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An Education of Their Own: The Precarious Position of Publicly Supported Black Colleges after *United States v. Fordice*

DARRYLL K. JONES*

*Racial considerations intruding upon education process contaminate educational at the source. Education is the awesome struggle to free the human mind of constructive parochialisms, superstitions and ignorance.*¹

INTRODUCTION

In *United States v. Fordice*,² the United States Supreme Court revisited the awesome task of eliminating race from educational policy. *Fordice* ostensibly involved the duty of a state to remedy past discrimination in its formerly segregated system of higher education.³ Mississippi argued that it need only cease further discrimination,⁴ while private petitioners and the United States argued that the state must also undertake remedial measures beyond simply ending present discriminatory practices.⁵ The Court's re-

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1. K. B. Clark, *Separate Is Still Unequal*, NATION, July 7, 1979, at 7, 9. Clark devised the so-called "Dolls Test" in which African American children were asked to pick between a white doll and a black doll. K. B. Clark, *Effect of Prejudice and Discrimination on Personality Development* (Midcentury White House Conference on Children and Youth, 1950), cited in *Brown v. Board of Educ.*, 347 U.S. 483, 494 n.11 (1954). African American children's preference for the white doll over the black doll was said to prove that segregation made African Americans feel inferior and suffer from self-hatred. *Id.*; J. WILLIAMS, *EYES ON THE PRIZE: AMERICA'S CIVIL RIGHTS YEARS, 1954-1965* 20-21 (1987). Clark's conclusions, however, have been questioned recently. Madhere, *Self-Esteem of African American Preadolescents: Theoretical and Practical Considerations*, 60 J. NEGRO EDUC. 47 (1991). "Many researchers argue that [Clark's] conclusion may not be warranted, pointing out that the Clerk doll test demonstrates not necessarily self-hatred but rather an 'outgroup orientation' or, more simply put, it merely taps the degree of social awareness among young African American children." *Id.* at 48. In his 1979 article, Dr. Clark castigates those who seek to preserve black colleges, concluding that their justifications "reflect deep fears of change, and a desire to preserve and protect vested interests." Clark, *Separate is Still Unequal*, NATION, July 7, 1979, at 7.

2. 505 U.S. ___, 112 S.Ct. 2727 (1992).

3. *Id.*

4. *Id.* at 2734; Brief for Respondents at 36, *United States v. Fordice*, 505 U.S. ___, 112 S.Ct. 2727 (1992) (Nos. 90-1205, 90-6588).

5. *Fordice*, 112 S.Ct. at 2734; Brief for Private Petitioners at 49, *United States v. Fordice*, 505 U.S. ___, 112 S.Ct. 2727 (1992) (Nos. 90-1205, 90-6588); Brief for the United States at 25, *United States v. Fordice*, 505 U.S. ___, 112 S.Ct. 2727 (1992) (Nos. 90-1205, 90-6588).

jection of Mississippi's approach and its adherence to the *Brown v. Board of Education*⁶ demand to eliminate race as a factor in educational opportunity uncovered the hidden and much more complex issue: that is, whether the continued existence of publicly supported black colleges⁷ is justifiable after nearly forty years of jurisprudence specifically oriented to the elimination of one-race educational institutions. *Fordice* represents merely an opening salvo with regard to that issue. The still uncertain resolution, however, may very well determine whether black colleges will continue to exist after the post-*Brown* struggle between racial discrimination and educational opportunity.

As the issue comes into focus, one fact remains distressingly obvious and should be acknowledged. It is apparent that the entanglement of race and education continues to cause an untold diversion of resources and creative energy. Since the beginning of Reconstruction⁸ race has had impact upon the educational process in almost every aspect, including the construction of new facilities,⁹ the hiring of faculty,¹⁰ and the adoption and/or rejection of curricula.¹¹ Moreover, judicial¹² and administrative¹³

6. 347 U.S. 483 (1954).

7. When used throughout the remainder of the discussion, the term "black colleges" refers only to publicly supported black colleges. Private black colleges are not generally included in the discussion unless otherwise noted. Presently, there are forty-eight publicly supported black colleges and fifty-nine privately supported black colleges. BLACK AMERICANS INFORMATION DIRECTORY 1992-93 (Julia C. Furtaw ed., 2d ed. 1992).

8. See generally J. ANDERSON, THE EDUCATION OF BLACKS IN THE SOUTH, 1860-1935 (1988); E. FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1977 (1984); R. C. MORRIS, READING, RITING AND RECONSTRUCTION: THE EDUCATION OF FREEDMEN IN THE SOUTH, 1861-1870 (1981); R. SCHERER, SUBORDINATION OR LIBERATION? THE DEVELOPMENT AND CONFLICTING THEORIES OF BLACK EDUCATION IN NINETEENTH CENTURY ALABAMA (1977); D. SPIVEY, SCHOOLING FOR THE NEW SLAVERY: BLACK INDUSTRIAL EDUCATION, 1868-1915 (1978); C. WOODSON, THE MIS-EDUCATION OF THE NEGRO (World Africa Press 1990) (1933); Kujovich, *Equal Opportunity in Higher Education and the Black Public College: The Era of Separate but Equal*, 72 MINN. L. REV. 29 (1987).

9. See, e.g., *Sanders v. Ellington*, 288 F. Supp. 937 (M.D. Tenn. 1968) (action to enjoin the construction of University of Tennessee at Nashville because it would interfere with state's duty to desegregate).

10. See *Craig v. Alabama State Univ.*, 451 F. Supp. 1207 (M.D. Ala. 1978) (reverse discrimination suit by white educators against black colleges). See also Note, *Race-Based Hiring and Layoff Remedies in School Desegregation Cases*, 104 HARV. L. REV. 1917 (1991).

11. See Jarvis, *Brown and the Afrocentric Curriculum* 101 YALE L.J. 1285 (1992).

12. Note, *Overcoming Original Sin: The Redemption of the Desegregated School System*, 27 HOUS. L. REV. 557 (1990). The author discusses the problem of "interminable litigation." The Supreme Court has recently shown greater sensitivity to the need to end judicial supervision of schools. See *Freeman v. Pitts*, 503 U.S. ___, 112 S.Ct. 1430 (1992).

Federal judicial supervision of local school systems was intended as a "temporary measure." Although this temporary measure has lasted decades, the ultimate objective has not changed — to return school districts to the control of local authorities. . . . Returning schools to the control of local authorities at the earliest practicable date is essential to restore their true accountability in our governmental system.

Freeman, 112 S.Ct. at 1445.

13. 34 C.F.R. 100 (1991) ("Nondiscrimination Under Programs Receiving Federal Assistance

supervision of educational policy appears by now to be the norm rather than the exception, surely stifling local creativity and experimentation as a result. The hopeless entanglement of race and education has ultimately resulted in the diversion of years of effort, billions of dollars, and untold intellectual energy from the pure quest for knowledge.¹⁴ An imperative of any resolution, then, must be the elimination of race as a diversionary factor in education.

When education is driven by factors not related to the attainment of knowledge per se, one must wonder whether knowledge, however it may be defined, remains its purpose. Certainly the vast amount of energy and resources spent defending or fighting racial ethnocentrism and its skewing effects on education suggest that education is more a tool or participant in class struggle than a focal point of human betterment.¹⁵ Little wonder, then, that education and educators are frequently accused of failing to achieve and impart true knowledge.¹⁶ The historic and present-day racial impetus behind educational policy and the use of educational institutions for purposes unrelated to the expansion of the mind necessitate doubt as to whether knowledge will ever be achieved. Indeed, as long as race is a factor in education, the freeing of the human mind may never occur.

Imparting knowledge to free the human mind was certainly antithetical to the original educational limits set for African Americans. As recently as the 1960s, "colleges" available to African Americans were colleges in name only, the consistent purpose of which was the maintenance of a discriminatory status quo through potent mind control inherent in racial management of education.¹⁷ This social purpose was most apparent in the

Through the Department of Education Effectuation of Title VI of the Civil Rights Act of 1964"). See also Revised Criteria Specifying the Ingredients of Acceptable Plans to Desegregate State Systems of Public Higher Education, 43 Fed. Reg. 6658 (1978).

14. Recent estimates of the overall economic cost of discrimination range up to 93 billion dollars. *America Loses Billions over Economic Racism*, GAINESVILLE (Fla.) SUN, Aug. 2, 1992. See also Locke, *The Economic Aspects of Race Prejudice*, 2 EDITORIAL REV. 488 (1910).

15.

The record of the U.S. Educational System since 1954 and its tendency to reinforce racial, class, and gender inequalities has caused many to challenge the meritocratic view of education. . . . [O]ver the course of the educational experience initial advantages of class, race, and sex are merely reinforced. There are exceptions to this pattern wherein educational achievement facilitates phenomenal upward social mobility. However, schools are frequently seen as channels for individuals to achieve previously reserved niches in the social hierarchy consistent with their origins.

Allen, *The Education of Black Students on White College Campuses: What Quality the Experience?* at 57-58, in TOWARD BLACK UNDERGRADUATE STUDENT EQUALITY IN AMERICAN HIGHER EDUCATION (M. Nettles ed., 1988).

16. "In short, instead of liberal education, what American students are getting is its diametrical opposite, an education in closed-mindedness and intolerance, which is to say, illiberal education." D. D'SOUZA, *ILLIBERAL EDUCATION: THE POLITICS OF RACE AND SEX ON CAMPUS* 229 (1991).

establishment of the publicly supported black colleges and universities, where education had less to do with imparting knowledge and more with creating, maintaining, and controlling a subservient labor force.¹⁸

Fortunately, and as educators surely know, even a little knowledge leads to greater curiosity, which leads to more knowledge, which leads to questioning and eventual rejection of old ways. Thus, even despite their intended status as farcical imitations of educational institutions, black colleges produced a seed of inquiry which, as so many advocates of the status quo predicted and feared,¹⁹ but could not prevent, led to demands for true equality. This demand implicitly and necessarily involved the discarding of separate, one-race colleges. Today, although black colleges are still notoriously underfunded, they can rightfully boast of having led the rejection

17.

William Dorsey Jelks, who was Governor of Alabama from 1901 to 1906, believed that even teaching blacks to read was a "curse" on the material interests of the South. He thought education had failed to teach blacks the "love of work." He regretted that the principles of free speech prevented white state government from controlling the black church, but he insisted that white control of black education should insure that blacks were taught their menial place in society.

Knight v. Alabama, 787 F. Supp. 1030, 1094 (N.D. Ala. 1991).

Education [of Blacks] controlled and directed by [whites] will repress not merely the expression but thought . . . and produce on the contrary, politeness, good will, respect for authority and good deportment.

