BROWN BLUES: RETHINKING THE INTEGRATIVE IDEAL

DREW S. DAYS, III*

I. INTRODUCTION

Thirty-eight years have passed since the Supreme Court's *Brown v. Board of Education*[1] decision declaring unconstitutional state-imposed segregation of public schools. One would have thought that by now American society would have arrived at a consensus with respect to the substance and scope of *Brown*. The truth is otherwise. Even in the education sector of our national life that *Brown* specifically addressed, deep differences remain over what changes that decision was designed to effect.

Of course, opposition to *Brown* by whites committed to the maintenance of racial segregation in public education has been a daily reality from the moment the decision was announced.[2] Over the years, that opposition has taken a variety of forms both simple minded and sophisticated.[3] However, it was generally thought that one group, African-Americans, was uniformly supportive of *Brown* and committed to its full implementation in education. After all, *Brown* was the culmination of a long campaign by the NAACP to overturn the "separate but equal" doctrine.[4] It also ushered in, without doubt, more than a generation of court decisions and legislation that eradicated all vestiges of formal segregation in America. Blacks seemed to agree with the Supreme Court's pronouncement in *Brown* that children are unlikely to function effectively in

---

* Professor of Law, Yale Law School. B.A., Hamilton College, 1963; L.L.B., Yale Law School, 1966. Prior to joining the Yale faculty, the author was Assistant Attorney General for Civil Rights from 1977-1980.

1. 347 U.S. 483 (1954).

2. *See, e.g.*, Cooper v. Aaron, 358 U.S. 1 (1958) (involving desegregation in Little Rock, Arkansas).

3. *See, e.g.*, U.S. COMM'N ON CIVIL RIGHTS, WITH ALL DELIBERATE SPEED: 1954-19?? 11-17 (1981) (discussing efforts in the South to hinder the segregation of public schools).

4. *See* RICHARD KLUGER, SIMPLE JUSTICE at x (1976).

America's pluralistic society unless they live and learn with people of different races from an early age.[5]

Several developments in recent years suggest, however, that growing numbers of blacks may be turning away from this integrative ideal. Four examples of this shift are worth noting: first, black parents now express support for school board efforts to end desegregation plans that involve busing, favoring instead a return to neighborhood schools, even though this would result in increases in the number of virtually all-black schools in the inner city;[6] second, at the urging of black parents, school boards in a number of major cities have attempted to create all-black male academies;[7] third, black administrators, faculty, students, and alumni of historically black colleges in the South have joined state officials in opposition to court-ordered higher education desegregation plans;[8] and fourth, black students on predominantly white college campuses have urged administrators to provide special facilities for the black students' social and cultural events.[9] Some critics have dismissed these developments as perverse efforts by blacks to return to a "separate but equal" regime.[10] In fact, these developments raise serious and complex questions about the future of race relations in America that deserve careful analysis, not simplistic characterization. This article is an attempt to contribute constructively to that process.

---

5. *See, e.g.*, MARTIN LUTHER KING, JR., THE ETHICAL DEMANDS FOR INTEGRATION, *in* A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR. 117 (James M. Washington ed., 1986).

6. *See, e.g.*, Michel Marriott, *Louisville Debates Plan to End Forced Grade School Busing*, N.Y. TIMES, Dec. 11, 1991, at B13.

7. Dirk Johnson, *Milwaukee Creating 2 Schools for Black Boys*, N.Y. TIMES, Sept. 30, 1990, at 1.

8. Peter Applebome, *Separate but Equal Goes Back to Court—A Special Report; Epilogue to Integration Fight: Blacks Favor Own Colleges*, N.Y. TIMES, May 29, 1991, at A1.

9. *Cornell: Opposition Blocks Plan to Improve Dorm Racial Mix*, N.Y. TIMES, Apr. 12, 1992, at 51.

10. *See, e.g.*, Sam Roberts, *Separate Schools for Male Blacks Igniting Debate*, N.Y. TIMES, Nov. 12, 1990, at B1. Dr. Kenneth Clark, whose studies were cited by the Supreme Court in the *Brown* decision for the proposition that segregation harmed black children, called the idea of black male academies "academic child abuse." *Id.*

II. Blacks and Neighborhood Schools

The school desegregation process has not been unproblematic, to say the least. Almost forty years after *Brown*, there is still active litigation alleging constitutional violations. There is no gainsaying, however, that as a result of *Brown* and its progeny, thousands of black, white, and Hispanic children have been able to receive integrated educations and develop both educational and social skills that will stand them in good stead in later life. At the very least, the mandatory presence of white children has saved some black and other minority children from the physically inferior facilities—and inferior resources—to which they had been assigned under segregation.

Acknowledging the important gains of desegregation, however, should not blind us to the continuing legacy of segregation within desegregated systems. In many schools, racially segregated classes make it unlikely that children of different races will have meaningful interaction during the school day.[11] Moreover, the black community has paid, in some instances, a high price for desegregation. For example, schools that served not only as educational institutions but as community centers in predominantly black neighborhoods have been closed;[12] the burden of busing has fallen disproportionately upon black children;[13] black teachers and administrators have been dismissed and demoted disproportionately;[14] and black students have encountered increased disciplinary action in recently desegregated schools.[15]

Most important, perhaps, given the initial hope that desegregation would increase the quality of educational opportunity for black students, is the fact that the desegregation process has not necessarily brought about improvements. Indeed, in some cases, desegregation has limited opportunity. For example, where magnet schools offering innovative educational programs have replaced

---

11. *Desegregation Under Law: Hearings Before the Senate Select Comm. on Equal Education Opportunity*, 91st Cong., 2d Sess. 997, 1006 (1970) (statement of George Fischer, President, National Education Association) [hereinafter *Desegregation Under Law*].

