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SCHOOL DESEGREGATION FROM BROWN TO FORDICE, 1954-1992: A CASE STUDY IN AMERICAN INDIVIDUALISM

A Dissertation

Submitted to the Graduate Faculty of the Louisiana State University and Agricultural and Mechanical College in partial fulfillment of the requirements for the degree of Doctor of Philosophy

in

The Department of Political Science

by

Albert L. Samuels
B.A. Southern University, 1988
M.A. Southern University, 1991
August, 1998
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I would first of all like to thank the God who created the heavens and the earth (Gen. 1:1). He has been my "rock, my fortress and my deliverer" (Psa. 18:2) throughout this process of writing this dissertation. I invite everyone to investigate the claims of His Son, Jesus Christ, the Lamb of God who takes away the sins of the world (John 1:29; Acts 4:12).

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ABSTRACT

In United States v. Fordice (1992), the Supreme Court declared that racially nondiscriminatory admissions and hiring policies alone failed to satisfy the state of Mississippi’s "affirmative duty" to dismantle a previously de jure system of segregated higher education. However, the justices declined to define precisely what the state must do to satisfy its constitutional obligations, leaving in its wake a host of unresolved questions. Of particular concern to many African Americans is the fact that the future status of public black universities was left in the balance.

Using a case study approach, this dissertation argues that higher education desegregation cannot be understood apart from the Brown decision and the larger struggle of African Americans to achieve the full rights of American citizenship. It was found that: (1) though African Americans have a unique history of slavery and racial segregation, they have adhered to, and used, the same principles from the Declaration of Independence and the Constitution in their struggles for equality; (2) the legal struggles for desegregation represent a classic case study of the faith of blacks in the liberal tradition; (3) though both whites and blacks share the same liberal creed, they have come to their faith through very different historical paths. These very different historical experiences create fundamental ideological disputes between whites and blacks over the
legitimate role of the federal government in race policy; (4) these different historical perspectives complicate the issue of desegregation in higher education, and particularly the question of whether black colleges should be publicly supported or discontinued; (5) because the Creed purportedly embodies universal, transcendent truths, it tends to delegitimize arguments rooted in history or culture - the very justifications most often relied upon by African Americans for the continuation of black colleges (as well as other race-based public policies). Consequently, historical and cultural differences between blacks and whites raise basic questions about whether the American Creed is an adequate prism with which to view political problems associated with race.
INTRODUCTION

The Supreme Court in United States v. Fordice (505 U.S. 717 [1992]) concluded that the state of Mississippi's policy of nondiscriminatory admissions policies on the basis of race was insufficient to meet its "affirmative duty" to desegregate a previously de jure system of segregated higher education. The case marked the Supreme Court's first ruling regarding the remedial policies that states are required to adopt in order to desegregate systems of higher education; previous Supreme Court rulings in higher education desegregation focused on the rights of black Americans to attend previously all-white, public universities. Yet, the Court failed to articulate clearly an equitable remedy in the Mississippi case, leaving the parties involved, as well as other states in similar straits, wrangling over exactly what a state's "affirmative duty" to desegregate in higher education actually means.

1The language "affirmative duty" to desegregate is derived from the Supreme Court's landmark decision in Green v. School Board of New Kent County (391 U.S. 430 [1968]).

The Fordice case represents one more manifestation of the continuing effort to implement the mandate first articulated in Brown v. Board of Education (347 U.S. 483 [1954]). The Supreme Court determined that separate educational facilities for white and black Americans denied blacks the equal protection guarantees of the Fourteenth Amendment. The decision represented the climax of a two-decade long legal campaign by the National Association for the Advancement of Colored People (NAACP) which commenced at the level of graduate and professional education. The NAACP’s objective was to overturn the "separate but equal" doctrine announced in Plessy v. Ferguson (163 U.S. 537 [1896]) which provided the constitutional, as well as legal, bedrock for the entire system of segregation in the South. The NAACP’s attorneys argued that racial segregation was unconstitutional because it allowed Southern state governments to classify African Americans as a separate class that received different and unequal treatment under the law. This principle violated the basic tenets of American democracy - that every individual, regardless of race, religion, or national origin, is entitled to equal protection under the law. Brown is now considered a heroic moment in American history when the nation (through its Supreme Court) reaffirmed its commitment to its first principles by acting to remedy the most egregious violation of them - the treatment of African Americans.
Though Brown now enjoys broad ideological consensus, the specific measures necessary to fulfill its mandate have always been the subject of intense controversy. In Brown II, the Supreme Court ordered that the federal district courts to enter decrees and orders that would eliminate segregated schooling "with all deliberate speed" (Brown v. Board of Education, 349 U.S. 294 [1955]). The vague nature of the mandate coupled with stubborn resistance to integration forced the Court to revisit on many occasions the question of precisely what Brown required local school districts and state governments to do. Brown has raised fundamental issues about the power of federal court judges to craft remedies to address constitutional violations, particularly in the face of intense public opposition; in essence, it has often placed unelected federal judges against the power of elected public officials and popular majorities.

The attempt to apply Brown to higher education has been particularly troublesome, particularly in light of the Supreme Court's conspicuous silence prior to Fordice on the requirements states must meet in order to dismantle segregation in higher education. Lacking precedent from the nation's highest court, the task has fallen into the hands of lower federal court judges. Consequently, different courts often came to radically divergent conclusions of law and
proposed conflicting remedies, making the entire enterprise a rather confusing area of constitutional law. In attempting to resolve this dilemma, federal judges have tended to look to precedents set in elementary and secondary school desegregation cases for guidance in the higher education area.

The existence of state-supported, historically black colleges and universities further complicates the problem of defining the remedial measures necessary to eliminate de jure and de facto segregation in higher education. The question for courts to resolve is whether, in light of the historical experience of African Americans, the maintenance of these institutions is a necessary requirement for equal educational opportunity for black Americans to exist, or if they are merely the remnants of an unconstitutional system of segregated higher education (Miller, 1982). At issue is whether these institutions will be continued to be allowed to exist, or if they must be sacrificed as the necessary price for an "integrated society" Thus, the fate of historically black universities further politicizes the inherently troubling dilemma of how to craft remedial measures to desegregate in higher education.

The three principal aims of this dissertation are (1) to show that the struggle of black Americans for equal educational opportunity represents a central component of the overall struggle of African Americans to achieve full
equality in American society more broadly and (2) desegregation in education is a classic case study in the fidelity of African Americans to the American Creed (Myrdal, 1944), and (3) while the Creed has provided the ideological basis for the current consensus that racially discriminatory laws violate fundamental American principles of fairness, it has been less successful at forging a consensus around the best means to remedy the effects of centuries of racist practice. Rather, it will be shown that though American blacks and whites share the same American Creed, different historical experiences color their perspective on what its policy consequences are with respect to the legitimate role of the state in remedying racial discrimination.

To accomplish this, I want to place Brown into a broader historical context of the struggle of black Americans to achieve full equality in all arenas of American life. Secondly, I plan to revisit the ruling in Brown with particular attention to how the ruling shaped the debate on desegregation in general and higher education in particular. Thirdly, Fordice will be analyzed as a case study in view of the principles laid down by Brown and its progeny. I will concentrate especially on the question of the relevancy of precedents set in public school cases to the higher education context. Fourthly, the political, economic, and social implications of the Fordice ruling will be examined. Finally, this dissertation will reflect on the Supreme Court's trek
from Brown to Fordice and assess how core American ideals - which undergird American constitutional law in general and the Brown decision in particular - help and/or hinder the debate on how best to improve race relations in the United States.

Conceptual Framework

It will be argued in this dissertation that the struggle of black Americans to achieve the full rights of American citizenship in general and the school desegregation battles in particular cannot be properly understood apart from what Louis Hartz (1955) calls the "liberal tradition in America." In a nutshell, Hartz persuasively argues that what distinguishes America from Europe is that it lacked a true feudal and aristocratic past based on notions of rigid class distinctions and the belief in the inherent right of some to rule others (Tocqueville, 1988). While European liberals spoke of the "state of nature" in a theoretical sense, America, with its virgin forests and bountiful natural wealth, seemed to be the practical fulfillment of Locke. This reality contributed to the American sense of mission - the idea that America represented a chance to "make the world over again" (Hartz, 1955; Davis, 1966; Peterson, 1976).

Thus, American democracy assumes the atomistic individual as the basis for society, and furthermore assume that a political system is just to the extent that it assures the maximum degree of freedom and equality to individuals (Myr-
Individualism assumes that people are intellectually and morally competent to make choices about their religion, occupation, politics, and other lifestyle choices apart from the influences of class, family heritage, church, guild, and/or community (McCullough, 1991). Much of what is generally accepted as democratic theory predicates itself on the belief that all of the aforementioned institutions represent "vices" from the Old World which were to be done away with in the New. Thus, democracy assumes a measure of "enlightenment" within the population, but also sees an informed citizenry as essential to its survival (Neuman, 1986). Public schools, thus, have come to be seen as foundational for perpetuating democratic values (Dewey, 1966; Cremin, 1989; Purpel, 1989; McCullom v. Board of Education, 333 U.S. 203 [1948]). The university, according to Bloom (1987), embodies the concept of the "free market of ideas" in the same way as the marketplace symbolizes laissez-faire capitalism.
Moreover, the Supreme Court's ruling in Brown explicitly acknowledges the central role that education plays in determining the life chances of citizens living in a modern capitalist economy. Access to educational opportunity, thus, becomes an intricate foundational stone to the realization of the Lockian birthright. Thus, Chief Justice Warren writes, "Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms" (347 U.S. at 493). Much has been written in recent years about the transition of the U.S. economy to a "knowledge economy" in an increasingly competitive global market; thus, as this transformation accelerates, the importance of education, as it relates to creating a highly-skilled labor force, rises exponentially (Johnston and Packer, 1987; Wilson, 1978; 1987; Reich, 1991). These economic transformations are occurring alongside a major debate about the roles, design, and pedagogy of public education (Chubb and Moe, 1990; Fiske, 1991; Purpel, 1989; Reitman, 1992). One of the central thrusts of this debate is the question of how best to "fix the schools" in order to better prepare tomorrow's work force.

Thus, the struggle for racial equality in America cannot be properly understood apart from the larger American political cosmos. As Berlin (1975) shows in his history of free Negroes, the implications of the beliefs of the American Revolution - specifically the claim that "all men are created
equal" - were not lost on black Americans. Viewed in this light, black protest in America derives not from a rejection of what Gunnar Myrdal (1944) calls "the American Creed;" rather, it reflects the sense that the high ideals of the Enlightenment were being denied to blacks on an equal basis. Even when one looks at the more "radical blacks" - men ranging from David Walker to Malcolm X - the basis for their rage was not a rejection of the American ideal itself. Rather, the source of their rage stemmed from their sense that America had not lived up to her principles. Most black political leaders, activists, and intellectuals operate within the "liberal tradition;" it is the rare soul who would raise fundamental questions about the American experiment itself.

Against this backdrop, the Supreme Court decision in Brown v. Board of Education in 1954, comes to be seen as a personification of the American Creed. It is more than simply the culmination of a two-decade old assault by the National Association for the Advancement of Colored People (NAACP) on separate and unequal education for blacks. Rather, the choice by black Americans to pursue their agenda through the courts presupposes a belief in the correctness of core American political values and institutions while simultaneously pleading for the extension of rights to those who had been historically disadvantaged. Furthermore, this basic reality locates subsequent desegregation battles, whether they
involve public schools or colleges and universities, within this broader context of black Americans struggling to enter the mainstream of American political life and culture.

**Literature Review**

A search through the database of *Dissertation Abstracts* revealed that no dissertation has been written since the rendering of the *Fordice* decision which attempts to analyze this case in light of the principles set forth in *Brown* and the subsequent public school precedents. In fact, a broader review of the scholarly literature on desegregation issues showed that there has been very little scholarly attention to the question of the relevance of principles set in elementary and secondary school cases for higher education. The overwhelming majority of scholarly literature in this field, whether it focuses on the public schools or colleges and universities, has consisted of case studies of desegregation efforts in particular locales, attitudinal surveys of persons and interest groups involved in the process, and analyses of specific court decisions as well as speculations about what these rulings might mean for similarly-situated parties in the future.

David J. Armor's *Forced Justice: School Desegregation and the Law* (1995) is the most comprehensive work written in the field to date. Armor’s book takes us from *Brown* up through the 1992 Supreme Court ruling in *Freeman v. Pitts* (involving the necessary requirements for a school system to
be declared "unitary") and all the efforts to apply the Brown mandate in between. Armor’s study raises serious questions about the basic thrust of desegregation efforts; mainly, he concludes that desegregation has not produced appreciable educational gains, while its social and political costs have been considerable. However, Armor’s study is confined to public school desegregation. He does not include the efforts to apply the Brown mandate to colleges and universities, which is what my dissertation proposes to do.

More and more of the scholarly literature is "chipping away" at the basic holding in Brown - that "separate is inherently unequal." Armor’s book specifically argues that this contention, based on Dr. Kenneth Clark’s famous doll study, is sociologically unsound. Other authors chisel away at other aspects of Brown. Steele (1993) makes the case for race separate schools in Detroit to combat the ills of crime, unemployment, poverty, and hopelessness that seem to predestine many inner-city school children to failure. Washburn (1994) argues, in defense of historically black colleges, that Brown need not be interpreted in the higher education context in such a way as to equate "racial balance" with inequality. Scott-Brown (1994) attacks conventional integrationist thinking, embodied in Brown, as "mythology" and "unworkable" in higher education, and makes a case for the use of race consciousness in the making of educational policy. Williams (1991) argues that the concept of "color-

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blindness" (a term used by both liberals and conservatives) as presently defined in American jurisprudence lacks the conceptual tools to deal with the dilemmas caused by racial discrimination. This literature captures a growing sense that the nation's forty-year experiment with desegregation has failed, and the time is ripe to reassess some of its basic assumptions.

The one book that comes closest to what my dissertation proposes to do is J. Harvie Wilkinson's *From Brown to Bakke: The Supreme Court and School Integration (1954-1978)* (1979). Wilkinson's work, written on the twenty-fifth anniversary of *Brown*, is a thoughtful examination of the tenets of the decision, as well as its implications on the civil rights movement which followed. Wilkinson clearly raises basic questions about the Court's holding in *Brown* and shows that the Court's failure to explain why separate is inherently unequal provides the precursor for future problems in trying to implement the ruling.

However, Wilkinson is more interested in how *Brown* set the table for the problems associated with its implementation in the public school context as well as other issues coming out of the civil rights movement - specifically, affirmative action. My dissertation will focus on how the principles set forth in *Brown* laid the foundation for subsequent battles to desegregate higher education. Moreover, when penned, Wilkinson writes, "now is yet too soon to render an accounting of
all the achievements of the modern Civil Rights Movement. . . ." (1979:6). Seventeen years later, we can afford to be more retrospective about the successes and failures of Brown, its impact on the civil rights movement, and the current debate about race in America.

Lastly, what the literature cited above does not attempt to do is to link Brown to the basic tenets of the Enlightenment itself - democracy, the belief in the power of human reason and/or science to solve social problems, and the critical role of education in a democracy as well as in facilitating economic and social mobility. Much of the literature on desegregation assumes Brown, thereby leaving it in somewhat of an historical vaccum. Thus, the struggle of black Americans to obtain equal educational opportunities is not seen as part of the larger "liberal tradition" of America that Hartz describes. What my dissertation argues is that core American political values (particularly Thomas Jefferson's bold statement: "We hold these truths to be self-evident that all men are created equal. . .") provided the reference point for the struggles of black Americans for inclusion in general and for school desegregation in particular.

Scope and Methodology

The heart of this dissertation will employ a case study approach of the Fordice decision in Mississippi. The Fordice case represents the Supreme Court's first full opinion
regarding the question of the remedial measures states must enact in order to eliminate the vestiges of a former de jure system of segregated higher education. Theoretically, the Mississippi case is also illustrative for two other reasons. First of all, of the former Confederate states, Mississippi’s history of race relations has had a unique viciousness; this history still remains a "black eye" on the state’s national reputation (Williams, 1987). Thus, the struggle of black Mississippians for equal educational opportunities occurs in a particularly hostile environment. Secondly, unlike other states involved in similar legal battles, Mississippi did not agree to any consent decrees, nor did it make any systematic efforts to enhance historically black colleges or require targets for the hiring of minority faculty and staff. In fact, the state stubbornly refused to enact "race-conscious" policies; instead, it based its defense on the fact that its admissions and hiring policies were no longer discriminatory. Thus, Mississippi is a classic case study in whether facially neutral policies are sufficient to end racial discrimination in higher education.

This dissertation will draw on historical evidence, the political science literature on American political culture, legal scholarship, and constitutional law precedents to put the Fordice case in context. In the opening chapter, I will rely heavily on Tocqueville, Hartz, Myrdal and others to paint a portrait of American political culture and
institutions. Secondly, I will survey the writings of several prominent black political leaders, with the eye toward locating their political ideas within the American political tradition. Chapter Two traces the NAACP's twenty-year campaign to overturn *Plessy* which culminated in *Brown*. This chapter includes a survey of the debates which ensued among legal academics following the *Brown* decision. This literature will be particularly helpful in pointing out the premises of *Brown* as well as the hints for future difficulty in clarifying what the decision actually required states to do. Chapter Three explores significant public school desegregation cases since *Brown* as well as discuss how courts have attempted to apply those principles to the higher education context.

Chapter Four discusses the historical development of higher education in Mississippi to document the creation of a dual system for blacks and whites. Then, I will turn to the genesis of the lawsuit itself and the circumstances which motivated the black plaintiffs to act in the first place. I will follow the journey of the Mississippi litigation through the Court, concluding with the Supreme Court's decision in *Fordice*. I plan to use legal briefs and other court documents in order to understand the specific legal arguments made by the parties involved in the litigation. Finally, the chapter concludes with a discussion of the Supreme Court's decision in *Fordice* and its potential rami-
fications for state-supported black colleges and universities. The plethora of law review articles that were written following the *Fordice* ruling shall form an instrumental part of the analysis and the conclusions on the significance of this case.

Chapter Five attempts to demonstrate how the basic tenets of American political culture inform the debate about race in general and effect the strategies used by blacks to pursue equality in particular.

**Expectations**

I expect to find that the goals and aspirations of the black plaintiffs who initiated this litigation were very much in line with one of the most basic ideals of the American Creed – that of equality. I would expect the original plaintiffs to have defined equality as meaning obligating the state of Mississippi to provide the same educational opportunities to black Mississippians as it had always provided for whites. However, they would interpret *Brown* as requiring the state to enhance black colleges to remedy the effects of past underfunding. Moreover, they would not see this position as inconsistent with the spirit of *Brown*.

I also expect there to be a divergence between this particular view of equality and the interests of black colleges in Mississippi to continue to exist. I particularly expect the United States Justice Department to define educational equality differently than black educators in
Mississippi. I anticipate that United States would be more interested in racial balance in state universities than in preserving and strengthening the role of historically black universities in the state. I also expect the state of Mississippi to not challenge the moral and constitutional legitimacy of Brown; instead, the state would interpret it as requiring only "colorblind" policies - meaning that measures to significantly enhance black universities for past state misconduct are not only unnecessary, they are unconstitutional.

It is expected that the trek from Brown to Fordice will prove to be a classic case study in the limitations of American political culture and institutions to cope with the problems associated with race. Such a finding would be consistent with the work of other scholars who have documented the limitations of American individualism (Tocqueville [1835]:1988; Huntington, 1968; Bellah, 1985; Fiorina, 1988; McCullough, 1991).
CHAPTER 1. THE AMERICAN CREED AND BLACK PROTEST

The American Political Consensus

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable Rights, that among these are Life, Liberty, and the pursuit of happiness. (Declaration of Independence: 1776)

Swedish sociologist Gunnar Myrdal noted that America "has the most explicitly expressed system of general ideals in reference to human interrelations" of any other country in the Western world (1944, 3). Indeed, Thomas Jefferson's words rank among the most familiar lines penned in the history of the modern world. The values expressed in the Declaration of Independence succinctly represent what Myrdal calls the "American Creed." This Creed, embodied in the political ideals of liberty, justice, equality, and opportunity for all, forges a common national identity out of a vastly heterogenous citizenry.

Despite the fact that the United States is a nation of unbelievable heterogeneity and diversity of cultures, many scholars have observed a common political culture in America (Tocqueville, [1835]:1988; Myrdal, 1944; Hartz, 1955; Rossiter, 1962; Hofstadter, 1971; Devine, 1972; Merriman and Parent, 1983; McCloskey and Zaller, 1984; Parent, 1985). This unity is remarkable when contrasted with political alternatives such as fascism and communism which, despite intentional, government-sponsored attempts to impose ideological consensus, have yielded far less impressive results. All of
America's institutions, ranging from the Supreme Court to mass media to churches and schools expound upon the basic value premises of "the American way of life." As Myrdal writes:

These ideals of the essential dignity of the individual human being, of the fundamental equality of all men, and of certain inalienable rights to freedom, justice, and a fair opportunity represent to the American people the essential meaning of the nation's early struggle for independence. In the clarity and intellectual boldness of the Enlightenment period these tenets were written into the Declaration of Independence, the Preamble of the Constitution, the Bill of Rights and into the constitutions of the several states. The ideals of the American Creed have thus become the highest law of the land. The Supreme Court pays its reverence to these general principles when it declares what is constitutional and what is not. They have been elaborated upon by all national leaders, thinkers, and statesmen. America has had, throughout its history, a continuous discussion of the principles and implications of democracy, a discussion which, in every epoch, measured by any standard, remained high, not only quantitatively but also qualitatively. The flow of learned treatises and popular tracts on the subject have not ebbed, nor is it likely to do so. In all wars, including the present one [World War II], the American Creed has been the ideological foundation of national morale (1944, 4-5).

This does not mean that the United States has been free of ideological disagreement. In fact, different conceptions of the practical implications of the American Creed for public policy lie at the heart of ideological disputes in American politics (Myrdal, 1944; Hartz, 1955; Huntington, 1968; Peterson, 1976; McCloskey and Zaller, 1984; McCollough, 1991). This chapter concentrates on perhaps the greatest evidence for the unifying force of the American Creed: the fact that African Americans, despite their unique history of
racial oppression and prejudice in America, have historically adhered to the principles endorsed by the national ethos. The same Thomas Jefferson who boldly declared the fundamental equality of all men openly questioned whether blacks were the moral and intellectual equals of whites; his trepidations implied that blacks could be justly excluded from the Lockian dispensation without violating the nation's basic creed. Nevertheless, blacks have often coopted the American values of liberty and equality to advance political agendas aimed at securing political, social, and economic rights that they felt were unjustly denied them. Consequently, African Americans partake in the national religion of Locke, but for different reasons.

The fact that blacks and whites share the same social ideals but for different reasons serves as the fountainhead for political conflict and cultural misunderstandings between the two groups. Higher education desegregation provides an excellent case study of this "clash of cultures" because of the existence of state-supported historically black universities. Beyond the issue of whether these institutions can be constitutionally permitted to exist without violating the imperative of Brown is a deeper question: can the apparent contradiction between the ideal of a "color-blind society" and "race-conscious" politics be reconciled under the umbrella of Lockian individualism?
The historical roots for America's political consensus are not hard to find. "The storybook truth," writes Louis Hartz, is "that America was settled by men who fled from the feudal and clerical oppressions of the Old World" (1955, 3). In a nutshell, Louis Hartz persuasively argues that what distinguishes America from Europe is that it lacked a true feudal and aristocratic past based on notions of rigid class distinctions among men. For Hartz, the key to understanding what America is lies with understanding what America never had to be. Unlike Europe, the colonists did not find a deeply entrenched landed aristocracy and a large peasant class "under the thumb" of a ruling class. Instead, in a country where land was plentiful and seemingly "for the taking," America seemed to be the practical fulfillment of the "state of nature" as conceptualized by Hobbes and Locke.

The American Revolution for Hartz was more a "mopping up" campaign to destroy "Old World relics" than it is the creation of an entirely new social order on the ruins of an older one. To the extent that many of its early settlers saw America as a safe haven from Europe's vices, the revolution had already occurred, as John Adams put it, "in the hearts of men," long before the first shots were fired at Concord (Peterson, 1976). Hartz observes that only in eighteenth century America could Jefferson proclaim the "self-evident truths" of the fundamental equality of all men and get away with it; in contrast, European liberals faced the dilemma "of
explaining how principles could be 'self-evident' when there were obviously so many people who did not believe them" (1955, 58). Thus, Americans have the luxury of living in a democratic society "without having to endure a democratic revolution" (Tocqueville, [1835]:1988).

Similarly, McCloskey and Zaller argue that capitalism and democracy provide the foundation for what they call the "American ethos" because both evolved "side by side as part of a common protest against the petty tyrannies of Old World monarchism, mercantilism, and the remnants of feudalism" (1984, 2). Indeed, both traditions share common beliefs, chiefly "a commitment to freedom and individualism, limited government, equality before the law, and rational - as opposed to feudal or merely traditional - modes of decision-making" (Ibid, 2-3). Democracy assumes that all citizens have equal worth and thus have a right to share in their own governance, either by holding office themselves or by electing others to rule them. It also aims to protect citizens from arbitrary use of state power and obligates rulers to observe "due process" of law. All citizens - the rulers and the ruled - are equal before the law, and specific liberties, such as freedom of speech, religion, press, assembly, and the right to petition the government are essential to ensuring the accountability of the rulers to the ruled (Tocqueville, [1835]: 1988; Myrdal, 1944; Hartz, 1955; Huntington, 1968; McCloskey and Zaller, 1984; McCullough, 1991).
The values of the capitalist creed are equally familiar to Americans: they include private ownership of the means of production, profit-seeking by self-interested entrepreneurs, and the right to unlimited wealth through economic effort (McCloskey and Zaller, 1984, 2). In its purest form, capitalism emphasizes competition among different manufacturers, a minimum degree of government regulation (or "laissez-faire"), market determination of both the production and distribution of goods. This encourages what Tocqueville (1988, 506) calls "individualism" by attaching wealth to the efforts of individuals, as opposed to family heritage or class origin. Certain values derived from the so-called "Protestant work ethic," which places a premium on achievement and hard work, are also thought to constitute an integral component of the capitalist creed (Weber, 1976; Bell, 1976; McCloskey and Zaller, 1984; McCullough, 1991).

The philosophical legacy of Locke coupled with the material abundance of the American continent breathed life into the "Horatio Alger myth," the idea that any American of humble beginnings could become materially wealthy and socially prominent provided he worked hard enough. It is the interplay between the specifics of America's historical development and the politics it gives rise to that Hartz calls the "liberal tradition." Furthermore, because of America's basic liberal consensus, socialism has never enjoyed a strong following in the United States. Part of the
appeal of Marxism relies on the sense in which an ancient social contract has been violated - namely, the peasants’ rights to "common use" of the land (Greene, 1971; Piven and Cloward, 1982). However, in a land where even the poorest American could realistically dream of becoming a capitalist, where Jefferson’s ideal for democracy is "a nation of small farmers," where is the attraction in socialism? What is more, America’s Lockian mentality has remained rather resilient in spite of macroeconomic changes. As Hartz observes:

And even when factory industrialism gained sway after the Civil War, and the old artisan and cottage-and-mill mentality was definitely gone, it was still a Lockian idea fortified by material resources which inspired the triumph of the job mentality of Gompers rather than the class mentality of the European worker. The "petit-bourgeois" giant of America, though ultimately a triumph for the liberal idea, could hardly have chosen a better material setting in which to flourish (1955, 18).

This reality has tended to shape the character of social protest movements by the poor in America; thus, America produces a Daniel Shays instead of a Karl Marx, or the Populist Party of the 1890’s rather than European socialism or Bolshevism (Hartz, 1955; Rossiter, 1962). Shays’ followers were petty capitalist farmers enduring economic hard times rather than proletarian radicals bent on revolutionary change. Similarly, Rossiter argues that the populist insurgencies of the 1890’s, despite the fear they inspired among Eastern business interests, were actually "latter-day Jeffersonians without Jefferson to lead them" (1962, 90). Never, he argues, did the Grangers, Populists,
Greenbackers, or Silver Democrats directly challenge the legitimacy of capitalist economic arrangements; instead, these groups represented small agrarian capitalists who were being marginalized by the encroachment of post-Civil War industrial capitalism. In fact, socialism is so thoroughly "un-American" that it has frequently been used in American history by powerful interests to delegitimize movements deemed to pose a threat to the status quo. Even in 1932, the darkest days of the Great Depression, American voters gave 38 million votes to the Democrats and the Republicans; by comparison, the Socialists garnered less than 1 million and exactly 102,991 votes went to the Communists (Rossiter, 1962, 92).

The American attachment to capitalism is so profound that political liberals, while they tend to favor more government involvement and regulation of business activity, will rarely propose remedies fundamentally at odds with capitalist economic arrangements. Rather, liberals maintain that the government’s role in the economy is to create "a more level playing field" in order to allow more individuals to compete in the marketplace.

At the same time, the American Creed embodies strong biases against undemocratic institutions. Tocqueville observed that democracy teaches men to love equality of condition and to consider it the normal state of affairs. Therefore, "amid general uniformity, the slightest
dissimilarity seems shocking, and the completer the uniformity, the more unbearable it seems" (1988, 673). "The American political mind," Rossiter writes, "has refused to think in terms of class, order, aristocracy, expertise." Every man is presumed to be the equal, or potential equal, of all other men. The egalitarian dimension of the American Creed houses the fuel for social and political movements that challenge the status quo.

For this reason, the property restrictions on voting and holding office were swept aside by Jacksonian democracy, despite the opposition of old-time luminaries from the Revolutionary era (notably, John Adams, James Madison, James Monroe, and John Randolph). As will be discussed later, democratic traditions launched the common school movement in direct opposition to the established bias that education constituted the sovereign promise of a leisure class. Egalitarian impulses provided much of the motive force of the drive to abolish slavery; during the Progressive era, it inspired the political reforms such as the initiative and split-ticket voting to counteract abuses in the political system. Thus, while political conservatives in America have from time to time feared "too much democracy," they have nonetheless endorsed most of the principles of the democratic tradition.

The turbulent politics of the 1960's, according to McCloskey and Zaller, provide further evidence of the
presence of a basic American political consensus. Various kinds of social and political movements during this period challenged traditional American political practices and attitudes. The extent to which these movements made lasting change, however, turned on whether their causes could be supported by - or harmonized with - traditional American values. With regard to the efforts of activists to change the status quo during that period, McCloskey and Zaller observe the following:

Their demands for the popular control of large corporations, for example, made little headway in the face of traditional American attachment to capitalism. Their unruly modes of protest - mass confrontation, urban guerrilla tactics, and occasional violence - were often counterproductive in a society accustomed to the democratic principles of free elections, peaceful debate, and orderly opposition. To the extent, however, that the causes championed by the protesters of the 1960s and 1970s were consonant with the values of the ethos, they helped bring about important changes. One can argue, in fact, that some of the "new issues" of the 1960s represented, in reality, efforts to extend certain values of the traditional ethos to new groups in new contexts. These issues included a concern for greater equality (women's rights and racial discrimination), political dissent (protests against the nation's participation in war), personal freedom (abortion and homosexual rights), and opposition to traditional forms of social control (the counterculture). Long after the atmosphere of confrontation had dissipated and the era of militancy had subsided, concern for these issues - a concern anchored in the values of the ethos - remained strong (1984, 5).

Thus, the Lockian settlement places powerful constraints on the nature of political discourse in America by granting
legitimacy to some issues and/or groups while delegitimating others. When ideological conflicts do arise in America, they nevertheless reflect a society in agreement on the essentials: (1) the belief in the right to property, (2) the philosophy of economic individualism and the acceptance of the economic virtues of capitalist culture as necessary qualities of man, (3) the political equality of all men, often operationalized as the "one man, one vote" principle, and (4) the necessity of ensuring basic political rights (freedom of speech, religion, the press, the right to petition, right to a fair trial, etc.), and (5) the legitimacy of resolving political disputes through competitive, democratic institutions (Hartz, 1955; Rossiter, 1962; Hofstadter, 1972; Piven and Cloward, 1971; McCloskey and Zaller, 1984; McCullough, 1991). Instead, political questions turn on concrete differences in approach, policy, and strategies of implementation.

Merriman and Parent (1983) maintain that the American nexus of democratic and capitalist values produces a "market mentality" and go on to describe how the national ideology concretely manifests itself:

The market view sees society as an arena in which individual competitors vie for things they want. The things individuals want vary greatly, potentially ranging through the whole range of human tastes and preferences. The characteristic common to all these desires and aspirations is the expectation that a proper mixture of skills and effort will, in a properly functioning market, lead to their fulfillment. The market does not guarantee that the individual will get what he or
she wants, but rather that the individual will get, and hold, what he or she can earn, given the talents and energy each possesses and employs. The expectation that the social marketplace will function predictably and fairly sustains, as nothing else can, the competitiveness that is so much a facet of American life (33-34).

By glorifying individual effort, the market mentality not only allows the individual to take pride in one’s own successes, but it provides a ready explanation for failure. Those who fail in what Hartz calls the "Lockian race" (1955, 219) are assumed to be at fault, due to personal deficiencies within themselves. The result of failure is guilt (Hartz, 1955, 224). This legacy of the liberal tradition is particularly relevant to the question of how scholars and ordinary citizens explain the continuing unequal economic and social status of blacks in America.

This dissertation concerns itself with one of the most powerful deductions from the Lockian settlement: American faith in the centrality of education. This abiding faith consists of two major dimensions which are noteworthy: (1) democratic capitalism requires education in order to foster the values of citizenship consistent with self-govern-ment, and (2) education plays an indispensable role in equipping citizens with the life skills essential for success in a market economy. Chief Justice Earl Warren, author of the Supreme Court’s opinion in Brown v. Board of Education, articulates this view:

Today, education is perhaps the most important fun-
c tion of state and local governments. Compulsory school
attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening a child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education [italics added]. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

(347 U.S. 483, 494)

Not only do Warren's words point to the centrality of education in American life, they also illustrate one critical reality: with respect to African Americans, the values of the American Creed have historically not been extended on an equal basis. Alexis de Tocqueville considered American slavery to be the most obvious contradiction of the nation's concept of liberty and the "most formidable evil threatening the future of the United States" (1988, 340). Writing more than a century later in the context of Jim Crow segregation in the South and less visible, but very real racial discrimination in the North, Myrdal (1944) comes to a similar conclusion. The "American dilemma," as he sees it, is essentially a moral one; it is a conflict between the American ideals of liberty, justice, equality, and equal opportunity for all and its actual treatment of blacks. The nation's failure to adhere to its principles with respect to the treatment of African Americans has often produced feelings of guilt among white Americans as well as active
efforts to change practices deemed inconsistent with American values (Myrdal, 1944; McCloskey and Zaller, 1984; Hacker, 1992).

Not only do these feelings of guilt make whites more susceptible to appeals for reform than they otherwise might be, but the American Creed rationalizes the tradition of black protest. In fact, there is perhaps no greater testament to the power of the American Creed than the fact that African American political discourse has been profoundly shaped by it. No other group, with the possible exception of native Americans, would be more likely to reject outright the national synthesis of democratic and capitalist values that embodies the heart of the American ethos. African Americans could easily point to the complicity of Lockian individualism in the defense of slavery, racism, and economic inequality (Oakes, 1992). Thus, African Americans theoretically have the greatest interest in a revolutionary critique on the order of Marx’s critique of European capitalism and in constructing a social alternative to democratic capitalism.

Yet, with rare exceptions, black political thought fits squarely within the liberal tradition. This is true despite the often bitter denunciations of the nation’s treatment of African Americans by black leaders. Foner (1984) contends that nineteenth-century black political thought, and indeed, modern black political thought and activism are rooted in "the republican traditions of the eighteenth century,
particularly as expressed in the Declaration of Independence and the Constitution" (60). Greenstone (1993) locates Frederick Douglass within the same liberal reform tradition as John Adams and Daniel Webster.

This interpretation, of course, does not enjoy universal acceptance. Dawson (1995) vehemently disagrees with this conclusion, suggesting that efforts to locate black political thought within the broad stream of American liberalism are simplistic, at best, and, at worst, self-serving by white Americans. He emphasizes the historical examples of black nationalism and black Marxism as well as specific cultural differences between blacks and whites to make the point that African American political discourse is not easily assimilated within America's "melting pot" of political ideas. Specific attention will be drawn to his case in a later section of this chapter. This dissertation does not deny the existence of significant differences in the historical experiences and political culture of black and white Americans; in fact, it will be argued that these very differences lie at the heart of the racial chasm in American politics. However, as I will show, the evidence for the conclusion that African Americans have enlisted the American Creed in their pursuit of the goal of full inclusion in American society is simply too overwhelming to be denied. Moreover, I will further demonstrate that even black nationalism, deemed by Dawson to support the view that black
political thought defies the boundaries of the liberal tradition, in fact owes a significant debt to Lockianism.

