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A Legal History of Desegregation in Higher Education

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The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage and holds fast to the principles of constitutional liberty. But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. (Justice John Marshall Harlan, dissenting opinion in *Plessy v. Ferguson*, 1896, p. 559)

For almost a century now, the American judiciary has struggled with issues of segregation and desegregation in higher education. Justice Harlan's simplistic characterization of a "color-blind" Constitution fails to address adequately our contemporary racially stratified, culturally diverse, and economically divided nation (Gotanda, 1991). The United States Supreme Court's 1992 decision in *United States v. Fordice* is only the most recent of many unsuccessful attempts to solve this thorny problem. With litigation still under way in several states, the Court's ruling in *Fordice* does not promise to be the final word on this topic. The issue of desegregation in higher education remains unresolved for many reasons—some of which are examined in this article.

Focusing on United States Supreme Court rulings, this article highlights legal, educational, and social issues surrounding the court-ordered desegregation of higher education. It also offers insights about the general effectiveness of the Court's rulings in this vital area. To accomplish this task, the article is divided into three parts. Part one provides a chronological, historical perspective of important court cases as well as relevant federal legislation on this topic.¹ Part two introduces and discusses concepts of academic freedom at the postsecondary level and their influence on higher education desegregation efforts. Part three concludes the article and offers a partial explanation why the judiciary has been unable to desegregate higher education.

*The authors wish to thank Ms. Rhonda Lee, a student at Temple University Law School, for her outstanding assistance with the legal research in this paper.

¹In the limited space available, only highlights can be provided. For a detailed history of desegregation in higher education, see Preer (1982) and Kujovich (1987).

THE LEGAL HISTORICAL PERSPECTIVE

The legal history of higher education desegregation is appropriately divided into three distinct segments. The first period, starting in the late 19th and early 20th centuries, focuses on early law that emphasized equal protection as guaranteed by the 14th Amendment of the United States Constitution. Stressing the importance of institutions and facilities, these decisions maintained that a separate education may be an equal education and, in essence, supported laws that mandated separate facilities for the races.

During the second period, which began in the late 1930s and reached its apex with such important rulings as *Sweatt v. Painter* (1950) and *McLaurin v. Oklahoma State Regents* (1950), the focus shifted from the institution to the individual, as individual plaintiffs, mostly African Americans, sued to attend the institution of their choice. In some of these cases, no separate facility was available while in others, such as *Sweatt*, a facility was available but the Supreme Court deemed that it was not equal. These cases began to question the separate but equal doctrine as it applied to higher education, and they laid the groundwork for the Court's 1954 *Brown v. Board of Education* declaration that, when it comes to education, separate is inherently unequal.

The third period shifted emphasis back to the institution. Encompassing litigation that occurred after the passage of the Civil Rights Act of 1964, this analysis focused on cases that called for dismantling dual systems of education for Whites and Blacks and that reconsidered the role of choice in this process. Desegregation litigation in higher education during this period is best characterized by the most recent applicable Supreme Court ruling in *United States v. Fordice* (1992).

Early Higher Education Litigation and the Separate-but-Equal Doctrine

The history of higher education desegregation litigation began as early as 1862,² with the passage of the Morrill Act, which extended federal financial support for the nation's land grant universities to provide the masses with scientific and practical training. Passed before the Emancipation Proclamation, the Act did not specifically address the educational needs of Blacks. On the other hand, it was significant in this regard because three states—South Carolina, Virginia, and Kentucky—established land grant colleges for African Americans with these monies (Preer, 1982). The Hatch Act of 1887, which funded state agricultural experiment stations at colleges and universities throughout the United States, stated that monies should be equally divided between White and Black institutions unless the state legislature deemed otherwise. Documenting this history, Preer observes that the Second Morrill Act of 1890 provided a more reliable source of funding for Black institutions by specifically requiring

²However, Chief Justice Roger Taney expressed the then-current legal standard for racial segregation and the inferiority of African Americans in *Dred Scott v. Sandford* (1857).

equitable distribution between these and White institutions. Simultaneously, however, the 1890 Act legitimized this separate status. As Preer notes, "Ironically, the earliest efforts to provide equal educational opportunities for Negroes came to be viewed as an impediment to desegregation" (p. 7).