12. *See* Bell v. West Point Mun. Separate Sch. Dist., 446 F.2d. 1362 (5th Cir. 1971).

13. U.S. Comm'n on Civil Rights, Fulfilling the Letter and Spirit of the Law 202-06 (1976) [hereinafter Comm'n on Civil Rights].

14. *Desegregation Under Law*, *supra* note 11, at 1006-07, 1082-1144.

15. Comm'n on Civil Rights, *supra* note 13, at 255-69.

formerly all-black facilities, black student enrollment in the special programs has been limited by the need to maintain racial balance.[16] This record establishes, contrary to common assumptions, that desegregation has not been an unmitigated benefit to previously segregated black students, teachers, and administrators.

One need not conclude that these negative consequences are the inevitable result of desegregation, however, and that the black community might have been better off seeking to improve educational opportunities within a segregated system. The more plausible explanation is that the same racist tendencies in America that created and maintained segregated schools did not disappear overnight once desegregation was mandated. Rather, they merely found new opportunities in this new arrangement to disadvantage the black community.

Whatever the pros and cons of desegregation, however, the reality is that demographic changes in the United States since 1954 have produced a pattern of residential segregation.[17] This makes further progress in school desegregation in certain areas difficult to envision. Urban centers across the nation are predominantly black and Hispanic; the suburbs and rural areas are predominantly white.[18] Even in those cities where the white population exceeds the minority, the public school populations are predominantly black and Hispanic.[19] This latter phenomenon can be explained by the presence of childless white couples, older white couples, and white families with children enrolled in private and parochial, rather than public, schools.[20]

---

16. JENNIFER L. HOCHSCHILD, THE NEW AMERICAN DILEMMA: LIBERAL DEMOCRACY AND SCHOOL DESEGREGATION 77 (1984).

17. NATIONAL RESEARCH COUNCIL, A COMMON DESTINY: BLACKS AND AMERICAN SOCIETY 88-91 (Gerald D. Jaynes & Robin M. Williams, Jr. eds., 1989).

18. *Id.*

19. *See, e.g.*, Riddick v. School Bd., 784 F.2d 521, 525 (4th Cir.), *cert. denied*, 479 U.S. 938 (1986). The court described the white flight from public schools in Norfolk: in 1970, the population of Norfolk was 70% white, but the public school population was 57% white; in 1980, Norfolk was 61% white, but the public schools were 42.6% white; although Norfolk was 35% black in 1980, the public school population was 58% black. *Id.*

20. *See id.* (demonstrating the tendency of whites not to enroll children in public schools).

Although some litigation efforts to achieve metropolitan-wide desegregation have been successful,[21] the Supreme Court's 1974 decision in a Detroit school desegregation case[22] effectively limited the availability of that remedy in most urban areas. A few large cities have adopted voluntary desegregation plans involving urban and suburban communities,[23] but their impact upon intercity segregation has been modest, largely because those participating in such programs have been disproportionately black. The result has been, therefore, a one-way rather than a two-way process, with urban blacks heading out to suburban schools but relatively few suburban whites coming into the city.[24]

It is true that some predominantly black and Hispanic school districts have been able to obtain significant resources from their states based upon a second Supreme Court ruling involving Detroit schools.[25] Still, the educational experiences of many black and Hispanic students in America will occur in one-race schools in poorly funded urban communities that have been abandoned by large numbers of white—as well as middle-class black—families.[26] Even in those districts where it is still possible for blacks and whites to attend school together, some members of the black community have begun to question whether the result achieved is worth the time and expense that desegregation entails.

There is also a sense among some blacks that although some desegregation plans no longer produce meaningful numbers of whites and blacks studying together, the plans are maintained because of the mistaken belief that blacks cannot learn unless whites are sitting next to them in class. The blacks who challenge the continuation of such plans argue that a return to neighborhood school assignment makes more sense because parental and community

---

21. *See, e.g.*, Davis v. Board of Sch. Comm'rs, 402 U.S. 33 (1971) (holding that a county-wide desegregation plan for Mobile, Alabama was a necessary remedy).

22. Milliken v. Bradley, 418 U.S. 717 (1974).

23. *See, e.g.*, Liddell v. Missouri, 731 F.2d 1294, 1300 (8th Cir.) (en banc), *cert. denied*, 469 U.S. 816 (1984) (discussing a voluntary plan for St. Louis and suburbs). For a discussion of the St. Louis plan, see D. Bruce La Pierre, *Voluntary Interdistrict School Desegregation in St. Louis: The Special Master's Tale*, 1987 WIS. L. REV. 971.

24. *See Liddell*, 731 F.2d at 1301-02.

25. *See* Milliken v. Bradley, 433 U.S. 267 (1977).

26. *See* WILLIAM J. WILSON, THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY 56-58, 102-04, 135-36 (1987).

involvement in the schools would be more likely to increase. Moreover, government resources expended on busing could be redirected to increasing the quality of materials and instruction available at those schools.

Blacks and whites who oppose efforts to roll back desegregation plans do so for a variety of reasons. First, they fear that such proposals are yet another attempt by school boards guilty of past intentional segregation to escape any further role in avoiding resegregation. Second, they suspect blacks who support such roll-backs of acting more in their own political and economic interests than in the interests of black children. What roll-back proponents seek, in fact, are more and better jobs for black administrators and teachers in exchange for reduced pressure for increasing or maintaining desegregation levels. Third, roll-back opponents fear that a return to all-black schools will result in "benign neglect" of those schools in terms of resources allocated for facilities, materials, and personnel.