Id. at 1079, quoting Thomas Goode Jones, a former white trustee of all-black Alabama State University.

Therefore, the free black laboring class "must be taught to work, to submit to authority, to respect their superiors . . . the saw and plane and the anvil must take the place of geography . . . the entire system of public education for the negro race, from top to bottom, should be industrial."

ANDERSON, *supra* note 8 at 85, quoting George T. Winston, former president of North Carolina College of Agriculture and Mechanic Arts.

18.

Industrial education thus symbolized a new consensus on the inferior status of blacks. It also served to emphasize the role of education as a mechanism of social control, at least for blacks in the South. Through vocational education, blacks and other inferior groups would be confined to low-level positions in the economic system. At the same time, they would be available as a disciplined labor force in the anticipated new period of industrial and agricultural expansion.

Browning and Williams, *History and Goals of Black Institutions of Higher Learning*, in *BLACK COLLEGES IN AMERICA* 72-73 (C. Willie & R. Edmonds eds., 1978).

19.

The white southern leaders were especially fearful that northern philanthropists would make blacks discontent with the political and economic roles accorded them in southern society. The *New Orleans Picayune* with good logic, charged that "just as soon as all the Negroes in the state shall be able to read and write they will become qualified to vote, and it is not doubted that they will demand their rights in the primaries with the 14th Amendment to back them up."

ANDERSON, *supra* note 8, at 95 (1988).

tion of educational management and opportunity based on race and, in the process, can point to thousands of proud and capable alumni as proof.

With the decision in *Brown*,²⁰ the rejection and discarding of old ways and institutions became an eventual, though not yet present, reality. Indeed, *Brown*'s sweeping holding, first questioning and then rejecting *in toto* the old ways and institutions having little or nothing to do with education, can be hailed as the truest emancipation proclamation for African Americans — an emancipation of the mind rather than just the body. Yet today, many concerned African Americans are in headlong retreat from *Brown*'s complete and logical rejection of race as a factor in the course of education although their reasons remain unconvincingly articulated. They put forth arguments demanding the maintenance of separate black colleges but do not understand that in doing so they necessarily adopt and justify arguments originally used to exclude African Americans from public life. Ironically, the retreat is led by the legal and educational leaders who won the battle represented by *Brown*.²¹

Indeed, after thirty years of using *Brown* as the sword it was intended to be, advocates of publicly supported black colleges now find the sword to be double-edged and swinging both ways. With the ultimate victory of *Brown* within distant sight, they seek to forestall its guiding principle: the complete eradication of race from the educational process. The resulting prolongation of racial management of education, with its diversion of purpose, demonstrates once again the negative influence of race in education regardless of which side uses it or the reasons for its use.

Perhaps there are convincing reasons why race should continue to have a role in education. If so, those who make the argument in favor of maintaining black colleges have not yet carried what rightly should be an extremely heavy burden. In fact, *Fordice* relied on this heavy burden against

20. 347 U.S. 483.

21. There is no universal opinion among those involved in the *Brown* victory. The National Association for the Advancement of Colored People (NAACP) has, at various times, opposed the continuation of black institutions. Bell, *Black Colleges and The Desegregation Dilemma*, 28 EMORY L.J. 949, 957 (1979). ("Defining all black colleges as segregated, an NAACP staff official has reported that his organization opposes segregated schools 'no matter what else is taught or how well it is taught.'"). See also, Note, *Creating Space for Racial Difference: The Case for African-American Schools*, 27 HARV. C.R.-C.L.L. REV., 187, 189 n.12 (1992). The National Association for Equal Opportunity in Higher Education ("NAFEO") a group of black educators, and other black educators have argued strenuously for the continuation of black institutions. Bell, *infra* at 971; N.Y. TIMES, Oct. 22, 1991 at C20; (black educators lobby President Bush to obtain Justice Department's support for Black colleges in *Fordice*); CHRON. HIGHER EDUC., Sept. 25, 1991 at A1 (black educators discuss the threats facing black colleges as a result of desegregation efforts). On other occasions, Black lawyers and educators have joined in support of enhancing black colleges. See Amicus Brief of the National Bar Association, the National Association For Equal Opportunity in Higher Education and the Congressional Black Caucus, *United States v. Fordice*, 112 S.Ct. 2727 (1992) (Nos. 90-1205, 90-6588).

the state of Mississippi at the behest of those who now seek to limit its effect on black colleges. The Court's holding in that case continued the path toward the complete discarding of race as a factor in education. Its color-blind demand for the elimination of one-race institutions, however, applies equally against the maintenance of black colleges. Hence, if those institutions are to be preserved, it is urgent that supporters of black colleges explain the inconsistency between *Brown*'s demand for the destruction "root and branch"²² of vestiges of segregation and the present-day demand for the maintenance of separate black colleges.

Before examining, discussing, and attempting to resolve this very complex issue, those immediately responsible for the educational process must fully understand the historical impact of race in education, particularly in the management of the black college. The use of the black college as a means of social control and the struggles of African Americans for educational equality must be examined. If necessary, African Americans themselves must be ready to reject the synonymy between "all-black" and "constitutionally inferior" which has been used as *prima facie* evidence of discrimination in so many cases. By asserting and even believing that "all-black" is a sure sign of constitutional inferiority, those who now seek to defend black colleges must do so against their own words and deeds. Perhaps it is merely necessary to better explain the functional relationship between all-black and discriminatory state action, rather than to discard the synonymy. The four opinions in *Fordice*²³ must be examined closely, for they demonstrate the Supreme Court's suspicion of applying race in educational planning even if for reasons seemingly defensible. Finally, the arguments set forth in favor of the continued maintenance of black colleges must be scrutinized with complete intellectual honesty. Only by examining the entire issue honestly can the promise of *Brown* be realized and the issue of race finally eradicated from the educational process.

HISTORICAL PURPOSE OF THE BLACK COLLEGE

*These questions cannot be answered accurately without a clear exposition and understanding of exactly what those historical policies of discrimination were — their specific forms and content, how they were intended to disadvantage black people and what effects they actually had.*²⁴

22. *Green v. County Sch. Bd. of New Kent County, Va.*, 391 U.S. 430, 437-38 (1968).

23. Justice White wrote the majority opinion in which all other justices except Justice Scalia joined. Justices Thomas and O'Connor wrote concurring opinions, and Justice Scalia wrote a dissenting opinion. 505 U.S. ____, 112 S.Ct. 2727.

24. *Knight*, 787 F. Supp. at 1066. *Knight* involved exactly the same issues as *Fordice* but was initiated in 1978, three years after *Fordice*. Both cases demonstrate the incredibly complex factual and philosophical determinations that must be explored before the arguments regarding black colleges can

The historical management, use, and resistance to separate black colleges present formidable barriers for those who now support their maintenance and continuation. From the standpoint of segregationists, black colleges were established and maintained not as sources of knowledge but as a means of mind control consistent with the larger goal of preserving an antebellum way of life. Each step in the growth of black colleges from little more than elementary and secondary trade schools²⁵ to their present status as quality institutions of higher education came not from a real interest in educating African Americans but as the result of social plans entirely inconsistent with the educational aspirations of African Americans.²⁶ Never ignorant of the real purpose, African Americans acceded only out of necessity and for lack of alternatives.²⁷

be understood and addressed. *Knight* involved "200 witnesses [and] hundreds of thousands of pages of exhibits and produced a transcript well in excess of 22,000 pages." *Id.* at 1051. The published opinion is comprised of 1,859 findings of fact and, counting captions, tables, and appendices, spans 367 pages. 787 F. Supp. 1030. The district court which heard *Ayers v. Allain*, a related case, conducted a "five-week bench trial, during which the court heard testimony from 71 witnesses and received 56,700 pages of exhibits." *Ayers v. Allain*, 674 F. Supp. 1523, 1526 (N.D. Miss. 1987).

25. Kujovich, *supra* note 8, at 66-67. Because the former slaves were mostly illiterate, all educational institutions had to function as elementary and secondary institutions before even attempting a higher curriculum. *Id.*

26. "Consequently the curriculum of black public schools avoided instruction that might make blacks unwilling to accept a social structure based on white supremacy." *Id.* at 69. Black colleges were established originally to exclude blacks from other state-supported schools and generally were upgraded only as a means to defend against challenges to that exclusion. Hence, upgrades were never sufficient except to allow segregationists to argue that equality existed between separate institutions. Kujovich, *supra* note 8, at 114, 120-136 ("Many states made superficial improvements in their black colleges by establishing makeshift graduate and professional programs, increasing funding levels and expanding undergraduate programs. Their efforts, however, were designed more to forestall black success in the courts than to serve the educational needs of black students."); FONER, *supra* note 8, at 368. ("Partly to head off black demands for admission to the state university, Mississippi established Alcorn University.") "What Southern white officials . . . considered to be the fundamental educational interests of blacks in the South 'differed very sharply from blacks' own interest in education.' These white interests were 'pervasive and intruded into almost every aspect, every decision made regarding black education in the late 19th century until well into the 20th century.'" *Knight*, 787 F.Supp. at 1093, quoting Dr. James D. Anderson. Ironically, segregationists would later argue that black students should not be admitted to all-white graduate or professional schools because the black colleges to which they were limited and which granted their undergraduate degrees were inferior. *Meredith v. Fair*, 305 F.2d 343, 361 (5th Cir. 1962) ("By an ironic twist, the defendants, *after Plessy v. Ferguson* has been overruled, seize upon the inferiority of the facilities-programs of Negro colleges as a reason for excluding Blacks from Mississippi's white colleges and universities.") (emphasis in original) *Franklin v. Parker*, 223 F. Supp. 724, 727 (M.D. Ala. 1963) ("It is the State of Alabama, therefore, that causes and permits the lack of accreditation of [all black] Alabama State College and it is the State of Alabama that causes or allows [all-white] Auburn University's requirement concerning admission from an accredited institution.").

27. *Knight*, 787 F. Supp. at 1074 ("In order to gain access to the education they so desperately desired, Alabama's black citizens compromised with conservative whites on two major issues: segregation and white control."); FONER, *supra* note 8, at 367 ("As for blacks, many surely agreed with Edward Shaw, the militant Memphis political leader, that racial segregation attached a 'stigma of

Logically, then, the continued destruction of barriers and the lack of a need for separate education are the strongest arguments for dismantling black colleges.

