RACE AND HIGHER EDUCATION:

THE TORTUOUS JOURNEY TOWARD DESEGREGATION

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I. INTRODUCTION

When I graduated from the University of Mississippi in 1959, there was not an African-American student in my class or in the University at all. Despite the Supreme Court's unanimous opinion in *Brown v. Board of Education*[1] that "in the field of public education the doctrine of 'separate but equal' has no place,"[2] massive resistance to desegregation was in full sway in my state and continued for years in Alabama, Georgia, Florida, Louisiana, Mississippi, and South Carolina.[3]

The long journey toward desegregation of higher education institutions has taken many tortuous turns. It has wound its way from complete statutory and constitutional state mandates for racial segregation in education to recognition by all states that the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964 stand for equal educational opportunity irrespective of race. There have been many important changes in higher education over the past fifty years, but none is more important than desegregation of our educational institutions. We would not be addressing issues today such as affirmative action, the future of historically black institutions, race-restrictive scholarships, and race-exclusive student organizations if this nation had not fought the battle to desegregate its schools, colleges, and universities. The legal leadership of Thurgood Marshall, Earl Warren, and John Minor Wisdom, among others, and the courage and moral leadership of James Meredith, Autherine Lucy, Hamilton Holmes, Charlayne Hunter, Rita Sanders Geier, Constance Baker-Motley, William Winter, Duncan Gray, Jr., Will Campbell, and countless others, caused this nation, especially the Deep South, to break down walls of separation because of race and to include people as people, no matter their race, color, creed, religion, national origin, disability, or sexual orientation.

This paper focuses on race and the desegregation of our schools, colleges, and universities. Before I share my own personal reflections on this subject, and to place them in context, I will recount the history of

1. 347 U.S. 483 (1954)
2. *Id.* at 495.
3. *See* MARK YUDOF, DAVID L. KIRP, BETSY LEVIN, & RACHEL F. MORAN, EDUCATIONAL POLICY AND THE LAW 373 (2002); *see also* NUMAN V. BARTLEY, THE RISE OF MASSIVE RESISTANCE: RACE AND POLITICS IN THE DEEP SOUTH DURING THE 1950S 77 (1969).

higher education desegregation from the pre-*Brown* days until now.[4] My emphasis will be on those events taking place in the Deep South because my roots are there. However, it should not be ignored that struggles for racial equality and full acceptance were and are on-going in other parts of the country as well.[5]

II. THE PRE-*BROWN* GRADUATE SCHOOL CASES

Prior to *Brown*, the Supreme Court decided four cases dealing with higher education desegregation at the graduate or professional school level.[6] Inequality was found in each case because there were specific benefits enjoyed by white students that were denied to black students with the same educational qualifications.

A. *Missouri ex rel. Gaines v. Canada* (1938)

The first of the four pre-*Brown* higher education cases, *Missouri ex rel. Gaines v. Canada*,[7] presented the question of whether the state of Missouri's providing funds for its black residents to receive a law school education in other states, but denying them admission to its own law school, satisfied the requirement of equal protection. At that time, Missouri law prohibited attendance of blacks and whites at the same educational institution. However, law schools at the state universities in four adjacent states—Kansas, Nebraska, Iowa and Illinois—would admit nonresident black students.[8]

The Missouri Supreme Court upheld the tuition payment plan, emphasizing the advantages afforded by the law schools of the adjacent states.[9] The United States Supreme Court, however, in a 6-2 decision found such advantages to be beside the point: "The basic consideration is not as to what sort of opportunities other States provide, or whether they are as good as those in Missouri, but as to what opportunities Missouri itself furnishes to white students and denies to Negroes solely upon the

4. The author relies heavily in presenting the history of the desegregation of higher education institutions on an article published by the *Mississippi Law Journal* in 1993: Mary Ann Connell, *The Road to* United States v. Fordice: *What Is the Legal Duty of Public Colleges and Universities in Former De Jure States to Desegregate?* 62 MISS. L. J. 285 (1993) (Permission from the *Mississippi Law Journal* is on file with the author).

5. *See, e.g.*, Milliken v. Bradley, 418 U.S. 717 (1974); Keyes v. School Dist. No. 1, 413 U.S. 189 (1973), *reh'g denied*, 414 U.S. 883 (1973); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).

6. See generally RICHARD KLUGER, SIMPLE JUSTICE (1975) for an excellent, readable account of the NAACP's strategy in the pre-*Brown* cases.

7. 305 U.S. 337 (1938), *reh'g denied*, 305 U.S. 676 (1939).

8. *Id.* at 342–43.

9. State *ex rel.* Gaines v. Canada, 113 S.W.2d 783, 790 (Mo. 1937).

ground of color."[10]

The Court forced the State of Missouri to provide a law school education for both races within its own state. However, the decision did not preclude the establishment of separate law schools for blacks and whites. Choosing that alternative, the Missouri legislature quickly appropriated $200,000 to Lincoln University to provide a Jim Crow institution for the education of black law students.[11] Approximately thirty students enrolled in the school in September 1939. Housed along with a movie theater and a hotel in the former site of a cosmetic school, Lincoln University's law school did not begin to rise to the level of the University of Missouri.[12] The Missouri Supreme Court sent the *Gaines* case back to the circuit court for a judgment on the equality of facilities.[13] The unexplained disappearance of Lloyd Gaines abruptly halted this second round of litigation and left open the unresolved question of the constitutionality of the separate-but-equal doctrine.[14]

While *Gaines* did little more than emphasize the "equal" in the separate-but-equal doctrine, the case was immensely important as a symbol of support of the rights of black citizens and of the Supreme Court's intention to uphold those rights. After World War II, The National Association for the Advancement of Colored People (NAACP), encouraged by growing public awareness of the race issue and by Gunnar Myrdal's powerful attack in 1944 upon the moral rectitude of the United States in tolerating the continued existence of segregation,[15] began preparation for its next higher education case.

B. *Sipuel v. Board of Regents* (1948)

In 1946, the University of Oklahoma School of Law denied admission to Ada Lois Sipuel, an honor graduate of Langston University, a historically black institution, solely because of her color.[16] Both the district and the Oklahoma Supreme Court denied Sipuel's plea for a writ of mandamus.[17]

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10. *Id.* at 349.

11. JEAN LYON PREER, LAWYERS V. EDUCATORS: BLACK COLLEGES AND DESEGREGATION IN HIGHER EDUCATION 53 (1982).

12. Gil Kujovich, *Equal Opportunity in Higher Education and the Public College: The Era of Separate But Equal*, 72 MINN. L. REV. 29, 118–19 (1987).

13. State *ex rel.* Gaines v. Canada, 131 S.W.2d 217, 220 (Mo. 1939).

14. In 2006, the University of Missouri awarded Gaines an honorary law degree and the Missouri state bar awarded him a law license, posthumously. David Stout, *Quiet Hero of Civil Rights History: A Supreme Triumph, Then Into the Shadows*, N.Y. TIMES, July 12, 2009, at A21.

15. GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY (1944).

16. Sipuel v. Bd. of Regents of Univ. of Okla., 332 U.S. 631 (1948), *mandamus denied sub nom.*, Fisher v. Hurst, 333 U.S. 147 (1948).

17. Sipuel v. Bd. of Regents of Univ. of Okla., 180 P.2d 135, 136 (Okla. 1947); *Id.*

She appealed to the U.S. Supreme Court. Thurgood Marshall, counsel for the NAACP Legal Defense Fund representing Sipuel, called upon the Court for the first time to reexamine the constitutionality of the separate-but-equal doctrine. Foreshadowing *Brown*, he argued that there was no rational justification for segregation in higher education and that segregation fostered feelings of humiliation, deprivation and inferiority totally incompatible with the fundamental egalitarianism of the American way of life.[18]

Only four days after oral argument, the Court handed down its three paragraph per curiam opinion.[19] Relying exclusively on *Gaines*, the Court ordered the State of Oklahoma to provide Sipuel a law school education in conformity with the Equal Protection Clause, but failed to order that she be admitted to the University of Oklahoma Law School.[20] Upon remand, the district court directed university authorities to either admit Sipuel to its law school, open a separate law school for her, or close the white law school until it opened one for blacks.[21] The Board of Regents quickly assigned three white law professors to instruct Sipuel in roped-off rooms in the state capitol, while it hurriedly began to establish a law school for black students at Langston.[22] Only one student attended the new law school at Langston, which closed after eighteen months.[23] After its closure, Sipuel was admitted to the University of Oklahoma Law School, from which she graduated in 1951.[24]

C. *Sweatt v. Painter* (1950)

In 1946, the University of Texas Law School denied admission to Heman Marion Sweatt, a black mailman, solely because of his race.[25] Sweatt sought mandamus to compel his admission. The trial court found that the State had violated Sweatt's constitutional right of equal protection by denying him a legal education, but denied relief.[26] Instead, the court continued the case for six months to allow the State to hastily create a new law school for blacks at Texas State University, a historically black

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at 144.

18. PREER, *supra* note 11, at 76–77.

19. *Sipuel*, 332 U.S. at 631–33.

20. *Id.*

21. Fisher v. Hurst, 333 U.S. 147, 150 (1948); *see also* Tracy Miller, Comment, *Desegregation and the Meaning of Equal Educational Opportunity in Higher Education*, 17 HARV. C.R.-C.L. L. REV. 555, 567 (1982).

22. KLUGER, *supra* note 6, at 259.

23. MARK V. TUSHNET, THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925–1950 123 (1987).

24. *Id.*

25. Sweatt v. Painter, 339 U.S. 629, 631 (1950), *reh'g denied*, 340 U.S. 946 (1950).

26. *Id*. at 631–32.

university. At the end of the six months, the trial court denied Sweat mandamus, finding that the State had provided a law school for black students, which he refused to attend.[27]

Sweatt appealed, asserting that the two schools were not equal.[28] The Texas trial and appellate courts disagreed and again denied Sweatt relief.[29] Upon appeal, the U.S. Supreme Court declined to re-examine *Plessy v. Ferguson*,[30] but did take note of the substantial inequality in the educational opportunities offered white and black law students by the State of Texas and ordered the University of Texas to admit Sweatt.[31] This was the first time the Court compelled the admission of a black student to a school previously maintained only for white students on the ground that the separate schools were unequal.[32]

D. *McLaurin v. Oklahoma State Regents* (1950)

In the last of the pre-*Brown* higher education cases, George W. McLaurin, a sixty-eight-year-old retired black professor, who had long before earned a master's degree, applied for admission to the University of Oklahoma's doctoral program in education for the 1947–48 term.[33] The University denied his admission solely on the basis of his race.[34] McLaurin sought injunctive relief.[35] The district court held that the Oklahoma statute that made it a misdemeanor to maintain a school at which blacks and whites were enrolled was unconstitutional.[36] The Oklahoma legislature amended the statute to permit attendance of black students at institutions of higher learning attended by white students, but required the programs of instruction to be operated on a segregated basis.[37]

The University admitted McLaurin to its graduate school but required him to sit apart from other students in a desk in an anteroom adjoining the classroom, to sit at a special desk on the mezzanine of the library, and to sit at a special table and eat at a designated time in the cafeteria where he

