 1981 embodies a reasonable and specific system-wide desegregation plan which promises realistically to work.” *Id.* *See* Federal Judicial Center at <http://www.fjc.gov/public/home.nsf/hisj>. President Gerald Ford appointed Judge

and admission of other race students to the previously historically white and historically black institutions;<sup>93</sup> the reduction of attrition of African American students at historically white institutions;<sup>94</sup> the reduction of program duplication created by the dual system;<sup>95</sup> preservation and enhancement of historically black colleges and universities;<sup>96</sup> increasing the presence of other race members in institutional staffing, faculties and supervisory boards.<sup>97</sup> The Consent Decree's term was one of approximately six years with an automatic expiration on December 31, 1987.

Pursuant to the Consent Decree's terms, on December 29, 1987, the United States requested a hearing to question and measure the state's compliance with the 1981 agreement.<sup>98</sup> 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.<sup>99</sup> Judge Schwartz's opinion was critical of the parties' primary focus on the remedial phase of the lawsuit which he found

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Charles Schwartz to the Eastern District of Louisiana federal bench in 1976.

<sup>93</sup> *U.S. v. Louisiana*, 527 F Supp. at 515 (stating Consent Decree's desegregation plan makes specific commitments to "shaping the processes of admissions and recruitment" of black and other race students).

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *United States v. State of Louisiana*, 692 F. Supp. 642, 647 (E.D. La. 1988).

<sup>99</sup> *Id.* at 653-57. (stating that while the mere existence of schools 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).

to have resulted from a misunderstanding of the standard by which the state's liability for constitutional violations was to be measured.<sup>100</sup>

Respecting the state's duty under the *Brown* mandate, it was the United States' and the state of Louisiana's position, that the appropriate measure of the state's duty was that set by the United States Supreme Court in *Bazemore v. Friday*.<sup>101</sup> 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.<sup>102</sup> Judge Schwartz's opinion entered the fray of this hotly debated constitutional question as had the Sixth Circuit in *Geier v. University of Tennessee*,<sup>103</sup> as would the federal court for the Northern District of Alabama court in *Knight v. Alabama*,<sup>104</sup> and ultimately, as would the United States Supreme Court in *United States v. Fordice*.<sup>105</sup> He rejected the position of plaintiffs and defendants in the Louisiana

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<sup>100</sup> *Id.* at \_\_\_\_.

<sup>101</sup> *United States v. State of Louisiana*, 692 F. Supp. at 654. The United States and Louisiana both argued that the Supreme Court's standard in *Bazemore* was constitutionally sufficient. *Bazemore*, if applied in the higher education context, would suggest that states "satisfied their duties in the higher education context by implementing good faith, racially neutral policies and practices where students are free to enroll where they wish, even where there continued to exist racially identifiable institutions within the state's public higher education system." *Id.* See *Bazemore v. Friday*, 478 U.S. 385, 388-91 (1986). 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. 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).

<sup>102</sup> See *United States v. Louisiana*, 692 F. Supp. at 654. See Halpern, supra note 66 at 191. *On the Limits of the Law* supports the proposition that 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.* It is wholly consistent with this characterization of a 1988 Office of Civil Rights that the United States would support a *Bazemore* standard of constitutional compliance. *Id.*

<sup>103</sup> 597 F.2d 1056 (6th Cir. 1979).

<sup>104</sup> 787 F. Supp. 1030 (N.D. Ala. 1991).

<sup>105</sup> 505 U.S. 717 (1992).

case.<sup>106</sup> Rather, Judge Schwartz determined that the standard set by the Court in *Green v. New Kent County School District* was the appropriate standard for *Brown I* compliance.<sup>107</sup> Explaining the states duty to provide equal educational opportunity under the command of *Brown*, the Court in *Green* would require higher education systems to “eliminate all of the ‘vestiges’ or effects of de jure segregation, root and branch.”<sup>108</sup> This meant that the state of Louisiana had to “eliminate from [its higher education system] all vestiges of state-imposed segregation.”<sup>109</sup> Accordingly, the state’s higher education system could not merely adopt race-neutral criteria in matters concerning admissions, recruitment, programming and staffing. The system would be required to take “affirmative” measures toward dismantling the prior de jure system of segregation.<sup>110</sup> 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.’”<sup>111</sup> The

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<sup>106</sup> United States v. Louisiana, 692 F. Supp. at 656.

<sup>107</sup> United States v. Louisiana, 692 F. Supp. at 656.

<sup>108</sup> *Green* supra at 438.

<sup>109</sup> 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 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.

<sup>110</sup> United States v. Louisiana 692 F. Supp. at 653.

<sup>111</sup> United States v. Louisiana, 692 F. Supp. at 658 (quoting *Norris v. State Council of Higher Ed. for Va.*, 327 F. Supp. 1368, 1373 (E.D. Va. 1971)).

district court did not decide on a remedy at this juncture, but it strongly suggested that an appropriate remedy would target program duplication, the institution of a junior college system, the abandonment of open admissions policies and the elimination of multiple university governing boards.<sup>112</sup>

The case was scheduled for trial to begin on September 22, 1988 on the limited issue of remedy, because the state's liability had already been determined.<sup>113</sup> 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, court appointed a Special Master during the interim. His report was ultimately adopted by the district court as its own order on the issue of remedy.<sup>114</sup> The report required consolidation of the multi-board university system into a single board system.<sup>115</sup> The single governing board was tasked with the job of implementing the court's order regarding the abandonment of open admissions policies;<sup>116</sup> the creation of a tiered system of universities wherein they were classified according to mission status;<sup>117</sup> the development of a comprehensive community college system;<sup>118</sup> and the thorough review of all programmatic offerings to remedy the problem of unnecessary program duplication created by proximate universities.<sup>119</sup> The two most controversial pieces of the Special Master's report requiring a single educational governing board and the merger of

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<sup>112</sup> See *United States v. Louisiana*, 692 F. Supp. at 658.

<sup>113</sup> See *id.* at 644.

<sup>114</sup> See *United States v. Louisiana*, 718 F. Supp. 499, 515–21 (E.D. La. 1989).

<sup>115</sup> See *United States v. Louisiana*, 718 F. Supp. at 515.

<sup>116</sup> *Id.* at 516–17.

<sup>117</sup> *Id.* at 516.

<sup>118</sup> *Id.* at 518.

<sup>119</sup> *Id.* at 519.

Southern University Law Center into LSU Paul M. Hebert Law Center, destined the case for a return visit to the Fifth Circuit.<sup>120</sup>

During the pendency of the Louisiana case before the Fifth Circuit, the Mississippi case, *Ayers v. Allain*, was decided by the Fifth Circuit Court of Appeals.<sup>121</sup> The Fifth Circuit's opinion in *Ayers* determined that *Brown I* compliance only required the low-threshold level of performance established in *Bazemore v. Friday*.<sup>122</sup> Applied in the Louisiana context, the opinion meant that the once state abandoned its de jure system of segregation and replaced it with race neutral practices, the higher education system was constitutionally sound.<sup>123</sup> The district court's remedial order was vacated and summary judgment was granted for the state defendants.<sup>124</sup> It was October 30, 1990 and the Fifth Circuit's *Bazemore* standard had now been applied in the Mississippi case and the Louisiana case.<sup>125</sup>

#### **B. 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.<sup>126</sup> The remaining four year institutions: University of Mississippi, Mississippi State

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<sup>120</sup>Id at 519; See Section V(E).

<sup>121</sup> *Ayers v. Allain*, 914 F.2d 676 (5th Cir. 1990) (decided on September 28, 1990 during pendency of appeal of United States v. Louisiana, 9 F.3d 1159 (5th Cir. 1993) (decided on December 10, 1993)).

<sup>122</sup> *Ayers v. Allain* 914 F. 2d 676, 686 (5<sup>th</sup> Cir. 1990). (stating "We believe *Bazemore*...provide[s] the proper standard to govern Mississippi's efforts to disestablish prior de jure segregation in its universities."

<sup>123</sup> *Ayers v. Allain* 914 F. 2d 676, 687 (5<sup>th</sup> Cir. 1990). (holding, "that to fulfill its affirmative duty to disestablish its prior system of de jure segregation in higher education, the state [] satisfies its constitutional obligation by discontinuing prior discriminatory practices and adopting and implementing good-faith, race neutral policies and procedures.")

<sup>124</sup> See *United States v. Louisiana*, 751 F. Supp. 606, 608 (E.D. La. 1990) (stating that "this Court [] finds that *Ayers* is both binding and controlling . . .").

<sup>125</sup> See *Ayers v. Allain*, 914 F. 2d 676 (5<sup>th</sup> Cir. 1990).

<sup>126</sup> *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. Mississippi Valley

University, Mississippi University for Women University of Southern Mississippi, and Delta State University are historically white universities.<sup>127</sup> Prior to the United States Supreme Court's decision in *Brown I*, the state of Mississippi required separation in higher education pursuant to state constitutional and statutory law.<sup>128</sup> Those holding the political reins in the state did not welcome *Brown I*.<sup>129</sup> The Court's decision came during same year as higher education systems Brewton Report - a self-examination of the status of higher education in the state.<sup>130</sup> The report revealed deficits and disparities in funding and facilities, as well as in program offerings in the historically black institutions.<sup>131</sup> Nevertheless, subsequent to the Brewton Report, the State of Mississippi, as had the

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State University was established in 1946 by Act of the Mississippi state legislature as a vocational school for African American students. It is located in Itta Bena, Mississippi. Jackson State University was established in 1946 to train African American teachers. It is located in Jackson, Mississippi.

<sup>127</sup> *Ayers v. Allain*, 674 F. Supp. 1525-28 (N.D. Miss. 1987). All of the State of Mississippi's historically white four-year universities were mandated under law to be *Plessy* institutions. 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.

<sup>128</sup> *Supra* note 23.

<sup>129</sup> See John N. Popham, *Reaction of South: 'Breathing Spell' for Adjustment Tempers Region's Feelings*, N.Y. TIMES, May 17, 1954, at 1 (highlighting Governor Hugh Lawson White reportedly urged "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.")

<sup>130</sup> See Brief for Petitioners at 14, *Ayers v. Mabus*, 1990 U.S. Briefs 6588 (5th Cir. 1991) (No. 90-6588) (citing *Brewton, Higher Education in Mississippi* (1954)) (describing equal educational opportunity goal as being "still very distant").

<sup>131</sup> See Brief of The Alcorn State University National Alumni Association As Amicus Curiae In Support of Petitioners, *Ayers v. Mabus*, 505 U.S. 717 (1992) (No. 90-1205), 1990 U.S. Briefs 1205. In support of their argument that the state of Mississippi continued practices that were responsible for current segregative effects, the alumni of Alcorn University cited to the historical practices of the state of Mississippi respecting funding of Alcorn State University which accounted for the restrictions in its mission. *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.* at 12. 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.* at 12. The Alcorn State University Alumni Association cited the Brewton Report which stated:

State of Louisiana, engaged in practices intended to thwart the entry of African Americans into its historically white universities.

While the Title VI litigation 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.<sup>132</sup> 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 State Superintendent of Education. The United States intervened on April 21, 1975 alleging Fourteenth Amendment Equal Protection and Title VI violations. The plaintiffs claimed that state continued to operate a dual system of higher education based on race after the Supreme Court's decision in *Brown*, in that the state's historically black colleges and universities were subjected to disparate funding and maintenance.<sup>133</sup> 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

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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).

<sup>132</sup> *Ayers*, 674 F. Supp. at 1525 (N.D. Miss. 1987)

<sup>133</sup> *Ayers*, 674 F. Supp. at 1525. Plaintiffs claimed that both African American faculty and students were denied equal educational opportunity 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.*

opposed to any actions of the state which perpetuated segregated institutions and that *Brown I* required no further action of the State.<sup>134</sup>

The case went to trial before Judge Neal Brooks Biggers, Jr. in April of 1987.<sup>135</sup> After a trial that lasted for five weeks, Judge Biggers made findings of fact and conclusions of law respecting admissions and student enrollment,<sup>136</sup> student recruitment,<sup>137</sup> faculty recruitment,<sup>138</sup> institutional missions and academic programs,<sup>139</sup> funding to the universities,<sup>140</sup> and facilities.<sup>141</sup> Guided by the

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<sup>134</sup> *Ayers* 674 F. Supp. at 1525–26. The state of Mississippi relied heavily on the argument that “good faith non-discriminatory and nonracial 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.*

<sup>135</sup> *Ayers*, 674 F. Supp. at 1523. *Judges of the United States Courts*, <http://air.fjc.gov/history/home.nsf>. 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.