After the Civil War, Northern missionaries and other samaritans traveled to Southern and border states and established educational curricula for emancipated slaves.²⁸ Necessarily idealistic, these missionaries and samaritans sometimes sought to instill visions and dreams invariably inconsistent with antebellum beliefs and certainly beyond ideals thought appropriate for former slaves.²⁹ Unable to control the curricula imparted by financially independent Northern teachers, Southern and border states instead sought control over the institutions to which freed slaves were increasingly flocking.³⁰ This was achieved through donations and appropriations to formerly private schools for African Americans. As always, appropriations were intricately connected to state oversight. Thus, as missionaries began to leave³¹ and Civil War veterans regained the right to vote and thus have control over state governments, the educational boom for African Americans faded quite quickly.³²

inferiority to the black child.' Few, however, seemed to have believed integration practicable. Generally black politicians acquiesced when officials established separate schools.''). The famous exception to blacks' grudging acceptance of subservient education is the so-called Hampton-Tuskegee Model, named after the system of education developed in America by northern missionary Samuel Chapman Armstrong at Hampton Institute and wholeheartedly adopted by Booker T. Washington at Tuskegee Institution. See D. SPIVEY, *SCHOOLING FOR THE NEW SLAVERY: BLACK INDUSTRIAL EDUCATION*, 1868-1915, at 16-70 (1978).

28. FONER, *supra* note 8, at 96-99, 144-45. The author notes that blacks took the initiative to establish schools even before the arrival of northern missionaries and by 1870 had spent more than a million dollars of their own money towards education. *Id.* at 97-98.

The black community as a whole also had a special interest in the school. Either on their own or with solicited white donations, the blacks usually bought the land, built their schoolhouse or used a church building, furnished, equipped, and maintained it, and then held the benefits to sustain the school, augment the extremely low salary of the teacher, or extend the school term beyond the two or three months provided many county schools by the state.

R. Scherer, *supra* note 8, at 18 (1977).

29. *Id.* at 144-45; *Knight*, 787 F. Supp. at 1073. ('Blacks' aspirations were supported by Northern white missionaries, who opened schools that taught blacks liberal curricula and equal rights. They were opposed by most native whites, who used violence to discourage any kind of education for blacks.') Southern fears of northern curricula were probably unwarranted since northern missionaries generally agreed that blacks should be taught industrial education only. See ANDERSON, *supra* note 8, at 92 (1988).

30. Kujovich, *supra* note 8, at 39. ('Fearful of the ideas of social equality promoted by missionary teachers and unwilling to 'disgrace' themselves by instructing black students, many white southerners supported the move to train black teachers.') By 1869 there were over 3,000 schools for freed blacks serving more than 150,000 students. FONER, *supra* note 8, at 144.

31. Most Northern teachers remained in the southern states for less than two years. FONER, *supra* note 8, at 145.

32. ANDERSON, *supra* note 8, at 117-47. The period during which Civil War veterans regained control of state governments and prospects for blacks in all walks of life declined is generally referred

The fading educational promise was just as quickly replaced by a system of "education" designed to insure that African Americans remained a subservient class of people.³³ Since African American educators were almost completely dependent on state financial assistance for necessary facilities, supplies, and even protection from those afraid of the power of education, they understandably were brought under the control and dominion of politicians and administrators who made clear that education for African Americans meant absolutely nothing more than training in industrial fields, such as unskilled farm labor or factory work. Even the opening of the teaching field to African Americans was motivated by noneducational concerns. By failing to allow African Americans to teach segregated students, Southern and border states would create a need which once again might be filled by independent-minded white teachers.³⁴ Once politicians and administrators established complete social and financial dependency for African American teachers, they could easily control curricula by threatening and firing teachers and administrators, closing schools altogether, and, of course, raising and lowering appropriations as the political tide fluctuated. Each of these means of control was exercised ruthlessly to the detriment of education for African Americans.³⁵

Were it not for the passing of land grant legislation, black educational institutions may have openly remained as tools for the preservation of white dominion and control. By providing limited funding for black colleges, the land grant legislation began the erosion of strict white oversight of black colleges. The Morrill Act of 1862³⁶ did not address educational

to as "Redemption" or the "redeemer period." FONER, *supra* note 8, at 589 ("Blacks suffered the most from educational retrenchment, for the gap between expenditures for black and white pupils steadily widened.").

33.

Along with the loss of political power came ever tighter, more oppressive white control of black educational institutions.

The white control, white Democratic and white supremacist control of black education in Alabama shaped the content of the curriculum because the schools were always to teach within the limits imposed by the knowledge that the kind of education which they imparted could never be permitted to challenge the supremacy of whites within the state, the existing social order and the subordinate position of the black race in the state.

Knight, 787 F. Supp. at 1089, quoting Dr. J. Mills Thornton.

34. See *supra* note 30.

35. Black administrators were always fearful of offending the segregationist-dominated political structure because it often led to demands to close the school. In 1887, for example, the president of Alabama A&M University was fired after several of his students rode in the first-class compartment of a train. *Knight*, 787 F. Supp. at 1086. The principal and all members of what is now Fort Valley State were once removed for failing to embrace industrial education. See ANDERSON, *supra* note 8, at 117-47.

36. Ch. 130, 12 Stat. 503 (1862).

funding for African Americans; thus, it did not present a threat to control of black education except in those states in which the freed African American population still exercised a substantial degree of political control. In those few states, the legislatures were able to direct some of the money to educate African American citizens.³⁷ The Morrill Act of 1890³⁸ sought instead to further education for blacks, although quite unsuccessfully at first. In the regrettable style of a compromise which purports to satisfy both sides, the act contained the proviso that:

no money shall be paid out under this act to any State or Territory for the support and maintenance of a college where a distinction of race or color is made in the admission of students, but the establishment and maintenance of such colleges separately for white and colored students shall be held to be in compliance with the provisions of this act if the funds received in such State or Territory be equitably divided as hereinafter set forth.³⁹

The 1890 Act left the "equitable" division of funds completely to the discretion of the state legislators.⁴⁰ Predictably, states appropriated very little money to the education of African Americans.⁴¹ Hence, black "colleges" were propped up not as true educational institutions but more as a means to obtain money for states' white-only universities. In some cases, legislators would earnestly seek a greater federal appropriation based on a population count augmented by a substantial African American presence while simultaneously ignoring the requirement to equitably use the funds to educate those very same citizens.⁴²

Ironically, the same carrot-and-stick approach used to gain control over and achieve the "mis-education"⁴³ of African Americans in the South —

37. Mississippi, South Carolina, and Virginia were the only three states to use some of the first Morrill Act funds for the benefit of blacks. *The Unique Role and Mission of Historically Black Colleges and Universities: Hearing Before the Subcommittee on Postsecondary Education of the House Committee on Education and Labor*, 100th Cong., 2d Sess. 12 (Serial No. 100-98, Government Printing Office, 1988) (hereinafter "Hearings") (Statement of Dr. Robert L. Albright, President, Johnson C. Smith University). Mississippi granted support to establish Alcorn University; South Carolina directed funds to Claflin College, and Virginia directed funds to Hampton Institute. *Id.*

38. Ch. 841, 26 Stat. 417 (1890).

39. Ch. 841, § 1, 26 Stat. 417 (1890). Nevertheless, the second Morrill Act led to the establishment of at least seventeen black colleges. Hearings at 12 (Statement of Dr. Robert L. Albright, President, Johnson C. Smith University).

40. Ch. 841, § 1, 26 Stat. 417 (1890).

41. Kujovich, *supra* note 8, at 100. Congress has found that black colleges were discriminated against in the allocation of land and financial resources under the land grant legislation. See 20 U.S.C. § 1060 (1986).

42. *Knight*, 787 F. Supp. at 1145. The same process occurred in the division of federal funds made available under the Smith-Lever Act. Ch. 79, 38 Stat. 372 (1914), which provided appropriation to the states based on the rural population. Thus, while southern states benefitted from their rural black populations, none of the money appropriated under the Smith-Lever Act was used for the education of blacks. *Knight*, 787 F. Supp. at 1148; Kujovich, *supra* note 8, at 54.

43. C. WOODSON, *THE MIS-EDUCATION OF THE NEGRO* (1933).

financial dependence with accompanying oversight — was now being used under the 1890 Morrill Act to destroy that same control and miseducation. Although there was never an “equitable” use of monies for the education of blacks, recipient states were required to direct at least a modicum of land grant appropriations to that purpose. Even minimal amounts were sufficient, however, to stimulate rejection of control and prompt demands for true equality.

Far from simply preserving the status quo, the creation of black colleges in response to the 1890 Morrill Act fueled the black intellectual process that would eventually reject the status quo. As segregationists correctly predicted, African Americans were not content with limited educational opportunities provided by inadequate institutions. The exposure to even an inadequate intellectual environment prompted further demands. Indeed, the history of segregation shows that every insufficient step taken to satisfy outside pressure or selfish motives and designed simultaneously to preserve the desired status quo resulted instead in more demands, followed by more insufficient incremental steps and still more demands. Thus, although sorely lacking, black colleges hastened challenges to discriminatory policies which prompted their creation and justified their very existence.

The cycle of demand, delay, insufficient response, and further demand is best seen in the African American students’ struggle for graduate and professional education. As they began to graduate from the states’ separate institutions, African Americans still found themselves barred from the professional ranks. Anticipating the irrepressible demand for equality, but still desperately seeking to maintain the exclusionary status of African Americans within their own borders, some Southern and border states established programs where African American students were paid a stipend to study in a different state.⁴⁴ Even this approach was characterized by the familiar incremental response. The programs did not provide enough funding to really make a difference.⁴⁵ Not until a Maryland state court found funds insufficient and accordingly ordered an African American’s admission to a white-only law school⁴⁶ did the states seriously consider providing true graduate education for African American students, but only by way of more money for out-of-state programs,⁴⁷ hence the demand for equality followed by an insufficient

44. Kujovich, *supra* note 8, at 116-20; *Knight*, 787 F. Supp. at 1097-1103.

45. Kujovich, *supra* note 8, at 116-20; *Knight*, 787 F. Supp. at 1097-1103.

46. *Pearson v. Murray*, 169 Md. 478, 182 A. 590 (1936). Donald Murray subsequently graduated from the University of Maryland, ranking twelfth in his class. Egerton, *Race and Equity in Higher Education* in *Race and Equity in Higher Education* (Proceedings and Papers of the American Council of Education — Aspen Institute Seminar on Desegregation in Higher Education, R. Wilson ed. 1982).

47. Kujovich, *supra* note 8, at 116-20; *Knight*, 787 F. Supp. at 1097-1103.

response, followed by a further demand and the familiar inadequate response.

