

Note

Mississippi Learning: Curriculum for the Post-*Brown* Era of Higher Education Desegregation

Cory Todd Wilson

Forty years ago, *Brown v. Board of Education*¹ marked the beginning of a long struggle to end the legacy of “separate but (un)equal” education. Though the battle for equal educational opportunity is far from won, there have been successes. In many places in the South, African-Americans and whites ride to school in the same school buses, eat in the same school cafeterias, and play together on the same school playgrounds. In Mississippi, the first generation of children to grow up without firsthand memories of “massive resistance” to desegregation has come of age in a society where African-Americans and whites often work together, dine in the same restaurants, and vote at the same polls.

Yet *Brown* has not eliminated many of the vestiges of *de jure* segregation. The generation of students that graduated together from integrated public school systems did not, for the most part, go on to college together. Many states set up dual systems of colleges, one for whites and one for African-Americans, just as they had with elementary and secondary schools before *Brown*.² The story of dual systems is similar to that of separate lower

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

2. Most of the 19 former dual-system states are in the South, but some Northern states also officially sanctioned college segregation. States currently under review, involved in litigation, or covered by a past desegregation plan include: Alabama, Arkansas, Delaware, Florida, Georgia, Kentucky, Louisiana,

education: The white legislators who doled out resources favored white schools. In fact, the clear disparities between historically white and historically black colleges led to the first court challenges to the pre-*Brown* "separate but equal" regime.³ Despite *Brown* and other early desegregation cases, dual-system state colleges remain largely separate, in many ways unequal, and until quite recently, unaddressed by the judiciary.

After *Brown*, courts pushed college desegregation to the back burner,⁴ perhaps because they were consumed with desegregating lower educational institutions. Gradually, however, courts have been forced to notice that *de jure* dual systems survived *Brown* in *de facto* form.⁵ Because the Supreme Court has provided few clear standards for higher education desegregation, lower courts have addressed the problem of state-supported dual systems of higher education since the late 1970's and 1980's without cogent guidance from above.

The most definitive pronouncement from the Supreme Court on the issue is *United States v. Fordice*.⁶ In *Fordice*, the Court set forth a test to assess

Maryland, Mississippi, Missouri, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, Tennessee, Texas, Virginia, and West Virginia. See Ronald Smothers, *Mississippi's University System Going on Trial*, N.Y. TIMES, May 9, 1994, at A10.

3. See *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950); *Sweatt v. Painter*, 339 U.S. 629 (1950); *Sipuel v. Board of Regents*, 332 U.S. 631, *mandamus denied sub nom. Fisher v. Hurst*, 333 U.S. 147 (1948); *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938). These cases represented the first hints from the Supreme Court that equal access to education was imperative under the Constitution, although the Court was willing only to order the admission of African-Americans to white programs. See generally Mary Ann Connell, *The Road to U.S. v. Fordice: What is the Duty of Public Colleges and Universities in Former De Jure States to Desegregate?*, 62 MISS. L.J. 285, 289-302 (1993).

4. See *Florida ex rel. Hawkins v. Board of Control*, 350 U.S. 413, 413 (1956) (holding "all deliberate speed" command of *Brown* not applicable to higher education desegregation).

5. Segregation at the college level is complicated by the fact that there is more to the system than two sets of racially distinct colleges. The proliferation of program duplication in junior colleges and branch campuses also has contributed to college segregation. See, e.g., *Norris v. State Council of Higher Educ.*, 327 F. Supp. 1368 (E.D. Va.) (enjoining expansion of predominantly white two-year facility situated only seven miles from historically black four-year college), *aff'd mem. sub nom. Board of Visitors of the College of William & Mary v. Norris*, 404 U.S. 907 (1971); *Alabama State Teachers Ass'n v. Alabama Pub. Sch. & College Auth.*, 289 F. Supp. 784 (M.D. Ala. 1968), *aff'd per curiam*, 393 U.S. 400 (1969) [hereinafter *ASTA*] (challenging construction and improvement of historically white college facilities in close proximity to ignored historically black colleges). In Jackson, Mississippi, for example, Hinds County Community College has drained area white students from Jackson State University, and Mississippi State University, the University of Mississippi, and the University of Southern Mississippi cooperatively offer graduate-level courses at a central location called the University Center. See *University Center Influences Ayers Case*, HATTIESBURG AMERICAN (Hattiesburg, Miss.), Sept. 25, 1992, at A1 (discussing University Center's role in desegregation remedy). Thus, these historically white schools adversely impact historically black Jackson State's ability to attract white students from the midstate area. Perhaps in response to *Fordice*, Jackson State has recently been able to gain greater control over the Center. See also Wendy R. Brown, *The Convergence of Neutrality and Choice: The Limits of the State's Affirmative Duty to Provide Equal Educational Opportunity*, 60 TENN. L. REV. 63, 88 (1992) (stating that dual systems were exacerbated by establishment by historically white schools of off-campus centers near historically black schools). In other states, Louisiana's segregated law schools competed for students in Baton Rouge, see *United States v. Louisiana*, 692 F. Supp. 642 (E.D. La. 1988) (discussing consent decree to end dual system), *vacated*, 751 F. Supp. 606 (E.D. La. 1990), while Nashville, Tennessee was home to two state-supported racially identifiable schools, see *Geier v. University of Tenn.*, 597 F.2d 1056 (6th Cir.), *cert. denied*, 444 U.S. 886 (1979).

6. 112 S. Ct. 2727 (1992).

whether states have done enough to dismantle dual systems of higher education.⁷ Before the Supreme Court's ruling in *Fordice*, the legal debate focused on what Mississippi had to do to remedy the continuing effects of *de jure* segregation. The question was whether, as the State claimed, it was sufficient to adopt facially neutral educational and admissions policies, or, as the plaintiffs argued, more sweeping steps were necessary to equalize and desegregate dual-system schools. At trial, Judge Neal Biggers held that a state's duty "is satisfied by the good faith adoption of race-neutral policies and procedures."⁸ The court of appeals, sitting *en banc*, broke with other courts⁹ and affirmed the district court's decision.¹⁰ The Supreme Court vacated both lower court decisions and remanded *Fordice*, requiring the implementation of more than facially neutral policies to eliminate vestiges of dual-system segregation.¹¹

This Note argues that *Fordice* represents the culmination of years of standardless jurisprudence, offering little hope for an effective remedy of dual-college systems. Mississippi's experience since the remand in 1992 suggests *Fordice's* inadequacy. With Mississippi as a guide, this Note examines the unique factors that influence desegregation in higher education. Although these factors will differ from state to state, the issues in Mississippi are representative of those in other states, from Mississippi's neighbors to states like Pennsylvania and Maryland.¹² Funding, access to education, and student

7. *Id.* at 2737. Several circuits have decided lawsuits factually similar to *Fordice*. See *Geier v. University of Tenn.*, 597 F.2d at 1056; *Knight v. Alabama*, 787 F. Supp. 1030 (N.D. Ala. 1991), *aff'd in part, rev'd in part, vacated in part, and remanded*, 14 F.3d 1534 (11th Cir. 1994); *Geier v. Alexander*, 593 F. Supp. 1263 (M.D. Tenn. 1984), *aff'd*, 801 F.2d 799 (6th Cir. 1986); *Norris*, 327 F. Supp. at 1368. *But cf.* *United States v. Louisiana*, 692 F. Supp. at 642 (holding that states had to do more than implement facially neutral policies), *vacated*, 751 F. Supp. at 606 (vacating prior judgment on grounds that *Ayers v. Allain*, 914 F.2d 676 (5th Cir. 1990), and its less demanding standard, was controlling); *ASTA*, 289 F. Supp. at 784 (holding that State and particular college need only address admissions, faculty, and staff in good faith, race-neutral manner to satisfy affirmative duty to dismantle dual system)

8. *Ayers v. Allain*, 674 F. Supp. 1523, 1552 (N.D. Miss. 1987), *aff'd en banc*, 914 F.2d 676 (5th Cir. 1990), *vacated sub nom. Fordice*, 112 S. Ct. at 2727.

9. See, e.g., *Green v. County Sch. Bd.*, 391 U.S. 430, 437-38 (1968) (recognizing more rigorous affirmative duty to eliminate vestiges of past discrimination "root and branch"); see also *Geier v. University of Tenn.*, 597 F.2d at 1056; *Hunnicut v. Burge*, 356 F. Supp. 1227 (M.D. Ga. 1973); *Norris*, 327 F. Supp. at 1368.

10. *Ayers v. Allain*, 914 F.2d 676 (5th Cir. 1990), *rev'g en banc Ayers v. Allain*, 893 F.2d 732 (5th Cir. 1990), *vacated sub nom. Fordice*, 112 S. Ct. at 2727. The Fifth Circuit's original panel opinion reversed the district court and followed the Sixth Circuit's decision in *Geier v. University of Tenn.*, 597 F.2d at 1056, that states have an affirmative duty to eliminate the vestiges of segregation "root and branch." As a result of the *en banc* opinion in *Ayers*, the decision in *United States v. Louisiana*, 692 F. Supp. at 642, was vacated by the district judge, who regretted stalling the progress being made under the decision. See *United States v. Louisiana*, 751 F. Supp. at 608.

11. See *Fordice*, 112 S. Ct. at 2727.

12. See, e.g., *Mandel v. United States Dep't of Health, Educ. & Welfare*, 411 F. Supp. 542 (D. Md. 1976), *aff'd by an equally divided court and remanded sub nom. Mayor of Baltimore v. Mathews*, 571 F.2d 1273 (4th Cir. 1978). Some states will be subjected to little more than a review by the Department of Education. Telephone interview with Raymond Pierce, Office of Civil Rights, U.S. Department of Education (Apr. 1, 1994). Other states will face major overhauls of their college systems. Telephone interview with R.D. Harrison, Mississippi Deputy Superintendent of Education (Mar. 30, 1994). Alabama's dual system and the litigation springing from it are strikingly similar to Mississippi's, and the Eleventh

choice are fundamental concerns in all of these states.¹³ Even the most carefully crafted remedy, if implemented haphazardly, might further destabilize the social and educational environments in these states.¹⁴ Given the factors perpetuating college segregation, a comprehensive remedy cannot come from the judiciary alone. Instead, limited court involvement must be coupled with an innovative, coordinated effort between the Department of Education and dual-system states.¹⁵

Part I describes Mississippi's dual system and the environment that will shape the resolution of the case. Part II discusses *Fordice* itself, arguing that the Supreme Court's standard for determining whether Mississippi has remedied past *de jure* segregation fails to resolve the analytical ambiguities of prior cases or to appreciate the importance of student choice among educational institutions. The Court's standard does not protect the victims of *de facto* segregation by fairly apportioning costs or ensuring a comprehensive remedy. Inconsistencies in desegregation standards across circuits, so problematic before *Fordice*, are likely to remain, given the political and financial realities in dual-system states.

Part III delineates several factors that courts must weigh in order to desegregate higher education effectively, and discusses how historically black colleges might argue for their preservation under the *Fordice* standard. As this Part makes clear, the courts and litigants who are designing a remedy must understand why African-American and white students choose particular educational institutions. Part III also postulates that resistance to remedies under *Fordice* fundamentally differs from the "massive resistance" of the past and calls for new strategies for prodding recalcitrant players to participate in eliminating dual systems. Finally, Part III illustrates the potential impact of *Fordice* in societal, economic, and educational terms through an examination of two Mississippi universities.

Circuit's treatment of this litigation illustrates many of the concerns about *Fordice* discussed in this Note. See *Knight v. Alabama*, 14 F.3d 1534, 1540-56 (11th Cir. 1994).

13. Mississippi is especially notorious for its chronic poor performance. Last year, California newspapers publicized their state's tie with Mississippi at the bottom in fourth-grade reading scores in order to urge school improvements in that state. Bruce Herschensohn & John Tunney, *Yes on Prop. 174: Bring Accountability to California Schools*, SACRAMENTO BEE, Oct. 26, 1993, at B7; Elizabeth Shogren & Ralph Frammolino, *State's Pupils Among Worst in Reading Test*, L.A. TIMES, Sept. 16, 1993, at A1; see also Tamara Henry, *The 10 States That Do Best at Educating*, USA TODAY, Sept. 10, 1993, at D1 (noting that Mississippi spends less per pupil than all states except Utah, and pays less per teacher than all states except South Dakota).

14. Significantly, *Fordice* will force courts to reopen several cases that mandated plans now in mid- or late-implementation phases. Telephone Interview with Carl Lahring, Attorney with the Educational Equity Division, Office of the General Counsel, U.S. Department of Education (Oct. 29, 1993); see also Lawrence Rossow & Betty Pfefferbaum, Commentary, *United States v. Fordice: Standards Set for Desegregation of Higher Education*, 81 EDUC. L. REP. 673, 681-83 (1993).

15. Authority for at least some federal assistance already exists. See 42 U.S.C. §§ 2000c to 2000c-8 (1988) (providing for technical and financial assistance to local school officials for preparation, adoption, and implementation of desegregation plans for public schools).

Part IV asserts that courts are unable to remedy desegregation adequately and argues that an effective solution must involve a broad consideration of both historical factors and present variables. It concludes that federal assistance is necessary as part of a comprehensive approach to college desegregation. The conventional, judicially supervised remedy now under development is feasible, but it is inadequate. Given judicial reluctance to supervise a broad initiative and the factors motivating dual systems today, a new approach is crucial. Nonconfrontational federal assistance will best eliminate higher education dual systems in the shortest period of time, while ensuring that states will have the ability to implement extensive remedies that do not further injure the original victims of segregation.

I. ANATOMY OF A DUAL SYSTEM

Some background is necessary to navigate the morass of conflicting legal doctrines and remedial possibilities that the district court has faced since the remand of *Fordice*.¹⁶ Mississippi has eight state-run universities, five historically white and three historically black. The historically white schools are the University of Mississippi (Ole Miss), Mississippi State University (Mississippi State), the University of Southern Mississippi (Southern Miss), Delta State University (Delta State), and Mississippi University for Women (MUW).¹⁷ Mississippi's "Big Three" comprehensive universities—Ole Miss, Mississippi State, and Southern Miss—are all historically white schools.¹⁸ The three historically black schools are Alcorn State University (Alcorn), Jackson State University (Jackson State), and Mississippi Valley State University (Valley).¹⁹ Ole Miss opened in 1848, originally for the education of whites

16. Because of the complexity of the problem, it was apparent even shortly after the remand that a remedy was still far off. Interview with Judge Neal B. Biggers, Jr., U.S. District Court for the Northern District of Mississippi, in Oxford, Miss. (Mar. 18, 1993) [hereinafter Biggers, Mar. 18, 1993 interview]. Retrial of the issues did not begin until May 9, 1994, after the parties unsuccessfully attempted to negotiate a settlement. Telephone Interview with Judge Neal B. Biggers, Jr., U.S. District Court for the Northern District of Mississippi (Mar. 10, 1994) [hereinafter Biggers, Mar. 10, 1994 telephone interview].

17. *Ayers v. Allain*, 674 F. Supp. 1523, 1529 (N.D. Miss. 1987), *aff'd en banc*, 914 F.2d 676 (5th Cir. 1990), *vacated sub nom.* *United States v. Fordice*, 112 S. Ct. 2727 (1992).

