COMMENTARY

FORDICE AS A WINDOW OF OPPORTUNITY: THE CASE FOR MAINTAINING HISTORICALLY BLACK COLLEGES AND UNIVERSITIES (HBCUs) AS PREDOMINANTLY BLACK INSTITUTIONS*

by
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Introduction

The landmark higher education desegregation case, *United States v. Fordice*, was filed more than twenty-five years ago. (See the end of this commentary for a complete legal history of *Fordice*.) In its 1992 decision, the Supreme Court held that the State of Mississippi had failed to meet its affirmative obligation to dismantle the prior *de jure* segregated system by adopting race neutral policies that govern its university system. This holding failed to explain adequately how the States should address the continuing vestiges of separate and unequal higher education. Although the decision is a landmark one that affects policymaking in all of the former *de jure* states, the *Fordice* decision in short did little more than tell us what standard to apply.

This decision has been taken to mean that public HBCUs will no longer be able to maintain themselves as predominantly Black institutions. Contrariwise, we argue, drawing on legal precedents, that *Fordice* can be interpreted as a window of opportunity for HBCUs to continue as predominantly Black institutions. To this end, we begin by briefly tracing the history on the nascent back and forth movement between "~~separate~~ but equal" and integration ideologies for desegregation of higher education in general, and the historical development of the *Fordice* case in particular. In the last part of the paper, we argue for using *Fordice* as a window of opportunity for maintaining public HBCUs as predominantly Black institutions.

The First Phase: Separate but Equal Facilities and Institutions

The Constitution of the United States was drafted with the intent of providing liberty based on the principle that all men are created equal.

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Indeed, the history of slavery in this nation questioned the notion of equality. After the Civil War, the Thirteenth Amendment of the Constitution abolished slavery and America was attempting to move toward this notion of equality. After a century of conflict, the laws and courts of the nation agreed with the Thirteenth, Fourteenth, and Fifteenth Amendments that all persons should not be discriminated against because of race, religion, and nationality.[2]

The first phase began with the 19th and 20th centuries focusing on early laws that emphasized equal protection as guaranteed by the Fourteenth Amendment. The Fourteenth Amendment to the United States Constitution mandates: "[N]or shall any State ... deny to any person within its jurisdiction the equal protection of the laws."[3] During this time the focus of segregation was placed on the institutions and the facilities within that institution. The notion of "separate but equal" education was supported by laws that mandated separate facilities for the races.[4] In 1862, with the passage of the Morrill Act, institutions were endowed to support industrial education courses. The federal financial support for the nation's land-grant universities was not necessarily a solution to the problem of education, but it was a start.[5] With the monies acquired from the Morrill Act, South Carolina, Virginia, and Kentucky established colleges for Blacks. In 1887, The Hatch Act called for money to be evenly divided between Black and White institutions unless the state legislature deemed otherwise. Subsequently, in 1890 the Second Morrill Act was passed, which provided a more credible source of funding for Black institutions by stating the requirement of equitable distribution of funds between Black and White institutions.[6]

In 1896 the Supreme Court held in *Plessy v. Ferguson* that "separate but equal" facilities did not offend any provision of the Constitution of the United States.[7] In *Plessy*, the plaintiff contested the constitutionality of a Louisiana statute that mandated "separate but equal" accommodation for Black and White railroad passengers and prohibited the mixing of the two races.[8] The case was not specifically an education precedent, but it provides an illustration of the timbre of the country during this first phase. *Plessy* must be considered in order to understand the plight of colleges and universities in the eyes of the law and the Constitution and to give a contextual reflection of the period.[9]

The Second Phase: Individual Choice

The second phase of higher education desegregation began in the late 1930s and it involved many court cases. This phase shifted the focus from the

2. B.G. GALLAGHER, COLLEGE AND THE BLACK STUDENT (New York: The Nat'l Assoc. for the Advancement of Colored People) (1971).
3. U.S. Const. Amend. XIV.
4. J.A. Stefkovich & T. Leas, A Legal History of Desegregation in Higher Education, 63 J. Negro EDUC. 406–420 (1994).
5. W.A. KAPLAN 7 B.A. LEE, THE LAW OF HIGHER EDUCATION (San Francisco, CA: Jossey–Bass) (1995).
6. STEFKOVICH, *supra* note 2, AT 2.
7. *Plessy*, 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256 (1896).
8. A.V. ADAIR, DESEGREGATION: THE ILLUSION OF BLACK PROGRESS (New York: University Press of America) (1984).
9. B.L. FIFE, DESEGREGATION IN AMERICAN SCHOOLS: COMPARATIVE INTERVENTION STRATEGIES (New York: Prager) (1992).

educational facilities to an emphasis on individual choice and accommodation of educational programs. During this phase, Blacks sued to attend institutions of their choice and the cases began to question the doctrine of "separate but equal." The first of the graduate school cases to reach the United States Supreme Court in 1938 was *Gaines v. Missouri*.[10] The plaintiff, Lloyd Gaines was a Black male who was refused admission to the law school of the University of Missouri solely because of his race. A complaint was brought against the university on the grounds of its failure to provide equal protection under the law, as provided by the Fourteenth Amendment. The university offered Gaines several options, one of which was to attend law school in another state, but these terms were not satisfactory to Gaines. The Missouri Supreme Court ultimately dismissed the case.

The National Association for the Advancement of Colored People (NAACP) provided legal counsel for Gaines, and appealed to the United States Supreme Court. The decision was reversed, not on the Fourteenth Amendment but on the grounds that the Constitution required the state to provide equal facilities for Blacks within the state. Due to the absence of facilities, Missouri had to admit Black applicants to the existing law school.[11] *Gaines* was significant because for the first time, the Supreme Court had ordered the admission of a black student to a segregated university.

The first of the post-*Gaines* graduate school cases was in 1948 with *Sipuel v. Board of Regents*.[12] In this case, the University of Oklahoma Law School denied admittance to a Black woman because of her race. The Oklahoma Supreme Court determined that because Sipuel failed to demand that the State establish a separate law school for blacks, she had no right to admission to the white law school.[13] Because she had not made this necessary demand, she "wholly failed to establish any violation of the Fourteenth Amendment of the Federal Constitution."[14] To the surprise of Sipuel's legal counsel (i.e., NAACP) the Supreme Court reversed the Supreme Court of Oklahoma's decision.