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27. *Id.* at 632.
28. *Id.*
29. Sweatt v. Painter, 210 S.W.2d 442 (Tex. 1948).
30. 163 U.S. 537 (1896) (upholding a Louisiana statute requiring that all railway companies provide "equal but separate accommodations" for black and white passengers against an equal protection challenge).
31. *Sweatt*, 339 U.S. at 636.
32. KLUGER, *supra* note 6, at 282.
33. McLaurin v. Okla. State Regents, 87 F. Supp. 526, 527 (W.D. Okla. 1948).
34. *Id.*
35. *Id.*
36. *Id.* at 528.
37. McLaurin v. Okla. State Regents, 339 U.S. 637, 639 (1950). "Segregated basis" was defined as "classroom instruction given in separate classrooms, or at separate times." *Id.* at 639 n.1.

could not mix with white students.[38] McLaurin sought to have these conditions of his admission removed, but the district court denied him relief.[39] Upon appeal, the U.S. Supreme Court found these conditions hampered McLaurin's educational pursuits, thereby denying him equal protection of the law: "We hold that under these circumstances the Fourteenth Amendment precludes differences in treatment by the state based upon race. Appellant, having been admitted to a state-supported graduate school, must receive the same treatment at the hands of the state as students of other races."[40]

Riding on the successes in the higher education cases and on several direct attacks on the separate-but-equal doctrine in interstate transportation cases, [41] the NAACP in 1950 launched a full-scale attack on the constitutionality of race-based segregation at the elementary-secondary level. From this assault came the unanimous opinion of the Supreme Court in *Brown v. Board of Education* (*Brown I*).[42]

III. *BROWN* AND ITS EXTENSION TO HIGHER EDUCATION

In a unanimous opinion written by Chief Justice Earl Warren, the *Brown I* Court concluded that "in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal."[43] The following year, the Court rendered its implementation decision, *Brown v. Board of Education* (*Brown II*),[44] remanding the cases to the district courts with guidelines to place responsibility for desegregation on local school officials and to assure progress with "all deliberate speed."[45]

The Court affirmed that the precedent it set in the *Brown* decisions clearly applied to higher education as well by ordering the University of Florida Law School to admit Virgil Hawkins, a black student who had been seeking admission since 1949.[46] The Court also ordered Louisiana State University to admit black students to a combined undergraduate and law school program,[47] Memphis State University to admit black students,[48] and

38. *Id*. at 640.
39. *McLaurin*, 87 F. Supp. at 531.
40. *McLaurin*, 339 U.S. at 642.
41. *See, e.g.*, Henderson v. United States, 339 U.S. 816, 824 (1950) (holding compulsory segregation on interstate trains unconstitutional).
42. 347 U.S. 483 (1954) (*Brown I*).
43. *Id.* at 495.
44. 349 U.S. 294 (1955) (*Brown II*).
45. *Id.* at 301.
46. Florida *ex rel.* Hawkins v. Bd. of Control, 350 U.S. 413 (1956).
47. Tureaud v. Bd. of Supervisors, 347 U.S. 971 (1954).
48. Booker v. Tenn. Bd. of Educ., 240 F.2d 689 (6th Cir. 1957), *cert. denied*, 353 U.S. 965 (1957).

Wichita Falls Junior College to admit black residents of Wichita Falls.[49]

Pursuant to court orders, Tennessee and Texas had desegregated their graduate and professional schools before *Brown*.[50] Following *Brown*, the six border states of Delaware, Maryland, West Virginia, Kentucky, Missouri and Oklahoma, along with the District of Columbia, took legislative and administrative action to abolish de jure segregation in public higher education.[51] Arkansas, Virginia, and North Carolina made "limited and circumscribed" efforts to desegregate their public universities.[52] The Universities of Arkansas and Virginia, for example, admitted blacks only for courses not offered at the black public colleges.[53]

Massive resistance to desegregation took place in Alabama, Georgia, Florida, Louisiana, Mississippi and South Carolina. These states used a potpourri of administrative, legislative, educational, and legal techniques to deny blacks admission to white colleges and universities. For example, admission tests were introduced, letters of recommendation from alumni and graduation from an accredited institution were required (most historically black institutions were not accredited), and subjective character assessments of applicants were made.[54] Statutes were passed ordering the closure of institutions ordered by a court to desegregate.[55]

Events surrounding the desegregation of the Universities of Alabama, Georgia, and Mississippi epitomized the politics of massive resistance in these Deep South states. In February 1956, Autherine Lucy entered the University of Alabama under court order.[56] Following two days of unrest and one day of rioting, the Board of Trustees suspended Lucy on February 6, 1956, supposedly for her safety and that of others. Lucy sued the University unsuccessfully to have the suspension overturned.[57] The University claimed that Lucy slandered the institution in her statements and permanently expelled her. [58] The University thus reverted to its all-white status which it maintained for another seven years.[59]

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49. Wichita Falls Junior Coll. Dist. v. Battle, 204 F.2d 632, 635 (5th Cir. 1953), *cert. denied*, 347 U.S. 974 (1954).

50. Gray v. Univ. of Tenn., 343 U.S. 517 (1952); Sweatt v. Painter, 339 U.S. 629 (1950).

51. U.S. COMM'N ON CIVIL RIGHTS, EQUAL PROTECTION OF THE LAWS IN PUBLIC HIGHER EDUCATION 51–56 (1960).

52. *Id*. at 56–59.

53. *Id.* at 56.

54. *Id.* at 56–58.

55. *Id.* at 69–96.

56. *Id*. at 84–89.

57. *Id.*

58. *Id.* Thirty-six years later, on May 9, 1992, Autherine Lucy Foster received her Master's degree in elementary education and her daughter, Grazia Foster, received an undergraduate degree in corporate finance from the University of Alabama. *Student Rises from '56 Riot*, THE CLARION-LEDGER (Jackson, Miss.), May 9, 1992, at A2.

59. United States v. Alabama, 628 F. Supp. 1137, 1142 (N.D. Ala. 1985).

Five years later, in 1961, the federal district court ordered the University of Georgia to admit Hamilton Holmes and Charlayne Hunter, thereby ending 160 years of segregation at the University. Riots ensued, and the two were suspended. The court immediately ordered them reinstated.[60] Both students graduated in 1963.

In 1962, the Court of Appeals for the Fifth Circuit ordered the University of Mississippi to admit James Meredith to its undergraduate program.[61] Stalling and delaying implementation of the court's order, the University's governing board withdrew the authority of University officials to act further on the matter and turned it over to Governor Ross Barnett, who appointed himself registrar and denied Meredith's application for admission.[62] President Kennedy ordered federal marshals to assist in enforcing court orders to admit Meredith by escorting him through the registration process. A riot followed in which two were killed and over 300 injured. President Kennedy federalized the National Guard and deployed 3,000 regular Army troops to stop the violence. Federal marshals escorted Meredith to and from classes to assure his safety until he graduated in the summer of 1963.[63]

In January of 1963, Harvey Gantt broke the color line in South Carolina as he was admitted to Clemson College without disruption and with no federal forces.[64] Six months later, however, President Kennedy federalized Alabama's National Guard to force Governor George Wallace to step aside from his defiant stance at the "schoolhouse door" at the University of Alabama and admit Vivian Malone and James Hood to enroll at that institution.[65] While the color line in higher education was broken during

60. Holmes v. Danner, 191 F. Supp. 394 (M.D. Ga. 1961), *aff'd*, 364 U.S. 939 (1961). Holmes subsequently achieved Phi Beta Kappa, and Hunter became a news broadcaster for the Public Broadcasting System. In 1988 Charlayne Hunter-Gault delivered the commencement address 25 years after her own graduation and was featured on the cover of the alumni magazine. University of Georgia, 40th Anniversary of UGA's Desegregation Timeline (Jan. 9, 2001), http://www.uga.edu/news/desegregation/history/index_time.html

61. Meredith v. Fair, 305 F.2d 343, 361 (5th Cir. 1962) (finding that Meredith's application had been turned down solely because he was a Negro in violation of the Constitution), *cert. denied*, 371 U.S. 828 (1962). Forty years later, the University of Mississippi held a yearlong "Open Doors" program to recognize Meredith's contribution to desegregating higher education and changing race relations at that institution. *James Meredith Returns to University of Mississippi for Ceremonies Marking 40th Anniversary of School's Integration*, JET 38–39 (Oct. 21, 2002).

62. CHARLES W. EAGLES, THE PRICE OF DEFIANCE 275–96 (2009). Professor Eagles' recent book is the definitive study of this tragic event.

63. DAVID G. SANSING, MAKING HASTE SLOWLY: THE TROUBLED HISTORY OF HIGHER EDUCATION IN MISSISSIPPI 156–57, 195 (1991).

64. JACK BASS, TAMING THE STORM: THE LIFE AND TIMES OF JUDGE FRANK M. JOHNSON, JR., AND THE SOUTH'S FIGHT OVER CIVIL RIGHTS 208 (1993). Gantt subsequently became mayor of Charlotte, North Carolina. *Id.*

65. Phillip Scott Arnston, *Thirty Years Later: Is the Schoolhouse Door Still*

the first ten years after *Brown II*, progress was slow and delay was the order of the day.

IV. THE CIVIL RIGHTS ACT OF 1964 AND THE *ADAMS* LITIGATION

Because progress in providing blacks with equal educational opportunities was moving so slowly, Congress responded to the call for stronger federal action by passing the Civil Rights Act of 1964.[66] Title VI of the Act states: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[67]

The Department of Health, Education, and Welfare (HEW) was given responsibility for enforcing Title VI in educational institutions receiving federal funds by withholding those funds from institutions that discriminated against blacks. The Department implemented regulations which prohibit a recipient of federal funds from denying, or providing a different quality of service, financial aid, or other programs on the basis of race, color, or national origin.[68]

The legislation also gave the Attorney General authority to file desegregation suits on behalf of private citizens.[69] However, not until 1969 did HEW begin examination of ten states that continued to operate dual systems of public higher education: Arkansas, Florida, Georgia, Louisiana, Maryland, Mississippi, North Carolina, Oklahoma, Pennsylvania, and Virginia.[70] HEW found that these states were in violation of Title VI and ordered them to submit statewide plans for desegregation within 120 days.[71] Five of the states ignored the directive and the other five submitted unacceptable plans, yet the Department did nothing.[72] It filed no formal complaints, instituted no enforcement proceedings, and made no referrals to the Justice Department for prosecution.[73]

HEW's failure to act led to the massive and lengthy *Adams* litigation, a class-action suit brought by the NAACP Legal Defense Fund against HEW, charging that the Department had defaulted in its obligation to enforce Title VI.[74] The plaintiffs asked the district court to compel HEW to enforce

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Closed? Segregation in the Higher Education System of Alabama, 45 ALA. L. REV. 585–86 (1994).