Shortly after the passage of the second Morrill Act, the United States Supreme Court handed down its decision in *Plessy v. Ferguson* (1896), a case involving the designation of separate railroad cars for Blacks and Whites. In *Plessy*, the Court endorsed the proposition that separate can be equal. Justice Henry B. Brown, writing for the majority, contended that while the object of the 14th Amendment was to enforce absolute equality of the races, it was not meant to abolish all racial distinctions.

Reflecting social attitudes of the time, Justice Brown maintained that such separation does not imply inferiority of either race, that there were times when and places where the races preferred separation, and that it was within the police power of the states to pass legislation requiring separate facilities. He also made a direct connection between separate railroad facilities and other separate facilities. Without specifically mentioning the Morrill Act or universities, Justice Brown observed that the most common instance of enactment of this type of legislation pertained to the following:

... the establishment of separate schools for white and colored children, which have been held to be a valid exercise of the legislative power even by courts of states where the political rights of the colored race have been the longest and the most earnestly enforced. (*Plessy*, 1896, p. 544)

The more well-known and most-quoted analysis, however, came from Justice Harlan's dissent, which set forth ideas foreshadowed in current legal thought and educational policy analysis. In his opinion, which is quoted at the beginning of this article, Harlan observed that the Constitution is color-blind.

While not a higher education case, or for that matter even a school case, *Plessy* preceded three important Supreme Court decisions that supported de jure school segregation: *Cumming v. Board of Education* (1899), *Berea College v. Commonwealth* (1908), and *Gong Lum v. Board of Education* (1927). Only one of these cases, the *Berea* case, involved higher education and desegregation; however, it concerned a private institution and therefore was not covered under the Constitution, which only protects citizens against interference by state actors. Nonetheless, *Berea* is important because from the time of *Plessy* until the 1938 *Missouri ex rel. Gaines v. Canada* opinion, it was the only Supreme Court case on desegregation in higher education that supported *Plessy's* separate-but-equal philosophy (Preer, 1982).

Issues of Choice and the Attack on Separate but Equal

Beginning with *Gaines*, the National Association for the Advancement of Colored People (NAACP) launched an all-out attack on de jure segregation as it applied to the education of African Americans in graduate and professional schools. In *Gaines*, as well as in a subsequent line of higher education desegregation cases, the NAACP contended that *Plessy's* doc-

trine of separate but equal was suspect when it came to higher education (Gunther, 1985).

The *Gaines* case involved an African American, Lloyd Gaines, who applied to the University of Missouri Law School but was rejected based on race. The university's defense rested on the fact that no law school for African Americans existed in Missouri; and while the university would not admit Gaines, it would subsidize his tuition to attend an out-of-state institution. The Supreme Court's majority opinion concluded that the state was obligated to provide Gaines "within its borders facilities for legal education substantially equal to those which the State there offered for persons of the white race, whether or not other negroes sought the same opportunity" (*Gaines*, 1938, p. 351).

The Court ruled similarly 10 years later in *Sipuel v. Board of Regents* (1948). In that case, the University of Oklahoma Law School denied admission to an African American woman, Ada Sipuel, because of her race. Citing *Gaines*, the Court declared that Sipuel was entitled to the same legal education as a White applicant.

Two cases decided in 1950, *Sweatt v. Painter* and *McLaurin v. Oklahoma State Regents*, are important because they laid the groundwork for the Court's 1954 decision in *Brown*. By definition, however, the cases revolved around very narrow legal questions. *Sweatt* addressed the question: "To what extent does the Equal Protection Clause of the Fourteenth Amendment limit the power of a state to distinguish between students of different races in professional and graduate education in a state university?" (*Sweatt*, p. 631). The *McLaurin* case was initiated to determine "whether a state may, after admitting a student to graduate instruction in its state university, afford him different treatment from other students solely because of his race" (*McLaurin*, p. 638).