Two 1950 cases, *Sweatt v. Painter* and *McLaurin v. Oklahoma State Regents* laid the foundation for the 1954 *Brown* verdict. The cases revolved around the same issue of equal protection under the law; however, the *Sweatt* case investigated to what extent the clause of the Fourteenth Amendment limited the power of a state to distinguish between the students of different races in professional and graduate education programs in a state university.[15] In *Sweatt v. Painter*, the University of Texas Law School rejected the plaintiff's application solely based on race.[16] During this time in Texas, there were no law schools for Blacks. Instead of the state trial court recognizing that the policy denied equal protection, the Court continued the case for another six months to allow time for a law school for Blacks to be built. The focus of this case was decided on the educational facilities issue analysis.

10. *State of Missouri Gaines v. Canada*, 305 U.S. 337, 59 S.Ct. 232, 83 L.Ed. 208 (1938).

11. K. ESTELL, THE AFRICAN-AMERICAN ALMANAC (Detroit: Gale Research) (1994).

12. *Sipuel v. Board of Regents*, 332 U.S. 631, 68 S.Ct. 299, 92 L.Ed 247 (1948).

13. *Id.*

14. *Id.* at 144.

15. *Sweatt v. Painter*, 339 U.S. 629, 70 S.Ct. 848, 94 L.Ed. 1114 (1950).

16. *Id.*

The Supreme Court held that there was not "substantial equality in the educational opportunities offered to White and Negro law students by the State."[17] The comparison between "number of faculty," "variety of courses," "opportunity for specialization," "size of student body," "scope of the library," and "availability of law review and similar activities" was one-sided in the favor of the University of Texas Law School.[18] The Court recognized the need for the exchanging of ideas and views for those who wished to practice law and noted this type of learning did not and could not take place in isolation. In conclusion, the Court expounded: "It is difficult to believe that one who had free choice between these law schools would consider the question closed."[19]

In *McLaurin v. Oklahoma State Regents*, a Black student with a master's degree was denied admission to the University of Oklahoma because of race.[20] At the time, an Oklahoma state statute made it illegal to maintain or attend schools that enrolled both Blacks and Whites. The District Court held the statute unconstitutional because it violated the Supreme Court's ruling in the *Gaines* and *Sipuel* cases. The plaintiff, George McLaurin entered the doctoral program and during his attendance, was required to sit in a special designated area in classrooms, the library, and the cafeteria. The state made the argument that McLaurin was not denied any of the facilities, and the seat they assigned him carried with it no particular disadvantage. The Court repudiated the argument on the basis that the special seats hindered McLaurin's pursuit of an advanced degree, and ultimately the ability to learn his discipline because he was segregated from the other students. This separation inhibited his learning, as he was unable to study, engage in discussions, or exchange views with the other students.

In the 1954 landmark *Brown v. Board of Education of Topeka* decision the "separate but equal" doctrine was challenged. The Court held that "separate but equal was inherently unequal."[21] The decision was unprecedented in its impact on removing the social barriers of isolation and prejudice based on race. The *Brown* Court relied on the earlier higher education school cases *Sweatt v. Painter* and *McLaurin v. Oklahoma State Regents* to discuss the intellectual experience of the Black student. (The legal reasoning of *Brown* will be discussed later in this paper when addressing the constitutional issue surrounding the state-funded HBCU.)

The Third Phase: Full Dismantling of Segregated Schools

The third phase of desegregation shifted attention back to institutions. With the passage of the Civil Rights Act of 1964, the country continued the job of dismantling a dual system of educating Blacks and Whites that had been in place for fifty to sixty years. Title VI of the Civil Rights Act of 1964 requires that "[n] o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[22] The Courts, Title VI, and the

17. *Id.* at 634.
18. *Id.*
19. *Id.*
20. *Id.* at 637.
21. *Brown*, 347 U.S. 483, 486, 74 S.Ct. 686, 687, 98 L.Ed. 873 (1954).
22. 42 U.S.C. 2000d (1996).

Constitution demanded a system of individual choice in attending institutions of higher learning.[23] In the 1968 *Alabama State Teachers Assn. v. Alabama Public School and College Authority* decision, an organization of Black teachers sought to prevent the establishment of a branch at Auburn University. They argued that the branch would attract White students from the already existing state-funded Black college in the same city. The United States District Court ruled against the Black teachers. The court reasoned that a student's choice to attend college was purely voluntary, unlike the elementary and secondary school cases. In 1971, the *Norris v. State Council of Higher Education* starkly contrasted the Alabama case.[24] This case concerned a state plan to expand a predominantly White two-year institution into a four-year institution in an area where a predominantly Black four-year institution already existed. In contrast to the Alabama case, the courts overturned the action because it impeded desegregation in the state system.

The 1973 case that set the agenda for dismantling the formerly *de jure* segregated systems of higher education was *Adams v. Richardson*.[25] In *Adams*, the United States Court of Appeals for the District of Columbia Circuit affirmed a District Court order that required the United States Department of Health, Education and Welfare (HEW) to enforce Title VI of the Civil Rights Act of 1964 by cutting off federal funding to states that had not taken steps to segregate their public schools. HEW, through its Office of Civil Rights (OCR), sought to require ten states to abandon their racial separate higher education systems (i.e., Louisiana, Mississippi, Oklahoma, North Carolina, Florida, Arkansas, Pennsylvania, Georgia, Maryland, and Virginia). The Court approved desegregation plans; therefore, states adopted specific remedial measures in college admissions and financial aid practices. Other institutions throughout the United States adopted similar measures but on a voluntarily basis. *Adams* was the first time that a Court acknowledged the distinctive value of Black colleges. This recognition was a result of arguments made in an *amicus* brief filed by the National Association for Equal Opportunity in Higher Education, a voluntary association for presidents of 110 predominantly Black public and private universities.[26] To preserve these institutions, states were required to develop a policy that "takes into account the special problems of minority students and of [b]lack colleges . . . "[27]

Additionally, as a result of this case, HEW developed criteria applicable to states having a history of *de jure* segregation in public higher education entitled "Revised Criteria Specifying the Ingredients of Acceptable Plans to Desegregate State Systems of Public Higher Education." The plan required that states follow prescribed steps which included: (a) enhance the quality of Black state-supported colleges and universities; (b) eliminate program duplication between Black and White institutions where possible; (c) place new "high demand" programs on traditionally Black campuses; (d) increase the percentage of Black academic employees in the system; and (e) increase the number of Black students enrolled at White public colleges.