66. 42 U.S.C. §§ 2000a–h (2000).
67. *Id.* § 2000d (2000).
68. 34 C.F.R. § 100.3(b) (2000).
69. 42 U.S.C. §§ 2000c-6, d-1 (2000).
70. Adams v. Richardson, 356 F. Supp. 92, 94 (D.D.C. 1973).
71. *Id.*
72. *Id.*
73. Adams v. Richardson, 480 F.2d 1159, 1164 (D.C. Cir. 1973) (en banc).
74. *Adams*, 356 F. Supp. at 94–95. The case is referred to as the "Adams"

the law, either by obtaining acceptable desegregation plans from the states or by cutting off federal funds to those colleges and universities that failed to produce acceptable desegregation plans. In 1973, the district court found that HEW had failed to uphold its responsibilities under Title VI and issued an injunction ordering the Department to institute compliance procedures against the ten states operating dual systems of higher education. That same year, the Court of Appeals for the District of Columbia upheld the district court and admonished HEW for failing to fulfill its enforcement responsibility.[75]

The Department of Education was created in 1979 and assumed responsibility for enforcement of Title VI.[76] The *Adams* litigation continued over the next seventeen years, with various Education Department secretaries as defendant. Finally, in 1990, the Court of Appeals for the D.C. Circuit ruled that no private right of action against government enforcement agencies existed under Title VI, and dismissed the case for lack of jurisdiction.[77]

Despite ending "not with a bang but a whimper," the impact of the *Adams* litigation was enormous. From this litigation came desegregation plans for seventeen states**,** involvement of the Justice Department in cases against Tennessee, Louisiana, Mississippi, and Alabama, and the HEW Revised Criteria Specifying the Ingredients of Acceptable Plans to Desegregate State Systems of Public Higher Education (Revised Criteria),[78] which still serve as the guidelines for measuring a state's compliance with the requirements of Title VI. The Revised Criteria require states having a history of de jure segregation to take affirmative steps to enhance the quality of black state-supported colleges and universities, to place new "high-demand" programs on traditionally black campuses, to eliminate unnecessary program duplication, to increase the percentage of black academic employees, and to increase the enrollment of blacks at traditionally white public colleges.[79] Even as late as 2005, the Office for Civil Rights continued to monitor cooperative desegregation partnership

litigation after Kenneth Adams, a Mississippi high school student whose name appeared first in alphabetical order on the complaint.

75. *Adams*, 480 F.2d at 1164.

76. Department of Education Organization Act of 1980, Pub. L. No. 96-88, 93 Stat. 668 (1979). For a good discussion of the powerful role of the executive branch in school desegregation, see Lia Epperson, *Undercover Power: Examining the Role of the Executive Branch in Determining the Meaning and Scope of School Integration Jurisprudence*, 10 BERKELEY J. AFR.-AM. L. & POL'Y. 146 (2008).

77. Women's Equity Action League v. Cavazos, 906 F.2d 742 (D.C. Cir. 1990).

78. 43 Fed. Reg. 6658 (Feb. 15, 1978).

79. *See* Elements of a Plan, 43 Fed. Reg. at 6661. For excellent, understandable coverage of Title VI, the *Adams* litigation, the implementing regulations, and the Revised Criteria, see WILLIAM A. KAPLIN & BARBARA A. LEE, THE LAW OF HIGHER EDUCATION 1450–52 (4th ed. 2006).

agreements with a number of states.[80]

V. DETERMINING THE SCOPE OF THE DUTY TO DESEGREGATE

The crux of the legal debate in the post-*Brown* higher education desegregation cases was whether Title VI and the Equal Protection Clause require a state to adopt race-neutral policies and practices (stop segregating by race), or whether a state with a former de jure system of higher education must do more and go beyond race-neutrality to ensure that any remaining vestiges of the formerly segregated system are removed.[81] While the Supreme Court clearly extended the mandates of *Brown I* to higher education institutions in *Brown II*, it gave no guidance to colleges and universities regarding their affirmative duty to desegregate.

The Revised Criteria, placing an affirmative duty upon school districts to integrate, were first incorporated into a major desegregation decree in *United States v. Jefferson County Board of Education*.[82] Writing for the Fifth Circuit in 1966, Judge John Minor Wisdom "transformed the law of school desegregation . . . ."[83] Judge Wisdom placed an affirmative duty on school boards to achieve a unitary system that he defined as "not white schools or Negro schools—just schools."[84]

A. *Green v. New Kent County School Board* (1968)

Mirroring to a large extent Judge Wisdom's landmark ruling in *Jefferson County*, the Supreme Court went far beyond its previous school desegregation rulings by holding unanimously, in *Green v. New Kent County School Board*,[85] that school boards have an "affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch."[86] In *Green*, the New Kent County Virginia school board continued to operate segregated schools for eleven years after *Brown* and modified this practice only after Title VI mandated cutting off federal funds to school districts that continued to operate racially segregated schools.[87] To comply with this mandate, the school board adopted a "freedom-of-choice" plan that

80. *See* 90 Md. Op. Atty. Gen. 153, 2005 WL 3024511 (Md. A.G., Nov. 8, 2005).

81. KAPLIN & LEE, *supra* note 79, at 1453.

82. 372 F.2d 836 (5th Cir. 1966). The seven cases consolidated for appeal involved public schools in Alabama and Louisiana. *Id.* at 845.

83. BASS, *supra* note 64, at 220. Judge Wisdom regarded his opinion in *Jefferson County* as the "most important of his career." JACK BASS, UNLIKELY HEROES 298 (1981).

84. *Jefferson County*, 372 F.2d at 890.

85. 391 U.S. 430 (1968).

86. *Id.* at 437–38.

87. *Id*. at 433–34.

allowed students to choose which school to attend.[88] During the three years of operation, no white students attended the all-black high school and only fifteen percent of black students enrolled in the historically white school.[89]

Justice Brennan, writing for the Court, stated that the ultimate goal in America is to dismantle the dual school system and achieve a "unitary, nonracial system of public education."[90] In addition, the Court stated that "[t]he burden of a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work now."[91]

The importance of the Court's opinion in *Green* cannot be overemphasized.[92] There had been forerunners to be sure, but none had used the express words "affirmative duty."[93] The mandate of the Court was clear—there exists an affirmative duty imposed on the states by the Fourteenth Amendment to take whatever steps are necessary to eliminate racial discrimination in education. But, the question remained: does that duty extend to public higher education institutions, as well as elementary/secondary schools, in former de jure states? Confusion and debate raged in the lower courts over the applicability, or lack thereof, of the mandate of *Green* outside the elementary/secondary field.

B. *Alabama State Teachers Association v. Alabama Public School and College Authority* (1969)

Alabama State Teachers Association v. Alabama Public School and College Authority (*ASTA*)[94] was the first case after *Green* to address the affirmative duty of a state to dismantle a dual system of higher education. The plaintiffs sought to prevent the State of Alabama from constructing a four-year degree-granting branch of Auburn University in near-by Montgomery, the home of historically black Alabama State Teachers College.[95] They argued that precedents from elementary/secondary cases imposed on the State a duty to use new construction or expansion of facilities to maximize desegregation and effectuate the dismantling of the dual system.[96] Constructing and operating a branch of historically white

88. *Id.*
89. *Id.* at 437.
90. *Id.* at 436.
91. *Id.* at 439.
92. *See* YUDOF ET AL., *supra* note 3, at 376 (2002) ("*Green* has a historic place in the evolution of constitutional standards, and it triggered a major change in the nature and pace of desegregation in the South.").
93. ARTHUR SELWYN MILLER, TOWARD INCREASED JUDICIAL ACTIVISM 124–25 (1982) (describing *Green* as "a constitutional revolution of the first magnitude").
94. 289 F. Supp. 784 (M.D. Ala. 1968), *aff'd per curiam*, 393 U.S. 400 (1969).
95. *Id*. at 785.
96. *Id*. at 787.

Auburn University within seven miles of historically black Alabama State would not maximize desegregation but would, instead, increase racial disparity of students and faculty between the two schools.[97]

The three-judge district court judicially noticed that Alabama had operated a dual system of higher education that had not been dismantled and had an affirmative duty to dismantle the system.[98] However, the court held that the scope of the State's duty differed from and was less strict than its duty to desegregate public elementary and secondary school systems.[99] While acknowledging the Supreme Court's recent decision in *Green*, the *ASTA* district court did not find its mandate to apply to the operation of an education system at the college level where freedom of choice rather than compulsory attendance existed.[100]

The Supreme Court affirmed the judgment in an unsigned opinion.[101] Justice Douglas objected in dissent, finding the delineation between higher and lower education in desegregation obligations was "an amazing statement" in light of the fact that the forerunners of *Brown* were cases involving higher education institutions.[102]

C. *Sanders v. Ellington* (1968)

During the same year that *ASTA* was decided, the District Court for the Middle District of Tennessee reached a completely opposite conclusion as to the applicability of *Green* to higher education in *Sanders v. Ellington*.[103] The facts in *Sanders* were remarkably similar to those in *ASTA*. In 1968, the University of Tennessee, a historically white institution, announced plans to construct a new building to provide more adequate space and facilities for its growing evening-school center in Nashville (UT-N).[104] Rita Sanders,[105] a law student at Vanderbilt University and an instructor at predominantly black Tennessee Agricultural and Industrial State University (later Tennessee State University (TSU)), also situated in Nashville, initiated a class-action suit seeking to enjoin the building of the new facility and expansion of UT-N's curricular offerings.[106] Sanders alleged that such expansion would duplicate programs offered at TSU, negatively affect

97. *Id.* at 787.
98. *Id.*
99. *Id.* at 790.
100. *Id.*
101. Ala. State Teachers Ass'n v. Ala. Pub. Sch. and Coll. Auth., 393 U.S. 400 (1968) (per curiam).
102. *Id.* at 401 n.2 (Douglas, J., dissenting).
103. 288 F. Supp. 937 (M.D. Tenn. 1968).
104. *Id.* at 941.
105. Rita Sanders later married and became Rita Sanders Geier; hence, the change in names of the plaintiff in this litigation.
106. *Sanders*, 288 F. Supp. at 939.

the desegregation efforts of TSU, and impede the desegregation of Tennessee's other institutions of public higher education.[107] The United States intervened and expanded the request for relief by asking the court to order the State to present a plan to produce "meaningful desegregation of the public universities of Tennessee."[108]

District Court Judge Frank Gray, Jr., relying on *Green*, held that "there is an affirmative duty imposed upon the State by the Fourteenth Amendment . . . to dismantle the dual system of higher education which presently exists in Tennessee."[109] By this time, all public institutions of higher learning in Tennessee had adopted non-discriminatory, open admission policies. Judge Gray held, however, that the existence of these non-discriminatory policies alone does not "discharge the affirmative duty imposed upon [Tennessee] by the constitution."[110] Finding that these policies were not working effectively to dismantle the effects of de jure segregation, the district court ordered the State to submit a plan designed to achieve desegregation of the higher education institutions of Tennessee, with particular attention to TSU, which remained over 99% black.[111]

The district court denied the plaintiffs' plea for an injunction halting construction of the new facility for UT-N because the focus of UT-N was the education of adult learners taking evening classes—a time when there were few, if any, such classes being offered at TSU.[112] Therefore, the court said, the two schools would not compete with each other in a manner that would perpetuate the dual system.[113] Judge Gray refused, however, to base his holding on *ASTA*, but chose instead to become the first court to adopt for higher education the scope of the affirmative duty defined in *Green*.[114]

Over the following years, the defendants in the *Sanders* litigation submitted a series of plans that focused on other-race enrollment and employment. Each plan produced incremental desegregation at the historically white institutions ("HWIs"),[115] but had essentially no effect on TSU, which remained overwhelmingly black. The parties and the court

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107. *Id.* at 940.