In *Sweatt v. Painter*, the University of Texas Law School rejected the Black plaintiff's application solely because of race. At that time, no law school in Texas admitted African Americans. The state trial court recognized this policy as one that denied equal protection. However, instead of granting Herman Sweatt relief, it continued the case for another six months to allow the state time to supply "substantially equal facilities" (*Sweatt*, p. 632). During that period, the state opened a law school for its Black citizens. The Supreme Court ruled that even with the new law school, there was no "substantial equality in the educational opportunities offered white and Negro law students by the State" (*Sweatt*, p. 633). Comparing such measurable factors as "number of faculty, variety of courses, opportunity for specialization, size of the student body, scope of the library, [and] availability of law review and similar activities," the Court maintained that the University of Texas Law School was superior (*Sweatt*, pp. 633–634). It also found the Whites-only law school far superior with regard to the more intangible, less easily measurable assets that make for a great law school such as "reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige" (*Sweatt*, pp. 634). The Court further recognized the importance of exchanging ideas and views for those who wish to practice law and noted that this type of learning could not be acquired in isolation. Introducing the issue of choice, the Court

concluded its comparison by asserting, "It is difficult to believe that one who had a free choice between these law schools would consider the question close" (*Sweatt*, p. 634).

In the 1950 *McLaurin* case, an African American student with a master's degree applied to the doctoral program in education at the University of Oklahoma. The university turned down his application solely because of his race. At that time, certain Oklahoma state statutes made it illegal to maintain or to attend schools that enrolled both White and Black students. A district court held that these statutes were unconstitutional, citing the *Gaines* and *Sipuel* rulings as the basis for the proposition that the state has a constitutional duty to provide Blacks with the same education it provided to applicants of any other group. This decision resulted in an amendment to the state laws that allowed admission of Blacks to White universities but only on a restricted basis.

Based on the trial court decision and the amended Oklahoma state statutes, George McLaurin entered the doctoral program. He was, however, required to sit in a special designated area in classrooms, in the library, and in the cafeteria. The state considered this separation to be nominal because, it argued, McLaurin was permitted to use essentially the same facilities as the White students, a privilege denied to other African Americans in the state, and the seats to which he was assigned carried with them no particular disadvantage. The Supreme Court rejected this argument, noting that these special seats hindered McLaurin's pursuit of an advanced degree and, ultimately, the ability to learn his profession because they set him apart from the other students and inhibited him from studying, engaging in discussions, and exchanging views with other students. Similar to its observation in *Sweatt*, the Court stressed the importance of such exchange:

Our society grows increasingly complex, and our need for trained leaders increases correspondingly. Appellant's case represents, perhaps, the epitome of that need, for he is attempting to obtain an advanced degree in education, to become, by definition, a leader and trainer of others. Those who will come under his guidance and influence must be directly affected by the education he receives. Their own education and development will necessarily suffer to the extent that his training is unequal to that of his classmates. Self-imposed restrictions which produce such inequities cannot be sustained. (*McLaurin*, p. 641)

In so far as the Court addressed the very narrow question of 14th Amendment protections in relation to graduate and professional schools, it specifically refused to address *Plessy*. It made this point explicit in *Sweatt* and in references noted in *McLaurin*. Even so, these cases laid the foundation for and were specifically referred to in *Brown*, which overturned *Plessy* and declared that in education, separate is inherently unequal.

The Supreme Court first applied the *Brown* principle to higher education desegregation in the case of *Florida ex rel. Hawkins v. Board of Control* (1956). However, scholars have consistently characterized the *Hawkins* precedent as ineffectual because it did not resolve the issue of remedy. Preer (1982) exposes the irony of the precedents set forth in *Sweatt* and *McLaurin* by noting that while these rulings supported *Brown* and desegregation in public schools, they only confused the issue in higher education. According to Preer, "Before *Brown*, the failure to provide separate educa-

tional opportunities facilitated access to state universities; after *Brown*, the existence of separate Black colleges impeded access to white schools" (p. 128). Smith (1991) attributes these problems to a lack of guidance with regard to remedy, an issue addressed in 1955, when the Court ordered desegregation with "all deliberate speed" in its *Brown II* ruling:

Though *Brown I* was explicitly made applicable to higher education, no such pronouncement was made by the Court concerning *Brown II*. The Court has not decided explicitly what remedies, other than admission, are available to a plaintiff alleging segregation in higher education. (Smith, p. 236)

Dismantlement of Dual Systems, Questions of Choice, and the Fordice Decision

The third period in the history of higher education desegregation began with the passage of the Civil Rights Act of 1964 and culminated with *United States v. Fordice* (1992), the most recent high court ruling on desegregation in higher education. During this period, the focus was on the dismantlement of dual systems and the questioning of previously conceived notions about choice in higher education.

The Civil Rights Act of 1964 guarantees that:

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving Federal financial assistance. (p. 391)

In 1969, what was then known as the United States Department of Health, Education, and Welfare (now the Department of Health and Human Services and the Department of Education) began to enforce the Act by requesting states to devise plans that would dismantle their previously established de jure systems of desegregation in higher education institutions (*Fordice*, 1992). This law, and efforts to enforce it, provoked a great deal of action at state judiciary levels. Arguments often centered on precisely what constitutes dismantlement and whether student choice was a key issue in determining if states had met legal requirements.

The Supreme Court addressed the issue of choice for public school students in the 1968 *Green v. New Kent County School Board* decision, stating that implementation of a choice program was not enough to constitute dismantlement of a dual system. Lower courts grappled with the application of the choice doctrine to higher education, but were often at odds with each other (Brown, 1992; Smith, 1991). Some cases such as the well-known *Adams v. Richardson* (1973) case, which pushed the enforcement issue, remained in the lower courts for years. The Supreme Court provided no definitive answer or direction on these issues, and indeed appeared reluctant to confront them, at least as they applied to the higher education setting.

In its 1986 *Bazemore v. Friday* decision, the Supreme Court applied the concept of choice to dismantling segregation in higher education. The connection was an attenuated one, however, because this case addressed the issue of whether a state university's extension service could continue supporting voluntary 4-H clubs, some of which consisted solely of African American students while others had only White students. The Court concluded in *Bazemore* that no discrimination was involved because "any racial imbalance resulted from the wholly voluntary and unfettered choice

of private individuals" (*Bazemore*, p. 408). When applied directly to institutions of higher education in *Fordice*, this "unfettered choice" argument did not prevail.

The facts in the *Fordice* case revolve around Mississippi's efforts to continue a long-established policy of de jure segregation in its public university system by maintaining "five almost completely white and three almost exclusively black universities" (*Fordice*, p. 2729). A group of private citizens, mostly African Americans, sued the governor of Mississippi for alleged racial discrimination in the state university system. The United States government intervened, claiming that state officials had failed to dismantle this dual system in violation of the Equal Protection Clause of the 14th Amendment and Title VI of the Civil Rights Act of 1964.

Although the Supreme Court had addressed this dual system question directly only at the elementary and secondary level, the obligation to dismantle dual systems of education applied to higher education as well. From the onset, the Court made clear its position in *Fordice* that Mississippi had a constitutional duty to dismantle its segregated programs. The primary issue before the Court was whether the state had met "its affirmative duty to dismantle its prior dual university system" (*Fordice*, p. 2735). In its view, Mississippi's mere adoption and implementation of race-neutral policies to govern its system of higher education did not fulfill this affirmative duty.

The state, on the other hand, argued that it had met this affirmative duty when it abolished laws requiring separate education of the races and when the universities changed their admissions policies. It further maintained that, unlike elementary and secondary school children, university students can choose "totally unfettered" which university they wish to attend. Therefore, the court in *Fordice*, as well as the courts in *Bazemore* and *Sweatt*, all considered the issue of choice.

