1-1-2005

The Picture of Equality

Alfred Dennis Mathewson
University of New Mexico - School of Law

THE PICTURE OF EQUALITY

Alfred Dennis Mathewson[*]

I. INTRODUCTION

I turned one year old the day after the decision in *Brown v. Board of Education*[1] was announced. I did not hear of the case until many years later, but I did benefit from it before I learned of its existence. I look at old yearbooks and see a picture of my third grade class filled with all black faces. I have often asked myself, "Why is it wrong to have a class of all black children and black teachers?" I did not see the yearbooks for the white schools in town, but I presume all the faces in them were white. While I never asked what was wrong with that picture, I have pondered the former question most of my adult life. This Article attempts to answer

---

* Dickason Professor of Law, University of New Mexico School of Law. This Article is dedicated to my daughters Eryn and Amber who attended predominantly white schools and my son Justin who attends or has attended predominantly white or predominantly Hispanic schools.

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

both. Anecdotes from past, along with applicable case law will be used to answer the questions raised by this Article.

The picture of the classrooms changed before I ever noticed them. My parents' generation born in the first two decades of the twentieth century ushered in a season of dramatic changes that seemed like the slow tide of progress to mine. When the school board in Tarboro, North Carolina adopted a freedom of choice plan, my mother decided to send me and my siblings to the white schools. We were not the first black family to attend the white schools, but we were among the first. As I recall, my two younger brothers attended the white elementary and junior high schools.[2] I started ninth grade at the white Ahoskie High School and Selma High School in Johnston County for tenth grade. I attended both under freedom of choice plans.[3] I finished my last two years at the consolidated Bertie Senior High School.

The dramatic changes that I observed did not miraculously occur. The U.S. Supreme Court ruled in *Brown* that the black students attending schools designated for blacks in segregated school systems were deprived of the equal protection of the laws in violation of the Fourteenth Amendment.[4] Unbeknownst to me, my school district was in violation of the Constitution. In *Brown II*,[5] the Court remanded the case to the district court to fashion remedies to admit black students "to public schools on a racially nondiscriminatory basis with all deliberate speed."[6] But, my school district had not complied by the time I attended sixth grade in 1964. I recall hearing about the freedom of choice option by eighth grade.

I did not know then that civil rights lawyers and the Department of Justice (DOJ) were vigorously trying to implement *Brown*[7] throughout North Carolina. That litigation involved my school districts and cases for

---

2. One of my younger brothers recalls writing President Lyndon B. Johnson for permission to attend the white school. He also recalls receiving a letter from President Johnson but does not recall its contents.

3. *See* Eileen M. Fava, *Desegregation and Parental Choice in Public Schooling: A Legal Analysis of Controlled Choice Student Assignment Plans*, 11 B.C., THIRD WORLD L.J. 83, 83-84 (1991). Under freedom of choice plans, school districts permitted students to attend any school of their level within the school district. Before the adoption of these plans students attended a school within the district designated for students of their race. School districts were organized by municipality or county. Schools of the same level designated for blacks or whites were within close proximity of each other. *Id.*

4. *Brown*, 347 U.S. at 495.

5. Brown v. Bd. of Educ., 349 U.S. 294 (1955). The Court required reargument on the remedies for the constitutional violations it found. *Id.* at 298.

6. *Id.* at 301.

7. *Brown*, 347 U.S. at 483.

Bertie and Johnston Counties were among those published in the reporters.[8] These cases reveal that the government and civil rights lawyers relentlessly tried to destroy the picture I had grown accustomed to in order to create a new picture full of black and white faces.

Godwin v. Johnston County Board of Education[9] was filed on April 4, 1968, in the spring before I attended Selma High School.[10] Under the freedom of choice plan used in Selma, a substantial number of blacks attended junior high school at the white school but only a handful attended grades nine through twelve. I was the only black student in the tenth grade. Most black high school students continued to attend the all black Richard B. Harrison High School. In his lawsuit, Godwin challenged the pace of integration.[11] He sued the school board as well as the State Board of Education and the State Superintendent.[12] The black and white high schools in Selma and Smithfield were expected to be consolidated by fall 1969. In fact, I was supposed to attend Smithfield-Selma High School had I remained in Johnston County. The major consequence of the court's ruling in *Godwin* was that the duty to desegregate was not placed solely on county boards of education; the state school board also had a duty to desegregate the school systems across the state.[13] Thus, the state had a duty to make county school boards change those pictures.[14]

In *United States v. Bertie County Board of Education*, the school board attempted to comply with the mandate of *Brown* by implementing a freedom of choice plan. This plan placed approximately 9% of black students in the county in previously all white schools, and no white students would attend the schools historically maintained for blacks.[15] The allocation of teachers was similar to the placement of the students. Nine of 149 black teachers were to be assigned to white schools and 16 of 103

---

8. *See* Godwin v. Johnston County Bd. of Educ., 301 F. Supp. 1339 (E.D.N.C. 1969); *see also* United States v. Bertie County Bd. of Educ., 293 F. Supp. 1276 (E.D.N.C. 1968).

9. *Godwin*, 301 F. Supp. at 1339.

10. *See* Adams v. Richardson, 356 F. Supp. 92, 102 (D.D.C. 1973). The Tarboro School District was deemed by the Department of Health, Education, and Welfare to be in presumptive violation of title VI of the Civil Rights Act of 1964 when it had failed to submit an acceptable desegregation plan by 1973. *See id.*

11. *See Godwin*, 301 F. Supp. at 1339-41.

12. *Id.* at 1339.

13. *Id.* at 1343.

14. *Id.*

15. United States v. Bertie County Bd. of Educ., 293 F. Supp. 1276, 1278 (E.D.N.C. 1968). School boards abolished the formal racial classifications of schools and adopted plans giving students the right to choose which school to attend. *Id.* at 1277-78.

white teachers were to be assigned to black schools.[16] Thus, the school board proposed to maintain a predominantly white high school and an all black high school.[17] The court rejected this plan and ordered the school board to consolidate the high school by 1968. All other schools would be fully integrated by the 1969-70 academic year.[18]

The *Bertie* case is still alive today[19] because one elementary school in the county is still identifiable as a white school.[20] The DOJ is pressing the county to come up with a plan to eliminate all racially identifiable schools in its system.[21] The county recently held a public hearing to discuss its proposal to build a new centralized middle school and convert a junior high school into a centralized elementary school.[22] In 1968, the school board argued that whites would flee a unitary school system,[23] and that prediction proved true.[24] Whites in Bertie County left the public school system for private schools, resulting in the student bodies of all schools in Bertie County except Askewville Elementary being predominantly black.[25] Notwithstanding the student bodies, white teachers comprise a larger proportion of the total number of teachers than the proportion of white students.[26]

This Article will discuss an eyewitness's analysis of events and circumstances surrounding cases involving the desegregation and integration of schools and colleges. For more than fifty years, Americans have litigated on the racial composition of schools at all levels of the educational system. That litigation has pursued remedies based on the notion that the ideal picture of equality was one that was racially

---

16. *Id.* at 1278.

17. *Id.*

18. *Id.* at 1283.

19. United States v. Bertie County Bd. of Educ., 319 F. Supp. 2d 669 (E.D.N.C. 2004).

20. *Id.* at 670.

21. Cal Bryant, *Citizens protest school closings*, ROANOKE-CHOWAN NEWS-HERALD, Dec. 2, 2004, *available at* www.roanoke-chowannewsherald.com/articles/2004/12/02/news/news2.txt (last visited Jan. 28, 2005).

22. *Id.*

23. *Bertie County Bd. of Educ.*, 293 F. Supp. at 1280 (citing Brown v. Bd. of Educ., 349 U.S. 294, 300 (1955)).

24. *See Bertie County Bd. of Educ.*, 319 F. Supp. at 670.

25. *See id.* Blacks now comprise 82% of the high school student body and whites 17%. At Askewville Elementary blacks comprise 24% of the student body and whites 72%. Bertie High School Overview, Greatschools.net, *available at* http://greatschools.net/modperl/browse_school/nc/276 (last visited June 7, 2005); Askewville Elementary School Overview, Greatschools.net, *available at* http://greatschools.net/modperl/browse_school/nc/274 (last visited June 7, 2005).

26. *See, e.g.*, Todd Silberman, *School Plan Riles Bertie Parents*, NEWS & OBSERVER, Feb. 21, 2005, at B1.

integrated. A picture with only blacks or with persons of color was not equal to a picture with all whites or a racially integrated picture that is predominantly white. The DOJ has pursued a strategy attempting to delink the categorization of schools from their racial composition and transform them into "Just schools" without success. Black plaintiffs have sought to integrate white schools and to equalize funding for black schools while white plaintiffs and defendants have fought integration and equal funding. The pictures matter but the cloud of *Plessy v. Ferguson*[27] and the separate but equal doctrine in American consciousness,[28] has made the public uncomfortable with evaluating the pictures and the courts are afraid to embrace the relative values of the those pictures. The pictures matter because people still make choices on whether to attend or send their children to an educational institution based on those pictures. Part II of this Article examines the efforts to desegregate elementary and secondary schools systems.[29] Part III of this Article examines the efforts in the dual systems of higher education in southern states.[30] Finally, Part IV examines affirmative action and the creation of new pictures in colleges and universities in the era of integration.[31]

II. THE PICTURE IN ELEMENTARY AND SECONDARY SCHOOLS AND FREEDOM OF CHOICE

A. *The Picture*

Something was wrong with the picture of my third grade class, but it was not readily apparent. On the surface, the boys wore suits and the girls were clad in skirts and dresses. Everyone was neat and well-groomed. The teacher was talking to a student. The walls were adorned with posters and schoolwork. The teacher-student ratio was too high, but there was order in

---

27. 163 U.S. 537 (1896).