23. STEFKOVICH, *supra* note 2, at 2.

24. 327 F.Supp. 1368 (E.D.Va.1971); aff'd without opinion 404 U.S. 907 (1971).

25. 356 F.Supp. 92 (D.D.C.1973), modified, 480 F.2d 1159.

26. *Id.* at 1165.

27. *Id.*

A more contemporary case on the dismantling of segregation in higher education is *Bazemore v. Friday*.[28] In 1986 the *Bazemore* Court addressed the issue of whether a state university's extension service could continue supporting organizations either with a primarily Black membership or others that enrolled primarily White students. The Court held that no discrimination was involved because "any racial imbalance resulted from the wholly voluntary and unfettered choice of private individuals."[29] Additionally, the Court found that there was no "evidence of any lingering discrimination in either services or membership."[30] Supporters of HBCUs argue that the *Bazemore* standard should have been applied in *Fordice*.

Gateway to *Fordice*

Mississippi established its first institution of public higher education in 1848. The University of Mississippi was established for the education of White students. The first public institution for Blacks was Alcorn State University in Lorman, Mississippi. Alcorn State University was established in 1871 specifically as the agricultural college for the education of Black students.[31] The next four universities in Mississippi were created for the education of White students: Mississippi State University (1880); Mississippi University for Women (1885); University of Southern Mississippi (1912); and Delta State University (1925). The last two universities created were for Black students, both were teachers colleges. Jackson State University established in 1940 was charged with educating Black teachers for Black public schools. Mississippi Valley State University (1950) had a similar mission that was confined to the rural area Black students' education. The Mississippi system of public education consisted of eight universities, five exclusively White and three exclusively Black.[32]

Even though *Brown* held that segregated public education was unconstitutional, the higher education system of Mississippi remained segregated well into the early 1960s. In 1963, the state's three historically White "flagship" institutions decided to use the standardized test score of fifteen as the minimum score (ACT) for all college entrants. At that time, 15 was the average score for Whites, and seven was the average score for Blacks. Under court order, James Meredith became the first student to integrate the University of Mississippi. This was an effort by Meredith, but unfortunately the Mississippi public university system remained segregated. Twelve years after Meredith integrated the University of Mississippi, other White universities had admitted at least one Black student. Jackson State University and Mississippi Valley State University remained exclusively Black, while Alcorn State University had admitted five White students.[33]

HEW was the organization that first sought to enforce Title VI of the Civil Rights Act of 1964. HEW requested that the state devise a plan to remove the former *de jure* segregated university system. The Board of Trustees of State Institutions of Higher Learning submitted a proposal, which included a numerical goal on the enrollment of students, improved hiring of

28. *Bazemore v. Friday*, 478 U.S. 385, 106 S.Ct. 3000, 92 L.Ed.2d 315 [32 Ed.Law Rep. [1223]] (1986).

29. *Id.*

30. *Fordice*, 505 U.S. at 730, 112 S.Ct. at 2737.

31. *Ayers v. Allain*, 674 F.Supp. 1523, 1527 (1975).

32. *Fordice*, 505 U.S. 717, 112 S.Ct. 2727, 120 L.Ed.2d 575 [75 Ed.Law Rep. [81]].

33. *Id.*

underrepresented faculty, and instituting remedial programs. HEW rejected the proposed plan because it did not aggressively address the areas of student enrollment and recruitment, faculty hiring, elimination of unnecessary program duplication, and institutional funding practices. These funding practices influenced students' choice of institutions. The board made amendments that HEW later rejected. Despite HEW's dissatisfaction with the plan, the board adopted it; however, the plan never got the legislative support it needed. Not until fiscal year 1978 was the plan funded and it was still far below the amount sought by the board.[34]

The *Fordice* controversy officially began in 1975 when private plaintiffs brought suit against the state of Mississippi for failure to dismantle Mississippi's dual system of higher education. The United States intervened in support of the plaintiffs. The case was argued under the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964.[35] The parties attempted a resolution through voluntary dismantlement. For 12 years, the two parties were unable to achieve a consensual resolution. Mississippi assigned three categories of missions to their institutions of higher education. The categories are as follows: (1) "comprehensive"–the three flagship universities–with the greatest resources and program resources; (2) "urban"–the sole urban university, historically Black–with a more limited mission geared toward the urban setting; and (3) "regional"–the remaining four universities, two historically White and two historically Black–with primarily an undergraduate role. During the 80s, the student populations remained relatively unchanged. More than 99% of the state's White students attended the University of Mississippi, Mississippi State University, University of Southern Mississippi, Delta State University, and Mississippi University for Women.[36]

In 1987, when the case finally went to trial, each side had an ample amount of evidence. The issues that were debated were admissions standards, faculty and administrative staff recruitment, program duplication, on-campus discrimination, institutional funding disparities, and satellite campuses.[37] The state argued that it had successfully fulfilled its duty to end *de jure* segregation by implementing non-discriminatory race-neutral policies and practices in student admission, faculty hiring, and operations. The state also made claims of attracting significant numbers of qualified Blacks to those institutions that had been exclusively White. The petitioners argued that the state continued to reinforce historic, race-based distinctions among the universities.[38]

After 71 witnesses and 56,700 pages of exhibits, the District Court outlined its findings. The District Court dismissed the case based on the opinion that "the state's affirmative duty to desegregate did not contemplate either the restriction of choice or the achievement of any degree of racial development."[39] The court further stated that although student enrollments and faculty/staff hiring should be examined, the bulk of emphasis should be

34. *Id.*

35. *Ayers III*, 914 F.2d at 678.

36. *Id.* at 734–735.

37. *Fordice*, 112 S.Ct. 2727.