108. *Id.* at 939.

109. *Id.* at 942. Judge Gray based his conclusion that the dual system still existed upon the fact that "the historically white institutions still have overwhelmingly white enrollments, and Tennessee A & I State University still has an overwhelmingly Negro enrollment." *Id.* at 940.

110. *Id.* at 942.

111. *Id.* at 940.

112. *Id.* at 941–42.

113. *Id.* at 941.

114. Note, *Constitutional Law—Desegregation—States Are Required to Take Affirmative Action to Desegregate Higher Education Facilities*, 22 VAND. L. REV. 208, 211 (1968).

115. In this article, the abbreviation "HBIs" will refer to historically black institutions; the abbreviation "HWIs" will refer to historically white institutions.

realized that even after years of litigation and the attempted implementation of countless plans, desegregation was not being achieved and had little prospect of being reached as long as UT-N remained a direct competitor of TSU. As a consequence, in 1977, the district court ordered the merger of UT-N into TSU.[116] The merger, however, did not end the case. The complexity of the issues expanded exponentially as the State worked to merge a vibrant UT-N into TSU.

In 1984, after years of litigation and implementation of countless plans, the parties reached a Stipulation of Settlement that provided programmatic and physical plant enhancements to TSU to speed its desegregation efforts and programs to further the recruitment and retention of black faculty and students on the campuses of the HWIs.[117] The district court approved the Stipulation, and the Sixth Circuit affirmed.[118] Calmness appeared for a while. Meanwhile, in the Fourth Circuit, another major desegregation battle was ongoing.

D. *Norris v. State Council of Higher Education* (1971)

Three years after *ASTA* and *Sanders*, the District Court for the Eastern District of Virginia stepped into the fray in *Norris v. State Council of Higher Education*[119] and halted the expansion of historically white Richard Bland College (RBC) from a two-year to a four-year institution in an area where a predominantly black four-year institution, Virginia State College, already existed. The plaintiffs contended that a racially identifiable dual system of higher education still existed in Virginia, that the state had an affirmative duty to dismantle the dual system, that RBC had not made satisfactory progress in desegregating its faculty and student body, that expansion of RBC would impede Virginia State in its efforts to attract white students and faculty, and that Richard Bland would duplicate programs offered by Virginia State because the two schools were only seven miles apart.[120] Relying on the Supreme Court's affirmance of *ASTA*, the defendants argued that the State's good faith, racially neutral admission and employment policies satisfied the State's constitutional obligation to dismantle its previously segregated system.[121]

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116. Geier v. Blanton, 427 F. Supp. 644, 661 (M.D. Tenn. 1977).

117. By this time, the district court had allowed two additional intervening parties: Dr. Raymond Richardson, a professor of mathematics at TSU, and a group of parents, teachers, and faculty at TSU (the "Richardson Intervenors") and TSU professor Dr. Coley McGinnis and a group of TSU faculty and students, whose primary interest was to see that the merger of UT-N and TSU was properly carried out. *Id.*

118. Geier v. Alexander, 593 F. Supp. 1263 (M.D. Tenn. 1984), *aff'd*, 801 F.2d 799 (6th Cir. 1986).

119. 327 F. Supp. 1368 (E.D. Va. 1971), *aff'd per curiam sub nom.*, Bd. of Visitors of the Coll. of William & Mary v. Norris, 404 U.S. 907 (1971).

120. *Id.* at 1369.

121. *Id.* at 1369–72.

The *Norris* court rejected defendants' position and their reliance on *ASTA*, holding instead that the affirmative duty set forth in *Green* applied equally to higher education institutions: "The means of eliminating discrimination in public schools necessarily differ from its elimination in colleges, but the state's duty is as exacting."[122] Finding that Virginia still operated a racially identifiable dual system of higher education and that expanding RBC would frustrate the efforts of Virginia State to desegregate, the court enjoined the expansion.[123] This was the first time that a court had enjoined the improvement of an all-white state college.[124] Even though *Norris* reached an entirely different conclusion of law from *ASTA*, the Supreme Court summarily affirmed the case.[125]

With per curiam affirmances of two cases reaching diametrically opposite results, the Court permitted confusion to reign for years.[126] Major desegregation suits were filed against the states of Louisiana, Mississippi, Tennessee, and Alabama, but there were no clear legal standards by which to judge the state's liability or the extent of permissible remedies. As Judge Gray pondered in *Geier v. Dunn*, "[w]hat, then, is the law which this court must follow in the instant case, given these two apparently diametrically opposed results [*ASTA* and *Norris*], each of which was affirmed summarily by the Supreme Court?"[127]

E. *Bazemore v. Friday* (1986)

In 1986, the Supreme Court rendered its decision in *Bazemore v. Friday*,[128] a case which was to become the focal point for those who did not think the affirmative mandates of *Green* extended to higher education. In *Bazemore*, the Court addressed 4-H and Homemaker clubs that had been segregated by law in North Carolina before enactment of the Civil Rights Act of 1964. In response to the Act, the clubs opened membership to any eligible person, regardless of race. At the time of the suit, however, the

122. *Id.* at 1373.

123. *Id.*

124. Comment, *Integrating Higher Education: Defining the Scope of the Affirmative Duty to Integrate*, 57 IOWA L. REV. 898 (1972).

125. Bd. of Visitors of the Coll. of William & Mary v. Norris, 404 U.S. 907, 907 (1971).

126. Deon D. Owensby, *Affirmative Action and Desegregating Tennessee's Higher-Education System: The* Geier *Case in Perspective*, 69 TENN. L. REV. 701, 708 (2002) ("The Supreme Court created greater confusion in the desegregation cases by not distinguishing *Norris* or *ASTA*, two cases with completely opposite results on the same issue.").

127. 337 F. Supp. 573, 578 (M.D. Tenn. 1972); *see also* Knight v. Alabama, 900 F. Supp. 272, 280–81 (N.D. Ala. 1995) (Judge Murphy writing: "If this case should again be appealed and the higher courts return the case to this Court, the Court earnestly seeks guidance.").

128. 478 U.S. 385 (1986).

clubs were still racially segregated, not by law but by choice.[129]

After a lengthy trial, the district court found no evidence of race-based discrimination after 1964 and concluded that any current racial imbalance in the clubs "was the result of wholly voluntary and unfettered choice of private individuals."[130] The Fourth Circuit affirmed, as did the Supreme Court in a bitterly divided 5-4 decision. Emphasizing the voluntary aspect of club membership, as opposed to the compulsory nature of public school attendance, Justice White, writing for the majority, found *Green* not controlling: "however sound *Green* may have been in the context of the public schools, it has no application to this wholly different milieu."[131] The Court found that where attendance and participation is based on voluntary free choice, discontinuing prior discriminatory practices and adopting neutral admission policies "is all the Constitution requires."[132]

The dissenting justices strongly criticized what they saw as the majority's "winking at the Constitution" and "relieving the State of the overall obligation to desegregate in one context while imposing that obligation in another."[133] Justice Brennan, in dissent, rejected the majority's reliance on the voluntary, non-compulsory nature of the club activities: "[I]t is clear that the State's obligation to desegregate formerly segregated entities extends beyond those programs where participation is compulsory to voluntary public amenities such as parks and recreational facilities."[134]

VI. "FREEDOM OF CHOICE" ARRIVES IN THE CIRCUITS: WILL IT BE *GREEN* OR *BAZEMORE*?

The Court did not discuss higher education in *Green* or *Bazemore*, nor did it send a clear message as to what standard the circuits should apply when determining the scope of the duty of a former de jure public university to desegregate. Did the affirmative duty of *Green* extend to higher education or did the "freedom of choice" factor in *Bazemore* lessen that duty? Cases pending before the Fifth, Sixth, and Eleventh Circuits, and the subsequent split in these circuits, probed at this question.

A. The Sixth Circuit Follows *Green* (1986)

In 1986, after eighteen years of going back and forth in the district and appellate courts in the Tennessee higher education litigation arising from

129. *Id.* at 407.
130. *Id.* (White, J., concurring).
131. *Id.* at 408.
132. *Id.*
133. *Id.* at 409, 419 (Brennan, J., dissenting).
134. *Id*. at 418.

Sanders v. Ellington,[135] the Sixth Circuit in *Geier v. Alexander*[136] declined to find *Bazemore* controlling and reaffirmed its earlier decision in *Geier v. University of Tennessee*[137] that *Green* was the controlling standard in the case:

> [T]he *Green* requirement of an affirmative duty applies to public higher education as well as to education at the elementary and secondary school levels. Nothing in the *Bazemore* decision, where the compelling interest of a state in the education of its citizenry was not involved, requires us to reexamine these holdings.[138]

Basing its opinion, in large part, on the distinction between "clubs" dealt with in *Bazemore* and "education" in *Green*, the Sixth Circuit refused to extend *Bazemore* to any level of education:

> It appears fallacious to attempt to extend *Bazemore* to any level of education. While membership in 4-H and Homemaker Clubs offers a valuable experience to young people and families, particularly in rural areas, it cannot be compared to the value of an advanced education. The importance of education to the individual and the interest of the state in having its young people educated as completely as possible indicate clearly that the holding in *Green* rather than that of *Bazemore* applies.[139]

Since the beginning of the Tennessee higher education desegregation litigation, both the district and appellate courts had been consistent in holding that the affirmative mandates of *Green* were just as applicable to

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135. 288 F. Supp. 937 (M.D. Tenn 1968) (declaring affirmative duty to do more than adopt race-neutral admission standards and ordering State to present plan for desegregating higher education institutions, but refusing to halt expansion of UT-N program), *enforced sub nom*., Geier v. Dunn, 337 F. Supp. 573 (M.D. Tenn. 1972) (finding that defendants had not dismantled the dual system or were "in any realistic sense on their way toward doing so" and ordering State to develop plan that would ensure a "white presence" on TSU campus), *modified sub nom*., Geier v. Blanton, 427 F. Supp. 644 (M.D. Tenn. 1977) (concluding that desegregation plan had not worked and ordering merger of UT-N and TSU under governance of Tennessee Board of Regents), *aff'd sub nom*., Geier v. Univ. of Tenn., 597 F.2d 1056 (6th Cir. 1979) (affirming defendant had affirmative duty to dismantle dual system of public higher education, open admissions policy failed to dismantle dual system, expanding UT-N impeded progress of desegregating TSU, and merger of TSU and UT-N was appropriate remedy), *cert. denied*, 444 U.S. 886 (1979); Geier v. Alexander, 593 F. Supp. 1263 (M.D. Tenn. 1984) (approving Stipulation of Settlement providing programmatic and physical plant enhancements to TSU, over objection of Justice Department to use of quotas and preferential treatment of minority students).