In retrospect, the pattern was entirely predictable, and it was merely a matter of time before African Americans demanded equality within the borders of their own states. In a series of cases, the Supreme Court recognized a right to equal in-state graduate or professional education for blacks.⁴⁸ In *Missouri ex rel. Gaines v. Canada*,⁴⁹ the Court stated that it was "impossible to conclude that what otherwise would be an unconstitutional discrimination, with respect to the legal right to the enjoyment of opportunities within the State, can be justified by requiring resort to opportunities elsewhere."⁵⁰ However, by refusing to completely overrule the separate but equal doctrine of *Plessy v. Ferguson*,⁵¹ the Supreme Court fell into the old pattern of demand, delay, insufficient response, and further delay. States were still allowed to provide segregated facilities within the State under *Plessy*. The result would be the demand for radical change, finally realized in the sweeping holding of *Brown* and its practically irrebuttable presumption that "all-black" is constitutionally illegal. The presumption was functionally required to break the endless pattern and shift the focus to a final remedy. Yet it is the final remedy that is now perceived — correctly — as a threat to black colleges.

48. *McLaurin v. Oklahoma State Regents for Higher Educ.*, 339 U.S. 637 (1950); *Sweatt v. Painter*, 339 U.S. 629 (1950); *Sipuel v. Board of Regents of Univ. of Okla.*, 332 U.S. 631 (1948); *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938). In *McLaurin*, a black student was admitted to the University of Oklahoma Graduate School, but was

required to sit apart at a designated desk in an anteroom adjoining the classroom; to sit at a designated desk on the mezzanine floor of the library, but not to use the desks in the regular reading room; and to sit at a designated table and to eat at a different time from the other students in the school cafeteria.

339 U.S. at 640. The Court found these conditions intolerable. *Id.* In *Sweatt*, the Court found that Texas' attempt to create a black law school in order to justify petitioner's exclusion from the University of Texas was insufficient since the black law school would lack the intangible qualities of the University of Texas and therefore would not satisfy the "separate but equal" doctrine. 339 U.S. at 633-34. Although the Court's reasoning challenged the underlying rationale of *Plessy v. Ferguson*, 163 U.S. 537 (1896), the Court explicitly declined to overrule *Plessy*. *Id.* at 636. In *Sipuel and Gaines*, the Court held that a state must provide graduate and professional education within the state for blacks just as it did for whites. *Sipuel*, 332 U.S. 631 (1948); *Gaines*, 305 U.S. 337 (1938).

49. 305 U.S. 337 (1938).

50. *Id.* at 350. Here, too, the Court's reasoning challenged the "separate but equal" doctrine without explicitly overruling *Plessy*.

51. 163 U.S. 537 (1896). *Plessy* created the doctrine of "separate but equal." It is best articulated by the following phrase which, ironically, might be adopted by advocates of black colleges today:

Laws permitting, and even requiring, their separation, in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power.

Id. at 544.

The Burden of *Brown v. Board of Education*

*The experience in the United States has been that usually when there is racial segregation, there is also racial discrimination. But the two things do not necessarily go together, and there should never be an opposition to segregation pure and simple unless that segregation does involve discrimination.*⁵²

When the noted educator W.E.B. Du Bois sought to distinguish segregation from discrimination and embrace the former,⁵³ he really did not mean what he said. He may have encouraged African Americans to accept exclusion, but he did so only in a fit of frustration, anger, and realization that no matter how hard they sought to be included in the great melting pot, an ignorant portion of the population would always seek their exclusion. Du Bois had merely reached the point where he considered the energy spent fighting segregation better spent on improving African American existence.⁵⁴

The litigants of the *Brown* era may very well have agreed with Du Bois's notion regarding the intractability of attitudes. Emboldened, however, by the successes in the areas of graduate education,⁵⁵ they nevertheless sought an opportunity to achieve the final discarding of racial limitations in education.⁵⁶ What they still wanted was not equal facilities and theoretical recognition but real and unlimited participation in society. They explicitly recognized that even institutional financial parity was not enough and by doing so implicitly rejected separate institutions, fiscal equality notwithstanding.⁵⁷

52. 2 W.E.B. DU BOIS, SELECTIONS FROM THE CRISIS 1926-1934, at 727 (1983).

53. *Id.*

54.

We have got to renounce a program that always involves humiliating self-stultifying scrambling to crawl somewhere we are not wanted; where we crouch panting like a whipped dog. We have got to stop this and learn that on such a program they cannot build manhood. No, by God, stand erect in a mud-puddle and tell the white world to go to hell, rather than lick boots in a parlor.

2 W.E.B. DU BOIS, SELECTIONS FROM THE CRISIS, 1926-1934, at 766 (1983); See also Carter, *The NAACP's Legal Strategy Against Segregated Education* (Book Review), 86 MICH. L. REV. 1084, 1089 (1988) (disputing the notion that Du Bois disagreed with the NAACP's direct attack on segregation).

55. See *supra* note 48.

56. WILLIAMS, *supra* note 1, at 19 (1987).

57.

True, the strategy was to attack segregation in education, but the real agenda was the removal of the basic barrier to full and equal citizenship rights for blacks in this country. Equal citizenship is not yet a reality, but blacks can now contend that the reality is contrary to the law. This is a powerful argument — a potent force that an equal facilities victory could not have produced.

Carter, *supra* note 54, at 1095.

Consider the four cases consolidated in *Brown*. In each one, the lower court recognized a right to fiscal equality.⁵⁸ In some, the courts found that parity existed, while in others, expenditure of funds necessary to achieve parity was ordered.⁵⁹ These holdings would have been sufficient to obtain fiscal equality for black colleges if such had been the ultimate goal. Yet the cases continued. Moreover, African Americans could not logically have asserted the sufficiency of fiscal parity while simultaneously making the unyielding demand for complete and unhindered participation on an equal basis in every aspect of society. To seek both would have been fatal to the elimination of segregation in society. The passage of time does not lessen the contradiction.

It seems almost like heresy to suggest that *Brown* presents a burden to those who have sought educational equality and opportunity for so long. Yet, *Brown*'s condemnation of separate facilities no matter how equal does just that. Its purposefully sweeping holding places a heavy, "almost irrebuttable" presumption on those who seek to maintain one-race colleges.⁶⁰ The onus which no segregationist state could meet was exactly the victory sought and won from the Supreme Court. Only through such a burden could African Americans eradicate race as the sole determinant of their educational opportunity. The Court's fidelity to this goal logically threatens all-black colleges just as it threatened and, at the behest of African Americans, continues to threaten all-white colleges.

The burden *Brown* places on the continued maintenance of black colleges is demonstrated in subsequent cases. The most sweeping immediate advantage which *Brown* provided African American students came in its equation of "all-black" with constitutional illegality. While ignoring the figurative slap in the face implicit in this notion, hundreds of African American plaintiffs since *Brown* have benefitted from the focus on racial identifiability, i.e., all-black, as a shorthand method of invoking continued judicial sanctions and supervision. The trap here was that further judicial supervision became warranted not — at least not explicitly —

58. 347 U.S. at 486 n.1. In one of the four cases, *Gebhart v. Belton*, the lower court suggested that segregation, regardless of fiscal equality, was illegal. *Id.*

59. *Id.*

60. See *Fordice*, 112 S.Ct. at 2744 (Thomas, J., concurring) ("Our decisions following *Green* indulged the presumption, often irrebuttable in practice, that a presently observed imbalance has been proximately caused by intentional state action. . . ."); *Freeman v. Pitts*, 112 S.Ct. at 1453 (1992) (Scalia, J., concurring) ("Our post-*Green* cases provide that, once state-enforced school segregation is shown to have existed in a jurisdiction in 1954, there arises a presumption, effectively irrebuttable (because the school district cannot prove the negative) that any current racial imbalance is the product of that violation. . . ."); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 26 (1971) (A substantially disproportionate number of students from one race warrants a presumption of unconstitutionality.).

because of generational injuries inflicted prior to *Brown*, but merely because too many African Americans were in one place.⁶¹ Nevertheless, African American plaintiffs have used the phenomenon of racial identifiability as their Sword of Damocles to force states to assume responsibility for the educational deprivations visited upon them. There could be no other method.⁶² Without this surrogate standard, each African American plaintiff would have had to prove anew "what everybody knows."⁶³ Progress in redressing the generational injury would have been subject to expensive and never-ending factual litigation.⁶⁴

Recognizing "all-black" as a surrogate for constitutional illegality, however, puts black colleges in a very difficult position. They must reject the shorthand method to survive; but by doing so they necessarily attack a successful method of invoking needed judicial supervision of public education. Admittedly, supporters of black colleges have better reason than others to recognize the correlation between "all-black" and inferiority. They correctly argue, however, that black colleges are *invariably* unequal in the sense that they have been purposefully so designed and maintained; they are not *inherently* unequal in the sense that they cannot be made equal.⁶⁵ Over time the demonstrated invariability of inequality from discriminatory funding has been transformed into an inherent inequality resulting, instead, from the presence of too many African Americans. "Inherent" implies a truth similar to the observation that when it rains the ground gets wet; that is, it implies a cause and effect. Thus, in the civil

61. See Bell, *Black Colleges and the Desegregation Dilemma*, 28 EMORY L.J. 949, 954-59 (1979). For the sake of progress, blacks indulged the presumption that anything all-black was inferior no matter what its substantive merits. *Id.*

62. *Id.* at 954. Professor Bell also discusses blacks' purposeful sacrifice of their own dignity and self-worth as a legal strategy in *Plessy*. *Id.* at 953.

63. *Meredith v. Fair*, 305 F.2d 343, 344-45 (5th Cir. 1962).

64. There are, indeed, many opinions which rely on "racial identifiability" as the sole or main indication of unconstitutionality. See, e.g., *United States v. Fordice*, 112 S.Ct. 2727 (1992); *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449 (1979); *Milliken v. Bradley*, 418 U.S. 717 (1974); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971); *Green v. County Sch. Bd. of New Kent County, Va.*, 391 U.S. 430 (1968); *Geier v. University of Tenn.*, 597 F.2d 1056 (6th Cir. 1979); *Norris v. State Council of Higher Educ. for Va.*, 327 F. Supp. 1368 (E.D. Va. 1971). This shorthand has recently been challenged by Justice Scalia:

At some time, we must acknowledge that it has become absurd to assume, without any further proof, that violations of the Constitution dating from the days when Lyndon Johnson was President, or earlier, continue to have an appreciable effect upon current operation of schools. We are close to that time. While we must continue to prohibit, without qualification, all racial discrimination in the operation of public schools, and to afford remedies that eliminate not only the discrimination but its identified consequences, we should consider laying aside the extraordinary, and increasingly counterfactual presumption of *Green*.