18. 1 Board of Trustees of State Institutions of Higher Learning, *The Ayers Decision* (1992) (on file with Mississippi Board of Trustees of Institutions of Higher Learning) [hereinafter 1 *The Ayers Decision*] app. Enrollment, Mississippi Universities Headcount Enrollment as a Percent of Total Enrollment All Locations, by Ethnicity, Fall 1987 Through Fall 1991 [hereinafter, Enrollment, by Ethnicity]. The "Big Three" dwarf the other schools financially. Mississippi State had a total operating budget of \$127,115,882 in 1992-93, compared to \$128,240,616 in operating funds for *all five* of the small schools, which served about 3000 more students than Mississippi State. *Id.* app. Financial Data, Mississippi Universities Summary of Total Operating Budgets, FY 1992-93. The three historically black schools spend less on each full-time equivalent (FTE) student than all the historically white schools except MUW. Mississippi Valley State University spends the least, at \$1980 per FTE student, while Southern Miss spends the most, at \$3604. *Id.* app. Financial Data, Total Expenditures Per FTE and Instruction as a Percent of Total and Instruction Expenditure Per FTE, Fiscal Year 1991-92.

19. *Id.* app. Enrollment, by Ethnicity.

only.²⁰ Today the "flagship" institution of the state, Ole Miss has under its auspices the only public law school, medical school, and pharmacy school in the state. It is a comprehensive university with a large liberal arts college, business and accounting programs, and well-developed engineering, education, and science departments. The school was not integrated until James Meredith enrolled in 1962,²¹ and in 1991, of the school's approximately 11,000 students, 85% were white and 9% were African-American.²²

Alcorn, the oldest land grant college for African-Americans in the United States, was founded in 1871 to provide agricultural education for Mississippi's African-American youth.²³ In 1991, about 95% of Alcorn's 3250 students²⁴ were African-American.²⁵ Alcorn has retained its focus on agriculture and related areas of study. A comparison of Alcorn and Mississippi State, the other land grant school and the third oldest college in the state, reveals the disparities inherent in the dual-educational system. Founded in 1878, Mississippi State also had an agricultural focus, but the school admitted whites only.²⁶ Since then, Mississippi State has grown to be the largest school in the state, with over 14,500 students enrolled in 1991, about 80% of whom were white.²⁷ Mississippi State maintains its agribusiness programs, and also has strong programs in other areas, such as engineering, business, and architecture. While Mississippi State has eleven agricultural business or science programs, Alcorn, the older land-grant school, has only four such areas of study, with only a few students enrolled in each.²⁸ While Mississippi State expended \$3673 per student in fiscal year 1991-92, Alcorn was able to spend only \$2731 per student.²⁹

In recent decades, Southern Miss also has become a comprehensive university of almost 14,000 students, most of whom are white. Jackson State and Valley, established only after litigation in the 1940's began to challenge the racial inequalities in higher education,³⁰ originally were limited to training African-American teachers and providing vocational education. Jackson State has grown somewhat in size and scope, but Valley has evolved into an institution geared toward community service and adult education.

20. *Ayers*, 674 F. Supp. at 1527.

21. *Id.* at 1529; see *Meredith v. Fair*, 305 F.2d 343 (5th Cir.), *cert. denied*, 371 U.S. 828 (1962).

22. 1 *The Ayers Decision*, *supra* note 18, app. Enrollment, by Ethnicity.

23. *Ayers*, 674 F. Supp. at 1527.

24. 1 *The Ayers Decision*, *supra* note 18, app. Enrollment, Mississippi Universities Headcount Enrollment All Locations, by Ethnicity, Fall 1987 Through 1991.

25. *Id.* app. Enrollment, by Ethnicity.

26. *Ayers*, 674 F. Supp. at 1527.

27. 1 *The Ayers Decision*, *supra* note 18, app. Enrollment, by Ethnicity.

28. *Id.* app. Academic Programs & Degrees Awarded, Mississippi Universities Junior and Senior Enrollment and Degrees Conferred by Academic Program, 1991-92.

29. *Id.* app. Financial Data, Comparison of Mississippi Per Student Appropriation to the SREB Region, Fiscal Year 1991-92. Both schools' average appropriations per student were far below those of comparable regional schools. *Id.*

30. *Ayers*, 674 F. Supp. at 1528.

All the schools have kept their original racial identities. Valley, the most extreme example, has almost 100% African-American enrollment.³¹ Jackson State is the least racially concentrated of the historically black schools; its student body was 93.5% African-American in 1991. Delta State is the most integrated of all of Mississippi's public colleges, with an enrollment ratio of 22.8% African-American, 76.3% white, and 0.8% other in 1991.³²

The *Fordice* defendants concede that past *de jure* segregation violated the civil rights of African-American citizens.³³ But Mississippi's system of higher education is an evolving entity—materially different even since the case began. The Board of Trustees of State Institutions of Higher Learning (IHL Board) oversees the operations of state universities;³⁴ its most recent reorganization of the university system came in the early 1980's. During this time, the IHL Board gradually approved disparate ACT testing requirements, with historically white schools requiring a higher minimum score for admission than historically black schools. With this policy, the IHL Board ostensibly sought to provide African-Americans with greater access to college, but the plaintiffs cite the policy as evidence of state-sponsored segregation.³⁵ The IHL Board also began using mission statements to attempt to define goals for the eight universities. The Board assigned universities to one of three classifications: comprehensive, regional, and urban.³⁶ Ole Miss, Mississippi State, and Southern Miss were called "comprehensive," and were authorized to offer a greater number of degree programs, including doctoral programs. MUW, Delta State, Valley, and Alcorn were labeled "regional," implying a more limited scope of quality undergraduate education. Jackson State became the state's sole "urban" university, offering more programs than the regional schools, but focusing on serving the Jackson area's needs.³⁷

31. 1 The *Ayers* Decision, *supra* note 18, app. Enrollment, by Ethnicity, *see also* James A. Washburn, Note, *Beyond Brown: Evaluating Equality in Higher Education*, 43 DUKE L.J. 1115, 1141 n 128 (1994)

32. 1 The *Ayers* Decision, *supra* note 18, app. Enrollment, by Ethnicity

33. *United States v. Fordice*, 112 S. Ct. 2727, 2735 (1992).

34. *Ayers*, 674 F. Supp. at 1526. Although the system has evolved, the Board noted funding disparities and a lower proportion of African-Americans attending college as early as 1954. The Board also recognized the limited opportunities for African-Americans once they arrived at college. *Id.* at 1528–29 n 2. The Board did little about these problems, however, and instead helped facilitate the obstacles erected to perpetuate segregation. *See generally* Washburn, *supra* note 31, at 1138–42 (describing inadequate actions taken by IHL Board to comply with Title VI of Civil Rights Act of 1964, 42 U.S.C. § 2000d (1988))

35. *See Ayers*, 674 F. Supp. at 1532–34. The lower required ACT score for historically black schools was justified as a means to compensate for the statistical fact that as a group African-Americans had, over time, performed worse on standardized tests than whites. *See id.* at 1531–35. As a result of the disparate testing requirements, access to the larger, better-endowed, predominantly white schools was more difficult than access to historically black schools.

36. *Id.* at 1539.

37. The "urban" designation has been undefined since its creation. The label may be little more than a truism that Jackson State is in the state's largest city. A series of polls of Jackson residents is instructive. Although Jacksonians interviewed could either broadly fault or praise the school for not meeting its role in metropolitan Jackson, no one was specific as to just what the school's role in the community was or should be. Andy Kanengiser, *Perceptions of Urban University Racially Divided*, CLARION-LEDGER (Jackson, Miss.), Dec. 20, 1992, at A14.

II. THE LONG AND WINDING ROAD: DEVELOPING A JURISPRUDENCE

A. *Detours of a Standardless Approach: Fordice in Context*

Before *Fordice*, the Supreme Court had never ruled on the specific parameters of the dual-system states' duty to remedy the effects of *de jure* segregation in higher education, despite opportunities to do so.³⁸ In large part, then, the Supreme Court deserves the blame for the confusion behind *Fordice*.³⁹ When the Court could have explicitly extended to colleges the mandate in *Green v. County School Board*⁴⁰ to eliminate *de facto* segregation in lower education,⁴¹ or developed an alternative standard for higher education, it straddled the fence.

Shortly after *Green*, the Court summarily affirmed two higher education cases that contained irreconcilable interpretations of the duty to integrate colleges: *Alabama State Teachers Ass'n v. Alabama Public School & College Authority (ASTA)*⁴² and *Board of Visitors of the College of William & Mary v. Norris*.⁴³ In *ASTA*, the lower court distinguished *Green*, citing differences between colleges and lower education and concluding that a state's duty to remedy past *de jure* discrimination was satisfied so long as racially neutral, equal-access policies were implemented for all colleges.⁴⁴ In contrast, the lower court in *Norris* held that Virginia's duty to desegregate schools required more than mere neutrality and extended *Green* to all areas of education.⁴⁵ These decisions made a consistent judicial commitment to ending dual systems impossible and instead left lower courts to choose between competing standards. A decade later, the Court erected *Bazemore v. Friday*⁴⁶ on this

38. In the landmark case of *Green v. County Sch. Bd.*, 391 U.S. 430, 437-41 (1968), the Court helped to define what must be done to desegregate lower education by finding that the Constitution mandates affirmative remedial measures to eliminate "root and branch" all vestiges of *de jure* segregation. See also *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971) (recognizing that remedy must be broad enough to address constitutional violation). Despite *Green's* apparent breadth, it was never clear whether the case's holding applied to higher education. See Comment, *Integrating Higher Education: Defining the Scope of the Affirmative Duty To Integrate*, 57 IOWA L. REV. 898, 901-05 (1972); Note, *Integration of Higher Education in the South*, 69 COLUM. L. REV. 112, 118-19 (1969); David E. Kendall, Note, *The Affirmative Duty To Integrate in Higher Education*, 79 YALE L.J. 666, 671-73 (1970).

39. For an interesting discussion of the development of the legal duty to integrate higher education before *Fordice*, see Washburn, *supra* note 31, at 1135-38; see also Lorne Fienberg, Note, *United States v. Fordice and the Desegregation of Public Higher Education: Groping for Root and Branch*, 34 B.C. L. REV. 803, 836-45 (1993).

40. 391 U.S. 430 (1968).

41. See sources cited *supra* note 39.

42. 393 U.S. 400 (1969).

43. 404 U.S. 907 (1971).

44. *ASTA*, 289 F. Supp. 784, 789-90 (M.D. Ala. 1968), *aff'd per curiam*, 393 U.S. 400 (1969).

45. *Norris v. State Council of Higher Educ.*, 327 F. Supp. 1368, 1372-73 (E.D. Va. 1971), *aff'd mem. sub nom. Norris*, 404 U.S. at 907; see also Geier v. University of Tenn., 597 F.2d 1056 (6th Cir. 1979) (following *Norris*); *Hunnicut v. Burge*, 356 F. Supp. 1227 (M.D. Ga. 1973) (following rationale similar to that in *Norris*).

46. 478 U.S. 385 (1986).

fractured foundation, which only exacerbated the confusion. In *Bazemore*, the Court seemed to draw a distinction between the duty to desegregate organizations where attendance is voluntary and the duty to desegregate organizations where attendance is mandatory.⁴⁷

Against this backdrop, it is easy to see why both sides in *Fordice* had strong legal arguments and little motivation to negotiate or settle. Plaintiffs, for example, had ample legal ammunition in *Green* and *Norris* to urge that the condition of historically black colleges, coupled with the paltry enrollment of African-Americans at historically white schools, showed that the doctrine of “separate but (un)equal” was alive and well. Conversely, defendants could argue that under *ASTA* and *Bazemore* facially neutral policies were adequate to desegregate higher education, where attendance is not compulsory. While college education differs in important ways from lower education, it is similar in at least one fundamental respect: Where discrimination existed, or persists, the best path to a solution lies in issuing a clear standard to guide remedial actions. Because the Supreme Court failed to articulate such a standard, litigation across circuits splintered,⁴⁸ and two decades were lost to posturing and retrenchment.

Finally, the Court, in an 8–1 opinion, held that Mississippi had to take greater steps to undo past racial discrimination than merely adopting facially neutral policies and admissions standards for all eight schools.⁴⁹ The Court agreed with the lower courts that higher education is different than lower education because universities are not fungible, and students have a choice in selecting a college.⁵⁰ The Court noted, however, that the fact that “college attendance is by choice and not by assignment does not mean that a race-neutral admissions policy cures the constitutional violation of a dual system.”⁵¹ Many factors influence choice of educational institution, and “[a]lthough some of these factors clearly cannot be attributed to State policies, many can be.”⁵² Any state policies traceable to the *de jure* era that have discriminatory effects, then, must be reformed “to the extent practicable and consistent with sound educational practices.”⁵³ According to the Court:

47. The Court examined the duty to desegregate voluntary organizations that had retained their racial identity, theoretically through applicants’ free choice, and held that if people could choose to join whichever club they wanted, and if membership itself were noncompulsory, nothing beyond neutral membership policies would be necessary. *Id.* at 408 (White, J., concurring).

48. The Sixth and Eleventh Circuits, along with several district courts, adopted more rigorous standards, while the Fifth Circuit required less from dual-system states to remedy segregation. See cases cited *supra* note 7.

49. *United States v. Fordice*, 112 S. Ct. 2727, 2736 (1992).

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

If the State perpetuates policies and practices traceable to its prior system that continue to have segregative effects—whether by influencing student enrollment decisions or by fostering segregation in other facets of the university system—and such policies are without sound educational justification and can be practicably eliminated, the State has not satisfied its burden of proving that it has dismantled its prior system.⁵⁴

The Court found, based upon the undisturbed factual findings of the courts below, that several aspects of Mississippi's dual system were constitutionally suspect. Although facially neutral, these aspects nonetheless influenced and limited student choice and contributed to the racial identities of the eight universities.⁵⁵ The Court specifically questioned four suspect areas—admissions standards, program duplication, institutional mission statements, and the continued operation of all eight universities, finding that policies in all four of these areas are traceable to past discrimination and raise concerns about continuing segregative effects.⁵⁶ The Court placed the burden to justify or eliminate questionable education policies on the State.⁵⁷

Justice Thomas, in a separate concurrence, emphasized his agreement with the Court's new standard, but he also placed a significant gloss upon it. The thrust of his concurrence is an explicit defense of historically black schools; he stated that *Fordice* in no way prevents states from operating a "diverse assortment of institutions . . . open to all on a race-neutral basis, but with established traditions and programs that might disproportionately appeal to one race or another."⁵⁸ Justice Thomas also claimed that the standard in *Fordice* does not require racial balancing or student reassignment, but a careful examination of the motivations behind suspect policies.⁵⁹ Thomas thus portrayed *Fordice* as requiring "a far narrower, more manageable task than that imposed under *Green*."⁶⁰

Justice Scalia, who partially concurred in the judgment but also filed a partial dissent, asserted that the burden imposed upon dual-system states by the

54. *Id.* at 2737.

55. *Id.* at 2738. The Court expressly left undisturbed the finding below that there was no discriminatory purpose behind many state policies. Nevertheless, the plaintiffs had only to demonstrate that policies traceable to the prior segregative regime had continuing segregative effects. *Id.* at 2738 n.8.

56. *Id.* at 2738–43.