With respect to education, its political significance has always been readily apparent to black Americans because of their peculiar history of racial discrimination in the United States. To a people enduring the humiliation of slavery and racial segregation, education symbolized a "door to freedom." To the slave masters, on the other hand, their security rested with keeping the slaves in ignorance. As slavery gave way to a system of racial segregation, the denial of equal educational opportunities to the newly freed slaves and their descendants formed the bedrock of white racial hegemony. Thus, education becomes politicized in black America in a way that distinguishes it profoundly from the dominant culture. It is intimately intertwined with the history of black protest. Black Americans view education as essential to their hope of full realization of the ideals enshrined in the American Creed.

In summary, many scholars agree that there exists a definite American Creed that unites Americans across class, regional, religious, ethnic, and racial lines. It provides the United States with a sense of national mission and is the rallying cry for all wars. This dissertation argues that the fact that black political discourse has been largely informed by the values of the liberal tradition supplies compelling evidence for the power of the American Creed. African
Americans, from the times of the American Revolution to the present day, have repeatedly appealed to liberal values in their efforts to realize their "Lockian birthrights." The next section discusses how African Americans have historically applied individualism in their political protest movements and how it leads to political conflict and cultural misunderstandings with whites. The third section focuses the historical roots of America's deep faith in public education as well as the critical role education has played in African American protest movements. The fact that both white and black Americans have a deep faith in the power of education provides a compelling case study of how both groups embrace identical social ideals but for different historical reasons. Finally, this chapter closes by addressing the counterarguments to the thesis that black political discourse has remained largely confined to the borders of the liberal tradition.

Black Political Protest within the Liberal Tradition

Berlin (1975) points out that the implications of the American Revolution were readily apparent to blacks, who were then referred to as Negroes. By the time of the Revolution, blacks had been living in America for over 150 years. This fact enabled them to seize an historic opportunity to appropriate the language of Lockian individualism in order to obtain their own freedom. As Berlin explains:

By the end of the eighteenth century, the transformation of Africans to Afro-Americans was largely
complete. Just as the colonial debate with Britain pushed ideas of natural rights and universal liberty to the fore, a century of cultural change enabled blacks to listen in on that debate and turn it to their advantage. If transplanted Englishmen were prepared to assert their independence, transplanted Africans were ready to take their liberty (1975, 10, 11).

Thus, the spirit of independence which inspired the colonists in the 1770's to seriously contemplate dissolving their union with Great Britain emboldened blacks to challenge slavery. In 1773, four free Negroes petitioned the Massachusetts colonial legislature to abolish slavery within the colony (Aptheker, 1951). It is worth noting that their words echoed the identical Lockian rhetoric that the colonists themselves employed to justify their grievances with King George III and the British Parliament. They spoke of the "divine spirit of freedom," reflecting the idea that freedom, not inherent class or race distinctions, represented the natural condition of men and the divine will of God. The petitioners showed not only that they understood the nature of the colonists' struggle with the British government; moreover, the petitioners argue that the same natural rights which forbade "taxation without representation" entitled Negroes to live as free men. The petition, in effect, challenged the legislature to be politically and morally consistent.

This pattern repeats itself over and over again throughout the Revolutionary period. When the British Crown placed Massachusetts under martial law in retaliation for the
famous "Boston Tea Party," Negroes seized the opportunity to petition the military government for their freedom. They declared that they "have in common with all other men a naturel right to [their] freedoms without Being depriv'd of them" (Grant, 1968, 30). For other blacks, the political climate motivated their attempts to escape from bondage (Berlin, 1975). Once hostilities commenced, manpower shortages forced both sides to rely on black soldiers by promising them freedom in exchange for service. Though the Revolution itself did not uproot the institution of slavery, a significant number of blacks gained their freedom as a result of the war (Quarles, 1961; 1986; Berlin, 1975; Franklin and Moss, 1987; Johnson and Roark, 1984). After hostilities ceased, blacks continued to capitalize on the political climate to petition against slavery, initiate freedom suits, protest racially discriminatory laws, or to take their freedom by running away (Grant, 1968; Berlin, 1975).

Without question, Frederick Douglass stands out as the best nineteenth century example of a black political leader who consistently invoked the liberal tradition to promote the goal of racial equality. Throughout his public career, Douglass vehemently opposed colonization schemes that principally proposed transporting blacks back to Africa (though sometimes other places were suggested), as a solution to the race problem. All such proposals, he argued, premised
themselves on the notion that blacks and whites could not possibly live together in a racial democracy. For Douglass, it mattered not whether such efforts were supported by blacks or by whites. Rather, Douglass boldly declared that not only could the Negro be peaceably assimilated into the American body politic, but the very moral integrity of the republic rested on the Negro's full incorporation into the mainstream of American life:

I shall advocate for the Negro, his most full and complete adoption into the great national family of America. I shall demand for him the most perfect civil and political equality, and that he shall enjoy all the rights, privileges, and immunities enjoyed by any other members of the body politic. I weigh my words and I mean all I say, when I contend as I do contend, that this is the only solid, and final solution of the problem before us. It is demanded not less by the terrible exigencies of the nation, than by the Negro himself for the Negro and the nation are to rise or fall, be killed or cured, saved or lost together. Save the Negro and you save the nation, destroy the Negro and you destroy the nation, and to save both you must have one great law of Liberty, Equality, and Fraternity for all Americans without respect to color (Douglass, 1966, 7).

One century later, Martin Luther King echoed these same sentiments. In King's famous "I Have a Dream" speech, he begins by invoking patriotic authority - the Declaration of Independence, the Gettsyburg Address, and the Emancipation Proclamation. However, "the architects of our republic" offered a "promissory note" that pledged liberty. But for blacks, that note had proved to be "a bad check," one "marked insufficient funds" (King, 1986, 217). His dream of racial equality, King continues, did not fundamentally depart from America's Holy Writ:
. . . . It is a dream deeply rooted in the American
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 (Ibid, 219).

Thus, King marshalls the core principles of the repub-
lic in service to the cause of black equality. Moreover, by
mixing Biblical prophecies with patriotic references, King’s
speech affirmed America’s natural law tradition in a dual
sense - by placing the nation’s secular laws under the scru-
tiny of divine law and appealing to America’s historic sense
of mission and Divine Providence (Myrdal, 1944; Hartz, 1955;
Peterson, 1976; Sandoz, 1990; Miller, 1992). Finally, King’s
dream that his children would one day be judged by their
character and not their skin color affirmed the Lockian
birthright to equality of opportunity rather than equality of
outcome. He seemed to be saying that black Americans were
only asking for the right to fairly compete in the Lockian
race like every other American.

As a result of the civil rights struggles of the 1950’s
and 1960’s, new legislation sought to eliminate legal
barriers to blacks participating freely in the marketplace.
With the legal barriers gone, black failure, according to
indivi-dualism, is the fault of blacks themselves. Parent
(1985) found that the market mentality produces a tendency
within a significant segment of the black community to blame
themselves for their unequal status in American society.
Roughly the same proportion of blacks and whites believed
that black inequality could be attributed to less in-born ability in blacks to learn: slightly more blacks (23.3%) than whites (21.0%) agreed with the statement. Forty-six percent of blacks attribute lack of will or motivation as the cause of black problems, whereas 59 percent of white respondents agreed with that statement. Slightly more than half of black respondents (54.2%) believe that if blacks would try harder, they could be just as well off as whites; roughly the same number of blacks (53.7%) maintain that many of blacks' problems are brought on by blacks themselves. Finally, 22.6% of blacks think that blacks would rather accept welfare than work for a living (Parent, 1985, 7-8).

These conclusions have been corroborated by Sigleman and Welch (1991) who found that 24% of blacks think that African Americans have less in-born ability than whites and 44% of blacks think that blacks lack sufficient will and motivation to pull themselves out of poverty. Barker and Jones (1994) cite a Joint Center of Political Studies-Gallup Poll which reports that 80% of blacks believe that well-off African Americans do not do enough to help other blacks get ahead (44). Taken together, these findings seem to indicate that key aspects of the liberal tradition - namely the tendency to attach responsibility for success or failure in life
primarily to the efforts of individuals - inform African American political attitudes.3

To say that the American Creed informs African-American political attitudes and strategies is not the same as saying that blacks and whites see the same reality. Parent (1985) shows that whites are more likely to interpret the black situation in terms of individualistic thinking than blacks. Sixty-nine percent of whites believe blacks could be just as well off as whites if they worked harder; even more whites (78.1%) believe that though racial discrimination has held down blacks, many of the problems faced by blacks are brought on by blacks themselves; finally, 34.1% of whites maintain that blacks would rather receive welfare than work for a living. Sigleman and Welch (1991) found that 69 percent of blacks explained racial inequality results primarily from discrimination; the comparable figure among whites was 46 percent. Even more revealing, seventy-five percent of black respondents maintained that whites do not want them to get ahead, while only 43 percent of whites held this view. Thus,

3 It is not the purpose of this dissertation to deny either the existence of, or the autonomy of, a separate black political culture distinct from dominant American norms. In fact, this chapter devotes an entire section to the discussion of black cultural autonomy and to objections to the thesis that the liberal tradition has deep roots in black America. It will be argued that not only does an autonomous black political culture exist, but the failure of the majority culture to understand this basic fact has grave social, political, and economic consequences. Nevertheless, the acknowledgement of black cultural autonomy does not overturn the profound impact of the American Creed on black culture.
though the black population subscribes to key aspects of the liberal tradition, African Americans tend to interpret political reality very differently from whites. The autonomy of black political culture (including some of its nonliberal traits), as well as the counterargument to the influence of liberalism on black America, is the subject of a later section in this chapter.

Not only do blacks and whites interpret reality with "different pairs of lenses," they often come to radically different conclusions even when they apply individualistic thinking. While many white Americans have been deeply troubled by the inherent conflicts between the nation's commitment to human equality and its treatment of blacks, others have appealed to the values of liberty to justify the racial status quo. Appeals to various "states' rights" and "limited government" theories have been used to justify slavery and to defend Jim Crow segregation (Hartz, 1955; McGarrick, 1964; Wilkinson, 1979).

Often, these rationalizations were little more than direct appeals (or thinly-veiled ones) to overt racism. After the legislative victories of the civil rights movement in the 1960's, political conflicts concerning racial policy revolve primarily around the question of the best means to achieve racial justice. Many black civil rights groups and their liberal allies argue that policies aimed at promoting equality of opportunity solely by outlawing discriminatory
policies do not address the cumulative effects of centuries of discrimination against blacks (Carmichael and Hamilton, 1967; Wilson, 1978; 1987; Merriman and Parent, 1983; Bell, 1987; Brown, 1992; Orfield, 1996). This view of the American Creed would require the government to not only outlaw racial discrimination, but to intervene proactively in the marketplace to help blacks "catch up" with whites in the Lockian race. Opponents of policies such as busing, affirmative action, minority set-aside programs, and racial redistricting contend that race-conscious policies unfairly violate the rights of white Americans and defeat the laudable goal of the civil rights struggle to have blacks judged "not by the color of their skin but by the content of their character" (Wilkinson, 1979; Sowell, 1981; Murray, 1984; Steele, 1986; Jones, 1987; Edsall and Edsall, 1991; Armor, 1995).

In spite of the fact that black civil rights groups and their allies routinely question the motives of their opponents, political conservatives, for the most part, stubbornly insist that they believe in the goal of racial justice. For conservatives, any use of race in the determination of government policy is illegitimate; after all, Americans should be judged as individuals. Thus, the language of individualism, when applied to race-related policies, not only leads to different policy preferences, but it serves as a fault line for ideological divides in America.

The fact that the American commitment to Lockian values often leads to polarizing ideological positions on issues of race is one of the central focuses of this dissertation. Bellah and associates (1985) illustrate this point when they report that Americans, steeped in a culture of individualism, often lack the conceptual tools to deal with genuine social and cultural differences. Americans operate from the political assumption of a consensual community of autonomous, but essentially, similar individuals; but as Bellah writes, this definition often has little room for those who do not meet that criteria:

For all the lip service given to respect for cultural differences, Americans seem to lack the resources to think about the relationship between groups that are culturally, socially, or economically quite different. Writing from the context of a very different culture, Octavio Paz, the Mexican poet, has pointed out that hierarchial societies often do better than egalitarian ones at including culturally different groups in a common moral order because they accept and give moral meaning to different levels and degrees of wealth and power. Some groups are poor and weak, but all are included in a common social body where the strong and the rich have special obligations to look out for the others. Of course, this view has often been used to rationalize exploitation and oppression. But the radical egalitarianism of an individualist society has its own problems. For such a society is really constituted only of autonomous middle-class individuals. Those who for whatever reason do not meet the criteria for full membership are left outside in a way unknown in a hierarchial society. The very existence of groups who do not meet the criteria for full social participation is anomalous. There should be no such groups. Their existence must be someone's fault, either their own - perhaps their culture is defective and they lack a "work ethic" or there is something wrong with their
family system - or someone else's: economic or political elites perhaps oppress them and prevent their full participation. Whatever explanation is accepted, it is difficult to give moral meaning to differences that are considered fundamentally illegitimate (206-207).

Bellah's findings do not bode well for black political movements. African Americans have had a radically different historical experience than other Americans; therefore, the inability of Americans to make moral sense out of real cultural, social, and economic differences has the effect of delegitimizing black protest in the first place. Moreover, it avails powerful ideological firepower to those opposed to specific policies that blacks may favor. The Protestant work ethic, the Horatio Alger myth, and other cultural symbols collaborate to buttress the claim that what African Americans want is not "equal rights," but "special rights," a view succinctly represented by Republican presidential candidate Pat Buchanan's slogan: "Equal rights for all, special privilege for none." Blacks who favor affirmative action, more majority black legislative districts, or support the existence and the enhancement of historically black colleges are accused of advocating a double standard - that is, opponents charge them with preaching a rhetoric of equality for all while fighting for special rights for African Americans. Furthermore, since politics is the "art of the possible," America's liberal consensus invariably influences the kinds of policy solutions that can be proposed to solve problems associated with black inequality and also stand a
reasonable chance of being enacted (Merriman and Parent, 1983; McCloskey and Zaller, 1984).

One of the more commonly hailed solutions to social problems in America (particularly those which involve race) is education (Jefferson, 1904; Cubberly, 1919; Rush, 1947; Arendt, 1958; Dewey, 1966; Alexander and Alexander, 1985; Reitman, 1992). Indeed, belief in the transforming power of education to improve human well-being represents one of the most powerful deductions from Locke. This legacy is directly traceable to the cultural imprint of the Enlightenment in America. For African Americans, access to greater educational opportunity (or, in many cases, education at all) has historically been at the heart of black protest movements. The centrality of education in America and its specific importance for African Americans will be discussed in the next section.

"In School We Trust"

Justice Felix Frankfurther, a participant in the adjudication of the Brown cases, described the public school as "the symbol of our democracy and the most pervasive means for promoting our common destiny" (McCullom v. Board of Education, 333 U.S. 203 [1948]). Indeed, Brown v. Board of Education testifies to the deep faith that Americans have in the power of education. The great majority of Americans conceptualize education in rather utilitarian terms as if it were a commodity in the marketplace; education must be useful
both to the individual and the larger society (Reitman, 1992, 4). Moreover, Americans consider the provision of education to be a legitimate government responsibility. This responsibility rests primarily at the state and municipal levels of government, as opposed to the federal government.

The popularization of American schools and colleges since the end of World War II provide ample evidence for the centrality of education in American life. In 1950, 34 percent of the American population twenty-five years of age or older had completed at least four years of high school while 6 percent of that population had completed at least four years of college. By 1985, 74 percent of Americans twenty-five years old or older had completed at least four years of high school, whereas the comparable figures for completion of at least four years of college stood at 19 percent (Cremin, 1989, 1). Education is considered part of the Lockian birthright. Many ordinary Americans today expect to obtain a college education, an expectation which for much of our nation's history was beyond the reach of most families.

The focus of this section is twofold: (1) to discuss the historical basis for the preeminence of education in American culture, and (2) to demonstrate how African Americans have viewed access to education as an indispensable tool in their battles for full equality.

Government involvement in education has a long history in America. For example, in 1642 the colonial legislature of
the Massachusetts Bay Colony passed a law requiring all parents to see to the education of their children; five years later, the legislature required all towns to appoint a teacher and permitted taxes for education. In 1643, the Virginia assembly passed a resolution granting legislative encouragement to wealthy benefactors who bequeathed money, land, or other materials in support of the establishment of schools (Cremin, 1970, 177-181; Butts, 1960, 34). Nevertheless, despite these early efforts, colonial legislatures generally ignored education. The colonies during the early years duplicated the class-oriented English educational system in which the idea of a free, universal education for all made little sense. Only those wealthy enough to afford it received an education, whereas poorer families either received no education at all or had to settle for learning various trades and/or manual skills (Cubberley, 1919, 21; Butts, 1960, 34; Genovese, 1967; Cremin, 1970; 1980; K. Alexander and M.D. Alexander, 1985, 21).

What efforts did exist reflected values inherited from the mother country. For example, the "pauper school laws" provided that indigent parents who declared themselves paupers would have their children sent to specified private or pay schools for a free education (Cubberley, 1919, 15). The 1647 law in Massachusetts was promulgated in order to teach all to read the Scriptures and thus avoid falling prey to "that old deluder, Satan" (Cremin, 1970, 181). This law
reflected the Protestant belief that any man should at least be literate enough to read the Bible for himself (Butts, 1960, 36). Another vestige of the English system, the "rate bill," required parents to pay an amount for each child to supplement inadequate school revenues (K. Alexander and M. D. Alexander, 1985, 21). The amount assessed was collected from the parents through ordinary tax bills. This requirement remained in place in New York State until 1868 (Cubberley, 1919, 149).

The colonists' Revolutionary struggle with Great Britain gave significant legitimacy to the philosophy of education as essential for the welfare of the state. America's Declaration of Independence boldly asserted the Enlightenment belief in the superiority of science and reason as the basis for the "social contract;" moreover, the philosophy of the Enlightenment tended to equate knowledge with human freedom. Education came to be seen as a primary vehicle for transmitting the values essential for a free, democratic society and would serve as the "first line of defense" against the threat of tyrannical government (Butts, 1960; Cremin, 1970; 1980; K. Alexander and M. D. Alexander, 1985; Bloom, 1987). Prominent Americans who held this particular view of education include James Madison, Benjamin Rush, George Washington, and Thomas Jefferson (Cubberley, 1919, 57; Jefferson, 1904; 1942, 89; Butts, 1960, 37-38; Rush, 1947; K. Alexander and M. D. Alexander, 1985).
However, perhaps no single individual more embodied the spirit of the public or common school movement than Thomas Jefferson. He initiated a bill for universal education in the Virginia legislature in 1779. Though the measure was defeated, he provided the inspiration for a later generation of reformers (Jefferson, 1904). Writing to his old professor George Wythe from Paris in 1786, Jefferson said:

I think by far the most important bill in our whole code is that for the diffusion of knowledge among the people. No other sure foundation can be devised for the preservation of freedom and happiness. . . . Preach, my dear sir, a crusade against ignorance; establish and improve the law for educating common people. Let our countrymen know. . . . that the tax which will be paid for this purpose is not more than the thousandth part of what will be paid to kings, priests, and nobles who will rise up among us if we leave the people in ignorance (1942, 89).

Despite having prominent advocates, the emergence of a consensus on the role of government in education proceeded slowly. The United States Constitution spelled out no specific role for education; with the exception of the land grants for schools provided under the Northwest Ordinance of 1787, the federal role in education was nonexistent (K. Alexander and M. D. Alexander, 1985, 55). In fact, a search of the debates at the Constitutional Convention reveals that only once was anything related to education discussed; it related to whether the new government would be empowered to establish a national university. While the chair answered in the affirmative, the issue was not explored any further (Cubberley, 1919; 52). Considering the Founding Fathers’
preoccupation with limiting the arbitrary use of power by the central government and the common belief that education was a private matter, their failure to authorize a clear role for the national government in education is not surprising. Thus, the battle for public, tax-supported education would be located at the state level. The lack of a clearly specified role for the federal government in educational matters gave rise to a uniquely American concept - the idea of "local control" of public schools.

The journey from sporadic early school laws to uniform state systems of free public education would be an arduous one, with battles over tax support and sectarianism along the way. By 1825, it had been generally accepted that a state system of education would necessitate general and direct taxation of a major source of revenue such as real property (Ibid, 131). Therefore, in order to achieve their objective, public school advocates had to overcome a variety of obstacles: (1) the long-held belief that education constituted the sovereign province of only those who could afford it, (2) the fear that making education available to all would make it "too common," thus educating people "out of their proper position in society," (3) the conviction of many that it was immoral to tax one man's property for the education of another man's child or to require those with no children at all to be taxed in order to support public schools, (4) opposition from religious groups who viewed nonsectarian,
public schools as a threat to religious liberty, (5) the suspicion that the crusade for public schools was merely a ruse designed to unite Church and State, and (6) public indifference to the benefits of public education (Cubberley, 1919; 1920; K. Alexander and M. D. Alexander, 1985; Cremin, 1989).

This period saw the rise of an extraordinary group of leaders such as Horace Mann of Massachusetts and Henry Barnard of Connecticut who championed the cause of public schools, which were also referred to as "common schools." They argued against tuition in any shape or form, maintaining that a "free school" should no longer mean one where the poor received a free education whereas all others paid tuition. The pauper schools, they contended, unjustly injured the poor, many of whom chose not to enroll their children at all because of the stigma attached to attending such schools (Cubberley, 1919, 121; Butts, 1960, 39; K. Alexander and M. D. Alexander, 1985, 23). Moreover, they argued that free and general education was a "natural right of all children in a Republic." They pointed to the influx of European immigration (which accelerated after 1825) as evidence for the need of an institutional mechanism to assimilate these new arrivals into a democratic culture (Cubberley, 1919, 121). This argument meshed well with a political climate in which property restrictions that prevented many poor whites from voting and holding office were tumbling under the weight of "Jacksonian
democracy" (Rossiter, 1962). Finally, they insisted that such schools should be nonsectarian and secular; religious education in the schools should convey a respect for freedom of conscience rather than teach the doctrines of a particular church. Furthermore, they believed it violated the principle of separation of church and state to compel a man to pay taxes to support religiously-based instruction in public schools regardless of whether he believed in what was being taught or not (Butts, 1960, 40; K. Alexander and M. D. Alexander, 1985, 139).

In addition to the alleged efficacy of the common school in instilling democratic virtues, universal education as an instrument for the social and economic advancement of the poorer classes was central to the value its most ardent advocates attached to it. Not surprisingly, they often encountered their most stubborn resistance from the wealthiest members of society who were more interested in preserving aristocratic privilege. Moreover, with the growth of cities and the industrialization that accompanied it, advocates of free schools saw education as the means of empowering more Americans to take advantage of the new economy (Cubberley, 1919, 101-115). Horace Mann represented one of the most powerful advocates of education as a tool for social uplift of the poor and the leveling of class distinctions. He argued that ignorance lay at the heart of feudal rule in Europe, but the emergence of a capitalist
economy had created a "more adject condition of servitude" than the Middle Ages ever had. Education, he continued, could counteract the tendency toward the concentration of wealth and power into the hands of the very few. Mann maintained that the continued prosperity of a capitalist economy depended on a general diffusion of knowledge among the masses. "Education, then," Mann declared, "beyond all other devices of human origins, is the great equalizer of the conditions of men" (1849, 59). In his view, education lacked the power to transform men morally so that they would "abhor the oppression of their fellow-men;" rather, it provided men with the necessary means to resist the selfishness of other men (Ibid, 60).

Curiously, the enemies of common schools also used the rhetoric of individualistic values in the hope of defeating the movement. They openly questioned the desirability of the expansion of education to the masses, and thought democracy was better protected by an enlightened, leisure class. Some doubted government's ability to carry out such an endeavor at all; others felt that taxation for public education amounted to the confiscation of the property of one class to educate another, thereby violating individual freedom. Still others believed that religious liberty was at stake; the specter of free, nonsectarian schools symbolized, in their eyes, a threat to their right to worship God as they pleased (Ibid,
Thus, the rhetoric utilized on both sides of the public school debate testifies to America's distinct fidelity to Lockian values.

Cubberley captures vividly the intense and polarizing character of the political battle over free, public, nonsectarian, tax-supported education:

Excepting the battle for the abolition of slavery, perhaps no question has ever been before the American people for settlement which caused so much feeling or aroused such bitter antagonisms. Old friends and business associates parted company over the question, lodges were forced to taboo the subject to avoid disruption, ministers and their congregations often quarreled over the question of free schools, and politicians avoided the issue. The friends of free schools were at first commonly regarded as fanatics, dangerous to the State, and the opponents of free schools were considered by them as old-time conservatives or as selfish members of society. . . . Often those in favor of taxation were bitterly assailed, and even at times were threatened with personal violence. Henry Barnard, who rendered such useful service in awakening Connecticut and Rhode Island, between 1837 and 1845, to the need for better schools, tells us that a member of the Rhode Island legislature told him that a bill providing a small state tax for the schools, while he was then advocating, even if passed by the legislature could not be enforced in Rhode Island at the point of the bayonet. A Rhode Island farmer threatened to shoot him if he ever caught him on his property advocating "such heresy as the partial confiscation of one man's property to educate another man's child." A member of the Indiana legislature, of 1837, declared that when he died he wanted engraved on his tombstone, "Here lies an enemy to free schools" (1919, 119, 133).

Gradually, the advocates for free, common schools for all won the day. State legislatures accepted the idea and began to recognize that they must require local school districts to tax themselves to provide for public schools rather than simply encourage it. As a result, state constitutions
and legislative statutes began to limit local discretion over the schools; the idea that a degree of centralized planning to achieve uniformity in a state system of education was preferable to completely decentralized local control (Butts, 1960, 39).

By the time Massachusetts passed the first compulsory attendance law in 1852, responsibility for education was firmly entrenched at the state level (K. Alexander and M. D. Alexander, 1985, 25). A series of subsequent court decisions further strengthened the preeminence of the state in educational policymaking. The period between 1870 and 1900 saw the expansion of the concept of public education to include the high school and the flowering of state-supported universities (Stuart v. School No. 1 of Kalamazoo, 30 Mich. 69 (1874); Butts, 1960; Lucio, 1963).

However, these reforms did not completely eliminate local control over the schools. Rather, what emerged was a system whereby state agencies set minimal standards for the school districts while day-to-day management of the schools remained with locally elected school boards, local superintendents, principals and teachers. This arrangement represents an approach to the governance of education that is uniquely American (Butts, 1960, 39). It mirrors, in some

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These include Railroad Co. v. Husen 95 U.S. 465 (1877); Leeper v. State, 103 Tenn. 500 (1899); Fogg v. Board of Education, 76 N.H. 296, (1912); Scown v. Czarnecki, 264 Ill. 305 (1914); Moore v. Board of Education, 212 N.C. 499 (1937).
ways, the relationship of divided sovereignty between the national government and the states. In a nation with such a deep-seated mistrust of centralized authority, it is difficult to imagine how any other political outcome could have emerged.

In summary, the American public school marries both abstract fidelity to Lockian idealism and the institutional embodiment of Horatio Alger pragmatism. Americans expect the public school to transmit democratic values to each succeeding generation; it is one of the primary institutions charged with the task of assimilating immigrants into American culture. Moreover, education represents the hope of a better society. It is thereby enlisted in the cause of social reform. Thus, social reform advocates, regardless of their ideological leanings, appeal to education in some form or fashion in order to bring about in reality their vision of the American Creed. Their faith flows directly from the creed of the Enlightenment which sees reason as a progressive stream flowing throughout history that is slowly, but inevitably, eroding the barriers to human progress. Thus, education, or more "enlightenment," becomes the hailed solution for an infinite number of social ills, ranging from poverty and racism to environmental degradation to the crisis of teenage pregnancy and AIDS (Dewey, 1966; Allen, 1989; Cremin, 1989; Purpel, 1989; Reitman, 1992; Walters, 1992). Knowledge, in the American psyche, is the key to more
rational and humane social policy. This orientation often turns the public school into a political and cultural battleground of competing interest groups who war over issues as diverse as curriculum design or content to disciplinary issues to desegregation (Cremin, 1989; Reitman, 1992).

In addition to its cultural functions, education, as the Warren Court recognized in Brown, is essential for economic and social mobility of individuals in American society. With the rapid expansion of technology and "knowledge-based industries," as well as stiffer global competition, the importance of education in preparing a highly-skilled labor force multiplies (Johnston and Packer, 1987; Wilson, 1978; 1987; Reich, 1991). No wonder national reports such as the U.S. Education Department's A Nation At Risk (1983) which allege that academic achievement among American students lags significantly behind that of their counterparts in the industrial world generate such panic (Chubb and Moe, 1990; Fiske, 1991). Regardless of how "education reform" manifests itself, the highly political nature of any proposal to change the schools testifies in part to the importance Americans attach to their role in preparing the work force.

Blacks, like other Americans, have historically had a high regard for the value of education, but for a very different reason: for most of their history in America, the opportunity to acquire learning was routinely denied them. The struggle for equal educational opportunities, long a
central theme of black political agitation, provides further evidence of black acceptance of the Lockian creed. Before the Civil War, access to an education constituted a luxury beyond the reach of most Southerners, regardless of race. Usually, the well-to-do in the South provided private tutors for their children or sent them to Europe for their college education (Harris, 1924; Vincent, 1981). The planter class deemed the provision of education to their slaves as a mortal threat to their hegemony; thus, it is not surprising that they generally opposed tax-supported universal education for the masses (Butts, 1960; Genovese, 1967; Anderson, 1981, 1988). Slaves states passed laws prohibiting instruction to blacks, and those who violated the law were commonly subjected to fines, imprisonment, or whippings if apprehended (Vincent, 1981).

Therefore, the existence of slavery, from the outset, politicized the importance of education for black Americans. Black political leaders, from various ideological stripes, have consistently viewed education as foundational to improving the lot of African Americans. Their perspective has been powerfully conditioned by the knowledge of their unequal social, economic, and political status vis-a-vis white Americans. Blacks, like other Americans shaped by the thinking of the Enlightenment, tend to equate knowledge with human freedom. The Enlightenment’s attachment to science and learning, coupled with the reality of slavery and racial
discrimination combined to place access to educational opportunity at the forefront of black political movements in America (Brotz, 1966; Bullock, 1967; Dann, 1971; Vincent, 1981; Quarles, 1986; Franklin and Moss, 1987; Anderson, 1988; Sansing, 1990).

Douglass, for example, recognized the liberating potential of learning at a young age. In his autobiography, he recalls his mistress who first instructed him in the rudiments of the alphabet. Excited with her pupil’s progress, she went on to tell her husband what she was doing. Upon hearing the news, the master lectured his wife on the evils of teaching slaves to read. Not only was it unlawful, he said, but it was also unsafe. Douglass happened to overhear the conversation:

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... if you give a nigger an inch he will take an ell. Learning will spoil the best nigger in the world. If he learns to read the Bible it will forever unfit him to be a slave. He should know nothing but the will of his master, and learn to obey it. As to himself, learning will do him no good, but a great deal of harm, making him disconsolate and unhappy. If you teach him how to read, he’ll want to know how to write, and this accomplished, he’ll be running away with himself (Douglass, 1962, 79).
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This incident, Douglass recalls, inspired in him a spirit of rebellion. The very fact that his master desired that he be kept in ignorance motivated him to acquire as much knowledge as he could. Douglass never forgot the words, "Knowledge unfit a child to be a slave" (Ibid, 79).
In an article Douglass he later wrote for *The North Star* entitled, "What Are the Colored People Doing for Themselves?" he further spells out his views on education:

... Let us educate our children, even though it should us subject to a coarser and scantier diet, and disrobe us of our few fine garments. "For the want of knowledge we are killed all the day." Get wisdom - get understanding, is a peculiarly valuable exhortation to us, and the compliance with it is our *only hope in this land* [my emphasis]. - It is idle, a hollow mockery, for us to pray to God to break the oppressor's power, while we neglect the means of knowledge which will give us the ability to break this power - God will help us when we help ourselves (Douglass, 1966, 208).

Douglass' vision of education was widely shared among blacks. Free Negroes, though they often found themselves in an economically precarious state, often formed self-help associations to finance schools for their children; at other times, they received assistance from sympathetic whites (Porter, 1942; Woodson, 1968). Once the social stigma of attending "free schools" was removed by the public school movement, Negroes sought admission to these schools on an equal basis; more will be said about this in the next chapter (Woodson, 1968; Grant, 1968). Despite laws which outlawed such activity, some white Southerners taught Negroes to read; it proved impossible for the state to completely regulate the practice out of existence (Woodson, 1968). When the Freedman's Bureau came to the South following the Civil War, they found preexisting black schools, many supported by blacks'
own efforts. Some of these schools predated the Civil War, despite local opposition to their existence (Porter, 1942; Woodson, 1968; Anderson, 1988).

The end of slavery further intensified the thirst within black Americans for education. It is most clearly manifested in their efforts to secure schooling for themselves and their children. Booker T. Washington, himself part of this mass movement, described the period this way: "It was a whole race trying to go to school. Few were too young, and none too old, to make the attempt to learn" (Anderson, 1988, 5).

Historians have generally underemphasized the indispensable role that blacks played in making educational opportunity a reality for themselves. While they readily accepted aid from Northern philanthropists, missionary societies, white Republicans and sympathetic Southern whites, the values of self-help and self-determination - values nurtured indigenously within the black community - formed the bedrock of the ex-slaves' educational movement (Anderson, 1988, 5). African Americans demonstrated a commitment to the Protestant work ethic and Lockian individualism that equalled, if not surpassed, that of whites. Black politicians in the Reconstruction state legislatures provided the impetus for instituting universal education in the former Confederate states (Bullock, 1967; Vincent, 1976; 1981; Jenkins, 1983; Anderson, 1988; Sansing, 1990). As W.E.B. DuBois would later remark, "Public education for all at public expense was, in
the South, a Negro idea" (Anderson, 1988, 6). When controversy flared at the turn of the century over whether liberal education or vocational training was best suited for the Negro (personified by the differences between Booker T. Washington and W.E.B. DuBois), the debate was not (at least among black Americans), whether black Americans needed schooling or had the capacity to grasp "higher culture"; rather, the debate, in part, turned on which model held the most promise for social uplift of the race (Washington, 1901; DuBois, 1903; Brotz, 1966; Aptheker, 1971; Anderson, 1978; 1988).

Finally, black appreciation for the value of education has tended to extend beyond its potential to better equip them to earn livings or to empower them to fight for social and political rights. Rather, African Americans view education as a fundamental tool in the battle to reduce racial prejudice. The fact that the belief in the intellectual and moral inferiority of blacks provided part of the rationale for slavery is beyond debate (Davis, 1966; Botz, 1966; Dann, 1970; Blassingame, 1972; Tocqueville, 1988; Higgins, 1990). Thomas Jefferson, though claiming his conclusions to be speculative, nevertheless expressed a commonly held view of blacks:

. . . . I advance it, therefore, as a suspicion only, that the blacks, whether originally a distinct race, or made distinct by time and circumstances, are inferior to whites in the endowments both of body and mind. It is not against experience to suppose that different species of the same genus, or varieties of the same
species, may possess different qualifications. Will not a lover of natural history then, one who views the gradations in all the races of animals with the eye of philosophy, excuse an effort to keep those in the department as man as distinct as nature has formed them? This unfortunate difference of color, and perhaps of faculty, is a powerful obstacle to the emancipation of these people (Jefferson, 1955, 143).

However, when Tocqueville visited America in the 1830's, he found little evidence that public opinion toward blacks had significantly improved. In fact, he observed that racial prejudice appeared to be most prevalent in Northern states where the institution of slavery had been abolished than in the South (1988, 343). Indeed, he noted that the widespread belief in the moral and intellectual inferiority of blacks, not the legal institution of slavery, posed the greatest obstacle to social progress for the Negro. For this reason, Tocqueville doubted that the two races could live together in a racial democracy. A social climate such as this, however, only served to inflame the passions of African Americans for education all the more. Through learning, it was hoped, they would prove their detractors wrong. Samuel Cornish, editor of the black newspaper *The Rights of All*, was an early advocate of a system of education for blacks. In an 1827 editorial, he wrote:

... Let us sacrifice or rather consecrate, the means of these unnecessary, and sometimes sinful indulgences, to the lid of a sealed box, for the purpose of education. It is truly said that knowledge is power, and let our coloured population once become as learned, as refined, and as wealthy as other classes of community, and prejudice will hide her face - the tyrants spell will be broken. To talk about prejudice against color is nonsense; but raise up sons learned and enterprising
with offsets of 20 to 30 thousand dollars - but real
daughters intelligent and polished heiresses to their
tens and hundreds of thousands, and the fair sons and
daughters of Columbia will forget the law of lights and
shades - it will be expunged from our system of philo-
sophy. And as should be, merit will form the estimate
of character and respectability (Dann, 1971, 301).