28. One commentator argues that the Court was influenced by the proposition that segregation resulted in psychic harm to blacks and directed courts to develop remedies to that harm without regard to the harm suffered by whites. Kevin Brown, *The Road Not Taken in* Brown*: Recognizing the Dual Harm of Segregation*, 90 VA. L. REV. 1579 (2004). However, *Brown* flowed directly from a definition of racial equality as it was understood at the adoption of the Civil War Amendments. That is, the treatment of whites constituted the standard of equality and the treatment of other racial groups was to be measured by it. Blacks were harmed by segregation but the principle harm was not psychic.

29. *See infra* Part II.

30. *See infra* Part III.

31. *See infra* Part IV.

the classroom and the students appear engaged. I have fond memories of third grade. I remember it as a year of great learning. I had not thought there was anything wrong with this picture until I studied the implications of *Brown*.[32] While I have recognized that *Brown* was necessary, I have resented the implication that blacks could not learn unless whites were in the picture.

Even the picture of equality expressed in Martin Luther King's famous *I Have a Dream* speech was clearly multiracial, unlike the picture of my classroom.

> I have a dream that one day this nation will rise up and live out the true meaning of its creed: "We hold these truths to be self-evident: that all men are created equal." . . . I have a dream that my four children will one day live in a nation where they will not be judged by the color of their skin but by the content of their character. I have a dream today.
>
> I have a dream that one day . . . little black boys and black girls will be able to join hands with little white boys and white girls and walk together as sisters and brothers.[33]

Implicit in his vision was that a scene of little black boys and girls joining hands was not equal to the vision in which they joined hands with white children.[34] Martin Luther King Jr.'s dream appears to have implied little about the pictures of the schools with all white faces, except that a picture full of multiracial faces was preferred to any that lacked such diversity.[35]

You could not tell what was wrong with the picture of my class merely by examining it. You would have to look at the pictures of all the schools to understand the role that the law played in creating those pictures. In society's eyes, the children in my class picture were not equal to those in white school yearbooks. The inequality was created by something that was not necessarily visible in any picture. The condition of the buildings or the age of the books, supplies and equipment compared to those of the all white schools was not visible. Furthermore, the *Bertie County* court specifically found that the facilities at the historically black schools were

---

32. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

33. Martin Luther King, Jr., *I Have A Dream (Aug. 28, 1963)*, BANGOR DAILY NEWS, Jan. 17, 2005, at 6.

34. *See id.*

35. *See id.*

substantially inferior to the historically white schools.[36] Society associated classrooms full of black faces with inferior facilities, outdated books and teachers many of whom were not deemed worthy to teach white students.[37]

Brown rests, however, on a different association, one greater in magnitude and more pernicious in its effect.[38] If it were not so, the defects could have been remedied by the equalization of financing pursuant to the separate but equal principle of *Plessy v. Ferguson*.[39] It is clear from the range of cases consolidated in *Brown* that the disparate condition of the school systems was not the principal harm.[40] In *Brown*, the trial court explicitly found that schools in the Topeka system were treated equally in funding and condition.[41] In *Briggs v. Elliott*, the trial court had found that the school district was equalizing its treatment of its two school systems.[42] *Brown* thus is premised on a deeply entrenched societal view that the color of the students in the picture determined the quality of the education received by, and the caliber of, those students.[43] The Jim Crow laws did not merely render us "separate and unequal"; they cast us as "black and inferior." Consequently, the Court explicitly acknowledged that the deeper association could not be remedied by mere equalization of the schools.[44]

Implicit in *Brown* was the notion that there was nothing wrong with the all black picture I had not questioned.[45] The law created those segregated pictures. The remedy in *Brown II* is predicated on the harm caused to black students because of the creation and maintenance of the two separate pictures by the state.[46] The Court presumes that the deep societal association flowing from state action will be remedied by modifying the pictures in the white schools and destroying the all black picture.[47]

The way to destroy the all black picture and modify the all white picture was to dismantle the racially dual system and establish a racially

---

36. United States v. Bertie County Bd. of Educ., 293 F. Supp. 1276, 1279 (E.D.N.C. 1968).
37. *Id.*
38. *See* Brown v. Bd. of Educ., 347 U.S. 483 (1954).
39. 163 U.S. 537 (1896).
40. *Brown*, 347 U.S. at 486.
41. *Id.* at 486 n.1.
42. Briggs v. Elliott, 103 F. Supp. 920, 921 (E.D.S.C. 1952).
43. *See generally Brown*, 347 U.S. at 486.
44. *Id.* at 494. The Court quoted the Kansas trial court that had a found a violation of the Fourteenth Amendment even though the schools had been treated equally. "Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of law; for the policy of separating the races is usually interpreted as denoting inferiority of the Negro group." *Id.*
45. *See id.*
46. *See generally* Brown v. Bd. of Educ., 349 U.S. 294 (1955).
47. *See id.*

unitary system. Such a school system would reflect the image in Dr. King's dream and would be attained through the removal of the legal barriers preventing their existence. Since the state statutes and constitutional provisions were declared unconstitutional in *Brown*, recalcitrant school boards attempted to achieve a racially unitary system through freedom of choice plans.[48] Theoretically, these plans would lead to racially mixed schools because students and their families could choose any school at their level within the district. Whatever pictures emerged would be the result of the choices of students and their families rather than ones dictated by state law or the school board. The school boards offered black students the opportunity to choose better-financed and well-maintained schools which were previously limited to white students. Presumably most black students could be expected to choose these schools.

B. *Freedom of Choice Litigation in My Backyard*

Freedom of choice plans have a storied history in post-*Brown* desegregation litigation. In particular, in North Carolina, these plans did not generate expected results. While freedom of choice plans modified the pictures in white schools, they did not destroy the black picture. No white students elected to attend the schools previously restricted to blacks and most blacks elected to remain in those schools.[49] The failure of the freedom of choice theory in practice resulted in several published opinions involving school districts in North Carolina.[50]

In *Boomer v. Beaufort County Board of Education*,[51] the district court rejected a freedom of choice plan submitted by the school board to cover the 1968-69 school year.[52] The school district operated 10 schools containing 2853 white students, 2417 black students, 123 white teachers and 85 black teachers.[53] The district court had previously approved freedom of choice plans.[54] However, by the 1968-69 year only 128 black students had requested to be assigned to white schools, but no white students had requested to be assigned to black schools.[55] Two white teachers had been assigned to black schools, but no black teachers had

48. *See supra* text accompanying note 5.
49. *See infra* text accompanying notes 51, 58, 67 and cases cited.
50. *See id.*
51. 294 F. Supp. 179 (E.D.N.C. 1968).
52. *Id.* at 181.
53. *Id.*
54. *Id.*
55. *Id.* at 182.

been assigned to white schools.[56] The district court noted that the all black schools would remain all black under the plan.[57] The exercise of choice by black and white students had slightly changed the pictures in the white schools but had failed to change the pictures in the county's black schools.

In *Teel v. Pitt County Board of Education*,[58] the school system was comprised of 8656 black students and 6261 white students.[59] The school board adopted a freedom of choice plan for the 1965-66 school year, but only 250 black students requested to be assigned to white schools.[60] In the following year, perhaps due to intimidation, more than half of those that had been assigned to white schools requested to transfer back to the black schools.[61] Black families' choices were being influenced by coercive forces. If black students chose to attend the white school, the families risked the safety of their children.[62] However, the plaintiffs continued to pursue the equality promised by *Brown*.[63] The district court nevertheless permitted the school board to continue a modified freedom of choice plan for the 1967-68 school year.[64] The district court was concerned that the number of black students requesting a transfer to white schools had decreased, but felt that the plan might work if flaws in the original plan were eliminated.[65] The most significant flaw was that the school district automatically reassigned students who chose to return to the school they previously attended.[66]

The use of violence to influence the choice of black families was commonplace. In *Singleton v. Anson County Board of Education*,[67] the district court ordered the school district to take further steps to eliminate racially identifiable schools and to provide equal educational facilities.[68] The school district adopted a freedom of choice plan that resulted in the partial integration of seven of the fourteen schools in the district.[69] As a result, some schools were predominately attended and staffed by whites

---

56. *Boomer*, 294 F. Supp. at 181.
57. *Id.*
58. 272 F. Supp. 703 (E.D.N.C. 1967).
59. *Id.* at 705.
60. *Id.*
61. *Id.* at 705-06.
62. *See id.*
63. Brown v. Bd. of Educ., 347 U.S. 483 (1954).
64. *Teel*, 272 F. Supp. at 707.
65. *Id.* at 706.
66. *Id.* at 707.
67. 283 F. Supp. 895 (W.D.N.C. 1968).
68. *Id.* at 901.
69. *Id.* at 898.

and other schools were exclusively attended and predominantly staffed by blacks.[70] The district court also found that black families who elected to attend the white schools had been subjected to acts of violence, including bombings and shootings.[71]

In *Coppedge v. Franklin County Board of Education*,[72] another freedom of choice plan failed to achieve unitary status due to threats of violence against black parents and bureaucracy in the school board.[73] The school board had only proposed to assign 750 out of approximately 3200 black students to white schools.[74] The court focused on the school board's role in providing choice.[75] Accordingly, the appellate court upheld the lower court's ruling for the school board to establish a unitary school system by the 1968-69 school year without further delay.[76]

Since freedom of choice plans were not bringing about the desired compliance with the *Brown* mandate, other remedies were required. The burden was initially placed on the school districts to devise a solution to change the racial composition of schools.[77] In *Nesbit v. Statesville City Board of Education*,[78] the appeals involving several school districts in North Carolina and one in Virginia were consolidated.[79] The school districts were ordered to terminate their dual systems immediately and thereafter to operate only a unitary system.[80] The school districts were required to adopt plans eliminating the racial characteristics of their schools including their student bodies and faculties.[81]

In *United States v. Jones County Board of Education*,[82] the district court approved a desegregation plan that called for the pairing of elementary and junior high schools in close proximity during the 1968-69 school year. Also, the plan would reorganize the entire school system in 1969-70 by pairing schools in primary, intermediate and junior high.