57. *Id.* at 2738. Justice O'Connor filed a concurrence "to emphasize that it is Mississippi's burden to prove that it has undone its prior segregation, and that the circumstances in which a State may maintain a policy or practice traceable to *de jure* segregation that has segregative effects are narrow." *Id.* at 2743 (O'Connor, J., concurring).

58. *Id.* at 2746 (Thomas, J., concurring).

59. *Id.* at 2744–45.

60. *Id.* at 2745. Although Justice Thomas touched on many of the concerns outlined in this Note, there is little in the majority's standard that historically black schools can rely upon to guarantee their survival. See *infra* notes 93–100 and accompanying text. Thomas ended his opinion with an admonition that may indeed be more prophetic than he hoped: "It would be ironic, to say the least, if the institutions that sustained blacks during segregation were themselves destroyed in an effort to combat its vestiges." *Fordice*, 112 S. Ct. at 2746 (Thomas, J., concurring).

majority is unsustainable.⁶¹ Scalia argued that the *Fordice* standard is ill-equipped to solve higher education segregation,⁶² and criticized it as lacking any genuine guidance for lower courts and as dangerous to the interests of citizens harmed by the effects of past discrimination.⁶³ Scalia predicted “a number of years of litigation-driven confusion and destabilization in the university systems of all the formerly *de jure* States, that will benefit neither blacks nor whites”⁶⁴ While much of his assessment of the majority opinion is compelling, Scalia offered no alternative solution.⁶⁵

B. *The Road Not Taken: A Vague Standard Fails To Protect Plaintiffs' Interests*

Fordice fails to remedy the lack of clarity and consistency in a muddled jurisprudence.⁶⁶ Where the Court could have either adapted *Green* to higher education or allowed state policies to stand under the less restrictive *Bazemore* regime, it did neither.⁶⁷ The principles of *Green* and *Bazemore* are relevant even if the cases are not entirely applicable, but the Court did not effectively fuse the relevant parts of each to articulate a standard that captures the scope of the duty to provide access to nondiscriminatory college education. The adoption of one or the other in a clearer, more forceful way would have at least minimized the destabilization and protracted litigation that is now likely. While *Fordice* notes many of the issues relevant to college desegregation, it does not offer adequate analysis or guidance. Defendants will easily manipulate the *Fordice* standard because it is vague. *Fordice* fails to solve the voluntary/involuntary dilemma raised by *Bazemore*, and it provides no formula for allocating the burdens of desegregation.

The *Fordice* standard's vagueness will hinder its implementation. Judge Biggers noted that in theory, once a court determines the scope of the policies and practices at issue in litigation, the burden is on the plaintiffs to prove that questionable policies are in fact remnants of *de jure* segregation.⁶⁸ But it may

61. *Id.* at 2746 (Scalia, J., concurring in the judgment in part and dissenting in part).

62. *See id.* at 2748–49. Scalia stated that despite the majority's claim that *Green* did not apply wholly to colleges, *Fordice*'s requirements “resemble[d] what we prescribed for primary and secondary schools . . . [and] has no proper application in the context of higher education.” *Id.* at 2746.

63. *Id.* at 2746–47. Scalia stated that “[w]hat the Court's test is designed to achieve is the elimination of predominantly black institutions.” *Id.* at 2752.

64. *Id.* at 2753.

65. Scalia seemed to suggest that the only real problem with Mississippi's dual system was its disparate admissions requirements, so that when that aspect of the former *de jure* system was repaired, Mississippi would have satisfied its desegregation burden. *Id.* at 2751.

66. *See supra* notes 38–47 and accompanying text.

67. *See Fordice*, 112 S. Ct. at 2734–37; *see also* Kevin Brown, *Has the Supreme Court Allowed the Cure for De Jure Segregation To Replicate the Disease?*, 78 CORNELL L. REV. 1, 43–48 (1992).

68. Biggers, Mar. 18, 1993 interview, *supra* note 16.

be difficult for courts to narrow the issues appropriately.⁶⁹ According to Judge Biggers, if courts do successfully define the issues and the plaintiffs show that some facet of the system is a remnant of *de jure* segregation, the burden then shifts to the State to show that the policies in question are justified or cannot practicably be eliminated. As a practical matter, however, courts will have to resort to cumbersome hearings and discovery, eventually leading to full evidentiary trials, to determine which policies are remnants of prior *de jure* systems.⁷⁰ The *Fordice* standard offers no clear guidance on how plaintiffs are to prove that existing policies are traceable to the past.⁷¹ Plaintiffs' victories, therefore, will likely be limited to those areas already identified by the Supreme Court as "suspect." Except in the case of an obvious violation, the standard favors defendants.

The *Fordice* defenses of educational justifiability and impracticable elimination provide defendants with ample opportunity to assert plans that, while solving smaller problems, leave larger problems untouched; remedial plans could merely disguise the maintenance of the status quo.⁷² Franz Marshall, an assistant attorney for the *Fordice* litigation at the U.S. Department of Justice, says that educational bureaucrats, part of the defendant status quo, will strongly influence courts because the courts lack a clear standard and the bureaucrats reputedly have the relevant expertise.⁷³ Those who control the

69. In Mississippi, the deliberations since remand have been acrimonious, characterized by myriad proposals that might meet the standard. See *Desegregation Plan Would Strengthen Rather than Close Black Universities*, MISS. PRESS (Pascagoula, Miss.), Dec. 31, 1993, at A1 (comparing different plans). The lack of specifics in *Fordice* has allowed the parties to remain far from agreement. See Transcript of Oral Presentation/Status Conference at 13-15, *United States v. Fordice*, No. GC75-9-B-O (N.D. Miss. filed Oct. 22, 1992), on remand from *United States v. Fordice*, 112 S. Ct. 2727 (1992) [hereinafter Status Conference Transcript]. The plaintiffs have called the defendants' solutions "cosmetic" and said that "there is nothing in th[eir] plan to indicate the defendants' ideas and proposals for making it work." *Id.* at 67. The status conference closed with heated accusations and angry comparisons to the days of "governors at the door." *Id.* at 75-81.

70. Biggers, Mar. 18, 1993 interview, *supra* note 16. The path of *Fordice* since remand confirms Justice Scalia's prediction of years of confusing litigation, see *supra* notes 62-64 and accompanying text, and contradicts Justice Thomas' assertion that *Fordice's* concentration on the justification behind policies would be "more manageable" than Court-ordered racial balancing among schools, see *supra* notes 59-60 and accompanying text; see also Robert N. Davis, *The Quest for Equal Education in Mississippi: The Implications of United States v. Fordice*, 62 MISS. L.J. 405, 433 n.177 (1993) (arguing that standard has proven to be full of land mines for litigants). The case was scheduled and rescheduled for retrial, which finally began on May 9, 1994, after last-minute negotiations collapsed "in a flurry of recriminations." Smothers, *supra* note 2, at A10. The parties could not reach an out-of-court settlement during closed negotiations throughout the winter and spring of 1994. See Biggers, Mar. 10, 1994 telephone interview, *supra* note 16; see also *Black Leaders Meet with College Board*, DAILY MISSISSIPPIAN (University, Miss.), Mar. 9, 1994, at 1.

71. *Fordice*, 112 S. Ct. at 2747 (Scalia, J., concurring in the judgment in part and dissenting in part).

72. *Id.* at 2737 (opinion of the Court); see also Davis, *supra* note 70, at 409, 449-50 (stating that *Fordice* standard could find even present dual system constitutional).

73. Telephone Interview with Franz Marshall, Assistant Attorney, U.S. Department of Justice, Civil Rights Division (Mar. 22, 1994). Of course, there are experts on the plaintiffs' side as well; hence, Marshall did not see the reliance on educational bureaucrats as problematic. Those experts already affiliated with the Mississippi Institutions of Higher Learning, however, will know the system best and will therefore give the most credible testimony.

necessary information (universities and governing boards) either have a vested interest in maintaining their programs, or participated in the original harm. Although the Supreme Court did not intend its four “suspect areas” to exhaust possible areas for reform,⁷⁴ the educational bureaucracy can manipulate the *Fordice* standard to limit to these four areas the policies and practices plaintiffs can successfully challenge as remnants of segregation.⁷⁵

Fordice would have been more effective if the Court had clearly articulated its intentions when it identified “suspect areas.” For instance, the Court should have explicitly stated that the maintenance of so many colleges—in light of the historical reasons for their establishment—represented state action that must be remedied, if that is what it meant by its allusion to the number of schools as a remnant of past discrimination. Such a statement would have saved time, resources, and pain on remand. As it is, courts and litigants are left to guess the Court’s meaning. Similarly, in noting that differences exist between higher and lower education, the Court could have told us *which* differences mattered most and thereby defined its standard.

In sum, the *Fordice* standard’s vagueness gives defendants much power to influence the remedy.⁷⁶ States may even be able to hitch unrelated reforms as “riders” to *Fordice* remedies.⁷⁷ Defendants must have some flexibility to fashion appropriate remedies, but *Fordice* allows them too much discretion to

74. *Fordice*, 112 S. Ct. at 2738.

75. Plaintiffs who challenge one of the four suspect practices will probably prevail automatically, because defendants will not be able to justify retention of these policies on educational grounds. *See, e.g.*, Plaintiffs’ Unified List of Policies and/or Practices Properly in Issue Before This Court at 4–7, *United States v. Fordice*, No. GC75-9-B-O (N.D. Miss. filed Nov. 18, 1992) (identifying ACT and admissions requirements, funding policies, mission statements, and number of schools as issues, although stipulating only that “the issue of the number of institutions of higher education . . . to be operated is before the Court”), *on remand from Fordice*, 112 S. Ct. at 2727.

76. In Mississippi, the Board’s attorneys have used the opinion to attack the plaintiffs, repeatedly pointing out that the defendants had never before raised the number of schools as an issue and that the Supreme Court rejected the plaintiffs’ main thrust for more funding. *See* Status Conference Transcript, *supra* note 69, at 22–24. The Board’s attorneys have accused the plaintiffs of “run[n]ing] from the decision that they obtained” and have claimed that the defendants do not have the power to effectuate the full range of proposed remedies. *Id.* at 24–25.

77. *See* Linda A. Schwartzstein, *Bureaucracy Unbounded: The Lack of Effective Constraints in the Judicial Process*, 35 ST. LOUIS U. L.J. 597, 610 (1991) (arguing that school boards may seek money not for educational needs but for improved working conditions). The Board of Trustees has used the plaintiff “victory” effectively to manipulate the identification of problematic remnants of *de jure* segregation and to argue that it is unable to construct broad solutions. The Board stipulated that mission statements, the number of universities, and maintenance of two colleges (Delta State and Valley) in the Delta are all remnants. The Board has not gone further than the concessions it made in its plan, however, and has carefully tailored its statements to be consistent with the plan’s implementation.

While the Board’s plan would elevate Jackson State to the status of a “comprehensive” university, the most controversial issue proposed by the defendants is the merger of Valley and Delta State to create a new university on the present Delta State campus. *See* The IHL Proposal at 7, *in* 1 *The Ayers Decision*, *supra* note 18. The Itta Bena campus would be closed completely. *Id.* at 13. There are no guarantees in the plan that any core quality curricula will be placed exclusively under a historically black college’s control. Defendants even admit that Jackson State will not have any programs that would attract large numbers of white students and that are unavailable at other comprehensive universities. The predominantly white schools will offer such programs. *See* Status Conference Transcript, *supra* note 69, at 48–49.

address issues not even contested by plaintiffs.⁷⁸ Anything that can be tied to the case can be portrayed as judicially mandated and thus not politically debatable, allowing special interests to blunt the effectiveness of the remedy.

The existence of choice is a crucial feature of the higher education context; indeed, it produced the divergence among cases that led to the confused reasoning in *Fordice*. The Court alluded to "choice" in *Fordice*,⁷⁹ but again it gave too little guidance on the term's meaning and significance. The scholars who have written on the dimensions and determinants of choice generally take one of two different approaches when explaining how choice works. One approach holds that constraints imposed by the white majority distort African-Americans' choices, forcing them to attend historically black schools they otherwise would not.⁸⁰ The other approach searches for independent rationales behind choices that African-American students make to attend historically black colleges.⁸¹ This latter approach assumes that many African-Americans weigh the costs and benefits of historically black schools and choose them for their unique culture and environment, in spite of the schools' physical shortcomings.⁸²

This second way of understanding "choice" suggests that attempts to make predominantly white campuses more hospitable to African-American students may not compensate for the damage caused by closing historically black schools. If historically white college campuses cannot be made attractive to African-American students, African-Americans may feel that they have no

78. In Mississippi, for example, the IHL Board has renewed its effort to close the veterinary and dental schools. See The IHL Proposal at 6, in 1 *The Ayers Decision*, *supra* note 18. The closure of the veterinary school has been debated, along with the closure of one or more historically black schools, for years, but the legislature has never implemented the proposals. See Vicky Oswald, *Vet School on Closure: "Here We Go Again"*, COM. DISPATCH (Columbus, Miss.), Oct. 26, 1992, at A1, A7.

79. See *Fordice*, 112 S. Ct. at 2736.

80. See Davis, *supra* note 70 (arguing that choice is not really free because of continuing effects of past constraints); Paul Gewirtz, *Choice in the Transition: School Desegregation and the Corrective Ideal*, 86 COLUM. L. REV. 728 (1986) (asserting that choice as an end is desirable, but that during remedy choice cannot be allowed to maintain racial identity).

81. See Drew S. Days, III, *Brown Blues: Rethinking the Integrated Ideal*, 34 WM. & MARY L. REV. 53, 63-74 (1992); Alex M. Johnson, Jr., *Bid Whist, Tonk, and United States v. Fordice: Why Integrationism Fails African-Americans Again*, 81 CAL. L. REV. 1401, 1432 (1993); see also *Fordice*, 112 S. Ct. at 2745-46 (Thomas, J., concurring) (describing "distinctive histories and traditions" of historically black colleges). The two groups' explanations of choice may be complementary rather than competing explanations of why African-American students choose to attend the colleges they do. An adequate remedy must eradicate racist distortions that curtail choices without reducing the options available to African-American students.

82. In fact, over a third of all African-American college applicants in Mississippi who qualify for automatic admission to predominantly white schools still choose to go to historically black colleges. Telephone Interview with Carl Lahring, *supra* note 14. Justice Thomas' emphasis on preserving historically black schools was aimed at preserving students' opportunities to make such choices, *Fordice*, 112 S. Ct. at 2746 (Thomas, J., concurring), as was Drew Days' discussion of the unique benefits that historically black schools offer, Days, *supra* note 81, at 63-74; see also Washburn, *supra* note 31, at 1156-63 (arguing that focus on racial balancing by *Brown* and other older integration cases should be reexamined in modern college context to accommodate importance of student choice and educational quality available at historically black schools).

choice but to leave the state or drop out of college.⁸³ Because economic constraints may prevent many African-American students from leaving the state, they are more vulnerable than whites if their unique college environment is eliminated. Because of discrimination, whites have always had more freedom of choice, and they can, therefore, more easily withstand the burdens of dismantling dual systems. For choice to become meaningful for African-Americans, it must encompass the freedom to choose among varied schools.