This debate, although perhaps the subject of greater media focus in recent years, is not a new one. Blacks, having seen the bad, along with the good, of desegregation, have for some time questioned whether the process should be extended to the limits that the Supreme Court precedents allowed. This attitude has been particularly prevalent with respect to desegregation plans that require extensive busing. These voices of restraint often had no effective forum, however, because they were often white school boards correctly viewed as inherently untrustworthy spokespersons for this point of view. The major civil rights organizations representing the plaintiffs in desegregation cases, on the other hand, strongly reject any thought of stopping short of what the Constitution would permit.[27]

---

27. The now classic exchange between Derrick Bell and Nathaniel Jones is a telling depiction of this controversy. *Compare* Derrick A. Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976) (promoting educational improvement rather than strict racial balancing as the means to implement equal opportunity in education) *with* Nathaniel R. Jones, *Letter*, 86 YALE L.J. 378 (1976) (defending as necessary the NAACP's focus on desegregation). *See also* GARY ORFIELD & CAROLE ASHKINAZE, THE CLOSING DOOR: CONSERVATIVE POLICY AND BLACK OPPORTUNITY 105-12 (1991) (discussing Atlanta school desegregation compromise).

The debate has taken on a new dimension, however, because black mayors, city council members, and school superintendents have begun to express similar concerns about the wisdom of what they see as "desegregation at any cost." Courts are justifiably perplexed over how to evaluate the views of this group, because their authority, as elected and appointed blacks, to speak for the black community certainly is equal to, if not greater than, that of plaintiffs and their lawyers in school desegregation cases. Although some might dismiss their views as perversely malevolent toward black students, the positions of black elected and appointed officials deserve an evaluation as expressions of concern about the most effective approach to educating black children under daunting circumstances.

For these and other reasons, blacks increasingly support efforts by school districts under court desegregation orders to return to neighborhood school arrangements, even though such modifications inevitably will return certain facilities in the black community to largely one-race status.[28] Of course, one must not lose sight of the fact that constitutional rights are individual.[29] Whether a school district has satisfied its responsibility under *Brown* and its progeny to dismantle a dual system is not subject to resolution by referendum.[30] The difficult legal question, one with which the Supreme Court continues to grapple, is how one determines whether the dual system is still in place.[31] Meanwhile, debates over modifications of desegregation plans continue.

Proponents of modification argue that once the school board has done all it can to eradicate the vestiges of its previously dual system, it has satisfied constitutional requirements. Continued segregation, they contend, is not the school board's fault, but rather, the consequence of residential segregation caused by private choice

---

28. *See, e.g.*, Dowell v. Board of Educ., 677 F. Supp. 1503, 1513-15 (W.D. Okla. 1987) (black minister chaired committee that proposed modification of the desegregation plan), *rev'd*, 890 F.2d 1483 (10th Cir. 1989), *rev'd*, 111 S. Ct. 630 (1991); Riddick v. School Bd., 627 F. Supp. 814, 821 (E.D. Va. 1984) (black superintendent and three black board members, out of seven, supported plan that would lead to a large number of identifiable black schools), *aff'd*, 784 F.2d 521 (4th Cir.), *cert. denied*, 479 U.S. 938 (1986).

29. *See* Shelley v. Kraemer, 334 U.S. 1, 22 (1948).

30. Lucas v. Forty-Fourth Gen. Assembly, 377 U.S. 713, 736-37 (1964).

31. *See* Freeman v. Pitts, 112 S. Ct. 1430 (1992); *Dowell*, 111 S. Ct. 630 (1991).

and market forces. Opponents of rolling back desegregation plans argue that the school board has a duty to continue making adjustments until the results of the pattern of segregation it created have been eradicated. They take the position that demographics cited by the board as an explanation of continued segregation are not adventitious, but rather, the consequence of past school board practices. Under current Supreme Court doctrines, the proponents of modification are likely to prevail because the Court consistently has refused to consider the extent to which segregative actions by governmental agencies other than school boards might justify maintenance of desegregation plans where modification would result in resegregation. Consequently, school desegregation plaintiffs are left with a wrong in search of a remedy.[32] As they witness schools that were all-black before desegregation return to that status once the board's modifications go into effect, it must seem to them that years of effort have been in vain.

III. Schools for Black Males

Media attention and public debate over the past few years have also focused on proposals to establish public schools or programs exclusively for black male students.[33] In Milwaukee, for example, the school board planned to designate two schools as all-black or virtually all-black facilities where special attention would be given to the educational and developmental needs of black males.[34] These "immersion schools" would offer features unavailable in other Milwaukee facilities: school days one hour longer and less rigidly structured than normal; a multicultural curriculum; and mandatory Saturday classes held in cooperation with the local branch of the Urban League.[35] Weekend sessions would focus on nonacademic subjects such as "what it means to be a responsible male," "how to save and invest money," and "the practicalities of

32. *See* Swann v. Board of Educ., 402 U.S. 1, 22-23, 31-32 (1971). For a more complete treatment of this issue, see Drew Days, *School Desegregation Law in the 1980's: Why Isn't Anybody Laughing?*, 95 Yale L.J. 1737 (1986).