---

70. *Id.* at 900-01.
71. *Id.* at 901.
72. 404 F.2d 1177 (4th Cir. 1968).
73. *Id.* at 1178.
74. *Id.*
75. *See generally id.* (finding that defendants' appeal was made most by their compliance).
76. *Id.* at 1178. This was the second time the case had been before the U.S. Circuit Court of Appeals for the Fourth Circuit. *See* Coppedge v. Franklin County Bd. of Educ., 394 F.2d 410 (4th Cir. 1968).
77. *See infra* text accompanying notes 78, 82, 86 and cases cited.
78. 418 F.2d 1040 (4th Cir. 1969).
79. *Id.* at 1041.
80. *Id.* at 1041-42 (citing Alexander v. Holmes County Bd. of Educ., 396 U.S. 19 (1969)).
81. *Id.* at 1042.
82. 295 F. Supp. 640 (E.D.N.C. 1968).

Furthermore, the plan would convert the black high school to the junior high school and the white high school to the senior high school.[83] The goal was to eliminate student choice and place the school assignments in the hands of the school district.[84] Whereas previously the school districts had assigned students by race, now they were to assign students without regard to race.[85]

In *Felder v. Harnett County Board of Education*,[86] the lower court held that the freedom of choice plan promulgated by the school board in 1964 had failed to achieve unitary status.[87] Initially the plan applied to only four grades,[88] although approximately 6000 of the 13000 students in the school system were black.[89] By the 1967-68 school term, less than 200 blacks were attending previously all white schools.[90] Although, the picture in the white schools had been slightly modified, the picture in the black schools remained the same.[91] Therefore, some other measure was needed to produce a greater change. When the school board proposed to close the three black high schools and reassign their students to all white high schools, the court required the school board to adopt a plan which covered elementary and secondary schools as well.[92] Most striking about the plan was that the black schools were going to be closed and black students were going to be involuntarily assigned to predominantly white schools.[93]

The school district's compliance with desegregation orders was met with resistance. Students, black and white, had to be assigned to schools that they had not been assigned to before. In *Huggins v. Wake County Board of Education*,[94] the school board assigned all students in grades ten through twelve, regardless of race, to their previously designated white high school and all ninth graders to their previously designated black high school.[95] The parents of children who had not attended the black school before sought to enjoin the reorganization.[96]

---

83. *Id.* at 641.
84. *See id.*
85. *See id.*
86. 409 F.2d 1070 (4th Cir. 1969).
87. *Id.* at 1071.
88. *Id.* at 1072.
89. *Id.* at 1071.
90. *Id.* at 1072.
91. *Felder*, 409 F.2d at 1072.
92. *Id.*
93. *Id.*
94. 157 S.E.2d 703 (N.C. 1967).
95. *Id.* at 707.
96. *Id.* at 704.

Given the inadequate facilities of most of the black schools and the limited size of white schools, new schools had to be constructed. The new construction required issuing bonds that could have required voter approval. In *Dilday v. Beaufort County Board of Education*,[97] voters approved the issuance of bonds to construct a new high school for white students and repairs for the two black schools.[98] Acting on advice that the proposed construction was unconstitutional, the school board modified the plan to construct a larger high school even though the bond issuance was insufficient to finance the revised plan.[99] A taxpayer lawsuit successfully challenged the proposed modification.[100]

C. *The Teachers in the Picture*

Most of the controversy in school desegregation cases in popular consciousness has related to the color of students in the classroom picture. However, the teacher in my picture was black. While students may have lamented the forced disruption in their schooling, courts have not focused on removing black teachers from the picture. Their place in the picture, however, was the subject of substantial litigation.[101] Freedom of choice plans were designed to permit black students to leave all black schools to attend white schools.[102] The impact on black teachers was not discussed in *Brown*, and still appears to have been an afterthought.[103] For example, in *Chambers v. Hendersonville City Board of Education*,[104] the school district fully integrated students for the 1965-66 school year;[105] however, it only offered employment in these integrated schools to eight of twenty-four black teachers. Meanwhile, every white teacher in the previously dual system was offered reemployment, and the school district even hired an additional fourteen white teachers.[106] The school district took the position that when the black students moved to the white school, the teachers at the black schools lost their jobs and had to compete with new applicants for openings at the white schools.[107]

---

97. 161 S.E.2d 108 (1968).
98. *Id.* at 114.
99. *Id.* at 113-14.
100. *See id.* at 113.
101. *See infra* text accompanying notes 104, 108, 114, 123-25 and cases cited.
102. *See* Fava, *supra* note 3, at 83.
103. Brown v. Bd. of Educ., 347 U.S. 483 (1954).
104. 364 F.2d 189 (4th Cir. 1966).
105. *Id.* at 190.
106. *Id.*
107. *Id.* at 191.

In *Teel v. Pitt County Board of Education*,[108] teacher assignments were included as a part of the freedom of choice plan.[109] Under the freedom of choice plan, teachers were assigned to schools based solely upon merit.[110] As a result of this policy, seventeen white teachers were assigned to black schools and two black librarians were assigned to white schools.[111] This configuration occurred even though fifty new teachers were hired, half of whom were white.[112] The *Teel* court also required the school district to devise a plan to desegregate the faculty as well.[113]

The issue of discriminatory teacher assignments was also raised in *Buford v. Morganton City Board of Education*.[114] The Morganton City school district operated two all black schools, hiring a total of twenty-six black teachers.[115] The school district achieved integration at the student level by refusing to assign black students from other districts thus reducing the number of black students.[116] Furthermore, the school district converted one of the black schools into a predominantly white school for the 1965-66 school year.[117] The school district then rehired only twelve black teachers.[118] The court observed that prior to desegregation, black teachers were not required to compete with white teachers.[119] The *Buford* court ruled against the black teachers because they had not proven that the black teachers who were not rehired were better qualified than the white teachers who were hired.[120]

Black teachers were therefore forced to resort to litigation in an attempt to preserve their jobs in the school system. In *Johnson v. Branch*, white teachers and school districts were forced to include black teachers in desegregation plans as school districts moved toward a racially unitary status.[121] In *Felder v. Harnett County Board of Education*,[122] the school district was ordered not to discriminate in the assignment of teachers and

---

108. 272 F. Supp. 703 (E.D.N.C. 1967).
109. *Id.* at 708.
110. *Id.*
111. *Id.*
112. *Id.*
113. *Teel*, 272 F. Supp. at 708.
114. 244 F. Supp. 437, 445 (W.D.N.C. 1965).
115. *Id.* at 439.
116. *Id.*
117. *Id.*
118. *Id.* at 439.
119. *Buford*, 244 F. Supp. at 439.
120. *Id.* at 443.
121. *See* Johnson v. Branch, 242 F. Supp. 721, 723 (E.D.N.C. 1965) (a black teacher was not rehired as retaliation for her involvement in the Civil Rights Movement).
122. 409 F.2d 1070 (4th Cir. 1969).

administrators.[123] The failure to retain black teachers in desegregation plans in North Carolina reached the Fourth Circuit on three occasions.[124]

In *Wheeler v. Durham City Board of Education*,[125] the circuit court addressed teacher assignments.[126] The circuit court previously rejected a freedom of choice plan and remanded the case.[127] The school district insisted upon continuing to "employ the best qualified available Negro teachers for schools attended by Negro pupils, and the best qualified white teachers for schools attended solely or predominantly by white pupils."[128] The circuit court, citing *Bradley v. School Board of Richmond*,[129] held that "removal of race considerations from faculty selection and allocation is, as a matter of law, an inseparable and indispensable command within the abolition of pupil segregation in public schools."[130]

In *Wall v. Stanley County Board of Education*,[131] the school board adopted a freedom of choice plan for pupil assignments for the 1965-66 school year.[132] The school district was 15% black and 300 black students were assigned to white schools.[133] As a result of the shift of black students to white schools, the number of students in the black schools decreased and the number of teachers required for those schools also decreased.[134] Prior to January 1966, no black teacher had ever been assigned to teach white students.[135] Consequently, a black teacher with thirteen years teaching experience, who was recommended for reemployment by her principal for the 1965-66 school year, was not offered employment.[136] The circuit court stated that the Fourteenth Amendment prohibited the assignment of teachers based upon race.[137] The school board was unconstitutionally assigning black teachers to teach only black students.[138]

---

123. *Id.* at 1072.
124. *See infra* text accompanying notes 125, 131, 140 and cases cited.
125. 363 F.2d 738 (4th Cir. 1966).
126. *Id.* at 739.
127. *Id.*
128. *Id.* at 739-40.
129. 382 U.S. 103 (1965).
130. *Wheeler*, 363 F.2d at 740.
131. 378 F.2d 275 (4th Cir. 1967).
132. *Id.* at 277.
133. *Id.*
134. *Id.*
135. *Id.*
136. *Wall*, 378 F.2d at 276-77.
137. *Id.* at 276.
138. *Id.*

The issue was a statewide problem and the black teachers' cause of action was taken up by the North Carolina Teachers Association.[139] In *North Carolina Teachers Association v. Asheboro City Board of Education*,[140] nine black teachers were not reemployed as the school district began taking steps to dismantle its dual school system.[141] Prior to the 1965-66 school year, the school district operated nine schools.[142] All black students were assigned to a school consisting of grades one through twelve.[143] White students were assigned to other schools consisting of five elementary schools, two junior high schools and one high school.[144] The school district adopted a desegregation plan in 1965, in which the black high school was to be converted to an elementary school and its faculty reduced from twenty-four to eleven.[145] However, the faculty at white schools increased and thirty-five new teachers were hired,[146] while the total number of teachers was reduced by three.[147] Black teachers bore the brunt of the attrition and sued.[148] The circuit court held that the school district denied black teachers the equal protection of the laws when it required them to compete with new applicants.[149]