Unlike the earlier decisions, however, choice alone did not dictate the *Fordice* Court's opinion. The Court held that the choice issue is determinant only when a state has not fostered segregation by playing a part in students' decisions. Justice White, writing for the majority, elaborated on this point:

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. Such policies run afoul of the Equal Protection Clause, even though the State has abolished the legal requirement that blacks and whites be educated separately and has established racially neutral policies not animated by a discriminatory purpose. (*Fordice*, p. 2737)

The Court went on to identify four policies of the Mississippi public university system that were "constitutionally suspect" although they appeared ostensibly neutral. The first of these had to do with admissions standards that (a) proved discriminatory intent because they were traceable to the former de jure system, and (b) had discriminatory effects because they were based solely on American College Testing Program (ACT) cut-off scores. Not only did African American students score lower on these tests, but the minimum score for admission was higher at the predominantly White universities (*Fordice*, p. 2739).

A second policy scrutinized by the Court was Mississippi's classification scheme for institutional mission. Three of the predominantly White universities were initially designated as "flagship institutions." They offered the most advanced programs and the broadest curricular offerings and therefore received more funds than the other institutions. The state's historically Black institutions, on the other hand, were much more limited in their missions and consequently in their funding as well. New mission designations for the state's universities, adopted in 1981, still reflected old policies based on de jure segregation.

Third, the Court questioned the policy of "unnecessary duplication" of programs between the predominantly White universities and the historically Black institutions. The district court in the case had earlier defined unnecessary duplication as "instances where two or more institutions offer the same nonessential or noncore program." It had further maintained that this policy of duplication was an essential part of the previous separate-but-equal notion that supported the dual system of de jure segregation (*Fordice*, p. 2740).

Lastly, the Court focused on the state's need to maintain all eight universities in light of limited financial resources and proximate geographical locations (*Fordice*, p. 2741). This issue raised fears among many that Mississippi might eliminate its historically Black institutions as a means of meeting its affirmative duty to desegregate (Blake, 1991). Although the Court stated explicitly that this did not mean that any of the schools would necessarily have to be abandoned, its language clearly leaves the decision with state officials and academicians:

[T]his issue should be carefully explored by inquiring and determining whether retention of all eight institutions itself affects student choice and perpetuates the segregated higher education system, whether maintenance of each of the universities is educationally justifiable, and whether one or more of them can be closed or merged with other existing institutions. (*Fordice*, p. 2743)

In many ways, *Fordice* raises more concerns than it resolves. On the one hand, the Court finally set forth a long-awaited test for determining when a state has dismantled a discriminatory dual system of higher education. As Justice Clarence Thomas wrote in his concurring opinion: "A challenged policy does not survive under the standard we announce today if it began during the prior de jure era, produces adverse impacts, and persists without sound educational justification" (*Fordice*, p. 2745).

On the other hand, Justice Antonin Scalia's separate opinion noted an additional component of the test: the requirement that policies cannot "substantially restrict a person's choice of which institution to enter" (*Fordice*, p. 2738). Characterizing the choice requirement as ambiguous and predicting that the test enunciated in the *Fordice* decision will result in further litigation, Justice Scalia stated emphatically, "I have not the slightest idea how to apply the Court's analysis—and I doubt whether anyone else will" (*Fordice*, p. 2748).

The critical issue remains that of what will happen to historically Black public colleges and universities. In his concurrence in *Fordice*, Justice Thomas praised the success of these institutions, implying that there would likely be "sound educational justification" for maintaining them as they are (p. 2746). "It would be *ironic*, to say the least," he noted, "if

the institutions that sustained blacks during segregation were themselves destroyed in an effort to combat its vestiges" (p. 2746).

Despite the assurances and statements of support offered by the *Fordice* Court, some scholars remain skeptical (Blake, 1991; Days, 1992). As Days notes, "It is this fear that black institutions will be the inevitable casualties of higher education desegregation that has complicated the dismantling of dual systems" (p. 68).

ACADEMIC FREEDOM AND HIGHER EDUCATION DESEGREGATION

In many ways, the view that our country and our judicial system have held about higher education in general and academic freedom in particular has had a profound effect on, and has sometimes been a detriment to, efforts to desegregate colleges and universities. Too often, institutions and individuals use academic freedom as a shield for evading responsibility for wrongdoing.³ To understand the relationship between the judiciary and academe, one must consider both traditional patterns as well as changing perceptions.