<sup>136</sup> *Ayers*, 674 F. Supp. at 1530–31, 1536–39, 56. Judge Biggers’ findings of fact regarding admissions standards, student recruitment and student enrollment revealed prior practices that tracked African American students towards historically black colleges and universities and away from the historically white universities. Even though 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 current system’s policies and practices were “reasonable, educationally sound, and racially neutral.” *Id.*

<sup>137</sup> *Ayers*, 674 F. Supp. at 1558. Student recruitment practices suggested that the system was dedicated to encouraging “minority participation in the system.” *Id.*

<sup>138</sup> *Ayers*, 674 F. Supp. at 1537. Judge Biggers found 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. He 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.* 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.

<sup>139</sup> *Ayers*, 674 F. Supp. at 1538, 1561. Regarding institutional mission assignments, the court was tasked to evaluate how and 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 addressed the argument that there existed unnecessary program duplication, which placed the historically black colleges and universities at a disadvantage in attracting a white student population. The court dismissed this notion, stating that there was no evidence that the elimination of program duplication would have any effect on a student’s choice. *Id.* at 1561.

<sup>140</sup> *Id.* at 1546–48 (discussing plaintiffs’ allegations that historically black institution suffered under state’s funding formula that preferred historically white institutions and concluding that differential funding was not intentionally discriminatory, but was instead connected to institution’s mission within system of higher education).

<sup>141</sup> *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

principle that the state had an affirmative duty to disestablish a dual system of higher education, Judge Biggers concluded that the state of Mississippi met that duty.<sup>142</sup> Students were recruited and admitted to each of the state's universities on a race-neutral basis,<sup>143</sup> and faculty, staff and fiscal allocations were made on a race-neutral basis.<sup>144</sup> 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.<sup>145</sup>

On appeal, the United States Court of Appeals for the Fifth Circuit 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,<sup>146</sup> the court corrected the trial court's analysis of the constitutional issue. According to Judge Goldberg, Judge Biggers correctly selected *Green*<sup>147</sup> as the measure for determining whether the state met its burden for dismantling the prior de jure segregation in education.<sup>148</sup> However, Judge Goldberg found that Judge Biggers' reading and application of *Green* was incorrect.<sup>149</sup> As Judge Biggers correctly recognized, *Green* placed an "affirmative duty" on the states to dismantle segregated systems of higher education.<sup>150</sup> However, Judge Biggers failed to value the "root and branch" requirement of the elimination of all vestiges of de jure segregation.<sup>151</sup> Instead,

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accordance with their defined mission.").

<sup>142</sup> *Id.* at 1564.

<sup>143</sup> *Id.* at 1564.

<sup>144</sup> *Id.* at 1564.

<sup>145</sup> *Id.* at 1564.

<sup>146</sup> Federal Judicial Center, Judges of the United States Courts, <http://www.fjc.gov/history/home.nsf>. 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.

<sup>147</sup> *Green* supra.

<sup>148</sup> *Ayers*, 893 F. 2d at 743.

<sup>149</sup> *Ayers*, 893 F.2d at 743-44.

<sup>150</sup> *Green*, supra at 437-38.

<sup>151</sup> *Ayers*, 893 F.2d 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

Judge Biggers' interpretation of *Green* only required the State of Mississippi to implement "good faith race neutral policies and procedures" in order to meet its constitutional responsibility.<sup>152</sup>

Judge Goldberg's evaluation and application of *Green* was based on an analysis of *Green* drawn from *Alabama State Teachers Association v. Alabama Public School*<sup>153</sup> and *Bazemore v. Friday*.<sup>154</sup> Joined by Judge Samuel D. Johnson Jr., Judge Goldberg wrote that the district court's evaluation of *Green* was erroneous and in turn adopted the interpretation of *Green* from the Sixth Circuit's decision in *Geier v. Alexander*.<sup>155</sup> Accordingly, the Fifth Circuit evaluated the state universities' various admissions policies,<sup>156</sup> the composition of the university faculties,<sup>157</sup> the institutions' missions and academic programs,<sup>158</sup> and funding,<sup>159</sup> and determined that defendants had

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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.*

<sup>152</sup> *Id.* at 750.

<sup>153</sup> 289 F. Supp. 784, 789 (M.D. Ala. 1968) *aff'd*, 393 U.S. 400 (1969). 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, an historically black university. They challenged this state action as violative of equal protection. 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. 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." *Id.* See *Ayers v. Allain*, 674 F. Supp. 1523, 1552 (1987) *rev'd*, 893 F.2d 732 (5th Cir. 1990). The *Ayers* court interpreted the summary decision of the United States Supreme Court in *Ala. State Teachers Ass'n* to represent approval of this standard.

<sup>154</sup> *Bazemore supra*.

<sup>155</sup> 801 F.2d 799 (6th Cir. 1986); see *Ayers v. Allain*, 893 F.2d 732, 744 (1990).

<sup>156</sup> *Ayers*, 893 F. Supp. at 735-36 (discussing admission policies from 1976-1986 and effect of minimum ACT score as requirement for admissions).

<sup>157</sup> *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).

<sup>158</sup> *Id.* at 738-39 (highlighting universities' institutional missions and academic programs and observing different program offerings and number of programs offered at each university).

<sup>159</sup> *Id.* at 741-42 (outlining funding of universities and calculating difference in average total education and general income per student and average total education and general expenditures per student among universities).

not met their duty under *Green*. The requirement that states transform dual systems of higher education into unitary systems of higher education required more than race-neutral policies.<sup>160</sup> 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.”<sup>161</sup>

A speedy resolution of the *Ayers* case was not to be. An en banc vote of the Fifth Circuit<sup>162</sup> resulted in a rehearing of the case and a subsequent affirmation of Judge Biggers' previous decision.<sup>163</sup>

The Fifth Circuit agreed with the district court's original reading of *Green*, and the en banc court determined that the state of Mississippi, had indeed, satisfied its constitutional obligation under *Brown*

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<sup>160</sup> *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.*

<sup>161</sup> *Id.* at 756.

<sup>161</sup> *Id.* at 756.

<sup>162</sup> The coalition of judges writing for the majority and those writing for the minority broke down across solidly partisan lines respecting the Presidents who appointed them. Judge John Duhe (1988-Reagan), who previously dissented in the 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). Now 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.

<sup>163</sup> *Ayers*, 914 F. 2d at 694 (Higginbotham, J., concurring in part and dissenting in part). It was Judge Higginbotham's observation that the Fifth Circuit's articulation of the issue in the case was wrong and in the context of a 1990 articulation of the issue, it was a sophisticated one:

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.

*I* and *Green* by “discontinuing prior discriminatory practices and adopting and implementing good-faith, race-neutral policies and procedures.”<sup>164</sup> It was September 28, 1990 and the Mississippi case was poised for the United States Supreme Court to grant it certiorari, well ahead of the Louisiana case.

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

The United States Supreme Court granted certiorari in *Ayers v. Mabus* on April 15, 1991 while the higher education suits in Louisiana,<sup>165</sup> Tennessee,<sup>166</sup> and Alabama<sup>167</sup> were still in the federal district and circuit courts.<sup>168</sup> In an opinion delivered by Justice White and joined by Chief Justice Rehnquist, Justices Blackmun, Stevens, O’Connor,<sup>169</sup> Kennedy, Souter and Thomas,<sup>170</sup> the Supreme

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*Id.*

<sup>164</sup> *Ayers*, 914 F.2d at 687. The Fifth Circuit sitting en banc disagreed with the panel’s adoption of the *Geier* standard. *Id.* at 686. Rather, 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* standards 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 application of the *Green* standards as interpreted in *Geier* would frustrate the goal of diversity that is sought in higher education. *Id.*

<sup>165</sup> *Supra* Section IV(A).

<sup>166</sup> *See Geier v. University of Tennessee*, 597 F. 2d 1056 (6th Cir. 1979), *cert denied*, 444 U. S. 886 (1979). By 1979, well in advance of any federal court in the Fifth Circuit, the Sixth Circuit had already 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.

<sup>167</sup> *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.*

<sup>168</sup> *Ayers v. Mabus*, 499 U. S. 958 (April 15, 1991).

<sup>169</sup> *See Fordice*, 505 U.S. at 743 (O’Connor, J, concurring). Justice O’Connor wrote a concurring opinion in which she sought to especially 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.” *Id.* at 744.

<sup>170</sup> *See Fordice*, 505 U.S. at 745 (Thomas, J., concurring). Justice Thomas wrote a concurring opinion in which he emphasized the value of the historically black college or university:

Court settled a disagreement among the circuits respecting the constitutional measure of a higher education system's compliance with the Fourteenth Amendment when segregative effects and racial identifiability remain after the de jure factors have been eliminated. The Court held that the *Bazemore* standard respecting freedom of choice as the standard of constitutional compliance in the evaluation of current effects of past de jure segregation, in some contexts, was not the appropriate standard by which a state system of higher education's compliance with the Fourteenth Amendment was to be judged.<sup>171</sup> Justice White's opinion in *Fordice* 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.<sup>172</sup> 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."<sup>173</sup> The Court identified four practices in the Mississippi system to be evaluated upon remand to the district court. The district court was instructed to review the system's admission standards,<sup>174</sup>

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[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.*

<sup>171</sup> *Fordice* at 505 U.S. at 730–32.

<sup>172</sup> *Fordice*, 505 U.S. at 743 (placing burden on 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.).

<sup>173</sup> *Id.* at 731.

<sup>174</sup> *Id.* at 733–38. The Court found the differential admissions requirements between universities with dissimilar

program duplication,<sup>175</sup> institutional mission assignments,<sup>176</sup> and continued operation of all eight public universities.<sup>177</sup> The district court was tasked to determine 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.<sup>178</sup>

### 1. The Mississippi Case post-*Fordice*

Judge Biggers had presided over this case for more than seven years by the time the Mississippi case was remanded. Once again, he evaluated the structure of the higher education system in the state of Mississippi, considering the factors mandated by the Supreme Court.<sup>179</sup> The current status of the states' higher education admissions standards, programmatic offerings, institutional mission assignments and numerosity of public universities, suggested to Judge Biggers, that they were in fact, vestiges of the prior segregated system of higher education.<sup>180</sup> 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"<sup>181</sup> and set up a Monitoring Committee to oversee the implementation of the terms of the court's judgment.<sup>182</sup> The remedial

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programmatic missions to be inadequately justified. It viewed these as "remnants of the dual system with a continuing discriminatory effect . . ." *Id.* at 736.

<sup>175</sup> *Id.* at 738-39. Unnecessary program duplication occurs when "two or more institutions offer the same nonessential or non-core program." *Id.* at 738.

<sup>176</sup> *Id.* at 739-41. 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.

<sup>177</sup> *Id.* at 741-42. The Court asked the lower court 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.

<sup>178</sup> *Id.* at 743.

<sup>179</sup> See generally *Ayers v. Fordice*, 879 F. Supp. 1419 (N.D. Miss. 1995).

<sup>180</sup> *Id.* at 1493-94. Judge Biggers found that although all four aspects of educational system were vestiges of prior discrimination, not all continued to have segregative effects.

<sup>181</sup> *Id.* at 1494.

<sup>182</sup> *Id.* at 1494.

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<sup>183</sup> and it redefined the institutional missions of some universities.<sup>184</sup> Notably, his remedial decree did not require the merger or closure of any institutions.<sup>185</sup>

Since Judge Biggers' initial post- *Fordice* ruling in 1995, the Fifth Circuit has made only one significant ruling in this case.<sup>186</sup> The Fifth Circuit heard the plaintiffs' appeal challenging portions of Judge Biggers' decree regarding the adoption of uniform admissions standards;<sup>187</sup> missions designations of universities within the system;<sup>188</sup> program duplication issues which might result in the

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<sup>183</sup> *Id.* at 1494 (requiring implementation of board's proposed 1995 admissions standards in all universities for 1995-1996 school year).

<sup>184</sup> *Id.* at 1494-96

<sup>185</sup> *See id.* at 1493-96. In a subsequent 1999 ruling, Judge Biggers rejected the private plaintiffs' objection to the expansion of a branch of the University of Southern Mississippi's programmatic offerings, but enjoined the Board of Trustee's institution of differential admissions standards at this campus. *See Ayers v. Fordice*, 40 F. Supp. 2d 382, 387-88 (N. D. Miss. 1999). The district court did not support the plaintiffs' position that adding a lower division to the curriculum of the University of Southern Mississippi-Gulf Coast would impede the implementation of the desegregation decree. The court 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 goals of eliminating the vestiges of de jure segregation sought under the *Fordice* standards. *Id.*

<sup>186</sup> *See Ayers v. Fordice*, 111 F. 3d 1183 (5th Cir. 1997) (affirming most of district court's findings of fact and remedial decree).