D. *The Freedom of Choice Paradox*

Freedom of choice plans failed to change school systems to prevent the constitutional violations condemned in *Brown*.[150] The most significant failure was its inability to bring about racially unitary school systems, as all black schools remained. Under freedom of choice plans, the picture did change for the historically white schools, even if only modestly. A significant number of blacks chose to attend those schools. However, the picture did not change significantly for the historically black schools. A few white teachers were assigned to the black schools, but no white students chose to attend them.[151] There was something wrong with the picture in which students were all black. Courts consistently held that

---

139. *See* N.C. Teachers Ass'n v. Asheboro City Bd. of Educ., 393 F.2d 736 (4th Cir. 1968).
140. *Id.*
141. *Id.* at 739.
142. *Id.*
143. *Id.*
144. *N.C. Teachers Ass'n*, 393 F.2d at 739.
145. *Id.* at 739-40.
146. *Id.* at 740.
147. *Id.*
148. *See id.* at 736.
149. *N.C. Teachers Ass'n*, 393 F.2d. at 743.
150. Brown v. Bd. of Educ., 347 U.S. 483 (1954).
151. *See* Wheeler v. Durham City Bd. of Educ., 363 F.2d 738 (4th Cir. 1966).

remedial methods that left black schools in place were not sufficient to comply with the constitutional mandate of *Brown*.[152] Clearly, the picture of a classroom composed of only black students was not equal to one with only whites students, or one with a majority of white students and a few black students.

The permissibility of existing classroom compositions as a remedy for *Brown* violations was reviewed by the U.S. Supreme Court in 1968.[153] In *Green v. County School Board*,[154] the Court held that using freedom of choice plans to achieve desegregation was not permissible unless it "promises meaningful and immediate progress towards disestablishing state imposed segregation and promptly converting a school system into one without 'white' schools or 'Negro,' schools but just schools."[155] The specific evil that freedom of choice plans addressed was the system in which states designated schools for students based upon their skin color.[156] Freedom of choice plans technically accomplished that goal as states removed the official white or negro designation, but placed the burden of removing the historical racial character of the schools on students and their families.[157] The pictures would change only if individuals chose to make different pictures.

The focus on "choice" emphasized the decisions of black and white students, rather than the options provided by the state. Prior to *Brown*, states with dual school systems provided students with only one option for a public education.[158] Education was mandatory through age sixteen, so all students were compelled to attend school. Students could choose private schools, but private schools in the South tended to be segregated as well.[159] The only public school option was the racially designated school. The schools designated for whites were better financed and maintained.[160] The facilities were good and the books were current. The state employed teachers they thought were well qualified. Students and teachers came from the same or similar communities. Both groups had high expectations of white students and low expectations of the black students in schools on the other side of town. They could be expected, along with their families,

---

152. *See Brown*, 347 U.S. at 483.
153. *See* Green v. County Sch. Bd., 391 U.S. 430 (1968).
154. *Id.*
155. *Id.* at 439-42.
156. *See id.* at 430.
157. *See id.*
158. *See* Brown v. Bd. of Educ., 347 U.S. 483 (1954).
159. *See, e.g.*, Runyon v. McCrary, 427 U.S. 160 (1976).
160. *See* United States v. Bertie County Bd. of Educ., 293 F. Supp. 1276 (E.D.N.C. 1968).

to object to the presence of black students and to offer an environment hostile to blacks.

The schools designated for blacks were given substantially less financing and their facilities were inadequate. Furthermore, the school district labeled the teachers at the black schools as less qualified than the teachers at the white schools.[161] However, whatever the teachers may have lacked in qualifications, they possessed in love. The teachers had high expectations for their students and provided them with encouragement.

Under the freedom of choice plans, black and white students were offered those two options. It is understandable that no whites chose to attend the black schools and that many blacks choose to stay in the black schools. It was reasonable for school boards to anticipate the continuation of black schools. Regardless of what may have been wrong with an all black picture, school boards expected that picture to remain. If a freedom of choice plan was designed so that the blacks would choose the white school in significant numbers, whites would desert the public schools for private schools. The same result would occur if the state offered only one option without choice. Put another way, if the state provided whites only with the option of attending schools with a large number of black students, they would opt out of the public schools. Consequently, the public school system would be a unitary system that would be predominantly black. The private schools would be predominantly white. The pictures would change only slightly if the DOJ and civil rights lawyers prevailed. If the school district prevailed, the pictures in the white schools would change modestly and the all black picture would remain unchanged.

The all black picture existed in 1963 because of *Plessy v. Ferguson*[162] and the separate but equal doctrine.[163] But for *Plessy*, freedom of choice would have existed in the public school systems of the South and the pictures in the schools would have likely resembled those under the post-*Brown* freedom of choice plans.[164] There would have been schools that were exclusively black and schools with a majority of white students and a significant number of black students. The majority in *Plessy* apparently would have objected to a picture of a school with any degree of integration, no matter how significant.[165] Why? What was so threatening about the picture of moderately integrated schools that even these schools could not exist? Perhaps the answer lies in the impact of the resulting

161. *See id.*
162. 163 U.S. 537 (1896).
163. *Id.*
164. *See id.*
165. *See id.* at 543.

pictures on racial equality. What was racial equality when *Plessy v. Ferguson* was decided?[166]

The premise of the majority in *Plessy v. Ferguson*[167] was that racial equality had been attained between blacks and whites.[168] The separation of blacks and whites had no bearing on their equality.[169] Any inequality that existed was only in the minds of blacks.[170] In his famous dissent, Justice Harlan took issue with this absurd proposition arguing that the purpose and inherent effect of the Jim Crow laws was not merely to afford blacks less rights than those accorded to whites, but to proclaim blacks and whites unequal.[171] Notwithstanding the muddled reasoning of the majority, the measure of equality at the time of *Plessy* was tied to the treatment of whites.[172] Plessy, a very light skinned black man, demanded to be treated as a white person.[173] Plessy's belief that he was entitled to privileges because he was part white was tied to a venerable history in American political discourse and jurisprudence. Although the Civil War Amendments[174] are race neutral in language,[175] the Civil Rights Act of 1866 established the rights of whites as the benchmark of equality.[176]

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, . . .[177]

The Civil Rights Act of 1866 was intended to invalidate the Black Codes adopted by a number of Southern states in the wake of the Civil War in an attempt to preserve slavery *de facto*. Those Codes imposed legal disadvantages on blacks that were not imposed on whites. Furthermore, the

---

166. *Id.* at 537.
167. *Plessy*, 163 U.S. at 537.
168. *See id.* at 544.
169. *Id.*
170. *Id.* at 551.
171. *Id.* at 556-57 (Harlan, J., dissenting).
172. *See generally Plessy*, 163 U.S. at 537.
173. *Id.* at 541.
174. *See* U.S. CONT. amend. XIV; *see also* U.S. CONST. amend. XV.
175. In the Slaughter-House Cases, the Supreme Court noted that the framers of the amendments intended to protect the freed slaves. Slaughter-House Cases, 83 U.S. 36, 71-72 (1872).
176. The Civil Rights Act of 1866 was revised in the Civil Rights Act of 1870, now codified at 42 U.S.C. § 1981.
177. 42 U.S.C. § 1981(a).

impairment of contract, property and legal rights amounted to a tax on blacks not imposed on whites. In the language of the Act, Congress recognized that white skin had value.[178]

Contrary to the majority's assertions, the purpose of the Jim Crow laws sanctioned in *Plessy* was to preserve the superior position of whites.[179] Justice Harlan had it right, however he thought that the Jim Crow laws were unnecessary to preserve the position of whites because of their inherent superiority.[180] Shaped out of the bosom of slavery,[181] the Jim Crow laws dictated the picture in both classrooms. The separate but equal doctrine erected a barrier physically separating blacks from others, through a system of discriminatory refusals.[182] Further, it strengthened the barrier between whites and blacks by enhancing the white people's access to resources and relationships necessary for educational, career and economic success, while greatly limiting or depriving blacks of such access. Perhaps, the most enduring legacy of the Jim Crow laws was their association of black skin with inferiority.[183] It created the picture that blacks were not merely unequal, but inferior.

Education is one of the principal areas in which the systemic advantages of whites and disadvantages of blacks occurred. Blacks were denied access to educational resources and were given less educational preparation for their future success.[184] Blacks were taught by teachers and professors educated in disadvantaged schools. They were asked to compete with white students who were given a superior quality of education since kindergarten, and who were taught by teachers who had been educated in advantaged schools.

Even if blacks overcame the disadvantages or grew up with the same advantages as whites, they would still face bias because of the picture the school system gave to the world. The school system associated black skin with inferiority and white skin with superiority. An examination of education institutions at every level would reveal that black schools had poorer quality facilities, fewer course offerings, older and outdated

---

178. *See id.*

179. *See Plessy*, 163 U.S. at 537 (Harlan, J., dissenting).

180. *Id.* at 559 (Harlan, J., dissenting).

181. *See id.* at 559-60 (Harlan, J., dissenting).

182. *See generally id.* at 537.

183. Scott v. Sanford, 60 U.S. 393, 404, 407 (1856). In *Scott*, Justice Taney predated the association of blacks with inferiority to before the adoption of the U.S. Constitution. Justice Taney stated that the association was strongly engrained in English culture. *Id.* at 407-08.