Traditional Patterns

From its earliest beginnings in the 12th and 13th centuries, higher education has generally enjoyed independence from governmental, religious, and societal pressures (Edwards & Nordin, 1979; Hofstadter, 1955; Hofstadter & Metzger, 1955; Kaplin, 1978). Such independence resulted from insights that education must be above parochial, national, or ideological controls to be effective (Commager, 1963). The amount of freedom accorded universities has varied over the years, but the ideological concepts of academic freedom and institutional autonomy of Europe of the Middle Ages have survived to the present (Edwards & Nordin, 1979; Kaplin, 1978; Ross, 1976).

The American judiciary has correspondingly respected the traditional academic freedom and autonomy of institutions of higher learning. The rationale for such deferential treatment was due to society's perception that academic institutions were private, complex, and delicate. If outsiders, including the courts, interfered with the internal operation of universities, a delicate balance might be so disturbed that the institutions would founder. Only by respecting the traditional means of governance by consensus and collegiality could higher education thrive and prosper in the United States (Kaplin, 1978, 1985).

Not only was the educational environment special, faculty and administrators were perceived as possessing unique qualities of virtue and

³Mobilia (1984) describes how the academic freedom defense has been used to resist discovery in employment discrimination investigations. A specific example can be found in the case of *In re Dinnan* (1981), which involved a professor who claimed qualified academic freedom privilege to withhold information regarding his vote on a female applicant's promotion. Also insightful is Anderson's (1993) account of Fred G. Wale's nationwide campaign to introduce a select group of distinguished African American scholars to the faculties of northern White universities.

ability. Their educational background and training were viewed as vastly superior to that of the general population. Additionally, they were charged with preserving knowledge and educating the leaders of the future. This combination of exclusive expertise and special mission introduced the idea that outside monitoring of academe was unnecessary—even dangerous—to society's interests (Kaplin, 1978). Justice Felix Frankfurter, in his concurring dictum in *Sweezy v. New Hampshire* (1957), addressed the dependence of a free society on free universities⁴:

This means the exclusion of governmental intervention in the intellectual life of a university. . . . "[I]t is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail 'the four essential freedoms' of a university—to determine for itself on academic grounds who may teach, what may be taught, how shall it be taught, and who may be admitted to study." (pp. 262–263)

Many jurists have used Frankfurter's statements to support what some commentators call "academic abstention" (Edwards, 1980; Edwards & Nordin, 1979). The so-called doctrine of academic abstention rests upon the foundation of the special expertise of the academician, a concept that can be traced to 1827, where it evolved from the law of elementary and secondary level schools (Leas, 1989). Essentially, those who subscribe to this doctrine maintain that the uncommon knowledge and experience of college and university faculty or administrators endow them with discretionary authority that jurists feel ill-equipped to second-guess (Leas, 1989).

There are similar historical reasons why courts do not interfere in the decision-making process of an administrative agency, a legislative body, or another court. For example, from 1800 to 1959, the federal courts were inactive participants in higher education litigation because of state–federal comity. The 10th Amendment of the Constitution reserves to the states (or rather, to the people in the states) those powers not specifically delegated to the federal government. Thus, the lack of activity reflected federal jurists' perceptions that educational matters were primarily a state responsibility. Over time, other judicial perspectives—the doctrine of *in loco parentis*, the law of private associations and contract law—emerged to justify increased judicial activity in higher education (Leas, 1989). Moreover, social and political movements inside and outside higher education ultimately have demanded a greater judicial presence in academe.

Evolving Perceptions

Since World War II, American colleges and universities have undergone vast transformations because of profound demographic changes in student and employee populations. Enactment of civil rights legislation and concerns regarding the individual constitutional rights of students and employees at colleges and universities have influenced the judiciary's attitude toward the discretion of educational leaders. As public institu-

⁴Ironically, given the context of this article, the quotation cited by Justice Frankfurter to support his view was excerpted from a statement made at a conference of senior scholars in South Africa!

tions grew in size and bureaucratic nature, judges appeared less inclined to defer to the discretionary authority of educators. The relative balance of power between institution and student or employee so heavily favored the institution and school officials, courts were sensitive to possible abuse. The increased value of a college education in terms of a property right also precipitated a judicial willingness to review the decision making of educators.