In this passage, Cornish calls upon his people to
establish schools of their own, not simply to learn skills
and attain knowledge (though they have intrinsic value in and
of themselves), but also to silence the prejudices of white
Americans. His perspective views color prejudice - and not
simply legal, political, and economic barriers - as barriers
to black progress. Through education, Cornish hopes, African
Americans can develop enlightened, enterprising, and
respectable communities which will disprove racial theories
of black inferiority. In other words, rather than produce
elaborate philosophical treatises refuting theories of inhe-
rent differences between the races, blacks should turn their
attention toward practical action; after all, results are
more difficult to argue against. His words reveal his degree
of dedication to the Protestant work ethic and Lockian
individualism. Blacks should be pragmatic, not philosophical
- consistent with the manner in which Lockianism manifests
itself in America (Hartz, 1955). Through hard work, sweat,
and perseverance, African Americans would show that they
merit first-class citizenship, values consistent with the
Protestant work ethic (Weber, 1976). Cornish's remarks imply
an acceptance of the American concept of merit.
He certainly was not alone in his beliefs. Frederick Douglass emphatically argued that what blacks needed from whites was not sympathy, but rather the freedom to either rise or fall based on their own efforts. Unhindered access to education, for this reason, was one of the essential preconditions to make this ideal a reality (Brotz, 1966, 283). Industrial education in the mind of Booker T. Washington afforded blacks with the opportunity to acquire skills and training necessary to "prove" that they could be effective partners in the building of a new southern economy, and therefore could not rightfully be denied political and social rights (Washington, 1901; Brotz, 1966; Anderson, 1978; 1988)

While rejecting Washington's belief that blacks needed to "prove themselves worthy" of political and social equality, DuBois nevertheless did not depart from American individualism (at least until late in his life). In advocating liberal education for a "talented tenth," DuBois set out in part to counter the objections of those who said that college was inappropriate for the Negro; the ideological climate of Social Darwinism at the turn of the century had reinforced longstanding racial stereotypes (DuBois, 1903; Brotz, 1966; Aptheker, 1971; Anderson, 1978; 1988). Thus, DuBois affirmed the "inalienable rights" of African Americans while pushing for liberal education as a means of discrediting the doubters of black ability. Black academics have traditionally accepted
the role of countering racist propaganda directed against African Americans (Kujovich, 1987, 158).

Therefore, black and white Americans come to attribute similar intrinsic value to education, but they arrive at the same social ideal through the tunnels of profoundly different historical experiences. White Americans more closely identify with education as part of their Lockian birthright, though this sentiment is rarely articulated. Blacks value education precisely because it, like other political and economic rights, was specifically denied them; rather than being treated as free men, interpretations of the Declaration of Independence and the Constitution treated them as if they were disinherited children rather than free sons. The NAACP's protracted campaign against "separate but equal" in the public schools, which began in the 1930's, constitutes one chapter in the history of black efforts at attaining equal educational opportunity in America. From the perspective of blacks, the cause of educational opportunity and political freedom were intimately linked. The fact that whites and African Americans bring different historical experiences to the political dilemma of desegregation contributes, in no small way, to the divisive character of such debates.

Aristotle reminds us in The Politics that it is simply not possible to speak of education apart from some consideration of the good life and the question of the best regime. Since it is inevitable that people will disagree over matters
concerning education, the topic is thus inherently political (1984, 229-230). Certainly, Americans did not invent the idea of education as essential to the health of the republic, nor are they the first to quarrel about its specific role in society. However, the American assertion in the superiority of reason over other bases for authority elevates the significance of education more so than it has in other countries (Arendt, 1958). Hence, education in America is more readily politicized. Political battles over proposed curriculum changes, religious values, academic standards, education reforms and other issues illustrate the politically explosive potential of education in America. Desegregation in education must be seen as a powerful example of this phenomenon.

Thus far, I have argued that blacks have from the days of the Revolution down through the civil rights era invoked the themes of the liberal tradition to press their claims for liberty. It has also been contended that the importance that African Americans, though peering through a different pair of historical lenses, nevertheless attach virtues to education consistent with the legacy of the Enlightenment. Moreover, the efforts that blacks have expended historically to acquire the means to education reflect an acceptance of critical aspects of the Protestant work ethic and Lockian individualism. This interpretation of the history of black political protest, of course, is not universally shared. Before further developing the thesis that black political
discourse, and specifically, desegregation litigation, demonstrates the fidelity of African Americans with the American Creed, it is necessary to consider the counterargument to this assertion. That is the subject of the next section.

African Americans: True Disciples of Locke?

With respect to the African American protest tradition, Oakes (1995) writes:

. . . . The fact that black political leaders consistently claimed the liberal tradition as their own therefore constitutes a major problem in the history of American political culture. . . . black political thought. . . has never been divorced from the liberal tradition. From the late eighteenth century to the late twentieth, blacks have successfully harnessed the themes of liberalism to the struggles against various forms of inequality (205-206).

Dawson (1995) offers black nationalism and black Marxism as counterexamples for his view that black political discourse cannot be confined within the boundaries of the liberal tradition. He argues that scholars who study black political thought err because, on one hand, they tend to overemphasize the importance of a few prominent individuals. Furthermore, he contends that black nationalist intellectuals like David Walker, Martin Delaney, Marcus Garvey, and organizations such as the Nation of Islam are systematically underrepresented in their analyses of black political thought. He also points to examples of blacks such as W.E.B. DuBois and Martin Luther King who, in the course of their
philosophical journeys, either dissented in part, or rejected entirely, fundamental tenets of liberalism (see DuBois, 1940; 1945; King, 1967).

Finally, Dawson points out the consistent demand in black politics that their individual leaders take political stands that are perceived by the community as not harmful to the black community, an auspiciously nonliberal trait; in fact, some would call it antiliberal. This tradition of a public community censoring and sanctioning those seen as attacking the black community manifests, for example, in the general disdain for black conservatives and black Republicans. White politicians, by and-large, are not expected (at least not explicitly) to articulate the "white perspective" when they go to City Hall, the state legislature or Congress. In contrast, black political leaders bear the special burden of being seen not only as representatives of particular constituencies, but as spokesmen for the race. This represents a peculiar aspect of black political culture that clearly departs from dominant American political norms.

Dawson's critique carries considerable weight. He makes a powerful case for a "black counterpublic" as an ideological site for the criticism of American democratic theory and practice that is consistent with the work of other scholars. For example, Blassingame (1972) persuasively documented the existence of a "slave community" which synthesized African and American elements in a time when most scholars had
seemingly concluded that the Middle Passage and the ordeal of American slavery had eradicated all aspects of African culture (see, for example, Stamp, 1956; Moynihan, 1965). That the slaves did not simply adopt the white master's culture (though they were influenced by it), but maintained a cultural integrity of their own has been shown by other scholars (Genovese, 1976; Levine, 1977; Sobel, 1979; Stuckey, 1987; Higgins, 1990). Pinderhughes (1987) objects to the use of the binary lenses of "assimilationism vs. black nationalism" to explain black political thought. This fallacy, she continues, not only understates the range of black political discourse, but also overstates the degree of unity among blacks. African Americans, she writes, "may agree on racial and economic matters; they might disagree on racial or economic or agree on the economic or racial goals; or they may disagree on both" (1987, 127).

Acknowledging the existence of a separate black political culture does not overturn the thesis that black political discourse has remained predominately within the borders of the liberal tradition. In fact, the reality of historical and cultural differences between blacks and whites explains how America's abstract commitment to Lockian values of equal rights and equal opportunity for all often leads to conflicting policy preferences with respect to debates on desegregation, affirmative action, racial redistricting. The focus of this section, however, is to demonstrate while black
nationalism and black Marxism constitute significant streams of the history of black political thought, their existence does not contradict my main thesis. Moreover, even those critiques of American democracy which have attempted to go beyond the borders of the liberal tradition nevertheless maintained strong liberal elements.

What, after all, is black nationalism? Is it not rooted in the sense that the "common experience of discrimination, humiliation, and economic self-interest" unites blacks in a unique way in relation to white America and to each other? Because of the common experience of slavery and segregation, they were no longer Mandingo, Mandinka, Yoruba, Ibo, or Hausa - they had become "one nation," or a "nation within a nation" (Brotz, 1966; Berlin, 1975; Aptheker, 1971; Walker, 1993; DuBois, 1996). Similarly, the political crisis with Great Britain in the 1760's and 1770's forged within the colonists a sense of nationalism - no longer were they simply New Yorkers, Virginians, or Georgians; they were Americans. The colonial sense of having endured a common oppression is spelled out vividly in the specific "usurpations" which King George III is alleged to have committed in the Declaration of Independence. Therefore, by basing black nationalism on a sense of a common historical experience, are they not acting like Americans?
Secondly, black nationalism tacitly accepts the doctrine of inalienable rights, a foundational stone of the American republic. Despite the stridency of David Walker’s condemnation of American slavery and the Founders’ complicity with it in his *Appeal to the Coloured Citizens of the World*, he leaves unscathed the doctrine of inalienable rights. His approach radically differs from that of Marx, who attacks capitalism on every point. One would think that one of the most radical treatises ever written condemning slavery and white racism would "leave no stone unturned;" seemingly, Walker would attack every pillar deemed responsible for the oppression of his people.

The reason he does not attack the concept of inalienable rights is obvious: he supports it. "Are we MEN!" Walker asks, (1992, 36) a direct challenge to Jefferson’s expressed doubts about the faculties of blacks. An affirmative answer to this question, Walker argues, undermines all the justifications for slavery. In asserting black manhood, Walker claimed that African Americans could not be rightfully denied the benefits of the same inalienable rights that applied to every other American.

So fervently does Walker accept this concept that any means were justified to end slavery. The violation of the rights of African Americans represents such a grievous evil that any means to eliminate it were justified, including
violent revolution. Walker's call sounds very much like Jefferson's call for revolution: because the king had violated the inalienable rights of the colonists as Englishmen, he had forfeited his right to rule. As a consequence, the colonists were justified in dissolving their political ties with the British crown. Walker, in effect, vindicates Jefferson and, by extension, Locke.

This pattern repeats itself consistently throughout the history of black nationalism. All nationalist movements from Martin Delaney to Elijah Muhammad aimed at establishing a separate black nation premise themselves on the inalienable right of self-determination (Brotz, 1966; Aptheker, 1971; Wintz, 1996). African American oppression is deemed to be so violative of the concept of inalienable rights and/or higher moral law that blacks may justifiably sever their ties with the United States and establish their own nation. In reality, black nationalism does not fundamentally challenge the liberal concept of rights; indeed, it vindicates it.

A survey of the rhetoric of Malcolm X produces even more evidence for the compatibility of black nationalism with the liberal tradition. Perhaps more explicitly than any other black nationalist thinker, Malcolm ventures to great lengths to sever his ties with the American political consensus. In a speech in 1964, Malcolm uttered these words:

I am not a politician. I'm not even a student of politics. I'm not a Democrat. I'm not a Republican. I don't even consider myself an American. . . . I don't come here tonight to speak to you as a Democrat or a
Republican or an American or anything you want me to be. I'm speaking as what I am: one of twenty-two million black people in this country who are victims of your democratic system. They're victims of the Democratic politicians, the victims of the Republican politicians. They're actually the victims of what you call democracy. So I stand here tonight speaking as a victim of what you call democracy (X, 1968, 134).

On the surface, it appears that Malcolm X rejects the entire American democratic experiment. A cursory examination of his speeches seems to indicate that that is his precise intent (Haley, 1992; Breitman, 1967). He sees himself not as an American, but rather as a victim of America: after all, the mere fact that a man sits at a table does not make him a diner. Malcolm dismissed King's strategy of civil disobedience in order to appeal to the nation's conscience as a waste of time, countering that if America really had a soul it would not have enslaved and mistreated African Americans. The Nation of Islam, of which he was a minister, expoused the belief that the black race were the "chosen people of God" (Lincoln, 1984), a direct challenge to America's own sense of Divine Providence (Hartz, 1955; Peterson, 1976; Gebhardt, 1993).

However, not even Malcolm can escape his Americanism. By pronouncing the judgement of Allah on sinful America, Malcolm invoked America's higher law tradition. In subjecting the nation's practices to a Higher Judge, how was he different from David Walker, William Lloyd Garrison, Nat Turner, John Brown, and Martin Luther King? In proposing to bring human rights charges before the United Nations against the United
States for its treatment of African Americans (Breitman, 1970), Malcolm behaves like an American. The very idea of charging the United States with human rights violations assumes these rights exist in the first place; moreover, if these rights are violated, those victimized by such actions have the right to self-defense and self-determination. His journey toward Pan-Africanism in the last year of his life (a logical extension of his black nationalism), rests on key aspects of the liberal creed—namely, the idea that a common historical experience (particularly a common oppression) forms the basis for national identity. For Malcolm, the American ideal proved to be so powerful that not even he, in spite his best efforts, could successfully think beyond it. America ironically provided Malcolm with the analytical tools with which to interrogate herself.

With black nationalism eliminated as a fundamental challenger to the liberal tradition, I now turn to Marxism. DuBois and many black intellectuals before and after him became members of the Communist Party (Marable, 1982; Stuckey, 1987; Pinderhughes, 1987; Dawson, 1995). Yet, socialism has never been able to attract a large share of the black masses, in spite of the fact that historical discrimination against African Americans have deprived them of a significant share of the benefits of capitalist democracy. Logically, they would seemingly have little stake in the preservation of the status quo.
Several ideas have been advanced to explain this rather curious fact. Organizational deficiencies, such as severe pressure to integrate into the economy (which also crippled institutions among white ethnic immigrants), were particularly more pronounced among blacks; they tended be in more marginal economic straits than their white counterparts (Garner, 1977). Marable (1982) attributes the demise of black left radicalism partly to government sponsored efforts to eradicate the left as well as crackdowns within the labor union establishment during the McCarthy era through the black power revolt. It has also been charged that communist organizations often succumbed to the same racism toward blacks that African Americans had united with them to fight against. Quoting Shawna Maglangbayan, Marable, himself a Marxist, writes: "Marxism-Leninism [is] a reactionary and white supremacist ideology whose chief aim is to maintain Aryan world hegemony once capitalism is overthrown" (1980, 85). Pinderhughes (1987) points to the Communist Party's failure to resolve the ideological contradictions between internationalism and black nationalism. The party's inability to manipulate racial issues, she concludes, renders them an unattractive option for the black population. Finally, black intellectuals would have been faced the same dilemmas in the post-World War II era as white members of the left; in particular, (1) they had to explain the postwar economic expansion, considering their confident predictions during the
Depression years that the "death of capitalism" was near and (2) in light of the revealed brutality of Stalin's regime, how could one still tout Marxist as the best hope for mankind (Diggins, 1990).

While all of the aforementioned explanations carry a certain measure of validity, they miss a more fundamental problem for Marxism with respect to black Americans: the fact that they are Americans. Indeed, it was never necessary for African Americans to become revolutionaries because the idea of America is already revolutionary.

The American revolutionaries found willing allies in the New England church, thereby eliminating the necessity of making the Revolution also a war to overthrow established religion, unlike the situation in France (Hartz, 1955; Peterson, 1976). Religion in America, as Hartz put it, was already revolutionary (41). The same is true with the nation's core principles. Why make war with principles which are so useful in justifying one's own cause? Moreover, not only does America assert the right to revolution to end unjust oppression, she goes further to declare this right to be "self-evident." America proclaims the fundamental equality of all men - certainly a radical thought in 1776 in light of the history of the Western world. A nation that sees itself as "hopefully experimentalistic" in its societal arrangements (Myrdal, 1944, 7) keeps the door of reform - even of revolution - constantly ajar.
Thus, Walker did not need to build a new revolutionary theory; rather, he only needed to insist, "We [meaning African Americans] are men, too!" Whereas the European liberal felt the compulsion to produce elaborate treatises in order to rationalize the right to challenge secular and ecclesiastical authorities deemed to be "God-ordained" and immutable, African Americans live in a society where the right to rebel against perceived injustices is viewed as a birthright. Having inherited such a legacy, it is no wonder that black protest leaders, in the main, draw inspiration from the Declaration of Independence rather than The Communist Manifesto.

Moreover, since the Revolution did not declare the "death of God," He could still be enlisted, when necessary, to serve political ends. The fact that the Revolution did not engage in an all-out war against the church had the effect of maintaining religion as a significant player in American politics. As Tocqueville observed, the lack of a state church in America actually served to strengthen the role of religion in America (1988, 298-299). The fact that religion has not been "eliminated from the [political] game" (Anderson, 1964) injects a significant element of moralism into American politics. Moralism has been found at the core of reform movements throughout the nation’s history, from the abolitionists to the temperance movements, to the present-day anti-abortionists. Political reform movements in America often resemble
"holy crusades" or Islamic jihads in character. The black protest leader, as a consequence, never needed to become Marx—he already had Moses and the Prophets.

In summary, the American Creed binds African Americans, as well as other traditionally disadvantaged and despised groups, into the American fold in a manner that is truly extraordinary considering their historical circumstances. Myrdal is right when he concludes:

The liberal Creed, even in its dynamic formulation by Jefferson, is adhered to by every American. The unanimity around, and the explicitness of, this Creed is the great wonder of America. The "Old Americans," all those who have thoroughly come to identify themselves with the nation—which are many more than the Sons and the Daughters of the Revolution—adhere to the Creed as the faith of their ancestors. The others—the Negroes, the new immigrants, the Jews, and other disadvantaged and unpopular groups—could not possibly have invented a system of political ideals which better corresponded to their interests. So, by the logic of the unique American history, it has developed that the rich and secure, out of pride and conservatism, and the poor and insecure, out of dire need, come to profess the identical social ideals. . . . Behind it all is the historical reality which makes it possible for the President to appeal to all in the nation in this way: "Let us not forget that we are all descendants from revolutionaries and immigrants" (1944, 13).

By proclaiming the self-evident truth of the fundamental equality of all men, the Creed knits African Americans and other historically disadvantaged and despised groups into the American fold in a manner that is truly extraordinary.

Consequently, The Creed ideologically underwrites the tradition of black protest in America. Blacks had to go no further than to the words of the Declaration of Independence and the Constitution to find a rationale for challenging the
racial status quo in America. Thus, I expect that the history of the efforts to achieve desegregation, both at the public school and college level, would be consistent with this established historical pattern. I anticipate that the NAACP would appeal to the values of the Creed to buttress its legal challenge to segregated education. However, Lockian individualism is a "doubled-edged sword" which supplies counterarguments to interests opposed to specific remedial policies favored by many black civil rights proponents and their liberal white allies. Many white Americans object to "race-consciousness" in the determination of public policy; they interpret the meaning of the civil rights struggle as a repudiation of race-consciousness and an affirmation of the equal worth of every individual. When applied to the issue of desegregation in higher education, the existence of publicly funded, historically black universities poses a troubling dilemma for an ostensibly "colorblind" society. Therefore, all the litigating parties, irrespective of the specific positions they hold, insist that they are being faithful to the American Creed.

Chapter Two shifts the focus of this dissertation from the macro-level of American political culture to the early history of the school desegregation movement. This chapter traces this phenomenon to the Supreme Court's landmark decision in Brown.
CHAPTER 2. THE ROAD TO BROWN

A cursory examination of the Supreme Court's decision in United States v. Fordice demonstrates that the justices clearly viewed the case as another extension of the logic of Brown v. Board of Education. Relying on the reasoning of Brown as well as its successor cases (most notably, Green v. School Board of New Kent County), the Court declared that Mississippi's nondiscriminatory policies did not meet the state's burden "to eradicate policies and practices traceable to its prior de jure dual system that continue to foster segregation" (505 U.S. 717, 728 [1992]). Thus, the Supreme Court continued its tradition of applying principles derived from elementary and secondary desegregation cases to higher education. Therefore, in order to adequately assess the significance of the ruling in Fordice, it is important to revisit Brown.

This chapter concentrates on the school desegregation movement leading up to Brown. It will be shown that the NAACP's legal campaign to end racial segregation in education provides a compelling case study in the fidelity of black Americans to the liberal creed. Indeed, by appealing to the

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Fourteenth Amendment's Equal Protection Clause, they charge Plessy's "separate but equal" doctrine with violating the amendment’s original intent - to safeguard the rights of the newly emancipated slaves from state laws that deprived them of their fundamental rights.

I begin by reviewing the original purpose of the Fourteenth Amendment because one of the central questions addressed by the parties in the Brown cases was whether school segregation was permissible in light of the vision the framers had of the Fourteenth Amendment. This is followed by a discussion of how the civil rights of ex-slaves were, for all intent and purposes, effectively nullified through court decisions, Northern neglect, legislative fiat, and violence. The fact that the citizenship rights of blacks had been seriously "qualified" (Woodson, 1921) explains the rise of organizations such as the NAACP. Given the plight of blacks, I will present the range of alternatives that were available to the NAACP. It will be argued that the NAACP's choice to pursue a litigation strategy to overturn the "separate but equal" doctrine provides a strong case for the organization's belief in the American creed. Indeed, the NAACP rejected an alternative characterization of the race problem in America - the idea that racism represented only one facet of class exploitation, and black liberation could not be achieved without a radical restructuring of the basic institutions of American capitalism. The NAACP's litigation
strategy affirmed their belief in the basic goodness of American institutions while simultaneously fighting for the right of blacks to share equally in the bounty of America. Once the legal barriers to black participation in the mainstream of American life were eliminated, the NAACP believed that blacks would be able to compete in the marketplace on an equal footing with other Americans. This vision played a powerful role in shaping the course of the desegregation campaign, and would have ramifications well into the post-Brown era.

Reconstruction and Reversal

The South’s defeat in the Civil War ended slavery and permanently denied to the states the right to secede from the Union. As the Thirty-Ninth Congress convened in Washington in December of 1865, it confronted the task of determining the means by which the defeated Southern states would be restored to the Union. Under the existing Constitution, three-fifths of black slaves, discreetly described in the document as "other persons," were counted for the purposes of taxation and representation. With slavery abolished and African Americans declared free persons by the result of the war, it became necessary to define precisely what freedom meant. Did freedom entitle the newly freed slaves to all the rights, privileges and immunities enjoyed by free white persons, including the right to vote? Or could blacks justly be excluded from political participation or, as some argued, be
required to demonstrate some minimal level of competence in order to qualify for voting privileges? Perhaps more importantly, which level of government - the national government or the states - had the power to define the specific rights of citizenship? Was there a difference between national citizenship and being a citizen of a particular state? In short, the task of restoring the defeated Southern states required Congress to address the status of the newly emancipated slaves under the Constitution (Flack, 1908; Kendrick, 1914; tenBroeck, 1951; Crosskey, 1953; James, 1956; Graham, 1968; Baer, 1983; Kaczorowski, 1987).

Faced with the duty of defining the constitutional status of the Negro, the memory of *Scott v. Sanford* (60 U.S. 393 [1857]) loomed large. The Court rejected the freedom suit of Dred Scott, a black slave, on the grounds that because of his African ancestry he was not, nor could he ever be, a citizen of the United States within the meaning of the Constitution. Even emancipation, in the eyes of the Court's majority, did not make blacks part of the political community (60 U.S. at 405 [1857]). Crosskey writes:

... the full purport of that case... was that no "man of African descent, whether a slave or not," could enjoy, under the Constitution of the United States, any right or protection [my emphasis] whatsoever. All such men were left, by the principles of the Dred Scott case, to the absolute, unrestrained power of the separate states (1953, 1084).
The ruling effectively left blacks at the mercy of the states. The Court’s opinion, though clearly racist in tone, nevertheless reflected the settled constitutional doctrine of the times - that the fundamental rights of citizenship were secured by the states. The Founding Fathers believed that the greatest threat to liberty rested with the national government; furthermore, pre-Civil War jurisprudence held that the Bill of Rights limited only the actions of the federal government. Therefore, when the Southern states enacted what came to be known as "The Black Codes," they did more than simply making it clear that their attitudes toward the ex-slaves had not softened. In another sense, the newly formed Southern legislatures were exercising the authority state governments were assumed to have.

The landmark case in this regard was *Barron v. Baltimore* (32 U.S. 243 [1833]) where the Supreme Court held that the Bill of Rights limited only the actions of the federal government and not those of the states. At the time of the adoption of The Bill of Rights, most states already had included protections of individual liberties within their state constitutions; presumably, the ordinary citizen had little reason to believe that the state governments would mount an assault on his inalienable rights. Thus, the original document inhered within it a fundamental defect with respect to the ability of African Americans to secure their rights against the actions of state governments. This was true precisely because it was the states that had legalized slavery as well as the supporting code of laws madde necessary by its existence. The notion of "state citizenship" would provide the rationale in part for later Supreme Court decisions justifying judicial nonenforcement of the civil rights of blacks. Not until the twentieth century when courts began to "incorporate the Fourteenth Amendment" did this doctrine began to crumble.
Franklin and Moss (1987) describe the ramifications of the Black Codes on the newly freed slaves:

... Several of them undertook to limit the areas in which Negroes could purchase and rent property. Vagrancy laws imposed heavy penalties that were designed to force all Negroes to work whether they wanted to or not. The control of blacks by white employers was about as great as that which slaveholders exercised. Negroes who quit their jobs could be arrested and imprisoned for breach of contract. Negroes were not allowed to testify in court except in cases involving members of their race. Numerous fines were imposed for seditious speeches, insulting gestures or acts, absence from work, violating curfew, and the possession of firearms. There was, of course, no enfranchisement of blacks and no indication that in the future they could look forward to full citizenship and participation in a democracy (206).

By severely restricting the political, civil, and economic liberties of the freedmen, these laws threatened to reduce African Americans to a condition not appreciably different from slavery. The Black Codes merely constituted but one manifestation of a Southern political climate characterized by increasing defiance of national authority.7 Northerners interpreted these events as evidence that the South was in rebellion again. Thus, the need for national protection of the rights of citizens, whether they be white

7Other examples of Southern defiance include the following: Southerners continued to invoke states’ rights doctrine; the rights of Northern whites and federal officials in the region were routinely ignored. White Southerners sympathetic to the Union were branded "scalawags" and received similar treatment. Many former successionists were returned to political office while newspapers and periodicals had, by the spring of 1866, succeeded in whipping up anti-Union sentiment to pre-Civil War levels (Kendrick, 1914; Graham, 1968; Kaczorowski, 1987).
Unionists, military or federal personnel, or freedmen was widely acknowledged and urged upon members of Congress (Kaczorowski, 1987, 26-30).

In response to the Black Codes, Congress passed the Civil Rights Act of 1866. As originally proposed, the civil rights bill declared:

All persons born in the United States, and not subject to any foreign power, are hereby declared to be citizens of the United States, without distinction of color, and there shall be no discrimination in civil rights and immunities among the inhabitants of any state or territory of the United States on account of race, color, or previous condition of servitude (Kluger, 1975, 627).

Supporters of the legislation saw it as an extension of the Thirteenth Amendment that secured the freedom of the slaves. In their view, the white South's intransigence had made it necessary for Congress to guarantee equality under the law and to spell out the privileges and immunities that the newly freed blacks were now entitled to. Under the new law, ex-slaves would be entitled to the rights to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding (14 Stat. 27, quoted in Graham, 1968, 307-308; Kluger, 1975, 628).

However, did the proposed legislation only apply to the specifically enumerated rights listed in the bill? Or were the specifically named rights merely examples intended to
communicate that the intent of the bill was to nullify the Black Codes? Had the Civil Rights Bill passed in its original form with the broad anti-discrimination language intact, Congress would have been empowered to strike down any future state laws that fostered segregation (Kluger, 1975, 628).

Democrats and conservative Republicans objected to the potentially broad scope of the bill, arguing that it would forbid the states from using race as a basis for any kind of statutory discrimination or classification. Interestingly, state laws requiring segregation in public schools were cited as examples of the kinds of state practices which the federal government would have the right to outlaw if the measure passed (Cowan in Avins, 1967, 127; Rogers in Avins, 1967, 166). Opponents insisted that the bill represented an unconstitutional exercise of federal power against the states. The bill passed after the anti-discrimination clause was removed, only to be vetoed by President Andrew Johnson. In his veto message, the president accused Congress of unconstitutionally usurping the sovereignty of the states. Congress subsequently voted to override the president’s veto and the Civil Rights Bill became law.

Nevertheless, doubts about the constitutionality of the new law remained. Thus, many in Congress saw the need for a constitutional amendment to lay the matter to rest. John Bingham, a Republican representative from Oregon, introduced the original draft of the Fourteenth Amendment. It began:
The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens of the United States [Article IV, Section 2]; and to all persons in the several States equal protection in the rights of life, liberty, and property [Fifth Amendment] (Kluger, 1975, 630).

By bracketing references to other parts of the Constitution, Bingham attempted to reassure his colleagues that what he was proposing was not revolutionary; rather, the new amendment was based on powers which were in the Constitution already (Ibid, 630). The new amendment, Bingham and other supporters of the measure argued, would simply arm Congress with the express power to enforce the guarantee of equality. It did not transfer all sovereignty over civil rights to the federal government, as conservative opponents charged.

However, the language of the first draft generated opposition both from conservatives and Radical Republicans. Conservatives argued that the proposal would give Congress the right to define and secure the rights of citizens - and conceivably, the right to take away rights from citizens. Such a proposal, they maintained, constituted a broadside against the American concept of free government - the idea that governments exist to secure natural rights, not to define the rights of citizens (Flack, 1908; Avins, 1967). On the other hand, Radicals objected to the wording of the original proposal because it made Congress responsible for securing the civil rights protections of citizens. Congressional majorities had a tendency to shift, they pointed out;
thus, the original proposal did not place civil rights protections beyond the power of future Congresses to either repeal or to simply not enforce (Bickel, 1955; Graham, 1968; Kluger, 1975; Kaczorowski, 1987).

Therefore, the final draft of the amendment eliminated the offensive language. Section One of the Fourteenth Amendment declared:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person the equal protection of the laws.

Supporters of the Amendment insisted that, by passing this legislation, the national government was not "granting rights" to the freedmen; instead, it was securing them. After all, governments existed to secure preexisting, inalienable rights according to the laws of nature; this new amendment merely declared that the former slaves, now freed, were entitled to those same rights. Furthermore, those on the Republican side who regarded the Fourteenth Amendment as the constitutional embodiment of the Civil Rights Act often coupled their arguments with appeals to abstract theories of justice and the natural rights of man (Bickel, 1955, 61). Thus, many of the framers of the Fourteenth Amendment regarded their task as consistent with the spirit of John Locke and the Founding Fathers (ten Broeck 1951; Avins, 1967;
Graham, 1968, 295-335; Friedman, 1969, 184; Baer, 1983; Kaczorowski, 1987). Graham observed:

At the outset, the Lockean philosophy of antecedent and inalienable rights (which colonial leaders had employed so effectively in the Revolution) simply had been given a new twist. Americans, it was argued, had to live up to the Declaration. "All men" had to mean all men; "Governments... instituted to secure rights" of "life, liberty, and the pursuit of happiness"; and governments "deriving their just powers from the consent of the governed" had to bestow protection, and to bestow it equally, irrespective of race and color, or the "self-evident truths" became self-evident mockery. . . Slavery was ethically repugnant, not simply because it chattelized man, but because it repudiated the very purpose of government and arbitrarily denied to some humans its protections solely on the basis of color (1968, 278).

The most heated debates during the proceedings concerned the question of whether or not suffrage constituted a natural right which could not be abridged by government (and hence, could not be denied to blacks) or a political privilege subject to qualifications set by government (Kendrick, 1914; Frank and Munro, 1950; James, 1956; Avins, 1967; Kaczorowski, 1987). Eventually, the Fifteenth Amendment specifically extended to black men the right to vote. The actions of racist organizations like the Ku Klux Klan motivated Congress to pass enabling legislation under the enforcement provisions of the Fifteenth Amendment to blunt efforts on the part of these groups to prevent blacks from exercising their constitutional rights.8

8The Civil Rights Enforcement Act of 1870 made it a federal crime for private individuals to conspire to injure or oppress persons exercising their constitutional rights. Because the Ku Klux Klan was a private organization, the Ku
In 1875, Congress passed what would turn out to be the last national civil rights measure enacted until 1957. After a long, protracted legislative fight led by Senator Charles Sumner of Massachusetts, Congress passed a new law aimed at guaranteeing to all citizens irrespective of race "the full enjoyment of the accommodations... of inns, public conveyances on land and water, theatres and other places of public amusements" (Kluger, 1975, 50). In addition, the Civil Rights Act of 1875 forbade states to disqualify citizens for jury service on the basis of race (Ibid, 50).

Therefore, the Thirteenth, Fourteenth, and Fifteenth Amendments declared that African Americans were the political equals of whites. Many abolitionists saw these developments as the completion of the American Revolution (Graham, 1968; Kluger, 1975; Baer, 1983; Kaczorowski, 1987). At the time, many of the proponents of the civil rights measures of the Reconstruction period believed that the passage of these laws and constitutional amendments had permenantly settled any questions regarding the black man's constitutional status. Thus, many Northerners who had sympathized with the black man's cause now believed that the freedman had been handed all of the rights that it was within government's power to bestow.

Klux Klan Act of 1871 made it a federal offense for two or more persons to conspire to deprive persons of their equal protection and voting rights.
As subsequent events would prove, this sentiment turned out to be tragically flawed. The Civil War had undeniably affirmed the permanence of the Union, the illegitimacy of the right to secession, and the freedom of the slaves. But the congressional debates did not resolve the question of whether state citizenship or national citizenship was primary. Many Americans who had consented to the expansion of the role of the federal government during the war now feared the loss of state sovereignty to a growing national behemoth. Moreover, the fact that many of the framers of the Fourteenth Amendment considered it the constitutional embodiment of the Civil Rights Act of 1866, rather than simplifying matters, actually clouded the picture. This was true because the framers had stripped the Civil Rights Bill of the no-discrimination clause in order to secure passage. Because of this compromise, it could be argued that while the Civil Rights Act of 1866 and the Fourteenth Amendment granted blacks equal rights under the law, that did not necessarily guarantee them access to the same public accommodations and services as whites. Partly for this reason, Sumner lost his fight to have unseg-

9 The deletion of the no-discrimination clause of the Civil Rights Act of 1866 created considerable problems for the NAACP legal team during the Brown cases. The NAACP was looking for clear, unambiguous evidence that the framers of the Civil Rights Act and the Fourteenth Amendment intended to outlaw all class discrimination based on race. The striking of the no-discrimination clause was seized upon by the Southern attorneys general to argue that it could not have been the intention of Congress to ban all statutory classifications that were race-based.
Regulated schools included in the public accommodations section of the Civil Rights Act of 1875. Therefore, because of these unresolved issues, the Supreme Court played a powerful role in interpreting the meaning of the Fourteenth Amendment.

The Supreme Court's decision in The Slaughterhouse Cases (16 Wall. 36 [1873]) reaffirmed the fact that the protection of the rights of freed Negroes represented Congress' original purpose in crafting the Fourteenth Amendment. However, the Court's interpretation of the Fourteenth Amendment would ultimately have the effect of stripping the black race of the very constitutional rights that the Amendment's designers had explicitly tried to protect. The Court zeroed in on the phrase "citizens of the United States" in the amendment. The majority concluded that the Fourteenth Amendment only prohibited state action abridging the rights of national citizenship; however, the "fundamental civil rights for the security and establishment of which organized society is instituted," the Court declared, "remain...under the care of state governments" (Ibid, 76). In other words, the protections enshrined in the Bill of Rights (such as freedom of

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10The Louisiana legislature in 1869 granted one corporation a twenty-five year monopoly over the entire butchering business in three of the state's parishes. Rival slaughterhouses sued, arguing that the Louisiana law deprived them of their natural right to practice the profession of their choice, creating a condition of slavery in violation of the Thirteenth and Fourteenth Amendments. By a 5-4 margin, the Supreme Court upheld the monopoly, declaring that the "pervading purpose" of the Civil Rights Amendments had been to protect the rights of blacks, not the rights of butchers to practice their profession (16 Wall. 36, 71).
speech, a free press, the right to petition, right to a fair trial, right to sit on juries, etc.) properly, according to the Court's majority, resided under the jurisdiction of the several states. This view coincided with pre-Civil War jurisprudence which saw the national government, not the states, as the greatest menace to the protection of individual liberties. Therefore, the Fourteenth Amendment, as far as the Court was concerned, had not fundamentally altered the relationship between the federal government and the states.

The ruling created considerable space for subsequent state governments to define the rights of citizenship in ways which effectively denied equal protection to black Americans. Moreover, the Supreme Court afforded blacks no defense from acts by private individuals which violated their constitutional rights. With the return of "home rule" in the South, blacks experienced a gradual, yet systematic assault on the

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"Perhaps in part to insulate themselves from the charge that they were doing away with the privileges and immunities clause, the Court felt compelled to cite some examples of rights protected by national citizenship: the right to vote in federal elections, the right to go to the seat of government and gain access to federal buildings, the right to petition the federal government for redress of grievances, and the right of access to seaports, the high seas, and navigable streams and the like. Kluger (1975) finds such an interpretation of the Fourteenth Amendment incredulous: "Was it possible that Congress and the nation had fought a great war and undergone agonizing recuperation with force-fed medicine to establish such rights as these - rights that were implicit in the supremacy clause of the Constitution" (1975, 58)? Wilkinson adds: "But to the black South Carolina sharecropper of 1873, bowed by debt and bound to the sod, protection when abroad or 'on the high seas' was not exactly the most precious gift" (1979, 14-15)."
gains of the Reconstruction period. Furthermore, Northern interest in the plight of the former slaves, save for philanthropic organizations, steadily diminished. The withdrawal of federal troops from the South following the election of 1876 reflected a widespread resignation in the North with the "Southern problem." The Negro, in Horatio Alger terms, was left to fend for himself (Kluger, 1975, 55; Wilkinson, 1979, 20-23; Marable, 1982; Franklin and Moss, 1987; Quarles, 1987).