Freeman, 112 S.Ct. at 1453-54 (1992) (Scalia, J., concurring).

65. See generally Hearings. See also R. A. MARGO, *DISENFRANCHISEMENT, SCHOOL FINANCE AND THE ECONOMICS OF SEGREGATED SCHOOLS IN THE UNITED STATES SOUTH 1890-1910* (1985).

rights struggle, inherency provides a theoretical cudgel with which to attach and defeat all racially exclusionary practices. "Invariability," however, implies only the usual or the historic empirical pattern, but not necessarily cause and effect; it harkens back to *Plessy*. Hence, if the rule of *Brown* were that "separate is invariably unequal" there would be room not only to justify the maintenance of black colleges, but also to rationalize segregation in other areas. Therefore, distasteful as the presumption remains, to assert that the presence of separate black educational institutions should no longer remain a weapon to invoke judicial scrutiny of states' educational systems would be premature. Discarding the presumption likely would have altered the outcome in *Fordice*, which not only represents a victory for African American students but also keenly demonstrates the precarious theoretical basis of black colleges in the post-*Brown* era.

The Implications of *United States v. Fordice*

*The idea is to end duplication, not to perfect it by ensuring that separate schools are in fact equal. It would be the height of irony for the resounding mandate of *Brown* that separate schools are inherently unequal to be taken . . . as dictating a focus on whether funding of separate historically black and historically white schools are equal. Indeed, "improved" duplication might well have the perverse effect of encouraging students to attend school where, other things now being more nearly equal, their own race predominates.⁶⁶*

In *Fordice*, the United States shifted somewhat from its initially correct interpretation of *Brown* as prohibiting a focus on fiscal equality.⁶⁷ The Supreme Court did not. Although the Court did not explicitly so state, its opinion was consistent with *Brown* and the United States' original position.

Mississippi argued, and the Fifth Circuit Court of Appeals agreed, that a state has met its obligation under *Brown* by adopting and implementing race-neutral policies in the operation of its colleges and universities.⁶⁸ No

66. Brief for the United States at 32, *United States v. Fordice*, 112 S.Ct. 2727 (1992) (Nos. 90-1205 and 90-6588).

67. See Reply Brief for the United States at 16-17 and 17n.*, *United States v. Fordice*, 112 S.Ct. 2727 (1992) (Nos. 90-1205 and 90-6588).

We believe that the dismantlement effort must take into account the important role of historically black institutions. While unwarranted duplication must be eliminated, the reallocation or cessation of programs and courses must be done in a way which does not place the burden of desegregation discriminatorily on black students, teachers, and administrators. Suggestions to the contrary in our opening brief . . . no longer reflect the position of the United States.

68. *Fordice*, 112 S.Ct. at 2735.

other steps were deemed necessary, even where a continuing discriminatory impact could be identified. In rejecting this approach, the Court articulated a three-step inquiry to determine whether a state had failed to remedy past discrimination: first, whether policies traceable to the prior *de jure* segregation exist;⁶⁹ second, whether those policies continued to have “segregative effects;”⁷⁰ and third, whether those policies were “without sound educational justification” and could be “practicably eliminated.”⁷¹ If all factors are found, a state is deemed not to have remedied its prior misconduct.⁷²

The Court’s suggested application of the standards provides clear indication of its disfavor for publicly supported one-race institutions. In different parts of the majority opinion, Justice White repeatedly emphasizes the “racial identifiability” of Mississippi’s higher education system and indicates that maintaining institutions identified as “white” or “black” would be extremely difficult for a formerly segregated state to justify. In the first instance, he points to the unnecessary duplication of colleges and universities as evidence of continued unconstitutional state action.⁷³ This almost ends the inquiry, since black colleges were, by definition, supposed duplications of white-only universities. Justice White acknowledged as much when he stated, “It can hardly be denied that such duplication was part and parcel of the prior dual system of higher education — the whole notion of ‘separate but equal’ required duplicative programs in two sets of schools. . . .”⁷⁴ He also suggested that closure of one or more institutions would provide the state with some relief and specifically directed the lower court to consider this opinion.⁷⁵

Whenever the matter of merger or closure is suggested, it logically implies the termination of the invariably (but not inherently) inferior black college. Previously all-white colleges are better equipped and receive a greater amount of funding. It would therefore be economically unwise to close those institutions. From a purely fiscal standpoint, the black colleges represent less of an economic investment and emerge as natural targets for closure. The same holds true for mergers. Because of the absorption of large numbers of white students, faculty, and administrators, the black college will obviously cease to exist as such.⁷⁶ Even where the resulting in-

69. *Id.* at 2736.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* at 2740-41.

74. *Id.* at 2741.

75. *Id.* at 2743.

76. Merger has been ordered in at least one instance. *Geier v. University of Tenn.*, 597 F.2d 1056 (6th Cir. 1979). In discussing the effects of merger on black colleges, the *Geier* dissent focused on Ten-

stitution retains the name of the black college, the black college will be swallowed because the white college will likely be larger and have superior facilities and more funding. As programs are shifted from the merging campuses in order to achieve a racial mix, the black college will eventually be characterized by the policies and practices in place at the larger white college. Hence, Justice White's discussion regarding the elimination of unnecessary duplication does not bode well for black colleges.

At another point in his opinion, Justice White seems to impose an absolute requirement that states take affirmative steps to dismantle black colleges, even while denying "racial identifiability" as the crux of the constitutional violation:

That an institution is predominantly white or black does not in itself make out a constitutional violation. But surely the State may not leave in place policies rooted in its prior officially-segregated system that serve to maintain the racial identifiability of its universities if those policies can be eliminated without eroding sound educational policies.⁷⁷

At still a third point, Justice White addressed the argument for greater funding for black colleges in rather strident terms:

If we understand private petitioners to press us to order the upgrading of Jackson State, Alcorn State, and Mississippi Valley *solely* so that they may be publicly financed, exclusively black enclaves by private choice, we reject that request. The State provides these facilities for *all* its citizens and it has not met its burden under *Brown* to take affirmative steps to dismantle its prior *de jure* system when it perpetuates a separate, but "more equal" one.⁷⁸

By rejecting demands for increased funding, not for pedagogic purposes but solely as a function of the state's burden, Justice White indicates not only that the demand is inconsistent with *Brown*, but also that a state which voluntarily complies with such a demand might be violating the Constitution nonetheless. Under Justice White's approach, the only safe course for any formerly segregated state consists of mergers and closures of previously one-race institutions.

Justice O'Connor states the issue in terms even more foreboding for black colleges. Under her standard, even when a state can identify adequate reasons why a racially identifiable institution remains, "it still must prove that it has counteracted and minimized the segregative impact of such policies to the extent possible."⁷⁹ She notes that this is a heavy

nessee State University's racial composition and noted that merger would eventually require TSU to "lose its identity as a respected and long-standing black university." *Id.* at 1075 (Engel, J., dissenting).

77. *United States v. Fordice*, 112 S.Ct. at 2743.

78. *Id.*

79. *Id.* at 2744 (O'Connor, J., concurring).

burden and that a court may "infer" bad faith when such "remnants" remain.⁸⁰ In her view as well as Justice White's, a state will certainly be hard-pressed to justify the existence of black colleges.

It is appropriate here to consider what "racially identifiable" really means, since that is clearly the vital focus. It cannot imply that a university cannot be predominantly white. A perfectly integrated system would be predominantly white under the present racial characteristics of society. Instead, "racially identifiable" must signify either the overrepresentation of African Americans in one institution or the underrepresentation of African Americans in a similarly situated institution. Both phenomena need not exist. Hence, the "racial identifiability" violation is solely a function of the presence (or absence) of African Americans.⁸¹ Black colleges, therefore, present constitutional problems no matter how integrated a formerly white-only university has become.

If this is not the logical result of Justice White's reasoning, it certainly follows naturally from his opinion. It is also the conclusion that Justice Scalia draws in his dissent when he accuses the majority of purposefully seeking to eliminate black colleges.⁸² Although Justice Scalia may be wrong in characterizing Justice White's design, he is certainly correct as to the ultimate effect. Justice White's opinion will eventually require the elimination of public black colleges.

The message of Justice Scalia's dissent, however, is that perhaps there can be no other result. Justice Scalia would have recognized Mississippi's argument that the state need only stop further discrimination to fulfill its duty under *Brown*.⁸³ In accepting this position, he articulates the dilemma facing black college leadership. On the one hand, the continued destruction of racial barriers will lead to the elimination of black colleges. On the other, ignoring racial identifiability and adopting Mississippi's "all is well" approach as Justice Scalia seeks to do, while saving black colleges, would also constitute a repudiation of *Brown* and threaten progress in other areas. Of more immediate importance, the black college would continue the bare minimum existence which has plagued its history.

Justice Thomas' concurrence acknowledges this unfriendly choice for black colleges but does not offer any real escape. He attempts to draw a compromise between what is constitutionally required and what is constitutionally permissible. He agrees initially that a state has no duty to

80. *Id.*

81. "Racially identifiable" seems to mean "predominantly Black." Tollet, *Black Institutions of Higher Learning: Inadvertent Victims or Necessary Sacrifices?* 3 BLACK L.J. 162, 168 (1974).

82. "What the Court's test is designed to achieve is the elimination of predominantly black institutions." *Id.* 15 2752 (Scalia, J., dissenting).

83. *Id.* at 2751.

upgrade funding for black colleges but adds that a state may choose to do so for nonracial purposes.⁸⁴ It is doubtful, however, that a state would accept his guidance. Along with Justice White, Justice Thomas acknowledges that racial identifiability, in itself, warrants a nearly irrebuttable presumption that the state is continuing its unconstitutional discrimination.⁸⁵ Justice Thomas thereby undercuts the utility of his distinction. As long as the black college is maintained, the continuing presumption of unconstitutionality remains, even if the state, acting for nonracial reasons, improves the facilities and reputations of its black colleges. Justice Thomas' approach, therefore, does not offer states much relief from continued constitutional challenges.

The essence of *Fordice* is its adherence to the goal of eliminating race from education. This reaffirmation of *Brown*'s mandate is the prize which African Americans have sought for so long. It is ironic and somewhat bittersweet that it appears to have been obtained at the expense of institutions once misprized but now deemed heroic and cherished. If this expense is to be avoided, presently an unlikely proposition,⁸⁶ supporters of black colleges must quickly address the apparent implications of *Fordice* and the more important philosophical ramifications resulting from the continuing influence of race as a factor in public education. If the philosophical

84. *Id.* at 2744, 2746 (Thomas, J., concurring).