The judiciary's perspective was especially influenced by civil rights legislation. When the plaintiff established a *prima facie* case of unlawful discrimination or a constitutional violation, the courts were compelled to peruse institutional practices. Armed with a clear mandate from the legislature to protect individual constitutional rights, the judiciary began to intervene in internal areas of academe. Only when there was no evidence of impermissible violations or other wrongdoing would judges continue to defer to the discretionary authority of educators.

Little doubt remains that institutions of higher education will continue to be subjected to greater external pressures. Public institutions can expect less autonomy as public demands for accountability and equality motivate state officials to become more involved in their operation. A larger federal presence accompanying grants and financial aid programming will continue to challenge the traditional autonomy of private institutions, as evidenced in the outcome of cases such as *Bob Jones University v. United States* (1983), in which a private, religious university's regulation prohibiting interracial dating resulted in that institution's loss of its tax-exempt status. When seeking to desegregate public higher education systems, however, the judiciary appears unable to act definitively.

THE CHALLENGE OF CRAFTING A DESEGREGATION REMEDY

While the courts will continue to play an important role in preserving individual, institutional, and academic freedoms on a case-by-case basis, the history of higher education desegregation reveals less-than-satisfactory success vis-à-vis the attempt to craft a judicial remedy for higher education segregation. *Fordice* presents the alarming possibility that states may eliminate their historically Black institutions as an acceptable method of meeting their affirmative duty to dismantle their dual systems of higher education. Who will protect the institutional freedom and autonomy of these institutions? The courts? The legislatures? The colleges and universities themselves? No one really knows. The message of *Brown* is now 40 years old, but how its principles are to be translated into policies and practices in our colleges and universities remains to be seen.

The obstacles to formulating an acceptable judicial remedy are formidable. Federal justices are restrained by the 10th Amendment from interfering too much in the states' handling of education. Similarly, judges are reluctant to take action that may adversely affect the "four essential freedoms" of colleges and universities. For example, the language used by the Supreme Court justices in *Fordice* clearly reflects their deference to the discretionary authority and expertise of academicians: "consistent with sound educational practices" (p. 2736), "sound educational justification" (p. 2737), "sound educational policy" (p. 2740), and "educational justification" (p. 2741).

The challenge of establishing an acceptable judicial remedy for segregated systems of higher education is the result of trying to balance competing values. The history of judicial activism in academic matters clearly suggests that judges in the future will be unwilling to disrupt the essential academic nature of colleges and universities by employing remedies similar to those used to enforce *Brown* in the public schools. As noted in *Fordice*, remedies suitable to public school desegregation are not available when individuals may, as they very well should, freely choose whether and where to pursue a higher education. On the other hand, the courts cannot simply ignore federal and state antidiscrimination legislation and permit segregated systems of higher learning to continue to engage in educational practices that violate the basic academic freedoms of students and faculty and deny educational opportunities to millions of citizens.

Complicating the issue is the confusion surrounding the fate of the nation's historically Black colleges and universities (HBCUs). Uninformed legislators and academicians will undoubtedly question why historically predominantly White universities must be "desegregated" while HBCUs must be "maintained." Scrupulous education about the nature of academic freedom and the historical and cultural facets of race must occur before an effective political solution to dual systems of higher education can be crafted. A more effective role for an informed judiciary, then, would be to provoke and supervise state efforts to desegregate higher education.

Jurists will continue to rule on the degree to which college or university systems comply with constitutional requirements, but they must ultimately rely on the states or on the institutions themselves to develop solutions within acceptable constitutional limits. By thoughtfully articulating those substantive academic areas that lie outside judicial inquiry, jurists can provide guidance to legislators, attorneys, and institutional officials.