Considering the political tenor of the times, it is not surprising that a "states-rights" theory of jurisprudence pervaded Supreme Court decisions which interpreted the rights of African Americans under the Civil War Amendments. In a number of decisions, the Court rendered narrow interpretations of these amendments that left the power to determine what constitutional rights blacks would enjoy in the hands of the states.¹² Beginning in 1887, Southern states began to

¹²In United States v. Reese (92 U.S. 214 [1875]), the Supreme Court declared that the Fifteenth Amendment had not conferred upon Negroes (or anyone else) the right to vote; suffrage was a right granted by the states. The Court held that the right to vote was "not a necessary attribute of national citizenship." In a companion case, the Court in United States v. Cruikshank (92 U.S. 542 [1875]), a case involving the indictment of white rioters who broke up a black political rally, determined that the Fourteenth Amendment only provided protection against discriminatory actions on the part of the states; it offered no constitutional protection against actions committed by individuals that violated the civil rights of blacks. Using the same logic, the Court in The Civil Rights Cases (109 U.S. 3 [1883]) declared the Civil Rights Act of 1875 which banned racial discrimination in public accommodations as unconstitutional. Restaurants, inns, theaters, and businesses were
enact a series of laws requiring the separation of the races in virtually every sphere of human activity - from schools, to the courts, parks, sidewalks, hotels, residential districts, and even cemeteries (Woodward, 1951, 212). New laws like the poll tax, the grandfather clause, residency requirements, literacy tests, property ownership requirements, gerrymandering, intimidation, outright violence, and other devises were employed to disenfranchise black voters (Kluger, 1975, 67-68).

Thus, the stage was set for Plessy v. Ferguson (163 U.S. 537 [1896]). Homer Plessy challenged a Louisiana law that required separate accommodations on railway cars for white and black passengers. By an 8-1 margin, the Supreme Court upheld the Louisiana statute, concluding that separate facilities for the races were permissable under the Fourteenth Amendment as long as the facilities were equal. It could not have been the object of the amendment, the majority insisted, "to abolish all distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either" (Ibid, 544). In making their argument, they cited private entities who could discriminate, and victims of such actions could not appeal to the Fourteenth Amendment for relief. Yet, not all of the decisions of this period were unfavorable to black plaintiffs. See Railroad Company v. Brown 84 U.S. 445 (1873), Strauder v. West Virginia 100 U.S. 303 (1879), Ex-parte Virginia 100 U.S. 339 (1879), Ex-parte Varbrough 110 U.S. 651 (1883), and United States v. Waddell 112 U.S. 76 (1884).
state laws establishing separate public schools for whites and blacks under their police powers as examples of legitimate uses of the concept of race to make legal distinctions among the citizenry. The Court denied the plaintiff's claim that enforced separation implied the inferiority of the colored race, countering that if blacks saw the statute in that fashion "it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it" (Ibid, 551).

Justice John Marshall Harlan, a former slaveholder, penned one of the most quoted dissenting opinions in the history of the Court. He charged that the Court's majority was simply being dishonest when it denied that the statute did not imply the inferiority of the Negro race. Of course, white Americans believed that they were superior to blacks, Harlan countered; such notions reflected the popular thinking of the day (DuBois, 1946; Kluger, 1975; Lofgren, 1987; Orfield, 1996). The Constitution, however, denied legitimacy to such rationalizations. "Our Constitution is color-blind, and neither knows nor tolerates classes among its citizens" (163 U.S. 537, 559 [J. Harlan, dissenting]). Plessy, in Harlan's view, effectively destined African Americans for

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13Specifically, the Court referred to Roberts v. City of Boston, 5 Cush. 198 (1849) in which the Supreme Judicial Court of Massachusetts determined that the general school committee of Boston did have power to provide separate schools for the instruction of Negro children and to prohibit them from attending schools set aside for whites.
second-class citizenship because it gave states the power to use race as a basis for placing blacks "in a condition of legal inferiority" with respect to other Americans (Ibid, 563).

Three years later, the case of *Cumming v. Richmond County Board of Education* (175 U.S. 528 [1899]) presented the Court with an opportunity to clarify the *Plessy* doctrine. In *Cumming*, the Supreme Court demonstrated that it seemed more interested in washing its hands of the problems of African Americans than in insuring that its "separate but equal" doctrine was actually honored. In response to increased demand on the existing school facilities set aside for black school children, a Georgia school board solved the problem by turning the only black high school into a grade school. Black taxpayers petitioned the courts to enjoin the operation of any white high school in the county in accordance with *Plessy* until one was provided for black children. True to its states-rights philosophy, the Court upheld the school board's action, declaring that authority over education rested with the states, not the federal government. A strict adherence to *Plessy* would have at least required the school board to provide an equal, though separate, high school for blacks. Instead, not only did the Court refuse to insist that this be done, the school board was not required to provide a high school for black students at all. Interestingly, the Supreme Court marshalled the example of school segregation to justify
the "separate but equal" doctrine and an education case served as the first test case for the Plessy regime. As it turned out, Cummings was a sign of what was to come for African Americans:

... In time equal became a ghost word, a balm for the nation's conscience, a token of the law's hollow symmetry and logic, but quite irrelevant in so far as the Negro was concerned. Signs of inequality sprouted everywhere. In the park was the separate water fountain that happened not to work; at the back of the restaurant was the black carry-out line; in the theatre was the Jim Crow balcony, unmaintained, because "they'd trash it up anyhow." Nor was there a separate-but-equal election to which blacks might be consigned when excluded from the white one (Wilkinson, 1979, 19).

There was no dissenting opinion in Cummings. In fact, Justice Harlan spoke for a unanimous Court. Kluger (1975) described this turn of events in the following manner:

By the close of the nineteenth century, then, the Supreme Court had nullified nearly every vestige of the federal protection that had been cast like a comforting cloak over the Negro upon his release from bondage. Even his sole demonstrated friend among the Justices was an unreliable champion. Once more, the black man seemed to have no rights that the white man was bound to honor (83).

Thus, by the turn of the century, the words of the Civil War Amendments had, for all intents and purposes, become "dead letters" for black Americans. Plessy granted the states a "blank check" to apply segregation to every aspect of Southern society. As far as Northern public opinion was concerned, the Negro was "out of sight and out of mind." Thus, it is within this context of indifferent, and often violently hostile public sentiment toward African Americans that the National Association for the Advancement of Colored
People (NAACP) emerged. The NAACP and its particular interest in equal educational opportunity for blacks, is the subject of the next section of this chapter.

The NAACP and the Crusade Against Segregated Education

The NAACP was founded in 1909 by a biracial group of Americans alarmed by the deterioration of the political and civil rights of blacks. Among their principal concerns were the increase in acts of violence - most notably, lynchings and race riots - committed by whites against African Americans. Also, the organization owed its beginnings to increasing disenchantment among influential blacks and sympathetic whites with strategies for black advancement that deemphasized, or ignored, the immediate quest for full political and civil equality for African Americans (DuBois, 1903; Aptheker, 1951; Kellogg, 1967; Ross, 1972; Franklin and Moss, 1987; Tushnet, 1987). To achieve their aims, the NAACP opted for a strategy of agitation and protest that involved lobbying for desired legislation deemed beneficial to blacks, publicity campaigns, propaganda designed to counter negative public perceptions of blacks, and litigation to secure and protect the rights of African Americans.

14 The story of the founding of the NAACP has been told so often, that it can only receive summary treatment here. Two general histories that I recommend are Charles Kellogg's NAACP (Baltimore: John Hopkins Press, 1967) and B. Joyce Ross's J. E. Springarn and the Rise of the NAACP, 1911-1939 (New York: Atheneum, 1972).
From the outset, the NAACP chose to remain within the ideological orbit of eighteenth century liberal democratic traditions. This can be demonstrated in a variety of ways. The organization's tactics - lobbying, litigation, holding public meetings, and the like - assumed the legitimacy of the principles of the Declaration of Independence and the Constitution. The NAACP purposely appealed to these great documents to make the case for black equality. Moreover, their tactics represented a classic case of interest group pluralism, a cornerstone principle of democratic political theory. The fidelity of prominent blacks within the NAACP such as W.E.B. DuBois, James Weldon Johnson, William Pickens, and Robert Bagnall to American democracy was further attested to by their highly critical posture toward Marcus Garvey's "Back to Africa" movement during the 1920's. African Americans, they argued, were better served channeling their efforts toward obtaining equality in America, rather than pursuing the dream of establishing a separate nation in Africa (Martin, 1976, 273-333).

Despite the fact that some of the founding leaders of the NAACP were economic leftists and/or socialists who advocated the restructuring of the American economy, their program emphasized the attainment of full civil and political equality for blacks within the existing socioeconomic system. White socialists like Mary White Ovington and Charles Edward Russell felt that blacks must free themselves from the
vestiges of chattel slavery before they could engage in any struggle for revolutionary change (Ross, 1972, 18-19). In the beginning, the founders of the NAACP contemplated linking the group to the burgeoning labor movement; however, the idea was abandoned for fear that few labor organizations would take up the Negro’s cause.

Furthermore, the founding of the National Urban League in 1910, an organization with the stated goal of promoting the economic uplift of blacks, discouraged the development of an economic emphasis within the NAACP (Ibid, 19; 144). To be sure, in any movement where many organizations have a common goal, it is important for individual groups to stake out an area of focus as to avoid confusion of purpose, unnecessary competition for membership, and duplication of effort. The decision to blaze a path that tended to deemphasize economic solutions to the plight of African Americans would have important implications for the future development of the organization.

Further evidence for the NAACP’s determination to pursue black equality through existing American political institutions is found in its growing faith in the efficacy of litigation. This faith emanated, in large measure, from a string of highly-publicized legal victories for the association.¹⁵ These favorable rulings had the effect not

¹⁵These included the following: Buchanan v. Warley (245 U.S. 60 [1917]) declared that municipal ordinances requiring residential segregation were unconstitutional. Six years
only of enhancing the reputation of the association to outsiders and attracting new supporters (Tushnet, 1987, 1), but internally, it gave the NAACP confidence in its ability to mount additional assaults against racially discriminatory practices in the courts. The organization’s sense that the pursuit of legal equality represented its specific area of expertise in the overall struggle for black advancement profoundly influenced the NAACP’s response to criticism of its tactics during the 1930’s, which will be explored later in this chapter. Coupled with the fact that it had rejected solutions calling for a fundamental restructuring of the capitalist order, many in the NAACP’s hierarchy came to regard efforts by black insurgents in the 1930’s for the association to adopt a greater economic emphasis not only as threatening, but as heretical.

Moreover, the NAACP, through its publicity, research, and propaganda efforts, revealed their commitment to another core American virtue: the inherent efficacy of education or "enlightenment." These efforts were premised on the assumption that the American race problem was largely - though clearly not entirely - attributable to ignorance. Some of the NAACP’s early leaders believed that by making the public

later, the Supreme Court in Moore v. Dempsey (261 U.S. 86 [1923]) overturned the conviction of an Arkansas black on the grounds that the proceedings had occurred in a mob-like atmosphere. In Nixon v. Herndon (273 U.S. 536 [1927]) Texas’ all-white Democratic primary was declared unconstitutional because it excluded blacks from participating.
aware of abuses committed against African Americans while simultaneously pointing out the accomplishments of blacks that they might be able to improve whites’ perceptions of Negroes. For example, The Crisis, the organization’s monthly magazine, devoted a considerable amount of attention to celebrating black culture and accomplishments while explicitly debunking purportedly "scientific" theories of black inferiority. Advertisements from black educational institutions of all kinds appeared prominently in the pages of The Crisis, no doubt a reflection of how much DuBois believed that the black man needed education. Thus, the NAACP, by assembling the true facts concerning the Negro’s condition and presenting them to the public, hoped to appeal to the nation’s conscience and thereby effect change (Ross, 1972, 45-46).

Not only did the organization value education in the abstract, but the NAACP expressed interest in improving the educational opportunities available to blacks from its earliest days. Despite the fact that Northern philanthropy had helped to raise the general level of education throughout the South, blacks increasingly were forced to settle for inferior schools. Southern states allocated considerably less money for facilities and teacher salaries for black schools than their white counterparts. Black students were taught by teachers with less training than white teachers; they attended shorter school terms, and had fewer course offerings
than similarly situated whites. Similar patterns of discrimination existed in higher education (DuBois and Dill, 1911; Harlan, 1958; Bullock, 1967; Kellogg, 1967; Kujovik, 1987; Anderson, 1988). Consequently, the NAACP in its early years was an advocate of federal aid to education, hoping that the infusion of federal dollars would bolster black education.\textsuperscript{16} However, Southern states had established such a pattern of systematic underfunding and neglect of black schools that by the 1920’s DuBois reversed his position on the subject of federal aid to education; he predicted that more aid would simply enable whites to become more effective racists (Tushnet, 1987, 6). With the help of a grant from the American Fund for Public Service [also known as the Garland Fund],\textsuperscript{17} The Crisis published a series of articles from

\textsuperscript{16} On this score, they were greatly disappointed. For example, the Smith-Lever Act of 1914 provided funds for agricultural extension programs. However, the law gave states the discretion in deciding which schools received the money; not surprisingly, black schools often received little, if any, funds for agricultural extension programs. This was the flaw of other federal education programs; for example, often black land-grant colleges were routinely denied their fair share of federal funds that they were entitled to under the Second Morrill Act of 1890 because the states had the right to determine the division of the federal funds to the appropriate universities (Alexander and Alexander, 1985, 55-56; Kujovik, 1987; Christy and Williamson, 1992).

\textsuperscript{17} The Garland Fund derives its name from Charles Garland, a twenty-one year old Harvard undergraduate who inherited a fortune upon the death of his father, a Boston millionaire. Believing it wrong to claim a fortune he had done nothing to create, Garland gave some $800,000 to establish a fund to support liberal and radical causes. Roger Baldwin, director of the American Civil Liberties Union (ACLU), became the fund’s chief administrator. Among the organizations assisted during the nineteen year existence of the Garland Fund were

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September 1926 to July 1928 that documented the disparities between black and white education in the South.\textsuperscript{18}

Equal educational opportunity for blacks, thus, figured prominently among the goals of the association from its very beginning. This concern, combined with the NAACP’s increased confidence both in litigation as an instrument to effect change and in its own capacity to successfully challenge racial discrimination set the stage for the organization’s leaders to pursue a long-term strategy to confront Jim Crow segregation in the public schools. They also sensed an opportunity to gain a more substantial grant from the Garland Fund to support their efforts.

By this time, an interlocking relationship had emerged between the Garland Fund and the NAACP. James Weldon Johnson, general secretary of the NAACP, also sat on the board of directors that administered the fund, as did Morris Ernst, a member of the NAACP’s Legal Committee. In 1929, Johnson and Ernst along with Lewis Gannett, a literary critic active with the United Mine Workers of America, the Rand School of Social Science, the League for Industrial Democracy, the magazine \textit{The New Masses}, the American Birth Control League, the Sacco-Vanzetti Defense League, Vanguard Press, the Brotherhood of Sleeping Car Porters, and the NAACP (Kluger, 1975, 132; Tushnet, 1987, 2-20).

\textsuperscript{18}The data revealed that South Carolina spent ten times more on the education of every white child as it did for every black child. No other Southern state approached the imbalance between black and white education that existed in South Carolina. Florida, Georgia, Mississippi, and Alabama spent five times as much on whites as it did on blacks; in North Carolina, Maryland, Virginia, Texas, and Oklahoma, the ratio was two to one (Kluger, 1975, 134).
the American Civil Liberties Union (ACLU) formed the fund’s Committee on Negro Work. Beginning in August, 1929 through May, 1930, the committee, in collaboration with the NAACP, drafted a proposal to give the NAACP a sizable grant from the Garland Fund (Kluger, 1975, 132; Tushnet, 1987, 6-7).

Noting that blacks were the largest group of unorganized workers in America, the proposal called for the Garland Fund to finance a massive legal campaign aimed not only at giving Southern blacks their constitutional rights but a "self-consciousness and self-respect which would inevitably tend to effect a revolution in the economic life of the country" (Kluger, 1975, 132). Included in the request was a memoranda of proposed legal strategy, particularly in the education arena. Taxpayers’ suits were urged to assure equal as well as separate schools in the seven states that most blatantly discriminated against blacks - Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, and South Carolina. The NAACP anticipated that the suits would make the costs of maintaining dual school systems so prohibitive that it would force Southern states to integrate their public schools (Ibid, 132).

This strategy was significantly modified when Nathan Margold, a legal consultant hired by the NAACP, weighed in on their deliberations. Because there were thousands of school districts in the South, the NAACP’s original proposal would have required them to engage in an infinite number of suits.
that would have to be waged to equalize black schools. Such an approach, he argued, not only would be a waste of their material resources, but it offered no assurance that a legal victory in one district would have any governing effect in another. Instead, Margold noted that *Plessy* had endorsed racial segregation *so long as facilities were equal*. But what if facilities not only were unequal, but they were habitually operated in such a manner as to maintain racial inequality? Margold suggested that the NAACP should start by attacking the "equal" portion of the *Plessy* doctrine. Based on what the NAACP’s investigations of Southern education had uncovered, he argued that it could be readily shown that neither the spirit nor the letter of the "separate but equal" doctrine actually existed for black people in the South (Ibid, 133-135). The NAACP’s early victories in *University of Maryland v. Murray* (169 Md. 478 [1936]) and *Missouri ex. rel. Gaines v. Canada* (305 U.S. 337 [1938]) reflected Margold’s influence on their tactics.19

19The *Murray* and *Gaines* cases were very similar. Neither Maryland nor Missouri provided graduate or professional education of any kind to black students within the state. Both states, however, operated scholarship programs for qualified blacks to pursue postbaccalaureate studies out-of-state. The Maryland Supreme Court declared that the out-of-state tuition program to be unconstitutional. Two years later, the U.S. Supreme Court concurred, finding the program in violation of the Fourteenth Amendment and did not meet its burden under *Plessy* to provide separate and equal education. Moreover, the Court wrote that "the provision for payment of tuition in another state did not remove the discrimination" because whites were not subject to the same treatment by the law. The *Gaines* ruling did not inspire repentence on the part of the South; on the contrary, other Southern states soon...
In summary, the NAACP's long-standing interest in eliminating segregated education and its faith in the legalistic approach came together in the school desegregation movement. Education, however, was only one component of a broad-based legal strategy to achieve political and civil equality for blacks. The association did not stop pursuing legal equality for blacks on other fronts once the decision to attack segregated education was made. Therefore, the NAACP adapted the philosophy of classical liberalism in service to the goal of attaining equal opportunity under the law for black Americans.

The NAACP's proposed strategy, however, was not greeted with unanimous support. Moreover, the stock market crash of 1929 and subsequent Great Depression presented the NAACP with the greatest challenge to its core convictions to date. The economic crisis touched off an intense debate, both inside and outside the NAACP, over the relevancy of the associa-

adopted their own unconstitutional versions of the Missouri out-of-state tuition program for blacks (Friedman, 1969, 523; Kluger, 1975, 187-194; Dorsey, 1981; Miller, 1982).

The following cases are examples of legal victories for the NAACP on issues other than education: Hale v. Kentucky, (303 U.S. 613 [1938]) [right to a fair criminal trial where blacks have been habitually barred from juries]; Lane v. Wilson, (307 U.S. 268 [1939]) [racially discriminatory laws denying blacks the right to vote]; Smith v. Alwright, 321 U.S. 649 (1944) [white primary]; Morgan v. Virginia, 328 U.S. 373 [laws requiring segregation of interstate passengers]; Henderson v. United States, 339 U.S. 816 (1950) [segregation in carrier regulation]; and Shelley v. Kraemer, 334 U.S. 1 (1948) [racially restrictive covenants].
tion's focus on legal equality for blacks. This exchange is the focus of the next section.

The Triumph of Legalism

Not everyone within the Garland Fund's hierarchy was enthusiastic about the NAACP's strategy. Indeed, Baldwin - the one with the most hands-on experience with the legal approach - was perhaps the most skeptical. He believed that the legalistic approach was doomed to fail because "the forces that keep the Negro under subjection will find some way of accomplishing their purposes, law or no law" (Kluger, 1975, 132). Drawing from his personal background of defending the rights of antiwar activists and conscientious objectors during World War I, Baldwin held that the law was to be used only as an instrument to a broader goal (and then defensively), not as an end in and of itself. Baldwin considered the black man's plight a subset of the struggles of working class people in America; the solution to the problem required the restructuring of the American economy, rather than simply guaranteeing legal rights. He felt the NAACP should devote its time toward effecting the unionization of black and white workers "against their common [capitalist] exploiters" (Kluger, 1975, 133).

Baldwin's views were not uncommon among those on the left during the 1920's and 1930's. More importantly, other members of the Garland Fund's Board of Directors shared his sentiments. The committee's initial proposal passed (though the vote was close) and $100,000 was approved for the NAACP's
strategy. Nevertheless, this tension remained, and would serve as a chronic source of conflict between the fund and the NAACP. Many of the fund's directors were more interested in the unionization of workers, and did not readily see how the NAACP's focus on litigation served that end.

By contrast, the NAACP's draft proposal emphasized that voting rights, equal rights in schools, on juries, and in public accommodations must precede unionization and "real economic independence" for Negroes (Tushnet, 1987, 7). Their approach was in line with the NAACP's traditional stance that put civil and political equality for blacks over strategies for economic uplift of African Americans. When pressed to defend the relevancy of the proposed campaign, NAACP leaders insisted on the "obvious link" between what it saw as the attainment of civil and political equality for blacks and the fund's concern for the labor movement. Nevertheless, some of the fund's directors remained unconvinced. In fact, on more than one occasion, some of the members of the board attempted to divert funds from the NAACP to the American Negro Labor Congress and the International Labor Defense (ILD), organizations that were more left-wing than the NAACP. Garland

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The NAACP received only slightly more than $20,000 of the original $100,000 that was promised. A number of factors contributed to this: in the first place, the stock market disaster seriously depleted the capital the fund had at its disposal. Secondly, the Garland Fund's ideological commitments led them to support marginal political groups who had difficulty repaying their loans. Finally, there existed underlying tension between the fund and the NAACP over how the funds should be used (Tushnet, 1987 1-20).
himself reportedly lamented the fund's decision to fund the NAACP's litigation drive because he felt the organization was not radical enough (Ibid, 14).

The NAACP's tactics elicited criticism from prominent leftist intellectuals outside the Garland Fund, such as Ralph Bunche, a political scientist at Howard University. He scorned the legal approach, arguing that its proponents failed to appreciate that the law was merely an instrument of the capitalist class to exploit the working classes (Bunche, 1935, 315). The NAACP, according to Bunche, had "conducted a militant fight under this illusory banner" (Ibid, 315). They had placed too much faith in the Constitution (and in particular, the Civil War Amendments), divorcing it from the real political and economic realities of life in America for African Americans. "This view," he continued, "ignores the quite significant fact that the Constitution... cannot be anything more than what the controlling elements of American society want it to be" (Ibid).

Furthermore, as the Depression deepened, pressure mounted, both within and without the NAACP, for the association to rethink its traditional program of fighting for legal equality for blacks in favor of a greater emphasis on class-based approaches to addressing the problems faced by African Americans. The organization's critics failed to see the

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22Blacks, an economically subordinate class even in boom times, were especially devastated by the Depression. By 1934, nearly 40 percent of working-age blacks were categorized as...
wisdom or the relevancy of an ambitious legal strategy in the midst of an unprecedented economic crisis (Ross, 1972, 144-185; Tushnet, 1987, 8). They reminded the NAACP that their rather impressive legal victories had yet to translate into a fundamental transformation in the everyday lives of ordinary black Americans. Residential segregation reigned both in law and custom despite Buchanan; the state of Texas circumvented the Supreme Court’s decision on white primaries by declaring the Democratic Party a private organization with the right to discriminate. Discrimination, they concluded, had continued despite favorable court decisions, either by nonenforcement, outright defiance, or ingenious circumvention of the law. Why should this campaign be any different?

W. T. B. Williams, in making the case that the courts were a "doubtful remedy," recalled the example of The Cherokee Nation v. The State of Georgia (5 Pet. 1 [1831]) where Chief Justice John Marshall’s Supreme Court denied that Georgia had the right to forcibly remove the Cherokee Indians from the lands they occupied. Drawing an analogy to those who would likely oppose favorable court decisions on behalf of blacks, Williams writes, "They [opponents of black rights] incapable of self-support. By 1935, some 65 percent of employable African Americans in Atlanta were in need of public assistance; the comparable figure in Norfolk was higher (Kluger, 1975, 140)."
can easily say with President [Andrew] Jackson... 'Marshall has made this decision, now let him enforce it'" (1935, 439-440).

Finally, even if one assumed that Southerners would honor judicial judgements that - for example, required them to equalize funding between black and white schools - where would the money come from? A proposal to extract increased appropriations for black schools in the poverty-striken South of the 1930's looked like a classic case of the proverbial attempt to "squeeze blood out of a turnip" (Kluger, 1975, 136). Thus, the NAACP's strategy was criticized not only because of doubts about its relevancy to the times and its attention to economic issues, but also the efficacy of litigation itself was called into question.

To be sure, though the NAACP had consciously decided in its early years to relinquish the role of securing the economic advancement of American blacks to the National Urban League, it had not been able to avoid economic concerns altogether. Rather, its concern for the legal equality of blacks necessarily engaged them in skirmishes to insure equal economic opportunities for African Americans. As more blacks migrated to the cities from the rural South and encountered racial discrimination in areas such as housing and hiring, the NAACP made forays into the economic sphere. For example, it had sought admission of black workers into the American Federation of Labor (AFL), though with no success; the
association had assisted in the unionization of black railroad workers, and fought against racial discrimination in wages and hiring under the New Deal programs (Ross, 1972, 160). Thus, it simply was not true, as its critics charged, that the NAACP did not have an economic program. However, considering the way that the NAACP's critics defined the issues, it simply was not possible to accommodate those pushing for a heavier economic emphasis in the association's basic program without a fundamental restructuring of the mission, internal organization, and practices of the NAACP.

This, however, turned out to be precisely what the NAACP was not willing to do. During the 1930's, its board of directors continued to be dominated by those who believed that the association's historic role - the attainment of full civil and political equality for blacks - must take precedence over any program of economic uplift. Once equality under the law had been secured, blacks would be able to move into the mainstream of American society. They continued to oppose the suggestion that a fundamental restructuring of the economy was a prerequisite for black liberation. Save for racial segregation, the NAACP's ideology affirmed the moral goodness of American capitalist and democratic institutions. This view was shared by both black and white board members. In fact, prominent blacks within the upper echelon of the NAACP, such as Walter White, Roy Wilkins, and Louis T. Wright proved to
be just as committed to the NAACP's traditional mission as their older, white colleagues (Ibid, 172).

Its leaders and supporters defended their legalistic approach more broadly, and their choice to focus on segregated education specifically. For example, though they had not succeeded in securing a long-standing goal - a federal anti-lynching law - the association attributed the statistical decline in lynchings over the previous two decades to their efforts (Ibid, 157-158). Moreover, those who criticized the NAACP's legal program had the burden of demonstrating how this could be done - up to that time, the NAACP's efforts, as well as those of other groups, had proved largely unsuccessful in achieving this goal. Many of the NAACP's leaders foresaw no change in this situation in the immediate future; therefore, they reasoned that a full-scale legal attack on segregated education promised more immediate results. Furthermore, many of the critics on the left failed to provide practical tactics or could not agree on the right approach to restructure the economy. As a result, many of the NAACP's leaders dismissed them as impractical. For example, Bunche (1935) severely criticized the NAACP's methodology while offering no solutions of his own. His logic implied that black liberation could not occur within the context of American capitalism, but he neglected to include any guidance for how blacks might construct a political and economic system more favorable to their interests. In addition, by
attacking inequalities such as huge disparities in the pay of white and black teachers, the NAACP felt it could secure tangible economic benefits for black communities (like higher salaries) now in lieu of their larger goals. For them, this approach seemed more practical and natural, given the NAACP’s roots, than venturing into the untried, untested waters of economic theories.

Charles Thompson, commenting on the litigation campaign against segregated schools, called the courts "the only reasonable alternative to remedy immediate abuses of the Negro separate school" (1935, 419-434). In response to fears of state defiance and circumvention of the law, he wrote, "The history of litigation in this country reveals only rare instances where the decisions of our higher courts are flouted to the extent of a direct refusal to act in accord with them" (Ibid, 425). He also hinted that litigation may actually improve the condition of public schools for blacks by drawing attention to the gross inequities perpetuated routinely by white school officials. Alain Locke (1935) doubted that if integrated education was firmly established as official policy that "few [white] parents would exercise their right to send their children to separate private schools and forego the advantages of public education on this account" (411). He hoped that mutual association of the races
in public schools would provide the means for eradicating the most harmful stereotypes that whites harbored about blacks (Ibid, 411).

Intertwined with the debate raging between the legalists and the economic determinists was a controversy precipitated by an editorial submitted by DuBois in the January, 1934 issue of The Crisis entitled, "Segregation." He declared that "... opposition to segregation is an opposition to discrimination... But the two things do not necessarily go together, and there should never be an opposition to segregation pure and simple unless segregation does involve discrimination" (20). By this time, DuBois had began to lose hope in the realization of black incorporation into American capitalist democracy; his sympathies were shifting toward labor and the Communists and he thought blacks needed to move leftward also (DuBois, 1968, 289-307). His editorial questioned the validity of the stance that racial segregation in any form should be met with unmitigated opposition. Though recognizing that many of the association's leaders considered racial segregation inherently evil, DuBois exploited the fact that the NAACP had never formally rendered an overall policy statement to that effect. He urged the NAACP to analytically distinguish between segregation and discrimination.

In light of white antipathy toward the black man, DuBois reasoned that African Americans must work in the meantime to make their own institutions the best they could be. A policy
of unqualified opposition to segregation, he maintained, implied that black institutions - whether they be schools, churches, fraternal associations, businesses, etc. - were inherently inferior because they were black. DuBois attempted to remind the association of examples from its history where, in his view, the NAACP had made practical concessions to the reality of segregation. Consequently, he concluded that an acknowledgement of a distinction between segregation and discrimination would not be inconsistent with the historical activities of the association.

DuBois' position placed him at odds with the prevailing philosophy of the association's leaders. They objected to his interpretation of the NAACP's mission and historical stance. J. E. Springarn, the last white chairman of the board quipped: "But we [the NAACP] were always against segregation, we always regarded it as evil, if sometimes as a necessary evil" (1934, 79). The fact that the organization had made

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23 I will mention a few examples. He argued that though the Association had opposed the extension of segregation in public education, it had never undertaken to attack the separate schools where black children were already being educated. Secondly, once the United States entered World War I, the NAACP supported a Negro officers' training camp and otherwise encouraged black enlistment in the armed forces despite the fact that blacks would be relegated to segregated units. Thirdly, though the NAACP had originally opposed the establishment of a Negro hospital at Tuskegee, once it was established, it fought to provide for that hospital the widest opportunity. Finally, he pointed out that the association had never explicitly denied the necessity of black organizations for self-help and defense, though it had recognized them as a necessary evil that reminded them of the very color line of which they were struggling to overcome (DuBois, 1934, 52-53).
practical concessions to segregation on occasion, Springarn replied, should not be construed as a generalization about the overall mission of the NAACP. David H. Pierce feared that any concession to segregation was tantamount to compromise with prejudice and, if continued, with slavery. DuBois’ views could be used, he concluded, to provide aid and comfort to a "policy of extreme reaction" (80). Walter White expressed a similar sentiment:

To accept the status of separateness, which almost invariably in the case of submerged, exploited, and marginal groups means inferior accommodations and a distinctly inferior position in the national and communal life, means spiritual atrophy for the group segregated. . . Arbitrary segregation of this sort means almost without exception that less money will be expended for adequate sewerage, water, police and fire protection and for the building of a healthy community (80-81).

Because unequal treatment always followed segregation, White argued, the NAACP had always stubbornly resisted segregation in municipal ordinances, racially restrictive covenants, hospital services and "wherever it "shows its head" (81). Thus, targeting segregation in schools did not depart from the association’s traditions.

DuBois’ position did not prevail. The Board passed a resolution in April, 1934 which read:

The National Association for the Advancement of Colored People is opposed both to the principle and the practice and the practice of enforced segregation of human beings on the basis of race and color.

Enforced segregation by its very existence carries with it the implication of a superior and inferior group and invariably results in the imposition of a lower status on the group deemed inferior. Thus both
principle and practice necessitate unyielding opposition to any and every form of enforced segregation. (149).

DuBois remained unsatisfied. What about black churches? How about black colleges? Did the NAACP believe in Negro newspapers and Negro businesses? Did it believe in Negro spirituals (149)? DuBois resented the implication that all-black institutions, made necessary by the reality of white exclusion, were nothing more than inferior imitations of white institutions. In summary, he complained that the NAACP resolution was merely an abstract declaration of principle which did not wrestle with the hard issues. The rupture between DuBois and the association could not be bridged; in May, 1934 he resigned every post he held within the NAACP. Nevertheless, he continued his crusade, urging blacks to build their own institutions. Directly challenging the premise of the NAACP's campaign against segregated education, DuBois asked:

Does the Negro need separate schools? God knows he does. But what he needs more than separate schools is a firm and unshakable belief that twelve million Negroes have the inborn capacity to accomplish just as much as any nation of twelve million anywhere in the world ever accomplished, and this is not because they are Negroes but because they are human (1935, 333).

DuBois' ideological opponents continued to press their case. Thompson (1935) countered, "I think most of us would agree that to segregate is to stigmatize, however much we may try to rationalize it" (433). Segregation was always precipitated by the actions of whites; thus, he reasoned that if
blacks acquiesce or rationalize the practice "they do something to their personalities which is infinitely worse than any of the discomforts some of them may experience in a mixed school" (433). Long (1935) wondered if segregation caused irreparable personality damage to black children. Both authors anticipated the psychological theories of Kenneth Clark which would be utilized by NAACP attorneys in the Brown cases.

Therefore, in the midst of the crisis of the 1930's, the NAACP hardened its belief in its historical convictions. Drawing on classical liberal sources, the NAACP envisioned a society whereby race could not be used for any reason to deny black Americans the full benefits of American citizenship. This view refused to entertain a distinction between voluntary segregation and compulsory segregation; instead, the NAACP regarded racial separation as it was then practiced as inherently evil and always harmful to the black race.

Secondly, the association reaffirmed its commitment to the tactics of litigation and other forms of agitation within the confines of existing American institutions as the most reasonable method of attacking racial injustice. It rejected theories which suggested that the American economy needed to be radically restructured before black Americans could enjoy their full rights as citizens. Rather, the NAACP believed that once equal opportunity was guaranteed under the law, blacks would have equal footing with all other Americans in
the Lockean race. Thus, legalism had triumphed. The prevailing vision of the NAACP's leadership which consolidated itself as a result of the controversies of the 1930's not only profoundly shaped the association for decades to come, but it significantly influenced the course that the school desegregation campaign would take. The legacy of the controversies of the 1930's constitute the subject of the final, upcoming section of this chapter.

**The Legacy of the Thirties**

To paraphrase Louis Hartz, once the question of "first principles" for the NAACP was settled, all subsequent issues became "matters of technique" (1955, 10). The ideological framework in which the litigation strategy against segregated education evolved was firmly established in the 1930's. The controversies both within the ranks of the NAACP and from outsiders served to harden the organization's commitment to its traditional program: (1) the pursuit of civil and political equality of blacks took precedence over promoting the economic concerns of African Americans, and (2) racial segregation in any form constituted an inherent evil which must be categorically opposed. Therefore, the strategy ultimately decided upon reflected the conscious choice of the NAACP in the face of counterarguments that other ways of expending its resources might prove more fruitful (Tushnet, 1987, 8).
The NAACP's ideological framework shaped the subsequent course that the campaign took in a number of important ways. For example, since the NAACP equated segregation with discrimination, the organization in the end chose to attack the constitutionality of *Plessy* itself; no other alternative was possible without the NAACP breaking with, or altering its principles. As segregative practices designed to make black education more "equal" while preserving separation of the races were being struck down one by one, the issue proved to be unavoidable.\(^2\) Despite the fact that many Southern states were scrambling to improve previously neglected black schools in response to the barrage of legal attacks,\(^2\) settling for

\(^{2}\)In *Gaines ex. rel. Missouri v. Canada* (305 U.S. 337 [1938]), the NAACP challenged the unequal application of *Plessy* without attacking the constitutionality of the separate but equal doctrine itself. By contrast, the graduate and professional education cases of the late 1940's and early 1950's attacked the constitutionality of *Plessy* itself. Yet, the NAACP, while arguing that blacks be admitted into white institutions still had a fallback position: insisting that blacks be provided equal facilities of their own. See *Sipuel v. Board of Regents*, 332 U.S. 631 (1948); *Sweatt v. Painter*, 339 U.S. 629 (1950); and *McLaurin v. Oklahoma Board of Regents*, 339 U.S. 637 (1950).