136. 801 F.2d 799 (6th Cir. 1986) (affirming district court's approval of consent decree following Stipulation of Settlement).

137. 597 F.2d 1056 (6th Cir. 1979), *cert. denied*, 444 U.S. 886 (1979).

138. Geier v. Alexander, 801 F.2d 799, 805 (6th Cir. 1986) (quoting Geier v. Univ. of Tenn., 597 F.2d 1056, 1065 (6th Cir. 1979)).

139. *Id.*

public colleges and universities as they were in the elementary/secondary sector. Likewise, they had been consistent in rejecting the freedom of choice argument put forward by the State of Tennessee. While the scope of the duty to desegregate was well-settled in the Sixth Circuit, such was not the case elsewhere.

B. The Fifth Circuit Follows *Bazemore* (1990)

1. *Ayers v. Allain* (the Mississippi case)

The Mississippi higher education desegregation case, *Ayers v. Allain*,[140] began in 1975 when Jake Ayers and other private plaintiffs sued the Governor of Mississippi, the Board of Trustees of State Institutions of Higher Learning, and other state officials for maintaining a racially dual system of public higher education in violation of both the Equal Protection Clause and Title VI.[141] The United States intervened. The plaintiffs claimed that since *Brown*, the defendants had perpetuated a dual system of higher education in which there continued from former de jure days separate institutions for blacks and whites.[142] The plaintiffs further contended that the historically black institutions (HBIs) were "markedly inferior" to the historically white institutions (HWIs) due to discriminatory practices in student admissions, employment of faculty and staff, mission designations and funding, and operation of HWIs in close proximity to HBIs.[143] Plaintiffs alleged that defendants had failed in their affirmative duty to eliminate lingering vestiges of segregation. Defendants responded by contending that they had adopted non-discriminatory admission and employment policies toward students, faculty and staff, and that any racial identifiability in the public universities was the result of the freedom of choice of students in choosing the universities they wish to attend.[144]

In 1987, after twelve years of pretrial discovery and procedures, the district court conducted a five-week trial with 71 witnesses and 56,700 pages of exhibits.[145] In reaching his decision, Judge Neal Biggers noted that until 1962, when the Fifth Circuit ordered the University of Mississippi to admit James Meredith as a student, the Board of Trustees of Mississippi's eight public colleges and universities had continued to operate a racially dual system of higher education that was "both separate and unequal."[146] However, the issue before the court at this time, the district court said, "is whether the defendants are currently committing

140. 674 F. Supp. 1523 (N.D. Miss. 1987) (*Ayers* I).
141. *Id.* at 1525.
142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.* at 1526.
146. *Id.* at 1528.

violations" of the Constitution and Title VI.[147]

Ruling in favor of defendants, the court found that since 1962 defendants had adopted racially neutral admission and employment policies, had fulfilled their affirmative duty to disestablish the former de jure segregated system of higher education, and were not in "current violation of the Constitution or Statutes of the United States."[148] Judge Biggers opined: "Although the various institutions continue to be identifiable by the racial makeup of the student populations, this is not a substantial result of current admission practices and procedures but is instead the result of a free and unfettered choice on the part of individual students."[149] The district court further found that the defendants had adopted racially neutral hiring policies and had worked affirmatively to attract other-race faculty and staff, thereby satisfying their affirmative duty with respect to employment.[150] He also found that the missions assigned to the respective state institutions were educationally sound, based on nondiscriminatory purposes, and justified by a need to conserve scant resources.[151]

In making these findings, the court applied the remedial standard set forth in *Bazemore* and *ASTA*, instead of the more expansive, affirmative duty set forth by the Sixth Circuit in *Geier*, which was rooted in *Green*. Freedom-of-choice in higher education, as opposed to compulsory schooling at the elementary/secondary level, was the element that seems to have undergirded the rationale of the district court's opinion.

The plaintiffs appealed. [152] A divided panel of the Fifth Circuit reversed and remanded, adopting the Sixth Circuit's rationale in *Geier* that "a state has an affirmative duty to eliminate all of the 'vestiges' of de jure segregation, root and branch, in a university setting."[153] Writing for the panel majority, Judge Goldberg criticized the district court for finding the searching inquiry of *Green* applicable only if attendance at a particular school is compelled by law. "[T]he lesson of *Brown* is that the malignancy of apartheid does not vanish in state-sponsored forums simply because attendance is voluntary and admittance race-neutral."[154]

Following the Fifth Circuit panel's holding that defendants had not satisfied their affirmative duty under *Green* to desegregate, the court granted rehearing en banc,[155] vacated the panel's decision and affirmed the district court, concluding that Mississippi had adopted and implemented

147. *Id.*
148. *Id.* at 1564.
149. *Id.* at 1555.
150. *Id.* at 1563.
151. *Id.* at 1561.
152. Ayers v. Allain, 893 F.2d 732 (5th Cir. 1990) (*Ayers II*).
153. *Id.* at 756.
154. *Id.*
155. Ayers v. Allain, 898 F.2d 1014 (5th Cir. 1990).

race-neutral policies and that students had real freedom of choice to attend the college or university they wish.[156] The en banc majority concluded that, because of the freedom of choice at the higher education level, *Bazemore*, not *Green*, provided the appropriate standard for desegregation of public higher education institutions and that Mississippi had met that standard.[157] Appeal to the Supreme Court was ripe. Before addressing Mississippi's appeal to the Supreme Court, however, attention should be drawn to the litigation across the Mississippi River in the State of Louisiana running parallel to the Mississippi case.

2. *United States v. Louisiana* (1969)

As a result of the *Adams* litigation, HEW asked the State of Louisiana in 1969 to submit a desegregation plan for its higher education institutions.[158] Louisiana refused to do so, maintaining that it did not operate a dual system of higher education based on race.[159] Disagreeing, the Attorney General of the United States filed suit in 1974, alleging that the State and its various public higher education governing boards maintained and perpetuated a segregated system of higher education in violation of the Fourteenth Amendment and Title VI.[160]

After seven years of protracted discovery and pretrial conferences, the parties entered into a Consent Decree, which was accepted by the district court in 1981.[161] The Consent Decree had three goals: (i) to reshape the process of admissions and recruitment to attract other-race students, (ii) to address problems that had arisen from Louisiana's "proximate college dilemma," and (iii) to remedy the financial disadvantages historically suffered by the historically black institutions.[162] The defendants agreed to increase other-race representation on its governing boards, to retain the State's open admission policy, to actively recruit and provide scholarships for other-race students, to employ greater numbers of black faculty, administrators and staff, to provide $300,000 a year for faculty at Louisiana State University (LSU), an HWI, and Grambling State University, an HBI, to obtain terminal degrees, to increase appropriation for all of the State's historically black institutions, to assure parity in funding for Southern University Law School, an HBI, with that of the LSU Law School, an

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

157. *Id.* at 687.

158. United States v. Louisiana, 527 F. Supp. 509, 511 (E.D. La. 1981).

159. *Id.* at 512–13.

160. *Id.* For thorough and thoughtful recountings of the Louisiana desegregation litigation, see generally Scott B. Arceneaux, *Chasing the Dream: Higher Education Desegregation in Louisiana*, 69 TUL. L. REV. 1281 (1995); Darrell K. Hickman, *Realizing the Dream:* United States v. State of Louisiana, 50 LA. L. REV. 583 (1990).

161. *Louisiana*, 527 F. Supp. at 515.

162. Arceneaux, *supra* note 160, at 1288.

HWI, and to eliminate program duplications.[163]

In 1987, the United States asked for a hearing to measure the state's compliance with the terms of the 1981 Consent Decree. The three-judge district court determined that the State had not met its responsibilities under the Decree and still maintained a dual system of higher education in violation of Title VI.[164] Even though the State had adopted open and non-discriminatory admissions policies, the racial identifiability[165] of Louisiana's public colleges and universities was even more pronounced than it had been before the Consent Decree.[166]

Writing for the panel,[167] Judge Swartz entered the fray of the hotly debated *Green*/*Bazemore* constitutional question, concluding that the standard established by Green was the appropriate standard to apply in measuring *Brown I* compliance.[168] Under this standard, the State of Louisiana was required to do more than merely stop its discriminatory practices.[169] It had to take affirmative steps to dismantle the lingering effects of its prior de jure segregated system.[170] "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 . . . ."[171] Further noting that the State had spent more than $200 million toward achieving the goals of the Consent Decree to little avail, the court found that the problem lay not in the fact that the State had not spent enough money, but in the way the money was spent – spending to enhance the state's black schools as black schools rather than towards "'convert[ing] its white colleges and black colleges to just colleges.'"[172]

Having determined the state's liability, the district court appointed a Special Master to assist the court in fashioning appropriate remedies.[173] The court adopted in its remedial Order the following recommendations of the Special Master: organization of the state's higher education system under one governing board, reclassifying universities according to mission designation, ending open admissions to all state universities and

163. *Louisiana*, 527 F. Supp. at 515.

164. United States v. Louisiana, 692 F. Supp. 642, 644 (E.D. La. 1988).

165. For years, progress toward desegregation had been measured principally by "racial identifiability." Douglas Laycock, *The Broader Case for Affirmative Action: Desegregation, Academic Excellence, and Future Leadership*, 78 TUL. L. REV. 1767, 1784 (2004).

166. *Louisiana*, 692 F. Supp at 647.

167. The panel consisted of Circuit Judge John Minor Wisdom and District Judges Charles Schwartz, Jr. and Veronica D. Wicker. *Id.*

168. *Id.* at 655.

169. *Id.*

170. *Id.* at 653.

171. *Id.* at 656.

172. *Id.* at 658.

173. United States v. Louisiana, 718 F. Supp. 499, 507 (E.D. La. 1989).

implementation of selective admission criteria to certain institutions, development of a community college system, reduction of unnecessary program duplication, and merger of Southern University Law Center with the LSU Law Center.[174] The two most controversial pieces of the remedial Order, which required a single educational governing board and the merger of the two Law Centers, destined the case for a return visit to the appellate court.[175]

Defendants appealed to the Fifth Circuit.[176] While the case was pending on appeal, the Fifth Circuit, sitting upon rehearing en banc, decided the Mississippi case (*Ayers III*) and determined that *Brown I* compliance could be satisfied when a former de jure state abandoned its segregative practices and replaced them with race-neutral ones.[177] Judge Swartz, disagreeing with the appeals court but finding "that *Ayers* is both binding and controlling," vacated the three-judge court's earlier order reorganizing the Louisiana higher education system.[178] By October 30, 1990, the Fifth Circuit had established the *Bazemore* standard as the measuring rod in both the Mississippi and Louisiana cases.[179] The split in the decisions of the circuit courts of appeal was dramatic. It was time for the Supreme Court to declare the standard to apply when measuring a former de jure state's compliance with the mandates of the Equal Protection Clause and Title VI.