<sup>187</sup> *See Ayers v. Fordice*, 879 F. Supp. 1419, 1434 (N.D. Miss. 1995). 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 differential ACT scores 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 elimination of open admissions standards and the adoption of proposed 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.

<sup>188</sup> *See Ayers*, 879 F. Supp. 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; required development of practices to increase racial diversity at Jackson State University; increased fiscal funding for Jackson State University; ordered creation of an Endowment Trust whose income would support other race recruitment and other race scholarships for Jackson State and Alcorn State University students.

of merger of HBCUs and HWIs;<sup>189</sup> the state's funding formula for universities;<sup>190</sup> facilities disparities between HBCUs and HWIs;<sup>191</sup> hiring and salary disparities between HBCUs and HWIs;<sup>192</sup> land grant assignment disparities;<sup>193</sup> and the racial composition of higher education governing boards.<sup>194</sup> The Fifth Circuit affirmed the trial court's implementation of the uniform admissions standards within the system;<sup>195</sup> 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

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<sup>189</sup> See *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. The court ordered a study of the existent 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 in this remedial decree. *Id.*

<sup>190</sup> See *id.* at 1453. The trial court found no constitutional defect in the system's current funding policies and practices. "Attainment 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.*

<sup>191</sup> See *id.* at 1457-58. The trial court found no current policies or practices that were vestiges of past de jure segregation respecting any differences in facilities at historically black and historically white colleges. The court determined that both faced similar problems respecting maintenance and repair. *Id.*

<sup>192</sup> *Id.* at 1462. The trial court recognized the existence of racial identifiability at the historically white colleges in the faculty and administrative levels, but did not conclude that the racial identifiability was wholly traceable to the prior de jure system of segregation. 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.*

<sup>193</sup> *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.*

<sup>194</sup> *Id.* at 1473. The trial court found no evidence of unconstitutional practices in the selection of members to the Board of Trustees. Contrary to the plaintiffs' assertions, there was 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 HBIs in a way that impede[d] their ability to protect the rights of their students." *Id.*

<sup>195</sup> See *Ayers v. Fordice*, 111 F. 3d 1183, 1195 (5th Cir. 1997). The Fifth Circuit affirmed the district court's remedial decree respecting uniform admissions standards but remanded on the issue of remedial developmental courses, which had been largely eliminated under the trial court's remedial decree.

jure system of segregation;<sup>196</sup> and remanded on four other issues respecting the implementation of the remedial decree.<sup>197</sup>

## 2. The Louisiana Case post- *Fordice*

Prior to the Supreme Court's decision in *Fordice*, it seemed that the Fifth Circuit's position on the applicability of *Bazemore* would be a settled one. However, with the Supreme Court's final pronouncement on the matter, the "affirmative duty to dismantle . . . root and branch" standard of *Green* required Judge Schwartz in the Eastern District of Louisiana to once again review the higher education system in the State of Louisiana for constitutional compliance. 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.<sup>198</sup> On appeal, the Fifth Circuit determined that Judge Schwartz's grant of summary judgment on the issue of liability was improvident.<sup>199</sup> There were genuine issues of material facts respecting the matter of unnecessary program duplication and whether there existed definable educational justifications for the duplicative programs in geographically proximate institutions.<sup>200</sup> Furthermore, there were genuine and material issues of fact respecting the various open admissions programs and whether they were responsible for

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<sup>196</sup> *Id.* at 1228.

<sup>197</sup> *Id.* On remand, the district court was ordered: to further evaluate the Board of Trustee's position on the possibility of merger between Mississippi Valley State University and Delta State University; to order an evaluation of the propriety of enhancing programs at Alcorn State University and increasing white enrollment there; to evaluate the accreditation attainment status of business programs at Jackson State University; and to make further findings respecting equipment funding disparities. *Id.*

<sup>198</sup> 1992 U.S. Dist. LEXIS 19854, 29 (E.D. La. 1992).

<sup>199</sup> *United States v. Louisiana*, 9 F.3d 1159, 1171 (5th Cir. 1993) (vacating remedial order).

<sup>200</sup> *Id.* at 1168–69 (5th Cir. 1993) (discussing different expert opinions and stating that evidence leaves room for different inferences).

the continuing segregative effects.<sup>201</sup> 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.”<sup>202</sup> There was a substantial record in this case that could not, and would not be ignored. Therefore, the court would only hear the disputed issues of fact which were defined by the Fifth Circuit.<sup>203</sup>

**V. 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, the parties in both cases should have been tremendously motivated to settle the lawsuits amicably because the crafting of a remedy by a federal judge could have yielded harsh outcomes.<sup>204</sup> In February of 1994, settlement negotiations in the Louisiana case resumed, culminating in a new Settlement Agreement in November of that year.<sup>205</sup> The Louisiana case entered its ten-year Settlement Agreement approximately two years after the States Supreme Court decision in *Fordice*. Oddly enough, the Mississippi case, which provided the Supreme Court with the opportunity

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<sup>201</sup> The Fifth Circuit agreed with defendant, Southern University Board of Supervisors, that the multiple-board governing structure in Louisiana could not be challenged under *Fordice* as a practice or policy emanating from the prior de jure system of education because the system was established under the 1974 Louisiana State Constitution, Article VIII, Sections 5–7. *Id.* at 1166, 1170.

<sup>202</sup> *United States v. Louisiana*, 1994 WL 374210, at \*2 (E.D. La. 1994).

<sup>203</sup> *Id.*

to define and clarify the measure for *Brown I* compliance in higher education, would not settle for another seven years.

Settlement negotiations in the Mississippi case began in June of 2000.<sup>206</sup> 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.<sup>207</sup> Other private plaintiffs disapproved of the settlement's terms and appealed Judge Biggers' order.<sup>208</sup> The Fifth Circuit found no abuse of discretion in the trial court's decision and approved the Agreement.<sup>209</sup> Unlike the Settlement Agreement in *United States v. Louisiana*, there was no stated period of time within which the states' progress under the Agreement would be monitored for compliance with the standards under *Fordice*.<sup>210</sup> Rather, the

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<sup>204</sup> See *infra*, Section V(E).

<sup>205</sup> See generally, Settlement Agreement in *United States v. Louisiana*, Civil Action Number 80-3300 (E. D. La.)

<sup>206</sup> *Ayers v. Musgrove*, 2002 U.S. Dist. LEXIS 1973, at \*7 (N.D. Miss. 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*, Vol. 17, Issue 17, October 12, 2000; Gina Holland, *Nicholson: Ayers Case Needs To Be Over College Board Wants To Settle Case*, *SUN HERALD*, June 14, 2006, at A4.

<sup>207</sup> *Ayers v. Musgrove*, NO: 4:75CV009-B-D, February 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*, 2002 WL 91895 \*4 (N. D. Miss. 2002). The Mississippi state House of Representatives and Senate assented to the parties Settlement Agreement during the 2002 regular legislative session. See House Concurrent Resolution No. 28, Mississippi Legislature, 2002 Session <http://index.ls.state.ms.us>.

<sup>208</sup> *Ayers v. Thompson*, 358 F. 3d 356, 365-367, 376 (5<sup>th</sup> Cir. 2004).

<sup>209</sup> *Ayers v. Thompson*, 358 F.3d 356, 375 (5th Cir. 2004), *cert. denied*, 543 U.S. 951 (2004).

<sup>210</sup> See Settlement Agreement *Ayers v. Musgrove*, Civil Action NO. 4:75CV9-B-D(N. D. Miss. 2001).

Agreement declared that its goal was to “[achieve] the finality of the *Ayers* litigation.”<sup>211</sup> 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.<sup>212</sup> Thus, the federal district court has now released the state of Mississippi from federal court oversight.<sup>213</sup>

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 minimum criteria for measuring whether a higher education system has disestablished its dual system of higher education.<sup>214</sup> Therefore, post-*Fordice* success requires a concerted focus on “sound educational practices,” and it is only through this concentrated focus that states may “disentangle” race from education thereby transforming “white colleges” and “black colleges” to “just colleges.”<sup>215</sup>

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<sup>211</sup> See Settlement Agreement *Ayers v. Musgrove*, Civil Action NO. 4:75CV9-B-D, p. 3 (N. D. Miss. 2001).

<sup>212</sup> See Mississippi Settlement Agreement at 3–4. The Settlement Agreement was required to be confected and approved based upon compliance with the requirements of the law of *Fordice*. See generally *Ayers*, 2002 WL 91895. Accordingly, the Settlement Agreement was required to meet the constitutional standards for the achievement of unitary status. The Settlement Agreement stated “[w]hen 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.” See Mississippi Settlement Agreement at 4.

<sup>213</sup> See Final Judgment in *Ayers v. Musgrove*, NO. 4-75CV009-B-D (N. D. Miss. 2002).

<sup>214</sup> See *Fordice*, 505 U.S. at 728 (declaring, “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.”).

<sup>215</sup> See *supra* note 8.

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*.<sup>216</sup> 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.<sup>217</sup> 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 Agreement.<sup>218</sup> The parties did not carve out any areas of responsibility for the state's historically white colleges.<sup>219</sup>

There exists some cognitive dissonance respecting complete theoretical dismantlement 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

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<sup>216</sup> Louisiana Settlement Agreement, at 2–24. (November 4, 1994).

<sup>217</sup> See Mississippi Settlement Agreement, (passim).

<sup>218</sup> See Mississippi Settlement Agreement, at 4–13 (describing both financial and academic terms of the settlement).

<sup>219</sup> See Mississippi Settlement Agreement, (passim).

by interpreting settlement agreements in desegregation lawsuits as contracts.<sup>220</sup> As contracts, the standard for successful performance is substantial compliance rather than 100% compliance with the terms of an agreement.<sup>221</sup> Now that the Louisiana Agreement has expired under its own terms and the higher education system in Mississippi has been released from federal court supervision, a commentary

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<sup>220</sup> See *Ayers v. Musgrove*, 2002 WL 91895, at \*3 (N.D. Miss. 2002) (stating that Mississippi's obligations under *Musgrove* Settlement are equally enforceable as obligations under any other contract).

<sup>221</sup> 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 generally *Lee v. Auburn City Bd. of Educ.*, 2002 WL 237091 (M.D. Ala. 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. Settlement Agreement, *U.S. v. Louisiana*, CV-80-3300A, at 30 (Nov. 4, 1995) [hereinafter Louisiana Agreement]. The Settlement Agreement in *Ayers v. Musgrove* was intended by its drafters to “accomplish a full, complete, and final settlement of [the case]. Settlement Agreement, *Ayers v. Musgrove*, No. 4:75CV00-B-D, at 1 (March 29, 2001) [hereinafter Mississippi Settlement Agreement]. The text of the Settlement Agreement provides guidance in this area, however, and illustrates that the Louisiana Agreement cannot derogate the requirements of *Brown I*, *Green* or *Fordice*. *United States v. Louisiana*, Settlement Agreement, *United States v. State of Louisiana*, No. 80-3300A, *passim* (Sept. 8, 1981) [hereinafter Louisiana Settlement Agreement]. The Louisiana Agreement specifically states that program duplication matters will be settled under the *Fordice* standard. Louisiana Settlement Agreement at 31. All other subjects covered within the Settlement Agreement purportedly will be governed by the question of whether the State of Louisiana has performed its promises under the Louisiana Agreement. The Louisiana Settlement 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 Louisiana Agreement. Louisiana Settlement Agreement at 31–32. There is no authoritative case law in the higher education context on the question whether the State of Louisiana can be released with less than complete performance under the Louisiana Agreement. However, there is case law in context of elementary and secondary desegregation, which suggests that the 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*.” *Dowell*, 498 U.S. at 249–50 (emphasis added). The language chosen by the *Dowell* Court and the *Fordice* Court require the elimination of vestiges of de jure segregation. Like the *Dowell* Court, the *Fordice* Court asked whether there existed policies or practices traceable to the prior de jure system which continue to foster segregation and are without sound educational justification. *Fordice*, 505 U.S. at 728. If these exist, they are to be eliminated to the extent practicable. *Id.* 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. See *Dowell*, 498 U.S. at 249–50. Here, a reviewing federal court is unlikely to be trapped by language relating to “unitary” or “dual status” in making its evaluation of the implementation of the Louisiana Agreement. 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.” *Dowell*, 498 U.S. at 245. The *Dowell* Court further noted that the term “dual” has been used by the judiciary to describe an intentionally segregated school system and “unitary” to describe a school system which complies

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 or whether racial non-identifiability is truly desirable or even possible.

Critiquing the end result under the Louisiana Settlement 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;<sup>222</sup> I) ensuring

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with the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution. *Dowell*, 498 U.S. at 245-46.