\(^{25}\)The 1940's was characterized by furious activity on the part of Southern state legislatures to upgrade black schools in the hope of discouraging integration. For example, when a black student applied for admission to LSU Law School in 1946, the LSU Board of Supervisors and the State Board of Education moved quickly to establish a law school at historically black Southern University (Vincent, 1981, 166). The creation of Southern Law School, however, did not stop blacks from attempting to enter LSU's law school on an equal basis (*Wilson v. Louisiana State University Board of Supervisors*, (92 F. Supp. 986 [1950]). Similar law suits were filed in other parts of the country. See *Johnson v. Board of Trustees* 83 F. Supp. 707 (E.D. Ky. [1949]) *State ex. rel. Toliver v. Board of Education*, (230 S.W. 2d 724 Mo. [1950]),
the equalization of schools under *Plessy* ran counter to the NAACP's vision that segregation itself was the evil that had to be eradicated. The Supreme Court vindicated the NAACP's position in *Sweatt v. Painter* (339 U.S. 629 [1950]) when it determined that Texas' frantic efforts to enhance black education under the "separate but equal" doctrine did not negate their constitutional duty to admit Herman Sweatt to the University of Texas Law School on an equal basis. Creating a separate black law school, in the Court's view, failed to satisfy the state's constitutional mandate to provide equal protection for black citizens because

The University of Texas Law School possesses to a far greater degree those qualities which are incapable of objective measurement but which make for greatness in a law school. Such qualities, to name but a few, include reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige (Ibid, 634).

Parker v. University of Delaware, (75 a. 2d 225 Del. [1950]), McKissick v. Carmichael, (187 F. 2d 949 [4th Cir. 1951]), cert. denied, 341 U.S. 951 (1951), Gebhart v. Belton, (91 A. 2d 137 Del. [1952]) and Tureaud v. Board of Supervisors (116 F. Supp. 248 [E.D. La. 1953]). This pattern of upgrading black education as opposed to integration prevailed throughout the South. States, for example, adopted their own versions of out-of-state tuition plans (in defiance of the ruling in *Gaines*) rather than provide graduate education for blacks within their borders. Clarendon County, South Carolina, one of the *Brown* defendants, accepted a bid in 1951 for a new $261,000 high school for blacks and had plans for two new grade schools for colored children on the drawing boards. Governor James Byrnes, who had successfully pushed a school equalization bond issue through the legislature, warned that if the federal courts ordered integration, he would order the public schools closed and converted to a private system (Kluger, 1975, 523, 531-532).
Conversely, creating a new black school, even if the state of Texas provided it with state-of-the-art facilities and equipment, did not meet the standards of equal protection because of these "intangible benefits" that the Court in Sweatt decision recognized. In other words, it was impossible for Sweatt to receive an equal legal education at an all-black law school within the meaning of the Equal Protection Clause. While the Court's reasoning did not overturn Plessy outright, it seemed to indicate that the time had come to challenge directly the constitutionality of segregation itself. The Court's rationale that providing separate law schools for blacks denied them certain intangible benefits that would be theirs in an integrated setting lay at the heart of the NAACP's case in Brown. The NAACP applied the principle announced in Sweatt to elementary and secondary education.

Plessy had explicitly denied that statutory segregation imposed a badge of inferiority upon the segregated group, in blatant contradiction to the facts of how "separate but equal" was practiced. The reality of how Plessy was applied seemed to strengthen the determination of black lawyers to overturn the legality of segregation itself. Had the NAACP lawyers not believed so strongly that state-imposed segregation created a sense of inferiority among African Americans (as well as a sense of superiority among whites), it is not likely they would have relied as heavily as they did on
Kenneth Clark's famous doll tests which alleged that school segregation psychologically damaged black children.

These "facts of life" made DuBois' suggestion that all segregation may not in fact be harmful (but may in fact be necessary for survival) seem, to many leading black thinkers, impractical at best and racial treason at worst. During the heat of the controversy that DuBois' position had generated, Francis J. Grimke, a prominent black minister, sighed:

Why Dr. DuBois has reopened the question of segregation in THE CRISIS I am at a loss to know. Can it be possible that in the remotest part of his brain he is beginning to think, after all, that it is a condition that ought to be accepted, a condition that we ought to stop fussing about? If so, then his leadership among us is at an end; we can follow no such leader (1934, 173).

Grimke's remarks implied that the issue raised by DuBois did not need to be debated: the issue was settled. How could any self-respecting, thinking black American consider such a thought?

Thus, the NAACP's view that racial segregation was an inherent evil most clearly manifested itself in its legal arguments before the Supreme Court during the Brown cases. They insisted that segregation in education was wrong because

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the framers of the Fourteenth Amendment clearly intended to forbid the states from passing laws which applied to one race that did not apply likewise to another. The existence of school segregation in many states during the 1860's was not relevant; congressional and judicial authority under the Fourteenth Amendment was broad enough to outlaw the practice. Indeed, the NAACP exploited the fact that some of the congressional opponents of the civil rights measures cited school segregation as one of the areas the federal government should not be able to interfere with. These references, the NAACP's attorneys reasoned, proved that Congress understood the amendment as nullifying the existing Black Codes in the states and forbidding the enacting of race-based statutory distinctions in the future. Moreover, the NAACP maintained that whether or not separate facilities were equal or not was beside the point; the very act of segregation in and of itself denied blacks equal educational opportunities in violation of the Fourteenth Amendment (Friedman, 1969, 12). It was here where the social science evidence became crucial to the NAACP's case.\footnote{Not coincidentally, the district court in Brown v. Board of Education (98 F. Supp. 797 [D.Kan., 1951]) found the separate facilities provided for the races to be comparable. Nevertheless, the district court upheld the Kansas statute, declaring that as long as Plessy was the law of the land, the state was permitted to maintain segregated schools. The ruling, however, served the NAACP's purposes for two reasons. First, the district court acknowledged that the facilities were equal; thus, the Supreme Court would have to determine the constitutionality of segregation itself. Unlike previous cases, it could not require the defendants to address clear...}
line of eminent social scientists who held that the very act of segregating black children from whites of similar age caused personality damage in black children, irrespective of whether or not the facilities were equal (Deutscher and Chein, 1948; Kurland and Casper, 1975). Thus, the NAACP concluded that Plessy stood in opposition to both the letter and the spirit of the Fourteenth Amendment (Friedman, 1969, 180-206).

However, their interpretation of the framers' motives required them to skirt the significance of persistent racial discrimination in education in the states despite the amendment's passage. Public education during the 1860's was

inequalities within the school system rather than reexamining the separate but equal doctrine itself. Second, the district court, in Item VIII of its findings of fact, explicitly acknowledged the plaintiffs' claim that segregation damaged the personalities of black children:

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 the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to restrain the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial integrated school system (Friedman, 1969, 542; Kluger, 1975, 424).

This finding was quoted verbatim by the Supreme Court in Brown and formed the heart of the Court's decision. "Whatever may have been the state of psychological knowledge at the time of Plessy v. Ferguson, this finding is amply supported by modern authority. Any language in Plessy v. Ferguson contrary to this finding is rejected" (347 U.S. 494 [1954]).
still in an embryonic stage; and in the South, it had been stubbornly resisted (Genovese, 1967; Kluger, 1975; Anderson, 1988). Though there existed a long standing tradition of black agitation against compulsory racial segregation in public education dating to the antebellum period (Peterson, 1935; Grant, 1968; Kluger, 1975; Dorsey, 1981; Vincent, 1981), the provision of any education for blacks - in the minds of those sympathetic to the ex-slaves and to many blacks themselves - was viewed as a sign of progress (Kluger, 1975, 633). Confronted with the problem of massive illiteracy among the ex-slaves, many blacks and liberal whites cared less about whether blacks received education on an integrated basis as much as whether they receive schooling at all. As a result, when Senator Sumner lost his fight to have the right to desegregated schools included in the public accommodations section of the Civil Rights Act of 1875, many observers did not think it was an important issue (Ibid, 50). In light of these facts, it was not surprising that Southern attorneys maintained that the existence of school segregation in the 1860’s (particularly in Northern and Western states), meant that Congress had never intended for school segregation to fall within the purview of the Fourteenth Amendment.28

28They cited the following examples as proof that Congress never intended to deny states the right to schools segregated by race: (1) the segregation of schools within the District of Columbia, (2) the establishment of all-black schools by the Freedman’s Bureau, (3) federal enactments granting land allotments for the establishment of all-black schools, (4) the striking of a provision to the Civil Rights
Southern attorneys recounted a vast array of historical evidence of school segregation during the period in question while conveniently ignoring the fact that the Supreme Court had on numerous occasions applied the Fourteenth Amendment to areas that the framers had clearly not contemplated. Therefore, the crux of the South's argument rested on the premise that the Court must be bound not only by the prejudices of the present, but by the prejudices of the past.

The Supreme Court's decision was exactly what the NAACP had hoped for. When faced with the question of whether Congress intended to prohibit segregated schooling when it originally adopted the Fourteenth Amendment, the Court reached a startling conclusion: the intent of the framers of the Fourteenth Amendment "cannot be determined with any degree of certainty" (347 U.S. 483, 489). The Court's finding was, at best, curious in light of an abundance of historical evidence that Congress did not intend to eliminate segregated

Act of 1875 which would have included schools in the category of public accommodations which could not be provided on a segregated basis. Curiously, the Southern argument more faithfully adheres to the historical context of the 1860's than the NAACP's version of events in one critical respect: it is more blatantly honest about the racial prejudices which existed in the country at large and in the halls of Congress. This is no doubt a function of their determination to prevent racial mixing in the schools. The historical context of post-Civil War America can be summoned by the South as an ally because it produces a fountainhead of examples of overtly racist policies and practices that continued in spite of the Fourteenth Amendment.

29See, for example, Lochner v. New York, 198 U.S. 45 (1905) and Coppage v. Kansas, 236 U.S. 1 (1915).
schooling when it passed the Fourteenth Amendment; indeed, Congress had passed up several opportunities to do just that. Rather, Chief Justice Warren wrote that public education, by modern standards, played a far less significant role in post-Civil War America, and in the South it was practically nonexistent. These facts, in the Court's view, explained the "paucity" of information that the history of the amendment produced with respect to the intent of the framers. Therefore, the Warren Court insisted that the permissability of segregation in public education must be determined based on the role of public education in 1954, not 1868, or 1896. Cahn (1955) observed, "Never was Thomas Jefferson more clearly vindicated in his insistence that the Constitution belongs to the living generation of Americans" (152). By insisting that the historical record was too murky to provide any guidance in the present controversy, the Court's logic played directly into the NAACP's color-blind theory of the Fourteenth Amendment.

Having judged the history of the Fourteenth Amendment as inconclusive, the Court turned to sociology. The justices cited several authors, most notably Kenneth Clark's study of sixteen black schoolchildren in a segregated South Carolina school. When asked to pick which of the dolls was the "nice" doll, ten children chose the white dolls, as opposed to the black dolls. He extrapolated that the tests demonstrated that segregated schooling created within black children a sense of
inferiority. Clark testified that this result was consistent with evidence from a larger study that he and his wife had conducted as well as other related literature in the field.

The Court apparently agreed with Clark’s conclusions, declaring that to separate black children from others of the same age and qualifications solely because of their race could potentially "affect their hearts and minds in a way unlikely ever to be undone" (347 U.S. 483, 494). Writing for a unanimous court, Chief Justice Earl Warren declared, "We conclude that in the field of public education, the doctrine of separate but equal has no place. Separate educational facilities are inherently unequal" (Ibid, 495). Recognizing the potentially sweeping nature of its decision, the Court directed all the parties to submit briefs in the following term on the question of remedy (Ibid, 495-496).

Curiously, the Court neglected to classify the right of blacks to integrated schools as a constitutional right; rather, Plessy was invalidated because segregation harmed African American children. In addition, the Court, without explaining why, determined that the fact that segregation violated the Equal Protection Clause "makes unnecessary any discussion whether such segregation also violates the Due Process Clause of the Fourteenth Amendment" (Ibid). Chapter Five will explore in more detail the significance of the Court’s failure to clarify these two points.
In Bolling v. Sharpe (347 U.S. 497 [1954]), a companion case to Brown, the Supreme Court invalidated school segregation within the District of Columbia:

Classifications based solely upon race must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect. . . . Segregation in public education is not reasonably related to any proper governmental objective, and thus it imposes on Negro children of the District of Columbia a burden that constitutes an arbitrary deprivation of their liberty in violation of the Due Process Clause (347 U.S. 497, 499-500).

Nevertheless, DuBois' doubts about the NAACP's approach would haunt the organization in the post-Brown era. The NAACP appropriated the ideals of the Declaration of Independence in support of a vision of American society where race was not considered as a rational basis for the formulation of public policy. However, they failed to resolve the tensions between the atomistic individualism of the Lockian tradition and the African American community's internal sense that it had a unique historical experience that separated it from the rest of American society. This element of black consciousness implied that certain aspects of classical liberalism did not apply to African Americans. Consequently, the NAACP's integrationist philosophy left it wholly unprepared for the difficult questions which lay ahead. Desegregation, in the

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30Bolling is often separated from the other Brown cases because it involved segregation in the District of Columbia. The Fourteenth Amendment was directed at the states; therefore, segregation within the District of Columbia was challenged under the Due Process Clause of the Fifth Amendment.
immediate aftermath of the Brown decision, was defined merely as insuring that blacks had legal access to public white institutions (Preer, 1982). This interpretation reflected the belief that the tenets of atomistic individualism constituted universal principles which were specifically applicable to every aspect of the black man's struggle for equality. As long as the issue revolved around the rights of individual blacks to attend all-white public schools or universities, then the matter seemed fairly clear-cut.

Once the problem shifted to defining what public school and state higher education systems needed to do to satisfy the constitutional requirements of Brown, the issues became exceedingly more complicated. Among the thorny institutional aspects of public higher education desegregation were questions about the future status of state supported black universities. Did these institutions have a future role to play in an integrated system of higher education, or were they to be the unfortunate, though necessary, casualties of the need to remedy a century of intentional discrimination in higher education? The ethos of the black power movement of the 1960's intensified the suspicion of many blacks that integration was the belief that the only way blacks could be effectively educated was in the same classrooms with whites (Wilkinson, 1979, 46-48; Preer, 1982; Kujovik, 1987). DuBois had warned the NAACP of this very possibility. As a result, significant elements within the black community came to view
the NAACP's agenda of integration to be out of step with their vision of what was in the best interests of black Americans. In fact, the attempt to apply the NAACP's integrationist model to higher education raised fundamental questions about the entire basis for the Court's decision in Brown. The problems associated with the application of Brown to higher education are the subject of Chapter Three.
CHAPTER 3. APPLYING BROWN TO HIGHER EDUCATION

Brown and its Unanswered Questions

One way to evaluate the significance of the Supreme Court's decision in Brown v. Board of Education is by contrasting it with the tide of American history since 1619, when the first Africans arrived in Jamestown. Viewed from the perspective of 335 years of slavery and Jim Crow segregation, the tide of American history can be justly interpreted as a tale of black exclusion from the bounty of America. It is precisely this burden of history which gives Brown its place in the annals of constitutional law. In a sense, Brown held out the hope of redemption - and this redemption had come from a most unlikely source. May 17, 1954 - the day the Supreme Court handed down its decision in Brown - seemed like "A Day of Atonement" for an institution which could be viewed as one of the chief bastions of white power in America (Wilkinson, 1979, 4).

Though there was much in the Court's traditions to give the black man hope that the Court might grant him a favorable hearing (After all, did not Madison believe that the true test of a democracy is how well it protects the rights of those in the minority?), there was nothing inevitable about a partnership between the Court and the black man. "Indeed," Wilkinson concludes, "its very lack of inevitability - the striking incongruity of it - lent Brown and events thereafter their magical and almost unprecedented power" (Ibid, 4-5).
Brown became a watershed in the struggle for African American inclusion into the body politic precisely because Plessy had been the norm (Miller, 1982; Orfield, 1996).

Not only did Brown cut against the current of American history with respect to black Americans, it held out the hope of freeing the nation from the ugly details of its past. Ten years after Gunnar Myrdal's An American Dilemma reminded the country of the peculiar place of race and racism in American consciousness, Brown offered the nation an opportunity to chart a different course. Moreover, the Court in Brown appeared to place great faith in the power of education and the institution of the public school to lead the way toward this new dawn. To Justice Felix Frankfurter, the public school represented "the symbol of our democracy and the most pervasive means for promoting our common destiny" (McCullum v. Board of Education, 333 U.S. at 231, J. Frankfurter, concurring). After a century of compulsory public education in America, the public school as an agent of assimilation - that is, converting Irish, German, Polish, Italian, Greek, and Swedish immigrants into Americans - had been generally accepted (Bickel, 1978; Wilkinson, 1979). Integration could work, it was argued, and "the kids themselves would make it work" (Wilkinson, 1979, 41). Thurgood Marshall told the Court:

These same kids in Virginia and South Carolina - and I have seen them [black and white children] do it - they play in the streets together, they play on their farms together, they go down the road together, they
separate to go to school together, they come out of school and play ball together. They have to be separated in school (Friedman, 1969, 239).

Thus, Brown spoke of education's promise and its potential, nothing of its problems. Education would point the way toward a new age envisioned by the reformers; after all, did not Horace Mann say "education is the great equalizer of the conditions of men?" Thus, Brown v. Board of Education stands out as a monumental victory in the struggle to incorporate black Americans into the mainstream of American life.

Despite the idealism which Brown inspired, implementing the Supreme Court's decision would prove to be extremely difficult. In the first place, the South was not ready to abandon racial segregation in its schools without a fight. Thus, the NAACP's victory in Brown represented the beginning, not the end, of a new phase in the struggle to secure equal educational opportunities for blacks. More importantly, Brown failed to answer many critical questions. For example, if segregated schools were unconstitutional, then what kind of schools were? Was the evil segregation itself, or the state's imposition of it (Wilkinson, 1979, 29)? Did Brown mean that black colleges and universities were unconstitutional remnants of Jim Crow systems of higher education that must now be eliminated (Miller, 1982)? This chapter concentrates on the difficulties that courts and federal agencies would have in attempting to apply the mandate of Brown in higher education.
This chapter begins by arguing that the heart of the dilemma which Brown posed stemmed from the very framework which had been so successful in overturning the legality of "separate but equal" education: the belief that desegregation was a personal right to which each black citizen was entitled. To deny blacks admission into schools and universities simply because of their race violated the principle of the fundamental equality of all men espoused in the Declaration of Independence. Once the issue was defined in that way, the political and legal battles over desegregation turned on the question of whose rights should prevail. In the initial phase, the predominate question was whether or not the right of blacks to attend integrated schools would outweigh the right of popular (mostly white) majorities to control their school systems.

Secondly, this chapter focuses on how the demise of the separate but equal doctrine forced public black colleges to justify their right to exist. It will be demonstrated that desegregation and the Black Power movement gave rise to a racial consciousness which came to view the NAACP's traditional integrationist ideology as a threat to one of the black community's most cherished institutions - the black public college. This fear intensified as the locus of desegregation efforts shifted from insuring the admission of individual black applicants to white schools to the need to dismantle "root and branch" (Green, 391 U.S. 430 [1968]) the
vestiges of *de jure* segregation. Judges, lawyers, educators, legislators, and activists debated whether the application of *Brown* necessarily required the elimination of state-supported black colleges.

Thirdly, I discuss a number of significant higher education desegregation precedents which attempt to apply principles derived from elementary and secondary school desegregation cases. This chapter shows that these precedents leave many pertinent questions concerning the fate of black colleges unanswered. These cases situate the Mississippi case in a constitutional framework and present the range of alternatives that was available to the Supreme Court when it considered *United States v. Fordice*.

**Desegregation as a Personal Right**

From the very beginning, the NAACP had defined desegregation as the right of blacks as individuals to have legal access to white institutions on the same basis as any other citizen. The 1955 rearguments in the remedial phase of *Brown* afforded the NAACP another opportunity to reiterate its core philosophy. *Plessy*, in their view, was wrong because it allowed states to use race as the rationale for denying black Americans certain constitutional rights that were freely exercised by other Americans. To use race in such a way was irrational, constitutionally suspect, and violated the spirit of liberty inherent in the Declaration of Independence. The NAACP’s doctrine of individual rights undergirded its
argument in 1955 when it attempted to persuade the Supreme Court to mandate specific deadlines whereby Southern school districts would be required to demonstrate compliance with Brown. The right of blacks to attend integrated schools was "present and personal" and deserved to be protected without delay.

By contrast, the South urged the Court to proceed with caution, countering with a rights theory of its own. "The overwhelming majority of people regard that decision [Brown] as a serious blow which they did not expect" North Carolina's attorney general declared (Friedman, 1969, 448). The current system of segregated education in the South enjoyed widespread public approval from Southern taxpayers. In addition, the Constitution did not grant explicit authority to the federal government with respect to education; therefore, education was a state matter. If federal judges presumed to dictate to local school boards how the schools should be run, they would be unjustly acting without the consent of the governed, thus undermining the basic contractual relationship between citizens and their rulers.31 Forced integration, Sou-

31 Interestingly, other commentators noted that Brown presented a conflict between segregation's forced separation of the race and integration's forced imposition of association. Ernest van den Haag (1957) complained that the Court attempted to solve the problem of forced segregation by restricting the right of disassociation. Herbert Weschler (1959) suggested that the principle announced in Brown - that "separate educational facilities are inherently unequal" - lacked a principled foundation. The real dilemma which the segregation cases posed was whether the state had the power to restrict the right of association and, for that matter,
thern attorneys argued, was tantamount to a deathknell for public education in the South. Integration, if implemented, had to proceed slowly in order to win public acceptance; they warned that Southerners would respond negatively to any attempt from without to forcibly impose integrated schools.32

The NAACP dismissed suggestions by Southern attorneys that their school districts should be granted flexible, open-ended timetables with which to convert segregated school systems to integrated ones. Thurgood Marshall retorted, "I don't believe any argument has ever been made to this Court to postpone the enforcement of a constitutional right. The argument is never made until Negroes are involved" (Friedman, 1969, 525). The NAACP considered proposals for "gradual integration" the equivalent of asking African Americans to wait until the South voluntarily conceded to them their

the right of disassociation. Neither of these men were apologists for the South; on the contrary, they agreed with the result in Brown but questioned the reasoning behind the decision.

32In this vein, Maryland's attorney general cited the fact that the state had discontinued its system of providing out-of-state tuition scholarship for black graduate students rather than providing graduate and professional educational opportunities for blacks within the state as proof that the South, if left to its own internal processes, would right itself. Thurgood Marshall replied that the state had only abolished this out-of-state program in 1954, sixteen years after the Supreme Court declared in Missouri v. Gaines and eighteen years after its own Court of Appeals in University of Maryland v. Murray (169 Md. 478 [1936]) had declared such practices to be unconstitutional. "So that it took them six-teen years to catch up with the law of their own Court of Appeals and the law of this Court and use that as the basis for saying that because of their good faith we should work the problem out" (Friedman, 1969, 523).
inalienable, antecedent rights under the Declaration of Independence and the Constitution. Though the NAACP did not use this precise language, it essentially argued that if the Court tolerated delay in the implementation of desegregation, it would be guilty of capitulating to what Tocqueville called the "tyranny of the majority" (1988). In short, the 1955 reararguments of Brown afforded the NAACP another occasion to reaffirm its faith in the American Creed.

The ruling in Brown II represented, in large measure, a victory for the South. Though the justices did not give the lower courts a "blank check," the ruling provided federal judges with great latitude in desegregation cases. The Court gave the following directives to lower courts:

1. Remember that school authorities, not the courts, have the primary duty for determining how and when schools are integrated.

2. Require the school board, however, to make a prompt and reasonable start toward full compliance with the May 17, 1954 ruling.

3. Once such a start is made, the board may be given additional time to complete integration.

4. The burden rests on the school board to establish the need for additional time. Do not grant a postponement unless you are convinced the board is acting in good faith to bring about integration at the earliest practicable date. Among the factors which may be considered in deciding whether a school district may delay integration are necessary administrative rearrangements, adjustments of the transportation systems, revision of school district lines to accommodate the altered situation, revision of local laws and regulations.

5. Do not allow school boards to postpone integration merely because the board members or their community favor segregation.
6. Plans calling for desegregation by steps are permissible provided authorities, acting in good faith, are proceeding with all deliberate speed.


Though Brown II placed local school districts under the scrutiny of federal judges, the Court made it clear that "school authorities, not the courts, have the primary duty for determining how and when schools are integrated" (349 U.S. 294, 300). The justices directed local officials to make "a prompt and reasonable start" toward creating unitary systems and called for the development of plans to accomplish that end; federal judges were charged with making sure these efforts proceeded in "good faith." But the Court failed to elaborate on what it meant by phrases such as "with all deliberate speed," "a prompt and reasonable start," and "good faith." The Supreme Court issued no specific decrees, promulgated no minimum steps required to satisfy its mandate, and gave no timetables for the accomplishment of any of its directives. Lingering questions about what Brown II's implementation decree actually meant provided the opening that many Southerners had hoped for in order to delay integration indefinitely. The Brown decisions mobilized

33Largely as a result of the intense opposition to integration in the South and, with rare exceptions, a lackluster enforcement effort from the federal government, only 2.3 percent of southern blacks were enrolled in desegregated schools by 1964 - ten years after Brown (Note, 1967). A whole cluster of mechanisms were devised to obstruct Brown including "freedom of choice" plans, school closures,
Southern congressmen, governors, state legislatures, educational officials, and citizens groups in a determined effort to ensure that the South's right to maintain segregated schools prevailed over the black man's right to education on an integrated basis.

One year later, the Supreme Court's decision in Florida ex. rel. Hawkins v. Board of Control (350 U.S. 413), a higher education case, further consolidated the view that desegregation was the personal right of an African American student to attend white institutions on the same terms as every other citizen. Brown II's implementation decree gave federal district judges wide discretion to grant delays to local school districts for administrative considerations related to the conversion of segregated school systems to integrated ones. The University of Florida Law School insisted that it should not be required to admit Virgil Hawkins until a systematic analysis of the likely impact of desegregation on both the Florida public school system and its colleges and universities could be conducted (Preer, 1982, 141-142). In

public aid to private schools, and optional attendance zones (which allowed white parents to send their children to all-white schools even if all-black schools were more proximate to their homes). Cases which involved tactics designed to evade desegregation include Cooper v. Aaron, 358 U.S. 1 (1958), Hall v. St. Helena Parish School Board, 197 F. Supp. 649 (E.D. La., 1961), Griffin v. County School Board of Prince Edward County, 377 U.S. 218 (1964), Green v. School Board of New Kent County, 391 U.S. 430 (1968), and Raney v. Board of Education of Gould District, 391 U.S. 443 (1968). See also (Carter, 1959; Peltason, 1971; Wilkinson, 1979; Morris, 1984; Orfield, 1996).
other words, the *institutional* impacts of desegregation had to be assessed before blacks as *individuals* could be integrated into white universities. *Brown II*’s implementation decree, the state of Florida contended, must apply to higher education.

For the NAACP, Florida’s argument was all too familiar: the rights of whites had to be taken into account before desegregation could proceed. What the state really wanted, the NAACP replied, was the right to delay the admission of blacks to its universities for as long as possible. The NAACP argued that this case was consistent with pre-*Brown* precedents in graduate and professional education where the Court required immediate admission of black applicants to the schools in question. *Brown II*’s "with all deliberate speed" decree, to the extent that it allowed for administrative complexities to delay the implementation of desegregation, did not apply to higher education.

The Supreme Court accepted the NAACP’s premise. In a *per curiam* decision, the justices denied certiorari to the Hawkins case and then recalled and vacated its order of May 24, 1954. In ordering the case remanded, the Court declared that the *Brown* implementation decree had no bearing on a case involving a black applicant to a state law school:

> As this case involved the admission of a Negro to a graduate and professional school, there is no reason for delay. He is entitled to prompt and immediate admission under the rules and regulations applicable to other qualified candidates. *Sweatt v. Painter*, 339 U.S. 629; *Sipuel v. Board of Regents of the University*

The Court's disposition of the Hawkins case indicated that it thought that the issues presented constituted no new legal questions that had not been resolved by Sweatt, Sipuel, and McLaurin. In rejecting Florida's arguments that the Brown implementation order did not apply in Hawkins, the Court, like the NAACP, refused to consider the institutional aspects of higher education desegregation. Subsequent per curiam decisions by the Supreme Court reiterated the same point: the "deliberate speed" principle was inapplicable to higher education. By endorsing the NAACP's framework, the Hawkins case contributed to the prevailing notion that progress toward desegregation could be measured fairly easily; all one needed to do was to conduct a "head count" of the number of blacks who had reached the "promise land of white classrooms" (Wilkinson, 1979, 46). It would not be until United States v. Fordice in 1992 that the Supreme Court would render a full opinion focusing on the institutional aspects of desegregation in higher education.

The effect of the Supreme Court's decisions in *Sipuel, Sweatt, McLaurin, Brown*, and *Hawkins* hardened the view that desegregation was an individual right in two important aspects that this dissertation will concentrate on. In the first place, by defining desegregation in terms of a personal right, the courts left untouched the power of the state to alter admissions policies in "racially neutral" ways that had the effect of nullifying the hard-won legal rights of black Americans. The NAACP's legal thrust against segregated education had only contemplated *qualified* black applicants who had been denied admission to white institutions merely because of their race. However, what if blacks either failed to meet the qualifications or if universities and state legislatures enacted policies and procedures which, for all intents and purposes, ensured that few blacks would meet the requirements for admission? Now that the "separate but equal" doctrine in education had been overturned, the burden had shifted to individual black applicants to prove that they could comply with whatever standards they would be required to meet (Preer, 1982, 144).

Starting in 1956 around the time of the Southern Manifesto, Southern states began changing their admissions

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35On March 12, 1956, one hundred Southern congressmen and all but three of the region's senators issued the "Southern Manifesto," a document in which they pledged to overturn the Supreme Court's integration decisions. The resolution was apparently triggered by discussions within the Eisenhower administration concerning civil rights legislation pursuant to *Brown*. The manifesto was undoubtedly designed to...
policies in higher education. These practices were consistent with the general hardening of opposition to the Brown ruling throughout the South during this period. Some were openly racist in their purpose to prevent integration at any cost; however, others were couched in racially neutral language that in practice accomplished the same end. For example, the University of Florida Law School began to require a score of 340 from all its applicants on its admissions examination. When Virgil Hawkins took the test, he scored only 200, effectively ending his efforts to enroll in the state’s all-white law school (Ibid, 145). In this case, the change in Florida’s admissions criteria could be justified on educational grounds. The unfortunate conclusion to Hawkins’ quest for admission to the University of Florida graphically illustrated the fact that the securing of legal rights by blacks and the ability to exercise them were two entirely different things.

Other states enacted new admissions policies which effectively put integrated higher education out of reach for most African Americans. Louisiana required each applicant to state-supported universities to submit certificates to the schools to which they sought admission attesting to his or
her eligibility and good moral character. The certificate had to be signed by the appropriate parish superintendent of education and high school principal. However, the state also passed laws which permitted the dismissal of any principal, teacher, or state employee who advocated integration. Not surprisingly, few people chose to sign the required certificates for fear of losing their jobs (Dorsey, 1981, 92; Miller, 1982, 592; Preer, 1982, 145). Georgia required applicants to submit certificates from alumni of the school they wished to attend; few alumni from white universities wanted to endorse the application of a black student (Preer, 1982, 145). In 1959, the Georgia General Assembly limited the age for undergraduate admission for its colleges to twenty-one and for graduate and professional education to twenty-five. Evidently, this law reflected the fact that black applicants, forced to endure a legal marathon in order to secure admission, tended to be older than their white counterparts (Ibid, 145). In 1963, Mississippi, recognizing that blacks generally scored significantly below the mean test scores of whites on the American College Test (ACT), began requiring minimum test scores on the ACT as a tactic to prevent blacks from enrolling in all-white universities. This new policy followed the controversy surrounding James Meredith’s petition to enter the University of Mississippi. This
policy played a pivotal role in the adjudication of United States v. Fordice. More attention will be devoted to this subject in the next chapter.

Secondly, by minimizing the importance of institutional issues, the Hawkins case neglected to take seriously the impact that desegregation would have on public historically black universities. The NAACP's legal offensive in cases such as Sweatt, McLaurin, Brown, and Hawkins predicated themselves on the assumption that black applicants could not hope to receive education of a substantially equal quality in a segregated setting. Because segregated education represented in the minds of many observers an egregious violation of the individual rights of black Americans, the potential ramifications of integration on black colleges was hardly considered. Indeed, the Court, by declaring that "separate is inherently unequal," (347 U.S. 494) appeared to endorse the notion that separate education - meaning, black education - necessarily meant inferior education. This implication set in motion a debate about the future of black colleges which, among other things, led many black Americans to rethink the NAACP's integrationist ideology. The "opening rounds" of this debate are discussed in the next section.

**Desegregation and the Future of Black Colleges**

Kujovich (1987) captured very pointedly the paradox which the politics of desegregation forced upon historically black colleges:
At midcentury the black public college was both a vestige of unconstitutional discrimination and a vestige of self-help and affirmative action by the black population. It was the product of segregation, but it also represented the achievements of a black academic community forced to develop in isolation while undertaking the most difficult educational task in the history of the nation. With the demise of the separate but equal doctrine, the worst qualities of the colleges made them candidates for extinction while their best qualities made them essential institutions serving the needs of the black community - needs that white public colleges were not likely to serve (159).

Because the black public college was both an artifact of segregation and a vehicle of self-help within the black community, many African American leaders came to vastly different conclusions as to what integration should mean for the future of these institutions. Some black Americans viewed these schools as obstacles that needed to be removed if the goal of full integration into American society were to be achieved. Lewis (1949) wrote:

In the final analysis, the system of higher education for Negroes will remain relatively warped and inadequate no matter what happens short of elimination so long as the kingpin in the system - the publicly-supported college for Negroes only - continues (361).

The rapid upgrading of black colleges in the 1940's by Southern states trying to discourage integration helped to reinforce this view. Walter White, in a strategy conference at Howard University prior to the Brown cases, complained:

Each time the NAACP wins a court case against a Southern state, new buildings spring up on the campuses of the colored land-grant colleges. We must make the public conscious of the fact this is a waste of tax payers money. It would be unjust to Northern states to require additional Federal expenditures to "equalize" the funds for colored land-grant colleges because it is the Northern states that already bear
the greatest burden of taxation (1952, 342).

Earlier in the same discourse, White clearly expressed his conviction that black colleges were not only inferior to white institutions; in addition, agitation on the part of blacks for additional funds for these schools (unless their programs were radically revised) was a waste of time:

In the field of higher education, the colored people of the United States must be willing to give up the little kingdoms that have been carved out in Southern states for so-called land-grant colleges. These schools do not begin to match the quality of white institutions that come under the same heading. It is wasteful and a brake on progress to agitate for additional funds to run these schools unless their programs are radically revised. There is a place for the college that is currently charged with performing the land-grant function but this place must not be on a segregated basis. The colored land-grant colleges, as the figures I am about to quote will reveal, have never received their just share of Federal and state support (Ibid, 341).

White's remarks were consistent with a significant change in the NAACP strategy that had occurred since the Sipuel decision. In the wake of the Gaines case, the creation of new, separate academic programs on black campuses had been treated as gains in educational substance, though temporary setbacks for the cause of outlawing segregation. Black educational leaders, fully aware of the academic shortcomings of their institutions, often welcomed these new investments, even while recognizing that Southern states were more interested in preventing integration than they were concerned about the educational welfare of black students (Preer, 1982, 86-87). However, by the late 1940's the NAACP had decided to
launch an all-out offensive on segregation in education. New programs at black colleges were henceforth seen as wasteful, duplicative efforts which impeded the goal of opening access to white universities. The new enhancements of black colleges were viewed as desperate attempts on the part of an unrepentant South to make separate schools more equal in the hope of avoiding integration altogether. Thus, the NAACP’s new legal strategy left no room for black colleges once the goal of obtaining legal access to white state universities had been achieved (Ibid, 87).

In this respect, White’s views were reminiscent of the association’s response to DuBois’ doubts about the NAACP’s legal strategy against segregation during the 1930’s. White continued to believe, as he did in the 1930’s, that racial segregation was inherently evil. The expansion of black colleges should not be encouraged because they would never be treated as the equal of white colleges. As far as the NAACP’s earlier support of enhancements at black colleges was concerned, White’s position sounded very much like J. E. Springarn’s rebuttal to DuBois: practical concessions to segregation from time to time do not necessarily overturn our fundamental conviction that racial segregation must always be opposed.

James Nabrit, Jr., a law professor at Howard University and a legal tactician for the NAACP, had expressed similar ideas in a conference of black college presidents two years
earlier. However, Nabrit’s tone not only was less threatening, his perspective acknowledged that the coming of integration would plunge the black public college through a difficult period of soul searching:

The Negro Land Grant Colleges must resist political efforts to saddle courses and curricula upon them which they are not organizationally [or] financially equipped to operate on a high level of efficiency. They should resist efforts to use them to nullify recent Supreme Court decisions. . . [T]he Negro Land Grant College must adjust its program to an integrated system of education in the South, where segregation will no longer exist, where competition will be terrific, where inferior plants, poorly trained teachers, weak administrators, curricula inadequate for a democratic society, and unsound educational policies will no longer be tolerated (1950, 79, 80-82).