38. *Id.*

39. *Id.* at 1551.

placed on racially neutral policies, developed in good faith, and implemented to substantially detract from the continued racial identity of the individual institutions. The District Court held the decision that Mississippi's officials had fulfilled their duty to desegregate.[40]

The United States Fifth Circuit Court of Appeals affirmed the holding of the District Court.[41] The court ruled that the state had adopted and implemented race-neutral policies and that all students had a right of choice as to what institution they would attend. On appeal, the Supreme Court made two significant findings. The Supreme Court reasoned that although Mississippi State's officials had implemented a race-neutral admissions policy, this window-dressing attempt at desegregation fell short of compliance.[42] The Court held:

> After a state has established a racially neutral admissions policy not animated by a discriminatory purpose, if policies traceable to the prior dual system are still in force and have discriminatory effects, then those policies must be reformed to the extent practicable and consistent with sound educational practices.[43]

The Supreme Court found several characteristics of the segregated system in the undisputed factual findings. The Supreme Court held that the Court of Appeals misinterpreted the Title VI claim. The Court also cited the regulation that the state was to "take affirmative action to overcome the effects of prior discrimination" (34 CFR 100.3 (b)(6)(I) 1991). If the Court of Appeals had applied the correct legal standard from the findings of the District Court, they would have noticed several surviving aspects of Mississippi's segregated system. The Court used the fact findings of the District Court that was affirmed by the Court of Appeals to target four areas of the present system: admissions standards, program duplication, institutional mission, and continued operations of all eight public universities.

The Supreme Court found that race neutral policies alone did not eliminate the segregated system.[44] Therefore, the Supreme Court vacated the Fifth Circuit's decision and remanded the case to the Court of Appeals and the District Court with instructions to apply the new appropriate legal standard. This standard queries whether the "state perpetuates policies and practices traceable to its prior system that continues to have segregative effects."[45] The Supreme Court studied Mississippi's admission standards, duplication of programs, institutional mission, and the continued operation of eight institutions. The Court's determinations on these issues are discussed in more detail below.

Admission Standards

Mississippi's system admissions policy changed in 1963. The three flagship institutions required all entrants to achieve a minimum composite score of 15 on the test administered by the American College Testing (ACT) Program. During the time of the admissions policy change, the average ACT composite score for Whites was 18, while 7 was the score for Blacks. The

40. *Id.*

41. *Ayers*, 914 F.2d 676 [62 Ed.Law Rep. [910]].

42. *Fordice*, 112 S.Ct. 2727.

43. *Ayers*, 914 F.2d 676.

44. *Fordice*, 112 S.Ct. 2727.

45. *Id.* at 2730.

admissions policy clearly had a "discriminatory taint."[46] The Court found that the policy was purposely used to limit the admission of Black students into White institutions. Because of this policy, the effects of the *de jure* segregation remained. A score of 15 on the ACT granted automatic admission to any Mississippi resident under the age of 21 to five of the six White institutions. The Mississippi University for Women required a score of 18 for automatic admission unless the student had a 3.0 high school grade-point-average. Mississippi residents scoring a 15 but not lower than 13 were allowed automatic admission to the three remaining Black universities. Students scoring 13 or 14 with few exceptions were excluded from the five historically White universities. In 1985, only 30% of Black students were eligible for admission to historically White institutions.[47]

Although the new system of college admission was based on the ACT composite test score and not racial identity, because of the past discriminatory effect, the university system remained relatively unchanged. The Board of Trustees justified the score identifying that students scoring less than a 15 on the ACT were not prepared for the academic requirements of the historically White institutions. They also purported that the ACT composite score of 15 if used across the board would have detrimental effects on the historically Black admission numbers.[48]

The constitutionality of the ACT as the sole criteria of college admissions was scrutinized. The plaintiffs exhibited evidence that using the ACT for automatic admission continued to foster *de jure* discrimination. Administrators of the test (The American College Testing Program) do not support the score as the sole admission criterion. They state that the test is only one variable that should be factored into the decision for admissions. Most states used ACT and high school grade-point-average in consideration for admission. In Mississippi, although the ACT score had a large racial disparity, the high school grade-point-average had a much narrower gap. If the ACT and high school grade-point-average were used in conjunction as admissions criteria, the number of eligible Black students would have increased at all Mississippi public universities.[49]

Duplication of Programs

The Supreme Court found that the duplication of programs was another aspect of the case that needed to be examined. The court defined duplication of programs as:

> [T]hose instances where two or more institutions offer the same nonessential or non-core program. Under the definition, all duplication at the bachelor's level of non-basic liberal arts and sciences course work and all duplication at the master's level and above are considered to be unnecessary.[50]

The Court determined that program duplication was present in both undergraduate and graduate levels. More than 34.6% of the undergraduate and 90% of the graduate programs were unnecessarily duplicated in the Mississip-

46. *Id.* at 1557.
47. *Id.*
48. *Id.*
49. *Id.*
50. *Ayers*, 674 F.Supp. XXX, 1442.

pi public higher education system. The District Court concluded that program duplication did not contribute to the racial identifiability of institutions, or necessarily impact student's choice of institution to attend.[51]

The Supreme Court reversed, instructing that program duplication was a tenet of the "separate but equal" standard entrenched by the *Plessy* ruling. Accordingly, the Supreme Court could not find any "educational justification" for the duplication of programs. The District Court noted that duplication of programs "cannot be justified economically or in terms of providing quality education."[52] However, by stating "there is no proof that elimination of unnecessary duplication would decrease institutional racial identifiability, affect student choice, and promote educationally sound practices," the District Court did not advise the parties to develop evidence to affirm or reject the statement.[53] The Supreme Court determined that the District Court failed to document what effect duplication of programs had on the admissions standards in evaluating whether the state had met its duty to dismantle the segregated system.[54]

Institutional Mission

The mission statements of the eight public universities varied by classification. The University of Mississippi, Mississippi State University, and University of Southern Mississippi are considered the "flagship institutions." They receive the largest share of funding, have more program choices, and offer more curriculum choices. The other historically White institutions, Delta State University and Mississippi University for Women, are liberal arts institutions. All of these institutions were founded for the sole purpose of educating White students. The remaining three historically Black public institutions academic program foci were smaller than any of the aforementioned White institutions. Alcorn State University was founded to educate Black students in agricultural areas. Jackson State University and Mississippi Valley State University were teaching institutions. *De jure* segregation played a major role in state funding and curriculum decisions when these institutions were founded.[55]