<sup>222</sup> 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 xvi-xvii, 17-18. For a critical analysis of

adequate financing for implementation of the desegregation plan; and J) an accountability component as a requirement of measurable outcomes for success and failure.<sup>223</sup>

#### A. The Long Range State-Wide Plan

The conceptualization of the desegregation efforts of a higher education system from a state-wide problem solving approach was first enunciated by the Court of Appeals in *Adams v. Richardson*,<sup>224</sup> in 1973 and embraced as policy by Department of HEW in 1978.<sup>225</sup> An effective desegregation plan can not attempt to remedy current de facto effects of prior de jure segregation on a “school-by-school basis.”<sup>226</sup> Of course, each institution within a system would necessarily have a role in implementing a sound desegregation plan.<sup>227</sup> 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,

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variances in the aggressiveness of the Justice Department's Title VI enforcement concomitant with changes in Presidential administrations, *see generally* HALPERN, *supra* note 66. Additionally, private business sector and private non-profit organization involvement as co-community partners is indispensable to a successful desegregation effort. 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. This dynamic is extraordinarily valuable in creating an “opportunity driven vision of public higher education.” S. EDUC. FOUND., at 51–52. 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.

<sup>223</sup> S. EDUC. FOUND., at xvi-xvii.

<sup>224</sup> 480 F. 2d 1159, 1164–66 (D.C. Cir. 1973).

<sup>225</sup> *See Adams*, 480 F.2d at 1164–66. *see also*, HALPERN, *supra* note 66, at 162–66.

<sup>226</sup> *See Adams*, 480 F.2d at 1164.

<sup>227</sup> *See id.* at 1164–65.

[addressing] the problem of *system-wide* racial imbalance,” allows a dual higher education system to successfully convert to a unitary one.<sup>228</sup>

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 systems’ structure can not 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.

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<sup>228</sup> See 43 Fed. Reg., at 6659; see also *Adams*, 480 F. 2d, at 1164–67 (reiterating need for structured state-wide plan in order to effectively achieve desegregation).

The 1974 litigation in *United States v. Louisiana* culminated in its first Consent Decree on September 8, 1981.<sup>229</sup> 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."<sup>230</sup> The Agreement 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 practices of all universities respecting other race staff and faculty; and 6) the structure of the governing boards of colleges and universities.<sup>231</sup>

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.<sup>232</sup>

The 1981 Consent Decree remained operable until its expiration on December 31, 1987.<sup>233</sup> Annual reports critiquing the progress under the agreement were generated for each year beginning on August 15, 1982.<sup>234</sup> On December 29, 1987, the United States moved to determine whether the State

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<sup>229</sup> *See* *United States v. Louisiana*, 527 F. Supp. 509 (E.D. L.A. 1981).

<sup>230</sup> *See id.* at 511.

<sup>231</sup> *See id.* at 515 (discussing commitments made by consent decree).

<sup>232</sup> *See id.*

<sup>233</sup> *See* Louisiana Consent Decree, at 29.

<sup>234</sup> *Id.* at 27.

of Louisiana had successfully performed under the Consent Decree.<sup>235</sup> 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.*<sup>236</sup> 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.<sup>237</sup> 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.'<sup>238</sup>

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 plans.<sup>239</sup> When the focus of the 1981 Consent Decree

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<sup>235</sup> See *U.S. v Louisiana*, 692 F. Supp. at 647.

<sup>236</sup> See *id.* at 657 (finding that state continued to provide "polarization and separation on a racial basis").

<sup>237</sup> See *id.* at 658.

<sup>238</sup> *Id.*

<sup>239</sup> See *id.* at 657-59.

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.<sup>240</sup> 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.<sup>241</sup> The 1992 *Fordice* Court’s focus on vestiges of segregation in particular universities informing the conclusion respecting the unconstitutional status of the *whole system* brought a comprehensibility to the 1994 settlement process. Now, a clearly articulated standard for unitary status informed the resultant 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.

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<sup>240</sup> See 1981 Louisiana Consent Decree, 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, other-race employee initiatives were left to individual institutions to implement without the guidance of a system-wide structure, or accountability.

<sup>241</sup> 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 *United States v. Louisiana*, 692 F. Supp. 642 (E. D. La. 1988). 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*, BATON ROUGE ADVOC., Oct. 17, 2005, at 6B; Will Sentell, *SUNO Officials Tout Service School Offers To Underserved*, BATON ROUGE ADVOC., Oct. 22, 2005, at 3B; Coleman Warner, *Housing Called Critical To Recovery at SUNO; Officials Envisions FEMA Trailer Park*, NEW ORLEANS TIMES PICAYUNE, Oct. 8, 2005, at A01.

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.<sup>242</sup> 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 easily come to an amicable, constitutional settlement amongst themselves. Whether it was the judges who were structuring and imposing a remedy, or whether, as the facts eventually revealed, the parties themselves developed an appropriate remedy, a salient question in resolving the Louisiana, as well as the Mississippi litigation, was the question of time and timing.

How much time is needed for effective implementation of the desegregation plan is a question of critical importance. A very important facet of both the Mississippi and Louisiana 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 must 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 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 Agreement has yet to be proven. With the Supreme Court's denial of certiorari in *Ayers* on October 18, 2004, the Settlement Agreement became effective and the federal court released the system from oversight and retained

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<sup>242</sup> See notes 71 and 72.

jurisdiction only to enforce the terms of the Agreement.<sup>243</sup> 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.<sup>244</sup> However, several provisions within the Agreement can not fully evaluated until the passage of time respecting the funding that implements them.<sup>245</sup> 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.<sup>246</sup> 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 respecting the failure of both plans to comprehensively view their public school systems and their higher education systems as a gestalt. Both Mississippi and Louisiana had histories of de jure segregation in their elementary and secondary public schools.<sup>247</sup> Problems in eliminating vestiges of segregation in a prior de jure system of higher education are

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<sup>243</sup> See *Ayers v. Thompson*, 543 U. S. 951 (2004); see also Final Judgment in *Ayers v. Mabus*, NO. 4:75CV009-B-D at 4, (N. D. Miss. Feb. 15, 2002).

<sup>244</sup> 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, at 15 (Feb. 15, 2002). 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.

<sup>245</sup> See *id.* generally.

<sup>246</sup> See *id.* generally.

<sup>247</sup> See notes 22 and 23.

inextricably bound to problems of prior de jure segregation in public school education.<sup>248</sup> 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 both states' higher education systems 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.<sup>249</sup> 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.<sup>250</sup>

### **B. Institutional Implementation of the State-wide Plans and Making Access An Institutional Mission**

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<sup>248</sup> See S. EDUC. FOUND., *supra* note 222, at xvi–xvii (discussing problems with de jure segregation and some proposed solutions).

<sup>249</sup> The 1981 Louisiana Consent Decree addressed the relationship between secondary school preparation and college entry more substantively than the 1994 Settlement Agreement. See Louisiana Consent Decree of 1981, at 21. 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. See Louisiana Settlement Agreement at 21 (stating that the programs “shall be designed to reduce the strangeness and alienation students often associate with other race institutions.”)

<sup>250</sup> 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. Mississippi Settlement Agreement, at 5. It was to be funded for ten years. See also Summer Program as originally proposed in the remedial proposal of the court in *Ayers v. Fordice*, 879 F. Supp. 1419, 1478–79 (N.D. Miss. 1995).

Although the higher education systems in the states of Mississippi and Louisiana are viewed by the Court as an entirety or a whole, their respective desegregation plans should require 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 focus on access to quality higher education for students whose opportunity at their respective institution was formally foreclosed under the de jure system of segregation.<sup>251</sup> Each institution should pay 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.<sup>252</sup> In the Mississippi Agreement, however, the fulcrum of the parties' agreement respecting institutional implementation and access rested heavily on historically black colleges and universities.<sup>253</sup> Maintaining and enhancing the programmatic offerings and the facilities at the historically black colleges was the entire focus of the Agreement.<sup>254</sup> The Agreement contained no terms placing new institutional commitments on the historically white colleges for eliminating

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<sup>251</sup> See S. EDUC. FOUND., *supra* note 222, at xviii (discussing proposed implementation plans).

<sup>252</sup> See Louisiana Settlement Agreement, at 20–22 (describing institutional responsibility for other race recruitment and retention); *Id.* at 23–24 (explaining institutional responsibility for other race recruitment in employment in university).

<sup>253</sup> See *Ayers* Settlement Agreement (*passim*). Other race presence at many historically white institutions within the system was much higher than at historically black institutions. See *infra* note 392. See also AAUP, *Historically Black Colleges and Universities: Recent Trends* (2007), (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.”)

<sup>254</sup> See *Ayers* Settlement Agreement (*passim*).

vestiges of prior de jure segregation.<sup>255</sup> 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*.<sup>256</sup> Additionally, the income generated from the Public and Private Endowments created by the Settlement 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.”<sup>257</sup>

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<sup>255</sup> According to the 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.” *See id.* at 4.

<sup>256</sup> This 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 (Lorman); Biotechnology Masters (Lorman); Bachelor of Computer Networking (Vicksburg); and Bachelor of Environmental Science (Lorman). *See* Mississippi Settlement Agreement, 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 Disorders; Ph. D. In Higher Education, and Ph.D. In Public Health. *See id.* at 6–7. The Mississippi Inter-institutional 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. 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. *See id.* at 7. The development, implementation, strengthening or reviewing of the programs must be in concert with “sound educational practices” and “resources available over time.” *See id.* at 5. The federal court expects substantial implementation and enhancement of these programs over the seventeen-year period of funding. *See id.* at 5.

<sup>257</sup> Mississippi Settlement Agreement, at 9. The Settlement Agreement defined other race as “persons who are not African-American.” *See* Mississippi Settlement Agreement at 10. n. 2.

A significant focus of the Louisiana Agreement addresses the *Fordice* program duplication factor.<sup>258</sup> The Agreement was designed to provide programmatic enhancements and differentiation at the historically black colleges.<sup>259</sup> The three historically black colleges agreed to establish and implement new programs for the express purpose of “attracting other race students.”<sup>260</sup> Prior to the effective date of the Settlement 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.<sup>261</sup> All of these programs were continued and some were expanded under the 1994 Settlement Agreement.<sup>262</sup> Each university in the system agreed to “develop a comprehensive program for recruitment and retention of other race students, faculty, administrators, and staff.”<sup>263</sup>

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<sup>258</sup> *See generally id.*

<sup>259</sup> *Id.*

<sup>260</sup> *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, four 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 Masters Degree in Criminal Justice that had previously been approved by the Board of Regents. *Id.* at 11–12. Southern University, New Orleans agreed to develop and implement a Masters Degree in Transportation, Masters Degree in Substance Abuse, Masters Degree in Teaching, and a Masters Degree in Computer Information Systems. *Id.* at 12–13. Grambling State University agreed to develop and implement a Ed. D. degree program, two masters degree programs and four baccalaureate/associate degree programs. *Id.*

<sup>261</sup> *See* Louisiana Settlement Agreement, at 16.

<sup>262</sup> *Id.* at 16–17. Louisiana State University the flagship historically white college 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.

<sup>263</sup> Louisiana Settlement Agreement, at 20–22.

Finally, the Louisiana agreement required each university within the system to create and develop a program to recruit and retain other race students, faculty, administrators, and staff.<sup>264</sup>

### 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.<sup>265</sup> The trial court's findings in *Ayers v. Fordice* support the truthfulness of this statement.<sup>266</sup> 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,<sup>267</sup> student retention is the indicator of the institution's success and performance.<sup>268</sup> Each is a measurable outcome. Research has also shown that there exists a direct

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<sup>264</sup> *Id.* at 23–24.

<sup>265</sup> See *Ayers v. Fordice*, 1995 WL 1945428, at \*44 (N.D. Miss. 1995) (finding that retention rates tend to be lower for African-American students than for white students in state colleges and universities).

<sup>266</sup> *See id.*

<sup>267</sup> “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.” Randi S. Levitz, *Strategic Moves for Retention Success*, 108 NEW DIRECTIONS FOR HIGHER EDUC. 31 (1999).

<sup>268</sup> 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.*

proportional relationship between retention and a student's academic ability.<sup>269</sup> Moreover, the student's ability to persist from the first to the second year is one of the most important factors influencing the institution's graduation rate.<sup>270</sup> In general, national graduation statistics rank Mississippi and Louisiana well below the top ranked states reporting six year graduation statistics for four- year institutions.<sup>271</sup> 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.<sup>272</sup> 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.<sup>273</sup> As a

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<sup>269</sup> See *id.* at 32 (listing empirical data showing relationship between academic achievement and retention rates).

<sup>270</sup> See *id.* at 36 (establishing connection between achievement between the first and second years).