Like White, Nabrit opposed enhancements at black schools which he viewed as last-ditch attempts to preserve Jim Crow segregation and encouraged black college presidents to resist such efforts. However, Nabrit’s remarks also reflected the sense that if black colleges were to have a role to play in a post-Plessy future, their leaders needed to be prepared for changing social conditions. A number of black educational leaders were pondering exactly what that future might mean for black colleges (Thompson, 1952; Atwood, 1952; 1958; Jenkins, 1952; Clark, 1958; Nabrit, 1958). Charles Thompson put the matter rather succinctly: "the burden is upon the

36In light of the political disenfranchisement of most African Americans in the South and the fact that black college presidents had to answer to their state legislatures, it is not clear how the leaders of these institutions could have prevented their states from imposing new academic programs on their campuses designed to keep black students at black colleges.
Negro publicly-supported college to justify its continued existence and future role" (1958, 129).

Other black educators responded to Thompson's challenge. S.M. Nabrit, president of Texas Southern University, the university created by *Sweatt v. Painter*, argued that the legacy of Jim Crow segregation in education meant that the average Negro cannot compete on equal terms with the average white student in our society. This fact may be embarrassing to Negroes and to white people alike, but it is undeniable. It is this retardation which requires the continuation of Negro institutions of higher learning, and it certainly suggests one of their prime functions: remedial education and professional education for persons with the potential but lacking many of the educative experiences and skills essential for first class competition (1958, 415).

F. D. Moon, president of Langston University, Oklahoma's black land grant school, agreed with Nabrit's assessment: "For a great many years to come, if Negro youth are to receive higher education, there will be a pressing need for the retention of the one-time Negro college" (1962, 325). Nabrit and Moon echoed the sentiments of many black educators who believed that the legacy of discrimination in segregated educational systems had ill-equipped most African Americans to compete on equal terms with their white counterparts. Therefore, they contended that legal access to white universities would not be an adequate remedy for black students who continued to be the victims of discrimination. In fact, they feared that a "desegregation only" remedy might actually
decrease educational opportunities for most African American students (Kujovich, 1987, 160-161).

Moreover, the black college's struggle to justify its continuation found support in the educational profiles of many of its students. While the National Scholarship Service and Fund for Negro Students studied the success of the more capable black undergraduates enrolled in integrated universities (Ibid, 161), black colleges reported serious educational deficiencies in a substantial proportion of their student bodies. For example, both Jackson State College in Mississippi and A & M and Normal College in Arkansas (now known as Arkansas-Pine Bluff) had instituted remedial programs for college freshmen for students who lacked basic reading skills (Troup, 1949; Stephan, 1962). Maryland's Morgan State College operated a special remedial curriculum which included nearly half of the entering freshmen class during the 1950's because the students' performance on placement tests indicated that they were unprepared for college level work (Grant, 1958). At North Carolina's five black public colleges during the early 1960's, the average score on either the verbal or math portions of the Scholastic Aptitude Test (SAT) was below 300 (Harris, 1962, 291-292). Therefore, though some black students were prepared to excel in white universities, many others still had a vested interest in the perpetuation of
black colleges. In the meantime, Southern states continued to improve black colleges in an effort to avoid the mandate of Brown.  

In addition, the prospect of the closure and/or merger of black colleges with white institutions jeopardized the status of another constituency that had a vested interest in the continuation of black colleges: black faculty and administrators (Kujovich, 1987, 162-163). Black colleges had served as one of the two major employers for black academics under the separate but equal regime; integration presented the distinct possibility that black educators, themselves the victims of discrimination, might be displaced for failing to meet up to white standards. In a region which routinely refused to recognize black competence, even the most confident black academics could not be assured of employment.

Furthermore, events surrounding the integration of the University of Louisville in Kentucky fed to these fears. In 1951, Louisville agreed to admit black students to all of their programs. As part of this action, Louisville Municipal College, a branch of the university reserved for black

37In 1951, Georgia provided $2 million for new buildings, increased operating expenses for its black colleges, and equalized faculty salaries at white and black campuses. Louisiana, under court order to desegregate the New Orleans campus of Louisiana State University (now University of New Orleans [UNO]), began construction of Southern University in New Orleans (SUNO). In 1960, the U.S. Civil Rights Commission specifically said that upgrading Negro colleges was not a proper remedy and assumed that equality of educational opportunity was only available at white colleges (Preer, 1982, 147).
students only, was discontinued. The faculty of the Municipal College included eighteen persons, including four with earned doctorates and at least seven persons who had served the college for eight or more years. However, the University Board of Trustees subsequently fired the entire college faculty. Subsequent negotiations led the university to hire one member of the college faculty (Atwood, 1951; Kujovich, 1987, 162-163). The events at Louisville underscored the fears of many African Americans that the implementation of Brown might force many qualified black academics out of the teaching profession.

Thus, the demise of the separate but equal doctrine presented black public higher education with a profound dilemma. Black educators were divided: some welcomed the opportunity for black colleges to compete with white institutions and to be judged by the same standards as their white brethren.38 Others, while welcoming the demolition of legal barriers that prevent blacks from enrolling at white universities, still wanted to preserve the right of blacks to voluntarily choose

38A concrete example of this is seen in the decision of the Conference of Presidents of Negro Land-Grant Colleges in 1955 to terminate its existence and accept the invitation to join the Association of Land-Grant Colleges and State Universities. In another example, the Southern Association of Colleges and Schools (SACS) discontinued its two-tiered method of accreditation whereby white universities either received an A rating or were not accredited and black universities were ranked either A, B, or C. From now on, the same policies would apply to both. Competing on an equal basis for the first time, about half of the sixty-five black colleges evaluated passed muster (Preer, 1982, 148-149).
to attend predominately black colleges. Moreover, many felt that the reality of racial segregation in elementary and secondary schools made black colleges, at least in the short run, an absolutely essential link between blacks and access to higher education. Yet, at the same time, many of these same people predicted that integration would cause black colleges to lose their best students, athletes, and faculty to white institutions. These losses presented the prospect of heaping new burdens on black institutions in addition to their historic traditions of being underfunded and isolated from the academic mainstream (Preer, 1982, 149). These traditional handicaps also suggested that black universities would face formidable obstacles in accomplishing the goal of desegregating their student bodies.39 While some blacks clearly believed that some black institutions would inevitably cease to exist, the slow pace of integration of

39The experience of West Virginia State and the enrollment of Bluefield State College in West Virginia and at Lincoln University in Missouri represented exceptions which illustrated the rule. Shortly after the Brown decision, these colleges attract substantial numbers of whites to their campuses. As part of its effort to shed its all-black identity, West Virginia State dropped out of its all-Negro athletic conference and joined the West Virginia Intercollegiate Conference. But the experience at West Virginia were atypical of most black colleges in practically every respect. The college was located in Charleston and had low tuition. Most black colleges were located in the rural hinterlands or in the same city with other white colleges. Furthermore, West Virginia's relatively small black population affected the pace of change in that state. The racial climate in other Southern states where the black population was substantially larger tended to be more politically charged and resistant to change (Preer, 1982, 148).
white Southern universities meant that the wholesale disappearance of black colleges would not occur any time soon (Jenkins, 1952; Stephan, 1958; Moon, 1958; 1962; Henderson, 1958).

Therefore, despite the concerns voiced by many black educators, desegregation continued to be defined by many observers as simply the legal right of blacks as individuals to attend white institutions during the 1950’s and early 1960’s. Though theoretically integration was a "two-way street," many black and white proponents of Brown appeared not to take the idea of whites entering black colleges very seriously. Thus, progress toward desegregation was measured largely in terms of how many black students had been admitted into white universities (Redding, 1958; Valien, 1958; Wilkinson, 1979; Preer, 1982).

However, the politics of desegregation radically changed in the mid-1960’s. The passage of the Civil Rights Act of 1964, the 24th Amendment, and the Voting Rights Act of 1965 (to the extent that these enactments represented the goal of securing the basic civil rights of African Americans that allowed blacks and whites with competing ideologies to organize around) shattered the civil rights policy consensus (Piven and Cloward, 1971). Without the goal of civil equality to unite them, genuine divisions emerged over the direction the movement should take. The collapse of the civil rights policy consensus during the mid-1960’s and the ascendancy of
the Black Power movement created an opening for the supporters of black colleges to voice their trepidations about the implications of Brown more openly. Armed with a growing sense of race pride and consciousness, blacks not only became more defensive of black colleges (as well as black culture and black institutions generally), but many openly challenged one of the central assumptions on which the Brown decision was based - the presumed inferiority of black educational institutions. That is the subject of the next section.

**Black Power, Black Colleges and Brown**

Civil rights advocates were accustomed to resistance to integration from whites; however, the Black Power movement represented resistance to integration from blacks.⁴⁰ Many within the civil rights establishment were caught off-guard by the new insurgency. Calls for "Black Power" replaced the singing of "We Shall Overcome;" peaceful, non-violent demonstrations gave way to urban riots; civil rights stalwarts like Martin Luther King, Roy Wilkins, and Bayard Rustin were accused of "not being radical enough" by figures such as Stokely Carmichael, Huey Newton, and H. Rap Brown. In particular, the Black Power insurgency called into question the traditional civil rights establishment's conceptualization of the race problem:

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⁴⁰White racists bent on preserving segregation capitalized on the Black Power movement, maintaining that it was proof that integration was unpopular with both races.
What we are discovering, in short, is that the United States—all of it, North as well as South, West as well as East—is a racist society in a sense and to a degree that we have refused so far to admit, much less face... The tragedy of race relations in the United States is that there is no American Dilemma. White Americans are not torn and tortured between their devotion to the American creed and their actual behavior. They are upset by the current state of race relations, to be sure. But what troubles them is not that justice is being denied but that their peace is being shattered and their business interrupted (Silverman, quoted in Carmichael and Hamilton, 1967, 5).

Black Power advocates rejected Gunnar Myrdal's view that Americans were inwardly torn between their ideals of equal justice for all and their actual treatment of African Americans. Myrdal's conceptualization of the race problem had been enthusiastically embraced by the NAACP and other civil rights organizations and had been specifically acknowledged by the Supreme Court in footnote 11 of the Brown opinion. The Black Power critique asserted that the NAACP's vision—and the vision of other integrationists as well—was naive. Rather, they maintained that America was fundamentally, and perhaps incurably, a racist society. The non-violent, "turn the other cheek" tactics of King, ultimately, were misguided; the only force that America respected was power. Some drew parallels between the plight of African Americans to that of colonized and newly independent peoples of Asia and Africa; blacks in America, it was argued, were not simply the victims of Jim Crow segregation but internal colonialism (Carmichael and Hamilton, 1967; Young, 1970). Often, their critiques suggested that the solution to the black man's plight could
not be found within the confines of American democratic and capitalist institutional arrangements.

Carmichael and Hamilton in *Black Power: The Politics of Liberation in America* explicitly expressed utter contempt for the goal of integration which had been pursued by civil rights organizations such as the NAACP and the SCLC (Southern Christian Leadership Conference):

... According to its advocates, social justice will be accomplished by "integrating the Negro into the mainstream institutions of the society from which he has been traditionally excluded." This concept is based on the assumption that there is nothing of value in the black community and that little of value could be created by black people... We recall the conclusion of Killian and Grigg: "At the present time, integration as a solution to the race problem demands that the Negro foreswear his identity as a Negro." The fact is that integration, as traditionally articulated, would abolish the black community (1967, 53,55).

Carmichael and Hamilton implied that *Brown*, because of its endorsement of integration, was a racist decision.41 Like many Black Power advocates, they feared that integration offered blacks entrance into white society but at the price of cultural extinction. Moreover, Carmichael and Hamilton

41 This same charge was repeated by Lewis M. Steel, an associate counsel for the NAACP, in a 1968 article in *The New York Times Magazine*. It was entitled "Nine Men in Black Who Think White." Steel criticized the Court for failing to articulate the principle that equality before the law was an absolute right which all citizens were entitled to, and official efforts to hinder the exercise of inherent constitutional rights would no longer be tolerated. Instead, the Court compromised, meaning that the rights of blacks to equal protection would have to be balanced against the rights of the very whites who had denied them equality. Steel was summarily fired after the article appeared; several members of the NAACP's legal staff quit to protest the firing.
doubted the relevancy of Brown in light of the fact that whites were abandoning the central cities in favor of the suburbs, leaving behind heavy concentrations of poor blacks in urban areas. "Clearly 'integration'--even if it would solve the educational problem--has not proved feasible... The real need at present is not integration but quality education" (Ibid, 157). Their analysis amounted to a rather stinging rebuke of those black students who had literally risked their lives in order to integrate the public schools and the colleges (Wilkinson, 1979, 47). Blacks did not need integration as much as they needed the power to control their own schools, neighborhoods, politics, and economies, the proponents of Black Power countered. In short, the advocates of Black Power made DuBois a prophet.

Thus, pre-existing black misgivings about the ramifications of Brown, the growing political clout of blacks as a newly enfranchised class, and the rhetoric of Black Power combined to produce a climate of greater black assertiveness (Young, 1970; Wilkinson, 1979; Preer, 1982). The leaders and supporters of black colleges became more proactive in defending their institutional interests. While the Coleman report and the Commission on Civil Rights extoled the virtues of greater desegregation by linking it with increases in academic achievement, black educators busied themselves with carving out niches for black colleges within the context of desegregated education. LeRoy B. Allen, president of Cheyney
State College in Pennsylvania, charged that events in West Virginia "proved once again that the constant tendency is to make Negro leadership expendable" (1966, 452). He envisioned desegregation as a process whereby "proportionately large numbers of Negro educators and administrators must be maintained" (Ibid, 452). He rejected the theory that blacks must be willing to surrender the educational benefits that black colleges afforded in order to gain the "greater blessings" that desegregation purportedly offered them. Rather than seeing traditionally black colleges as expendable now that Brown was the law of the land, Allen insisted that black universities were needed more than ever to meet the increasing demand for higher education.

This section makes no attempt to elucidate the multiple factors which contributed to the rise of the Black Power movement. However, in view of African American political history, a black backlash against Brown was not surprising. In Chapter One, it was argued that black nationalist thought in America has a long history. Thus, when Malcolm X (for whom many of the advocates of black power drew inspiration) urged blacks to pursue freedom "by any means necessary," he had said very little that David Walker had not already said in 1829. Rather, Malcolm X built on a preexisting political tradition in the African American community. The same was true of black separatists in the 1960’s who proposed creating a black nation out of several states (Brotz, 1966; Haley,
1992; Wilkinson, 1979). In addition, those who argued that the black man’s plight could not be solved until capitalism was either overthrown or radically restructured had said little that was new; Chapter Two discussed in detail the lively debate between the legalists (the NAACP and its allies) and those favoring economic redistribution during the 1930’s. While the Black Power movement per se did not command a mass following, it nevertheless articulated a broad ideological framework which was shared by many African Americans. Its militant emphasis on black pride and self-determination appealed to broad segments of the black community. Thus, many blacks sympathized with many of the broad goals articulated by the proponents of Black Power while rejecting some of the more specific positions and tactics of the movement (Young, 1970, 329).

Thus, as black educators became more resentful of the notion of the "inherently unequal" nature of black education, Jencks and Reisman published an article in the Harvard Educational Review on the shortcomings of black colleges that proved to be the functional equivalent of the 1965 Moynihan Report on black family life.42 The authors described black

42Daniel Patrick Moynihan (1965), among other things, stressed that rising rates of out-of-wedlock births, female-headed homes, and welfare dependency were among the most central problems facing lower-class blacks. His suggestion that these problems stem from previous patterns of inequality that originated in slavery and that certain aspects of this legacy were pathological triggered an angry response from many corners of black academia and the civil rights community (Hare, 1969; Alkalimat, 1969; Staples, 1970; Hill, 1972;
colleges as "academic disaster areas" (1967, 55), with little chances for successful integration (Ibid, 57). They listed a host of factors which would frustrate efforts to desegregate these institutions. These included the poor, rural locations of many of these schools, the competition of white public colleges in urban areas, the disparity of funding between white and black campuses, and the academic needs of poorly trained black students. They concluded, "Integrationists, both black and white, may disapprove of Negro institutions on principle, but it will be hard to demand that such institutions be closed as long as Negroes are voluntarily choosing them" (57).

Jencks and Reisman were roundly denounced for their conclusions. Their observations were dismissed as inaccurate, impressionistic, and not based on the day-to-day realities of black colleges. Stephen Wright, head of the United Negro College Fund, took the authors to task for numerous factual errors in their article (1967, 451-455). Albert Dent of Dillard University complained that Jencks and Reisman not only unfairly stereotyped these institutions, but that they ignored evidence related to the positive educational impacts of black colleges (Ibid, 461-464). Hugh M. Gloster of Hamp-

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Ladner, 1973). William Julius Wilson wrote, "The vitriolic attacks on the 'Moynihan Report'. . . helped to create an atmosphere that discouraged many scholars from exploring certain aspects of the lower-class black experience" (1984, 77).
ton Institute took exception to the glossy terms with which the authors spoke of white universities:

... It might interest Jencks and Riesman to know that some Negro students - after observing nonteaching professors, diverted graduate students, and stimulant-obsessed undergraduate students - feel that the large universities are also "academic disaster areas" (461).

The sense that smaller class sizes and more direct contact with professors made black colleges more conducive to black academic success manifested itself in the overwhelming opposition of African Americans to a 1967 proposal to phase out the law school at Texas Southern University. Between 1950 and 1965, TSU had produced 95 percent of the black members of the Texas bar (Jones, 1969). Interestingly, Herman Sweatt had dropped out of the University of Texas Law School before the end of his first year, while Henry Doyle, TSU's first law student and a witness who testified at Sweatt's trial, graduated and became a member of the Texas bar (Preer, 1982, 120). Thus, the reasons cited for the school's academic inferiority during the 1940's - its small classes and its black student body - had by the late 1960's provided the justification for TSU's continued existence (Ibid).

In summary, the Brown decision, far from being a "panacea," left many critical questions about the future of black higher education unanswered. Many proponents of integration continued to embrace an interpretation of Brown that included little concern for its impact on black colleges. Partly for this reason, a black backlash against Brown was not particu-
larly surprising. It is not argued here that all blacks who sought to preserve black institutions were proponents of Black power per se. Rather, the strength of the movement lay not in its numbers, but in its ideological appeal. Black Power had deep roots in the history of black nationalism, which was discussed in Chapter One. Second, black nationalism borrowed many of its core concepts—belief in inherent rights, the equality of all men, the right to self-determination, black self-help, and the social contract—from the Lockean tradition. Thus, certain aspects of the broad vision articulated by the advocates of Black Power resonated among a significant segment of the black community, even while the majority of blacks rejected the tactics of its most vocal practitioners.

The emerging vision of the defenders of black colleges amounted to a synthesis of certain aspects of the liberal tradition and the sense that black Americans had a unique historical experience which white society was obliged to take into account. Brown was intended to deal with compulsory racial segregation, it was argued; it had no bearing on the voluntary choices of blacks to attend colleges in which their race was in the majority. Black educators believed that the legacy of Jim Crow segregation left many prospective black college students unprepared to compete with white students on an equal basis; thus, if black institutions ceased to exist, many blacks would be denied the opportunity to pursue higher
education altogether. While black students on white campuses often felt alienated from the academic community, black colleges served as "creditable models, psycho-socially congenial settings, special-group-oriented enclaves, and as insurance against a possible declining interest in educating Blacks" (Tollett, 1972, 207). Tuition costs at black schools tended to be considerably less than at their white counterparts, thereby making them an economic bargain for the poor, regardless of race.

Supporters of black colleges not only wanted to preserve the right of blacks as individuals to make the voluntary choice to attend black schools, but they asserted that the black community had the right to maintain these institutions. These institutions were necessary in light of the unique history of African Americans, it was maintained, and served a remedial role in integrating blacks into the mainstream of American society. Furthermore, because the Brown opinion did not expressly state whether it meant to eliminate compulsory segregation or segregation regardless of its purpose, black educators were able to extol the virtues of the black college without being required to repudiate the entire Brown decision.

At the same time, black college leaders articulated a vision of black colleges as institutions committed to providing quality education for all regardless of race. They recognized that in the wake of Brown, historically black
schools needed non-racial justifications for their existence. Black educators often pointed out that African Americans had not established schools for the express purpose of racial segregation; thus, in a sense desegregation coincided with the historical traditions of black colleges. However, they believed that partly because of their legacy of underfunding, they were ill-equipped to compete on even footing with white schools for white students. Most whites perceived black schools as inferior institutions and did not see them as serious options for the pursuit of higher education. Thus, black college presidents during the late 1960's began to organize themselves in order in order to increase their political influence as well as their financial resources.

This point is illustrated by the position taken by the National Association for Equal Opportunity in Higher Education (NAFEO) during the Adams v. Richardson case, which will be discussed later in the chapter. In the NAFEO brief, the black colleges questioned whether public black colleges, established with specific state intent to separate whites from blacks, could be implicated as a collaborator in illegal segregation. Blacks, the NAFEO protested, were the victims of discrimination, not its perpetuators.

The National Association for Equal Educational Opportunity in Higher Education (NAFEO) was formed in 1969 by the presidents of both public and private black colleges. Initially, the organization was formed to challenge the Nixon administration’s lack of support for black higher education. The formation of NAFEO showed how black college leaders had come full circle since the Brown ruling in 1954. One year after Brown, the presidents of the black land-grant colleges had voluntarily disbanded their organization and merged into the Association of State Universities and Land-Grant Colleges. By 1969, black college presidents saw the need of organizing all-black organizations in order to protect their interests. The NAFEO’s agenda devoted very little attention to integration; instead, it focused on increasing the visibility
Not only did black colleges more aggressively pursue greater financial aid from philanthropic sources (a traditional benefactor of black education), but these institutions sought to gain a larger share of federal aid as well (Ware, 1966). Taking note of the massive expansion of federal aid to education during the 1960's, blacks determined that they should have a more equitable share of these funds.\(^4\) Furthermore, black educators insisted that black colleges needed to be financially compensated to remedy the effects of historical discrimination by the states in order to "catch up" with white universities. These enhancements, they maintained, were deemed essential for desegregation to occur on traditionally black campuses.

Meanwhile, Title VI of the Civil Rights Act of 1964 and the expansion of federal spending in higher education had given the federal government greater power to prod states toward desegregation, either by filing lawsuits or withholding federal funds. However, in light of the unsettled state of the law in this area, it still remained unclear how federal authorities would interpret the mandate of Brown in higher education. This background set the context for the

\(^4\)In 1970, black colleges received only 2 percent of all federal funds to higher education (U.S. Congress, cited in Preer, 1982, 194).
landmark Supreme Court decision in *Green v. School Board of New Kent County* (391 U.S. 430 [1968]). *Green* initiated a new phase in public higher education desegregation: the requirement that states not only grant legal access to white institutions to blacks, but that they dismantle dual systems of higher education for the races. The next section discusses the impact of *Green* on higher education.

"The Affirmative Duty to Desegregate"

The *Green* decision in 1968 crystallized the Supreme Court’s frustration with the snails-pace of public school desegregation as well as its determination to enforce *Brown*. In *Green*, the Court struck down a freedom of choice plan which required first and eight grade students to annually choose which school they wished to attend. In three years of operation, not a single white child had chosen the county’s all-black school. Though 115 black children had selected the all-white school, 85% of the blacks still attended the all-black school. The Court determined that the county’s "freedom of choice" plan had been devised to delay integration indefinitely. School boards had the "affirmative duty," the Court wrote, to promulgate plans that "promise realistically to convert promptly to a system without a 'white' school and a 'Negro' school, but just schools" (391 U.S. 430, 442). This duty, the Court elaborated, was the school board’s and could not be shifted either to parents or students.
Green firmly established that school boards were not simply required to cease unconstitutional actions; rather, they had a proactive responsibility to enact policies and procedures that would transform segregated school systems into integrated ones (Crump, 1993, 769). Moreover, the Court indicated that it would tolerate no more delay on the part of local school districts. Furthermore, the Supreme Court made it clear that it was not only interested in affirming the right of black students to attend all-white schools; rather, states were required to destroy all the vestiges of dual systems of education "root and branch" (391 U.S. 430). Green reflected the Court's growing impatience with the various ways state and local governments had manipulated Brown's implementation decree in order to prevent or to limit, as much as possible, the number of blacks able to attend integrated schools. In the wake of Green, future courts asked whether continued racial identifiability of schools resulted from state action or represented the voluntary choices of parents and students.

The Supreme Court's intent to eradicate dual systems of education "root and branch" increased the sense of urgency in the debate over the constitutionality of public black colleges (Note, 1970; Tollett, 1972). Up to this point, the Court had only concerned itself with the rights of African Americans to attend all-white public schools and state universities. Green forced future courts to grapple with the
issue of defining the remedial measures necessary in order for a state to fulfill its "affirmative duty" to desegregate. Among the principal questions that courts would have to address was whether the rights of blacks to desegregated education could be reconciled with the desire of a significant segment of the black community to maintain voluntary majority black public universities (Bickel, 1971, 239-240; Shimeall, 1980, 537-538).

It would not be until United States v. Fordice that the Supreme Court would render a full opinion on the nature of the state's "affirmative duty" to desegregate. Because of the Court's silence on this matter, the task fell to lower federal courts which, not surprisingly, came to conflicting conclusions. Alabama State Teachers Association v. Alabama Public School and College Authority46 (289 F. Supp. 1368, M.D. Ala. [1968]), decided a few months after Green, represented the first attempt to tackle the problem. In this case, a black teachers' organization at Alabama State College in Montgomery challenged the constitutionality of an act of the Alabama legislature creating a branch of Auburn University in Montgomery. They argued that the expansion of Auburn served to perpetuate a dual system of education in Alabama in violation of the Fourteenth Amendment and would undercut the efforts of Alabama State College to recruit white students. In rejecting the black plaintiffs' arguments,

46Hereinafter, this case will be referred to as ASTA.
the district court drew a distinction between public school desegregation cases and those involving higher education. Public schools, the court stated, were "free and compulsory," giving school boards greater leverage in impacting the choices available to students. Colleges, on the other hand, were anything but "free and compulsory," and they differed widely in size, missions, course offerings, and other factors. States, the court concluded, did not have as many remedial options at its disposal to impact the choices of students as to which university they would attend. Given these differences, the court reasoned that

as long as the State and a particular institution are dealing with admissions, faculty and staff in good faith, the basic requirement of the affirmative duty to dismantle the dual schools system on the college level, to the extent that the system may be based on racial considerations, is satisfied (Ibid, 789-790).

Because the district court perceived there to be stark differences between the contexts of public school cases and colleges, it believed its remedial options were more limited. The district court's opinion stood in marked contrast to the NAACP's interpretation of the Supreme Court's decision in Sweatt, mentioned in the last chapter. Sweatt declared that creating a separate law school for blacks denied them certain "intangible benefits" which they would receive in an integrated setting. The NAACP reasoned that the benefits which integration would bring were similarly denied to students at the elementary and secondary levels of education. This view minimized the differences between the public schools and
postsecondary education and seemed to assume that whatever remedial options applied in one context equally applied in the other. ASTA, however, recognized a fundamental difference between the two contexts. By defining the "affirmative duty" of Green strictly in terms of racially nondiscriminatory admissions and hiring policies, ASTA represented a rather restrictive interpretation of the remedial power of federal courts in higher education desegregation cases.

Other courts have defined the state's responsibility under Green more broadly. In Norris v. State Council of Higher Education (327 F. Supp. 1368 E.D. Va. [1971]), black plaintiffs sought the enjoining of plans to upgrade Richard Bland College, an all-white college in Richmond, from a two-year school to a four-year institution. The plaintiffs argued that this proposal served to perpetuate segregation by placing Richard Bland in direct competition with historically black Virginia State College (also located in Richmond) for white students. They charged that the Virginia legislature had knowingly and willfully passed this legislation in an effort to undercut Virginia State's efforts to attract whites.

The district court in Norris said the Green standard applied with "equal force" in higher education. While noting the differences between higher education and public school cases that the court recognized in ASTA, the court concluded that while the options available to the state may differ, its
responsibility was just as exacting. Moreover, the court rejected the defendants' contention that ASTA standard should be the controlling law in this case. Instead, the judges declared that when the particular facts of the case were considered, ASTA simply did not expound principles which were generally applicable to higher education desegregation cases. Relying on the phraseology of Green, the court in Norris declared that the state had the obligation to "convert its white colleges and black colleges to just colleges" (Ibid, 1373).

Consequently, ASTA and Norris announced two opposing views of the applicability of Green to higher education. ASTA defined the state's "affirmative duty to desegregate" very narrowly - its definition was restricted to the duty of the state to promulgate policies, practices, and procedures that did not discriminate on the basis of race. ASTA did not necessarily require the dismantlement of black schools to achieve desegregation; rather, it declared that state educational policies should not be predicated on race. In that respect, ASTA's logic served as a precedent which black colleges would appeal to resist attempts to merge and/or close their schools. But ASTA was a two-edged sword: for black colleges seeking enhancement of their campuses to compensate for historical patterns of discrimination as well as to facilitate their attempts to adapt their missions to social change, the ASTA remedy did not require the states to
do so; in fact, it could be argued that enhancing black schools constituted discrimination in favor of such institutions that violated the color-blind spirit of ASTA. On the other hand, supporters of black colleges were deeply troubled by Norris' interpretation of the Green standard. The language of Norris, specifically the statement that the state's responsibility was to "convert its white colleges and black colleges to just colleges," raised the specter that desegregation in higher education might mean the elimination of black public colleges.

The Supreme Court refused to grant either case a full hearing; instead, the Court summarily affirmed the decisions of the lower courts (393 U.S. 4 [1969]; 404 U.S. 907 [1971]). Apparently, the Court believed that the issues presented in ASTA and Norris were not fundamentally different from those the justices had already addressed in the public school context. Lower federal judges, lacking precedent from the Supreme Court, were forced to tackle the question of interpreting the mandate of Green in higher education alone. Thus, they continued to rely on precedents set in public school desegregation cases for guidance.

Swann v. Charlotte-Mecklenburg Board of Education (402 U.S. 1 [1971]) illustrated that the problem of applying public school desegregation precedents to higher education was far from clear-cut. In Swann, the Supreme Court attempted to further clarify the "affirmative duty" announced in Green.
Federal courts, the justices announced, had broad "equitable powers" to remedy constitutional violations, and they validated the use of a variety of methods (including certain types of racial quotas, majority-to-minority transfer programs, the rearrangement of attendance zones, and busing) to effectuate desegregation. In subsequent cases, the Supreme Court made it clear that the mandate of Brown also applied to Northern and Western school systems as well; despite the fact that many of these systems had no statutory history of racial discrimination in public education, the Court determined that the existence of de facto segregation made them subject to Brown.47

Nevertheless, the ambiguity of Brown's application to higher education persisted, despite the Court's more aggressive and interventionist posture. For example, the Court in Swann made it clear that a school's identity should not be reflected in the racial composition of the faculty, the quality of its facilities and equipment, or the sports activities of the school (402 U.S. 1, 18 [1971]). Such a situation, the Court warned, would consitute a prima facie case of violation of constitutional rights (Ibid, 18). On this score, Swann harmonized the spirit of Green which set forth the goal of creating school systems that did not have

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"white schools" and "black schools" but "just schools." In essence, Swann declared that continued racial identifiability of public schools - and by extension, colleges - created the presumption of a constitutional violation. Therefore, the very fact that a college was "black" made it vulnerable to constitutional challenge. Secondly, the Court affirmed that federal judges had broad equity powers in desegregation cases. Concerns about the continued racial identifiability of universities and Swann's affirmation of the "broad equitable powers" of federal judges provided the rationale for Geier v. Blanton (427 F. Supp. 644 [M.D. Tenn. 1977]) and United States v. Louisiana (718 F. Supp. 499 [E.D. La. 1989]) where district courts ordered the merger of black and white institutions after concluding that previous efforts had failed to produce significant progress toward integration.48

However, Swann disavowed a "substantive constitutional right" to a particular racial balance, making it unclear what

48 In Geier, the district court ordered the merger of historically black Tennessee State University (TSU) with the University of Tennessee-Nashville (UT-N), a cross-town white school, with TSU emerging as the surviving institution. Though conceding that merger was a "radical remedy," it felt that this option did not exceed the remedial power of the court. The Geier court relied on Swan's reasoning to justify merging the two institutions. The merger was upheld on appeal (579 F.2d. 1056 [6th Cir. 1979]), cert. denied, 444 U.S. 886 (1979). In the Louisiana case, the district court ordered, as part of a radical overhaul of the higher education system, the merger of Louisiana State University Law Center (97% white, 3% black) with Southern University Law Center (58% black, 42% white), with LSU as the surviving institution. However, the court was forced to reverse itself following a ruling by the Fifth Circuit Court of Appeals on the Mississippi higher education case (914 F.2d. 676 [5th Cir. 1990]).
an integrated school, or an integrated school system, should look like. Was 10 percent black enrollment enough? Or should it be twenty? Thirty? Swann's lack of clarity on this issue made it unclear how this precedent applied in the context of higher education, where federal judges, state legislatures, and educational officials had to figure out what to do with black colleges. Should Brown and its progeny be targeted only at state-enforced racial segregation? Or was racial separtism so invidious in and of itself that government was obligated to dismantle it, regardless of its cause?

Therefore, the status of the black public university, two decades after Brown, was far from clear. On one hand, these universities existed partly because, despite increasing black enrollments on white campuses, many African Americans still found white academic communities to be both unfriendly and uncomfortable. Hostility to integration, though often manifesting itself in less obvious forms than in the 1950's and early 1960's, was still very real. On the other hand, the NAACP's integrationist ideology threatened the very existence of black institutions because it equated superior education with education in a mixed setting. Black college leaders by the 1970's were increasingly defining the goal of desegregation in terms of enhancing black institutions whereby they could expand their missions in ways that would enable them to serve all students, regardless of race. These competing versions of the meaning of Brown for higher education finally
led to a direct confrontation between the NAACP and the National Association for Equal Opportunity in Higher Education (NAFEO) in the case of Adams v. Richardson (356 F. Supp. 92 [D.C.D., 1973]). The Adams case is the subject of the concluding section of this chapter.

Adams and the Concept of Equal Educational Opportunity

The Adams case commenced in 1970 when the NAACP Legal Defense Fund (LDF) filed suit against the U.S. Department of Health, Education, and Welfare. The LDF accused the agency of failing to enforce Title VI of the Civil Rights Act of 1964 forbidding racial discrimination in programs receiving

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49 The NAACP Legal Defense Fund was established to coordinate the NAACP’s legal campaign against segregation in 1939. In its early years, it worked closely with the NAACP’s leadership. Often, board members held joint memberships on the NAACP’s Board of Directors and the LDF’s Board of Directors. This arrangement, in the wake of the Brown decision, became untenable, as the operations of the NAACP were subjected to intense scrutiny by the organization’s enemies. Southern district attorneys and attorney generals accused LDF lawyers with "fermenting litigation" (manufacturing legal business by advising or causing actions likely to produce lawsuits and then participating as the attorneys on record in the cases; in the legal profession, this is grounds for disbarment.). In addition, Southern congressmen complained about the fact that board members sat on both the NAACP’s Board and the LDF. They wanted the Bureau of Internal Revenue to investigate whether the NAACP and LDF were violating tax laws by accepting contributions as non-profit organizations and using them for political purposes. In the face of these pressures, many of the NAACP’s leaders feared that their ability to bring test cases would be hampered without a formal severing of corporate ties between the NAACP and the Legal Defense Fund. Thus, in 1957, the NAACP and the NAACP Legal Defense Fund formally became two distinct corporate entities (Morris, 1984; Ware, 1994).
federal financial assistance. The HEW had found ten states operating dual systems of education in violation of the law; however, the agency had announced that it would not use threats of cutoffs in federal aid to prod state and local officials to desegregate. Since the threat of fund terminations had been credited with encouraging states to speed up efforts to desegregate since 1964, the move was seen as a slowdown in enforcement efforts by the federal government to effect desegregation (Orfield, 1969; Preer, 1982, 198). The suit combined all levels of education and charged HEW with a "general and calculated neglect" to enforce the law (Preer, 1982, 198). HEW rebutted that it had upheld the provisions of the law by seeking voluntary compliance (Ibid, 201). The district court did not agree with HEW, and ordered the agency in Adams v. Richardson to commence enforcement actions within 120 days (356 F. Supp. D.C.D. [1973]).