The Court could have addressed the issue of choice by holding that college attendance is no longer completely voluntary, that there is less of a choice in the decision to attend college than there once was. Such an analysis would have allowed the Court to apply *Green* to higher education while preserving *Bazemore's* voluntary/involuntary analysis. Since *Green* was decided, a college degree has become much more crucial to success in society and the economy.⁸⁴ Rather than confusing the issue through a strained adaptation of *Green* and a reinterpretation of *Bazemore*,⁸⁵ the Court could have noted that college is now so essential to gaining social influence that college attendance is effectively involuntary.⁸⁶ Perhaps *Green* does not apply perfectly to universities, but such an analysis reconciles *Fordice* with both the spirit of *Green* and the voluntary/involuntary logic of *Bazemore*. In *Fordice*, however, the Court fumbled its opportunity to provide meaningful treatment of choice.

Another problem with *Fordice* is that it provides no safeguard against the possibility that the remedial burdens will fall heavily on the people most hurt by the dual system in the first place. There is nothing in the standard to protect plaintiffs' interests once they have identified remnants of *de jure* segregation.⁸⁷ States can reduce program duplication by leaving historically black schools as even weaker shells, yet the standard will be met. The vague nature of "sound educational justification" leads to an opinion purporting to

83. See *Days*, *supra* note 81, at 71; *Johnson*, *supra* note 81, at 1412-13; *Kendall*, *supra* note 38, at 677-78.

84. College degree holders commanded a 60% premium in salaries over high school diploma holders in 1990. See Robert J. Samuelson, *Grad Glut?*, WASH. POST, Aug. 26, 1992, at A23. The worsening economic performance of high school graduates compared to college graduates thus distinguishes *ASTA*, 289 F. Supp. 784 (M.D. Ala. 1968), *aff'd per curiam*, 393 U.S. 400 (1969), from *Fordice*. When *ASTA* was decided, people had access to a larger selection of high-paying, challenging career opportunities without a college degree, so that if there were residual barriers to higher education, the injury was less severe. In light of a college degree's increased importance, however, more state action is now necessary to ensure that choice is not illegally constrained. While this does not reconcile *ASTA* and *Norris*, such a rationale does make *ASTA* consistent with *Green* and *Bazemore*.

85. See *Fordice*, 112 S. Ct. at 2736-37.

86. See Samuelson, *supra* note 84, at A23; Paul W. Valentine, *Plan to Improve Md.'s Black Institutions Clears First Hurdle*, WASH. POST, Nov. 20, 1991, at F5 (noting need for higher education among African-Americans as growing segment of work force competing for jobs requiring degrees).

87. See *supra* notes 62-64 and accompanying text. U.S. Representative Bennie Thompson, who represents Mississippi's majority African-American Second Congressional District and is a plaintiff in the lawsuit, said that many plaintiffs feared African-Americans would bear the heaviest burden in college desegregation, just as they did in lower education desegregation. *Smothers*, *supra* note 2, at A10.

stand for the preservation of historically black colleges⁸⁸ but proving in reality to be quite hostile to their existence.⁸⁹ If “sound educational justification” refers only to the quality of facilities and other tangibles, then states will be free to disregard special cultural or environmental considerations and other intangibles in choosing schools to eliminate. Defendants’ delineation of “sound” educational policy, rather than plaintiffs’ needs for remedial measures that are truly compensatory, will dictate school closures.⁹⁰

To ensure plaintiffs a meaningful victory, the Court could have included an explicit balancing component or cost-appropriation formula to allocate the burdens of the remedy. Courts would then have to consider how remedial plans affect the parties, not just whether the plans technically correct violations. If colleges had to be closed or programs discontinued, plaintiffs could be compensated and losses could be shared equitably. Such balancing may be implied by *Fordice*, but the standard would protect plaintiffs’ rights better if the decision explicitly incorporated such protections, especially given the problems created by defendants’ virtual monopoly on state educational information and resources.

Fordice is more consistent with recent primary education cases that eschew both long-term activism and clear direction than with *Green*.⁹¹ Such restraint in judicial implementation of a remedy is appropriate, but courts could more clearly identify the elements of a legal violation and still avoid policy questions better handled by political actors. Judicial flexibility might ordinarily be desirable, but *Fordice* leaves the remedy to the defendants’ discretion. Furthermore, the *Fordice* plaintiffs’ attempts to address broader systemic and social concerns will increase their burden of proof because these concerns are less obviously tied to *de jure* segregation. The defendants will be able to rely on societal factors, such as poverty in Mississippi, and a host of other

88. *Fordice*, 112 S. Ct. at 2746 (Thomas, J., concurring) (noting that there may be “sound educational justification” for maintaining historically black colleges).

89. *Id.* at 2752 (Scalia, J., concurring in the judgment in part and dissenting in part) (noting vulnerability of historically black schools under Court’s analysis); see also Note, *The Supreme Court 1991 Term—Leading Cases*, 106 HARV. L. REV. 163, 235 (1992) (“*Fordice* poses a serious threat to the continued viability of state-supported, predominantly black universities in the formerly segregated states.”); Washburn, *supra* note 31, at 1147–50 (concluding that *Fordice* will likely provoke states to integrate all public universities rather than risk further judicial scrutiny).

90. In fact, the Mississippi defendants’ proposal reduces the number of schools. The IHL Proposal at 7, in 1 *The Ayers Decision*, *supra* note 18. In several states, the most common suggestion is merger or closure of historically black programs. See, e.g., *United States v. Louisiana*, 692 F. Supp. 642, 658 (E.D. La. 1988) (noting that one way to remedy vestiges of segregated system is to reduce number of colleges and duplicative programs), *vacated on other grounds*, 715 F. Supp. 606 (E.D. La. 1990). Parts of the Eleventh Circuit’s opinion in *Knight v. Alabama*, 14 F.3d 1534, 1552–53 (11th Cir. 1994), however, require district courts to consider campus environment and cultural factors. Nonetheless, the court gives no guidance as to when campuses are hostile or hospitable, or when curricula adequately reflect African-American cultural concerns.

91. See *Freeman v. Pitts*, 112 S. Ct. 1430, 1445–46 (1992) (giving courts authority to withdraw supervision in incremental stages in order to return control to local authorities as soon as actual violation is remedied); *Board of Educ. v. Dowell*, 498 U.S. 237, 247–48 (1991) (holding that desegregation decrees are not perpetual and that, once legal violation is remedied, court must withdraw).

demographic factors to argue that vestiges of *de jure* segregation cannot be practicably eliminated.⁹² Thus, a solution encompassing the total educational environment in Mississippi is effectively foreclosed.

III. LIVING WITH *FORDICE*: DYNAMICS OF RESOLUTION

In order to create a more workable framework for educational reform, a remedy should reflect several factors that may not be amenable to inclusion in the Court's opinion. Specifically, a remedy must account for the societal role of historically black colleges, the character of resistance to court remedies, and the impact of any remedy on both education and society as a whole.

A. *Winning the Battle, Losing the War: The Peril of Historically Black Colleges*

Fordice was a Pyrrhic victory for the plaintiffs and for historically black colleges, because the decision pitted the goals of increased access and quality education for African-Americans against the perpetuation of historically black schools.⁹³ Throughout the *Fordice* litigation, the goals of maintaining historically black colleges and equalizing educational opportunity were thought to be consistent. Given the flexibility and control that states retain under *Fordice*, however, it seems unlikely that any dual-system state will increase the resources and preserve the identity of historically black colleges at the expense of larger and better-endowed historically white colleges.⁹⁴ In choosing which schools to maintain, states like Mississippi will close weaker schools due to scarcity of resources.⁹⁵ Because the dual system shortchanged historically black schools for years, the weaker schools undoubtedly will be the historically black ones.⁹⁶ The Supreme Court ominously stated that "[i]f we understand

92. See *Knight*, 14 F.3d at 1553 (finding that even though colleges must do more than refrain from fostering racially hostile climates, "where a defendant institution is doing all that it practicably can to remedy the effects of a vestige of segregation," courts can order no further relief)

93. See, e.g., *Davis*, *supra* note 70, at 452-53 (noting that the "challenge before Mississippi is to construct a system that will comply with constitutional requirements and provide a quality education for all of its citizens" despite the "lack of willingness on the part of most Mississippians to sacrifice present allegiances" to existing schools).

94. See *Rosow & Pfefferbaum*, *supra* note 14, at 682-83

95. Mississippi's fiscal considerations may hamper the success of any desegregation proposals far more than past racial discrimination. Recently, funds for higher education have come more from tuition than from state appropriations, and funding of state schools has lagged behind the rest of the region. See SOUTHERN REGIONAL EDUC. BD., MISS., STUDENT COSTS AND STATE FUNDING IN PUBLIC COLLEGES AND UNIVERSITIES COMPARED TO SREB AVERAGES, 1990-91 (1992). It is becoming more difficult to retain faculty and attract new professors, as salaries lag far behind the Southeast's average. 1 *The Ayers Decision*, *supra* note 18, app. Financial Data, Average Full-Time Faculty Salaries, FY 1981 to FY 1993. This incomplete list of financial problems is fairly representative of the problems in other dual-system states. Such financial problems make it more difficult to resist cost-expedient solutions, like closure and merger of colleges.

96. See generally Note, *supra* note 89, at 230-39 (summarizing ramifications of *Fordice* decision)

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."⁹⁷ The plaintiffs had to resolve the apparent contradiction in their arguments.⁹⁸ The Court refrained from ordering the preservation of historically black schools with funding and programs equal to those of historically white schools.⁹⁹ Therefore, the maintenance of historically black colleges seemed inconsistent with efforts to achieve equality in higher education. *Fordice* has made it more difficult to argue simultaneously for the preservation of quality schools and for the maintenance of colleges with almost exclusively African-American enrollments.¹⁰⁰

It is a challenge in desegregation cases to balance the desires of the actual plaintiffs against those of a larger set of victims and society.¹⁰¹ Since *Brown*, remedies for segregation have often included considerations exogenous to the actual litigation,¹⁰² and the existence of dual systems is a problem that courts must view as more than an isolated dispute between parties to a lawsuit.¹⁰³ Therefore, it is crucial that plaintiffs base arguments for the preservation of historically black schools on broad societal considerations. The most effective way to defend historically black schools is for plaintiffs to demonstrate that, although historically black schools are products of a system that harmed them, the continued existence of the schools nevertheless represents one of the best means of compensation for that harm. Historically black schools must argue that they are a necessary part of any effort to increase African-Americans' access to educational opportunity.

97. *United States v. Fordice*, 112 S. Ct. 2727, 2743 (1992).

98. *See Days*, *supra* note 81, at 67–70; Note, *supra* note 89, at 235–37.

99. Justice Scalia concluded that the majority opinion made such a policy of equalization practically impossible to implement because "[t]he only conceivable educational value it [would] further[] is that of fostering schools in which blacks receive their education in a 'majority' setting . . ." *Fordice*, 112 S. Ct. at 2752 (Scalia, J., concurring in the judgment in part and dissenting in part). The Court's failure to order more funding for historically black schools leaves states adopting this course of action vulnerable to accusations of facilitating segregation. Dual-system states are unlikely to equalize funding where they are not ordered by courts to do so, however, because channeling scarce resources away from better-endowed historically white schools will be politically unpalatable. *See generally Johnson*, *supra* note 81, at 1405–08 (concluding that Court's unwillingness to define appropriate remedy—equalized funding—could result in closure of Mississippi's historically black schools).

100. *See sources cited supra* note 89.

101. Some of the *Fordice* plaintiffs reacted quite favorably to the decision. Lillie Ayers, the widow of Jake Ayers, Sr., who brought the *Ayers* case, was jubilant about the opinion and said her hope was to have schools with no racial identity, but "where we can go and get an education." Carole Lawes & Cathy Hayden, *I Wish It Would Have Happened Before He Passed*, CLARION-LEDGER (Jackson, Miss.), June 27, 1992, at A1. Jake Ayers, Jr., the inspiration for the case, agreed that the outcome was right. He had avoided the limelight for 17 years. He graduated from high school in 1975, eventually joined the Air Force, and settled in Oklahoma. Cathy Hayden, *Inspiration Behind Lawsuit Gets Long-Distance Good News*, CLARION-LEDGER (Jackson, Miss.), June 27, 1992, at A10.

102. *See, e.g., Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971) (stating that remedy must be broad enough to address constitutional violation).

103. For a useful discussion of the appropriate remedial scope, see James S. Liebman, *Desegregating Politics: "All-Out" School Desegregation Explained*, 90 COLUM. L. REV. 1463, 1484–1540 (1990).

Perhaps the plaintiffs' wisest approach is to counterattack against defendants' manipulation of the *Fordice* standard by using the standard itself to make a policy argument against unfair solutions.¹⁰⁴ Plaintiffs can argue that there is *sound educational justification* for the schools' existence because historically black colleges provide a unique educational experience¹⁰⁵ and enhance African-Americans' educational choices. Granted, *Fordice* is geared more toward eliminating vestiges of dual systems than accommodating exceptions to the desegregation mandate.¹⁰⁶ Still, plaintiffs should argue that these schools provide a unique living archive of African-American heritage and culture.¹⁰⁷ Historically black schools have provided leadership in the African-American community. Before *Brown*, black colleges, against formidable constraints, also represented by and large the only opportunity for the production of an African-American professional class.¹⁰⁸ That significant role continues today: Losing the colleges may harm the African-American community by removing a significant path to enrichment and success.¹⁰⁹ Historically black colleges provide sanctuary for the preservation of African-

104. The *Fordice* plaintiffs missed this novel approach, arguing instead more conventionally against the injustices in the system and advancing the need for a comprehensive solution, including funding, maintenance of all eight universities, and inclusion of the community colleges in the remedy. See Status Conference Transcript, *supra* note 69, at 6-9. Plaintiffs called for some specifics: Jackson State as the sole school in Jackson, reform of the IHL Board, open admissions standards, and comprehensive remedial education, *see id.* at 8-9, 16-20, and forthrightly equated closing schools with eliminating opportunity, saying that the Board should not be allowed to close schools that it had made weaker through discrimination, *see id.* at 21, 59. They did not, however, attempt to justify the retention of historically black schools by using the language of the *Fordice* standard.

105. Such an approach will depend on the priority lower courts give to Justice Thomas' argument that *Fordice* allows the perpetuation of historically black schools because they are justified by sound policy. *United States v. Fordice*, 112 S. Ct. 2727, 2746 (Thomas, J., concurring). The Supreme Court, of course, left "sound educational policy" undefined, but it seems to require more than merely racial reasons for preserving historically black schools. Plaintiffs will have to show concrete *educational* benefits from the preservation of historically black schools to be safe from the counterargument, well supported by *Fordice*, that equalization and maintenance of historically black schools will impermissibly contribute to the perpetuation of segregation.

106. *See Fordice*, 112 S. Ct. at 2743 (O'Connor, J., concurring) (writing to emphasize that circumstances under which states may maintain vestige of segregation "are narrow")

107. *See Johnson*, *supra* note 81, at 1432-43 (discussing role of historically black schools as transmitters of African-American culture and as cultural buffers that ease transition to majoritarian culture)

108. Telephone Interview with R.D. Harrison, *supra* note 12. Mississippi Deputy Superintendent of Education R.D. Harrison, a graduate of historically black Alabama State University, stated that it would have been much better for African-Americans had *more* dual systems existed across the country, because when he went to college, those schools were his only options. *Id.*; *see also* Smothers, *supra* note 2, at A10 (stating that "a powerful constituency . . . believes that . . . black institutions have earned the right to exist for their own sake and continue to serve thousands of black students with potential who would be passed over by other colleges").