184. *See* United States v. Bertie County Bd. of Educ., 293 F. Supp. 1276 (1960).

textbooks and less money than white schools.[185] However, eliminating racial advantages and disadvantages today does not undo the advantages and disadvantages of the past that flow to future generations. *Brown* sought to remedy this history by addressing the pictures in each classroom.[186] If the pictures were destroyed, the deep feelings of inferiority that rendered blacks and whites inherently unequal would dissipate as well. This premise has clouded the subsequent *Brown* jurisprudence.

E. *Hispanics and Freedom of Choice*

Though racial discourse in the United States tends to revolve around a black and white axis, the discussion has broadened in the contemporary era.[187] My wife's experience in Corpus Christi, Texas leads me to ask whether equality is all about color. Mexican-Americans comprised the largest minority group in my wife's school district. However, Mexican-Americans were classified as white. In *Cisneros v. Corpus Christi Independent School District*,[188] Mexican-Americans, regardless of skin color, were classified as "White: Spanish Surnamed."[189] My wife had always thought she went to an integrated school. She had heard that Corpus Christi had complied with *Brown* very quickly after it was decided. If so, Corpus Christi did so using a technique commonly employed in the southwestern United States by school districts with substantial Hispanic populations.[190] The city integrated blacks with Mexican-Americans who were officially classified as "white," albeit with the colon.[191] The student body at my wife's school, Roy Miller High School, was comprised of more than sixty-five percent of White: Spanish Surnamed students.

Her different experience meant that the color of the faces in her classroom were different from those in mine. The majority of the faces were Mexican-American. The *Cisneros* court held that *Brown* prohibited

---

185. *See id.*

186. *See* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

187. The issue has always been broader. The language of the Civil Rights Act of 1866 was not limited to blacks, and in *Plessy*, the majority also discussed Mexican peonage and the Chinese coolie trade. *Plessy*, 163 U.S. at 542.

188. 324 F. Supp. 599 (S.D. Tex. 1970).

189. *Id.* at 602 n.1.

190. Steven H. Wilson, *Brown Over "Other White": Mexican Americans' Legal Arguments and Litigation Strategy in School Desegregation Lawsuits*, 21 LAW & HIST. REV. 145, 178 (2003).

191. *Id.*; *see also* Margaret E. Montoya, *A Brief History of Chicana/o School Segregation: One Rationale for Affirmative Action*, 12 BERKELEY LA RAZA L.J. 159, 162-63 (2001).

a picture comprised exclusively of Mexican-Americans.[192] The immediate result was a freedom of choice plan as my wife recalls, in which students were given the right to attend any high school, including the newly constructed Ray High School.

The faces were different but the issue was similar. The *Cisneros* court indicated that a picture comprised of a majority of Mexican-Americans and a few black students was not equal to one comprised of a substantial majority of white students.[193] Furthermore, in *Keyes v. Denver School District No. 1*,[194] black plaintiffs argued that the schools with mostly brown and black students were not equal to the schools with almost all white faces.[195]

Despite the litigation, the inequalities remain; the picture of my classroom still exists. Schools are nearly as segregated today as they were when I was in high school.[196] Resisting consolidation, the school board in *Bertie County* argued that white parents who are still free to choose private schools would flee public schools.[197] Following the decision in Bertie County, white parents did what the school board predicted. Currently, 82% of the student body in Bertie County is black.[198] At Roy Miller High School, the student body is 82% Hispanic and 12% African-American.[199] Contemporary *Brown* jurisprudence has forgotten the deep association that rendered segregation inherently unequal.[200]

The picture continues to exist but the state's role in creating the picture is the focus of constitutional doctrine.[201] The school board may now argue, as the State of Mississippi unsuccessfully did in *Ayers v. Allain*,[202] that the

---

192. *Cisneros*, 324 F. Supp. at 604.

193. *See id.* at 599.

194. 413 U.S. 189 (1973).

195. *See id.* at 196.

196. *See* United States v. Bertie County Bd. of Educ., 319 F.Supp. 2d 669 (E.D.N.C. 2004); *see also* Gary Orfield & Chungmei Lee, *Brown* at 50: King's Dream or Plessy's Nightmare, *available at* http://www.civilrightsproject.harvard.edu/research/reseg04/resegregation04.php (last visited June 7, 2005).

197. *See* United States v. Bertie County Bd. of Educ., 293 F. Supp. 1276, 1280 (1968) (citing Monroe v. Bd. of Comm'r, 391 U.S. 450, 459 (1968)).

198. Bertie High School Overview, *supra* note 25.

199. Miller High School Center for Communication & Technical, Greatschools.net, *available at* http://www.greatschools.net/cgi-bin/tx/other/1582 (last visited June 7, 2005).

200. *See generally* Plessy v. Ferguson, 163 U.S. 537 (1896).

201. Brown v. Bd. of Educ., 347 U.S. 483 (1954). In regarding the state's role the Court stated, "The impact is greater when it has the sanction of law." *Id.* at 494.

202. 914 F.2d 676 (5th Cir. 1990); *rev'd* United States v. Fordice, 505 U.S. 717 (1992).

racial characterization of its colleges and universities was due to the freedom of choice of college students.[203] The school boards were successful in *Freeman v. Pitts*[204] and *Board of Education of Oklahoma City Public Schools, Independent School Dist. No. 89 v. Dowell*.[205] A unitary school is one in which the racial identity of the school is determined through the exercise of choice by students and their families rather than by actions of the state.[206] Once unitary status is attained, the state is no longer responsible for addressing the deep association of inferiority brought about by its previous actions. Societal discrimination is the culprit and the state is exculpated.

III. FREEDOM OF CHOICE AND THE SYSTEMS OF HIGHER EDUCATION

In 1963, a similar picture existed in the dual higher education system of other southern states.[207] After *Brown* and the enactment of title VI of the Civil Rights Act of 1964,[208] these institutions were dubbed "Historically Black Colleges and Universities" (HBCUs). Institutions designated for whites are sometimes referred to as "Traditionally White Institutions" (TWIs). While measures to change the pictures in TWIs have been the subject of great public controversy,[209] policies and efforts to change the picture in HBCUs have produced substantial litigation but little public controversy.

The litigation to integrate HBCUs highlights the significance of student choice in shaping the pictures in public institutions. Students choose from among the institutions they apply to that offer them admission. More importantly, the litigation demonstrates the role of the states in shaping student choice. Prior to that litigation, the pictures in black colleges and

---

203. *Ayers*, 914 F.2d at 678.

204. *Fordice*, 505 U.S. at 467.

205. 498 U.S. 237 (1991). *See also* Missouri v. Jenkins, 515 U.S. 70 (1995) (holding that the district court exceeded its power in ordering the school district to institute remedial measures).

206. *Dowell*, 498 U.S. at 634.

207. Adams v. Richardson, 356 F. Supp. 92 (D.D.C. 1978). The then Department of Health, Education and Welfare found ten states to be in violation of title VI of the Civil Rights Act of 1964 for ignoring requests to submit desegregation plans for their higher education systems or failing to submit an acceptable desegregation plan. The ten states were Arkansas, Florida, Georgia, Louisiana, Maryland, Mississippi, North Carolina, Oklahoma, Pennsylvania, and Virginia. *Id.* at 94.

208. 42 U.S.C. § 2000.

209. *See infra* Part III.

universities looked like the picture in my classroom, except that faculty may have been racially diverse. Similar to the public elementary and secondary school systems, HBCUs were provided with less funding, facilities, and other resources. The picture of HBCUs perpetuated the association of blacks with inferiority. In southern systems, HBCUs were the only option for blacks who wanted to attend a state college or university. Under *Brown*, states could not restrict that choice but blacks who wanted to attend a white college or university needed a judicial decree and the assistance of the federal government to enforce the court decree.[210] Notwithstanding the change in the law to integrate TWIs, blacks continue to attend HBCUs. As in the case of elementary and secondary schools, whites were not rushing to choose HBCUs. Accordingly, the litigation to integrate HBCUs was directed at the implementation of measures to induce white students to choose to attend them.

States established, operated, and maintained each state educational institution. The DOJ's pursuit of policies to render the institutions as just schools as opposed to schools with a racial character, was an attempt to cease any determination of the racial character of institutions. However, several factors affect the choice of prospective students in deciding to attend those institutions. Those factors include missions, curriculums, programs, quality of faculty, facilities, level of funding, historical status, and proximity. Consequently, HBCUs are likely to remain as are TWIs. Recognizing this reality, blacks sought remedies that would improve the quality of HBCUs and the discontinuance of support for newly established TWIs close to HBCUs. Those institutions drained resources that could have been placed into HBCUs.

The litigation to change the pictures in HBCUs has not been advanced by whites. Rather the cases have been brought by blacks seeking to end the unequal treatment of HBCUs and the DOJ seeking to change the pictures in HBCUs. In *Knight v. James*,[211] the students, faculty, staff, and alumni sued claiming that the establishment of two white state colleges offering duplicate programs, after the establishment of a state HBCU in the same city, violated the Fourteenth Amendment.[212] They sought to merge the

---

210. *See, e.g.*, Meredith v. Fair, 305 F.2d 343 (5th Cir. 1962); Lucy v. Adams, 134 F. Supp. 235 (N.D. Ala. 1955); United States v. Alabama, 628 F. Supp. 1137, 1141-42 (N.D. Ala. 1985); Hunt v. Arnold, 172 F. Supp. 847 (N.D. Ga. 1959).

211. 514 F. Supp. 567 (M.D. Ala. 1981).

212. *Id.*

white institutions into the HBCU.[213] In *United States v. Alabama*,[214] the DOJ brought suit to require Alabama to desegregate its dual system of higher education.[215] The Court found that Alabama had not dismantled its dual system and ordered the state to eliminate the vestiges of its dual system.[216] The racial identifiability of student bodies, faculty, staff, and governing boards was evidence of the continuing dual system. The Court also found factors such as program duplications, degree offerings, facilities, and funding. These factors demonstrate that freedom of choice is a misnomer. Students choose among a limited number of options offered by a state. States attempt to influence those choices by the mix of these factors available within and among institutions. After the enactment of title VI, states varied the missions and levels of funding offered by black and white colleges so as to influence students to enroll in a way that continued their status as HBCUs or TWIs. Rather than equalize missions and funding or dictate student choice as in the case of public schools, the Court permitted tinkering with the many factors.