33. Tom Dunkel, *Self-Segregated Schools Seek to Build Self-Esteem*, Wash. Times, Mar. 11, 1991, at E1.

34. *Id.*

35. *Id.*

cooking and cleaning."[36] The students would also be required to wear uniforms.[37]

As a result of actual or threatened litigation,[38] Milwaukee's proposal and similar ones in other urban school districts were modified to include female and white students who wished to participate.[39] The legal and political debate continues, however. At the core of the controversy is the question of whether a school that admits only blacks is any more constitutional than the ones that *Brown* outlawed because they admitted only whites.

At one level, they clearly are not comparable. The system of state-imposed racial segregation in public education that *Brown* declared unconstitutional was designed to ensure that blacks remained a second-class, subjugated race in American society. Schools established for black males, in contrast, are not designed to subjugate whites or deny them first-class citizenship. Rather, they address what most would acknowledge is the critical plight of young black males in urban America. The premise of the theory is that "one of the most obvious psychosocial deficits in the environment of innercity black boys is the lack of consistent, positive, literate, black *male* role models."[40]

At another level, however, our history counsels us to be wary of *any* racial classifications. For that reason, the Supreme Court has mandated that any use of racial criteria by government must be for the purpose of achieving a compelling interest and must be necessary to achieve that purpose.[41] Dual school systems under segregation failed that test because maintaining segregation of the races did not constitute a compelling government interest.[42] All-black academies, in contrast, concededly are designed to meet a compelling interest—saving black males from educational and social dis-

---

36. *Id.*

37. *Id.*

38. *See, e.g.*, Garrett v. Board of Educ., 775 F. Supp. 1004 (E.D. Mich. 1991) (striking down all-male academies on both state and federal grounds).

39. Carol Innerst, *School Geared to Black Boys Attracts Girls*, WASH. TIMES, Sept. 3, 1991, at A3.

40. Spencer H. Holland, *A Radical Approach to Educating Young Black Males*, EDUC. WK., Mar. 25, 1987, at 24, 24.

41. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985).

42. Bolling v. Sharpe, 347 U.S. 497, 499-500 (1954).

aster.[43] However, the case has not been made persuasively that this is an interest that *necessarily* requires the exclusion of whites.

The fact that the school district might be able to achieve its goals more efficiently employing a racially exclusive approach is no justification for such a system. Expedience cannot legitimize racial segregation. Even taking the proponents of all-black academies at their word, there is little evidence to support the view that mentoring, counselling, extended school days, small classes, and a curriculum that gives proper recognition to the contributions of blacks to American society, will improve black male educational and social functioning *only* in a racially segregated setting. Such an enriched educational environment is likely to produce positive effects *irrespective* of the racial setting.

Proponents may contend that only experimentation will determine the effectiveness of such programs. Racial classifications, however, are not proper subjects for experimentation. Of course, in many urban settings, the likelihood that whites will be enrolled in center city schools and thereby be displaced to accommodate the all-black academies, is slim. Similarly, whites likely will not apply to attend such schools. Under these circumstances, as a practical matter, school districts can set up programs for all-black student bodies without imposing any bar to whites.

Proposals to create all-black male academies have attracted adherents largely in those districts where a number of schools in the center city, as in Milwaukee, cannot feasibly be desegregated. Under these circumstances, it is hard to fault black parents and sympathetic school officials who do not believe that black male students can await the integration millennium. Consequently, they have joined forces to develop a structure that they hope will save their sons. Such approaches clearly reflect disenchantment with the *Brown* integrative ideal and may be educationally misguided. However, to the extent that whites and females may participate, the programs would not appear to violate constitutional limits.[44]

---

43. In Milwaukee, for example, 50% of the black males entering high school do not graduate. Dunkel, *supra* note 33, at E1. Black males make up 27.6% of the school population but account for half of all students suspended. *Id.* In 1990, out of 5,716 black males in the city's public high schools, only 125 had grade point averages above 3.0. *Id.*

44. Some commentators have raised questions not only about the constitutionality of all-black male academies but also of the "Afrocentric" curriculum that such schools offer, an

IV. Historically Black Colleges and Universities

NAACP lawyers prepared for their ultimate assault on the "separate but equal" doctrine in *Brown* by challenging successfully the exclusion of blacks from all-white graduate and professional schools.[45] Indeed, it was in one of those earlier cases that the Supreme Court acknowledged the "intangible" inequality caused by segregation that would figure so prominently in its 1954 decision.[46] The Court made clear shortly after *Brown II*,[47] the desegregation implementation decision in 1955, that the concept of "all deliberate speed"[48] had no application to higher education desegregation.[49] Consequently, efforts by blacks to enroll in previously all-white colleges and universities during the late 1950s and early 1960s found support in the courts, as well as in the executive branch. In a few instances, the government even called out troops to ensure the admission of blacks.[50]

Meanwhile, almost no attention was being given to the fact that southern and border states were continuing to operate dual *systems* of higher education. This arrangement was dictated, in large part, by the federal government's promotion in 1862, under the First Morrill Act,[51] of state land grant colleges for whites and then, in 1890, under the Second Morrill Act,[52] parallel institutions for blacks. Thereafter states systematically discriminated against black institutions in the allocation of funds for a period that extended well beyond 1954.[53]

---

issue that this Article does not address. For a comprehensive treatment of that issue, see Sonia R. Jarvis, *Brown and the Afrocentric Curriculum*, 101 Yale L.J. 1285 (1992).

45. *See* Mark V. Tushnet, The NAACP Legal Strategy Against Segregated Education, 1925-1950, at 105-37 (1987).

46. Sweatt v. Painter, 339 U.S. 629, 634-35 (1950).

47. Brown v. Board of Educ., 349 U.S. 294 (1955).

48. *Id.* at 301.