<sup>271</sup> THE NATIONAL CENTER FOR PUBLIC POLICY AND HIGHER EDUCATION, *Measuring Up 2006: The State Report Card on Higher Education, Mississippi* at 10 and THE NATIONAL CENTER FOR PUBLIC POLICY AND HIGHER EDUCATION, *Measuring Up 2006: The State Report Card on Higher Education, Louisiana* at 10. 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 top ranked states in 2006 reported six year graduation statistics of 64%. *Id.*

<sup>272</sup> The Education Trust, College Results Online, <http://www.collegeresults.org/search2d.aspx?y>. See also Change, *Rethinking and Reframing The Carnegie Classification*, Sept./Oct. 2005, Vol. 37, No. 5, pgs. 50-57. The 1997-2004 six-year graduation rates at Louisiana's historically black colleges were (Carnegie Classification indicated in parenthesis): Grambling State University(Master's Small), 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.*

<sup>273</sup> The Education Trust, College Results Online, <http://www.collegeresults.org/search2d.aspx?y>. The 1997-2004 six-year graduation rates for 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,

matter of sound educational policy and 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 both states' six-year graduation rates for not only for African American students, but for all students enrolled in the states' 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.<sup>274</sup> Judge Biggers' 1995 remedial order eliminated the greater portion of these remedial courses and substituted an intense summer developmental program.<sup>275</sup> Judge Biggers found that African American student retention rates were lower than those of white students system-wide.<sup>276</sup> As a response, he adopted the Board of Trustees' uniform admissions program that provided

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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.*

<sup>274</sup> See *Ayers v. Fordice*, 111 F. 3d 1183, 1201 (5th Cir. 1997) (discussing previous arrangement for providing remedial education).

<sup>275</sup> The Court of Appeals ordered a remand on the propriety of the elimination of the remedial courses at Mississippi universities. See *Ayers*, 111 F. 3d at 1202, 1228.

<sup>276</sup> 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

for a spring placement process for high school seniors, coupled with a summer developmental program for qualifying students.<sup>277</sup> The subsequent Settlement Agreement in *Ayers* did not abandon the focus on retention initiatives. The Settlement Agreement provided for the maintenance and implementation of a summer developmental education program that had been established under a prior Consent Decree.<sup>278</sup> 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.<sup>279</sup>

Much of the student-oriented text in the Louisiana Settlement Agreement focused on the financial aspect of recruiting and retaining of other race students, to the detriment of a more balanced approach, which should have also focused on the academic implications of retention.<sup>280</sup> According to

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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. Mississippi 1995).

<sup>277</sup> *Id.* at 478 (explaining both facets of the admission procedure).

<sup>278</sup> *See Ayers*, 879 F. Supp. at 1478. In 1995, Judge Biggers ordered adoption of the Board of Trustees' 1995 admissions standards for admission to Mississippi colleges. *See Ayers*, 879 F. Supp. 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. *See id.* at 1478. If students passed the spring academic screening process, they would be admitted to the university. *See 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. *See 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. *See Final Judgment, Ayers v. Musgrove*, No. 4:75CV009-B-D, at 4–5 (Feb. 15, 2002). These appropriations are designated for use by students who qualify for admission to the summer developmental program. *Id.*

<sup>279</sup> *See Ayers*, 879 F. Supp. at 1478.

<sup>280</sup> *See Louisiana Settlement Agreement*, at 20–22.

the text of the Settlement 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.<sup>281</sup> The Agreement's limited requirements for academic retention efforts permitted each university to address these issues or not, in its individual plan of implementation.<sup>282</sup> 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.<sup>283</sup>

However, respecting the two geographic proximate state law schools in Baton Rouge, Louisiana, the Agreement contained specific requirements concerning retention efforts.<sup>284</sup> LSU Law Center, the historically white institution, was required to create and implement a plan for recruiting and

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<sup>281</sup> See Louisiana Settlement Agreement, at 20–22.

<sup>282</sup> Settlement Agreement, at 20–22.

<sup>283</sup> Ninth Annual Evaluation of the Desegregation Settlement Agreement, Implementation of the Settlement Agreement United States v. State of Louisiana, No. 80-3300A, at 37–39 (May 2004); Eighth Annual Evaluation of the Desegregation Settlement Agreement, Implementation of the Settlement Agreement United States v. State of Louisiana, No. 80-3300A, at 33–35 (May 2003); Seventh Annual Evaluation of the Desegregation Settlement Agreement, Implementation of the Settlement Agreement United States v. State of Louisiana, No. 80-3300A, at 29–31 (May 2002); Sixth Annual Evaluation of the Desegregation Settlement Agreement, Implementation of the Settlement Agreement United States v. State of Louisiana, No. 80-3300A, at 29–31 (May 2001); Fifth Annual Evaluation of the Desegregation Settlement Agreement, Implementation of the Settlement Agreement United States v. State of Louisiana, No. 80-3300A, at 33–34 (May 2000); Fourth Annual Evaluation of the Desegregation Settlement Agreement, Implementation of the Settlement Agreement United States v. State of Louisiana, No. 80-3300A, at 29–30 (May 1999); Third Annual Evaluation of the Desegregation Settlement Agreement, Implementation of the Settlement Agreement United States v. State of Louisiana, No. 80-3300A, at 32–33 (May 1998); Second Annual Evaluation of the Desegregation Settlement Agreement, Implementation of the Settlement Agreement United States v. State of Louisiana, No. 80-3300A, at 27–29 (May 1997); First Annual Evaluation of the Desegregation Settlement Agreement, Implementation of the Settlement Agreement United States v. State of Louisiana, No. 80-3300A, at 18–19 (May 1996).

<sup>284</sup> Louisiana Settlement Agreement, at 19.

retaining more African American students.<sup>285</sup> Southern University Law Center, the historically black institution, agreed to provide academic support activities for students at risk for attrition.<sup>286</sup>

#### **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.<sup>287</sup> A

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<sup>285</sup> *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.” *See id.* The LSU plan was implemented effective the 1995-1996 academic year. *Id.* 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. 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%. Ninth Annual Evaluation of the Desegregation Settlement Agreement, Implementation of the Settlement Agreement United States v. State of Louisiana, No. 80-3300A, at 34 (May 2004). 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.

<sup>286</sup> Louisiana Settlement Agreement, at 20. In accordance with Agreement requirements, Southern University Law Center implemented an academic support program for students effective the 1993-1994 academic year. 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. First Annual Evaluation of the Desegregation Settlement Agreement, Implementation of the Settlement Agreement United States v. State of Louisiana, No. 80-3300A, at 16 (May 1996).

<sup>287</sup> S. EDUC. FOUND., *supra* 222, 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.

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. If the community college system is organized to foster easy articulation between the system's two-year colleges and four-year institutions, and true student choice is operational as opposed to the situation under prior de jure segregation practices, the community college can achieve its place in fulfilling access to equal educational opportunity.<sup>288</sup>

When the Louisiana case was originally filed in 1974, there was no separate state-wide community college system.<sup>289</sup> Three community colleges were named as defendants in the lawsuit, but there was no "system" to name as a defendant or to address remedially.<sup>290</sup> Nevertheless, recognizing the need to remediate the 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

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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* at 30.

<sup>288</sup> *See id.* (noting concern regarding rates of transfer between two and four-year colleges).

<sup>289</sup> *United States v. Louisiana*, 718 F. Supp. 499, 503 (E. D. La. 1989).

<sup>290</sup> *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 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 "operated on anything but a fully integrated basis and their supervising boards, which [were] wholly separate from Louisiana's four higher education boards, [had not] discriminated in any fashion against minorities." *Id* at 658.

establishment of a community college system in the state.<sup>291</sup> 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.<sup>292</sup> 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.<sup>293</sup> The final 1994 plan partnered with the community college in its four-year college desegregation effort, but only to very limited extent. The plan only required 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.<sup>294</sup> This narrow community college focus suggests that parties can, in fact,

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<sup>291</sup>United States v. Louisiana, 718 F. Supp. 499, 509 ( E. D. La. 1989). The trial court ordered the creation of a "system" of community colleges with open admissions standards . *Id.* 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 the all responsibility for higher education remedial programming, thereby eliminating remedial educational programming from all four-year institutions. *Id.* at 518.

<sup>292</sup>See U.S. v. Louisiana, 718 F. Supp. 499 (E. D. La.1989); *Ayers v. Allain*, 914 F. 2d. 676 (5<sup>th</sup> Cir. 1990), and U. S. v. Louisiana, 751 F. Supp. 606, 608 ( E. D. La. 1990).

<sup>293</sup>The Louisiana State legislature ultimately provided the vehicle through which a community college system was created. See Louisiana Senate Bill No. 1 First Extraordinary Session, 1998 and Louisiana Senate Bill No. 2, First Extraordinary Session, 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*, THE TIMES PICAYUNE, Nov.23, 1998, B4; Ed Anderson, *Community College Plan Top Amendment on Ballot 18 Changes Proposed For State Constitution*, THE TIMES PICAYUNE, Sept. 23, 1998, A3; Ed Anderson, *Foster Quietly Signs Community College Bill*, THE TIMES PICAYUNE, May 8, 1998, A3.

<sup>294</sup>Louisiana Settlement Agreement, at 4, 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.* Additionally, the Agreement required an articulation agreement between the community college and the four-year institutions. *Id.* at 9. The Baton Rouge Community College was established 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. See Louisiana Settlement Agreement, 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 of the Desegregation Settlement Agreement, Implementation of the Settlement Agreement

settle within narrower constitutional parameters, than might be identified by a judicially crafted remedy.

By contrast, the Mississippi Settlement Agreement is totally lacking in community college desegregation partnering. Mississippi has a substantial community college system.<sup>295</sup> However, 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 Settlement Agreement contained no collaborative coordination between community colleges and the state's four year institutions.<sup>296</sup> 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* requisites respecting dismantling a prior de jure system of higher education by eliminating 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:

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United States v. State of Louisiana, No. 80-3300A, at 18 (May 2004).

<sup>295</sup> See IHL Miss. Bd. of Tr. of State Institutions of Higher Learning, Miss. Pub. Univ.s, *See generally* Mississippi Settlement Agreement. <http://www.ihl.state.ms.us/universities.html>.

<sup>296</sup> See *Ayers* at 879 F. Supp. 1419, 1475-76 (N. D. Miss. 1995) stating: "[T]he 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.*

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 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.<sup>297</sup>

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 given institution is not a required *Fordice* remedy if its continued existence is educationally justifiable.

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.<sup>298</sup> Inadequate funding also

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<sup>297</sup> United States v. Fordice, 505 U. S. 717, 743 (1992) (emphasis added).

<sup>298</sup> *Responding to the Needs of Historically Black Colleges and Universities, Before the H. Subcomm. on 21<sup>st</sup> Century Competitiveness and the H. Subcomm. on Select Educ. Of the Comm. on Educ. and the Workforce*, 107th Congress 7–8 (2002) (opening statement of Rep. Robert Scott); *Responding to the Needs of Historically Black Colleges and Universities, Before the H. Subcomm. on 21<sup>st</sup> Century Competitiveness and the H. Subcomm. on Select Educ. of the Comm. on Educ. and the Workforce*, 107th Congress 37–39 (2002) (statement of Michael Lomax) (discussing capital improvement and funding problems of HBCUs); LORENZO MORRIS, *ELUSIVE EQUALITY: THE STATUS OF BLACK AMERICANS IN HIGHER EDUCATION* 193–98 (1979).

had an effect on student teacher ratio in the classroom, as well as the ability of the institutions to effectively recruit the best students.<sup>299</sup> 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.<sup>300</sup> Neither the Louisiana, nor the Mississippi Settlement Agreement resulted in the closure of any historically black institution.<sup>301</sup> Whether the plans have resulted in “black enclaves by private choice” or institutions which are now “just universities,” taking their place in an array of educational opportunities provided by the state has been, 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.<sup>302</sup> If *Brown* said that “separate is

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<sup>299</sup> 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, Before the H. Subcomm. on 21<sup>st</sup> Century Competitiveness and the H. Subcomm. on Select Educ. Of the Comm. on Educ. and the Workforce*, 107th Congress (2002); 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).

<sup>300</sup> In *Fordice*, Justice Thomas speaks to the educational value of the historically black 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. *Id.* at 748–49 (Thomas, J., concurring).

<sup>301</sup> See generally Louisiana Settlement Agreement; Final Judgment, *Ayers v. Musgrove*, No. 4:75CV009-B-D (Feb. 15, 2002).

<sup>302</sup> See *Diversity: The Emerging Modern Separate But Equal Doctrine* wherein Professor Robert Davis characterizes *Fordice* as “[holding] open the separate but equal door....to provide educational justifications for maintaining [racially identifiable] institutions for the sake of diversity. *Id.* at 1 *Wm. & Mary J. Women & Law* 11, 51-52 (1994).