In 1981, new classification missions were developed for state institutions. The three flagship institutions were given the "comprehensive" mission. The comprehensive mission was assigned to the universities having the most varied programs and graduate degrees. Four campuses were given the "regional" status. Mississippi Valley State University, Alcorn State University, Delta State University, and Mississippi University for Women have limited programs and were devoted primarily to undergraduate education. Jackson State University was classified as the sole "urban" university; its mission is designated by the location.[56] Although the mission statements are not discriminatory on their face, the Court found connection between the mission of the institutions and the past *de jure* segregation are connected. Although the new university classifications were adopted post *de jure* segregation, the status of the universities was perpetuated by the segregationist society. The mission

51. *Fordice*, 112 S.Ct. 2727.
52. *Ayers*, 674 F.Supp. XXX, 1541.
53. *Id.* at 1561.
54. *Fordice*, 112 S.Ct. 2727.
55. *Id.*
56. *Id.*

statements combined with admissions standards and program duplication serve to decrease a student's choice of institution.[57]

Continued Operation of Eight Public Higher Education Institutions

Mississippi has eight public education institutions, which is clearly within its discretion; however, the Supreme Court found that to operate all eight universities was wasteful and irrational. More specifically, the Court recognized that the close proximity of Delta State University and Mississippi Valley State University (35 miles) along with Mississippi State University and Mississippi University for Women (20 miles) created a financial situation that was not feasible. The District Court had ruled that the ability to operate all eight institutions was a matter of fiscal responsibility and not a constitutional issue.[58] As the system continued with eight public institutions of higher education the argument of closure of one or more institutions was assessed. Allowing students to have eight choices of public institutions did not assist in the dismantling of the *de jure* segregation. To close or merge institution in close proximity had the potential of decreasing the effect of the present system. Elimination of program duplication and the revision of admission standards may be sufficient to correct the problems caused by *de jure* segregation; however, this may not be educationally justifiable.[59]

In response to the Supreme Court's decision in *Fordice*, the Mississippi Board of Trustees of State Institutions of Higher Learning reached a solution for compliance with *Fordice*. The solution required the closure of one public HBCU (Mississippi Valley State University), and required another (Acorn State University) to be absorbed into Delta State University, an historically White institution; thus leaving Jackson State University as the sole surviving public HBCU in the state.[60] The District Court on remand did not find it necessary to approve this aspect of the plan for compliance which sought to close Mississippi Valley State University, reserving such a ruling until the Supreme Court sets forth precedent clarifying whether public HBCUs may be preserved under the *Fordice* standard. Until such precedent is established, the future of public HBCUs is unclear.

Can State-Funded HBCUs Continue to Exist After *Fordice*?

It is difficult to determine what the *Fordice* standard actually means. This section of the paper will explore whether public HBCUs can be reconciled with the *Fordice* opinion. It will first discuss the opinions of Justice Scalia, Justice O'Connor, and Justice Thomas. It will then explain a constitutional theory based on *Brown* under which HBCUs may be able to continue to survive. It appears that the private plaintiffs in *Fordice* lost because they sought an order that would have required upgrading the HBCUs. In essence, what the plaintiffs desired was an equalization remedy reminiscent of the relief sought in pre-*Brown* cases. However, even though the Court refused to accept the private plaintiffs' demand of "publicly financed, exclusively black enclaves by private choice," the Court may have kept the door open for the continued operation of the public HBCU.[61] At the conclusion of the *Fordice*

57. *Id.*
58. *Id.*
59. *Id.*
60. *Fordice*, 505 U.S. 717, 730, 112 S.Ct. 2727, 2737.
61. 505 U.S. at 743, 112 S.Ct. at 2743.

opinion, the Court reasoned that increased funding for public HBCUs might be necessary to rid the segregated system. The majority opinion suggested that the Court would endorse improving public HBCUs if the schools no longer were racially identifiable. Accordingly, HBCUs would need to attract White students.

Justice Scalia, the lone dissenter, concurred in the judgment in part and dissented with the opinion in part. Justice Scalia's interpretation of the majority opinion demonstrated the inherent ambiguity in the *Fordice* standard. Justice Scalia wrote that "nothing good will come out of this judicially ordained turmoil."[62] He criticized the majority opinion as being without guidance, and claimed that "the opinion was something for all, guidance to none."[63] In fact, Justice Scalia predicted many years of litigation-driven confusion and destabilization in the university systems of all formerly *de jure* states.[64] Justice Scalia believed that this standard would be impossible to overcome since virtually all HBCUs were established when this country supported a dual system of education. Justice Scalia's interpretation of the standard requires states to prove that HBCUs are not the consequence of prior *de jure* regimes, or if they are, they must be educationally justifiable. Justice Scalia did agree with the majority on three issues. First, he believed that the Constitution compelled Mississippi to remove all discrimination barriers on public universities. Second, he believed that the Constitution did not compel Mississippi to remedy funding disparities between its historically Black and historically White universities. Finally, he believed that the disparity of ACT score requirements between universities does not need to be further reviewed.[65]

Justice O'Connor, in her concurrence, stressed that the State has the burden of proving that it has eliminated its prior segregated system.[66] In hoping that discriminatory systems would become a distant memory, Justice O'Connor reasoned that the lower courts "must carefully examine Mississippi's proffered justifications for maintaining a remnant of *de jure* segregation to ensure that such rationales do not merely mask the perpetuation of discriminatory practices."[67] Justice O'Connor also said that it follows from the State's obligation that the State must demonstrate that it has "counteracted and minimized the segregative impact" of any policies found necessary to be maintained that are remnants of its prior system but essential elements needed to accomplish legitimate educational goals.[68]

Justice Thomas also wrote a concurring opinion. He wrote separately to "emphasize that this standard does not compel the destruction of historically black colleges nor the severing of those institutions from their distinctive histories and traditions."[69] Justice Thomas believed that the majority's standard did not call for the elimination of public HBCUs. Justice Thomas rather believed that the Court's standard allowed for the maintenance of public HBCUs if they are consistent with "sound educational practices," and if they

62. 505 U.S. at 762, 112 S.Ct. at 2753.
63. *Id.* at 2646 (Scalia, J., dissenting).
64. *Id.* at 2753.
65. *Id.* at 2746.
66. *Id.* at 2743 (O'Connor, J., concurring).
67. *Id* at 2743–44 (O'Connor, J., concurring).
68. *Id.* at 2744. (O'Connor, J., concurring).
69. *Id.* at 2745.