49. Florida *ex rel.* Hawkins v. Board of Control, 350 U.S. 413, 413-14 (1956).

50. *See* James H. Meredith, Three Years in Mississippi 208-10 (1966).

51. Ch. 130, § 4, 12 Stat. 503, 504 (1862) (codified as amended at 7 U.S.C. §§ 301-305, 307-308 (1988)).

52. Ch. 841, 26 Stat. 417 (1890) (codified as amended at 7 U.S.C. §§ 321-326, 328 (1988)).

53. For a general review of the Morrill Acts and underfunding of historically black institutions, see Gil Kujovich, *Equal Opportunity in Higher Education and the Black Public College: The Era of Separate But Equal*, 72 Minn. L. Rev. 29, 40-64 (1987).

The historically black institutions, as a group, nevertheless, achieved remarkable success educating students from segregated and inferior secondary schools. They developed programs that provided their students with instruction and nurturing sufficient to prepare them to function effectively in society after graduation. In many cases, their graduates have pursued graduate and professional training at prestigious universities in the North and West.[54]

Early attempts to challenge dual systems of higher education produced court orders that seemed to embrace a "freedom of choice" approach.[55] State officials successfully argued that college students were not assigned to institutions, but rather, were free to select a college or university based upon considerations of curriculum, location, cost, and admissions requirements. Consequently, as long as states did not preclude students from attending an institution because of their race, the courts determined that dual systems did not offend the Constitution.[56]

In the early 1970s, however, black plaintiffs initiated litigation in *Adams v. Richardson*,[57] charging federal officials with illegally providing funds to states that maintained dual systems of higher education.[58] As a result of this suit, the court ordered the Department of Health, Education and Welfare (HEW)—and later the Department of Education—to launch an enforcement campaign to dismantle those systems.[59] Central to that campaign was the premise that the states in question had a constitutional duty to act affirmatively to remedy the conditions that created and perpetuated separate black and white institutions at the post-secondary level.[60]

Unlike earlier court decisions, federal administrative directives rejected the notion that "freedom of choice" was the proper reme-

---

54. Antoine Garibaldi, *Black Colleges an Overview*, *in* BLACK COLLEGES AND UNIVERSITIES: CHALLENGES FOR THE FUTURE 3, 3-8 (Antoine Garibaldi ed., 1984).

55. *See, e.g.*, Alabama State Teachers Ass'n v. Alabama Pub. Sch. and College Auth., 289 F. Supp. 784, 788-89 (M.D. Ala. 1968).

56. *Id.* at 789-90.

57. 480 F.2d 1159 (D.C. Cir. 1973) (en banc) (per curiam).

58. *Id.*

59. *Id.* at 1165.

60. *See id.* at 1163-65; Geier v. University of Tenn., 597 F.2d 1056, 1065 (6th Cir. 1979).

dial model.[61] They recognized that students' choices were shaped powerfully by the effects of longstanding mandated segregation and discriminatory resource allocations between black and white institutions.[62] One example of this was the placement of new institutions with parallel curriculums in communities where previously only historically black public institutions existed. These parallel institutions effectively provided white students with segregated alternatives.[63]

Black higher education groups were at odds with federal agencies and the NAACP Legal Defense Fund, which brought the *Adams* suit, regarding the wisdom of pressing desegregation of public colleges and universities.[64] Black college presidents, faculty, and alumni were undoubtedly mindful of the burdens the black community had been forced to bear during desegregation of public primary and secondary systems. They feared that desegregation of higher education would result, at best, in whites displacing black teachers and administrators, as well as black students.[65] At worst, given the relative inferiority of their institutions, desegregation might result in the closing of schools, or the absorption of traditionally black institutions into historically white schools.[66] In either event, institutions important to the black community would lose their identity, and opportunities in higher education for black administrators, faculty, and students would be significantly diminished.[67]

Despite similar concerns, however, proponents of desegregation in higher education believed that both litigation and administrative enforcement could increase resources available to historically black institutions. Reducing program duplication and forcing the

---

61. *See, e.g.*, Revised Criteria Specifying the Ingredients of Acceptable Plans to Desegregate State Systems of Public Higher Education, 43 Fed. Reg. 6658, 6658-59, 6661 (1978) [hereinafter Revised Criteria].

62. *Id.* at 6658-61.

63. *See* Geier v. Blanton, 427 F. Supp. 644 (M.D. Tenn. 1977) (mandating merger of parallel institutions because desegregation was not occurring), *aff'd sub nom.* Geier v. University of Tenn., 597 F.2d. 1056 (6th Cir. 1979).

64. For a full discussion of these concerns, see JEAN L. PREER, LAWYERS v. EDUCATORS: BLACK COLLEGES AND DESEGREGATION IN PUBLIC HIGHER EDUCATION 188-232 (1982).

65. *Id.* at 202-03.

66. *Id.*

67. *Id.*

states to locate especially attractive academic programs at traditionally black schools would also enhance the schools' long-term viability.[68]

It is fair to say that this desegregation effort has not been very successful. Significant segregation between historically black and white institutions is still apparent. Since 1973, state officials have effectively utilized the administrative process to delay meaningful change. Ultimately, the Court of Appeals for the District of Columbia Circuit dismissed the *Adams* litigation on technical grounds.[69] As a result, the federal government is able to decide upon the nature, scope, and timing of enforcement largely free of court oversight.