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.”<sup>303</sup>

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 for resolving lingering effects of prior discrimination. A truly progressive and effective desegregation plan in both states should have accounted for the successes the institutions experienced despite the disparities in funding they lacked. The settlement processes in both states reflect these considerations. Both plans respected and valued the contribution of their respective historically black institutions by defining their missions within the confines of *Fordice*, thereby exposing their educational justifiability.<sup>304</sup> Once the de jure segregative missions of the institutions were properly de-

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*But see, Race Consciousness in Higher Education: Does “Sound Educational Policy” Support the Continued Existence of Historically Black Colleges?* wherein Professor Wendy Scott Brown challenges 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*, “re-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 at 43 Emory L. J. 1, 17-18 (1994).

<sup>303</sup> *Fordice*, 505 U.S. at 743.

<sup>304</sup> Comprehensive desegregation plans must “transform institutions through new mission statements, creative program assignments, and enhanced institutional cooperation . . .” S. EDUC. FOUND., *supra* note 222, at xvii. Justice White further commented in *Fordice*:

That an institution is predominantly white or black does not in itself make out a constitutional

constructed, all of the retained institutions and programs necessarily *required* enhancement. At this juncture, the two states' 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 realized and fulfilled.<sup>305</sup>

The Louisiana Agreement is very interesting respecting the question of the incorporation of the historically black college in a diverse assortment of institutions within the state's system of higher education versus the problem of merger or closure of institutions. Under the terms of the Settlement Agreement, the court retained jurisdiction in order to enforce the terms of the agreement.<sup>306</sup> The court *was not* authorized to order "any remedial action different from that set forth in the Settlement Agreement."<sup>307</sup> A careful analysis of the Settlement Agreement, however, reveals a requirement that the *Fordice* formulary was to be applied to the program duplication factor.<sup>308</sup> Therefore, if the system

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violation. But surely the State may not leave in place policies rooted in its prior officially segregated system that serve to maintain the racial identifiability of its universities if those policies can practicably be eliminated without eroding sound educational policies.  
United States v. Fordice, 505 U. S. 717, 743 (1992).

<sup>305</sup> S. EDUC. FOUND., *supra* note 222, at xvii (suggesting advancements in black institutions to enhance education levels).

<sup>306</sup> Louisiana Settlement Agreement, at 30-31.

<sup>307</sup> *See* Louisiana Settlement Agreement, at 31. The Settlement Agreement operates as does any other settlement agreement in that there is not admission of liability on the part of the defendant and the defendant retains the entitlement to due process respecting the issues of liability and remedy before terms outside the text of the agreement can be imposed.

is found out of compliance with the *Fordice* standard respecting program duplication, the court has to 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*.<sup>309</sup> The Special Master identified the duplicate programs 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

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<sup>308</sup> *See id.*

<sup>309</sup> United States v. Louisiana, 718 F. Supp. 499, 513-514 (E. D. La. 1989). The Special Masters Report stated:  
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 black is particularly important 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*, THE TIMES PICAYUNE, December 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.*

Law Center as the surviving institution.<sup>310</sup> 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.”<sup>311</sup> 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.<sup>312</sup> This merger remedy became the lightning rod for a very contentious debate between the parties because the African American legal community was vehemently opposed to it.<sup>313</sup> Fortunately, after hearing further evidence in the

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<sup>310</sup> *Id.* 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.” *See id.* at 514, (emphasis added) The court’s final order required the merger of “Southern Law Center *into* the LSU Law Center.” *Id.* (emphasis added)

<sup>311</sup> Alfreda A. Sellers Diamond, *Becoming Black in America*, 67 MISS. L.J. 427, 458 n.133 (1997).

<sup>312</sup> 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.*”

<sup>313</sup> When the merger of the two law schools was originally announced 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....” *See* John LaPlante, *Black Lawyers Liken Judges’ Reasoning on Law School Merger to That of Bigots*, BATON ROUGE ADVOC., July 27, 1989, at 1B; *see* 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*, NEW ORLEANS, 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.

matter, the trial court reversed itself on the merger order.<sup>314</sup> Nevertheless, within the confines of the implementation of the Settlement 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, Southern University Law Center's casting as the “inferior school... produc[ing second class lawyers]” by the Special Master and its historical inferior treatment by its creator, continue as a background premise, producing calls for justification by the school's detractors and defensive-minded suspicion by its supporters.<sup>315</sup> 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, so educational justifiability has become the linchpin of its remedial focus. The Settlement 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.”<sup>316</sup> The state promised to “improve the

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<sup>314</sup>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: “[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 ration, 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, FN 54.

<sup>315</sup>*See supra* note 309-310; *see also* Section VII, *infra*.

<sup>316</sup>*See id.* at 20. The plan also incorporated the April 1994 Master Plan for Higher Education, Board of Regents, State of Louisiana; *see also id.* at Appendix E. Respecting program duplication and program differentiation, The Settlement Agreement required Southern University Law Center to institute a four-year part-time Juris Doctorate Program in the Fall of 1993, as well as a four-year part-time Juris Doctorate Program in the Fall of 1993. The establishment of this program not only manages the *Fordice* factor of program duplication, it also differentiates Southern University Law Center's

quality of [its] physical facilities and academic offerings, articulate fundamental differences in the mission of the [two law schools], [and] increase access to LSU Law Center.”<sup>317</sup> 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 Board of Regents 1993 Master Plan.<sup>318</sup>

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mission from that of the Paul M. Hebert Law Center at Louisiana State University. *See generally id.* at Appendix E, 11–15, as excerpted from The Master Plan for Higher Education, Board of Regents, State of Louisiana, April, 1994. 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 the Law Centers progress in removing its probationary accreditation status with the American Bar Association. *See Second Annual Evaluation of the Desegregation Settlement Agreement, Implementation of the Settlement Agreement United States v. State of Louisiana, No. 80-3300A, at 27–29 (May 1997).* Each report of the Monitoring Committee ends with the committee’s Conclusions and Recommendations. 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 the Law Center’s progress respecting faculty salaries and faculty hiring, bar examination preparation, curriculum expansion, capital outlay improvements, and academic assistance for at risk students; *Second Annual Evaluation of the Desegregation Settlement Agreement, Implementation of the Settlement Agreement United States v. Louisiana, No. 80-3300A, at 24–26 (May 1997).* 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, 2006-08 at 40.

<sup>317</sup> *See* Louisiana Settlement Agreement, at Appendix H, 1, § 12.

<sup>318</sup> *See* Louisiana Settlement Agreement, at 17-18. Under the plan, the state aspired to move Southern University, Baton Rouge from a Four-Year III University to a Four-Year II University. *Id.* at 4. This goal required Southern University to end its open admissions policy in the year 2000. Beginning in the 2001 academic year, Southern University A & M implemented selective admissions requirements for freshman students. 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 as 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 of the Desegregation Settlement Agreement, Implementation of the Settlement Agreement United States v. Louisiana, No. 80-3300A, at 5 (May 2004). Southern University, New Orleans is a Four-V University and it was allowed to maintain its open-admissions status under the Settlement Agreement. *See* Louisiana Settlement Agreement at 5. *But see* BD. OF REGENTS STATE OF LA., MASTER PLAN FOR PUBLIC POST-SECONDARY EDUC.: 2001, *supra* note 242, respecting Louisiana Board of Regents Master Plan modification of open admissions status of Grambling State University and Southern University New Orleans. *Id.* There are six categories of Southern Regional Education Board classifications

## F. Financial Support for Implementation

The settlement process in *Ayers* was contentious and resulted in no unanimous viewpoint respecting its funding provisions.<sup>319</sup> 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;<sup>320</sup> the funding requirements would restrict state policymakers'

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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/main/EdData/InstCategories/definitions.asp>. The Four-Year 1 category is the highest ranking, describing universities "awarding at least 100 doctoral degrees that are distributed among at least 10 CIP categories with no more than 50 percent in any one category. *Id.* By contrast, a Four-Year II university is the second highest ranking, describing universities awarding at least 30 doctoral degrees that are distributed among at least 5 CIP categories." *Id.* A Four-Year III university is the third highest ranking, describing universities "awarding at least 100 master's education specialist, post-master's, or doctoral degrees with master's education specialist, and post-master's degrees distributed among at least 10 CIP categories. *Id.* A Four-Year-IV university is the fourth ranking category, describing universities "awarding at least 30 master's education specialist, post-master's, or doctoral degrees with master's education specialist, and post-master's degrees distributed among at least 5 CIP categories. *Id.* The Four-Year V university is the fifth ranking category describing universities "awarding at least 30 master's education specialist, post-master's or doctoral degrees." *Id.* The Four-Year VI university is the sixth ranking category describing universities "awarding less than 30 master's education specialist, post master's or doctoral degrees. *Id.* 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> (last visited January 25, 2007).

<sup>319</sup>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 not in the field of education, but who are interested as citizens and taxpayers, have expressed strong views on the issue." *Ayers v. Musgrove*, 2002 WL 91895, \*3(N. D. Miss. 2002).

<sup>320</sup>Under a prior remedial plan designed by the court, requirements for enhancements at Jackson State University, Alcorn State University and Mississippi Valley State University were completed or substantially completed, yet the funding required by the Settlement Agreement in *Ayers* mandated additional millions of dollars. *See Ayers v. Musgrove*, 2002 WL 91895, at \*3 (N.D. Miss. 2002).

future choices respecting structural changes to the state's higher education system;<sup>321</sup> the funding decisions within the plan were the result of a politicization of the litigation process, rather than the result of sound educational planning;<sup>322</sup> expansion of the budgets for the historically black colleges supported program duplication in derogation of the law of *Fordice*;<sup>323</sup> and finally, the state's fiscal situation in the future might result in an inability to comply with funding mandates under the plan.<sup>324</sup> 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.<sup>325</sup> The appellants' primary criticism of the Settlement Agreement was its insufficient financial support for historically black colleges.<sup>326</sup> Additionally, appellants were critical of the requirement that a numerical goal of 10% other race student enrollment must have been achieved and

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<sup>321</sup> 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.* at \*4.

<sup>322</sup> *See id.* at \*4.

<sup>323</sup> *See id.* at \*4 n.7.

<sup>324</sup> *See Ayers*, 2002 WL 91895, at \*4.

<sup>325</sup> *See Ayers v. Thompson*, 358 F.3d 356, 359 (5th Cir. 2004).

<sup>326</sup> *See id.* at 370.

maintained by the historically black colleges before the institutions could receive control of the public endowment.<sup>327</sup> The Fifth Circuit subsequently determined that the district court had not abused its discretion in approving the Settlement Agreement.<sup>328</sup>

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.<sup>329</sup> Pursuant to the agreement, if any historically black college or university “attain[ed] a total head count other-race enrollment of 10% and sustain[ed] such a 10% 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.<sup>330</sup> The Agreement provided for spending for the improvement of academic programs,<sup>331</sup>

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<sup>327</sup> *See id.* at 370.

<sup>328</sup> *Id.* at 376.

<sup>329</sup> 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.” *Id.* 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 11. 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 9–10, 11–12. 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.

<sup>330</sup> 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.” *See id.* at 10. Nowhere in the Settlement Agreement, however, do the parties indicate how they arrived at a ten-percent other-race enrollment level as a benchmark for historically black colleges to

special summer academic programs,<sup>332</sup> capital improvement funding,<sup>333</sup> special Ayers Funding from the state legislature spanning a seventeen-year-period,<sup>334</sup> and an elevation in status for Jackson State University.<sup>335</sup>

reach in order to gain control over the principal of the Ayers Public and Private Endowments. 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 benchmark for the number of white students to set as a target goal on historically black campuses. The relative percentages across the last several years vary 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%

IHL Miss. Bd. of Tr. of State Institutions of Higher Learning, Miss.s Pub. Univs., Ayers Accountability Manual, § iv, Sept. 15, 2005. Comparatively, white enrollment at the historically black colleges during the same period did not approach the same percentages. *Id.* 10% was more than the total number of African Americans enrolled in college in America in 1980 and less than in 2000, 9% in 1980 and 11% 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>.

<sup>331</sup> The state promised to spend \$246 million dollars 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, at 5–8 (Feb. 15, 2002).

<sup>332</sup> This portion of the settlement provides \$6.25 million dollars to be spent for qualifying students to attend summer

The funding provisions in Louisiana Settlement Agreement were obligatory upon the state only for the duration of the Agreement. With the expiration of the Settlement Agreement in 2005 came the expiration of all Agreement mandated funding of its special programs.<sup>336</sup> The funding structure supported the programmatic enhancements for the historically black colleges, and it supported other race graduate scholarships at historically white colleges as well.<sup>337</sup> All funding provisions in these categories which have not become self-sustaining are at risk for discontinuance.<sup>338</sup>

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developmental education classes. *Id.* at 4–5.