are "educationally justifiable."[70] Justice Thomas' concurring opinion also contained a salient statement regarding the educational value of the HBCU. Thomas reasoned that the *Fordice* opinion in no way detracted from sound educational justifications for maintaining HBCUs that were welcoming to White students.[71] More specifically, Justice Thomas found that: (1) opportunities at HBCUs and at White schools have expanded; (2) HBCUs are still considered as a source of pride and leadership especially in the South; (3) states should maintain diverse institutions, including HBCUs, open to all on a race-neutral basis, but with established traditions and programs that might disproportionately attract one race or another; and (4) existence of the HBCUs does not constitute the kind of program duplication the majority wanted eliminated. Justice Thomas concluded: "Although I agree that a State is not constitutionally required to maintain its [HBCUs] as such, . . . I do not understand our opinion to hold that a State is forbidden from doing so."[72]

Justice Thomas' concurring opinion resonated one constitutional theory under which a public HBCU may continue to exist in light of *Fordice*. For instance, using the legal reasoning under *Brown*, there is "sound educational justification" for the continued maintenance of public HBCUs.[73] The *Brown* Court never indicated that single-race schools, which do not discriminate in their admissions policies could never be legal.[74] The Court merely held that legally mandated racial segregation in public primary and secondary schools cannot result in an equal education under the law because such a situation stigmatizes students belonging to the minority racial group. Additionally, *Brown* used evidence focused on the intellectual experience of the Black student and relied on the District Court's finding on evidence from reputable social scientists, that legally mandated segregation resulted in harmful psychological effects on Black children.[75] Justice Thomas concluded in stating that "it would be ironic, to say the least, if the institutions that sustained blacks during segregation were themselves destroyed in an effort to combat its vestiges."[76]

The dicta of *Fordice* questioned the constitutionality of public HBCUs. The Court suggested that a racially identifiable university borders on unconstitutionality.[77] Additionally, in the opinion the Court noted that closing or merging one or more institutions would remedy the discriminatory effects of the existing system. Indeed, the ambiguous standard set forth in both the Court's dicta and opinion suggested that public HBCUs may be unconstitutional and perhaps should be merged or closed to comply with the desegregation order mandated in *Brown*.[78] Only two jurisdictions have had the opportunity to interpret the confusing *Fordice* standard as it relates to the future role of public HBCUs. However, in these cases both the Fifth and the Eleventh Circuits failed to address the constitutionality of public HBCUs under *Fordice*, although the Fifth Circuit in its dicta cited *Fordice* for the proposition that the Constitution does not require the closing of its state-funded

70. *Id.* at 2747.

71. *Id.* at 2746.

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

73. 47 ALA. L. REV. 481 (1996).

74. *Id.*

75. *Id.*

76. *Fordice*, 505 U.S. at 749, 112 S.Ct. at 2746 (Thomas, J., concurring).

77. *Id.* at 743.

78. *Id.* at 742.

HBCU.[79] Thus, the question of whether a state-funded HBCU may continue to operate remains unclear with few lower courts interpreting *Fordice*.

The irony of the arguments made in favor of Black colleges is that they seem in some ways to be the same claims that were made by defenders of segregation when *Brown* was argued.[80] This argument could be construed as accepting the *Plessy* rationale that "separate but equal" schools for Black students are as good as receiving an education in an integrated school. At first glance, it may appear that the argument contradicts the integrationist principle of *Brown*. However, the plaintiffs in *Fordice* were not seeking a return to segregation because they are not excluding White students from their schools. What the plaintiffs hoped for was simply the preservation of the public HBCU because of HBCUs history of success in educating its students. The *Brown* litigation aimed at eliminating the relegation of students to a separate and under-funded system of segregated institutions.[81] The argument in support of the state-funded HBCU is a different issue. What opponents of the state-funded HBCU fail to acknowledge is that HBCUs established during the era of segregation managed to educate thousands of Black students, even with the considerable constraints imposed by limited resources.

Further, today the public HBCU continues to have success in the education of Black students, especially those who were educated in the often inequitable elementary and secondary system. Indeed, access to higher education cannot adequately be addressed while ignoring the pernicious educational practices that leave all too many disadvantaged and minority students grade levels behind. To further demonstrate the inequities between Black and White students in the kindergarten through 12 system, one only needs to look at the disparities in ACT scores that were discussed earlier in this paper. The Court noted that in 1985 "seventy-two percent of Mississippi's white high school seniors achieved an ACT composite score of fifteen or better, while less than thirty percent of black high school seniors earned that score."[82] The elimination of *de jure* segregation does not mean that these institutions are no longer needed, as *de facto* inequitable kindergarten through 12 systems often plague Black students. HBCUs help equal the playing field for the students who received an inequitable primary and secondary education. The success of public HBCUs is strong evidence of their capacity to prevail against tremendous obstacles. Opponents of the HBCU are therefore ignoring both past discrimination and the present issue of increasing the educational opportunities for Black students.

The *Brown* Court relied on the earlier higher education school cases *Sweatt v. Painter* and *McLaurin v. Oklahoma State Regents* to discuss the intellectual experience of the Black student. Both of these higher education cases addressed the question "to what extent does the Equal Protection Clause of the Fourteenth Amendment limit the power of a state to distinguish between students of different races ... in a state university?"[83] The

79. *United States v. Louisiana*, 9 F.3d 1159, 1164 [87 Ed.Law Rep. [361]] (5th Cir.1993); *see also Knight v. Alabama*, 14 F.3d 1534, 1540 [89 Ed.Law Rep. [65]] (11th Cir.1994).

80. B.C.L. REV., May 1994, p. 24.

81. *Id.* at 26.

82. *Fordice*, 505 U.S. at 735, 112 S.Ct. at 2739.