The plaintiffs were permitted to intervene[217] and subsequently in *Knight v. Alabama*,[218] the Court declined to merge TWIs into HBCUs. Such a merger would infringe upon student choice.[219] The Court also found that the state's contemporary use of standardized test scores in the admission process was permissible.[220] Alabama had a system in which its top tier TWIs used standardized test scores and other TWIs and its HBCUs used open admissions policies.[221] The Court distinguished between hard and soft standards. It upheld the use of a soft standard in which the university of Alabama and other TWIs used a sliding scale based on the combination of test scores and grade point average as well as conditional admissions to assure a diverse student body.[222] These institutions would be an option for more African-Americans. However, the Court struck down the hard standard used by Auburn University that relied solely upon fixed test score

213. *Id.* at 568.
214. *Alabama*, 628 F. Supp. at 1137.
215. *Id.* at 1140.
216. *Id.* at 1161.
217. *Id.* at 1140.
218. 787 F. Supp. 1030 (N.D. Ala. 1991).
219. *Id.* at 1131.
220. *Id.* at 1153-64.
221. *Id.* at 1156-63.
222. *Id.*

benchmarks.[223] The benchmarks were inflexible and applicants who did not have the requisite scores were rejected.

The Court's holding was influenced by two notions. First, a state has the right to offer educational options based upon the academic preparation and abilities of students.[224] That is, it could design a higher quality program for students and select students based upon their likelihood of success. Second, blacks were more likely to choose a school based upon the quality of a student body relative to their own abilities. That factor was more important than the historical racial character of an institution.[225]

In 1968, Tennessee had established a dual system of higher education. That system had not been dismantled through a freedom of choice policy.[226] In that case, a group of black and white citizens sought to enjoin the proposed construction and expansion of the University of Tennessee-Nashville (UTN) Center.[227] The plaintiffs argued that Tennessee had established Tennessee State University (TSU) in Nashville for blacks and that the state was continuing to maintain it as such.[228] By expanding UTN, the state was offering whites an alternative state institution in Nashville.[229] The expansion of UTN would attract whites who might otherwise choose to attend TSU.[230] The DOJ joined the litigation and requested that the state submit a plan for the desegregation of its dual system of higher education.[231] The district court denied the petition to enjoin the construction and expansion, but ordered the defendants to submit a plan of desegregation.[232] In 1972, the district court held "that a dual system of higher education which originated in the state law requiring separation of the races is not dismantled as long as one overwhelmingly black state institution remains surrounded by predominantly white state institution."[233] In *Geier v. Blanton*,[234] the district court ordered that UTN and TSU be

---

223. *Knight*, 787 F. Supp. at 1166-67.

224. *Id.* at 1164.

225. *Id.* at 1058.

226. Sanders v. Ellington, 288 F. Supp. 937 (M.D. Tenn. 1968). Despite freedom of choice, black enrollment ranged from .6% to about 7% at traditionally white colleges and universities while 99% at TSU. *Id.* at 940.

227. *Id.* at 939.

228. *Id.* at 940.

229. *See id.* at 941.

230. *See generally id.* at 937.

231. *Sanders*, 288 F. Supp. at 939.

232. *Id.* at 941-42.

233. Geier v. Univ. of Tenn., 597 F.2d 1056, 1060 (6th Cir. 1979).

234. 427 F. Supp. 644 (M.D. Tenn. 1977).

merged into a single institution.[235] That decision was upheld in *Geier v. University of Tennessee*.[236] The surviving institution was to be TSU, a historically black institution.[237] While it survived in name and administration, the resulting institution was an integrated institution with nearly equal percentages of black and white students.

Similarly in *Norris v. State Council of Higher Education for Virginia*,[238] black faculty and students at Virginia State College challenged the expansion of Richard Bland College from a two-year to a four-year institution.[239] Prior to *Brown*, Virginia law required its colleges and universities to be racially segregated.[240] After *Brown*, the state adopted a freedom of choice policy for its higher education system.[241] Notwithstanding the policy, 81% of the black students in the system attended its two HBCUs while black student enrollment in TWIs ranged from less than 2% to 7%.[242] The HBCUs had difficulty attracting white students.[243] Furthermore, while the TWIs reported virtually no black faculty at the time of the litigation, the HBCUs reported more success in attracting white faculty than they did white students.[244] If Richard Bland College were transformed into a four-year institution, the state would be providing white students with an alternative to Virginia State College.[245] The court enjoined the expansion of Richard Bland College because it would perpetuate the dual system but refused to order the merger of Richard Bland College into Virginia State College.

Student choice plays a central role in the litigation over Mississippi's dual system largely because the state's defense rested upon it. In 1975, the parent of a student at Jackson State University an HBCU, sued for equal funding and the dismantling of the dual system.[246] The State of Mississippi claimed that it was no longer maintaining a dual system of education after

---

235. *Id.* at 661.
236. *Geier*, 597 F.2d at 1056.
237. *See id.* at 1076-77 (Engel, J., dissenting).
238. 327 F. Supp. 1368 (E.D. Va. 1971).
239. *Id.* at 1369.
240. *Id.* at 1370.
241. *Id.*
242. *Id.*
243. *Norris*, 327 F. Supp. at 1370. Virginia State College reported that about three percent of its student body was white at the time of the litigation. *Id.*
244. *Id.* at 1370.
245. *Id.* at 1371.
246. United States v. Fordice, 505 U.S. 717 (1992).

the state dropped its racial designations in 1970.[247] The state took this position even though desegregation followed the same pattern under freedom of choice plans in public schools.[248] A small percentage of black students attended the historically white institutions and virtually no white students chose to attend its HBCUs.[249]

Mississippi maintained that the racial character of its colleges and universities in 1990 was the product of student choice rather than state action.[250] What the state overlooked was its actions in shaping the options to students in its higher education system. Simultaneously with the removal of racial designations, the state chose to set admission standards based solely on standardized test scores.[251] The required scores at historically white institutions were set at the level at which most whites scored above and most blacks scored below.[252] The admission standards at its HBCUs were significantly lower.[253] Thus, most whites were offered the option of attending any institution in the state and most blacks were only offered the option of attending HBCUs.[254] Much of the litigation involved remedies that influenced student choice. As black public schools were under financed, had comparatively inadequate facilities and had less qualified faculties, few whites could be expected to choose HBCUs.

The Supreme Court held that Mississippi was still in violation of the Fourteenth Amendment.[255] The Court addressed the state's obligations under the Fourteenth Amendment in the aftermath of its abrogation of the state's racial classification of its educational institutions.[256] It held that "[a] state does not discharge its constitutional obligations until it eradicates policies and practices traceable to its prior *de jure* dual system that continue to foster segregation."[257]

The Court distinguished the role of choice in higher education from that in the case of elementary and secondary schools.

---

247. *Id.* at 725.
248. *See id.*
249. *Id.* at 723 n.2.
250. *Id.* at 725.
251. *Fordice*, 505 U.S. at 733-34.
252. *Id.* at 734.
253. *Id.* at 734-35.
254. *Id.*
255. *Id.* at 743.
256. *Fordice*, 505 U.S. at 729.
257. *Id.* at 728.

> [W]e do not disagree with the Court of Appeals' observation that a state university system is quite different in very relevant respects from primary and secondary schools. Unlike attendance at the lower level schools, a student's decision to seek higher education has been a matter of choice. The State historically has not assigned students to a particular institution.[258]

The Court recognized that Mississippi restricted the choices of prospective students in the same manner it had when it designated the racial character of its institutions through admissions policies, duplication of programs, missions, and number of institutions.[259]

The combination of these four factors limited the options provided by the state from which students could choose. First, admission standards determined which of the eight institutions a student could choose. Standardized test scores were established at levels so most whites could choose from among all institutions, but most blacks could only choose from a smaller set of institutions, primarily those that had been designated for blacks under the formal racial classification system. Second, the assignment of missions and duplication of programs assured that most whites would continue to prefer TWIs. The *Fordice* ruling presumes that it is possible for a state with a past history of dual race systems to transform into a single system possessing a racial character not dictated by the state. However, the solution must seek to broaden the choice of black students and encourage white students to select HBCUs.

On remand, the district court fashioned such a remedy.[260] The two pillars of the settlement rested on revised admission standards and scholarships for white students. The district court established the same admission standards of all state institutions so that a significant number of blacks could choose TWIs.[261] It ordered the creation of diversity scholarships to attract white students to HBCUs.[262] In the school year following the settlement, black freshman enrollment in all Mississippi

---

258. *Id.* at 728-29.

259. *Id.* at 732-43.

260. *See* Ayers v. Fordice, 879 F. Supp. 1419 (M.D. Ms. 1995).

261. *Id.* Students were not to be evaluated based solely on standardized test scores but instead were to be evaluated on a variety of factors, including high school grades, class rank, teacher evaluations and test scores. High school graduates with at least a 3.2 grade point average were to be automatically admitted to any Mississippi institution. A sliding scale based on grade point average and test scores were to be used for students with a grade point average less than 3.2.