109. Elimination of historically black schools "would tremendously impact black leadership and black role models," asserted Leflore County (Mississippi) High School Principal Charles Scott. Janice H. Moor, executive vice president of the Itta Bena Chamber of Commerce, expressed concern about losing the involvement of college staff members in the Chamber. Steve Walton, *Valley State Loss Could Drain Itta Bena Dry*, CLARION-LEDGER (Jackson, Miss.), Dec. 14, 1992, at A1, A3. Itta Bena, in rural Leflore County, Mississippi, is host to Valley, the most frequent target for closure. *See also Johnson*, *supra* note 81, at 1432-39.

American culture and in many ways represent success over adversity.¹¹⁰ Closing schools that African-American students may identify as uniquely "theirs" may be so demoralizing as to more than negate any benefit from increased access to predominantly white schools. There may be no way to replicate the experience of attending largely black colleges, and African-American students may feel so unwelcome on white campuses that they will drop out of the system altogether.¹¹¹ Historically black colleges provide a sense of belonging that keeps students in school.¹¹²

Plaintiffs can also argue that historically black schools *cannot be practicably eliminated*. The costs to society would simply be too high, especially given the possibility that African-American students, particularly those who cannot afford to leave the state, will drop out of the system rather than attend predominantly white schools.¹¹³ The remedy for dual systems must not make the cost of choosing to remain in school or in the state prohibitive. A remedy that causes people to drop out, reducing not formal access but real educational opportunity, contradicts the ideal of increased educational access. The primary objective should be to minimize disruption and prevent deterioration of quality so that students will choose to go to school in the first place. Institutions whose absence would almost surely stunt, rather than foster, African-American progress cannot be "practicably eliminated" without rendering *Fordice* altogether hollow.

Two dynamics will have to be carefully offset against each other. First, a remedy must enhance African-American students' freedom to choose among schools without destroying historically black schools. Second, whites must not find that their choices are so unfairly burdened or eliminated that they feel forced to exit the system. In Mississippi, the inevitable tradeoffs are apparent in the possible responses to the Department of Justice's proposal to assign control of the state university medical center to Jackson State.¹¹⁴ Such a move would be a step toward allocating programs fairly between historically

110. See Days, *supra* note 81, at 71-73; Johnson, *supra* note 81, at 1432.

111. An instructor from Valley characterized the feelings of those defending against school closures when he stated that "[w]e'd do a lot less damage if we close Ole Miss than if we close down Valley Those students (at Ole Miss) have somewhere else to go." Stacy L. Hawkins, *Students, Alumni Rally at Ayers Hearing*, BLUE AND WHITE FLASH (Jackson, Miss.), Oct. 29, 1992, at 1, 3. Protests for the historically black colleges have been marked by pickets and chants of "We shall overcome," reminiscent of the 1960's, except that then the protests were for enforcement of court edicts. Today, they are against the consequences of the Supreme Court's holding, which was ostensibly for the plaintiffs' benefit. *Id.* at 1; see Jimmie Gates, *Students Protest Ayers Plan*, CLARION-LEDGER (Jackson, Miss.), Nov. 20, 1992, at A11; see also Johnson, *supra* note 81, at 1443-46; Washburn, *supra* note 31, at 1151-52.

112. See Days, *supra* note 81, at 63-74. Gwen Granderson, a Valley student who transferred from Valley to MUW only to return to the historically black school, stated that although the schools were similar in size, Valley was "a lot more personal My father went here and he knew then and I know now that with just a little more effort and help, this could be a really fine school." Smothers, *supra* note 2, at A10.

113. See Days, *supra* note 81, at 71-74; see also Kendall, *supra* note 38, at 677-78 (discussing inability of black students to gain admission in consolidated junior college system).

114. *Desegregation Plan Would Strengthen Rather Than Close Black Universities*, MISS. PRESS (Pascagoula, Miss.), Dec. 30, 1993, at A1.

white and historically black schools, and would likely increase minority enrollment in the medical school. If whites reacted negatively, however, by assuming that quality would decline, donations from white alumni might dry up, and white students might leave the state rather than go to a Jackson State medical school. A significant short-term exodus by whites would damage the medical school and the state over the long term, since Mississippi already lacks an adequate number of professionals.

This balancing act is riskier for African-American students than for white students. African-American students may be worse off if a remedy closes historically black schools and standardizes education at historically white schools. African-Americans' choices, because of long-standing discrimination and fewer resources, are more fragile than those of whites. Where the two groups' interests collide, therefore, courts should be more sensitive to threats to minority opportunity. In considering the Department of Justice's proposal concerning Mississippi's medical school, for example, it may well be more important to enhance African-Americans' access to professional schools than to prevent whites from leaving the state. If whites seek only to retain their ability to choose to attend an overwhelmingly white medical school, it is appropriate to override that choice to allow African-Americans an opportunity to attend medical school where access is otherwise effectively denied, regardless of the short-term consequences.¹¹⁵

B. *Massive Resistance for the 1990's*

The greater the resistance to any remedy, the greater the delay in its implementation. To stem local recalcitrance effectively, a remedy must account for the fact that modern resistance to desegregation springs largely from a different dynamic than the "massive resistance" of the past. The South is no longer the anti-*Brown* world of Jim Crow; indeed, *Fordice* was decided in an environment very much influenced by *Brown*. A cooperative reaction from educators, leaders, and the citizenry in Mississippi suggested receptivity to a remedy.¹¹⁶ Soon, however, optimism faded as motivations once

115. See generally *Brown*, *supra* note 5, at 98-109 (discussing tension between rights of free association and equal protection and stating that government can appropriately limit choices of majority to protect rights of subordinate minority); Gewirtz, *supra* note 80, at 741-54 (stating that more than free choice is needed to remedy segregation where prior constraints prevent true assertion of choice) Of course, it is inappropriate to disregard legitimate concerns of whites if quality of education or administration of the medical school is truly threatened by a sloppy transition or lowered academic standards.

116. Newspaper accounts and public statements throughout the state made this clear. See, e.g., *Avers Decision Will Aid State in Long Run*, NATCHEZ DEMOCRAT (Natchez, Miss.), June 28, 1992, at A4 (editorial) (stating that decision will bring about opportunity to make necessary consolidations within Mississippi's college system); Susan M. Stachowski, *Fordice Wants Desegregation Plan by Sept. 1*, COM DISPATCH (Columbus, Miss.), July 1, 1992, at A1 (discussing MUW President Clyda Rent's praise for state reaction to opinion and her excitement for opportunity state had); Reagan Walker, *Supreme Court's Order Desegregate*, CLARION-LEDGER (Jackson, Miss.), June 27, 1992, at A1, A15 (quoting Lieutenant Governor Eddie Briggs as stating that case "can be an opportunity for Mississippi to do a better job in higher

overshadowed by *de jure* discrimination came into clearer relief. Where *Brown's* success wiped away glaring legal barriers, *Fordice* animated more subtle background forces that have spawned resistance in the form of interest groups, which have found ample support for their resistance in the labyrinthine *Fordice* standard.

Past resistance to desegregation was irrational and somewhat monolithic in its opposition to granting African-Americans basic civil rights, and its goals were clear. Blatant racism was widespread and public, and was official state policy. Now, racist attitudes, though still a significant undercurrent, have abated somewhat, at least to the degree that race is no longer *the* roadblock to progress. Today, there is no real resistance to the idea that a remedy is needed,¹¹⁷ and no single part of any proposed remedy is the focus of resistance.

Still, there is strident disagreement about what should be done to eliminate Mississippi's dual system, as even minority groups are often internally divided about appropriate remedies. This disagreement results in large part from the confusion in *Fordice*. The intensity of many resisters draws on arguably rational economic motivations, because resisters are fighting to keep benefits they now control. The lack of clarity in *Fordice* allows them to claim that they are still entitled to the same amount of state resources. Rather than a united white citizenry refusing to accept racial equality, the resisters today are diverse and ground their public opposition to a remedy in broad arguments about self-interest rather than in racial considerations. Minority groups,¹¹⁸ alumni associations and individuals (both African-American and white),¹¹⁹ and

education").

117. State leaders reacted positively to the *Fordice* decision, though many also recognized that developing a remedy would be challenging. *See, e.g.*, Frank Fisher, *Ayers Decision Seen as Opportunity and a Challenge*, SUN-HERALD (Gulfport, Miss.), June 28, 1992, at A1 (quoting state and university officials who believed that *Fordice* would be catalyst for leadership in education); Jerry Huston, *Miss. College Officials Pledge Desegregation*, COM. APPEAL (Memphis, Tenn.), June 28, 1992, at A1, A12 (discussing upbeat tone of officials despite uncertainty about remedy).

118. *See* Hawkins, *supra* note 111, at 1, 3 (discussing various minority groups protesting closure of historically black institutions).

119. The Governor's Office received resolutions from the Delta State and Valley Associations, as well as several county alumni associations. Predictably, the alumni associations moved to defend their schools: "Delta-wide pride in and support for Delta State have been major factors in bolstering economic development and racial harmony in the region." Statement of the Board of Directors of the Delta State University Alumni Association (n.d.) (on file with author). The Governor also received a wide variety of letters from individuals, ranging from parents of out-of-state students concerned about their children's futures to elderly alumni concerned about various issues. One parent wrote to keep the Veterinary School open since her daughter was enrolled in the pre-veterinary program at Mississippi State. Letter from Joyce Long to Bill Jordan, Chairman, Lay Advisory Panel (Oct. 28, 1992) (on file with Mississippi Governor's Office). Another woman, responding to a plan to close schools, stated that closure was "certainly *not* for the University of Mississippi. That would be the death knell, also, for the small town of Oxford, the home of William Faulkner. At all costs, the University of Mississippi, with its rich heritage must be preserved!" Letter from Alice M. Farr to Kirk Fordice, Governor of Mississippi (Aug. 7, 1992) (on file with Mississippi Governor's Office).

communities and organizations¹²⁰ have all resisted change in order to protect their favored institutions.

The educational bureaucracy, because of its resources and organization, will likely be the most enduring source of resistance.¹²¹ It is institutional in nature and represents special-interest, rather than grassroots, resistance to desegregation.¹²² The relevant participants in the educational bureaucracy include college presidents, college administrators, and the IHL Board of Trustees. Even within that bureaucracy, administrators from one school have little fidelity to their counterparts at other colleges. Motivated to preserve their "territories," university presidents in Mississippi have appealed to alumni pride as the main defense against proposals to trim programs and cut other nonessentials at their schools.

Resistance by educational bureaucrats may not be as formidable as it has the potential to be, however, because there are forces that counter it. First, these bureaucrats are not automatically united against changes that do not involve their individual schools.¹²³ While alumni groups have been roused by calls to arms from their college presidents, and these groups present significant organized resistance, the general public has not been very receptive to their message. The IHL Board has in fact been criticized for retarding the

120. The Governor's office received various resolutions and letters in support of the maintenance of Delta State and Valley. *E.g.*, Board of Supervisors, Leflore County, Mississippi, Resolution in Support of the Continued Operation of Mississippi Valley State University (Oct. 23, 1992) (on file with Mississippi Governor's Office); Resolution of the Greenville Area Chamber of Commerce (Oct. 27, 1992) (on file with Mississippi Governor's Office); Serene Lodge #567, Improved Benevolent Protective Order of Elks of the World, Resolution (Jan. 11, 1993) (on file with Mississippi Governor's Office). These groups maintained that higher education in the Delta region is an important conduit for economic development. Several groups opposed closure of the state's only veterinary school, citing the value of the services provided by the staff there and the school's contribution to Mississippi's economy. *E.g.*, Letter from Ernest Jordan, President, Mississippi Emu Association, to Kirk Fordice, Governor of Mississippi (Nov. 18, 1992) (on file with Mississippi Governor's Office) [hereinafter Jordan Letter]; Letter from Barbara A. Barrett, Zoo Director, Jackson Zoological Park, to Kirk Fordice, Governor of Mississippi (Nov. 15, 1992) (on file with Mississippi Governor's Office) [hereinafter Barrett Letter]; Oktibbeha County Cattlemen's Association, Resolution (Oct. 29, 1992) (on file with Mississippi Governor's Office) [hereinafter Cattlemen's Resolution].

121. See Schwartzstein, *supra* note 77, at 607-13. Schwartzstein argues that in *Missouri v. Jenkins*, 495 U.S. 33 (1990), the Kansas City Municipal School Board had both incentives and power to influence any court-designed remedy, and she alleges that the district was a bureaucracy with an agenda different from that which would best serve the interests of schoolchildren. *Id.* This Note uses the term "educational bureaucracy" to refer to the dominant bureaucratic players in dual educational systems who have failed to provide access to minorities under the status quo.

122. This is an important change from the past, when the grassroots population supported (and perhaps motivated) the actions of segregationist governors like Ross Barnett in Mississippi. Though political support from rank-and-file voters was not the sole impetus for racist acts and statements by state officials in the 1960's, that support provided a powerful incentive to resist desegregation. Today, there is at least some evidence that popular support for the educational establishment is absent. See *infra* notes 124-25 and accompanying text.

123. Each college president will have little incentive to defend another college if reductions in spending at that other college serve to insulate his or her college from harm. Resistance from the educational bureaucracy is diverse, suggesting that it can be divided and conquered by offering a broader remedy that minimizes spending and program reductions while allocating benefits to those suffering the required cuts.

case's resolution through rhetoric and secretive meetings.¹²⁴ The educational bureaucracy seems as unpopular as governmental bureaucracy in general, and its support for the status quo in higher education lacks credibility with the public because resistance to any change is seen as endemic to "the bureaucracy's" inherent interest in self-preservation.¹²⁵

Individual colleges may also resist changes in the educational system, even when the educational bureaucracy as a whole has agreed on the need for reform. Debates about college closures and program reductions predate *Fordice*, and dual-system states have grappled with the problem of racially identifiable schools in the past.¹²⁶ Small schools, like Valley and MUW, have been the targets of frequent proposals for budget cuts and have become accustomed to resisting those proposals. Though they are part of the current system, smaller schools (especially historically black ones) have learned to resist the bureaucracy itself. Their resistance to *Fordice* will likely be more intense as a result. In fact, threatened schools eventually reacted to the *Fordice* opinion by mounting efforts to defend against reform in the latest round of an ongoing fight. Valley students protested outside Board meetings, vowing to fight bitterly closure of the school,¹²⁷ while MUW alumni began a telephone campaign to urge the Governor's Office and Legislature to support the university.¹²⁸ Recently, Valley administrators have refused to cooperate with the Board to develop a program to close the school.¹²⁹

Strong resistance to *Fordice* also exists in the African-American community. Outside the October 22, 1992 hearing, approximately 350 students, mostly from historically black schools, staged protests—proof that they realized the potentially adverse results of a suit that the plaintiffs purportedly won.¹³⁰ While many African-Americans resist losing historically black

124. See *College Board Has Not Informed People*, NORTHEAST MISS. DAILY J. (Tupelo, Miss.), Oct. 21, 1992, at A8; *Our Views, Ayers Case*, CLARION-LEDGER (Jackson, Miss.), Oct. 2, 1992, at A8; *Our Views, Universities*, CLARION-LEDGER (Jackson, Miss.), Oct. 12, 1992, at A8; see also *NAACP Wants Members of College Board Ousted*, SUN HERALD (Gulfport, Miss.), Oct. 27, 1992, at C1 (reporting NAACP call for ouster of IHL Board members who voted during private meeting for proposal to close schools).