83. *Id.*

Sweatt and *McLaurin* decisions opened the legal door for the *Brown* Court's reliance on social science evidence. The Court's reasoning in *Sweatt* and *McLaurin* demonstrated a commitment to allowing Black university students an education the value of which is based in large part on "those qualities which are incapable of objective measurement."[84]

Under a *Brown* analysis, public HBCUs may be preserved because unlike the hastily created institutions in *Sweatt* and *McLaurin*, HBCUs currently possess the intangible qualities which those cases concluded were lacking in those schools and deemed as essential components of the Black university student's intellectual experience.[85] HBCUs possess those qualities which *Sweatt* and *McLaurin* deemed as indicia of greatness in institutions. HBCUs have a reputation in the community for faculty committed to the nurturing and development of eager minds, as well as an experienced administrators and influential alumni.[86] Further, any evaluation of equality of education should consider how effectively predominantly Black colleges educate their students relative to how well predominantly White colleges educate Black students. Some sociological evidence suggests that Black students are more likely to succeed at a predominantly Black school than at a predominantly White institution.[87]

Opponents of public HBCUs reason that HBCUs are merely a vestige of a discriminatory system that inhibits current efforts to integrate schools. Justice John Marshal Harlan, the lone dissenter in *Plessy* warned of the effects of "separate but equal." Justice Harlan predicted that the "separate but equal" policy would have a long-term "pernicious" effect on a country where "the destinies of the two races ... are indissolubly linked together ... " "The thin disguise of 'equal' accommodations ... will not mislead anyone, nor atone for the wrong this day done."[88] Opponents of the public HBCU further argue that this "separate but equal" movement could build into our society new racial barriers to opportunity that are nearly as intractable as those that followed *Plessy*.

Contrarily, there are several policy arguments against integration of historically White and historically Black universities. The importance of public HBCUs is well documented, HBCUs provide a valuable educational experience to Black students and HBCUs possess "qualities which are incapable of objective measurement."[89] Black colleges do not have the same history as White colleges that engaged in race-exclusive admission practices. Additionally, racial tension continues to remain prevalent on many American campuses and the public HBCU therefore provides among other things a nurturing environment. Further, Black schools afford Black students the opportunities to serve in leadership positions that may be more limited or difficult to attain at White colleges. Perhaps most importantly, Black culture and accomplishment are essential ingredients in the curriculum at Black colleges. The attributes of the public HBCU cannot be replicated at White universities. At White universities, Black students can be marginalized and

84. 47 ALA. L. REV. 481 (1996).

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Sweatt*, 339 U.S. at 634, 70 S.Ct. at 850.

the courses oftentimes ignore the contributions of Blacks to the sciences, art, and literature. Continued access to HBCUs ultimately ensures full and meaningful participation of Blacks in a multicultural democratic society and the research supports these statements. For instance, in 1990, 20% of Black undergraduates were enrolled in HBCUs, which awarded more than 33% of all undergraduate degrees earned by Black students.[90] Black colleges also continue to provide better opportunities for Blacks interested in pursuing math and science degrees.[91]

Further, public HBCUs were the source of nearly 50% of the nation's Black Ph.Ds. between 1986 and 1992.[92] In its 1991 report entitled "The State of Black America" the National Urban League observed that HBCUs produced 70% of the nation's Black elected officials, 80% of the Black lawyers and judges, and 85% of Black doctors.[93] Public HBCUs are currently making possible the reality of similar future academic success. There are 104 HBCUs in the United States, 51 of which are public. Most of these institutions are located in southern states whose university systems were once racially segregated by law.[94] In the fall of 1992, public HBCUs enrolled 204,966 students, or approximately 70% of all students enrolled in Black colleges and universities.[95]

A 1995 study also supports financial incentives for maintaining HBCUs. Jill Constantine researched the effect of attending an HBCU on Black student's future wages. Constantine's study reported that the value added in future wages from attending HBCUs was 38% higher than from attending a traditional White university.[96] It is clear from the research that state-funded HBCUs are a vital source of education for Blacks in the same way that they were when *de jure* racial segregation existed. Consistent with this belief, in his dissenting opinion in *Missouri v. Jenkins*, a Kindergarten through 12 desegregation case, Justice Thomas noted the difference between voluntary and involuntary segregation.[97] Justice Thomas inferred that making everyone integrate could be cultural genocide and that the consequence of coerced desegregation is that the minority groups need to be subservient to the White population. Justice Thomas claims that this could be patronizing, because the assumption is that because a school is Black, it is bad. He believes that one should take into consideration cultural differences. Those who advocate closure of the HBCUs in the name of integration and *Brown* ignore the fact that history has demonstrated the remarkable job that HBCUs both public and private have done in educating Black students. HBCUs have served and continue to serve as the bridge between a failing kindergarten through 12 system and the reality of a college education.

Conclusion

The *Brown* Court held that separate is inherently unequal. At first glance, *Fordice* did not appear to follow the rhetoric of *Brown* when the

90. 47 ALA. L. REV. 481 citing the Nat'l Center for Educ. Statistics, U.S. Dep't of Educ., Fall Enrollment in Institutions of Higher Education 224, tbl. 213 (June 1994).

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. 48 Indus. & Lab. Rel. Rev. 531 (1995).

97. *Missouri v. Jenkins*, US LEXIS 4041 (1955).

Court refused to explicitly state that HBCUs were unconstitutional. Therefore, there is a possibility that public HBCUs could survive under *Brown*. Indeed, the issue of a publicly funded HBCU is difficult. However, it cannot be denied that HBCUs have persevered and developed into superior institutions of higher education with a legacy, which all can respect, and from which many can benefit. Contrarily, it can also be argued that the HBCU is promoting "separate but equal" in its truest sense. It has been 25 years since the beginning of the *Fordice* litigation and it continues to remain unclear whether the state-funded HBCU will survive. The authors' final notes are that HBCUs should remain as predominantly Black institutions that maintain fidelity to their history and cultural identities. They should continue to remain predominantly Black, while also open to White students as well.