Two higher education desegregation efforts, one involving Louisiana and the other Mississippi, were severed from the *Adams* administrative process and referred by HEW to the Justice Department for judicial enforcement.[70] Little systemic desegregation has occurred in either case over the many years they have been in court. The Supreme Court recently ruled on Mississippi's higher education desegregation case.[71]

The case presented the Court with an opportunity to define a state's constitutional duty to dismantle formerly dual systems of higher education, a question which had produced conflicting answers in the lower federal courts. Some courts had taken the position that higher education authorities had an affirmative responsibility, similar to that imposed upon school boards in the case of primary and secondary school desegregation, to eradicate the vestiges of their dual systems.[72] Like HEW in the *Adams* proceedings, these courts believed that this responsibility must be discharged by addressing a variety of practices that affect students' decisions about which institutions they attend, such as admissions standards, program duplication, institutional resources, and govern-

68. Revised Criteria, *supra* note 61, at 6658-64.

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

70. *See* United States v. Louisiana, 692 F. Supp. 642 (E.D. La. 1988), *vacated*, 751 F. Supp. 606 (E.D. La. 1990); Ayers v. Allain, 674 F. Supp. 1523 (N.D. Miss. 1987), *aff'd*, 914 F.2d 676 (5th Cir. 1990) (en banc), *vacated and remanded sub nom.* United States v. Fordice, 112 S. Ct. 2727 (1992).

71. United States v. Fordice, 112 S. Ct. 2727 (1992).

72. *See* United States v. Louisiana, 718 F. Supp. 499, 532-35 (E.D. La. 1989).

ance.[73] Other courts rejected the notion that primary and secondary school desegregation doctrines had any applicability to higher education, principally because college and university attendance is not mandated by the state but depends upon individual student choice.[74] Consequently, these courts—including both the trial and appellate courts in the Mississippi case—concluded that a state's constitutional responsibility ends once it has removed all racial bars to students' attending the college or university of their choice.[75]

In *United States v. Fordice*,[76] the Supreme Court essentially embraced the former "affirmative duty" doctrine and reversed the lower courts' determination that Mississippi had met its constitutional responsibility. The Court found that in at least four areas—admission standards, program duplication, institutional mission assignments, and continued operation of all eight public universities—the state had failed to show that the "policies and practices traceable to its prior system that continue to have segregative effects" had "sound educational justification" and could not "be practicably eliminated."[77] The case was then returned to the lower courts for evaluation of the Mississippi system against the Court's newly articulated standard.[78]

The Court's decision leaves in limbo, however, the future of Mississippi's three historically black institutions. Although the Court acknowledged that "closure of one or more institutions would decrease the discriminatory effects of the present system,"[79] it declined to find such action constitutionally required.[80] However, it flatly rejected the notion that Mississippi had a constitutional duty to upgrade the historically black institutions, as such.[81] Rather, it left to the lower courts the question of whether "an increase in

---

73. *See, e.g.*, Geier v. Blanton, 427 F. Supp. 644, 657-60 (M.D. Tenn. 1977), *aff'd sub nom.* Geier v. University of Tenn., 597 F.2d 1056 (6th Cir. 1979).

74. *See Allain*, 674 F. Supp. at 1553-54.

75. Ayers v. Allain, 914 F.3d 676, 687 (5th Cir. 1990) (en banc), *vacated and remanded sub nom.* United States v. Fordice, 112 S. Ct. 2727 (1992); *Allain*, 674 F. Supp. at 1554.

76. 112 S. Ct. 2727.

77. *Id.* at 2730.

78. *Id.* at 2743.

79. *Id.* at 2742-43.

80. *Id.* at 2743.

81. *Id.*

funding is necessary to achieve a full dismantlement."[82] Given this ambiguity, the possibility exists that Mississippi will be able to achieve a unitary higher education system by closing those institutions.[83]

It is this fear that black institutions will be the inevitable casualties of higher education desegregation that has complicated the dismantling of dual systems. Take for example, the ostensibly odd alignment of parties in the Louisiana case.[84] After concluding that Louisiana's desegregation plans were inadequate, the federal court commissioned its own strategy.[85] That plan envisioned, among other things, merging the traditionally black Southern University Law Center into the law school of Louisiana State University (LSU), the state's traditionally white flagship institution.[86] The two law schools are located in Baton Rouge, only a few miles apart.

That the state opposed the merger plan was not surprising.[87] However, it was joined by the Southern University Board of Supervisors,[88] which viewed the court's order as a step backward, rather than forward, for black education in Louisiana.[89] The board claimed that blacks, the victims of the state's history of segregation and discrimination in higher education, were being required to bear a disproportionate burden in rectifying that situation.[90] Specifically, they contended that the merger of Southern University's law school into LSU's would undoubtedly displace black faculty and staff and curtail opportunities for blacks seeking legal educa-

---

82. *Id.*

83. Both Justices Thomas, *id.* at 2746 (Thomas, J., concurring), and Scalia, *id.* at 2752 (Scalia, J., concurring in the judgment and dissenting in part), expressed concern in *Fordice* over the future of historically black institutions.

84. United States v. Louisiana, 692 F. Supp. 642 (E.D. La. 1988), *vacated*, 751 F. Supp. 606 (E.D. La. 1990).

85. *Id.* at 657-59.

86. United States v. Louisiana, 718 F. Supp. 499, 514 (E.D. La. 1989).

87. The Attorney General for Louisiana supported the motion either to alter the court's higher education desegregation order, or order a new trial; the Governor, however, opposed the motion and supported the court's plan. United States v. Louisiana, 718 F. Supp. 525, 527 (E.D. La. 1989).