125. See, e.g., Schwartzstein, *supra* note 77, at 607–13 (discussing problems inherent in bureaucracies). As a result, the Board has been ripe for attacks by the Legislature as well. Early in the 1993 session, the Legislature revoked the Higher Education Commissioner's tenure and restricted the Board of Trustees' powers. See Paul Barton, *Amendments Target College Board*, COM. APPEAL (Memphis, Tenn.), Jan. 14, 1993, at A10; Sarah C. Campbell, *House Bill Revokes Tenure for Cleere*, CLARION-LEDGER (Jackson, Miss.), Feb. 10, 1993, at B3.

126. See cases cited *supra* note 7.

127. Paul Barton, *200 From Valley Protest Proposal to Close School*, COM. APPEAL (Memphis, Tenn.), Oct. 16, 1992, at A1.

128. Interview with Marsha M. Kelly, Assistant to the Education Advisor, Office of the Governor, in Jackson, Miss. (Mar. 16, 1993). *But see* Stachowski, *supra* note 116, at A1 (discussing MUW President's initial positive reaction).

129. Valley President William Sutton opposed the closing by refusing the state College Board's request for data regarding the school. He preferred to object publicly, rather than contribute to the demise of the school. Andy Kanengiser, *Valley: We Won't Help Closing*, CLARION-LEDGER (Jackson, Miss.), Jan. 22, 1993, at A1.

130. See Hawkins, *supra* note 111, at 1.

schools, their resistance to *Fordice* runs deeper than that. Some African-American organizations are resisting what could become a hollow victory, offering *no* benefits to compensate for past discrimination.

Alumni groups from historically white colleges, on the other hand, have filed amicus briefs and motions for joinder to defend historically white schools as they now exist, fearing that unsound educational reforms will dilute quality at their alma maters.¹³¹ Many citizens, both African-American and white, express concern that reforms will reduce the quality and range of programs offered at particular schools.¹³² At the same time, community organizations and towns, whose economic bases will shrink if nearby colleges are pared down, fight to preserve their communities.

This discussion of the various factions that are resisting change in the current dual system illustrates the new environment judges face in applying *Fordice*. Racism certainly motivates many people to oppose remedial measures, but the nature of the most significant sources of resistance suggests that the right amount and kind of compensation can win cooperation from at least some of these groups. For example, communities affected economically by college closings and program reductions would protest much less if they were compensated with offsetting economic benefits: new jobs to replace vanishing old ones, perhaps. Ensuring that *Fordice* is not an empty promise could placate minority students, who should receive something for their victory other than the gutting of historically black schools. While any remedy will be delayed until *Fordice*'s true meaning is fleshed out, compensating the resistance in the meantime might make major factions more receptive to an overall remedy. Although such measures are outside the scope of an appropriate judicial remedy, some form of government appropriation could play a role in a broader compensation plan. The civil rights groups, alumni groups, and educational bureaucrats that form the "resistance" are not bedfellows by choice but by necessity. When enough of these resisters are compensated as part of an overall solution, their unity will crumble and a remedy will finally be implemented.¹³³

131. Some of the alumni associations, from both historically black and white colleges, have filed motions for joinder in the case, alleging that all alumni will suffer personal injury if their universities are harmed, on the theory that their diplomas will be diminished in value. Biggers, Mar. 18, 1993 interview, *supra* note 16; see also *MUW Affiliates Propose Own Plan*, COM. DISPATCH (Columbus, Miss.), Jan. 5, 1993, at A1 (stating that MUW alumnae associations wished to join case to "represent the interests of their school"). Of course, a possible counterargument is that the historically white schools' alumni groups have not offered to pay for the inflated present value of their diplomas, brought about by disparities in funding and discrimination against historically black schools over the years.

132. See *supra* notes 118–20 and accompanying text.

133. This suggests, of course, a real danger that the most politically popular decision among powerful resisters, rather than the best reforms for the school system or the victims, will win out in the end. Given the crucial need for the educational bureaucracy's cooperation, more resources may be necessary to win its support and ensure that other legitimate concerns (those of the victims) will not be ignored.

C. *Impact of a Flawed Legal Regime*

Remedies will eventually be implemented in Mississippi, and in the other dual-system states. Judge Biggers believes that the Mississippi state government has waited too long to have a meaningful role now in fashioning a remedy, although the court will consider all the input that Jackson offers.¹³⁴ Because other states have been just as reluctant as Mississippi to move toward solutions, judicial pressure under *Fordice*, if the sole approach, will prevent smooth transitions among colleges and across state systems.¹³⁵

The most likely remedy, if *Fordice* is applied with only judicial oversight, is implementation of changes that roughly track the IHL Board's plan to standardize admissions, merge colleges, and consolidate administrative functions.¹³⁶ The principle of "shared sacrifice" behind the IHL plan, which spreads the pain of system modifications, would appear fair to many people. In fact, the plan may be the most politically popular and feasible one available.¹³⁷ The remedy, to withstand appellate review, will certainly address the areas identified by the Supreme Court. Admissions standards will be made uniform,¹³⁸ because the parties agree that the current policy is not educationally justifiable and can be practicably eliminated.¹³⁹ Mission statements will also be modified, although there will be disagreement as to what modifications should be made.¹⁴⁰ Program duplication will be reduced

134. Biggers, Mar. 18, 1993 interview, *supra* note 16.

135. There have already been challenges to judicial authority to order certain actions, especially school closures. See Jay Eubank, *Only Legislature Can Close Schools, Senate Panel Says*, CLARION-LEDGER (Jackson, Miss.), Jan. 7, 1993, at A1.

136. The IHL Proposal at 4-10, in 1 *The Ayers Decision*, *supra* note 18. The IHL plan will solve the most egregious violations while remaining affordable, but it will not provide a comprehensive approach that addresses all of the deficiencies in Mississippi's university system. In its estimate of cost savings, for example, the IHL plan does not account for extra expenditures to help students adjust or assimilate into a campus culture that may not be welcoming. *Id.* at 11. Although the plan makes extensive provisions for expanding admissions, requisite detail is again lacking. If admission standards are liberalized without a corresponding improvement in high school preparatory education, many students will arrive on campuses unprepared for college-level study. The plan fails to account for the increased cost necessitated by enlarged remedial educational courses and the like, which will divert money from mainstream curricula. *Id.* at 8-11.

137. The real danger, of course, is that the politically popular sacrifices will be "shared" more by some groups, likely the plaintiffs and historically black colleges, than by others.

138. See The IHL Proposal at 8-9, in 1 *The Ayers Decision*, *supra* note 18.

139. The IHL Board has admitted that the use of the ACT as the sole criterion for automatic admission is a remnant of segregation, but denied that the test was a cause of its continuation. While defending the use of floor scores, the Board did agree that other factors could be used, with "cautious and deliberate efforts," to eliminate the present practice. Board of Trustees' Proposed Stipulations Regarding "Remnants" at 3, *United States v. Fordice*, No. GC75-9-B-O (N.D. Miss. filed Nov. 19, 1992), *on remand from United States v. Fordice*, 112 S. Ct. 2727 (1992). While rejecting plaintiffs' call for open admissions, the proposal includes an extensive program with uniform automatic admission based on high school grades and ACT scores. Status Conference Transcript, *supra* note 69, at 35-40. For those not qualifying for automatic admission, a detailed program of conditional admission would be developed. The Board claims that the criteria for admission would be broader under the plan, especially for minorities, and that the disparate racial effects of the old system will be reduced. *Id.* at 44.

140. See *Knight v. Alabama*, 14 F.3d 1534, 1546 (11th Cir. 1994) (holding that even though mission differentiation is sound educational policy, it does not address fact that historically black schools are ones with limited missions, and that state still has duty to eliminate vestiges of segregation).

and some entire programs will be eliminated, both to implement the required legal remedy and for fiscal reasons.¹⁴¹

Finally, the remedy will probably reduce the number of schools, though this will be the most difficult remnant of the dual system to address. Valley is most likely to be eliminated; its size and proximity to Delta State make it the least painful target politically.¹⁴² Other small schools may not suffer closure, but they will emerge less independent. One possible benefit of school reorganization, though, is the improvement of Jackson State. Assuming that it will become a "big fourth" university, Jackson State could alleviate some of the harm caused by cuts at other historically black schools, although it cannot completely alleviate the harmful effects of the reduction in choices available to many African-American students.¹⁴³ It is unclear whether other dual-system states will be able to offset the negative effects of the remedy in this way. The overall effects of school closures on the net welfare of individual African-American students is also uncertain.

To illustrate the impact of proposals to reduce the number of universities and programs, an isolated examination of Ole Miss and Valley, two schools of disparate size and funding, will show the different ways that Mississippi's colleges will pay for past discrimination.¹⁴⁴ Ole Miss, with a 1992-93 operating budget of \$111,572,286, has the second-highest per student appropriation level in the state¹⁴⁵ and relatively well-equipped facilities, compared with the historically black state-supported schools. Even at Ole Miss, however, the room for cutbacks is slim. The impact of program reductions on Ole Miss could be acute,¹⁴⁶ although it is unlikely to be fatal to the school's existence.¹⁴⁷ Ole Miss, as one of the comprehensive "big three" universities,

141. The IHL Board has proposed the closure of Mississippi's only dental and veterinary schools in particular. The IHL Proposal at 6, in 1 *The Ayers Decision*, *supra* note 18. This has met with considerable opposition. See Barrett Letter, *supra* note 120; Cattleman's Resolution, *supra* note 120; Jordan Letter, *supra* note 120. Despite such resistance, it will be easier to eliminate smaller courses of study (cutting accounting courses within one business school, for example) that are offered at more than one overarching school.

142. See The IHL Proposal at 12-13, in 1 *The Ayers Decision*, *supra* note 18 (listing Valley as one school to be closed under Board's plan).

143. Jackson State's role in the remedy should be extensive, since it is located in the state's most populous city. It is also centrally located and fairly distant from any other large school.

144. For a pre-*Fordice* debate on the costs and benefits of merging Louisiana's two law schools under court supervision, compare Darrell K. Hickman, Note, *Realizing the Dream: United States v. Louisiana*, 50 LA. L. REV. 583 (1990) with L. Tiffany Hawkins, Note, *Recognizing the Nightmare: The Merger of Louisiana State University and Southern University Law Schools*, 50 LA. L. REV. 557 (1990).

145. 1 *The Ayers Decision*, *supra* note 18, app. Financial Data, Summary of Total Operating Budgets FY 1992-93 & Comparison of Mississippi per Student Appropriation to the SREB Region Fiscal Year 1991-92. Mississippi State has the highest per student appropriation level, just ahead of Ole Miss and Southern Miss. *Id.* app. Financial Data, Comparison of Mississippi Per Student Appropriation to the SREB Region Fiscal Year 1991-92.

146. Interview with Dr. Bela J. Chain, Director of Personnel, University of Mississippi, in Oxford, Miss. (Mar. 18, 1993).

147. The IHL predicts that in the long run, if some schools are closed or reduced in size, more money and resources will be available to the remaining schools. See The IHL Proposal at 11, in 1 *The Ayers Decision*, *supra* note 18. While efficiencies may be likely in the long term, significant short-term transition costs will accrue even to larger schools. If these costs are not accurately anticipated, they could cause long-

would likely have to reduce staff and reallocate resources if programs were eliminated or transferred to other campuses to reduce program duplication. While cost reductions will result where programs are no longer offered, faculty relocation costs, expenditures to retool existing facilities for new purposes, and other similar "adjustment" expenses may outweigh such savings. It is likely that more money will have to be spent on new programs at other colleges than is currently spent on existing programs at Ole Miss. Furthermore, if appropriations for Ole Miss are disproportionately reduced to pay for increased spending and program enhancement at other colleges, university-wide cutbacks may be necessary.¹⁴⁸ Even if other schools are closed, Ole Miss would be an unlikely candidate to reap any gains realized from resulting cost savings: Savings realized from closures more logically should be channeled to enhance historically black schools.

It is also likely that if universities are closed or merged, Ole Miss will have to accept a greater student load. This outcome may in fact be more severe for the college than a loss of programs. Increased tuition revenues from higher enrollment would not be sufficient to offset the initial pressure from increased student numbers, so that a large influx could adversely affect the quality of education.¹⁴⁹ In the short run the school would have to choose between larger classes and emergency hiring. Financial aid and housing would become more scarce, both because the bureaucracy administering these benefits would be unable to handle the increase in volume and because the school's limited scholarship endowment and housing stock would be distributed in smaller amounts to more students, or to a smaller percentage of the student body.¹⁵⁰ These pressures, even if only short-term, would have a severe impact on the university, where basic renovation needs have already gone unfulfilled, and physical plant capacity is already inadequate.¹⁵¹

term reductions in educational quality that could eclipse any increase in resources at colleges due to reductions in spending elsewhere in the system.

148. This is not to say that system-wide efficiencies are not possible, especially over the long run. The point here is to emphasize that even a relatively well-endowed, large school will suffer in the short term under a remedial proposal that requires cutbacks. Funding cuts actually made during the economic recession in the early 1990's tell the story: The last round was only a five-percent cut to give a five-percent raise to faculty and staff, who had not received any raise in years. Interview with Dr. Chain, *supra* note 146. At that time, administrative departments were hit hardest, and 20 people lost their jobs as a result. *Id.*

149. *Id.*

150. Naturally, increasing the number of students at a fixed physical plant could tend to reduce overall access to higher education. While some forms of financial aid, like federal grants or loans, would admittedly increase with the number of applicants, regardless of where they attend college, many scholarship programs tied to specific schools or courses of study at particular schools would not necessarily increase with higher student enrollment at a given college. Furthermore, the weaker schools that would likely be closed would also be the least well-endowed.

151. *Id.* The lack of resources is a perennial problem that will only get worse with court-mandated remedies. Ole Miss, one of Mississippi's best-endowed schools, was denied a Phi Beta Kappa chapter years ago because of its inadequate library, and no public college has a chapter yet. Because of inadequate funding, the state has only recently begun improvements on the library, and many classrooms are in disrepair, with no current plans for renovation.

A court-ordered remedy would also be unpredictable. While legislative or economic cuts can be anticipated, a court-ordered cutback under the malleable *Fordice* decision may preclude advance planning, because educators charged with implementing a court decree will not know if the decision is final. The *Fordice* remedy may bring interminable judicial appeals. With the final outcome unpredictable, a mood of resignation will likely result, driving qualified faculty and students away from public colleges and further hampering Mississippi's educational progress. The last economic cuts cast a pall over faculty and staff members unsure of whether they would keep their jobs. The threat of cuts stifled a positive atmosphere and reduced the attention given to education.¹⁵²

Valley, a small school in Itta Bena, is likely to be closed as a result of *Fordice*. With an operating budget of \$15,978,113,¹⁵³ Valley is one of the smallest schools, and, because of its location thirty-five miles from Delta State in Cleveland, it has had to justify its existence against frequent attacks since the case began.¹⁵⁴ Aside from the possibility that Valley students might lose all access to higher education if the school were to close, the impact of their transfer to other college towns would severely hurt the Itta Bena community. Valley has between 400 and 450 full-time employees, and the annual payroll is at least \$7.5 million.¹⁵⁵ For Itta Bena, a town of 2400 in Mississippi's poor Delta, losing the economic boost of approximately \$52.5 million annually would be devastating.¹⁵⁶ Louise Garragan, a longtime downtown store owner, echoed other businesspeople's concerns when she highlighted the despair that would result in the town, and in Leflore County as a whole: "Itta Bena would be dry as a bone We have no factories. The farming is so mechanical, they don't need many hands."¹⁵⁷ School closings would also drain towns like Itta Bena of leadership talent and the benefits associated with being a college town.¹⁵⁸

152. Many key positions vacant at the time of the budget cuts, including the Dean of the Business School, were frozen, remaining empty for some time. Positions were eliminated through attrition as well. Supplies, travel money, and other supports were also cut back, to the point that there was often no chalk in classrooms or paper in reproduction rooms. *Id.*

153. See 1 *The Ayers Decision*, *supra* note 18, app. Financial Data, Summary of Total Operating Budgets FY 1992-93 & Comparison of Mississippi per Student Appropriation to the SREB Region Fiscal Year 1991-92.