VII. THE SUPREME COURT FINALLY SPEAKS: *UNITED STATES V. FORDICE* (1992)

The Supreme Court granted certiorari in the Mississippi case[180] and held on June 26, 1992, that the State of Mississippi's efforts to desegregate were insufficient to fulfill its obligations under the Equal Protection Clause and Title VI.[181] The Court found by an 8-1 vote[182] that Mississippi continued to maintain a system of public higher education with remaining "constitutionally suspect" vestiges of past discrimination in four policies: admission standards, program duplication, institutional mission

174. *Id.* at 515–21.

175. Alfreda A. Sellers Diamond, Black, White, Brown, Green, *and* Fordice*: The Flavor of Higher Education in Louisiana and Mississippi*, 5 HASTINGS RACE & POVERTY L. J. 57, 80 (2008).

176. United States v. Louisiana, 751 F. Supp. 606, 608 (E.D. La. 1990).

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

178. United States v. Louisiana, 751 F. Supp. 606, 608 (E.D. La. 1990).

179. *Ayers*, 914 F.2d at 687.

180. Ayers v. Mabus, 499 U.S. 959 (1991).

181. United States v. Fordice, 505 U.S. 717, 743 (1992).

182. The lone dissenter was Justice Scalia. *Id.* at 749–62.

assignments, and continued operation of all eight public universities.[183] The Court determined that the en banc Fifth Circuit had erred in affirming the district court's judgment, vacated the circuit court's decision, and remanded the case for further proceedings consistent with its opinion.[184]

In so doing, the Court settled the disagreement among the circuits as to the standard to be applied in measuring a former de jure state's higher education system's compliance with the Equal Protection Clause and Title VI when segregative effects and racial identifiability remain after de jure segregation has been eliminated.[185] Writing for the majority, Justice White applied the affirmative duty standard from *Green* and rejected the lower court's use of the race-neutral standard of *Bazemore*:

> We do not agree with the Court of Appeals or the District Court, however, that the adoption and implementation of race-neutral policies alone suffice to demonstrate that the State has completely abandoned its prior dual system. That college attendance is by choice and not by assignment does not mean that a race-neutral admissions policy cures the constitutional violation of a dual system.[186]
>
> * * * *
>
> If the State perpetuates policies and practices traceable to its prior system that continue to have segregative effects—whether by influencing student enrollment decisions or by fostering segregation in other facets of the university system—and such policies are without sound educational justification and can be practicably eliminated, the State has not satisfied its burden of proving that it has dismantled its prior system.[187]

The Court tasked the district court upon remand to examine the "constitutionally suspect" policies and to place the burden on Mississippi to "justify these policies or eliminate them."[188] The Court acknowledged that the fact that "an institution is predominantly white or black does not in itself make out a constitutional violation.[189] It emphasized, however, that "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."[190]

183. *Id.* at 733.
184. *Id.* at 743.
185. Diamond, *supra* note 175, at 81.
186. *Fordice*, 505 U.S. at 729.
187. *Id.* at 731.
188. *Id.* at 733.
189. *Id.* at 743.
190. *Id.*

VIII. POST-*FORDICE* LITIGATION AND FINAL RESOLUTIONS

Reaction to the Court's opinion was mixed. Federal judges charged with applying the Court's opinion voiced concern over its lack of guidance.[191] Legal scholars lamented the absence of direction from the Court on major issues.[192] Justice Scalia criticized the lack of good guidance in the majority and stated this as the key reason for his dissent.[193] However lacking the *Fordice* opinion may have been in providing guidance in details, it did settle the major question regarding the correct legal standard to apply when establishing the duty of a former de jure state to desegregate. There was no more doubt that the affirmative standard set forth in *Green* was the measuring rod by which a state's compliance with Equal Protection and Title VI would be assessed.[194]

A. The Mississippi Litigation (1995–2004)

Upon remand, Judge Biggers conducted a two-month trial in 1994 and examined each of the policies declared "constitutionally suspect" by the *Fordice* court.[195] He issued an eighty-three page opinion and subsequent remedial decree in 1995 requiring the State to, among other things, eradicate the use of the ACT score as the sole criterion for admission, review the assigned missions and possible program duplication of the state universities, design programmatic enhancements for the historically black institutions, create an endowment trust to fund other-race recruitment and scholarships for the HBIs, and establish a Monitoring Committee to oversee terms of the remedial decree.[196]

On appeal, the Fifth Circuit in 1997 upheld the district court's decree regarding uniform admission standards, reversed the district court's

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191. For example, Judge Harold Murphy, sitting by designation in the *Alabama* litigation, expressed frustration at the task of fashioning a post-*Fordice* remedy: "If this case should again be appealed, and the higher courts again return the case to this Court, the Court earnestly seeks guidance. This Court will enforce whatever remedy the higher courts think appropriate. This Court has done all it can do." Knight v. Alabama, 900 F. Supp. 272, 280–81 (N.D. Ala. 1995).

192. KAPLIN & LEE, *supra* note 79, at 1451 ("The *Fordice* opinion has been criticized by individuals of all races and political affiliations as insufficiently clear to provide appropriate guidance to states as they attempt to apply its outcome to desegregation of the still racially identifiable public institutions in many states.").

193. *Fordice*, 505 U.S. at 750–53 (Scalia, J., dissenting).

194. For an excellent discussion of the *Fordice* opinion and the post-*Fordice* litigation, see 90 Md. Op. Atty. Gen. 153 (2005) (advising Maryland Higher Education Commission how to use the *Fordice* factors in assessing the State of Maryland's compliance with its constitutional and statutory obligations to dismantle any lingering effects of its former de jure segregated higher education programs).

195. Ayers v. Fordice, 879 F. Supp. 1419 (N.D. Miss. 1995).

196. *Id.* For a good discussion of the case upon remand and the district court's remedial decree, see Scott L. Sroka, *Discrimination Against Students in Higher Education: A Review of the 1995 Judicial Decisions*, 23 J.C.& U.L. 431 (1997).

approval of the use of ACT cutoffs for scholarship awards, and remanded for reconsideration on the scholarship issue, on disparities in equipment funding between the HWIs and the HBIs, on monitoring the summer remedial program, and on further evaluation of the IHL Board's position on the possibility of a merger between Mississippi Valley State University, an HBI, with Delta State University, an HWI.[197] In 1998, the district court ruled that it would no longer consider the consolidation of Mississippi Valley State and Delta State, since the IHL Board had concluded that the merger was not practicable.[198]

In 1999, Judge Biggers ruled that the Board had fully complied with several of its obligations concerning Jackson State (implemented academic programs in allied health, social work (Ph.D.), and business (Ph.D.), and was prepared to establish an engineering school there).[199] In 2000, he approved the Legislature's appropriation of funds to construct a facility to house the court-ordered MBA program at Alcorn State's Natchez campus.[200] In January 2001, the district court, finding no unmet demand for legal or pharmacy education, concluded that the IHL Board did not need to create either a law or pharmacy school at Jackson State and that all elements of the Ayers Remedial Decree having to do with Jackson State University and significant expenditure of funds had been completed.[201]

After lengthy negotiations, in March 2001, some of the private plaintiffs, the United States and the State of Mississippi reached a settlement agreement that required the State to provide $500,000 annually from 2002 to 2006 and $750,000 from 2007 to 2011 to supplement the need-based summer program participants, enhance academic programs at Alcorn State, Jackson State, and Mississippi Valley State, all HBIs, with annual appropriations for seventeen years in the total amount of $245,880,000, create a $77M publicly funded endowment for the benefit of the HBIs, authorize capital improvements at a total cost of up to $75M for the HBIs, and recognize Jackson State as a comprehensive university.[202] Before approving the parties' agreement, Judge Biggers required that the Legislature pass a concurrent resolution stating its support for the costly ($503M) settlement proposal.[203] The Legislature agreed to fund the

197. Ayers v. Fordice, 111 F.3d 1183, 1209, 1225, 1228 (5th Cir. 1997), *cert. denied*, 522 U.S. 1084 (1998).

198. Ayers v. Thompson, 358 F.3d 356, 362–63 (5th Cir. 2004) (relating actions of district court following 5th Circuit's 1997 decision).

199. Ayers v. Fordice, 40 F. Supp. 2d 382, 385 (N.D. Miss. 1999).

200. Ayers v. Fordice, No. 4:75CV009-B-D, 2000 WL 1015839, at *2 (N.D. Miss. July 6, 2000).

201. *Thompson*, 358 F.3d at 364 (relating actions of district court since 5th Circuit's 1997 decision).

202. *See* Settlement Agreement, United States v. Louisiana, No. 80-CV-3300 (E.D. La. Nov. 4, 1994) [hereinafter Settlement Agreement].

203. Ayers v. Musgrove, No. 4:75CV009-B-D, 2002 WL 91895 at *5 (N.D. Miss.,

settlement over a period of seventeen years.[204] Despite having concerns about the proposed settlement, including its high cost and long duration,[205] Judge Biggers entered a final judgment on February 15, 2002, dismissing the case with prejudice.[206] Certain of the private plaintiffs objected to the settlement and moved to opt-out. After Judge Biggers denied the opt-out plea, the Fifth Circuit affirmed his decision,[207] and the Supreme Court denied certiorari.[208] In 2004, after nearly thirty years of litigation, Mississippi's massive desegregation case came to an end.[209]

B. The Tennessee Litigation (2001–2006)

After thirty-eight years, the parties to the Tennessee litigation reached settlement that culminated in the 2001 Geier Consent Decree.[210] The Consent Decree required the State to enhance the effectiveness and outreach of the admissions, financial aid, and registrar's offices at TSU, to increase recruitment of other-race and nontraditional students,[211] to engage in a public relations campaign to emphasize programs for adult learners and financial aid available at the downtown Avon Williams campus of TSU, to create a College of Public Service and Urban Affairs at TSU, to create an Endowment for Academic Excellence at TSU, to conduct a facilities review to ensure that all vestiges of prior segregation in facilities have been removed on TSU's main campus,[212] to raise admission standards at TSU, to revitalize the downtown Avon Williams campus (now part of HBI TSU), to create a new five-year $750,000 a year scholarship program exclusively for Nashville residents who enroll in TSU's evening and weekend classes, to

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Jan. 2, 2002).

204. H. Con. Res. 28, 2002 Leg., Reg. Sess. (Miss. 2002).

205. Judge Biggers noted that larger states had settled their higher education disputes for much less amounts—Tennessee for $75 million over seven years and Virginia for $69.9 million over six years. Ayers v. Musgrove, 2002 WL 91895 at *3, n.6.

206. *Id.*

207. Ayers v. Thompson, 358 F.3d 356 (5th Cir. 2004).

208. Ayers v. Thompson, 543 U.S. 951 (2004).

209. For good summaries of the Mississippi post-*Fordice* litigation, see KAPLIN & LEE, *supra* note 79, at 1460 & n. 59; Diamond, *supra* note 175, at 82–83.

210. Geier v. Sundquist, 128 F. Supp. 2d 519 (M.D. Tenn. 2001). For a good discussion of *Geier* and the 2001 settlement, see generally Deon D. Owensby, *Affirmative Action and Desegregating Tennessee's Higher-Education System: The* Geier *Case in Perspective*, 69 TENN. L. REV. 701 (2002).