<sup>333</sup> The state promised to spend \$75 million dollars for new construction and physical renovations at Alcorn State University, Jackson State University and Mississippi State University. *See* Michael A. Fletcher, *Mississippi Reaches \$500 Million Settlement in Desegregation Case*, WASH. POST, Apr. 24, 2001, at A1.

<sup>334</sup> “Special Ayers Funding” is required for implementation of every facet of the agreement as well as the funding of the summer development programs, academic programs, public endowment and the capital improvements required under the Settlement Agreement. Mississippi Settlement Agreement, at 14–17.

<sup>335</sup> The Settlement Agreement provided that Jackson State University be designated a “comprehensive university.” *Id.* at 17–18.

<sup>336</sup> *See* Tenth Annual Evaluation of the Desegregation Settlement Agreement, Implementation of the Settlement Agreement United States v. State of Louisiana, No. 80-3300A, at I (Oct. 2005).

<sup>337</sup> *See* Louisiana Settlement Agreement, at 13–14, 21–22. Under the Louisiana Agreement, the state legislature committed \$48 million dollars in spending for programs in the ten-year plan. The Southern University Board of Supervisors was allocated \$34 million dollars for programmatic enhancement, development and implementation with an annual allowance of \$4.1 million dollars. The University of Louisiana system was allocated \$14 million dollars for programmatic enhancement, development, and implementation for Grambling State University. *Id.*

<sup>338</sup> 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 is not yet know as of the submission of this article. *See generally Id.* at 13-17, 20–22, 23–24, 27. Louisiana lawmakers approved a bill imposing large budget cuts on higher education. *See* Karin Fischer,

## G. The Accountability Component As A Requirement of Measurable Outcomes

The Settlement Agreement in *United States v. Louisiana* completed its ten-year term under the supervision of a monitoring committee.<sup>339</sup> The committee produced ten annual evaluations of the implementation of the Agreement.<sup>340</sup> By comparison, no monitoring committee acts in an oversight capacity in the Mississippi Settlement Agreement.<sup>341</sup> The parties to the Mississippi Agreement maintain contractual rights to seek specific performance of the contract pursuant to the terms, but there is no independent non-partisan monitor to evaluate progress under the agreement.<sup>342</sup> 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.<sup>343</sup> The annual report is a factual disclosure detailing compliance with the critical portions of the Agreement.<sup>344</sup> It is not evaluative, reflective or critical. As of the completion of this article, only one report has been generated under the Mississippi Settlement Agreement.<sup>345</sup>

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*Louisiana Legislature Imposes \$77 Million In Cuts On State's Colleges and Students*, THE CHRON. OF HIGHER EDUC., Nov. 23, 2005, available at <http://chronicle.com/daily/2005/11/2005112301n.htm>. 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 of the Desegregation Settlement Agreement, Implementation of the Settlement Agreement, *United States v. State of Louisiana*, No. 80-3300A (Feb. 2006).

<sup>339</sup> See, e.g., Tenth Annual Evaluation of the Desegregation Settlement Agreement, Implementation of the Settlement Agreement *United States v. State of Louisiana*, No. 80-3300A, at ii (Oct. 2005).

<sup>340</sup> *Id.*

<sup>341</sup> See Mississippi Settlement Agreement, at 29.

<sup>342</sup> See *id.* generally.

<sup>343</sup> See *id.* generally.

<sup>344</sup> 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 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

The 1994 Louisiana Settlement Agreement differed from its 1981 predecessor in that the former contained no benchmark numerical goals for proportional enrollment of other race enrollment in the historically black and the historically white institutions.<sup>346</sup> Similarly, the 2001 Mississippi Agreement contained no numerical goals but focused on institutional enhancements and incentives for attracting other race students to historically black campuses.<sup>347</sup> 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

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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, 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. *See Ayers v. Musgrove*, 358 F.3d 356, 361 n.6 (5th Cir. 2004); *Ayers v. Fordice*, 879 F. Supp. 1419 (N.D. Miss. 1995).

<sup>345</sup> *See generally* IHL Miss. Bd. of Tr. of State Institutions of Higher Learning, Miss. Pub. Univs., Ayers Accountability Manual, Sept. 15, 2005, <http://www.ihl.state.ms.us/universities.html>.

<sup>346</sup> *See* 1981 Louisiana Settlement Agreement, at 15–16, Table 2 1991 Louisiana Settlement Agreement, at 20–22 ("[e]ach state institution shall develop a comprehensive program for recruitment and retention of other race students"). The 1981 Consent Decree, contained Equal Access provisions which set specific numerical goals: 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. *See* 1981 Louisiana Settlement Agreement, at 3. 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." *Id.* at 4; 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. *Id.* at 4, reference table 2. None of the numerical goals were met.

definable with any numerical precision. As long as no party to the agreement complains, the racial identifiability of many of the institutions in both states can remain with a wink and a nod of the parties. In addition, litigation fatigue set in and 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 files.<sup>348</sup>

A three person Monitoring Committee evaluated the progress and compliance of the state of Louisiana under its Settlement Agreement for ten successive years, producing a report for each year of implementation. The 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.<sup>349</sup> Historically black colleges awarded more than \$750,000 in other race scholarships.<sup>350</sup> However, all historically black universities within the system reported very low numbers of other race students actually enrolled.<sup>351</sup> Other race scholarships at historically white universities resulted in the award of 97 doctoral degrees during the term of the Settlement Agreement.<sup>352</sup> Most capital outlay projects promised under the Agreement

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<sup>347</sup> Mississippi Settlement Agreement (*passim*).

<sup>348</sup> See Halpern *supra* note 66.

<sup>349</sup> See Tenth Interim Annual Evaluation on the Louisiana Settlement Agreement, at *i*.

<sup>350</sup> See *id.* (specifying scholarships were to SUBR and SUNO).

<sup>351</sup> See *id.* at 16 (providing statistical chart of "other" race students from 1995 through 2004 attending Louisiana universities).

projects were completed.<sup>353</sup> Program duplication review by the State Board of Regents was completed during the term of the Settlement Agreement, resulting in ninety programs in the system being merged, consolidated, or terminated.<sup>354</sup> Program enhancements at the state's historically black colleges, mandated under the Settlement Agreement, and were completed during the its term.<sup>355</sup> 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.<sup>356</sup> Open admissions for all four-year institutions will end in 2010 when Grambling State University and

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<sup>352</sup> *See id.* at *I*

<sup>353</sup> *See id.*

<sup>354</sup> Second Annual Evaluation on the Louisiana Settlement Agreement 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 collaborative” programs between Louisiana State University and Southern University in Baton Rouge, New Orleans and Shreveport. *See* Louisiana Settlement Agreement, at 16–17. These programs were successfully developed during the Settlement Agreement. Tenth Interim Annual Evaluation on the Louisiana Settlement Agreement at *I*; *see also* Second Annual Evaluation of the Desegregation Settlement Agreement, Implementation of the Settlement Agreement United States v. State of Louisiana, No. 80-3300A, at 1, 27 (May 1997).

<sup>355</sup> *See* Louisiana Settlement Agreement, 10–13 and Tenth Interim Annual Evaluation of the Desegregation Settlement Agreement at *I*. Only one program targeted for development was abandoned. *Id.*

<sup>356</sup> *See* BD. OF REGENTS STATE OF LA., MASTER PLAN FOR PUBLIC POST-SECONDARY EDUC.: 2001, *available at* <http://www.regents.state.la.us/pdfs/Planning/masterplan2001.pdf> .

Southern University in New Orleans, two historically black colleges, will be the last four-year institutions to institute selective admissions requirements.<sup>357</sup>

Significant aspirational goals under the Louisiana Agreement, however, were not met. 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, however, this goal was not met.<sup>358</sup> The Agreement provided funding incentives for other race student enrollment and other race employment rather than setting numeric goals in these areas.<sup>359</sup> Unfortunately, across the ten-year period, the numbers in many institutions remained largely unchanged in entering freshman percentages in universities with selective admissions requirements. The employment statistics have

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<sup>357</sup> After the Board of Regents four step review, the decision was made to eliminate all open admissions requirements in four year institutions. *See id, supra*, at 25–26, 42, 49. Under the original terms of the Settlement Agreement, Grambling State University was allowed to retain its open admissions policy. Louisiana Settlement Agreement, at 6. Generally, ending an open admissions requirement is intended to bolster graduation rates. 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 Matthewson, *Beyond Brown: Children, Race and Education Essay*, 16 U. FLA. J.L. & PUB. POL'Y 299, 322 (2005).

<sup>358</sup> Louisiana Settlement Agreement, at 3–5; Tenth Annual Evaluation of the Desegregation Settlement Agreement, Implementation of the Settlement Agreement United States v. State of Louisiana, No. 80-3300A, *passim* (Oct. 2005). 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. *Supra* note 318. Neither university accomplished this goal within the ten-year period. Tenth Annual Evaluation of the Desegregation Settlement Agreement, Implementation of the Settlement Agreement United States v. State of Louisiana, No. 80-3300A, at 3 (Oct. 2005). 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. Louisiana Settlement Agreement, at 3–5; Tenth Annual Evaluation of the Desegregation Settlement Agreement, Implementation of the Settlement Agreement United States v. State of Louisiana, No. 80-3300A, at 3 (Oct. 2005).

<sup>359</sup> Tenth Interim Evaluation of the Desegregation Settlement Agreement, Implementation of the Settlement Agreement United States v. State of Louisiana, No. 80-3300A, at 16 (Oct. 2005); Louisiana Settlement Agreement, at 20–22.

also remained relatively unchanged.<sup>360</sup> Since the trial court will probably find that the universities have substantially performed the terms of the Agreement in these areas it is only speculative whether a more aggressive remedy would have been able to accomplish more towards accomplishing an integrative ideal.

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

The Settlement Agreement in the *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’s admissions standards, program duplication, and institutional mission assignments which were

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<sup>360</sup> Louisiana Settlement Agreement, at 23–24. In the Tenth Interim Evaluation of the Monitoring Committee, the Committee commented that “[m]ovement toward increasing the diversity of employees continues to remain minimal.” Tenth Interim Annual Evaluation of the Desegregation Settlement Agreement, Implementation of the Settlement Agreement *United States v. State of Louisiana*, No. 80-3300A, at 16 (Oct. 2005); Louisiana Settlement Agreement, at 43. A comparison of employees demonstrates largely white employee staffs at historically white colleges and largely black staffs at historically black colleges:

Institution	1995			2004		
	White	Black	Other	White	Black	Other
Grambling	74	966	54	83	648	44
La. Tech.	895	203	25	927	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 of the Desegregation Settlement Agreement, Implementation of the Settlement Agreement *United States v. State of Louisiana*, No. 80-3300A, at Appendix G, Number of Full Time Employees, Comparison 1995-96 (May 1997); *see also* Tenth Interim Annual Evaluation of the Desegregation Settlement Agreement, Implementation of the Settlement Agreement *United States v. State of Louisiana*, No. 80-3300A, at 43–44 (Oct. 2005).

responsible for continuing segregative effects. The Settlement Agreement in *Ayers v. Musgrove* focused largely on incentives for the state's historically black institutions to attract other race students across the next several years. 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 final assurance that there are no current effects of past de jure segregation causally linked to the prior de jure system.

All of the targeted problems respecting differential admissions standards, program duplication and institutional missions assignments will have been resolved pursuant to the parties' understandings of the Louisiana Settlement Agreement and hopefully to the satisfaction of the trial court judge. 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.<sup>361</sup> 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 there exist present effects of prior de jure discrimination. *Race qua race* initiatives would most certainly be unconstitutional.<sup>362</sup> The only constitutional use of race outside of a court-ordered desegregation agreement would be its use in *Grutter* affirmative action programs.<sup>363</sup>

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<sup>361</sup> See Tenth Interim Annual Evaluation of the Desegregation Settlement Agreement, Implementation of the Settlement Agreement *United States v. State of Louisiana*, No. 80-3300A, at I, 47 (Oct. 2005).

<sup>362</sup> See *Regents v. Univ. of Cal. v. Bakke*, 438 U. S. 265 (1978).

<sup>363</sup> *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 constitution. Using race as a one of many factors, the plan was narrowly tailored

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 should a university permissively employ diversity initiatives.<sup>364</sup> 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.<sup>365</sup>

However, in the state of Louisiana, the maintenance of race-specific other race student, faculty and employee initiatives post-Declaration of Unitary Status also requires an analysis under Louisiana state constitutional law. What may have been permissible under the *Fordice*-driven desegregation order, may be impermissible once the system has been declared unitary. I predict that the next round of higher education litigation in the state of Louisiana will be those cases that seek to address a university’s attempt to implement *Grutter* diversity initiatives.