85. *Id.* at 2744; *See supra* note 60. Ironically, as Assistant Secretary for Civil Rights, Justice Thomas' testimony in *Knight* demonstrated how susceptible a state can be when racially identifiable schools continue:

- Q. Indeed, was anybody or any specific institution culpable in the sense of an overt violation of Title VI?
- A. I don't think that was the letter of violation. The letter of violation was the maintenance of a dual school system in the post-secondary — at the post-secondary level, statewide, not institution specific, as you said before.
- Q. I am asking you, are you aware of anything that the University of Alabama has done, or any of its officers, agents or employees, which violates Title VI?
- A. I think it is the University of Alabama's one [sic] fault is that it is part of a dual [racially identifiable?] school system.
- Q. Now, what can the University of Alabama do to remedy that fault?
- A. Get all of your other buddies together and develop a plan.
- Q. What if we have no control over our buddies?
- A. Then I think that you would have to suffer with your buddies.

Knight, 787 F. Supp. at 1363-64 quoting Clarence Thomas, former Assistant Secretary for Civil Rights, Department of Education.

86. Less than a month after *Fordice*, Mississippi officials began discussing whether to close at least one black college. CHRON. HIGHER EDUC., July 22, 1992, at A20. *But see Closing HBCU to Desegregate May Be Illegal, Justice Says*, EDUC. DAILY, July 30, 1992, at 1 (An unnamed Justice Department official is reported as speculating that closing all the black schools may be unconstitutional.). In Mississippi and Louisiana, black students and alumni are irate over plans to close or merge historically black colleges with larger historically white colleges. *Quest for Fair Share Backfire*, USA TODAY, Jan. 28, 1993, at 1.

ramifications are correctly articulated, sufficient reason exists to preserve black colleges. To date, neither advocates for the maintenance of black colleges nor the Supreme Court has recognized the sole justification for maintaining black colleges. Instead they have focused on fallacious arguments which do more harm than good to black colleges.

Advocacy for Public Black Colleges

[Blacks] have a natural praiseworthy pride in keeping their educational institutions in their own hands. There is jealousy in the superintendence of the white man in this matter. What they desire is assistance without control.⁸⁷

The dilemma facing black colleges as a result of *Brown* and *Fordice* is all the more pressing today given their emergence as quality institutions. While remaining victims of insufficient funding,⁸⁸ black colleges certainly no longer exist as tools for those who would deny meaningful education to African Americans. Instead, they are enjoying intellectual freedom and increasing popularity.⁸⁹ As their alumni have increased in number and prospered, a reservoir of strong emotional attachment, typical of the maturation of any college, has developed. These increasing numbers of alumni and students bring into sharp focus, in absolutely emotional terms, the threat to the very existence of black colleges in the midst of the post-*Brown* era. Perhaps because it is such an emotional issue, advocates of black colleges have so far failed to articulate the reasons that justify saving them: an equal role in 1) the superintendence of the scholarly resurrection and transmission of African American history and culture, and 2) the scholarly process which defines and imparts knowledge, whatever the subject, to all Americans. It is no longer justifiable that African Americans simply absorb that which is placed before them. Like all students of knowledge, African Americans are not satisfied with and are justifiably suspicious of simply receiving that which has been defined by others without regard to the thoughts and ideas of a whole race of people. One need only recall the limited curricula open to African Americans to understand the suspicion. The historical and categorical denial of control over educational process and content is ultimately the real injury upon which black college advocates should focus. Remedying this demonstrable injury, this denial of control, is the rationale which supports the maintenance of black colleges. The injury would only be heightened by the exclusive closing of black colleges or the exclusive merger of smaller black

87. ANDERSON, *supra* note 8, at 5, quoting northern missionary, William Channing Gannett.

88. See generally Hearings, *supra* note 37.

89. See Johnson, *Are Black Colleges Worth Saving?* TIME, No. 11, 1991, at 81.

colleges with larger white colleges. Conversely, the raw demand to maintain separate black colleges because of "history" is an unnecessary and unjustified reliance on segregation policies. Furthermore, advancing the historical argument obscures the prospective remedial purpose of black colleges: the need to place African Americans in a position to define and impart knowledge rather than merely to receive it as defined and imparted by others.

An examination of the arguments made by some supporters of black colleges demonstrates how the failure to articulate a logical justification makes matters worse. Supporters of black colleges seek a greater presence of African American students, faculty, and administrators on American campuses. Indeed, this has been a consistent goal throughout the civil rights struggle. Simultaneously, however, some seek public money to support and maintain separate campuses at which African American students, merely as a result of the color of their skin, constitute the overwhelming majority and white persons are discouraged from attending.⁹⁰ In his concurring opinion in *Fordice*, Justice Thomas attempts to mitigate this goal by arguing that there is nothing wrong with a state purposefully orienting its colleges to attract one race with the effect that students of other races might be discouraged from attending, so long as no explicit bar to their attendance exists.⁹¹

History does, indeed, repeat itself. The purposes advanced for maintaining a literally all-black college are exactly those which African Americans have found and continue to find so utterly offensive when urged by those seeking to maintain all-white campuses. The similarity between present demands for black colleges and apologists for segregation is frightening. One prominent lawyer, educator, and advocate for black colleges has gone so far as to suggest that African Americans actually ally themselves with those who have denied and would continue to deny them educational equality, as if to suggest that differences exist in segregationist arguments and the more popular arguments in support of black colleges.⁹² To characterize the maintenance of black colleges in this light as anything other than a replication of the arguments in support of all-white colleges is simply dishonest. One cannot define one argument in terms of cultural awareness and the other in terms of segregation. Moreover, by admitting

90. Tollet, *supra* note 81, at 166 ("This does not mean that whites should be systematically excluded from these enclaves, but it does mean they should be in the minority."). See also, Geier, 597 F.2d at 1075 n.9.

91. *Fordice*, at 2746 (Thomas, J., concurring).

92. Bell, *supra* note 61, at 975 ("One surprising consequence of directly opposing nonracial identifiability policies, however, may be the formation of a temporary coalition with state officials who were for so long unresponsive to black college demands for parity in resources and appropriations.").

that the demand for a literally all-black campus is an effort to establish an exclusionary one-race college, these supporters weaken, rather than strengthen, support for black colleges.⁹³

The resistance to mergers sufficiently demonstrates this point.⁹⁴ A merger between formerly all-white and all-black colleges would involve the elimination of duplicative programs. Black colleges point to their remedial courses as examples of programs which would be lost. They argue that formerly all-white colleges have ignored the need for these programs, and that merger would hurt aspiring African American students. A merger carried out in good faith, however, would not eliminate necessary remedial programs but bring them to the newly merged college. Such programs need not and arguably could not be eliminated given a state's obligation to undertake continuing remedial efforts for some African American students. Hence, resistance to merger based on the feared elimination of programs most needed by some African American students could easily be avoided.⁹⁵

Helping address past wrongs by providing particular attention to African American students is one of two frequently advanced arguments

93. Fortunately, some advocates of black colleges recognize that black colleges cannot demand existence as separate institutions for blacks only:

The record is in favor of, rather than against the continued existence of predominantly black colleges. A self-centered attempt, however, to save black colleges and universities for blacks will be as damaging as an other-directed recommendation to remake these institutions in the image of white ones. Both actions will end in defeat.

C. WILLIE, *THE IVORY AND EBONY TOWERS* 111 (1981).

94. Indeed, in Mississippi both black and white institutions are presently fighting merger. *Loyalists on 2 Mississippi Campuses Reject Suggestion by Court That State Consider Merging Institutions*, CHRON. HIGHER EDUC., July 8, 1992, at A17 ("Any solution that would merge the campuses, especially if it requires closing one campus altogether is akin to blasphemy, said loyalist to each.").

95.

It is not true that historically black institutions are better equipped to provide developmental services or that they are more prone to do so. Efforts in this regard have been carefully examined for the States of Louisiana, Mississippi, and the District of Columbia. More than 100 programs have been looked at, and no indication has been found that historically white institutions, once committed to the developmental education concept, are less adept at mounting successful programs than black institutions. In fact, there is increasing evidence that mainstream institutions are engaging in developmental education with more than a little pride since such programs afford design, planning and research challenges for enterprising and creative faculty members. This is as it should be, since more whites are in need of developmental education than blacks, although blacks have the greatest need in terms of their disproportionate representation among under-served students.

Berrian, *Toward Desegregation and Enhancement* at 152-53 in *Race and Equity in Higher Education* (Proceedings and Papers of the American Council on Education-Aspen Institute Seminar on Desegregation in Higher Education, R. Wilson ed., 1982).

for maintaining black colleges.⁹⁶ Another is based on the struggles which black colleges have made over the years. Like segregationists of the past, advocates of black colleges frequently point to rich traditions and proud history to justify a demand for continuing all-black institutions that are necessarily hostile to the infusion of white students. Certainly, black colleges are heroes of the civil rights movement. Along with black churches, black colleges provided both the impetus and the people willing to challenge racial discrimination, not only in education but in many other areas. Additionally, black colleges have produced a large number of African American professionals and scholars.⁹⁷ Their advocates forget, however, that black colleges have done so only as a result of the practice of exclusion of the sort which African American collegians themselves have resisted for so long.⁹⁸ Moreover, notions of tradition and preservation of some amorphous cultural idea, suggesting a disdain for anything foreign, simply come too close to the ignorance and discrimination of earlier days.

Hovering above many of the arguments in defense of black colleges is an understandable visceral reaction to *Brown's* presumption that anything predominantly black is inherently inferior, regardless of its substantive merits.⁹⁹ While it has provided African Americans with instant standing, the presumption nevertheless manifests the essence of racism: the idea that African Americans themselves are inherently inferior. That African Americans once relied upon and encouraged this presumption as part of an overall desegregation strategy, however, does not foreclose its present rejection once it is no longer consistent with common experience and especially when the presumption reaches a point of diminishing returns. For black colleges, the point of diminishing returns has indeed arrived. Although the presumption helps challenge the invariable disparity in resources between black and white colleges by inviting judicial scrutiny, it also carries with it *Brown's* demand for dismantling all one-race colleges.

96. See generally Tollet, *supra* note 81; Bell, *supra* note 61; Kujovich, *supra* note 8.

97.

In retrospect, despite the most appalling resistance and often unsympathetic and contemptuous reception [black colleges] succeeded magnificently In his three-year study of more than two thousand alumni of these institutions, Thompson reports that nearly 90 percent of the alumni surveyed were professionals in medicine, dentistry, teaching and law; 8 percent held white collar jobs, e.g., secretaries, salesmen, and office managers; and 3 percent were blue-collar workers — waitresses, taxi drivers, and cooks.