The Adams case signaled a fundamental shift in the Legal Defense Fund's approach to desegregation in higher education. Previous lawsuits concentrated on the rights of African Americans to attend specific universities. The suits had

50The Adams states were Louisiana, Mississippi, Oklahoma, North Carolina, Florida, Arkansas, Pennsylvania, Georgia, Maryland, and Virginia. The Adams case testified to the unevenness of federal enforcement efforts during the period. Not all the states with historically black colleges received notices nor were required to submit desegregation plans; Texas, South Carolina, and Alabama were not notified by HEW that they were in violation of Title VI of the Civil Rights Act of 1964 until 1980 (356 F. Supp. 92, 100; Preer, 1982, 196).
pursued integration on a school-by-school basis. The *Adams* lawsuit recognized the increasingly systemic organization of higher education and the need for systemic solutions to the problems of racial discrimination. Ironically, it was the NAACP that refused to consider systemic solutions fourteen years earlier in the *Hawkins* case; rather, it viewed Florida's insistence that an impact study of the effects that desegregation might have on the state's educational system merely as a stalling tactic. Invoking the letter of *Green*, the NAACP argued that states needed to dismantle segregated school systems "root and branch" and remedies which only focused on specific universities failed to meet the state's "affirmative duty" to desegregate. Now it was the NAACP that was advocating institutional remedies (Preer, 1982, 141-142; 198-200).

The fact that the LDF's lawsuit encompassed all levels of education (thus assuming that a single legal standard applied to all) caused great consternation among black college presidents, who feared the *Adams* ruling might lead to the dismantling of black public colleges.\(^5\) The NAFEO submitted an *amicus curiae* brief with the Court of Appeals

\(^5\)Black college presidents and educators were not alone; while *Adams v. Richardson* navigated through the courts, the future of black colleges was widely debated in other social arenas. For example, the first National Black Convention, meeting in Gary, Indiana in March, 1972, took a stand against the merger of black and white state colleges. Rev. Jesse Jackson, leader of Operation PUSH, sponsored Black Expo, with the theme "Save the Black College" (Preer, 1982, 205).
for the District of Columbia in April, 1973. The NAFEO's brief constituted a fundamental broadside on the NAACP's position. At the core of the NAFEO's argument was the contention that, contrary to the NAACP's reasoning, the Green standard did not apply in higher education. The NAFEO sought to refute three of the Legal Defense Fund's basic premises: (1) whether public school precedents provide suitable standards for higher education; (2) whether black colleges could be implicated in systemwide discrimination; (3) whether eliminating the racial identity of state colleges promised to enhance educational opportunities for black students (Ibid, 202). Black colleges, the NAFEO insisted, were not the perpetuators of discrimination; rather, they were its victims. It objected to the suggestion that black colleges were guilty of maintaining unnecessary program duplication and therefore should be merged into unitary systems of higher education. In other words, the NAFEO brief asserted that blacks should not be forced to abandon the tangible benefits of maintaining black colleges in favor of the hypothetical and uncertain advantages of an integrated system:

The Black Institutions of Higher Education have served and continue to serve as the bridge between a crippling and debilitating elementary and secondary educational system to which Brown itself was directed because of the experience with the equal education cases from Murray to Sweatt in the field of higher education. This experience demonstrated that equality of educational attainment could not be achieved until the feeder system of the secondary and elementary levels had been improved for black students. Eighteen years after Brown, with a general consensus that this feeder system has not been improved--and maybe has lost ground, . . . the assimi-
lation of the Black Institutions of Higher Learning would be to remove the wooden beam in order to replace it with a steel or cement support before the new beam is in place, leaving the structure unsupported at all (NAFEO Motion to Intervene as Amicus Curiae, in Haynes III, 1978, C-23 - C-24).

The Court of Appeals upheld the decision of the district court, reaffirming the finding that HEW's enforcement efforts had been insufficient (480 F.2d. 1159 [1973]). It accepted the LDF's conception of the problem as systemic, requiring coordinated statewide efforts in order to remedy. However, the Court of Appeals suggested that states consider the role that historically black colleges have played in providing educational opportunities for black students:

A predicate for minority access to quality postgraduate programs is viable, co-ordinated state-wide higher education policy that takes into account the special problems of minority students and of Black colleges. These Black institutions currently fulfill a crucial need and will continue to play an important role in Black higher education (Ibid, 1164).

The district court in Adams v. Califano was even more emphatic about the role of black colleges:

The process of desegregation must not place a greater burden on Black institutions or Black students' opportunity to receive a quality higher education. The desegregation process should take into account the

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52 Following the Court of Appeals' decision in Adams v. Richardson, eight states submitted desegregation plans to HEW, and the Office of Civil Rights (OCR) accepted them. The NAACP Legal Defense Fund sued for further relief, charging that the plans accepted by HEW were deficient and failed to meet Title VI requirements. HEW contended that it was inexperienced in higher education matters; the district court, nevertheless, ordered HEW in Adams v. Califano (430 F. Supp. 118 [1977]) to develop criteria specifying the components of acceptable desegregation plans for state systems of higher education.
unequal status of the Black colleges and the real danger that desegregation will diminish higher educational opportunities for Blacks. Without suggesting the answer to this complex problem, it is the responsibility of HEW to devise criteria for higher education desegregation plans which will take into account the unique importance of Black colleges and at the same time comply with the Congressional mandate (430 F. Supp. 118, 120).

The Adams cases represented the first time that federal judges incorporated in their decisions special consideration for the impact that desegregation might have on black public colleges. Though not resolving the constitutional dilemma of black colleges by any means, the Adams decisions constituted a significant victory for black educators concerned that the price of desegregation would be the extermination of black colleges. Many of the black college presidents' concerns were reflected in HEW's higher education desegregation criteria, promulgated in 1978 pursuant to Adams v. Califano. The HEW Criteria required the following components to statewide desegregation plans: (1) the state would define the mission of each institution within the higher education system; (2) a description of planned improvements for black institutions, including the dollar amounts and timetables for these improvements; (3) the elimination of unnecessary program duplication in a way that is consistent with strengthening the mission of black institutions; (4) priority consideration for the placement of new, high demand programs should be given to black institutions; and (5) the withholding of state approval from any changes within the higher education
system which may thwart or undermine the goal of desegregation (U.S. Department of Health, Education, and Welfare, 1978).

Thus, the tension between ASTA, Norris, and Adams have formed the legal cornerstone of subsequent higher education desegregation battles in the absence of guidance from the Supreme Court. ASTA interpreted the Green standard very narrowly, restricting the "affirmative duty to desegregate" to the promulgation of nondiscriminatory admissions and hiring practices. Norris interpreted Green’s mandate for higher education more broadly, insisting that though remedial options may differ, the standard applied with equal force. Norris raised the question of whether the state’s charge to transform its colleges to "just colleges" precluded the existence of black public universities. Adams cautioned states to consider the role of black public colleges when developing statewide desegregation plans. Adams suggested that Green’s "just schools" standard, which did not consider if majority black public schools serve any beneficial societal roles, may be inappropriate in the context of higher education.

The Adams cases also illustrated the growing rift between the LDF’s endorsement of integration at all costs and the reservations of other interest groups within the black community about the wisdom of this approach. The debate raged even within the NAACP itself. At the association’s 1973
annual meeting, the national leadership introduced a resolution calling for mergers to achieve desegregation. After much discussion, the title of the resolution was changed from "Merger of State Supported Colleges" to "Desegregation of State Colleges" (Preer, 1982, 205). The compromise reflected the lack of consensus within the NAACP's rank-and-file membership on the definition of desegregation. Though the revised wording represented a clear compromise in light of dissension within the ranks, Executive Secretary Roy Wilkins nevertheless insisted, "There is nothing at variance in association policy in calling for desegregation of state

Nevertheless, despite their awareness of the opposition of many blacks to further desegregation efforts as well as dissension within their own ranks, the NAACP backed a 1974 Louisiana plan that proposed the merger of Louisiana State University and Southern University and historically white Louisiana Tech with historically black Grambling College. Roy Wilkins declared that the issue of integration in higher education was no different than in the case of the public schools (Preer, 1982, 205). After the Supreme Court refused to stay the merger of Tennessee State University and the University of Tennessee-Nashville, the Legal Defense Fund announced its intention to seek the merger of black and white state colleges in other Southern cities (Ibid, 221). In 1979, on the twenty-fifth anniversary of the Brown decision, Kenneth Clark took an uncompromising stance on integration. He wrote:

There has been no evidence to refute what the Court said in Brown: "separate educational facilities are inherently unequal." Whatever might have been the value of black colleges in the seventeenth century and up to World War II, their continuation - particularly state-supported, publicly funded colleges - is a flagrant violation of the letter, the spirit, and the goals of the Brown decision. It marks a return to Plessy v. Ferguson. Black colleges and white colleges are educational anachronisms (Clark, 1979, 8).
supported systems. Under desegregation, any kind of operation that would desegregate those facilities would be acceptable" (Ibid, 205).

However, many African Americans accused the NAACP of trying to exterminate black colleges. Because of the historical link between the NAACP and the NAACP Legal Defense Fund, many African Americans continued to view these two organizations as if they were synonymous, despite the fact that they had been formally separated for years. Thus, the very organization which had been synonymous with the fight for equal rights for African Americans stood accused, at least in some quarters of the black community, with racial treason. By endorsing remedies that threatened the existence of black colleges, their critics within the black community accused them of being out of step with what was in the best interests of African Americans.

Actually, the NAACP was internally divided. Those within the NAACP who believed that Brown was intended to eliminate all racial segregation (regardless of its cause or its purported benefits) did not take kindly to be portrayed in this manner. They held to the view that separate education would always be inferior education because white state legislatures would never treat black schools equally (Clark, 1979; Wilkinson, 1979; Bell, 1979). While many pure integrationists recognized many of the problems associated with integration that their critics had identified, they nevertheless con-
cluded that integration’s benefits far outweighed its liabilities (Armor, 1995). Conversely, many feared that integration might become an excuse for states to simply eliminate black colleges without improving black access to higher education. Some NAACP officials recognized that the organization was losing ground in the black community because of the Adams case. They pointed out that the LDF, not the NAACP, had initiated the Adams case, and accused the LDF of damaging the NAACP’s reputation with the black community.54

Nonetheless, the criticism reflected the disillusionment felt by many blacks with legal efforts to enforce the Brown decision and the sense that integration itself had actually proved to be disastrous for the black population (Bell, 1975). It also served as an example of the tendency noted by Dawson (1995) of a public community censoring those seen as

54The Adams case became part of a long simmering feud that had been developing between the NAACP and the NAACP Legal Defense Fund for years. Though both organizations are viewed synonymously in the eyes of the public, they had actually been pursuing two different agendas for quite some time. However, because of that public perception, the NAACP was unable to compete financially with the NAACP Legal Defense Fund. Many donors assumed that giving to one of the organizations was as good as giving to the other. In addition, the NAACP accused the LDF of initiating suits (including Adams) in the NAACP’s name without consulting with the organization’s leadership. For years, NAACP officials demanded that the LDF drop the NAACP initials in front of its name to avoid confusion in the public mind. Relations between the two organizations turned icy in the late 1970’s and early 1980’s. Finally, the NAACP sued the NAACP Legal Defense Fund to try to force the LDF to relinquish its initials; the suit was ultimately unsuccessful (Ware, 1994; NAACP v. NAACP Legal Defense and Educational Fund, 559 F. Supp. 1337 (D.C.D.C. [1983]); rev’d 753 F. 2d. 131 (1985), cert. denied, 472 U.S. 1021 (1985).
attacking perceived black interests. Ironically, Brown, aimed at eradicating separate but equal in education, failed to destroy the allure of Plessy: the very decision that had victimized blacks could now be summoned to support a new version of "separate but equal" (Bell, 1975; Wilkinson, 1979).

The ambivalence in black America over integration, as well as the unsettled state of the law with respect to the requirements for desegregation in higher education, set the backdrop for the Mississippi case. The litigation, initiated in 1975 by the Black Mississippians' Council on Higher Education, stemmed from the frustration of black plaintiffs with the Legal Defense Fund's handling of the Adams case and their concern that the desegregation process would result in the elimination of black colleges. Chapter Four focuses on the history of United States v. Fordice.
Public Education and Racial Politics

Knowledge unfit a child to be a slave (Douglass, 1962, 79).

Gunnar Myrdal observed that education has played an especially significant role in American thought and culture. He wrote:

Education has always been the great hope for both individual and society. In the American Creed it has been the main ground upon which "equality of opportunity for the individual" and "free outlet for ability" could be based. Education has also been considered as the best way - and the way most compatible with American individualistic ideals - to improve society (1944, 882).

In Chapter One, I argued that the American faith in the power of education represents one of the most powerful deductions from the Lockean settlement. American education is premised on the idea that the United States is a meritocratic society where persons are free to rise and fall based on their own efforts. Thus, according to Allen and Jewell (1994), when one achieves educationally, it is presumed that he or she is adding to his or her "human, social and cultural capital" in a way that enhances his or her economic value (178). At the same time, the public school represents one of the chief institutions charged with instilling democratic values to each succeeding generation; it is also assumed to play an instrumental role in "assimilating" new arrivals into mainstream American culture. Social reform movements typically appeal to education to effect change in American society.
(Myrdal 1944; Cremin, 1989; Reitman, 1992). Viewed in this light, the Brown decision should be seen as an example of the American tendency to use education as the instrument to bring about social change - in this case, in the area of race relations (Arendt, 1958; Wilkinson, 1979).

It was also argued that the existence of slavery in the Southern United States politicized the importance of education for African Americans in a way that distinguishes them from the nation's majority population. "Education," Wendy Brown writes, "remains the essential element for liberation from social and economic subordination in the black community" (1992, 121). Dr. Beverly Cole, the National Director of Education for the NAACP, concurs:

We [meaning African Americans] have always regarded education as our blueprint for survival. Since before the Civil War when every slave state had laws against blacks learning to read and write, those actions signaled to the African American community the absolute importance of education, and we have been struggling to obtain access to a quality education ever since (1991, 23).

Therefore, the struggle to obtain equal access to educational opportunities has occupied a central place in African American liberation movements in the United States. Education, for African Americans, should bring them closer to freedom. Conversely, because Southern planters viewed the education of slaves as a threat to the institution of slavery, the coming of tax-supported universal education in the South would have to wait until the end of the Civil War. If education "is the great equalizer of the conditions of men" (Mann, 1849, 59),
Southern whites seemed determined to nullify its potential to make the ex-slaves the social equals of whites. Consequently, Southern aristocracy demonstrated their faith in education by their *unwillingness* to educate their slaves.

The South's defeat in the Civil War hardly softened the hostility of many Southerners toward public education, and perhaps no state better exemplified Southern antipathy toward public education than Mississippi. In fact, no state spent less on black education than Mississippi (McMillen, 1990, 73); thus, it provides a classic case study of how racial considerations have profoundly shaped the politics of education in America. Black Mississippians, like blacks elsewhere, have seen access to education as a crucial component in the struggle to equalize their life chances. Consequently, when a group of black plaintiffs initiated the lawsuit that ultimately became *United States v. Fordice*, it represented the most recent chapter in the struggle of black Mississippians for equal educational opportunity.

This chapter begins by tracing the development of the "separate but equal" system of higher education in the state of Mississippi. This is followed by a discussion of the period between the state's campaign of massive resistance to the *Brown* decision to the filing of the *Ayers* suit by the Black Mississippians Council of Higher Education. Third, this chapter locates the Mississippi case within the context of the increasing polarization of racial politics in America.
Fourth, I examine the arguments raised by the parties in the suit and demonstrate how the opposing sides linked their cases to critical aspects of the American Creed. Finally, this chapter concludes with a discussion of the Court’s decision in *Fordice*.

**Mississippi Higher Education: Separate and Unequal**

While Northern and Western states were moving toward tax-supported education, the Southern planter class remained either indifferent or openly hostile. Mississippi aristocrats were no different than the rest of their Southern brethren in their contempt for the common school movement. In general, opposition to the idea came from evangelical clergymen who regarded the "encroachment of scientific discoveries upon sacred mysteries with profound intolerance" and southern gentry who simply felt that education was a luxury, not a right, and one which should be indulged by those who could afford to pay for it (Sansing, 1990, 34).

Two factors broke the political gridlock that prevented the establishment of a public university in Mississippi: first, the Panic of 1837 eroded the financial base of private-supported seminary education, thereby weakening the position of the evangelicals. Secondly, the growing sectional dispute over slavery increased the pressure on Southern states to "educate her sons at home." Thus, the state legis-
lature chartered the University of Mississippi in Oxford in 1844 and designated it by statute to serve whites only (Ibid, 34-35).

The South’s defeat in the Civil War forced white Mississippians to face the possibility that the former slaves - whom they deemed as their "social inferiors" - might now be able to enjoy the same rights that white men considered as their Lockian birthright. Perhaps nothing horrified white Mississippians more than the idea of blacks exercising the right to vote - especially in light of the fact that African Americans constituted 54 percent of the state’s population in 1870 (McMillen, 1990, 37). Provisional Governor William L. Sharky declared in 1865 that even if it were limited to the most educated and propertied blacks, enfranchisement was impossible in Mississippi; General William T. Sherman doubted that black suffrage could be imposed by force (Ibid, 36). That same year, many whites were terrified when a group of Vicksburg blacks petitioned Congress for the right to vote (Ibid, 36-37). An influential Democratic editor predicted that the enfranchisement of blacks would produce only one of two results: white exodus from the state or a race war (Ibid, 37).

However, despite their opposition, white Mississippians were unable to prevent blacks from entering the body politic, at least in the short run. The Reconstruction Act of 1867 made black Mississippians eligible voters for the first time,
and they helped to draft a new constitution. On the basis of this new constitution, Mississippi was readmitted to the Union in 1870 (Ibid, 37). In 1870, black legislators coalesed with northern Republicans and southern "scalawags" to create, for the first time, a public education system, albeit on a racially segregated basis (McMillen, 1990, 75; Sansing, 1990, 56-62). The legislature agreed to provide stipends of $100 each to college students who choose to teach in the new system and to reorganize the state university. Since the University of Mississippi had been set aside for whites, these efforts raised the question of state-supported higher education for blacks.

In 1870, there were two private colleges in Mississippi providing higher education for blacks: Shaw University and Tougaloo Normal and Manual Training School (Sansing, 1990, 61; Jenkins, 1983, 275-276; McMillen, 1990, 101). Shaw, established by the Mississippi Conference of the Methodist Episcopal Church at Holly Springs in 1866, included a commercial institute and a medical school in addition to the traditional liberal arts curriculum (Sansing, 1990, 61). In 1890, it changed its name to Rust University and subsequently to Rust College. Tougaloo\(^5\) was established in Jackson, Mississippi by the American Missionary Society and the Freed-

\(^5\)Its name was changed to Tougaloo University in 1871. In 1916, it was renamed Tougaloo College and in 1953, the school's name was changed to Tougaloo Southern Christian College (McMillen, 1990, 101).
man's Bureau in 1869. Both schools received small state subsidies; thus, they were "quasi-public" institutions until the state’s Constitution of 1890 banned the use of public funds for private institutions (Sansing, 1990, 62; Jenkins, 1983, 275-276).

The ex-slaves' passion for learning made many white Mississippians uneasy. Judge Robert S. Hudson of Yazoo City, in an open letter to Chancellor John Newton Waddell of the University of Mississippi asked, "Will the faculty as now composed, receive or reject an applicant for admission as a student on account of color?" Waddell and the faculty responded that they would be "governed by consideration of race and color" and would "instantly resign should the trustees require them to receive negro students" (Sansing, 1990, 62). Their exchange was widely circulated in the Mississippi press and stimulated numerous comments. The Jackson Clarion wrote of the faculty: "We warmly endorse their stand" (Ibid, 62). However, Governor James Alcorn branded Hudson's letter as the "stuff of political hucksters" and chided the "obsequious faculty" for allowing "such a man as Judge Hudson" to intimidate them. He added that they were at liberty to resign at any time (Garner, quoted in Sansing, 1990, 62).

The controversy over educational equality gave a sense of urgency to establishing a state-supported university for blacks only. In May, 1871, Alcorn University was founded on the old campus of Oakland College, which ironically, had been
an antebellum liberal arts school for the sons of planters (Sansing, 1990, 63; Jenkins, 1983, 278; Thompson, 1989; McMillen, 1990, 103; Blake, 1991, 540). Alcorn was designated as the state’s black land grant college - the first black institution so designated in the South.\(^{56}\) While black leaders initially preferred the integration of the University of Mississippi over the establishment of a separate black school, they were won over by the state’s generous support for Alcorn during its early years (McMillen, 1990, 103). The legislature promised to appropriate a sum of $50,000 to Alcorn annually over the next ten years and the governor appointed an all-black board of trustees. In addition, the state was to provide the same number of scholarships for Alcorn that it provided for the University of Mississippi.

\(^{56}\)The Morrill Act of 1862 providing for the establishment of land grant colleges marked a watershed in the history of American education. Before the Civil War, higher education in America had been restricted to private, sectarian institutions serving only the wealthy and professional classes and offering a classical curricula to train the children of the privileged for leadership positions in society. The land grant colleges represented a rejection of both purely classical education in favor of a scientific and practical curriculum and a democratization of American higher education. By the turn of the century, these colleges had assumed a major role in making higher education more broadly accessible to the working classes and in training the leaders of agriculture, industry, and science. Alcorn was only one of three black institutions designated as a land grant college until the Second Morrill Act of 1890 extended the mandate to black schools. Though the new law required states to "equitably" apportion federal funds to land grant schools, in reality, black land grant colleges were woefully underfunded in relation to their white counterparts throughout the Plessy era (Kujovik, 1987; Sansing, 1990, 62; K. Alexander and M. D. Alexander, 1985, 55-58; Presidents of 1890 Land-Grant Colleges and Universities, 1980; McMillen, 1990, 103-106).
Furthermore, the institution was to receive 60 percent of the state's land-grant appropriation funds pursuant to the First Morrill Act based on the fact that blacks were the majority of the state's population (Jenkins, 1983, 278; Sansing, 1990, 64; McMillen, 1990, 103). As a testament to the importance that black Mississippians attached to education, Hiram Revels, the black United States Senator from that state, resigned his seat in Congress to become the university's first president (Blake, 1991, 540-541).

Alcorn's political good fortunes, however, would not last very long. The waning of Republican commitment to educational parity for blacks and the reassertion of Democratic control of the legislature in 1874 would put black and white public higher education on two distinct paths. In 1875, Alcorn University's state appropriation was drastically reduced to $15,000 annually, an omen of things to come (Jenkins, 1983, 278; McMillen, 1990, 103). In 1876, its all-black board of trustees was replaced by one composed of whites only (McMillen, 1990, 103). The Democratic legislature reduced Alcorn's share of the state's land-grant funds from three-fifths to one half; in that same year, the state also abolished the $100 stipends for scholarship students. Between 1876 and 1890, Mississippi appropriated only $82,140 to Alcorn, an average of only $5,476 annually (Mayes, quoted in Jenkins, 1983, 280).
By systematically undermining Alcorn's financial base and appointing an all-white board, the state of Mississippi made its purpose abundantly clear: it intended to provide an institution for blacks of inferior quality designed to frustrate the efforts of black Mississippians to compete for the same educational and economic opportunities that whites took as their Lockian birthrights. In 1878, the state revoked Alcorn University's original charter and a new charter reestablished the institution as Alcorn Agricultural and Mechanical College. The striking of the term "university" from Alcorn's name was deliberate; the state intended to relegate Alcorn to the status of a "vocational, agricultural, and trade-oriented curriculum of questionable collegiate quality" that could not compete with the University of Mississippi (Blake, 1991, 540). The same statute changing Alcorn's charter provided for the creation of Mississippi Agricultural and Mechanical College (now Mississippi State University) in Starkville. This new institution assumed the land-grant functions for the state previously provided by the University of Mississippi. Though the state technically had two land-grant institutions, it only funded one: as time unfolded, Alcorn became a land-grant institution in name only. Finally, the state legislature allowed Alcorn's physical plant to deteriorate by official neglect (Sansing, 1990, 64).
Southern Democrats would not have been able to enact these reversals in black educational gains in the absence of a political climate characterized by growing disinterest in the plight of the ex-slave. As it was argued in Chapter Two, by the 1870's Northern public opinion had tired itself of the problems of the Negro, and many were content to let the South resolve the problems related to the future status of African Americans in its own way (Bullock, 1967; Woodward, 1974; Kluger, 1975; Marable, 1982; Quarles, 1987; McMillen, 1990). Following the return of "home rule" in Mississippi, some whites wanted to abolish public education altogether, viewing it as a "Yankee innovation" that had been imposed on them against their will (McMillen, 1990, 75). However, "cooler heads" prevailed; many conservative lawmakers determined that such drastic action would be imprudent in that it ran the risk of triggering massive black resistance and inviting northern intervention into their affairs (Anderson, 1988, 27; McMillen, 1990, 75). Moreover, the ex-slaves' school campaigns had ignited interest among the classes of poor whites for universal education (Anderson, 1988, 27). Practical political concerns prevented the most extreme factions from wiping out public education altogether. However, the state did, significantly reduce support for public education and - to the extent that the state supported public schools, it was primarily directed toward benefiting whites at the black man's expense. At the turn of the century, African Americans
represented 60 percent of the state’s school aged population, but black schools only received 19 percent of the state’s funds (McMillen, 1990, 73). In 1899, A. A. Kincannon, State Superintendent of Education, described state educational policy with respect to the black race rather succinctly when he said:

> It will be readily admitted by every white man in Mississippi that our public school system is designed primarily for the welfare of the white children of the state, and incidentally for the negro children (quoted in McMillen, 1990, 72).

Many white Mississippians believed (as whites elsewhere) that blacks were intellectually inferior to whites, and were skeptical that providing education would improve the plight of ex-slaves. Some whites resented the very idea of being taxed to support black education, countering that blacks should pay for their own schools. However, lurking behind the appeals to white supremacy were practical concerns that educating blacks would destabilize the racial status quo of the state. Mississippi Governor James Vardeman expressed white fears very well in 1899 when he said:

> In educating the negro we implant in him all manner and ambitions which we then refuse to allow him to gratify. It would be impossible for a negro in Mississippi to be elected as much as a justice of the peace. . . . Yet people talk about elevating the race by education! It is not only folly, but it comes pretty nearly being criminal folly. The negro isn’t permitted to advance and their education only spoils a good field hand and makes a shyster lawyer or a fourth-rate teacher. It is money thrown away (quoted in McMillen, 1990, 72).

By limiting the quality of black education, the state’s white minority hoped to cripple the political aspirations of
African Americans, inhibit the ability of blacks to compete with whites economically, and to insure a low-skilled, menial labor force (Ibid, 73). When discussions about black education took place among white Mississippians, one of the principal concerns was the "right kind of education for the Negro" - one that did not disturb the racial hierarchy of the state. For this reason, state lawmakers let a proposal to divide taxes along racial lines die for the purposes of public education. Under this proposal, taxes levied on white taxpayers for public education would be spent only on white schools; similarly, black schools would be financed only with taxes from black citizens. Supporters of the proposition maintained that it was consistent with the Plessy decision as well as white hostility toward being taxed for black schools. However, the proposal was defeated because of fears that expenditures to black schools might have actually increased (Ibid, 76-78). In the final analysis, black Mississippians ended up being taxed to support white public schools, despite the fact that they were legally barred from attending those very institutions (Ibid, 78-79). In summary, while white Mississippians were unable to completely eliminate the educational gains made by blacks as a result of Reconstruction, they nevertheless devoted themselves to efforts to direct the character of black education so that it would not disturb the settled nature of white hegemony in the state. They were determined to keep the former slaves, as well as
their descendents, in a subordinate role in the state’s postbellum political and economic order.

Nevertheless, Alcorn’s black leadership persisted in the goal of creating the best liberal arts college and high school they could in spite of the state’s intentions. McMillen (1990) noted:

Its first president, Hiram Revels (1871-1882), whatever his administrative shortcomings, was educated in the classical tradition and he staffed the institution with black men much like himself, most of them graduates of Fisk University. Its first generation of students wrestled with Latin and Greek as well as with English literature, trigonometry, and chemistry. Its redesignation as an A&M college meant little; the professors and the curriculum remained the same and when Revels retired he was followed by a succession of other liberally trained black educators who did not share white notions about black academic limitations (103).

Often this required the institution’s administrators to deliberately lie to state officials to avoid offending white sensibilities. They emphasized that Alcorn was "primarily industrial" and that its students were engaged in a "very practical curriculum" appropriate for a black school. However, despite the heroic efforts of Alcorn officials to provide instruction that whites deemed blacks unworthy of, the institution more closely approximated a high school than a university until the 1940’s. This pattern held true for most public black colleges in the South (Blake, 1991, 543-544). The fact that Alcorn’s high school program continued until after the Brown decision not only demonstrated the state’s determination to circumscribe the institution’s
development; it provided a stark commentary on the unequal nature of elementary and secondary education for blacks in Mississippi as well.\footnote{In 1950, only 25 percent of eligible blacks of high school age were enrolled in high school in Mississippi compared to 62 percent of the state's eligible white students (McMillen, 1990, 89).}

The Supreme Court's ruling in \textit{Plessy} and its application of the "separate but equal" principle to education in \textit{Cummings} only gave sanction to what the state of Mississippi was already doing. Between 1884 and 1946, the state legislature authorized the establishment of five additional universities. In each case, the state's intent to keep the races apart guided their decisionmaking. Three of these new schools were reserved for whites only and the other two existed solely to serve blacks.\footnote{The white universities were Mississippi University for Women (1884), University of Southern Mississippi (1910), and Delta State University (1924). Jackson State University, established originally as a private school for the purpose of preparing black ministers and teachers, came under state control in 1940. It took ten years of petitioning by black Mississippians to convince the legislature to aquire the school, which was in serious financial trouble as a result of the Great Depression. On assuming control, the state changed the name of the school to Mississippi Negro Training School and cut its curriculum from four years to two. After four years of political pressure from Jackson State College alumni, the school's four-year curriculum was restored; however, its degree-granting authority was limited to teacher education (McMillen, 1990, 107-108). In 1946, the state established Mississippi Valley State University as Mississippi Vocational College with the mission of "educating teachers primarily for rural and elementary schools and providing vocational training for Black students" (Petitioners' Brief, 1991, 4).}
By 1910, Mississippi's pattern of deliberately under-funding Alcorn in comparison to other state-supported white universities was well entrenched. Table 1 on page 213 illustrates the point. State funding policies reflected a deliberate effort to relegate Alcorn to an inferior status within the higher education system. Moreover, these patterns had no educational justification other than the perceived need to keep whites and blacks apart in institutions of separate and decidedly unequal educational quality.

As the state progressively increased its financial commitment to higher education, the gap in funding between Alcorn and the other institutions widened rather than narrowed. Table 2 on page 213 chronicles state appropriations for higher education during the 1928-1929 fiscal year.

What is significant about these figures is not simply the fact that the financial disparities between Alcorn and the white universities increased as the state's commitment to higher education increased. It is also interesting that when Mississippi established new all-white universities, these institutions began at a higher funding level than Alcorn even though it was the second oldest college in the state. For example, Delta State Teachers College, founded only in 1924, received slightly more revenues for its general fund than Alcorn for the 1928-29 year ($159,500 for Delta State and $155,185 for Alcorn); however, Delta State's capital outlay budget was a whopping 39 percent higher than Alcorn's.
### TABLE 1. LEGISLATIVE APPROPRIATIONS FOR MISSISSIPPI'S SENIOR COLLEGES (1910-1911)

<table>
<thead>
<tr>
<th>Institution</th>
<th>General Expenses</th>
<th>Capital Outlay</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Univ. of Mississippi</td>
<td>$157,004</td>
<td>$86,500</td>
<td>$243,504</td>
</tr>
<tr>
<td>Alcorn A&amp;M College</td>
<td>43,905</td>
<td>9,500</td>
<td>53,405</td>
</tr>
<tr>
<td>Mississippi A&amp;M</td>
<td>340,737</td>
<td>112,343</td>
<td>453,081</td>
</tr>
<tr>
<td>Industrial Institute and College*</td>
<td>162,054</td>
<td>105,650</td>
<td>267,704</td>
</tr>
</tbody>
</table>

*now Mississippi University for Women


### TABLE 2. LEGISLATIVE APPROPRIATIONS FOR MISSISSIPPI'S SENIOR COLLEGES (1928-1929)

<table>
<thead>
<tr>
<th>Institution</th>
<th>General Expenses</th>
<th>Capital Outlay</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Univ. of Mississippi</td>
<td>$388,057</td>
<td>$1,620,000</td>
<td>$2,008,057</td>
</tr>
<tr>
<td>Alcorn A&amp;M College</td>
<td>155,185</td>
<td>225,000</td>
<td>380,185</td>
</tr>
<tr>
<td>Mississippi A&amp;M</td>
<td>1,009,218</td>
<td>683,543</td>
<td>1,692,761</td>
</tr>
<tr>
<td>Miss. State College for Women</td>
<td>488,245</td>
<td>565,000</td>
<td>1,053,245</td>
</tr>
<tr>
<td>State Teachers College*</td>
<td>287,000</td>
<td>501,000</td>
<td>788,000</td>
</tr>
<tr>
<td>Delta State Teachers College</td>
<td>159,500</td>
<td>365,000</td>
<td>524,000</td>
</tr>
</tbody>
</table>

*now University of Southern Mississippi


The state also systematically discriminated against Alcorn in its disbursement of federal and state funding for land grant purposes. For example, a 1945 report submitted to the Mississippi Board of Trustees of State Institutions of Higher Learning described a well-developed School of Agriculture and College of Engineering at Mississippi State.
College; it also included recommendations for a new veterinary school, graduate education in home economics, a forestry department, and an engineering station. That same report, however, revealed that the state had not spent a cent for land grant activities at Alcorn, though it was legally obligated to do so (Mississippi Board of Trustees of State Institutions of Higher Learning, 1945). Because the experiment stations played a critical role in developing scientific research methods in higher education, the state’s funding policies retarded the development of the physical sciences at Alcorn. These practices were consistent with the overall intent of Jim Crow education. Black colleges existed mainly to produce teachers to serve in the segregated schools and graduates in the lowest vocational occupations. Graduate and professional education were deemed inappropriate for blacks.

The evidence suggested that Mississippi’s system of higher education was more successful in its aim of frustrating black college education than any other state in the South. In 1932, Mississippi, though it had the largest black

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59 Often, the experiment stations at white universities were staffed by university faculty; thus, the stations became the first form of graduate instruction at the white land grant institutions. Thus, the denial of Morrill land grant funding to black land grant colleges comparable to their white counterparts severely limited the curriculums of these institutions and made them land grant schools in name only. Not until the separate but equal doctrine began to be subjected to legal challenged in the 1940’s did Southern states reluctantly began to expand the academic offerings at these institutions (Kujovik, 1987, 42-64; Christy and Williamson, 1992).
population of any state, had only 2.7 four-year college graduates per 10,000 blacks (Blake, 1991, 544). By comparison, Georgia, the only other southern state with over a million blacks, had almost four times the number of black four-year college graduates (10.7 per 10,000) in 1932 (Ibid, 544). In 1940, when 77% of the black high school age population in the South were not enrolled in school, the figure for Mississippi was 89% - the highest black out-of-school population of any southern state (Anderson, quoted in Blake, 1991, 545). Thus, despite the efforts of black public colleges to increase black college graduation rates, they operated in an environment where the odds were heavily stacked against them.

In 1954, on the eve of Brown, Mississippi's system of higher education stood decidedly separate and unequal. In that year, H. M. Ivy, President of the Board of Trustees of State Institutions of Higher Learning, submitted a report to the full board documenting the inequalities between white and black education in the system. The report noted that while white students had the benefit of a variety of undergraduate programs and extensive offerings at the graduate and professional levels, the missions of black colleges had been circumscribed primarily to undergraduate training in teacher education, agricultural and mechanical arts and the teaching of various trades (Ayers v. Allain, 674 F. Supp. 1523, 1528-1529). Additionally, it commented that, in Alcorn's case, the
institution's actual offerings did not match its stated mission: the report found that there was little evidence that Alcorn was in fact a land grant institution (McMillen, 1990, 104). The report also made reference to the inequitable funding patterns which favored white institutions over their black counterparts. For example, of the better than $10 million that the state spent on higher education during the period of 1952-54, only 15.7% of those dollars were spent on black institutions (Ayers v. Allain, 674 F. Supp 1523, 1529).

Like whites elsewhere in the South, white Mississipians defied the Brown decision, determined to maintain racial segregation in higher education. Nevertheless, black Mississipians, encouraged by the Court's ruling, would assert their rights to educational equality and challenge the status quo. Their challenge to the state's practices, which ultimately led blacks to take Mississippi to court, are the subject of the next section.

From Brown to Ayers

The Brown decision was roundly denounced throughout the South as an affront to the entire Southern way of life (Carter, 1959; Orfield, 1969; Bartley, 1969; Peltason, 1971; Martin, 1970; Wilkinson, 1979; Tabarlet, 1987). Criticism of the Court ranged from charges that the justices relied on "sociological reasoning" rather than time-honored traditions of constitutional law to charges that the Court, as well as anyone associated with or supportive of the Brown decision,
was involved in a worldwide communist conspiracy to overthrow the government of the United States (Bartley, 1969; Wilkinson, 1979).