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towards to accomplishment of the compelling state interest of diversity. *Id.*

<sup>364</sup> *Id.*

<sup>365</sup> Tenth Interim Annual Evaluation of the Desegregation Settlement Agreement, Implementation of the Settlement Agreement United States v. State of Louisiana, No. 80-3300A, at 46 (Oct. 2005).

Under the Louisiana State Constitution of 1974, a *Grutter* affirmative action program that uses race as plus factor would raise serious state constitutional questions. Article I, Section 3 of 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 affiliation. No law shall arbitrarily, capriciously, or unreasonably discriminate against a person because of age, sex, culture, physical condition, or political ideas or affiliations.<sup>366</sup>

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 counterpart.”<sup>367</sup> While the use of race as criteria in an affirmative action program must withstand an evaluation under strict scrutiny under the United States Constitution,<sup>368</sup> Article I Section 3 of the Louisiana State Constitution provides that any use of race results in a complete repudiation of the law.<sup>369</sup> 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 decision to seek the goal of diversity under the *Grutter* standard, using race as a plus factor, would result in a finding that the

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<sup>366</sup> LA. CONST. art. I, § 3 (emphasis added).

<sup>367</sup> *See* La. Associated Gen. Contractors, Inc. v. State of Louisiana, 669 So.2d 1185, 1196 (La. 1996).

<sup>368</sup> *See* 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”).

program would be constitutionally invalid.<sup>370</sup> If this analysis is correct, African-American enrollment at the flagship law school would be wholly dependent upon race-neutral criteria in the admissions selection now that the Settlement Agreement has expired.<sup>371</sup>

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 union whose state constitutions do not contain an equal protection provision.<sup>372</sup> 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 of the union have determined

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<sup>369</sup> *Associated General Contractors*, 669 So.2d at 1196.

<sup>370</sup> In *La. Associated Gen. Contractors, Inc. v. State of Louisiana*, the Louisiana Supreme Court found the Louisiana Minority and Women's Business Enterprise Act unconstitutional. 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. § 39:1955. 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. § 39: 1956 (A)(B). 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 article I section 3 of the Louisiana State Constitution." *Id.* at 1200.

<sup>371</sup> 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).

<sup>372</sup> 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).

that there exists some source of law within the state's legislation or positive law, which creates a right to equal protection of the law.<sup>373</sup> The state of Mississippi is one of two states where this determination has not been made.<sup>374</sup> The Mississippi State Supreme Court has not interpreted the state of Mississippi's due process provision as containing an equal protection component.<sup>375</sup> Neither is there any decisional law which guides the resolution of the *Grutter* question upon the concomitance of release from federal court supervision and the expiration of the terms of the *Ayers* Settlement Agreement. Only the passage of time can answer this question.

## **VII. 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!*<sup>376</sup>

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<sup>373</sup> 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. *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

<sup>374</sup> See 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.").

<sup>375</sup> *Id.*

<sup>376</sup> See *infra* note 399.

Justice Antonin Scalia was the lone dissenter in *United States v. Fordice*.<sup>377</sup> His dissent has been largely ignored by scholars, possibly because 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.<sup>378</sup> It was Justice Scalia's opinion that the *Green* standard, as applied by the majority, was inappropriate in the higher education context.<sup>379</sup> 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."<sup>380</sup> Justice Scalia speculated that the majority's application of *Green* to the higher education context would result in:

[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.<sup>381</sup>

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<sup>377</sup> 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.*

<sup>378</sup> *Fordice*, 505 U.S. at 749 (Thomas, J., concurring) (stating "[n]o 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."

<sup>379</sup> See *id.* at 748.

<sup>380</sup> *Id.* at 759.

<sup>381</sup> *Id.* at 762.

Indeed, Justice Scalia pondered whether the application of *Green* might, in fact, redound to the detriment of historically black colleges.<sup>382</sup> 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 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.<sup>383</sup> 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. If Justice Scalia's words in *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

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<sup>382</sup> *See id.* at 760

<sup>383</sup> *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*, 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, 2006, available at <http://www.nashvillescene.com>, where the author notes that although TSU was growing, "white students flocked to MTSU."; Liz Murray, *Lightening Up*, NASHVILLE SCENE, Nov. 10, 1997, available at <http://www.nashvillescene.com>, 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.

could be risky business for those who were proponents of those interests.<sup>384</sup> The litigants in both cases sought to avoid the unpredictability a judicially drawn remedy.

In view of the Mississippi case, Justice Scalia may have been correct. Once the case was remanded to the district court, another nine years passed before the parties reached a settlement.<sup>385</sup> The Mississippi Settlement Agreement placed all responsibility for *Fordice* dismantlement upon the historically black colleges with monetary rewards for successful performance. The Louisiana case settled within a shorter period of time and created various enhancements at the historically black and historically white institutions to attract other race students. However, at the expiration of the Louisiana Agreement and approximately six years into the funding provisions of Mississippi agreement many of the states' universities are still substantially identifiable by race.<sup>386</sup> Whether the

<sup>384</sup> See Section V(E), *infra*.

<sup>385</sup> See *Ayers v. Fordice*, 879 F.Supp 1419, 1428 (N.D. Miss. 1995), *aff'd*, 358 F.3d 356 (5th Cir. 2004); see also *Ayers v. Thompson*, 358 F.3d 356, 365 (5th Cir. 2004).

<sup>386</sup> Both Settlement Agreements focus on universities attracting other race students. See Mississippi Settlement Agreement, at 9–12, 16; Louisiana Settlement Agreement, at 20.

Institution	1995			2004		
	White	Black	Other	White	Black	Other
La Tech	78.95%	12.51%	8.54%	68.0%	15.7%	16.2%
LSU A&M	77.49%	8.34%	14.17%	80.9%	8.8%	10.2%
LSU-S	80.51%	14.72%	4.77%	60.2%	30.9%	8.9%
UNO	57.3%	27.2%	20.0%	51.0%	30.5%	18.5%
ULL	72.73%	18.95%	8.32%	74.3%	19.1%	6.6%
McNeese	81.57%	14.77%	3.66%	74.0%	21.4%	4.6%
Southeastern	88.73%	8.24%	3.03%	75.0%	18.9%	6.1%
Nicholls	81.29%	13.62%	5.09%	68.8%	24.7%	6.5%
Northwestern	71.16%	20.39%	8.45%	51.4%	37.7%	10.9%
ULM	73.59%	20.29%	6.12%	74.3%	19.1%	6.6%
Southern A&M	4.32%	93.76%	1.92%	.3%	96.5%	3.3%

See Second Annual Evaluation of the Desegregation Settlement Agreement, Implementation of the Settlement Agreement United States v. State of Louisiana, No. 80-3300A, at Appendix F (May 1997) (providing 1995 statistics); see also Tenth Annual Evaluation of the Desegregation Settlement Agreement, Implementation of the Settlement Agreement United States v. State of Louisiana, No. 80-3300A, at 14–16 (Oct. 2005).

erasure of segregative effects or racial non-identifiability in higher education under the *Fordice* formula was ever attainable is a real question and perhaps an unanswerable one 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

*See also* IHL Miss. Bd. of Tr. of State Institutions of Higher Learning, Ayers Accountability Manual, § iv, Sept. 15, 2005.

<b>Institution</b>	<b>Ethnicity</b>	<b>Fall 2002</b>	<b>Fall 2003</b>	<b>Fall 2004</b>
<b>Alcorn State University</b>	White	281	327	25
	Black	2,858	2,955	3,080
	Other	0	0	2
	Not Identified	0	0	0
<b>Delta State University</b>	White	2,473	2,445	2,333
	Black	1,353	1,401	1,601
	Other	36	56	47
	Not Identified	0	0	0
<b>Jackson State University</b>	White	306	342	291
	Black	7,296	7,310	7,756
	Other	53	54	72
	Not Identified	0	0	0
<b>Mississippi State University</b>	White	12,517	12,124	11,921
	Black	2,930	2,945	2,970
	Other	386	400	446
	Not Identified	744	704	597
<b>Mississippi Valley State University</b>	White	104	96	103
	Black	3,030	3,353	3,415
	Other	4	8	11
	Not Identified	32	49	92
<b>University of Mississippi</b>	White	10,656	11,298	11,737
	Black	1,685	1,822	1,917
	Other	255	319	364
	Not Identified	539	365	479
<b>University of Mississippi Medical Center</b>	White	1,327	1,416	1,575
	Black	180	196	266
	Other	166	161	162
	Not Identified	0	152	167
<b>University of Southern Mississippi</b>	White	10,901	10,765	10,586
	Black	3,502	3,581	3,887
	Other	555	552	613
	Not Identified	0	152	167

*Id.* Note the effective date of the Mississippi Settlement Agreement was October 18, 2004 after the United States Supreme Court denied certiorari. However, funding draws on the Settlement Agreement began from 2002. *See id. generally.*

significant numbers when historically white alternatives are available.<sup>387</sup> 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 which was sought in its settlement agreement.<sup>388</sup> The report was based on the responses of participants in several focus group studies from whom white student perceptions of historically black colleges and universities were drawn.<sup>389</sup> The responses suggested that the populations surveyed generally perceived the historically black college or university negatively. They voiced concerns about institutional quality,<sup>390</sup> academic credibility,<sup>391</sup> white minority status on historically black college campuses,<sup>392</sup>

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<sup>387</sup>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, Louisiana (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.*

<sup>388</sup> 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).

<sup>389</sup> See *id.* at 414.

<sup>390</sup> See *id.* at 416 (quoting a focus group participant, "predominantly black schools do not have a reputation in the white community").

discriminatory treatment at the hands of African American students,<sup>393</sup> and finally, parental or peer disapproval of the choice of an historically black college.<sup>394</sup> 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.<sup>395</sup>

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;<sup>396</sup> that the responsibility for desegregation may be unfairly and disproportionately borne by the historically black colleges;<sup>397</sup> and that resultant failure to achieve projected settlement other-race percentages may portend danger for Mississippi historically

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<sup>391</sup> See *id.* at 417 (finding that “white high school and community college participants generally felt that quality of education was low at the HBIs”).

<sup>392</sup> See *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”).

<sup>393</sup> 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).

<sup>394</sup> 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”).

<sup>395</sup> See *id.* at 433.

<sup>396</sup> See *id.* at 429.

black colleges in the future.<sup>398</sup> These observations may not only be germane to the future of black colleges in Mississippi. The observations of the study 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.<sup>399</sup> In the 21<sup>st</sup> century, where *Fordice* is ending, and *Grutter* diversity work should 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.

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<sup>397</sup>. *See id.* at 430–431.

<sup>398</sup> *See Id.* at 432–433.

<sup>399</sup> 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 will come and play for him. More specifically, the much maligned Shoeless Joe Jackson will come: "If you build it . . . he will come." *See Field of Dreams* (Universal Pictures 1989).

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 Settlement Agreement.<sup>400</sup> It was able to accomplish this goal under the Settlement Agreement through aggressive marketing and recruitment.<sup>401</sup> 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 an historically black college.<sup>402</sup> Its other race students are not only whites from the state of Mississippi, they are whites who hailed 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.<sup>403</sup> Alcorn's

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<sup>400</sup> See Mississippi Settlement Agreement, at 10.

<sup>401</sup> 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).

<sup>402</sup> The Focus Group Study conducted in 2004 suggested as much, "general belief was that few 'traditional' students from the region would attend an HBI, especially if they had other options." See Sum, *supra* note 388, at 427.

<sup>403</sup> 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, available at <http://www.highereducation.org/crosstalk/ct0304/news0304-blessing.shtml>; Sara Hebel, *Alcorn State Meets Nonblack Enrollment Goal Under Desegregation Settlement*, THE CHRONICLE OF HIGHER EDUCATION, Vol. 52, Issue 14, p. A33, November 25, 2005, see also Alcorn State University Five-Year Strategic Plan FY 2007 Through 2011, Submitted to: IHL Miss. Bd. of Tr. of State Institutions of Higher Learning, Submitted By: Dr. Clinton Bristow, Jr. President Alcorn State University, Alcorn State, Mississippi 39096-7500, August 1, 2006, at 4-5.

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 behavior for all those responsible for higher education in [the state].<sup>404</sup>

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<sup>404</sup> Tenth Annual Evaluation of the Desegregation Settlement Agreement, Implementation of the Settlement Agreement United States v. State of Louisiana, No. 80-3300A, at 47 (Oct. 2005).