Hearings at 22 (Statement of Herman R. Branson, President Emeritus, Lincoln Univ., citing D. THOMPSON, *A BLACK ELITE: A PROFILE OF GRADUATES OF UNCF COLLEGES* (1986)).

98. When asked why he sought admission to the all-white University of Mississippi, James Meredith replied that all-black Jackson State University was "substandard." *Meredith*, 305 F.2d at 346.

99. See *supra* note 60 and accompanying text.

The issue, then, is whether the presumption should now be discarded. The danger of discarding it is that doing so would assist those states which continue subtle forms of delay in destroying barriers to education. It would open the door to various other seemingly benevolent explanations for the continued barriers to quality and equally accessible education for African Americans. Mississippi's explanations for the educational conditions of African Americans, in *Fordice*, prove this point.¹⁰⁰

Many African Americans experience open hostility on formerly all-white campuses¹⁰¹ and cite this as a reason for maintaining black colleges. The short answer, perhaps easier said than done, is not to yield to the country-club ethos of a formerly all-white university by leaving but to assert a steadfast right of presence by staying.¹⁰² This involves not only remaining on a campus which African Americans should claim as much theirs as anyone else's but also encouraging other African American students to enter the same college.

In this respect, there is validity to Justice Scalia's argument in *Fordice* that maintaining black colleges "so blacks can go there"¹⁰³ is counter-productive to African American students, faculty, and administrators' assuming their rightful place on other campuses. Ironically, state support of black colleges undermines simultaneous efforts to increase an African American presence on formerly all-white colleges. As the black college increases in stature and prestige and competes for African American students at an ever increasing advantage, racial identifiability of white and black colleges may be expected to increase, not decrease. Since racial identifiability creates a presumption of unconstitutionality, the result is likely to be a continuing suspicion that the state is not really trying to desegregate. If such an accusation is to be made and carried, as is sometimes necessary, black colleges and those who support them must examine their own role in keeping low the number of African Americans on formerly all-white campuses. More importantly, they must confront their role in keeping race involved in education.

100. Mississippi's brief in *Fordice* might objectively be described as shrill and one which attempts to blame African Americans themselves for the lack of African American representation on formerly all-white campuses. Brief for Respondents at 15, 56 ("Blacks' disproportionate election in high school not to take a college preparatory curriculum contributes to the disparity . . . [Ultimately it must be recognized that blacks disproportionately qualify for admission to universities because they disproportionately appear at lower levels of academic development upon graduation from high school.]")

101. P. Dawson, *Bigotry and Violence on American College Campuses* (Report of the United States Commission on Civil Rights, 1990).

102. For an account of James Meredith's life-threatening struggle to assert a right of presence at the University of Mississippi, see T. BRANCH, *PARTING THE WATERS: AMERICA IN THE KING YEARS 1954-63*, 633-73 (1988).

103. *Fordice*, 112 S.Ct. at 1247 (Scalia, J., dissenting).

Yet another argument defending black flight from formerly all-white universities is based on the desire to maintain colleges with a particular emphasis on a single cultural group:

Diverse groups have historically sought to attend institutions they found congenial; whether one is talking about rural and farm students attending land grant colleges, Catholic students attending the many Catholic colleges, and universities, or Jewish students attending Brandeis University. Are Blacks less entitled to congenial educational setting than whites?¹⁰⁴

Certainly African Americans, like Jews and Catholics, are entitled to a "congenial educational setting." Nevertheless, it is not difficult to imagine or understand the justifiable outcry that would be heard if the state, rather than private individuals, established or maintained a Jewish or Catholic university that openly discouraged non-Jews or non-Catholics from attending. The place for culturally-oriented education is in private schools, and even in those institutions it would indeed be difficult to openly espouse the exclusion of different groups.¹⁰⁵ African American students have taught this lesson, and black colleges simply cannot escape its universal truth.

Justifications such as an "environment congenial to a certain background" hint of a combative and disdainful attitude toward different people which African Americans recognize or should recognize all too easily. Who can give credence to such subjective reasons for exclusion without traveling back in time and giving credence to those same arguments when presented by strident segregationists? Certainly, any distinction between the two is merely wishful thinking. Can a state now establish a college which does not explicitly exclude African Americans, Jews or Catholics, but openly discourages their attendance? *Brown* and *Fordice* are consistent in their answers to that question.

"Institutional diversity" is an attractive but similarly flawed argument. It essentially holds that a state may encourage and maintain different colleges with different foci.¹⁰⁶ While this argument is certainly true where a state wishes to maintain different academic programs at different colleges,

104. Tollet, *supra* note 81, at 166.

105. Perhaps the best example of this is demonstrated by *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983), which upheld the revocation of Bob Jones' tax exempt status resulting from its racially discriminating admission standards. For a critique of federal tax regulation and resistance to discrimination in private religious schools, see Mawdsley, *Religious Universities and Title VII: The Right to Discrimination on Religious Grounds*, 43 EDUC. L. REP. 491 (1988); Mawdsley, *Bob Jones University v. United States: A Decision With Little Direction*, 12 EDUC. L. REP. 1039 (1983) (Both articles generally advance the position that private religious schools should not be "punished" for discrimination based on religious beliefs.). See also Simon, *Tax-exempt Status of Racially Discriminatory Religious Schools*, 36 TAX. L. REV. 477 (1981).

106. *AYERS v. ALLAIN*, 914 F.2d 676 (5th Cir. 1990).

such is not the case where a state attempts to maintain identical programs at colleges explicitly or implicitly designated for certain races. There is no logic in equating the division of course curricula between different colleges with the division of races between different colleges.

A recent case in the area of gender discrimination highlights a court's failure to recognize this inconsistency. In *United States v. Virginia*,¹⁰⁷ Virginia Military Institute's (VMI) arguments were strikingly similar to those now advanced by supporters of all-black colleges. VMI argued that forcing a public college to admit women would destroy its character and tradition; therefore, women should be excluded.¹⁰⁸ The lower court agreed. Ironically, the court relied on diversity between institutions in support of its reasoning and cited the lower court opinion successfully challenged by the *Fordice* petitioners.¹⁰⁹ Specifically, the court justified VMI's exclusion of women by stating:

I find that both VMI's single-sex status and its distinctive educational method represent legitimate contributions to diversity in the Virginia higher education system and that excluding women is substantially related to this mission. The single-sex status would be lost, and some aspects of the distinctive method would be altered if it were to admit women.¹¹⁰

The court's reliance on the lower court opinion in *Fordice* indicates the similarity in issues and the difficulty in precluding this same rationale from applying to single-race colleges as black college advocates seek to do. Once accomplished, it is equally difficult to honestly justify allowing black colleges the luxury of this reasoning while denying the same luxury to white colleges. Indeed, the Fourth Circuit Court of Appeals confirmed this dilemma in its review of the VMI case, stating that "[a] policy of diversity which aims to provide an array of educational opportunities, including single-gender institutions, must do more than favor one gender."¹¹¹ If it is diversity which justifies the purposeful maintenance of an all-black college at public expense, that same "diversity" would logically and necessarily justify maintaining an all-white college at public expense. The rather obvious price for relying on "institutional diversity" as a justification for maintaining an all-black college is a concession that a state has a cor-

107. 766 F. Supp. 1407 (W.D. Va. 1991).

108. *Id.* at 1411-13.

109. *Id.* at 1409, citing *Ayers v. Allain*, 914 F.2d 676 (5th Cir. 1990).

110. *Id.* at 1413. This case is an excellent example of how keeping race or sex involved in education for seemingly "good" reasons can lead to perversion of the idea of "diversity."

111. *United States v. Commonwealth of Virginia*, 976 F.2d 890, 899 (4th Cir. 1992). Although this article is not intended to delve into the intricate issues raised by the cited case, the case does suggest that a state policy which essentially legitimizes all-black schools, for whatever reason, must also make accommodations for "all-white" schools. This necessitates a repudiation of the principles involved in *Brown*.

responding interest, indeed a mandate, to accomodate those who seek an all-white college. In the end, institutional diversity would have the same effect as segregation.

The final flawed justification, one that is really an amalgam for all the previous arguments, is the fear that, without all-black colleges, institutions of higher education will focus exclusively on the "educational needs of the white community."¹¹² This argument is never accompanied by an explanation of the differences in "educational needs" between African Americans and other students, except in the patronizing context of remedial education. To the extent that there are such racially grounded differing bodies of knowledge, a fact that fails of proof, all truly educated people need such knowledge. Indeed, this is the main thrust behind the present move for diversity within colleges and the push for Afrocentric¹¹³ education. If African Americans need to be taught that "all-black" is not inherently inferior or that African American soldiers played an important role in the Civil War,¹¹⁴ so do other students. Whatever the "educational need," it is a common one.¹¹⁵ The solution is not in one-race colleges but in curricula developed, directed, and controlled entirely by persons who believe in intellectual honesty.

If, as is argued here, there is no logical support for one-race colleges, one must wonder why the issue remains relevant, especially among African American educators. Assuming that even the most strident supporter of all-black colleges concedes the fallacy of the object of his support, it would appear that reason for debate no longer exists. The task would be simply to comply with the Supreme Court's requirement to eliminate barriers to a system of education not characterized by "white" or "black" schools. The dismantling of one-race schools has been the cornerstone of the civil rights process,¹¹⁶ and the grudging acceptance of this

112. Bell, *supra* note 61 at 966; Tollett, *supra* note 81.

113. See Asante, *The Afrocentric Idea in Education*, 60 J. NEGRO EDUC. 170 (1991); Gill, *Jewish Day Schools and Afrocentric Programs as Models for Educating African American Youth*, 60 J. NEGRO EDUC. 566 (1991); Jarvis, *Brown and the Afrocentric Curriculum*, 101 YALE L.J. 1285 (1991).

114. D. CORNISH, *THE SABLE ARM: BLACK TROOPS IN THE UNION ARMY, 1861-1865* (1987); J. GLATTHAAR, *FORGED IN BATTLE: THE CIVIL WAR ALLIANCE OF BLACK SOLDIERS AND WHITE OFFICERS* (1990).

115. Professor Bell cites "social welfare, community planning and community health" as "special educational needs" of blacks, without explaining why whites do not have the same needs. Bell, *supra* note 61, at 967.

116.

Eleanor Holmes Norton, a former head of the Equal Employment Opportunity Commission under President Carter and now a professor at Georgetown Law School, complains that the new separatism is "exactly what we were fighting against — it is antithetical to what the civil rights movement was all about. It sets groups apart, and it prevents blacks from partaking of the larger culture."