KEYCITE

CITATION: U.S. v. Fordice, 505 U.S. 717, 112 S.Ct. 2727, 120 L.Ed.2d 575 [75 Ed.Law Rep. [81]], 60 USLW 4769 (U.S.Miss., June 26, 1992) (NO. 90–1205, 90–6588)

History

Direct History

1 Ayers v. Allain, 674 F.Supp. 1523 [43 Ed.Law Rep. [972]] (N.D.Miss. Dec. 10, 1987) (NO. Gc75–9–NB)

Reversed by

2 Ayers v. Allain, 893 F.2d 732 [58 Ed.Law Rep. [48]] (5th Cir.(Miss.) Feb. 6, 1990) (NO. 88–4103)

Rehearing Granted by

3 Ayers v. Allain, 898 F.2d 1014 [59 Ed.Law Rep. [618]] (5th Cir.(Miss.) April 9, 1990) (NO. 88–4103)

AND on Rehearing

4 Ayers v. Allain, 914 F.2d 676 [62 Ed.Law Rep. [910]] (5th Cir.(Miss.) Sept. 28, 1990) (NO. 88–4103)

Certiorari Granted in Part by

5 Ayers v. Mabus, 499 U.S. 958, 111 S.Ct. 1579, 113 L.Ed.2d 644, 59 USLW 3701 (U.S.Miss.April 15, 1991) (NO. 90–6588)

AND Certiorari Granted by

6 U.S. v. Mabus, 499 U.S. 958, 111 S.Ct. 1579, 113 L.Ed.2d 644 [66 Ed.Law Rep. [921]] 59 USLW 3535, 59 USLW 3695, 59 USLW 3701 (U.S.Miss. April 15, 1991) (NO. 90–1205)

AND Decision Vacated by

7 U.S. v. Fordice, 505 U.S. 717, 112 S.Ct. 2727, 120 L.Ed.2d 575 [75 Ed.Law Rep. [81]] 60 USLW 4769 (U.S.Miss.June 26, 1992) (NO. 90–1205, 90–6588)

On Remand to

8 Ayers v. Fordice, 970 F.2d 1378 [76 Ed.Law Rep. [724]] (5th Cir.(Miss.) Aug. 18, 1992) (NO. 88–4103)

On Remand to

9 Ayers v. Fordice, 879 F.Supp. 1419 [99 Ed.Law Rep. [279]] (N.D.Miss. March 7, 1995) (NO. 4:75CV009–B–O)

Affirmed by

10 Ayers v. Fordice, 99 F.3d 1136 (5th Cir.(Miss.) Sept. 25, 1996) (TABLE, NO. 95–60329)

AND Affirmed in Part, Reversed in Part by

11 Ayers v. Fordice, 111 F.3d 1183 [117 Ed.Law Rep. [840]] (5th Cir.(Miss.) April 23, 1997) (NO. 95–60431)

Certiorari Denied by

12 Ayers v. Fordice, 522 U.S. 1084, 118 S.Ct. 871, 139 L.Ed.2d 768, 66 USLW 3473 (U.S.Jan. 20, 1998) (NO. 97–6811)

13 Ayers v. Allain, 674 F.Supp. 1523 [43 Ed.Law Rep. [972]] (N.D.Miss.Dec. 10, 1987) (NO. GC75–9–NB)

Judgment Affirmed by

14 Ayers v. Allain, 914 F.2d 676 [62 Ed.Law Rep. [910]] (5th Cir.(Miss.) Sept. 28, 1990) (NO. 88–4103)

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15 Ayers v. Mabus, 499 U.S. 958, 111 S.Ct. 1579, 113 L.Ed.2d 644, 59 USLW 3701 (U.S.Miss.April 15, 1991) (NO. 90–6588)

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17 U.S. v. Fordice, 505 U.S. 717, 112 S.Ct. 2727, 120 L.Ed.2d 575 [75 Ed.Law Rep. [81]], 60 USLW 4769 (U.S.Miss.June 26, 1992) (NO. 90–1205, 90–6588)

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18 Ayers v. Fordice, 970 F.2d 1378 [76 Ed.Law Rep. [724]] (5th Cir.(Miss.) Aug. 18, 1992) (NO. 88–4103)

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Certiorari Denied by

22 Ayers v. Fordice, 522 U.S. 1084, 118 S.Ct. 871, 139 L.Ed.2d 768, 66 USLW 3473 (U.S.Jan. 20, 1998) (NO. 97–6811)

23 Ayers v. Allain, 674 F.Supp. 1523 [43 Ed.Law Rep. [972]] (N.D.Miss.Dec. 10, 1987) (NO. GC75–9–NB)

Decision Vacated by

24 Ayers v. Fordice, 970 F.2d 1378 [76 Ed.Law Rep. [724]] (5th Cir.(Miss.) Aug. 18, 1992) (NO. 88–4103)

On Remand to

25 Ayers v. Fordice, 879 F.Supp. 1419 [99 Ed.Law Rep. [279]] (N.D.Miss.March 7, 1995) (NO. 4:75CV009–B–O)

Affirmed by

26 Ayers v. Fordice, 99 F.3d 1136 (5th Cir.(Miss.) Sept. 25, 1996) (TABLE, NO. 95–60329)

AND Affirmed in Part, Reversed in Part by

27 Ayers v. Fordice, 111 F.3d 1183 [117 Ed.Law Rep. [840]] (5th Cir.(Miss.) April 23, 1997) (NO. 95–60431)

Certiorari Denied by

28 Ayers v. Fordice, 522 U.S. 1084, 118 S.Ct. 871, 139 L.Ed.2d 768, 66 USLW 3473 (U.S.Jan. 20, 1998) (NO. 97–6811)

Negative Indirect History

Declined to Extend by

29 Burton v. City of Belle Glade, 178 F.3d 1175, 44 Fed.R.Serv.3d 43, 12 Fla. L. Weekly Fed. C 979 (11th Cir.(Fla.) June 25, 1999) (NO. 97–5091)* * *

30 Johnson v. DeSoto County Bd. of Com'rs, 204 F.3d 1335 [142 Ed.Law Rep. [59]], 54 Fed. R. Evid. Serv. 246, 13 Fla. L. Weekly Fed. C 427 (11th Cir.(Fla.) March 3, 2000) (NO. 98–3714) * * *

Distinguished by

31 Chester Residents Concerned for Quality Living v. Seif, 132 F.3d 925, 46 ERC 1065, 28 Envtl. L. Rep. 20487 (3rd Cir.(Pa.) Dec. 30, 1997) (NO. 97–1125)* * *

Related References

32 Ayers v. Fordice, 40 F.Supp.2d 382 [134 Ed.Law Rep. [172]] (N.D.Miss.March 24, 1999) (NO. 4:75CV009–B–0)

33 Ayers v. Fordice, 2000 WL 1015839 (N.D.Miss. July 6, 2000) (NO. 475CV009–B–D)