88. The Southern University Board of Supervisors joined the Attorney General in filing the motion to alter or amend the court order, or order a new trial, *see id.* at 525, and a motion to stay execution of the order pending determination of the new trial motion and anticipated appeals, *see id.* at 527 n.2.

89. Marilyn Milloy, *Black School Fights Desegregation*, NEWSDAY, Nov. 19, 1989, at 6.

90. *See Louisiana*, 718 F. Supp. at 533.

tion.[91] The court's plan did not envision LSU's absorbing Southern's faculty and staff, nor did it require LSU to expand to ensure against a net loss of law school seats for black students after the merger.

In defense of its plan, the court took the position that the merger was required by the Constitution and was in the long-term interests of the citizens of Louisiana, black and white.[92] But for the state's creation and maintenance of segregated higher education, the court pointed out, there would not still be two public law schools in the same city, one white and the other black.[93] The court concluded that desegregation could occur only if one of the institutions closed.[94] Moreover, the court observed that in a fiscally strapped state, maintaining two law schools in Baton Rouge made no economic sense.[95]

Because Southern University's law school had been denied adequate state support due to its status as a black institution, the condition of its physical plant and the quality of its educational program were inferior to those of LSU. Consequently, the court concluded that Southern's law school should be the one to close.[96] In response to the Southern University Board of Supervisors' concerns about the desegregation process, the court suggested that the board was interested in protecting the jobs of Southern faculty and administrators, rather than in improving educational opportunities for blacks.[97]

This controversy delineates starkly the dilemma confronting proponents of higher education desegregation. The court clearly was correct that the maintenance of dual, segregated law schools in one city makes no legal or fiscal sense and that merging the institutions would require blacks and whites to study law together rather than apart. But the black opponents of the merger also have

---

91. *See id.*

92. *Id.* at 532-35; *see also* United States v. Louisiana, 718 F. Supp. 499, 508, 513-14 (E.D. La. 1989) (explaining the need to end duplication of law schools in order to end dual system).

93. *Louisiana*, 718 F. Supp. at 513-14.

94. *Id.* at 514.

95. *Id.* at 513-14.

96. *Id.*

97. *See* United States v. Louisiana, 718 F. Supp. 525, 531, 533 (E.D. La. 1989).

compelling arguments. Absent the state's history of discriminatory treatment of Southern University Law Center, the school's facilities and program probably would not be so inferior to those of LSU. Had there been "tangible" equality over the years between the two institutions, white students might have opted to attend Southern rather than LSU based upon "intangible" considerations, such as the presence of particular faculty members or curricular emphases. Moreover, there is no reason why Southern's board should apologize for seeking to protect the jobs of faculty and administrators. They too are victims of the state's segregative practices.

Finally, Southern University Law Center and LSU Law School have different admissions criteria.[98] As a consequence, Southern has been able to admit some black students who, based upon objective indicators such as GPA and LSAT scores, would not be competitive candidates at LSU. Southern nevertheless has been able to train and graduate generations of black lawyers who provide competent legal services to poor and minority communities in the state. Unless LSU ensured that black students whom Southern would have admitted would find seats at LSU, the merger would represent a net loss of educational opportunities for black students in Louisiana.

The Louisiana case eventually was dismissed in light of the Fifth Circuit's ruling in the Mississippi case.[99] Solving the dilemma in Louisiana and in other states where higher education desegregation is underway will not be easy now that the Supreme Court has vacated that decision.[100] The solution cannot be achieved overnight, however. It must operate within the twin constraints of constitutional requirements and economic reality. At the same time, it must address responsibly the displacement effects of the desegregation process and the ironic price that the black community must pay for desegregation.

---

98. *See Louisiana*, 718 F. Supp. at 513-14.

99. United States v. Louisiana, 751 F. Supp. 606 (E.D. La. 1990), *vacating* 692 F. Supp. 642 (E.D. La. 1988).

100. United States v. Fordice, 112 S. Ct. 2727 (1992), *vacating* Ayers v. Allain, 914 F.2d 676 (5th Cir. 1990).

V. BLACKS ON WHITE CAMPUSES

The proposed merger of Southern University Law Center into LSU undoubtedly raised concerns in the minds of black students about the reception they were likely to receive upon enrolling at LSU. Would the administration be supportive? Would faculty members nurture their intellectual development? Would white students accept them as colleagues and peers? These are questions that many black applicants likely ask when considering a predominantly white college or university anywhere in the country. The alternative for these students is to attend one of a group of public and private historically black institutions with proven track records of providing students with excellent preparation for post-graduate employment or education.[101]

These are not idle concerns. Blacks have always encountered difficulties in predominantly white institutions, as accounts of the "best and brightest" of pioneer black students at prestigious northern institutions attest.[102] They had to overcome both social isolation and a lack of evenhanded administrative and faculty support in order to excel.[103] Even though black enrollment in these institutions has increased over the years, the schools generally have not succeeded in retaining and graduating blacks in proportions equal to those for white students.[104]

Explanations for this disparity range from the failure of such institutions to provide adequate financial support to the academic deficiencies of the students. One of the major variables, however, appears to be black students' perception of the degree to which the institutions will offer supportive environments within which they

---

101. Lee A. Daniels, *The Future of Black Colleges*, EMERGE, Apr., 1991 at 31, 38.

102. *See, e.g.*, GILBERT WARE, WILLIAM HASTIE: GRACE UNDER PRESSURE 12-20 (1984) (accounting William Hastie's college experience at Amherst in the 1920s). Hastie graduated Phi Beta Kappa, made the *Law Review* at Harvard, and later became the first black federal judge.