262. *Id.*

colleges decreased; most of that decrease occurred at HBCUs.[263] Furthermore, there was some evidence that more blacks were choosing to attend TWIs.[264] In *United States v. Louisiana*,[265] Health, Education and Welfare and its successor, the Department of Education, continued to pursue the implementation of a desegregation plan.[266] The DOJ brought suit against Louisiana in 1974 arguing that the state was maintaining a dual system of higher education based upon race.[267] The state entered into a consent decree in 1981.[268] When the DOJ sought compliance with the consent decree in 1987, the state acknowledged that it had not fully implemented the consent decree and that its colleges and universities remain racially identifiable.[269] After the enactment of the Civil Rights Act of 1964, the state discontinued the racial designation of its colleges and universities and adopted a freedom of choice admissions policy in which a Louisiana high school graduate could attend any Louisiana institution of higher education that he or she chose.[270] Notwithstanding the change in policy, as of 1988, the four institutions established as black schools remained predominantly black and the eleven institutions established as white schools remained predominantly white.[271] In fact, the enrollment of white students at the HBCUs only increased slightly between 1981 and 1987 and the enrollment of blacks at the TWIs decreased noticeably during the same period.[272]

The Fifth Circuit interpreted *Fordice* to say that an institution that has a racial identity is not automatically a constitutional violation.[273] The picture of the institution after a state disavows its official racial

---

263. Racial and Ethnic Tensions inAmerican Communities: Poverty, Inequality, and Discrimination — Volume VII: The Mississippi Delta Report, ch. 2 Race and the Public Education System in Mississippi, *available at* http://www.usccr.gov/pubs/msdelta/ch2.htm (last visited June 7, 2005).

264. *Id.*

265. 9 F.3d 1159, 1164 (5th Cir. 1993).

266. Order Denying Motion to Stay, 815 F. Supp. 947 (E.D. La. 1993); Opinion and Order, 718 F. Supp. 499 (E.D. La. 1989); Order on Summary Judgment Motion and Reasons, 692 F. Supp. 642 (E.D. La. 1988); Order Approving Consent Decree, 527 F. Supp. 509 (E.D. La. 1981).

267. *Order and Reasons*, 692 F. Supp. at 643-44.

268. *Order Approving Consent Decree*, 527 F. Supp. at 509.

269. *Order and Reasons*, 692 F. Supp. at 644.

270. *Id.*

271. *Id.* at 644-45.

272. *Id.* at 645.

273. United States v. Louisiana, 9 F.3d 1159, 1164 (1993) (citing United States v. Fordice, 505 U.S. 717 (1992)).

classification is not relevant because individual choice may be a major factor in bringing about that racial character. Rather, specific state policies and practices must be examined to determine whether the state has dismantled its dual system or whether state action is the cause of the continuing racial identity.[274] In *Fordice*, for example, Mississippi followed HEW guidelines and assigned its existing institutions specific racially neutral missions in 1981.[275] The plaintiffs maintained that these missions were designed to lock the dual system into place and to continue to treat black institutions unequally.[276] The University of Mississippi and Mississippi State University, two major white institutions, were designated as comprehensive research institutions. Jackson State, the major black institution, was designated as an urban university.[277] The comprehensive research institutions were to continue receiving favored treatment under the law.[278] If all institutions continued to have their same racial identities, was Mississippi continuing to operate a dual system? According to the U.S. Supreme Court, this depended upon the actions taken by the state to end its determination of that racial identity.[279]

According to the Justice Department, actions to provide equal funding and treatment of Jackson State and other HBCUs would be a constitutional violation because equal treatment would tend to preserve the racial identity of black schools, rather than then being just a school.[280] This would occur because equal treatment of black institutions would cause blacks that would have opted to attend the better financed white institution to prefer black institutions.[281]

In *United States v. Louisiana*,[282] the Fifth Circuit held that "each suspect state policy or practice [must be] analyzed to determine whether it is traceable to the prior *de jure* system, whether it continues to foster segregation, whether it lacks sound educational justification and whether its elimination is practicable."[283] The trial court found that Louisiana failed to meet the *Fordice* standard by the state's "open admissions policy and

274. *Id.*
275. United States v. Fordice, 505 U.S. 717, 724 (1992).
276. *Id.* at 723-25.
277. *Id.* at 723-24.
278. *Id.* at 724.
279. *Id.* at 728.
280. *See Fordice*, 505 U.S. at 730 n.4.
281. *Id.*
282. United States v. Louisiana, 9 F.3d 1164 (5th Cir. 1993).
283. *Id.* at 1164.

program duplication in proximate institutions."[284] The state's hand in shaping the racial identities of its educational institutions was particularly indicated by "the coexistence of predominantly black institutions and predominantly white institutions in close geographic proximity in four areas of the state."[285] Under Louisiana's open admissions policy, students were free to choose any institution, but the state provided the option to attend TWIs or HBCUs.[286] Just as the black students in elementary and secondary schools, blacks at the college level continued to choose lesser financed and maintained institutions. Furthermore, whites were unlikely to choose to attend those schools. By providing two sets of institutions with duplicate programs, the state was not dismantling its dual system.[287]

Justice Thomas has twice argued for the preservation of HBCUs.[288] In his concurrence in *Fordice*, Justice Thomas emphasized his belief that the *Fordice* standard did not require the destruction of the all black picture.[289]

> Today, we hold that "[i]f policies traceable to the de jure system are still in force and have discriminatory effects, those policies too must be reformed to the extent practicable and consistent with sound educational practices. . . . I agree that this statement defines the appropriate standard to apply in the higher education context. I write separately to emphasize that this standard is far different from the one adopted to govern the grade school context . . . In particular, because it does not compel the elimination of all observed racial imbalance, it portends neither the destruction of historically black colleges nor the severing of those institutions from their distinctive histories and traditions."[290]

Justice Thomas further noted that states may have a sound educational policy justification for maintaining historically black colleges.[291] However,

---

284. *Id.* at 1165.

285. *Id.*

286. *See id.*

287. *See Louisiana*, 9 F.3d at 1159.

288. *See* United States v. Fordice, 505 U.S. 717, 745-49 (1992) (Thomas, J., concurring); *see also* Grutter v. Bollinger, 539 U.S. 306, 378-87 (2003) (Thomas, J., dissenting).

289. *Fordice*, 505 U.S. at 745 (Thomas, J., concurring).

290. *Id.* (Thomas, J., concurring).

291. *Id.* at 747-48 (Thomas, J., concurring). Justice Thomas did not address the issue of whether a sound educational policy could justify a state's provision of a predominantly white institution. *Id.* at 745-49 (Thomas, J., concurring); *see* Wendy Brown-Scott, *Race-Consciousness in Higher Education: Does "Sound Educational Policy" Support the Continued Existence of*

Justice Thomas did not address whether offering an HBCU as a sound educational policy requires a state to provide equal funding of those institutions.[292]

In a recent dissent in *Grutter v. Bollinger*, Justice Thomas retreats from his embrace of the sound educational policy standard of *Fordice*.[293] He chides the majority for not acknowledging a growing body of scholarly studies that show that racially homogenous student bodies benefit the educational development of blacks, while integration impairs the learning of black students.[294] Moreover, Justice Thomas argues that the majority's acceptance of diversity, because of its educational benefits, would permit states to exclude whites from HBCUs because blacks attain educational benefits from racial homogeneity.[295] Justice Thomas's statements in *Grutter* raise the question of whether he is disavowing the position he took in *Fordice*. If he is not, it is unclear what Justice Thomas meant when he expressed his view in *Fordice* that the Fourteenth Amendment did not require destruction of HBCUs.[296] Moreover, Justice Thomas clearly sees HBCUs as identified by more than their historical function, but also by the skin color of the students in such institutions.[297] Justice Thomas's *Grutter* analysis raises the question of how HBCUs can continue if a state does not offer an option that more blacks are likely to choose than nonblacks.[298] Yet, Justice Thomas insists that it is unconstitutional for a state to make the picture relevant in setting its educational goals.[299]

IV. OPTIONS AND THE TRADITIONALLY WHITE INSTITUTIONS (TWIS)

Courts have severely limited the power of states to change the picture of TWIs in and outside the South. Courts have been receptive to reverse discrimination actions brought by whites to resist voluntary measures by colleges and universities to integrate. First, the U.S. Supreme Court has

---

Historically Black Colleges?, 43 EMORY L.J. 1 (1994).

292. Justice Antonin Scalia in his concurrence expressed his view that equal funding of HBCUs would perpetuate segregation and therefore was unconstitutional, thus proffering a separate and unequal doctrine. *Id.* at 759 (Scalia, J., concurring in part and dissenting in part).

293. Grutter v. Bollinger, 539 U.S. 306, 378-87 (2003) (Thomas, J., dissenting).

294. *See id.*

295. *See id.*

296. *See Fordice*, 505 U.S. at 745 (Thomas, J., concurring).

297. *See id.*

298. *See Grutter*, 539 U.S. at 378-87 (Thomas, J., dissenting).