154. Although geographically close, the two schools are worlds apart. While Valley's "flat-roofed, spartan buildings" give the impression of a "no-frills military installation," Delta State's turn-of-the-century buildings and shaded landscapes convey the fabled charm of the Deep South. Smothers, *supra* note 2, at A10. Of course, other former dual-system states have schools in similar proximity to each other. In Louisiana, Grambling State and Louisiana Tech are similarly close, and in many more instances, large campuses exist practically side by side.

155. Steve Walton, *Valley State Loss Could Drain Itta Bena Dry*, CLARION-LEDGER (Jackson, Miss.), Dec. 14, 1992, at A1.

156. Assuming every dollar turns over about seven times in the local economy, the economic impact is of course far greater than the \$7.5 million paid to employees. *Id.* at A3.

157. *Id.* at A1.

158. *Id.* at A3.

Itta Bena's fate as a small college town vividly illustrates a key difference between higher and lower education desegregation. Closing or merging segregated high schools in a county district, for example, does not change the situation of the district as a whole.¹⁵⁹ As the state shifts resources from school to school, the impact on any single area is minimal because the district is not big enough to be adversely affected by shifting funds among schools. The locality still contains the same amount of resources. The higher education system, however, is statewide. Desegregation may not alter the position of the entire system (a questionable assumption when the number of schools may be reduced and when students can exit the system), but a shift in resources, even thirty-five miles from Itta Bena to Cleveland, entails great costs where reductions occur. Places that gain programs and students may benefit from readjustment, but such gains will cause irreparable losses elsewhere in the state. Unlike a resource shift in the local school system, a shift in the higher education system will wreck businesses and displace people with no connection to the school system.¹⁶⁰ Where desegregation of a primary school district basically maintains resources in the same area, college closings may devastate the towns that once hosted state colleges.

IV. PUTTING MONEY WHERE OUR MOUTHS HAVE BEEN: A NATIONAL COMMITMENT

A. *Landscape of the Post-Brown World*

The essence of the problem with *Fordice* is that it attempts to address too much beyond college integration. Indeed, much of the criticism of *Brown*-inspired desegregation arises from the fact that judicial supervision does not adequately address the full range of causes of segregation.¹⁶¹ The *proper* kind of help could eliminate many of the problems endemic to higher education desegregation. Since courts have proven poorly equipped to defeat school segregation, however, except in *de jure* and other obvious instances, the judiciary has either retreated from desegregation¹⁶² or been unable to provide an adequate remedy.

159. This assumes that student levels will remain constant in the county. Even if students drop out of the public school system, by joining private schools, demand for teachers and supplies will stay in the local area. Only when a significant number of students and their families actually leave will this assumption not hold.

160. The forced nature of the relocation is important. Where a college is closed, people will have to leave the area merely to survive economically or to receive any education at all.

161. See generally Johnson, *supra* note 81, at 1410-14 (stating that *Brown* has failed and discussing societal factors related to minorities' lack of advancement). But see Schwartzstein, *supra* note 77, at 617-21 (calling for tighter constraints on judiciary in designing remedies).

162. See, e.g., cases cited *supra* note 91.

Courts are ill suited to implement forcefully a comprehensive approach to higher education desegregation. The fundamental cause of *Fordice's* shortcomings is that courts have had to address intermingled policy and legal concerns without the active involvement of the political branches of government. Examining both policy and legal issues is crucial to correcting past discrimination, but courts are not capable of properly resolving pure policy issues.

If *Brown* has failed in any respect, it is because it has not provided a regime that is tailored to address more than the *de jure* impediments to equal education. The more courts attempt to remedy abstract problems caused by larger societal factors, rather than concrete legal violations, the less power they have to provide any real remedy.¹⁶³ Simply put, courts cannot address the far-reaching causes and effects of segregation without an equally broad solution that reaches policy concerns and political issues.¹⁶⁴

Any workable remedy to alleviate the lingering effects of *de jure* segregation and improve education in Mississippi must involve educational policymakers. *Fordice* must be understood as another burden on an already overburdened educational system, struggling with the frustration of being perennially behind the rest of the nation.¹⁶⁵ Many of the plaintiffs' contentions relate more to educational policy than to constitutional violations,¹⁶⁶ and such policy questions should not and cannot be decided by

163. Cf. Schwartzstein, *supra* note 77, at 606–07, 617–21 (questioning effects of extensive, costly remedy, and concluding that reforms are needed for judiciary to be able to address education desegregation); Stanley J. Andersen, Note, *Judicially Imposed Taxation and Desegregation*. *Missouri v. Jenkins*, 24 CREIGHTON L. REV. 289 (1990) (arguing that federal judiciary has powers to provide sufficient funding for plans to eliminate public school segregation). *But cf.* *Missouri v. Jenkins*, 495 U.S. 33, 55–58 (1990) (holding that courts can order local authorities to levy taxes to pay for required remedial measures); *Evans v. Buchanan*, 582 F.2d 750, 760 (3d Cir. 1978) (stating that abuse of district court discretion exists only when judicial action is “arbitrary, fanciful, or unreasonable, or when improper standards, criteria, or procedures are used”), *cert. denied*, 446 U.S. 923 (1980).

164. See Schwartzstein, *supra* note 77, at 618–20; Andersen, *supra* note 163. In *Jenkins*, the trial court ordered minutely detailed improvements at schools to correct discrimination. 495 U.S. at 38 n.4. It also set a tax rate higher than allowed by state law to pay for them. *Id.* at 41–42. Schwartzstein criticizes the Supreme Court's opinion in *Jenkins* for allowing courts to require tax increases indirectly. Schwartzstein, *supra* note 77, at 616. She sees potential danger in allowing the judiciary to implement policy decisions without the constraints imposed on the legislature by the electorate. *Id.* Andersen simply concludes that *Jenkins* involves an unconstitutional judicial exercise of the taxing power. Andersen, *supra* note 163, at 305–08. Even ordering elected officials to arrange funding as they see fit is unworkable where, as in dual-system states, there is significant disagreement among parties responsible for funding. *Id.* at 308–09 This Note argues that it is more advisable and effective for political actors to make all relevant policy decisions

165. See sources cited *supra* note 13.

166. For example, the plaintiffs cite inadequate course offerings, equipment, and personnel in local school districts as a “[p]olicy and/or [p]ractice” that hampers access to colleges. Plaintiffs' Unified List of Policies and/or Practices Properly in Issue Before This Court at 5–7, *United States v. Fordice*, No GC75-9-B-O (N.D. Miss. filed Nov. 18, 1992), *on remand from* *United States v. Fordice*, 112 S. Ct. 2727 (1992). They also cite failure to provide training programs to help faculty and students “cope effectively with racial diversity.” *Id.* at 4. Finally, they cite Jackson State's lack of control over a football stadium as affecting fundraising ability. *Id.* at 7.

the courts.¹⁶⁷ Still, ineffective policy is a serious problem that some empowered actor, other than the judiciary, must address.

It is thus crucial to acknowledge the lesson of *Brown's* shortcomings. It is also important, however, to consider *Brown's* successes. *Fordice* may be the latest step in the evolution of desegregation jurisprudence, but it was born in an environment shaped by the changes wrought by *Brown*.¹⁶⁸ The lessons of *Brown* must be, and in fact can be, adapted to apply to the post-*Brown* world. Today, *Brown* can be supplemented in a way once almost unthinkable—by cooperation between dual-system states and the federal government. The solution to dual-system segregation is attainable today through federal money, not federal marshals. The states need the federal government to facilitate remedies, rather than to ensure their implementation through legal action. In short, given the environment created by *Brown*, federal and state cooperation can be harnessed to develop, implement, and fund solutions to the broader concerns that will elude an approach based entirely on judicial application of *Fordice*.

In the context of the post-*Brown* world, the advantages of addressing *de facto* segregation through constructive federal involvement become clear. Because today's resistance comprises more special interests than in the past, there is a better chance that this resistance will heed guidance from the federal government; a non-adversarial tenor is more feasible.¹⁶⁹ More cooperation and money will lessen resisters' need to cling to their current positions. Significantly, outside support will alleviate some of the pressure to close or reduce the size of historically black schools to pay for other changes.¹⁷⁰ This is not to suggest that educational authorities should keep all colleges open or maintain duplicative programs. Some schools are likely not justified given their costs. Still, a full account of all societal factors is necessary for an accurate

167. It is important, however, for courts to consider the policy implications of their constitutional remedies in the context of the overextended Mississippi school system. Judge Biggers, very mindful of the impact the case will have, stated that he would remain involved as long as necessary, but that he has no desire to become a "superchancellor" overseeing the colleges for long periods. Biggers, Mar. 18, 1993 interview, *supra* note 16. There is also disagreement about the scope of the power of courts to implement remedies beyond the contemplation of the parties and beyond jurisdictional limits. See Hawkins, *supra* note 144, at 568–73.

168. Forty years after *Brown*, the South leads the nation as the least segregated part of the country. Julie Stacey, *Northeast Most Segregated*, USA TODAY, May 12, 1994, at A1. While 81% of Southerners surveyed in 1954 opposed *Brown*, only 15% of those surveyed in 1994 lodged opposition. *The Numbers Reflect Change of Attitudes*, USA TODAY, May 12, 1994, at A8. A poll conducted April 22–24, 1994, reveals how attitudes across the nation have changed over the years. Eighty-seven percent of those surveyed approved of the *Brown* ruling, compared to 55% in 1954. J.L. Albert, *Progress Made, Gaps Remain on Race Issues*, USA TODAY, May 12, 1994, at A8 (providing results of *USA Today/CNN/Gallup* poll). Sixty-two percent of whites and 75% of African-Americans responded that integration has improved race relations, and more whites (42%—up from 35% in 1988 and 23% in 1971) believed that school integration has improved the quality of education for whites. *Id.*

169. Telephone Interview with R.D. Harrison, *supra* note 12; Telephone Interview with Raymond Pierce, *supra* note 12.

170. For a summary of the financial difficulties facing Mississippi schools in general, see *supra* notes 95, 151–52 and accompanying text.

decision about which schools to close. State policymakers may not consider factors like cultural preservation and campus environment if the overriding goal is the preservation of scarce resources. Federal assistance will protect educational choice and diversity, and enable states to evaluate school closings in terms of fairness as well as efficiency.¹⁷¹

A cooperative approach by the federal government and the dual-system states would also be more effective in ameliorating the resistance to a comprehensive remedy than the current adversarial approach has been. Cooperation is feasible where those resisting change receive some benefit in exchange for reforms that would otherwise harm their interests. Political give-and-take, or bargaining toward a comprehensive agreement, is possible because large-scale, irrational racist opposition to equality is not the primary basis of the resistance. The reluctance of minority groups would largely abate, for example, if the government were to demonstrate that the rights and benefits *Fordice* purported to award them will translate into concrete gains rather than a hollow victory or a long-term setback.¹⁷² Where *Fordice* alone provides no such guarantee, federal support intended to achieve that end would lend credibility to desegregation plans. Similarly, alumni groups would be reassured if, through more federal money, system-wide quality enhancement and increased efficiency did not necessitate concurrent reductions in quality and resources at their schools.¹⁷³

Dealing with the educational bureaucracy and with communities and workers displaced by reform will be trickier, as any reductions in the scope of the present dual system will negatively affect them. Nevertheless, cooperative planning would still more effectively compensate them than would a judicial solution. To the extent that federal involvement would facilitate a smoother transition or reduce the number of cuts necessary to provide for remedial improvements, there would be less dislocation and adverse economic impact. Government-supported measures, implemented independently of the legal remedy, would help make change less painful. It is thus crucial to acknowledge the necessity of policy decisions beyond the province of the judiciary.

171. For a discussion of how the *Fordice* plaintiffs could use arguments concerning the unique cultural and educational environment at historically black colleges within the *Fordice* framework, see *supra* notes 104–13 and accompanying text.

172. Special scholarships, programs, and the like can be created to reassure African-American students that *Fordice* is a true victory.

173. See *supra* note 131 and accompanying text for a discussion of alumni opposition to *Fordice*. Of course, where program duplication is wasteful and produces no educational benefit, it should be reduced, in order to enhance programs at historically black schools. Some alumni factions will continue to resist, but the overall problem of alumni resistance will be lessened where the net quality of education is certain to remain the same. Federal support would go far toward convincing white alumni groups that their schools' quality will not be diluted to maintain offerings at historically black schools because such support would make system-wide enhancement feasible.

B. *Feasibility of a Cooperative Framework*

The United States government, as a litigator, has not played a very productive role in working toward a resolution of *Fordice*.¹⁷⁴ The government and private plaintiffs often have disagreed about what to advocate, especially since remand.¹⁷⁵ The federal government is not very familiar with the nuances of lawsuits in different states, and two relatively autonomous sets of plaintiffs are not likely to develop cohesive proposals.¹⁷⁶ The courts' role in the solution generally should be limited to identifying specific legal violations that injure individual parties and to ordering compliance with remedies, so long as such action does not unduly intrude upon political or policy questions. Other government bodies must take responsibility for the policy and societal problems that courts are unable to address.¹⁷⁷

This Note urges a two-tiered approach that would divorce policy and political problems from legal ones. In such a system, courts would identify legal violations, thereby facilitating their correction, and the Department of Education, under an expansion of its present authority under Title IV,¹⁷⁸ would provide non-adversarial help to states to effect systemic policy remedies aimed at societal factors.¹⁷⁹ The goal is to facilitate the smoothest transition possible from impermissible dual systems to unitary systems that maximize all students' access and opportunity.

Title IV already provides for technical assistance for school districts preparing and implementing desegregation plans,¹⁸⁰ so adaptation of that aspect of an overall program to the higher education context should not be difficult. Furthermore, Title IV provides for grant money for training local

174. Interview with Marsha M. Kelly, *supra* note 128. The Justice Department filed an alternate proposal for reorganizing Mississippi's university system that called for the preservation of all schools and differed radically from the earlier IHL plan. No agreement was reached in closed negotiations and the parties maintained their disparate plans through May 1994, when the case finally went to retrial. Smothers, *supra* note 2, at A10.

175. See Brown, *supra* note 5, at 122-23; Davis, *supra* note 70, at 453-55. The private plaintiffs in *Fordice* have filed separate stipulations about which issues to address with the remedy. See Separate Statement of the Private Plaintiffs in Response to the Court's Order of October 23, 1992, *United States v. Fordice*, No. GC75-9-B-O (N.D. Miss. filed Nov. 18, 1992), *on remand from United States v. Fordice*, 112 S. Ct. 2727 (1992).