103. *See id.*

104. *See* Walter R. Allen, *The Color of Success: African-American College Student Outcomes at Predominantly White and Historically Black Public Colleges and Universities*, 62 HARV. EDUC. REV. 26, 27 (1992). *See generally* JACQUELINE FLEMING, BLACKS IN COLLEGE (1984) (presenting a comprehensive study of black students' intellectual development in various settings).

can grow academically and socially.[105] This concern is not unique to blacks, of course. Students from other racial or ethnic minorities, public school graduates, southerners going north, and northerners going south, want to know whether they are going to feel at home in the institutions they are considering. The stakes just seem to be higher for blacks.

The number of black students attending traditionally white institutions surpassed token levels in the late 1960s, largely through a combination of more aggressive recruiting of candidates clearly meeting normal admissions criteria, as well as the establishment of affirmative action programs for qualified but less competitive students. This development was not an unalloyed advance, however, in efforts to increase educational opportunities for black students and reduce racial segregation in higher education. Black students on predominantly white campuses began to express concern about the difficulties of their adjustment, unlike their predecessors, who usually opted to suffer in silence. With varying degrees of insistence, black students asked that college administrators provide facilities specifically to allow them opportunities for greater social interaction than the institutions were affording them.

These requests prompted a range of reactions from blacks and whites, many quite hostile to the idea of black "Afro-Am houses" on campus. Some blacks and whites who had fought to end segregation viewed such developments as striking at the very heart of what *Brown* symbolized. Some administrators wondered why blacks had sought admission to their predominantly white institutions in order to segregate themselves from their white classmates. Whites who would have preferred not to see any black students on campus pointed cynically to the demands for special "houses" to justify their support for social groups, such as Greek societies or eating clubs, that excluded blacks.[106]

These considerations, even the cynical claims of racists, highlight the difficulty of defending university support for racially *exclusive* social clubs and living arrangements that bar nonblacks irrespec-

---

105. RICHARD C. RICHARDSON & ELIZABETH F. SKINNER, ACHIEVING QUALITY AND DIVERSITY: UNIVERSITIES IN A MULTICULTURAL SOCIETY 33-46 (1991).

106. *See U. of Minnesota Will Not Recognize or Support Group That Promotes 'White Culture,'* CHRON. HIGHER EDUC., Mar. 18, 1992, at A34.

tive of their backgrounds or interests.[107] Blacks-only clubs or dormitories are bad social policy in that they reinforce racial stereotypes and most likely are unconstitutional. Ensuring that a hostile campus environment does not force black students to terminate their studies prior to graduation may well qualify as a compelling interest that justifies the establishment of such clubs and dormitories. As in the case of all-black academies, however, it is not clear that racially exclusive facilities within the university are *necessary* to achieving that goal.

In contrast, administrative support for *non-exclusive* facilities to benefit black students is sound social policy. They may provide black students with a "safe harbor" from stormy weather, particularly for those who are encountering a predominantly white environment for the first time.[108] When special facilities for blacks first appeared on campuses, some sympathetic observers thought, perhaps naively, that blacks would have decreasing need for such refuges as time passed. However, the ongoing debate over affirmative action issues—from the legality of minority scholarships[109] to whether blacks are stigmatized by such efforts[110]—and the growth of hate speech on college campuses[111] have surely caused black students on predominantly white campuses to feel more embattled than ever before. Black students should not have to subject themselves to undue psychological and emotional stress in order to enjoy the prestige, rich resources, outstanding academic programs, and influential alumni networks that top predominantly white institutions provide their students. "Afro-Am houses," properly handled, need not be the source of racial divisiveness. Rather, they can serve to promote the healthy integration of black students and

---

107. *See Campus Life; Syracuse: Blacks-Only Group May Soon Forfeit Status and Money*, N.Y. TIMES, Dec. 9, 1990, § 1, at 62.

108. CARNEGIE FOUND. FOR THE ADVANCEMENT OF TEACHING, CAMPUS LIFE: IN SEARCH OF COMMUNITY 25-32 (1990) [hereinafter CARNEGIE FOUND.].

109. *See* Podberesky v. Kirwan, 956 F.2d 52 (4th Cir. 1992) (declaring scholarships exclusively for black students at University of Maryland illegal in the absence of a showing of present effects of past discrimination).

110. *See* SHELBY STEELE, THE CONTENT OF OUR CHARACTER: A NEW VISION OF RACE IN AMERICA 111-25 (1990).

111. For a collection of campus incidents, see Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2370-73 nn.245-256 (1989); *see also* CARNEGIE FOUND., *supra* note 108, at 26-34 (giving examples of racial harassment).

black culture into the life of predominantly white institutions. Such integration does not demand black assimilation but instead reflects respect for cultural diversity.

VI. Conclusion

The *Brown* decision and the integrative ideal that it embraced have opened opportunities for black advancement that were previously unthinkable. *Brown* also transformed our entire society in other ways too numerous to recite under these circumstances. As the four developments discussed above suggest, however, the increasing racial polarization and residential segregation in America have put the integrative ideal to the test. Concerns about the burdens blacks have had to carry in the desegregation process, the degree to which integration requires assimilation and rejection of black values and institutions, and the seemingly intractable problems presented for largely black school systems in educational *extremis,* are causing growing numbers of blacks to rethink *Brown's* integrative ideal. These are admittedly difficult questions. Nevertheless, they deserve to be asked—indeed, they cannot be avoided. They must also be answered, although the answers may be uncomfortable and disappointing, at least in the short run, for those of us who hoped that we would see a different America almost forty years after *Brown.*