299. *Id.* at 386-87 (Thomas, J., dissenting).

held that the Fourteenth Amendment does not permit states to remedy the effects of societal discrimination.[300] In *Croson v. City of Richmond*,[301] a case involving industry rather than educational institutions, the Court held that state institutions could not voluntarily change the picture because it was created by societal discrimination rather than specific state action.[302] Secondly, prior to *Grutter*, the Court refused to permit white institutions outside the South to use race based affirmative action admission policies to alleviate the effects of historical discrimination in the absence of specific conduct by the state.[303] In *Regents of the University of California at Davis v. Bakke*,[304] the U.S. Supreme Court was asked whether a state institution without a history of past discrimination could voluntarily change the picture within classrooms in its professional schools.[305] In a split decision, the Court permitted moderate changes in the picture based upon educational policies rather than race.[306] In Justice Powell's famous opinion, he explained that states could take race into account to attain a diverse student body.[307]

The Supreme Court has never accepted a challenge to an affirmative action admissions policy involving an institution of higher education from the South. It denied certiorari in *Hopwood v. University of Texas*,[308] a case in which white applicants objected to the steps taken by the University of Texas School of Law to change its historical picture.[309] In crafting its affirmative action admissions policy, the University of Texas sought to achieve a student body comprised of approximately ten percent Mexican Americans and five percent African-Americans.[310] The law school offered two basic rationales for the policy: the historical discrimination in the entire Texas educational system and the benefits of a diverse student body.[311] In finding the policy and practice unconstitutional, the Fifth Circuit stated, "The use of race, in and of itself, to choose students simply

300. *See* Croson v. City of Richmond, 488 U.S. 469 (1989).
301. *Id.*
302. *Id.* at 490.
303. *See* University of California v. Bakke, 438 U.S. 265 (1978).
304. *Id.*
305. *Id.* at 269-70.
306. *Id.* at 272.
307. *Id.* at 320.
308. 236 F.3d 256 (5th Cir. 2000); *cert. denied*, 533 U.S. 929 (2001).
309. *Hopwood*, 236 F.3d at 262.
310. Hopwood v. Texas, 78 F.3d 932, 937 (5th Cir. 1996).
311. *Id.* at 938.

achieves a student body that looks different."[312] The Court rejected the diversity rationale for the admissions policy and went to considerable lengths to dispel a causal connection between the policy and past discrimination by the State of Texas. It further asserted that the racial discriminatory practices of the law school, condemned in *Sweatt v. Painter*,[313] ended in the 1960s.[314]

The Eleventh Circuit took a similar approach in *Johnson v. Board of Regents of University of Georgia*,[315] in which three unsuccessful white applicants sued the University of Georgia (UGA) over its affirmative action program designed to increase the number of African-American students.[316] The program had been implemented as part of a desegregation plan UGA was ordered to adopt by the Office of Civil Rights (OCR).[317] Prior to 1961, no African-American had attended UGA.[318] In 1969, the OCR determined that the Georgia university system was still operating a dual system and ordered the Board of Regents to adopt a desegregation plan and affirmative action programs to alleviate the vestiges of discrimination.[319] In 1989, the OCR informed the Board of Regents that the university system "had substantially complied with the prescribed remedial measures and therefore 'Georgia's system of public higher education is now in compliance with Title VI, and no additional desegregation measures will be required.'"[320] However, it required Georgia to remain in compliance and to avoid discrimination on the basis of race, color, or national origin."[321] The case was not appealed to the Supreme Court.

While the diversity rationale may have been a pretext for the Texas educational system to justify an admissions policy developed to remedy past discrimination, the University of Michigan presented an admissions policy clearly driven by diversity considerations. Under the diversity rationale, the changing of the picture has been divorced from notions of

312. *Id.* at 945.
313. 339 U.S. 629, 635 (1950).
314. *Id.* at 633-35.
315. 263 F.3d 1234 (11th Cir. 2001).
316. *Id.* at 1237.
317. *Id.* at 1239-40.
318. *Id.* at 1239.
319. *Id.* at 1240.
320. *Johnson*, 263 F.3d at 1240.
321. *Id.*

equality.[322] While the picture is not important, the interactions in the institutions are.[323] In general, diversity promotes measured, perhaps modest, changes to the picture. In any case, there would be something wrong with the picture of the all black classroom, which was completely devoid of racial diversity. Justice Thomas's opposition to affirmative action may rest on this result. Justice Thomas would probably find nothing wrong with the picture of an all black classroom. It may not be equal to a classroom with all whites today, but it can never be equal unless it is allowed to exist and flourish.

Consistent with the rationale of *Knight v. Alabama*, the State of Michigan was entitled to design a program of legal education for students possessing high levels of skill and ability. In doing so, the state could expect prospective students to choose a school based on the perceived quality of that program. The state also had an interest in selecting students for the program who were more likely to be successful within the program. "The hallmark of [its] policy [was] its focus on academic ability coupled with a flexible assessment of the applicants' talents, experiences, and the potential to contribute to the learning of those around them."[324] The law school appears to have developed its admission policy based upon a determination that the success of qualified minority students would be enhanced by the matriculation of a significant number of minority students. That significant number was called a critical mass.[325] Moreover, it could have also concluded that the success of nonminority students would not be enhanced without a critical mass of minority students. The majority's recognition of this as a compelling state interest was consistent with its rationale in *Fordice* that the racial picture of an institution was constitutionally permissible if justified by sound educational policy.[326]

As shown in the discussion of *Knight v. Alabama* and *Fordice*, the use of standardized test scores as part of the criteria used in the admissions

---

322. *See* Grutter v. Bollinger, 539 U.S. 306 (2003).

323. *See id.*

324. *Id.* at 315.

325. *Id.* The University of Michigan Law School designed its admissions process consciously to attain a student body that it considered to be racially and ethnically diverse. To reach that goal, it sought to admit and retain a "critical mass" of African-American, Hispanic, and Native American students. By critical mass, the law school meant that number of minority students "that encourages underrepresented minority students to participate in the classroom and not feel isolated." *Id.* at 318. It also designed the program to "bring to the Law School a perspective different from that of members of groups which have not been discriminated against." *Id.* at 319.

326. *Id.* at 328.

process produces racial effects. Under *Fordice*, racially identifiable institutions resulting from the use of such tests are constitutionally permissible if such use is justified by sound educational policy. If a state may offer racially identifiable institutions using admissions criteria justified by sound educational policy, why are admission practices designed to achieve a racially diverse student body also permissible when justified by sound educational policy? *Grutter* says they may be; *Gratz v. Bollinger*,[327] the case pertaining to undergraduate admissions decided with *Grutter*, says they are not.

The analysis challenges two phases of the admission process. In the admission policy establishment phase, a university determines the criteria it will use to evaluate applicants. In the consideration stage, a university selects from among its applicants by evaluating them using those criteria. The argument of the plaintiffs in *Hopwood* and *Grutter* is that the state has an obligation to refrain from adopting admissions policies intending to favor a particular race in the establishment phase or to intentionally apply a racially neutral admissions to favor a particular race in the consideration stage. It is permissible, however, to adopt a racially neutral policy in the establishment phase that the state knows will favor a particular race in the consideration stage. The plaintiffs apparently attempted to draw a distinction between a policy and application process the state intends to have racial effects from one that it merely knows will have racial effects. Under their arguments, it is perfectly acceptable for a state to establish an admission policy that it knows will favor white applicants as long as it did not intend them. For example, in *Fordice*, when Mississippi dropped the racial classification of its institutions in 1970, it adopted an admissions policy using standardized test scores as the sole criterion.[328] The required scores for the state's TWIs were set levels at which most whites scored above and most blacks scored below.[329] The required scores for HBCUs were set considerably lower.[330] Alabama followed a similar practice but used soft rather than hard standards.[331] Both states used admission criteria to limit the higher education option it made available to prospective black applicants.[332] Most black applicants would not be eligible for admission to

327. 539 U.S. 244 (2003).
328. United States v. Fordice, 505 U.S. 717, 733-34 (1992).
329. *Id.*
330. *Id.* at 734-35.
331. United States v. Louisiana, 9 F.3d 1159, 1163 (5th Cir. 1993).
332. *See supra* text accompanying notes 322, 331 and cases cited.

the institutions that were provided the states' best resources. The plaintiffs in *Grutter*[333] and *Hopwood*[334] had no objection to the state discriminating in the options it made available to minority applicants.[335] Given the limited number of slots available, any admissions policy that gave black or minority applicants a real chance at selection would have reduced the probability of their selection.[336]

Justice Thomas strongly suggests that knowingly establishing admissions criteria that produces racially disparate results is unconstitutional.[337] However, he then states that once the institution decides to use an impermissible method at stage one, it can not then select in a racially disparate way in stage two.[338]

In *Knight v. Alabama*, the Court acknowledged that the existence of a racial identity was inevitable.[339] It permitted soft standards because they were inclusive. It prohibited hard standards using standardized test scores because they were exclusive. *Grutter* permitted a soft inclusive diversity standard and *Gratz* disallowed a hard diversity standard presumably because it was exclusive on its face. Soft standards emphasize the consideration phase rather than the policy establishment phase. Although the law school did not rely upon the history of racial disparities in the Michigan public school systems, the interveners made such claims.[340] The existence of such a history was an issue in *Knight v. Alabama.*

V. CONCLUSION

The separate but equal doctrine needed to be eliminated and *Brown*[341] did just that. Now, the time has come to unshackle our thinking about racial equality from the chains of the separate but equal doctrine. This doctrine has confused us far more than it has provided us with a reliable measure of racial equality. It is naive to believe that if the law only

---

333. Grutter v. Bollinger, 539 U.S. 306 (2003).

334. Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996).

335. *See supra* text accompanying notes 333-34 and cases cited.

336. *See Grutter*, 539 U.S. at 306.

337. *Id.* at 350 (Thomas, J., concurring in part and dissenting in part).

338. *Id.* at 350-51 (Thomas, J., concurring in part and dissenting in part).

339. Knight v. Alabama, 787 F. Supp. 1030, 1377 (N.D. Ala. 1991).

340. Grutter v. Bollinger, 137 F. Supp. 2d 821 (E.D. Mich. 2001). The *Grutter* court rejected these claims as constituting a compelling state interest justifying the admissions policy. *Id.*

341. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

disavows the doctrine of separate but equal over and over again, some day racial equality will emerge. Colorblind legal principles have not only not led to the dissipation of the inequality between the pictures legitimized by the separate but equal doctrine, such principles have furthered that legitimacy. Pictures of the racial composition of educational institutions are going to exist in this country tomorrow and twenty-five years from now. Despite all the litigation, all the lofty U.S. Supreme Court odes to racial equality, there is still something wrong with the all black picture. Will the Court permit democracy and its educational institutions to tackle the removal of the deep ingrained association of dark skins with inferiority or will it leave the task to American society as it has since the founding of the Court?