176. This is not to condemn all governmental intervention in cases like *Fordice*. Government litigation is often a much-needed injection of resources, energy, and legitimacy for smaller groups of plaintiffs taking on a state government. Telephone Interview with Franz Marshall, *supra* note 73.

177. Marshall, the assistant Department of Justice attorney handling the case, stated that "sound educational policy" is the key to *Fordice* remedies. He agreed that desegregation of colleges may be best achieved as part of a comprehensive approach through consistent policy. *Id.*

178. 42 U.S.C. §§ 2000c to 2000c-9 (1988). Title IV, while completely consistent in spirit with the approach suggested by this Note, probably does not supply enough authority by itself to enable the Department of Education to execute such a broad strategy unilaterally. Congressional authorization for an enlarged appropriation of funds to facilitate comprehensive solutions may be necessary, even if sweeping new additions to Title IV are unnecessary.

179. *Cf. id.* § 2000c-2 (providing for technical assistance to states or school board officials in preparing, adopting, or implementing desegregation plans).

180. *Id.*

officials and aid from experts to ameliorate desegregation problems.¹⁸¹ What is really needed for higher education desegregation is only a change in degree of assistance, rather than an entirely new approach.

While more money, and the authority to spend it, will require new legal authorization, the spirit of the proposed program is the same as that embodied in Title IV. An enlargement of the scope of Title IV or a special provision of funds through general education expenditures would be necessary to foster coordinated state-federal action. Title IV could serve as a springboard for developing a joint state and federal approach that would help give national meaning to *Fordice* and move toward a new cooperative era of desegregation.¹⁸² States like Mississippi would be more willing to address their dual systems without the threat of federal coercion if they received resources adequate to fund a wider range of constructive policy options.¹⁸³ In the event of state noncompliance under such an approach, Title IV would still provide for judicial recourse.¹⁸⁴ Despite huge federal deficits and the dangers of governmental largesse, education desegregation is such an important investment in the nation's future that it merits increased attention, even at the expense of other programs.

The key to such a proposal is to find the proper bridge between dual-system states and federal educational policymakers. At the federal level, the Department of Education already has a liaison to work with states' educational infrastructures.¹⁸⁵ The Department of Education's Office of Civil Rights monitors states with desegregation plans in various stages of implementation,¹⁸⁶ and this office has already established links with relevant state officials. Thus, the Department of Education has developed a specialization in dealing with dual systems by working cooperatively with state officials charged with formulating plans to end segregation. Raymond Pierce, who handles *Fordice* for the Department of Education's Office of Civil Rights, agrees that such an approach to education is desirable.¹⁸⁷ Pierce believes it

181. *Id.* § 2000c-4 (allowing grants for training of teachers or hiring of specialists to deal with problems arising in desegregation).

182. Such an enhanced Title IV could be aggressively used to create extensive cooperation between federal and state governments. It already provides for technical assistance in "preparation, adoption, and implementation" of desegregation plans through the use of Education Department personnel, information, or advice. *Id.* § 2000c-2 (emphasis added).

183. Indeed, much of the resistance to past federal initiatives probably arose from the impossibility of implementation without adequate resources. See Telephone Interview with R.D. Harrison, *supra* note 12.

184. 42 U.S.C. § 2000c-6 (giving Attorney General right to bring suit to enforce rights of those unable to bring one).

185. Telephone Interview with Raymond Pierce, *supra* note 12.

186. *Id.*

187. *Id.* Pierce commented that to date, the broad approach advocated in this Note has not been tried. He went on to say that today, more comprehensive issues surface more often, and he agreed that past cases show that dealing with desegregation in a vacuum leads to cosmetic remedies that do not truly aid African-American students. *Id.*

would be feasible to develop a more comprehensive approach to complement court-devised remedies.¹⁸⁸

The proposal is also workable from the standpoint of dual-system states. According to R.D. Harrison, Mississippi Deputy Superintendent of Education, Mississippi's educational structure, for example, is quite amenable to this approach.¹⁸⁹ Three separate boards, which supervise colleges, junior colleges, and lower education, respectively, oversee the state's educational system. Although these boards are independent, they meet regularly and believe that prudent educational policy mandates collaborative, coordinated action.¹⁹⁰ Harrison stated that the boards could develop and implement system-wide reforms, and have in fact already done so. To his knowledge, other dual-system states have similarly adaptable agencies that would be suited to federal cooperation.¹⁹¹ In fact, state educators are already addressing many of the plaintiffs' broad concerns, but inadequate resources have hindered progress.¹⁹² It is not, therefore, that plans and good intentions are absent (as in the past), according to Harrison, but that they have been deferred because of inadequate resources and, in some states at least, because of bureaucratic burdens.¹⁹³

Effective communication is essential if a coordinated attack on dual systems is to work. Proposals and other information must flow accurately and readily between state and federal officials to develop comprehensive plans tailored to individual state systems' needs. Beyond support in plan development, reviews by the Federal Department of Education are necessary to ensure that dual-system states are in fact applying federal aid to remedy segregation. According to Pierce, his office already performs this function,¹⁹⁴ and Harrison said Mississippi educators would have no problem complying with progress reviews and other guidelines in exchange for funding and other

188. *Id.* Pierce agreed with the assertion that in many cases, the environment is quite amenable to non-adversarial negotiation. *Id.* Pierce said that his office is currently reevaluating plans in Florida, Kentucky, Maryland, Ohio, Pennsylvania, Texas, and Virginia in light of *Fordice* (after tentatively releasing eight other states from review), and that federal/state cooperation is likely to work especially well where there is a less litigious environment. *Id.* In Mississippi, then, the opportunity for constructive reform may be lost given the current state of affairs. Still, remedies will be more likely to be speedy and effective where state and federal governments take a cooperative, rather than a litigious, approach.

189. Telephone Interview with R.D. Harrison, *supra* note 12.

190. *Id.*

191. *Id.*

192. *Id.* For example, Harrison said that Mississippi has introduced equity funding for poorer high schools and has raised the sales tax by a penny to better fund education, and that the state is currently introducing technology like computers in all classrooms. The pace is slow, however, chiefly because of funding constraints that make federal help the best way to advance state efforts to address the root causes of continuing minority disadvantage. *Id.*; see also Henry, *supra* note 13, at D1; Interview with Dr. Bela J. Chain, *supra* note 146.

193. Harrison stated that in Alabama, for example, massive reorganization of the entire school system is underway, leaving educational administration there in shambles. Such confusion will surely retard the progress of eradicating that state's dual system. Telephone Interview with R.D. Harrison, *supra* note 12.

194. Telephone Interview with Raymond Pierce, *supra* note 12.

support.¹⁹⁵ The federal government should not attempt to micromanage, but it can monitor and offer support to foster consistent progress in education desegregation.

Funding will be essential for any remedy. States with unconstitutional dual systems should pay for their violations, but poor states will not suddenly become rich enough to provide fairer and greater educational opportunity. Federal money can fill the gap,¹⁹⁶ taking away one of defendants' most common justifications for not doing more.¹⁹⁷ The idea is to put maximum force behind court orders through cooperative desegregation plans, to achieve more than a superficial solution. Of course, states, while retaining flexibility in spending, should not receive funding *carte blanche*. This is not a problem, though, so long as funding goes to established entities, like the three boards responsible for Mississippi's educational system, because judicial and U.S. Department of Education supervision could check such entities.¹⁹⁸ Federal money would simply increase states' educational options. This Note does not advocate merely "throwing" federal dollars at the problem.¹⁹⁹ Extrajudicial responses can, nonetheless, be better tailored than judicial approaches to the problems that have emerged in the remedial phase of *Fordice*. If integrated, quality schools are as important as Americans—through decades of struggle—have said they are, then the commitment to the goals of *Brown* must stretch beyond the courtroom and adapt to a changing educational and social environment.

Several programs might be developed as part of a cooperative policy effort to solve the broad concerns that courts could not properly address as part of a legal remedy. Foremost, state and federal policymakers could address college dual systems with a comprehensive educational reform plan. While *Fordice* does not mandate that high schools provide more college preparation,²⁰⁰ for example, in poor, heavily African-American districts across the country, stronger college preparation is absolutely imperative in boosting minority

195. Telephone Interview with R.D. Harrison, *supra* note 12.

196. An expansion of Title IV assistance would be very effective for dual-system states in tackling larger problems. See 42 U.S.C. § 2000c-4 (1988) (providing grant money for training of teachers and other school officials and retention of experts to advise on desegregation matters).

197. Throughout *Fordice*, Mississippi has avoided extensive changes, claiming that it cannot afford to revamp its entire educational system. Many Mississippians seem to agree that today this is not a cover for racial malice but a real constraint. See *supra* notes 151–52, 192. While money will always be the "real" constraint, help in erasing past harms by making solutions possible is no different from aid to urban school districts or specialized programs like HEADSTART, save for the fact that the problem remedied is past discrimination.

198. R.D. Harrison stated that Mississippi's governmental structure would be well suited to operating under such federal oversight. Telephone Interview with R.D. Harrison, *supra* note 12, see also *supra* notes 185–91 and accompanying text. The key is flexibility. Harrison said: so long as regulations do not stifle the process, federal resources will stimulate changes that are far beyond the judiciary's reach. Telephone Interview with R.D. Harrison, *supra* note 12.

199. Harrison emphatically agreed that federal dollars are not a panacea for Mississippi's educational woes. He supported the proposal discussed here only because funding was just one part of the scheme *id*

200. Telephone Interview with Carl Lahrng, *supra* note 14.

enrollment in college. If lower education systems fail students, enhanced freedom to choose among colleges is an empty right. Without the opportunity to enroll in college and compete on an even footing in a unitary system, many students will never have a choice at all. States and the federal government could address this concern, as well as many others, by exploring ways to expand access to college. Providing better college preparation courses might be more difficult than simply lowering required ACT scores, but in the long run it will be much more beneficial to students in poorer districts.

State and federal policymakers should also work together to develop programs specifically to compensate victims of past discrimination and contemporary reforms. Such programs would help to alleviate resistance to desegregation and possible negative side effects of dismantling dual systems. To address the possibility that African-American students may drop out of a unitary system, policymakers could earmark some funding for special minority scholarship programs and efforts to foster a more comfortable campus environment at historically white schools. Policymakers should also use funds to keep some historically black schools open and to preserve their unique cultural environment. Economic aid and other support can help displaced faculty, businesses, and employees to relocate or retrain wherever schools have been closed or pared down, so that reallocations in the education budget do not unfairly punish communities in some parts of a state. Greater efficiencies produced by streamlining the system may free resources, perhaps allowing displaced workers to relocate to remaining schools, which will host enhanced programs. Even if a state were to reduce its entire educational system to a more efficient level, some savings could be used to help workers make the transition to other fields.

To suggest a cooperative approach to policy questions is not to suggest that courts should relinquish entirely the duty to examine the adequacy of policy measures taken to remedy dual systems. Courts must, however, remain in a monitoring role where possible and limit resort to the sledgehammer-like option of litigation to situations where it is absolutely necessary. Court-supervised remediation remains most expedient in solving discrete, blatant violations of constitutional protections. Clear, concise opinions on issues like disparate ACT testing requirements, and even the number and location of schools, can guide defendants to address such problems quickly. Courts also would remain responsible for enforcement of the overall remedy, by ensuring adherence to the agreed-upon plan. They would not, however, determine every minute element of policy. States would be subject to litigation if they deviated from agreed-upon solutions.²⁰¹

201. See *supra* note 184 and accompanying text.

C. *Scope of the State/Federal Partnership*

This Note does not envision a permanent subsidy to the nineteen states currently covered by *Fordice*. Instead, federal support would supplement judicial enforcement of civil rights as a temporary crutch to help states through the transition to a unitary system. As jurisprudence evolves, more states may be required to remedy impermissible segregation, while others involved now may successfully complete their transitions. The thrust of the argument for federal aid is that if states are left to remedy *de facto* segregation by themselves, they may do more harm than good by implementing cosmetic programs inadequate to the task. Courts are ill equipped to force them to do more.

The funding and support urged here is transitional in nature; federal dollars would be used to reform dual systems, not to maintain dual-system states' educational structures. Indeed, implicit in *Brown* itself is the idea that what is needed is a shift to a nondiscriminatory regime. To many, *Brown* stood for the proposition that schools should be integrated to make educational equality feasible for African-Americans.²⁰² After the completion of that process, no more court supervision would be needed, because the violation—denial of access to quality schools—would be cured.²⁰³ Federal support as envisioned in this Note would facilitate implementation of *Fordice*, and once changes are in place, aid would no longer be necessary or appropriate. A cooperative approach would examine what states have already attempted to change and would acknowledge that states' failures may be motivated by considerations other than race. A cooperative approach would exist simply to support the transition.

The larger number of states that are not covered by *Fordice* may object to programs created specially to aid dual-system states on the grounds that the nation should not subsidize states that have unconstitutionally deprived African-American citizens for generations. Such criticism is misplaced, however, as federal assistance would aid the victims of past discrimination, rather than the states that discriminated. Those states are much better positioned than the rest of the nation to serve as the dispensaries of relief for the shameful legacy of segregation. Federal dollars spent in a cooperative effort to end dual systems are thus not meant to subsidize states' chronic underfunding, except in the sense that perennial malnourishment of school budgets in poorer states has precluded any truly effective remedy. Dual-system states should in no way be allowed to use federal help as an excuse to avoid responsibility for their own educational systems; technical assistance and

202. See Washburn, *supra* note 31, at 1120–25 (critiquing *Brown* Court's fixation on ending segregation).

203. See *Freeman v. Pitts*, 112 S. Ct. 1430 (1992); *Board of Educ. v. Dowell*, 498 U.S. 237 (1991)

funding from the federal government should serve as temporary crutches, not as opiates.

V. CONCLUSION

There is a long way ahead before we feel the true impact of *Fordice*, because a case like *Fordice* affects people for generations. Its effects will survive students currently in college, who do not know if they will have an alma mater, and it will forever alter many careers. It will strain college systems already strapped for scarce resources. Mississippi may be the first state to encounter these problems, but other states will shortly be forced to reform their dual systems under the *Fordice* standard.²⁰⁴ If *Fordice* is not implemented with care, the ironic result may be that damage to dual-system states' educational systems will reduce African-Americans' access to education.

The efficacy of long-term judicial involvement and the propriety of judicial administration of educational systems are doubtful, but court detachment from education leaves too much discretion to local officials, who may levy great costs on African-Americans. A new jurisprudence and another enforcement mechanism, arising both from *Brown's* successes and from a better awareness of its limitations, are needed. A better approach is feasible—one that relies on cooperation with dual-system states, rather than on confrontation. *Fordice*, applied in isolation, allows cosmetic changes to pass constitutional muster, leaving foundational problems completely unresolved. To address the entire problem, the entire problem must be fixed in the national consciousness. While courts play a significant role in giving force to rights, the federal government must comprehensively address policy issues and make broader remedies attainable. In short, federal participation in higher-education desegregation must be an essential part of any national commitment to reform the way we learn.

204. See *Knight v. Alabama*, 14 F.3d 1534 (11th Cir. 1994) (remanding parts of lower court decision in light of *Fordice* standard).