D'SOUZA, *supra* note 16, at 238 (1990).

point ought to end the debate and confusion over the continued maintenance of black colleges.¹¹⁷ Unfortunately, it does not.

Even while accepting the fact that one-race institutions are contrary to the principle of integration, supporters of black colleges have forged a remarkable consensus suggesting that black colleges should nevertheless be enhanced and maintained at public expense. One amicus brief in *Fordice* noted that the consensus has existed for more than two decades and included every presidential administration since that of Richard Nixon, as well as the United States Congress.¹¹⁸ This long-standing consensus is best codified in federal regulations entitled "Revised Criteria Specifying the Ingredients of Acceptable Plans to Desegregate the State Systems of Public Higher Education."¹¹⁹ Paradoxically, even the consensus within the federal government seems self-contradictory. The regulations were:

designed to eliminate one of the primary vestiges of the *de jure* system of higher education: the extensive duplication of programs between historically white and historically black institutions in the same service area. This duplication lay at the heart of the *de jure* system and was one of the primary reasons why historically black and historically white institutions remain racially identifiable.¹²⁰

117. One writer reports the following discussion between an unidentified speaker and an advocate of black colleges:

Is the real issue the survival of the public black colleges, or is it the evolution of a higher education system that compensates for past inequities and provides the fullest and fairest opportunities for all in a diverse family of institutions indivisible by race?

It is really very simple. The Public black colleges do exist; they should; they must. There is no way to justify the closing of a single one of them . . . They simply must exist and serve all.

But serving all will ultimately mean white majorities in most of these schools. Even in Mississippi, which has the highest black population in the nation, nearly two-thirds of the people are white. If formerly white institutions are brought by force or by choice to an acceptable level of integration, the black institution will have to do the same, and in time there will be no more public black institutions.

No, there will still be institutions, and they will be stronger and more competitive than they are now; they just wouldn't be majority black.

Egerton, *Race and Equity in Higher Education* at 25, in *Race and Education* (Proceedings and Papers of the American Council on Education-Aspen Institute Seminar on Desegregation in Higher Education, R. Wilson ed., 1982).

118. Amicus Curiae Brief of the National Bar Association, The National Association for Equal Opportunity in Higher Education and the Congressional Black Caucus at 19-28, *United States v. Fordice*, 112 S.Ct. 2727 (1992) (Nos. 90-1205, 90-6588). The brief discusses a consistent 22-year effort to support black colleges manifested in presidential speeches to congress, executive orders, and administrative initiatives. It also notes specific federal legislative history designed to perpetuate black colleges. *Id.*

119. 43 Fed. Reg. 6658 (Feb. 15, 1978).

120. Amicus Curiae Brief of Joseph A. Califano, Jr., Mary F. Berry, Ernest L. Buyer and David S. Tatel at 11, *United States v. Fordice*, 112 S.Ct. 2727 (1992) (Nos. 90-1205, 90-6588). The authors, former officials of the Department of Health, Education and Welfare, developed the criteria to be used in evaluating desegregation plans. *Id.* at 1.

Hence, the federal government acknowledges that duplicative one-race schools represent the problem rather than the solution. Still, the regulations specifically accept the need to enhance black colleges. Finally, in what appears to be yet another twist, the regulations' authors later return to the general proposition against the argument for maintaining black schools:

We emphasize that the strengthening of the historically black institutions was sought as a means of achieving desegregation and enhancing educational and employment opportunities for black students. It was not intended to preserve particular institutions.¹²¹

Thus, while a long-standing consensus between the federal government and advocates for black colleges exists, it does so despite contradictory statements concerning the ultimate goal.

The resolution lies not in the inevitable result — the elimination of one-race schools and the creation of a single system of education — but in the process. Many advocates of black colleges readily accept the result even though it will mean the end of black colleges as they previously existed. Their fears and objections are usually articulated in the admonition that "the process of desegregation must not place a greater burden on Black institutions"¹²² or that "the transition to a unitary system must not be accomplished by placing a disproportionate burden upon black students, faculty, or institutions."¹²³ It is the process — and the effect that that process is likely to have on African American faculty and students — that keeps the debate relevant even after the need to eliminate one-race institutions has been acknowledged.

A desegregation process which closes black colleges exclusively or merges black colleges with larger predominantly white colleges will result in an unacceptable loss of incumbent status for African American faculty and administrators. As these persons are assimilated into a larger existing system, they tend to lose the status they enjoyed and cultivated for so long in their former institutions. Far more than a self-serving euphemism to protect individual status and prestige, incumbency for African American faculty and administrators is linked to African Americans' participation in the process which defines and imparts knowledge and ultimately controls their own minds. African American educators certainly are not ignorant

121. *Id.* at 12.

122. *Adams v. Califano*, 430 F. Supp. 118 at 120. *Adams* represents the first explicit judicial recognition of a need to enhance black colleges.

123. Amicus Curiae Brief of Joseph A. Califano, Jr., Mary F. Berry, Ernest Buyer and David S. Tate at 10, *United States v. Fordice*, 112 S.Ct. 2727 (1992) (Nos. 90-1205, 90-6588).

124. See C. WILLIE, *BLACK COLLEGES IN AMERICA* (1978).

of the historic perversion of education to the detriment of African American students. They argue, with considerable proof, that education in America focuses on the experience of the dominant European culture and, historically, has devalued or ignored the experience and contributions of African Americans.¹²⁴ Yet retaining or sharing control goes further than merely the opportunity to teach African American history and experience. It also involves authoritative access to all students and the entire realm of knowledge defined and dispensed, whether it be Asian history or molecular science. With this in mind, the black college is viewed as a defense against the loss of African American heritage and self-worth as well as an offensive mechanism to instill and maintain pride and that same self-worth into African American students coming to them from an elementary and secondary school system that has ignored or devalued their experiences.¹²⁵ Equally important, the black college also provides African Americans with a podium from which they, too, can truly explore, define, and dispense the elusive concept of knowledge whatever its subject or source.

A merger or closure of a black school might very well involve a generous and thoughtful placement program whereby African American faculty and administrators are insured a position in a mainstream university. But occupying scattered positions throughout a state's system of higher education, even if accompanied by transferred seniority, is far different from incumbent control over institutions. The transferred African American faculty or administrator would be coming into a new and substantially different environment which usually will not view its own function as that of restoring and maintaining a sense of value and self-esteem in its minority students or realize the historical lack of control. This is not to suggest that the displaced students and administrators will encounter active or even purposeful discrimination; what they will find, however, is a benign indifference perhaps best characterized by Mississippi's belief that merely preventing present and future discrimination adequately remedies the historic loss of input and control. Black college advocates know better than anyone else that the educational deprivations visited upon African American students has resulted not so much from a lack of funding but from a lack of control.

Additionally, and perhaps more importantly, institutional consolidation will likely cause a loss of incumbent programs and curricula existing only at black colleges. To put it bluntly, things just won't be done the way

125. "A merger of the two would not recognize the advantages of historically black colleges. There is self-esteem built here." *Loyalist on 2 Mississippi Campuses Reject Suggestion by Court That State Consider Merging the Institutions*, CHRON. HIGHER EDUC., July 8, 1992, at A17.

they used to be. It may be presumed, instead, that the programs and curricula of the former black colleges would be pushed aside in favor of those existing at the receiving institution. Absent an active welcome at the receiving institution, it is likely that the black college programs would wither in the face of inertia.

Of course, progress and change are desirable in any institution; but abrupt progress and change imposed from without rather than evolved from within brings on justifiable suspicion and anxiety. In the case of black colleges, today those fears result from not having a controlling effect on the changes foreseeable as a result of *Fordice*. Throughout history, a lack of control over their own education has resulted in the "mis-education" of African Americans.

The ongoing struggle for black colleges, then, and the apparent inconsistency even within the consensus of support is best explained by a valid demand of African Americans to share in the control of the educational process itself. While one-race institutions must be eliminated, the "burden" — that is, the loss of sharing in the direction and control of education — should not fall exclusively on African Americans. While there certainly must be a reduction in the sheer duplication of institutions, white and black colleges must share this reduction so that the education of African Americans is not always controlled from without rather than within. African American students, faculty, and administrators, instead of always being the ones required to go into a new environment, should sometimes be allowed to remain as incumbents in established institutions to which other students come. African Americans, too, must be allowed to compete in the marketplace of ideas and to help define that knowledge which is disseminated to all students, not just African Americans. Established programs and processes at black colleges should not always yield to those existing at white colleges. Exclusively closing black schools or exclusively merging black schools with white schools unfairly deprives African Americans of legitimate control and direction and will necessarily prolong the entanglement of race and education as objections continue and are recognized and addressed in a piecemeal fashion.

CONCLUSION

When you control a man's thinking you do not have to worry about his actions. You do not have to tell him not to stand here or go yonder. He will find his "proper place" and will stay in it. You do not need to send him to the back door. He will go without being told. In fact, if there is no back door, he will cut one for his special benefit. His education makes it necessary.¹²⁶

126. WOODSON *supra* note 8, at back cover.

Supporters of black colleges must acknowledge the logical and necessary result of *Brown* and *Fordice* if they are to achieve education free from racial distraction. This goal, which African American students have pursued for so long, necessarily changes the face of black colleges. This is something welcomed, just as changing the face of predominantly white colleges is also to be welcomed. Certainly, black college supporters have legitimate suspicions regarding the process. Too often, though, the assertions in support of black colleges have been grounded in familiar racist notions. Not only are these arguments counterproductive; they also obscure the single legitimate reason for maintaining black colleges.

The real injury inflicted on African Americans throughout history has been the loss of control over the definition of knowledge brought about by an educational system controlled exclusively by others. Sufficient historical evidence exists to prove the damage that results when African Americans are exclusively recipients of education rather than providers of education as well. Hence, the legitimate desire to share in the control of education is a logical, nonracist justification for maintaining black colleges. This desire cannot and should not, however, justify the continuation of one-race schools. Rather, it explains why black colleges should continue in a nonexclusionary manner, i.e., as mainstream colleges with students and faculty of different races¹²⁷ coming to their doors to receive knowledge which is fairly presumed to be defined without the burden of ignorance and racism. Preserving black colleges as a means to preserve a degree of black incumbent control, not as an end in itself, is the only way to remedy two hundred years of loss of control. Most importantly, black college supporters must not adopt arguments which have for so long been used against them. To do so not only cheapens and impedes the lesson which African American students from black colleges have taught this country all too well but also legitimizes the long and sorry practice of mixing race and education.

127. "To be frank, we must concede that there is no particular body of facts that Negro teachers can impart to children of their own race that may not be as easily presented by persons of another race. *Id.* at 28.