211. The term "other-race" refers to white persons at TSU and black persons at the predominantly white institutions. The term "nontraditional students" means working adults generally over the age of 25. *Geier*, 128 F. Supp. 2d at 523 n.2.

212. From the mid-1980s until the time of the Joint Motion for Final Dismissal in 2006, the State of Tennessee spent $220M on the physical plant at TSU as a direct result of the *Geier* litigation. Joint Statement in Support of the Parties' Motion for the Entry of a Final Order of Dismissal at 13, n. 4, Geier v. Bredesen, 453 F. Supp. 2d 1017 (M.D. Tenn. 2006) (No. 5077) [hereinafter Joint Statement].

limit for five years the number of Ph.D. programs at Middle Tennessee State University to the number of such programs at TSU, to enhance and further the recruitment, hiring, and retention of other-race faculty and students within both the University of Tennessee and Tennessee Board of Regents systems, and to provide significant funding for TSU over the five years of the Consent Decree.[213]

On September 7, 2006, the parties filed a Joint Statement in Support of the Parties' Motion for the Entry of a Final Order of Dismissal agreeing that the parties had adhered to the requirements of the Consent Decree and that Tennessee had at long last met its legal obligations to operate and support a unitary system of public higher education.[214] The plaintiff and the plaintiff-intervenors agreed that the Defendants had satisfied their legal burden and had met the constitutional requirements set forth in *Fordice*.[215] They acknowledged that all funding required by the Consent Decree had been provided and that Tennessee had eliminated the vestiges of segregation from its system of public higher education.[216] In supporting their Motion for a Final Order of Dismissal, the parties noted that they were bringing to a close a significant chapter in the history of public higher education in Tennessee, but they were not ending the State's efforts to "ensure and promote the unitary system of public higher education it has now achieved. In the years and decades to follow, the Tennessee Board of Regents, and the University of Tennessee are committed to building upon the efforts and progress of the last 38 years."[217]

On September 21, 2006, Judge Wiseman held that the parties had fully complied with the requirements of the 2001 Consent Decree, were now operating a unitary system of public higher education, and entered a Final Order of Dismissal.[218] With that, the Tennessee litigation, that had spanned the terms of seven Tennessee governors and ten attorneys general, came to an end.[219]

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213. *Geier*, 128 F. Supp. 2d at 522–49.

214. Joint Statement, *supra* note 212.

215. *Id.*

216. *Id.*

217. *Id.* at 20.

218. Geier v. Bredesen, 453 F. Supp.2d 1017 (M.D. Tenn. 2006). Judge Wiseman acknowledged with appreciation that the single most significant factor in bringing the successful resolution of this litigation was the tremendously important contribution of the court appointed mediator, Carlos Gonzalez. His integrity, neutrality, understanding, and sensitivity to the respective positions of the parties caused them to fully accept and trust him as an honest broker. "He finishes this job with my great respect and gratitude for a job well done." *Id.* at 1019.

219. Rita Sanders Geier, the named plaintiff in the Sanders (later Geier) litigation, is now a senior fellow at the Howard H. Baker, Jr. Center for Public Policy and associate to the Chancellor at the University of Tennessee – Knoxville. *See* Howard Baker Jr. Center for Public Policy, http://bakercenter.utk.edu/main/directory.php (last visited Jan. 29, 2010).

C. The *Louisiana* Litigation (1992–2005)

Shortly after the Court's *Fordice* decision, Judge Schwartz reinstated the 1988 and 1989 liability and remedial orders in *United States v. Louisiana* and granted summary judgment to the plaintiff.[220] The only change to the remedial order was the removal of the requirement to merge the LSU Law Center with the Southern University Law Center.[221] On appeal, the Fifth Circuit determined that the grant of summary judgment was improvident because questions of fact remained as to whether unnecessary program duplication existed in Louisiana's colleges and universities and whether the open admissions policies fostered segregation.[222] Reluctantly, the Fifth Circuit reversed the summary judgment ruling, vacating the remedial order, and remanded for resolution of the issues of fact.[223]

Shortly thereafter, settlement negotiations in Louisiana resumed, culminating in a new Settlement Agreement in November of 1994.[224] The Settlement Agreement's main purpose was to create some measure of fiscal equality between the State's HBIs and HWIs. It took significant steps in two areas addressed in the 1981 Consent Decree. First, the Settlement Agreement pledged that $65M in deferred capital improvements be spent on the campuses of the HBIs.[225] Second, the Agreement addressed the problem of program duplication and lack of programs at the HBIs.[226] It created a number of new programs at Southern and Grambling, included an appropriation of $48M for them, and forbade their creation at any proximate institutions.[227] In addition, the Settlement Agreement altered admission criteria and focused on the financial aspect of recruiting and retaining other-race students, established a new community college in Baton Rouge to be jointly operated by LSU's and Southern's Boards, and made a commitment to encourage employment of other-race faculty.[228]

The Louisiana Settlement Agreement did not contain numerical goals for proportional enrollment of other-race students. It did provide for supervision of a Monitoring Committee and annual reports by the

220. United States v. Louisiana, 811 F. Supp. 1151, 1160 (E.D. La. 1992).

221. *Id.* at 1160 n. 54.

222. United States v. Louisiana, 9 F.3d 1159, 1162 (5th Cir. 1993).

223. *Id.* at 1169–70 ("We greatly respect the district court's diligence in attempting to resolve this protracted litigation expeditiously. We also commend the trial judge for his obvious familiarity with the massive record in this case and his circumspection in attempting to frame remedial measures. In such an old case, where the state's colleges and universities remain starkly racially identifiable, we remand for continued litigation with great reluctance."). *Id.* at 1170.

224. Settlement Agreement, *supra* note 202.

225. *Id.* at 10–14

226. *Id.*

227. *Id.*

228. *Id*. at 4, 8, 20–24.

Committee.[229] In 2005, at the end of the tenth year of the Agreement, it expired under its own terms. The Tenth Annual Report revealed that despite the expenditure of millions of dollars, movement toward increasing the diversity of employees remained minimal.[230]

D. The Alabama Litigation (1981–2006)

1. *United States v. Alabama I* (1985)

As in the Tennessee and Mississippi desegregation cases, the Alabama case involved both private parties, John F. Knight, Jr. [231] and a class certified as all black citizens of the State of Alabama, as well as the United States, suing the State in 1982, claiming that its university system had not fulfilled its obligation to eradicate the remnants of its de jure past because it, among other things, funded its HWIs (the University of Alabama and Auburn University) in much greater amounts than it afforded its HBIs (Alabama State University and Alabama A&M University). Furthermore, plaintiffs contended that former de jure policies and practices continued to have segregative effects as reflected in the make-up of the student bodies, faculties, staffs, and governing boards.[232]

After extensive discovery and numerous pre-trial motions, a month-long trial was held before Judge U. W. Clemon in July 1985.[233] The district court found that Alabama had historically provided far less funding to black schools than to white, had taken various actions that stymied the growth and development of the HBIs, such as permitting HWIs to establish branch campuses in areas where HBIs offered the same programs, had maintained colleges and universities easily identifiable by race, and continued to operate a system with surviving vestiges of prior segregation, as readily seen in unequal physical facilities and program duplication.[234]

Auburn University moved to disqualify Judge Clemon.[235] The Eleventh Circuit upheld the motion, holding that Judge Clemon's involvement both as a state senator in disputed factual issues surrounding the composition of defendants' governing boards and in legislative efforts to improve A & M's physical plant, as well as his involvement as a private attorney in civil rights cases involving Alabama's junior colleges and trade schools,

229. *Id*. at 2.

230. Diamond, *supra* note 175, at 117 & n. 326.

231. Mr. Knight is presently a state senator and chair of the appropriations committee of the Alabama State Senate.

232. United States v. Alabama, 628 F. Supp. 1137 (N.D. Ala. 1985).

233. *Id.*

234. United States v. Alabama, 628 F. Supp. 1137 (N.D. Ala. 1985). For a good commentary on *Alabama I*, see generally John C. Walden, *Desegregation of Higher Education in Alabama Unresolved*, 42 EDUC. L. REP. 505 (1988).

235. United States v. Alabama, 828 F.2d 1532 (11th Cir. 1987).

mandated his disqualification.[236] The Eleventh Circuit disqualified Judge Clemon and remanded for a new trial.[237]

2. *United States v. Alabama II* (1991)

After six Alabama district court judges were recused on their own motion or by order of the Eleventh Circuit, Judge Harold L. Murphy, District Judge for the Northern District of Georgia, was designated to perform all judicial duties arising from the case.[238] Under Judge Murphy, trial was held for six months in Birmingham in 1991.[239] Approximately 200 witnesses testified and hundreds of thousands of pages of exhibits were received, which resulted in a transcript of 22,000 pages.[240]

Unlike the defendants in the Mississippi and Louisiana cases, the various *Alabama* defendants, including all the public universities in the State, raised separate defenses and were represented by numerous different attorneys. The basic contentions of the defendants were that race-neutral admission and employment policies were all that were required by Title VI and the Constitution, that the fact that the HBIs remain almost entirely black is the result of free choice, that racial imbalance does not violate the Constitution, and that the standard for determining whether an institution has dismantled a racially dual school system differs at the higher education level from the elementary-secondary level.[241]

In his 300-page opinion, Judge Murphy traced the historical development of higher education in the State of Alabama, recounted attempts made by whites first to prevent and then to control education of blacks, related efforts of blacks to establish and operate public higher education institutions for black students, emphasized the role of these institutions in the civil rights movement, recounted the development of HWI branch campuses in areas where HBIs already existed, and the massive resistance in Alabama after *Brown* to avoid desegregation.[242] He then turned to a detailed assessment of the present racial composition of the faculties, student bodies and administrative staff on the respective campuses, adequacy of campus facilities, funding and mission assignment, and recruitment and retention efforts made by the HWIs toward black students.[243] He concluded that vestiges of de jure segregation remained and that the scope of the duty of the State to remove those lingering

236. *Id.* at 1536.
237. United States v. Alabama, 828 F.2d 1532, 1536 (11th Cir. 1987) *cert. denied*, 487 U.S. 1210 (1988).
238. Knight v. Alabama, 787 F. Supp. 1030, 1050 (N.D. Ala. 1991).
239. *Id.*
240. *Id*. at 1051.
241. *Id*. at 1353–54.
242. *Id.* at 1061–153.
243. *Id.* at 1153–348.

vestiges of de jure segregation was the affirmative obligation set forth in *Green*.[244] He further found the principles of *Green* to apply at the higher education level as well as elementary-secondary, stating: "A college student is no less entitled to attend a non-racially segregated state institution than is a secondary school student."[245]

The court fashioned a comprehensive remedial decree ("the 1991 Decree"), which required the HWIs to achieve improvement in the employment of black faculty and staff, instructed Alabama State University to develop a plan for improving recruitment and enrollment of white students, ordered increased funding for the HBIs, required elimination of program duplication, mandated creation of new high demand programs for the HBIs, and ordered the creation of a statewide Monitoring Committee to make reports to the court concerning efforts being made to achieve a greater level of desegregation in higher education in Alabama.[246]

3. *United States v. Alabama III* (1995)

The case moved up and down twice between the district and appeals courts.[247] Finally, upon remand, the district court, relying on the standards set forth in *Fordice* and the Eleventh Circuit's interpretation thereof, ruled that where plaintiffs show that a current policy is traceable to past de jure segregation, has a continuing segregative effect, and the State has not adopted less segregative remedies that are practicable and educationally sound, the State is in violation of the Fourteenth Amendment.[248]

In *Alabama III*, Judge Murphy made over six hundred findings of fact and ordered in his second comprehensive remedial decree that the State of Alabama provide scholarship money for ASU and A&M to attract other-race students, placed restrictions on the expansion of two-year and technical colleges in Montgomery and Huntsville to help ASU and A&M in their efforts to attract more non-minority students to their programs, and implemented a unified land grant system which would unify Auburn University and A&M into the Alabama Cooperative Extension System.[249] The court ordered the creation of several new high demand programs for

244. *Id.* at 1357.