There is no place in higher education for the type of invidious discrimination practiced in the past, discrimination that perpetuates institutional racism by failing to measure accurately applicants' potential and denying any opportunity to establish their qualifications. Commager (1963) warns of the dangers awaiting the nation if it should fail to protect the academic freedom of students, faculty, and institutions:

[O]ne of the most sobering examples of what happens to a society when it limits freedom of research or freedom of intellectual activity [is] the experience of the antebellum South between 1835 and 1860. That section of the country was committed to the principle that slavery, far from being an error, was a positive good and a blessing. Aware that the rest of mankind did not share this view, the South . . . closed its ears and its eyes and its mind to criticism and attempted to enforce upon its thinkers—its scholars, its writers, and its scientists—a single point of view. It censored books, removed criticism from the mails, went through libraries and burned publications which criticized the peculiar institution of slavery. . . . It organized itself, as best it could in that independent and individualistic society, to silence criticism.

Not everyone in the South had agreed, by 1860, that slavery was an unmitigated blessing, but those who did not agree were silenced. The result was that the South foreclosed any solution of the problems of slavery except the solution of violence. It foreclosed the possibility of working out an evolutionary solution. It made it impossible even to talk about the subject except in partisan or fanatical terms. Having closed all the normal channels of discussion, it forced the issue along the violent channels of war. . . . The Civil War and what happened to the South is a monument . . . to what happens to a society which does not permit free inquiry and criticism of its social and

political institutions . . . when the avenues of inquiry are closed, and when all solutions except the official one are outlawed. What happened to the South will happen to any society that harasses, intimidates, silences, or punishes dissenting opinion: it will condemn itself to error and, in the long run, to defeat. (p. 367)

The primary responsibility for securing and maintaining academic freedom, institutional autonomy, and equal access belongs to institutional authorities and legislators, not the courts. It sounds naive and simplistic to say, but institutional officials must treat students and employees fairly, in accordance with statutory and common law, and consistent with the tenets of traditional academic freedom. Legislators should acknowledge the special qualities of colleges and universities, especially HBCUs, and avoid further eroding their autonomy when drafting and adopting new laws. Working together, mindful of the advantages of *all* aspects of diversity, the two groups can protect the special interests of academe and promote those interests that will better serve society.

Selected U.S. Supreme Court Decisions and Federal Legislation Affecting Higher Education Desegregation

- 1862 The Morrill Act
 - provided for land grant universities
- 1887 The Hatch Act
 - funded equally Black and White agricultural stations unless deemed otherwise by the state legislature
- 1890 The Second Morrill Act
 - provided grants for Black colleges
- 1896* *Plessy v. Ferguson*
 - established the separate-but-equal doctrine
- 1908 *Berea College v. Commonwealth of Kentucky*
 - first Supreme Court higher education desegregation case
- 1938 *Missouri ex rel. Gaines v. Canada*
 - first Supreme Court higher education desegregation case to show vulnerability of the separate-but-equal doctrine
- 1948 *Sipuel v. Board of Regents*
 - African American law school applicant entitled to same consideration as White applicant
- 1950 *Sweatt v. Painter*
 - a state may not distinguish between students of different races in admission to professional and graduate education at a state university
- 1950 *McLaurin v. Oklahoma State Regents*
 - after admitting a student, a university may not afford the student different treatment based on race
- 1954* *Brown v. Board of Education of Topeka, Kansas*
 - separate is inherently unequal
- 1956 *Florida ex rel. Hawkins v. Board of Control*
 - first Supreme Court case to apply the *Brown* principle to higher education
- 1964 The Civil Rights Act of 1964, § 2000d
 - institutions accepting federal funding shall not discriminate on the basis of race

- 1968* *Green v. New Kent County School Board*
- choice is not enough to dismantle segregated public school system
- 1986 *Bazemore v. Friday*
- no discrimination in segregated 4-H clubs when choice is wholly voluntary and unfettered
- 1992 *United States v. Fordice*
- mere adoption of race-neutral policies does not fulfill the state's affirmative duty to dismantle segregated system of higher education

*These are not higher education decisions, but they carry important implications for higher education cases.

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