245. *Id.*

246. *Id*. at 1377–82. For a good overview and analysis of the *Alabama I and II* litigation, see generally Phillip Scott Arnston, *Thirty Years Later, Is the Schoolhouse Door Still Closed? Segregation in the Higher Education System of Alabama*, 45 ALA. L. REV. 585 (1994).

247. *See* United States v. Alabama, 628 F. Supp. 1137 (N.D. Ala. 1985), *rev'd and remanded*, 828 F.2d 1532 (11th Cir. 1987), *cert denied*, 487 U.S. 1210, (1988), *on remand sub nom*, Knight v. Alabama, 787 F. Supp. 1030 (N.D. Ala. 1991), *aff'd in part, rev'd in part, vacated in part and remanded*, 14 F.3d 1534 (11th Cir. 1994), *on remand*, 900 F. Supp. 272 (N.D. Ala. 1995).

248. United States v. Alabama, 900 F. Supp. 272, 282 (N.D. Ala. 1995).

249. *Id.* at 356.

ASU and A&M, including a program of Allied Health Sciences and the development of up to two new Ph.D. or Ed.D. programs at ASU.[250] The court further directed that ASU should be the only institution in the Montgomery area to offer a Master's Degree in Accounting for a period of five years, and authorized A&M to establish an undergraduate mechanical and electrical engineering program.[251] Finally, the district court created a long-term planning and oversight committee to help implement the court's decree and retained jurisdiction over the case for ten years (until 2005) to ensure compliance with the decree.[252]

As the date for a hearing on the ending of the court's jurisdiction approached in 2005, settlement negotiations intensified. Substantial consensus was reached first between the Knight Plaintiffs and the University of Alabama System ("UAS"). This document was shared with the other HWIs, who thereafter reached their own settlement agreements.[253] The UAS agreement called for each of the three campuses within that system to develop a strategic diversity plan reiterating its commitment to diversity in its student body and among its faculty and upper-level administrators.[254]

On December 5, 2006, the court held a final fairness hearing regarding the proposed Settlement Agreements and concluded that the Agreements were designed to serve the purposes of the court's 1991 and 1995 Remedial Decrees, as well as the ultimate goal of this litigation: to remove, to the extent practicable and educationally sound, the remaining vestiges of de jure segregation.[255] The court approved the ten Settlement Agreements as being "fair, reasonable, and consistent with the requirements of the Constitution and laws of the United States."[256] Two of the non-named plaintiff class members objected to the district court's approval of the Settlement Agreements and appealed.[257] The Eleventh Circuit affirmed, thereby ending the last of the massive higher education desegregation lawsuits.[258]

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250. *Id.* at 370.

251. *Id.* at 371.

252. *Id.* at 374.

253. A unique governance system existed in Alabama (unlike Tennessee, Louisiana, and Mississippi), where each of the State's public institutions had its own distinct governing board.

254. Knight v. Alabama, 469 F. Supp. 2d 1016, 1029 (N.D. Ala. 2006).

255. *Id.* at 1030. Judge Murphy, as had Judge Wiseman in the Tennessee litigation, expressed his appreciation for the highly experienced and skilled talents of Carlos Gonzalez as a mediator. "[T]he Court is well aware that the parties would not have been able to resolve the issues in this litigation without Mr. Gonzalez's efforts." *Id.* at 1039.

256. *Id.* at 1037.

257. United States v. Alabama, 271 F. App'x 896, 2008 WL 834130 (11th Cir. March 28, 2008).

258. *Id.*

VIII. WHERE WE ARE TODAY

While the massive higher education desegregation cases are ended, desegregation is still "unfinished business."[259] Numerous colleges and universities continue to exist with racially identifiable faculties, staffs, and student bodies, despite hundreds of millions of dollars of expenditures designed to eradicate segregation. Related issues of affirmative action, the future of HBIs, and state funding of HBIs, without a parallel expectation that the funding will be used to achieve desegregation, remain unresolved.

As discussion continues to focus on desegregation, the underlying question remains as to whether the affirmative duty to desegregate applies to HBIs as it does to HWIs. And, should "racial identifiability" or percentage of other-race students, faculty, and staff even be the measuring rod of achieving equal educational opportunity for all and be the defining test of desegregation? Many of these issues will be addressed in other articles in this commemorative edition.

IX. PERSONAL REFLECTIONS

When I was asked to write an article on the changes in higher education law as they involve race for this 50th year commemorative edition, I at first declined. I did not think I had sufficient scholarly experience to undertake the challenge. Also, I wear the "burden of Mississippi" when matters of race are discussed and was concerned that what I had to say on this subject would be discounted because of my place of origin. While both are true, I finally realized after a second invitation that the perspective of a 72-year-old white woman from Mississippi, who has lived through the dark days of total de jure segregation, the massive resistance to desegregation in the Deep South, the turmoil surrounding the integration of my own university, and the dramatic changes that have taken place since those days, should be heard.

During my lifetime, a legal and moral societal revolution in the area of both desegregation and race relations has occurred. Throughout my elementary, high school, and college days, I never attended school with an African-American. The law would not have permitted that. You may rightfully ask, "But what did you do about it?" Regretfully, I have to say, "Not enough." By the time I entered college, I had begun to lose my naiveté and to question the legal and moral grounds for racial segregation, but I and many of the "silent generation" of the 1950s in the Deep South did not do much more than that. The political maelstrom silenced most of us.

When the 1960s arrived and the Civil Rights Movement was reaching the Deep South in full force, I was early married and absorbed in raising

259. *See* KAPLIN & LEE, *supra* note 79, at 1462.

four little girls. I watched in horror as the news unfolded of the rioting and death that accompanied the integration of the University of Mississippi, my alma mater, but I did little more than to speak out on a local level about the legal and moral injustice taking place around me.

Through the years, I have tried in both my role as a university attorney and as a teacher, to make students aware of the tremendous price their parents, grandparents, and great-grandparents – both black and white – paid so that current and future generations can enjoy the opportunities they have today. While it is painful to go back in time and talk about the terrible resistance to desegregation in my part of the country in 1940s, 1950s, and 1960s, I think it is important for us to do so "lest we forget."

While memory of the past will always be with us, we must take great pride in where we are today. Perfect, no. But, we have come a long way. For example, Rose Flenorl, an African-American woman, is president of the University of Mississippi Alumni Association. Her daughter is a recent graduate of this University. In 2002, James Meredith attended a forty-year commemorative event celebrating his enrollment at the University of Mississippi. He donated his personal papers to the University on that occasion. Mr. Meredith's son recently received his Ph.D. from the University of Mississippi. A beautiful statue of Mr. Meredith is placed in a prominent site on the campus of the University of Mississippi. This past year, two great-nieces of slain civil rights leader Medgar Evers graduated from the University of Mississippi law school.

Wonderful, positive changes have been acknowledged by both African-Americans and whites in many other of the Deep South states. For example, in the Statement in Support of the Parties' Motion for the Entry of a Final Order of Dismissal in Tennessee's *Geier* case, the parties said: "During the period of this case profound progress in official policies, individual attitudes, institutional structures, and educational programs has been achieved."[260] In a complete reversal of spirit from the days when it fought her admission, the University of Alabama named an endowed scholarship in Autherine Lucy Foster's honor and unveiled a portrait of her in the student union building. The inscription reads: "Her initiative and courage won the right for students of all races to attend the University."[261]

In the Fall of 2008, the University of Mississippi hosted the first of the Presidential Debates between now President Barack Obama and Senator John McCain. CBS newsman Bob Schieffer was on campus to cover the event. This was his first return trip to Oxford and the University of Mississippi since 1962 when he reported on the admission of James Meredith as the University's first black student. During the "Face the

260. Joint Statement, *supra* note 212, at 3.

261. E. CULPEPPER CLARK, THE SCHOOLHOUSE DOOR: SEGREGATION'S LAST STAND AT THE UNIVERSITY OF ALABAMA 260 (1993).

Nation" broadcast the Sunday following the debate, Schieffer praised the University's progress in racial reconciliation over the past forty years. "Being there for the debate made me understand how far the country has come. It was one of the most wonderful moments in the history of the country, and I was so happy to be there."[262]

My life would have been enriched had I had the opportunity to attend school with African-Americans, who comprise over 37% of the people living in and around me. My four daughters had this opportunity. They were all educated in a public school system that was fully integrated. They are all, I am proud to say, people without racial prejudice, who treasure their other-race experiences in life and learning. I noted with pride during my research for this paper that my daughter Stella had written a fine paper on the civil rights litigation in Mississippi from the integration of the University of Mississippi by James Meredith to the *Ayers* case as part of her Masters degree in American Studies at the University of Alabama.[263] She is part of the book-publishing world today so I asked her to review this paper and give me her comments. She said to me: "You may not have been as actively involved in the Civil Rights Movement of the 1950s and 1960s as you wish you had been, but you got a lot of it right. You knew that what was going on in the Deep South was terribly wrong. You cared. And, you instilled in your four daughters a strong sense of conscience and of social justice." Perhaps that affirmation from a daughter, along with the NAACP Freedom Award and the Chancellor's Award for Diversity at my institution, help to assuage my guilt. I know, however, how wonderful it would have been to have grown up in an open, inclusive society that we are becoming instead of the closed society of yesteryear.[264]

This commemorative issue of the Journal of College and University Law is focused on change in higher education law over the past fifty years. More than in any other area, change has taken place with regard to race and higher education – and it has all been for the good.

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262. Mitchell Diggs, *CBS Newsman Bob Schieffer to Deliver UM Commencement Address*, University of Mississippi Newsdesk (April 23, 2009) http://130.74.79.130/index.php/Ole-Miss-News/News-Releases/Commencement-advance09.html (last visited January 29, 2010).

263. *See* Stella G. Connell, *From* Meredith *to* Ayers*: A Retrospective View of Civil Rights Litigation in Higher Education in Mississippi, 1962–1990*. A paper submitted in partial fulfillment of the Master of American Studies, AMS 525, University of Alabama (1990). (Copy on file with the author.)

264. *See generally* JAMES SILVER, MISSISSIPPI: THE CLOSED SOCIETY (1964) (discussing the history of Mississippi's closed doors involving segregation and race relations).