The Supreme Court's decision in *Brown* did not come as a complete surprise to the state's political leadership. While the segregation cases were being argued before the Supreme Court, the state legislature began making provisions to either influence the Court's decision or to circumvent any ruling that jeopardized the continuation of segregation (Carter, 1959, 21-22). During a special session, the state legislature passed an equalization program for the public schools which called for equal salaries for black and white teachers, equal transportation, equal buildings, and equal school opportunities for all children - black and white. However, the program was not to go into effect until after the Supreme Court's ruling, and only if the state's position that segregation was constitutional was affirmed. Not surprisingly, when the Supreme Court announced its decision in *Brown*, Mississippi's belated equalization program was never enacted (Ibid, 22). During the regular session in early 1954 (prior to the Court's announcement), the legislature agreed to appropriate only enough funds for the public school system for a year, instead of two years as was its custom.60. State

60This is significant because in those days, the Mississippi legislatures convened its regular session only once every two years. Thus, it is clear that the state was bracing itself in anticipation of the Supreme Court's ruling and was preparing for whatever contingencies were deemed

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Lawmakers wanted the flexibility to make whatever adjustments might be made "necessary" by the Brown decision. They anticipated that they might be called into special session before the next regular session in 1956.

Nevertheless, despite a climate of official opposition, Medgar Evers, Field Director of the Mississippi State Conference of the NAACP applied for admission to the University of Mississippi School of Law in January, 1954 (Adams, 1992, 269). His application was rejected on the grounds that he had failed to comply with the requirement that he submit two letters of recommendation from prominent citizens of his county. While Evers did submit letters from two citizens in Newton County, where his family's homestead was and where he had lived most of his life, the State Board replied that his letters should have come from Bolivar County where he had lived the two years prior to his application (Ibid, 269). After consulting with NAACP officials, Evers decided not to pursue the matter further.61

Once the Court's decision was announced, the state of Mississippi, like her Southern neighbors, quickly mobilized in an effort to circumvent Brown. Mississippi Governor Hugh White called it "the most unfortunate thing that has ever necessary.

61 Instead, Evers went to work for the NAACP in Jackson investigating racial incidents in Mississippi and the statewide activities of the White Citizens Councils (Adams, 1992, 269-270).
happened" and insisted that it was "impossible to mix the races together in the public schools of Mississippi" (Tabarlet, 1987, 33). The Jackson Clarion-Ledger published an editorial which said that "May 17, 1954, may be recorded as a black day of tragedy for the South" (Carter, 1959, 25). The Jackson Daily News' lead editorial was entitled "Blood on the Marble Steps" (Ibid, 25). In late May, Circuit Judge Tom P. Brady criticized the Court in a speech to the Sons of the American Revolution in Greenwood, Mississippi for abandoning over a half century of legal precedent in the Brown decision. Brady argued that the justices did not take into account the black man's basic inferiority to the white man (Ibid, 26). Organized leadership would be required if the South intended to successfully resist efforts by "outside agitators" to impose the Brown decision on the South. The speech was widely circulated, and Brady's words are considered as the inspiration for the formation of the Citizens' Council Movement throughout the South (Carter, 1959, 26-35; Bartley, 1969, 85). The first Citizens' Council was formed in July, 1962. The White Citizens' Councils (the term "White" was dropped from the name in the late 1950's) sprang up in reaction to the Brown decision. Prior to Brown, the Ku Klux Klan was the best known white supremacist organization; however, its influence was limited even in Mississippi. Many "respectable racists" disliked the "white trash" reputation of the Klan and feared that the Klan's reliance on terrorism and murder (as well as other extralegal tactics) would invite massive federal intervention in the South. The Citizens' Councils, sometimes referred to as "the country club Klan" drew their membership from business leaders, professionals, clergymen, and educators committed to the doctrine of white supremacy. They worked through existing political and legal
1954, in Indianola, Mississippi, near the heart of the state’s Delta region (Bartley, 1969, 85; Tabarlet, 1987, 34). The movement spread rapidly to Alabama, Louisiana, Texas, South Carolina, Florida, Arkansas, Tennessee, and Virginia (Bartley, 1969, 84). Mississippi boasted the largest membership in the Citizens’ Councils of any Southern state; by the end of 1954, the Mississippi Association of Citizens’ Councils claimed chapters in more than thirty counties (Ibid, 86).

Meanwhile, the legislature created the Legal Education Advisory Committee in order to allow both black and whites to voice support for voluntary segregation (Ibid, 76). The governor selected a few conservative blacks who supported the plan in order to demonstrate that black Mississippians did not want integration; rather, "outside agitators" with no appreciation for Southern mores were attempting to impose it against the will of both black and white citizens of the South. Held on July 30, 1954, the conference began with speeches by whites insisting that the racial status quo remain the same. However, much to the chagrin of the organizers of the conference, the blacks who attended did not stick to their original bargain. With near unanimity, the black spokesmen urged the state to comply with the Supreme Court decision (Ibid, 76). Their much-publicized bi-racial institutions in order to obstruct desegregation and hamper the activities of civil rights organizations (especially the NAACP).
conference a fiasco, the legislature subsequently passed a constitutional amendment that permitted the abolition of the entire public school system (or parts of it), and provided for the payment of tuition grants to school children to attend private schools. (Ibid, 76). These amendments passed with a solid majority of the popular vote in December, 1954, thanks largely to the efforts of the White Citizens’ Councils (Ibid, 76, 85-86). The message was clear: the state would rather abolish the public school system than to integrate.

Meanwhile, the State Board of Institutions of Higher Learning announced a new regulation requiring applicants to the University of Mississippi to obtain character references from five alumni of the school, and decreed that any such references would have to have been acquainted with the applicant for at least two years (Adams, 1992, 269). Since the new rule required black applicants to find white alumni who would write letters of recommendations for them, it served as an effective barrier to blacks entering white universities for nearly a decade. Mississippi’s "character requirement" was copied by other Southern states that were searching for ways to discourage black applications to all-white universities (Dorsey, 1981; Preer, 1982; Samuels, 1991).

From the halls of the United States Senate, Mississippi Senator James Eastland emerged as perhaps the greatest champion of blatant white supremacy. He regularly denounced desegregation as a communist-inspired plot to undermine the
foundation of Anglo-Saxon civilization. White supremacy, according to Eastland, was part of the immutable order of things, and segregation was consistent with "the Constitution, the laws of nature, and the laws of God" (Bartley, 1969, 118). He specifically accused some of the key social scientists who were cited in footnote eleven of the Court’s opinion of subversion. These included Theodore Brameld, E. Franklin Frazier, and Gunnar Myrdal. Brameld, according to Eastland, was "a member of no less than 10 organizations declared to be communist, communist front, or communist dominated" (Wilkinson, 1979, 33). The House of Representatives’ Un-American Activities Committee had "18 citations of Frazier’s connections with Communist causes in the United States," Eastland complained (Ibid, 33). Eastland dismissed Myrdal as an "alien" and a "socialist" who had dismissed the federal Constitution as unsuited for modern conditions (Bartley, 1969, 120; Wilkinson, 1979, 33). He also criticized Myrdal for relying on sources that he considered to be subversive, such as Frazier and DuBois (Bartley, 1969, 120; Wilkinson, 1979, 33).

But opposition to the Brown decision was not simply a manifestation of the racial animosities of white men or a reflection of Southern-style McCarthyism. This became clear in 1956 when many Southern states (including Mississippi) broadened their attack on the Brown decision by enacting interposition resolutions. Basically, the interposition
resolutions conceived of the Union as an interstate compact whereby the states had only surrendered to the national government those powers directly specified in the compact—in this case, the Constitution. All other powers, according to the South, belonged to the states. This included the power to regulate public schools. *Brown v. Board of Education*, in their view, did not overturn the state's sovereignty over its public schools according to the Tenth Amendment. While the Fourteenth Amendment did place certain limitations on the powers of the states, it did not fundamentally change the nature of the Union nor forbid the states from operating segregated schools. By supposing that the states had the right to declare null and void any law that, in their view, violated the original compact, the South set the Tenth Amendment against the Supreme Court's interpretation of the Fourteenth Amendment in *Brown*. Consequently, if the Fourteenth Amendment did not change the nature of the Union, any action on the part of the federal judiciary to implement the *Brown* decision would be illegal barring the enactment of a constitutional amendment (Bartley, 1969, 126-134).

Thus, the South resurrected a constitutional debate over the relationship between the federal government and the states that could be traced back at least to the Virginia Resolution in 1798; similar arguments were relied on by John Calhoun during the nullification crisis in 1832. To be sure, there existed legitimate fears in the states about the growth
of federal power in many nonracial areas: many of the interposition resolutions mentioned fields other than race where state lawmakers railed against alleged "federal usurpations of the sovereignty of the states" (Ibid, 133). Still, despite the claim of a spokesman for the Virginia Defenders that Brown was "the occasion, rather than the cause, for reasserting the sovereignty of individual states within the Union" (Ibid, 133), the timing of this reassertion, in the very least, made such claims suspicious. Rather, it looked like the South was fighting the Civil War all over again.

The South's determination to resist desegregation forced a confrontation between the national government and the states. Throughout the 1950's, the federal government seemed reluctant to take decisive action to enforce the Court's decision in Brown. It took a threat to law and order to push President Eisenhower into nationalizing the Arkansas National Guard during the Little Rock school crisis in 1958 to force the integration of Central High School. Thus, the slowness of the federal government's enforcement efforts made it possible for Mississippi to continue to defy the Brown decision outright throughout the decade of the 1950's. In 1958 and 1959, the University of Mississippi Graduate School and Mississippi Southern College,63 in concert with other state officials not only denied admission to two black applicants

63It is now the University of Southern Mississippi.
to their schools; state officials blatantly violated the rights of these applicants in the process.\textsuperscript{64}

When James Meredith, an Air Force veteran, petitioned to enter the University of Mississippi in 1961, the university, the state college board, the governor, the lieutenant governor, and other state officials joined forces in order to prevent his admission. This time, however, the university lost its battle to deny Meredith admission, but only after the state exhausted all of its legal options (\textit{Meredith v. Fair}, 305 F. 2d 341 [5th Cir. 1962]; \textit{cert. denied}, 371 U.S. 828 [1962]; \textit{enf'd}, 313 F. 2d 532 [1962]). Nevertheless, despite a federal court order requiring that Meredith be admitted, he had to be escorted by federal marshals and attorneys from the U.S. Justice Department in order to insure

\textsuperscript{64}In 1958, Clennon King, a professor at Alcorn College, sought to enroll in the University of Mississippi Graduate School. Unable to get any alumni to write letters for him, he nevertheless tried to register in person. Governor J.P. Coleman, Attorney General Joe Patterson, and Commissioner of Public Safety Tom Scarborough met him at the Registrar's office to personally deny his petition. He was arrested and subsequently committed to the state's mental hospital for a short time. An NAACP spokesman remarked, "no other state has ruled that a man was crazy because he wanted an education" (Bartley, 1969, 212). He was declared sane, and he subsequently left the state. The following year, Clyde Kennard's application to Mississippi Southern College was rejected. Upon leaving the campus after meeting with college officials, Kennard was immediately arrested for speeding and charged with illegal possession of alcohol (though he did not drink). Though the state Supreme Court overturned his conviction two years later, Kennard was convicted of theft and sentenced to seven years in prison in a case where much of the evidence was manufactured. Kennard developed cancer while in the state penitentiary and died in 1963 (Bartley, 1969, 212; Adams, 1992, 270-271).
his admission (Tabarlet, 1987, 35-36). Meredith’s admission precipitated a riot which ultimately required 16,000 U.S. troops to put down. Two men were killed, hundreds were injured, and nearly 200 were arrested (Ibid, 36, 51-52).

Having lost the battle to prevent all blacks, regardless of their qualifications, from entering white universities, the state of Mississippi moved to circumscribe access to traditionally white schools by African American applicants. In 1963, the University of Mississippi, Southern Mississippi, and Mississippi State University all enacted admissions policies requiring a minimum score of 15 on the American College Test (ACT) for entering freshmen. At the time, the average ACT score for white Mississippians was 18 while the average score for blacks was 7 (Ayers v. Allain, 893 F. 2d 732, 735). The gap between black and white performance on the ACT was a powerful testimony to the legacy of separate and unequal education for black Mississippians at the elementary and secondary level. The new policies fit a general pattern among Southern states that was mentioned in Chapter Three: the strategy of altering admissions requirements in facially neutral ways in order to limit the number of blacks who would be able to meet the new standards as much as possible. The new admission standards at Mississippi’s white universities manifested another form of the state’s resistance to the Brown decision.
Mississippi State University admitted its first black student in 1965; Mississippi University for Women and Delta State University followed suit in 1966. In 1967, the University of Southern Mississippi became the last all-white university to drop its color barrier to blacks (Davis, 1993, 412-413). Alcorn State became the first black college in Mississippi to enroll white students in 1966; Whites first enrolled at Jackson State in 1969 and at Mississippi Valley State in 1970 (Ibid, 413).

Nevertheless, while Mississippi’s universities were technically "integrated," the racial designations of its schools still persisted. Though the state had made some improvements in the black colleges,6 a substantial gulf remained between the financial support and academic offerings for predominately white schools and black ones. Table 3 on page 228 summarizes the distribution of degree programs among Mississippi’s institutions of higher learning as of 1974.

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6Between 1966 and 1974, the state had appropriated $16,084,656 for new construction at Alcorn State University. The comparable figures for Jackson State and Mississippi Valley were $17,691,557 and $10,668,514 respectively. However, the state was still making substantial investments on the white campuses as well. Mississippi allocated $11,417,960 for new construction at Delta State University, $13,989,528 at Mississippi State, $9,705,574, $17,206,793 at the University of Mississippi, and $12,412,978 at Southern Missis-sippi. Thus, while the new investments brought much needed improve-ments to black campuses, they did not substantially reverse the "cumulative defecit" that had amassed from a century of underfun-ding black higher education.
In addition, the predominately black institutions continued to receive a substantially smaller share of overall state appropriations than the predominately white universities. Table 4 on page 229 documents the distribution of state dollars to its universities between 1970 and 1974.

Mathematically, these figures were computed based on the total number of student credit hours at the respective institutions. Formula funding was based on student enrollment at both the baccalaureate and postbaccalaureate levels. Since the predominately white universities offered a greater range of programs at both levels than the predominately black uni-
TABLE 4. STATE APPROPRIATIONS FOR MISSISSIPPI UNIVERSITIES, 1970-1974*

<table>
<thead>
<tr>
<th>Institution</th>
<th>Total Appropriation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alcorn State University</td>
<td>$9,442,783</td>
</tr>
<tr>
<td>Delta State University</td>
<td>12,341,051</td>
</tr>
<tr>
<td>Jackson State University</td>
<td>19,804,944</td>
</tr>
<tr>
<td>Mississippi State University</td>
<td>41,414,924</td>
</tr>
<tr>
<td>Mississippi Univ. for Women</td>
<td>11,021,959</td>
</tr>
<tr>
<td>Mississippi Valley State Univ.</td>
<td>8,889,710</td>
</tr>
<tr>
<td>University of Mississippi</td>
<td>35,545,525</td>
</tr>
<tr>
<td>Univ. of Southern Mississippi</td>
<td>36,700,432</td>
</tr>
</tbody>
</table>

*These figures are based on student credit hour production. Funds for new construction at these universities are not included in these totals.


Universities, significant disparities between black and white colleges continued to persist. The inequalities were even more stark with respect to the land grant activities of the state. For fiscal year 1970, Mississippi received $4,465,035 in federal funds under the Morrill Act to divide between its two land grant universities. When the funds were divided, all but $127,000 of those dollars went to Mississippi State (Ayers Complaint, January 28, 1975, 17).

Furthermore, the University of Mississippi, Mississippi State University, and the University of Southern Mississippi established several off-campus centers throughout the state, which further insured that few white students would attend predominately black schools. As black college presidents in
Mississippi increasingly defined the missions of their institutions as places that provided low-cost education to all Mississipians, they viewed the existence of the off-campus centers as a deliberate effort on the part of the state to discourage white enrollment at black colleges. The black college presidents maintained that these branch campuses "unnecessary duplicated" the course offerings of their institutions and served to drain away funds, students, programs, resources, and facilities that might otherwise be invested in Jackson State, Alcorn State, and Mississippi Valley.  

"Unnecessary duplication" refers to instances where two or more institutions offer the same nonessential or noncore program. Using this definition, the district court in Ayers considered all duplication at the bachelor's level of nonbasic liberal arts and sciences course work and all duplication at the master's level and above to be unnecessary (United States v. Fordice, 505 U.S. 717, 738). Implicit in the term is the lack of an educational rationale for such duplication and the fact that some, if not all, duplication could be practically eliminated (Ibid, 739).  

In 1972, the state legislature passed a law which limited somewhat the universities' ability to establish branch campuses. Senate Bill No. 1527 prohibited the establishment of a degree granting branch or residence center within 40 miles of another Mississippi university. The new law was designed to end the "haphazard manner" in which these branch campuses were being created; many times, the universities were establishing off-campus centers in the same cities (Peoples, 1995, 258-259). However, the urban areas of Jackson and Natchez were specifically exempted from this provision. This exemption expressly protected the existence of The Universities Center (operated jointly by the University of Mississippi, Mississippi State, and Southern Mississippi) located in Jackson, and the University of Southern Mississippi Natchez Center. Nor did the new law require the closing of the Mississippi State University Branch Center in Vicksburg, which was less than 40 miles from Lorman, Mississippi, where Alcorn State is located. The
Patterns of faculty employment continued to reflect the legacy of segregation in Mississippi higher education. It was not until the 1970-71 academic year that the state broke with its historic policy of not hiring black faculty at white universities. During that year, the University of Mississippi, Mississippi University for Women, and Southern Mississippi hired blacks for the first time. Delta State hired its first black in 1973-74, and Mississippi State joined the crowd in 1974-75 (Davis, 1993, 413). Meanwhile, the black universities hired whites at Alcorn State in 1966-67, Jackson State in 1967-68, and Mississippi Valley in 1968-69 (Ibid, 413).

In 1969, HEW's Office of Civil Rights found the state's higher education system to be in violation of Title VI of the Civil Rights Act of 1964 (Preer, 1982; Adams, 1993; Connell, 1993; Davis, 1993; Kujovich, 1996). HEW requested that the state submit a desegregation plan to disestablish the dual system. However, four years passed before Mississippi developed any sort of plan to meet HEW's request. They were able to get away with negligence largely because HEW lacked clear definitions of desegregation in the higher education context, a point which will be further explored later in this chapter.

Universities Center offered the white population of Jackson an alternative to Jackson State; similarly, both the Natchez and Vicksburg branch campuses, located in close proximity to Alcorn State, competed for the same pool of white students that Alcorn was trying to attract to its campus (Ayers Complaint, January 28, 1975, 15-17).
Chapter Three discussed how dissatisfaction with HEW's record on securing compliance with Title VI of the Civil Rights Act of 1964 prompted the NAACP Legal Defense Fund to bring the Adams suit. After the Adams court ruled against the federal government, the Office of Civil Rights (OCR) turned its focus to Adams states such as Mississippi.

Meanwhile, the Adams case motivated a group of black Mississippi activists who were dissatisfied with the state's progress toward desegregation to begin sharing information with each other concerning the state's response to HEW. They formed an organization called the Black Mississippians' Council on Higher Education (Davis, 1984, 243; Adams, 1993, 277). While the NAACP Legal Defense Fund was frustrated with the federal government's record of enforcing the provisions of Title VI, the Council was more concerned about the unequal status of black colleges within Mississippi's system of higher education. They feared that the process of desegregation would result in the further marginalization and/or the elimination of black colleges.

In a letter dated May 21, 1973, OCR renewed its request that the state submit a desegregation plan (Peoples, 1995, 303). Hastily and without relying on any black input, the state submitted its first Plan of Compliance on June 7, 1973. Among other things, the plan operated as if Brown's mandate in higher education meant freedom of choice and little else, ignoring the potential ramifications of the Supreme Court's
decision in Green for higher education. The plan was summarily rejected by HEW on November 10, 1973 (Adams, 1993, 276-277; Peoples, 1995, 303). After a period of negotiations and resubmissions, HEW approved the state's plan of May 28, 1974 pertaining to its four-year institutions (Adams, 1993, 277). Among other things, the black colleges complained that the state's Plan of Compliance left the branch campuses at Jackson, Natchez, and Vicksburg intact. Instead, the Plan called upon Jackson State to participate in the Universities Center in Jackson and for Alcorn to provide 25 percent of the teaching load at the bachelor's and master's level at the Natchez Center (U.S. Exhibit 1, "State of Mississippi Modifications to the Plan of Compliance to Title VI of the Civil Rights Act of 1964," 82-83). While the Plan required the removal of programs at the Universities that were duplicative of Jackson State's course offerings, it permitted, with Board approval, the development of any "unique or professional programs which are not offered at Jackson State University" (Ibid, 82). The Board of Trustees proposed that

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68 John Peoples, former president of Jackson State University, complained that the provision forbidding the off-campus centers to duplicate course offerings at Jackson State and Alcorn was routinely evaded for years. The off-campus centers would change the title of course offerings while leaving the course content essentially the same as corresponding courses at Jackson State or Alcorn; thus, a course at Jackson State entitled, "Modern European History" might be offered at the Universities Center as "The History of Europe After 1900" (U.S. Exhibit 14, Letter from John A. Peoples to Dr. E. E. Thrash [July 25, 1975], United States v. Mabus, 1991, 144-145; Peoples, 1995, 309).
it would seek a special appropriation from the legislature of slightly less than $3 million to implement the total plan (78).

Still to be resolved was the status of the state's junior colleges.\textsuperscript{69} Since compliance with Title VI required an approved plan for the entire system of higher education, and since the junior colleges could not agree on a comprehensive plan, HEW referred Mississippi's case to the U.S. Justice Department in August, 1974 for enforcement action (Ibid, 277).

For several months after HEW's referral of Mississippi's case to the Department of Justice, no visible action was taken. The Justice Department did consider entering a pre-existing case in Mississippi in order to attack the state's higher education system. In 1970, the Lawyers Committee for Civil Rights Under Law, a Washington based civil rights advocacy group, brought suit to force the U.S. Agricultural Extension Service to desegregate \textit{(Wade v. Mississippi Cooperative Extension Service),} 372 F. Supp. 126 [N.D. Miss.], \textit{modified,} 378 F. Supp. 1251 [N.D. Miss. 1974], vacated, 528

\textsuperscript{69}This posed a problem because the state's college board had no constitutional authority over the junior colleges. Each public junior college in Mississippi had an independent governing board, while all fell under the authority of the Junior College Commission. This commission, however, had very little real authority over the fiercely independent, county based governing boards. Consequently, it is not surprising that the junior colleges could not come to a suitable settlement to the question of desegregation (Peoples, 1995, 303).
F.2d. 508 [5th Cir. 1976]). The Extension Service was a branch of both Mississippi State University and Alcorn State College, which were included as defendants. It was also partially funded by the U.S. Department of Agriculture, which was also named as a defendant (Adams, 1993, 278). Although the decision in Wade had been handed down in 1974, the case remained active in order that its implementation might be monitored. In January, 1975, the Justice Department announced its intention to enter the case as a plaintiff, creating the interesting situation of the federal government being on both sides of the case (Ibid, 278). The Justice Department sought to reopen the suit and expand its jurisdiction to include the entire higher education system, "thereby hoping to kill two unconstitutional birds with one judicial stone" (Ibid).

The Black Mississippians' Council was displeased with HEW's decision to accept the senior college portion of Mississippi's higher education plan because it did not, in their judgement, fundamentally alter the unequal status of the state's black institutions. Unwilling to allow the Justice Department to obtain judicial approval for the HEW's accepted solution for Mississippi's senior colleges, the Council on January 28, 1975 filed Ayers v. Waller as a

\[\text{Note:}\]
In Mississippi, the governor is the titular head of the higher education system, even though the Board of Trustees for State Institutions of Higher Learning has the constitutional authority to actually manage the system. Therefore, the suit has changed names with succeeding gubernatorial administrations. William Waller was governor in 1975 when the suit was filed; subsequently, William Allain,
class action suit and invoked a three-judge district court (Ayers Complaint, January 28, 1975; Preer, 1982, 212; Adams, 1993, 278). In their petition, they accused the state of unconstitutionally violating the rights of African American citizens in the state by failing to maintaining a separate and inferior system of higher education for blacks. However, unlike the NAACP lawsuits which were geared primarily toward eliminating barriers to black admission at white universities, the Ayers complaint charged Mississippi officials with systematically underdeveloping predominately black institutions. They aimed primarily to improve black universities, arguing that these institutions still served a vital role in assuring access to higher education for African Americans. Leading the list of plaintiffs was Jake Ayers, Sr., father of two of the minor plaintiffs in the Adams suit (Preer, 1982, 212). The Justice Department subsequently filed a motion to intervene as a plaintiff in the case (Motion to Intervene as Plaintiff, April 7, 1975).

The Ayers suit not only signaled the beginning of a new phase in the history of Mississippi higher education; it com-

Roy Mabus, and Kirk Fordice (the current governor) have been named defendants in the Mississippi case.

71 Jake Ayers, Sr. had been a longtime civil rights activist and a member of the Mississippi Freedom Democratic Party (MFDP), an all-black political party famous for challenging the legitimacy of the all-white Mississippi delegation to the 1964 Democratic National Convention in Atlantic City, NJ. Ayers died in 1986, but the suit which bears his name continues.
menced a significant turning point in the debates about desegregation in higher education more broadly. The next section attempts to place the litigation in Mississippi in a wider context of what was happening nationally with respect to desegregation and civil rights enforcement.

The Political, Judicial, and Regulatory Context of Ayers

The Ayers suit crystallized how the political landscape of desegregation in higher education had radically changed since the early pre-Brown lawsuits in the graduate and professional school cases. Since Green, the Supreme Court had made it clear that it had lost patience with the deliberate tactics that state universities had utilized to escape the full weight of the Brown mandate in higher education; mere "freedom of choice" plans were not sufficient. States now were expected to demonstrate clear numerical progress toward desegregation. Moreover, the Court's insistence that dual systems be eradicated "root and branch" occurred in the context of the increasingly systemic organization of higher education in the states. As a consequence, the focus in desegregation enforcement shifted from not only insuring that individual blacks had access to white universities, but also to the creation of unitary systems of higher education, thereby exposing the vulnerability of public black colleges.

In Chapter Three, it was shown that the mid-1960's witnessed the collapse of the policy consensus on civil rights. The effort to apply the Green decision to higher
education drove a wedge through an already deeply divided civil rights community which agreed on the issue of expanding black access to white universities, but disagreed about what should happen to public black colleges. With the goal of legal equality obtained, longstanding tensions between black integrationism and black separatism reemerged. The debate over the future of the black college in the post-Brown era represented but one facet of black America's schizophrenia between its desire to be fully integrated into the mainstream of American society and its desire to preserve its unique history and culture.

Thus, Ayers represented the first time that blacks had challenged racially discriminatory practices in higher education where the principal goal was not simply increased access to all-white institutions, but access defined as strengthening black universities. This stood in marked contrast to the Reconstruction period, where black acquiescence to segregated schools reflected their recognition of the reality of the hostility of Southern whites to the concept of public education and to integrated education in particular. It also differed remarkably with the pre-Brown litigation of the NAACP against segregation in which benefits had accrued to black colleges as a byproduct of the efforts of Southern states to evade the full effect of integration. Unlike the past where the existence of all-black institutions was seen by some as illegitimate, dangerous, or contrary to
American ideals, the Ayers plaintiffs uncompromisingly defended the existence of public black colleges based on their vision of the Constitution.

In May, 1975, the Black Mississippians' Council adopted a position paper which attempted to forge a synthesis between the concepts of legal equality and equal educational opportunity (Preer, 1982, 212). They urged the courts to move away from preoccupation with educational form (which they defined as the racial identity of students, faculty, administrators, and institutions) to educational substance (the necessary requirements for quality education). The Council chastised both the Justice Department and the Legal Defense Fund for their obsession with eliminating the racial identifiability of institutions, arguing that both parties neither understood the ramifications that a desegregation-only remedy would have for the educational opportunities of black Mississippians. Black colleges, they asserted, were needed to preserve the full range of educational opportunities for black youth. The Ayers plaintiffs did not disavow the need to increase black access to historically white institutions in Mississippi; rather, they maintained that the goal of increasing black access to previously all-white universities should supplement, not replace, the academic opportunities afforded to black Mississippians by black colleges (Ibid, 212). In insisting that Mississippi’s black colleges be preserved and enhanced in any desegregation remedy, the Council defined the
goal of desegregation as making sure that black students would have equal educational opportunities regardless of what institution they chose to attend.

The concerns listed by the Ayers plaintiffs tended to mirror the institutional aspirations of black colleges in Mississippi. Though Mississippi's black universities were not listed specifically as plaintiffs in Ayers, the institutional heads of the black schools have had considerable input with regard to the framing of the arguments by attorneys for the plaintiffs (Peoples, 1995, 317-318). In addition, the plaintiffs solicited and received financial support from The Alumni Association of Public Colleges, a black college advocacy group that had been formed with the cooperation of the presidents of Mississippi's black colleges. Because of

The Alumni Association of Public Colleges is a collaboration of the alumni associations of Jackson State, Alcorn, and Missis-sippi Valley to advocate the cause of black colleges within the state of Mississippi. It was established in 1969 in Jackson in response of the refusal of all-white inter-alumni associations to accept black alumni associations. The formation of the association required the putting aside of past grievances that had served to divide the individual institutions in question. For example, Alcorn alumni had opposed the state's decision to take over Jackson State College in 1940, deeming it unnecessary. As time passed, enmity between the two schools intensified as Jackson State developed into an institution with more than twice the enrollment and academic scope as Alcorn. When the state established Mississippi Valley, both Jackson State and Alcorn alumni opposed the move, but they did not have anything resembling the political clout to prevent white Mississippians from creating another "separate but equal" black institution within the state. The alumni of the two older black schools saw the creation of a third black public college as an unwelcome competitor to them for the already measley allocation of state funds for black schools. Thus, the formation of the Alumni Association of Public Colleges
the close relationship between the plaintiffs' aims and the aspirations of black universities, they had to fend off the charge by attorneys for the state of Mississippi that what they were in fact asserting were "institutional rights" not individual rights (Brief for Respondents, in Kurland and Casper, 1993, 379 [especially, footnote 30]). Title VI of the Civil Rights Act of 1964 and the Fourteenth Amendment, the state argued, were designed to protect individuals from acts that infringe on their liberties (either by the state or by private individuals); it did not establish rights for institutions to receive equal protection. The Ayers plaintiffs accused the state of distorting their argument, insisting that the "examination of institutions is necessary in determining whether individuals (here, the plaintiff class) are afforded their constitutional and statutory rights" (Reply Brief of Private Petitioners, in Kurland and Casper, 1993, 448-449). They countered that individuals can only receive higher education from institutions. Hence, if state policies represented a definite break from the past: the black college alumni associations began to shift their focus from fuding against each other toward fighting their common foe: state educational policies that discriminated against all black colleges in Mississippi.

The evidence shows that Mississippi's argument directly impacted at least one justice on the Supreme Court, albeit it the one justice, Antonin Scalia, who dissented in the state's favor in Fordice. Scalia interpreted the question of whether black colleges were entitled to enhancement as part of a desegregation remedy a question of institutional, not individual, rights. Quoting Gaines and Sweatt, he argued that "it is students and not schools who are guaranteed equal protection of the laws."
unconstitutionally discriminate against certain institutions, such actions would abridge the rights of the individuals receiving an education in such settings.

In describing what motivated her late husband to bring the suit, Mrs. Lillie Ayers said:

The underfunding and disparate funding of Black institutions amount to segregation. We as a Black race would love to go to our Black colleges, but on the other hand, we want the best education that this country has to offer. . . . We will pursue this issue until justice is done. . . . My husband was an avid reader. . . . He knew that Alcorn existed a long time before Mississippi State and the University of Southern Mississippi. It angered him when the State Legislature made Alcorn a branch of MSU, for all practical purposes. . . . I am going on as long as it takes to get this matter settled because I feel that this is what he wanted me to do (Brown, 1992, 122).

The Ayers plaintiffs, thus, saw their task as requiring them to take on not only the state educational establishment in Mississippi which had discriminated against the state's black colleges, but those civil rights liberals (black and white) who saw black colleges as obstacles that needed to be removed in order for blacks to obtain equal educational opportunities. Isaiah Madison, convenor of the Council and one of the attorneys for the plaintiffs wrote that while he did not oppose an increased black presence on white campuses, he did reject "any mode of educational integration or cultural assimilation which Blacks have not freely chosen to undertake themselves" (Preer, 1982, 212-213). He believed that the drive to merge black colleges into larger white universities to meet the "just schools" standard announced in
Green represented the handiwork of an elitist corps of white social engineers (with the assistance of a few blacks) who had imposed their definition of desegregation on the black population (Ibid, 213). While not condemning Brown directly, Madison accused many liberals of racism by implying that black colleges were necessarily inferior because they were black. By implication, black leaders who favored the phasing out of black schools had internalized the racist assumptions of their white benefactors. Madison's views sounded the theme of a longstanding complaint voiced by African Americans that the Black Power movement had revived: black resentment of the perceived paternalism of the "benevolent whites" who were "helping" them. Ayers represented a rebuke to liberal white elites and their black counterparts who felt, as many African Americans saw it, that they knew best what black people wanted or needed.  

Some integration advocates not only denied that black schools had any educational value, but even if they did, it did not matter. One NAACP official said that his organization opposed segregated schools "no matter what is taught or how well it is taught" because the "existence of segregation teaches that racial separation is right and proper in American society." While the official acknowledged that thirty percent of all blacks college students were enrolled in mainly black colleges, he denied that these schools offered a unique educational experience. A black school board member in one of the nation's largest school districts remarked, "Of what value is it to teach black children to read and write in an all-black school?" Many black college officials reacted bitterly to such criticisms. For example, Dr. Samuel DuBois Cook, president of Dillard University scathingly referred to the liberal establishment within the federal bureaucracy and many civil rights organizations as those who "masqueraded as friends" but are in fact the greatest threats to "the future and well-being of black
For many integrationists who saw Brown as the incarnation of America's long struggle to match its reality with its ideals with respect to race, efforts by African Americans to save black colleges smacked of heresy (Wilkinson, 1979). However, contrary to the opinions of their critics, the Ayers plaintiffs (and by extension, the supporters of black colleges generally) did not depart from the American Creed. First, as mentioned in the last chapter, Brown never specified whether it meant to eradicate compulsory segregation or every type of segregation, whether freely chosen or not. Thus, the Ayers plaintiffs were able to embrace the ideals of Brown without having to directly repudiate some of its more troublesome assertions — particularly the notion that "separate facilities are inherently unequal." Because of Brown's ambiguity, supporters of black colleges were spared the unenviable task of explaining how a decision of such profound symbolic and historical significance to both black and white Americans could possibly be wrong — or, at the very least, naive and misguided. Brown seemed to epitomize American ideals at their best; indeed, the shrill tactics of Brown's critics only served to strengthen the conviction that the South was "on the wrong side of history." As Wilkinson has argued, "Those promoting an idea can do no better than to hire intemperate opponents. And the vindication of Brown owes higher education, particularly black colleges" (Bell, 1979, 957-959).
much to them" (1979, 34). Supporters of black colleges, then, merely had to fashion an interpretation of Brown that suited their cause; thus, they claimed Brown's moral legacy as their own.

Secondly, the plaintiffs contended that segregation harmed blacks not simply because it denied them equality or damaged them psychologically, but because it denied them freedom. The end of legal segregation, the argument ran, left blacks free to choose from the full range of educational institutions for academic, vocational, cultural, social and economic reasons (Preer, 1982, 213). No longer would the choices of an individual black person be predetermined simply because he or she happened to be an African American. The problem with defining integration as requiring the extinction of black colleges was that it served to restrict the range of legitimate choices that each individual black person could make concerning which type of institution to attend.

Third, it has already been demonstrated that the elimination of the racial identification of schools threatened the power of black educators and black administrators. It also posed a threat to black students who might not qualify for admission to white universities. Not only were black colleges important centers of black educational power, but they also represented key centers of black political power as well. Not surprisingly, the groups who resisted efforts to merge black colleges out of existence were motivated, at least in part,
by self-interest. Since participation in politics by self-interested groups or parties is considered a foundational cornerstone of politics in a democracy, the Ayers plaintiffs certainly did not depart from American democratic norms. This conclusion becomes even stronger in view of the fact that the original complaint was filed precisely because the plaintiffs feared that a solution to the Mississippi desegregation problem was being imposed on them that was not in their best interests.

Fourth, the Ayers case provided strong evidence of black fidelity to another key American virtue: pragmatism. For African Americans, pragmatism had historically manifested itself in the proliferation of a vast array of black self-help programs, mutual aid societies, and social fraternities. Blacks had developed these institutions to provide needed services to their communities (such as education) in the face of a hostile, white-dominated world that had refused to grant them equal access to the public sphere. In the present case, Ayers symbolized black pragmatism in the recognition that (1) racism would not be overcome as quickly as many had hoped and (2) the end of legal segregation left many blacks unprepared to compete with whites on the same terms. In view of these realities, the Ayers plaintiffs argued that black colleges still constituted a critical link between disadvantaged blacks and a college education. At the same time, black colleges presented themselves as institutions representing
the hope for a college education for all regardless of race and color (another pragmatic compromise); in a political climate where majority-black institutions were considered suspect at best, black colleges could ill afford to make naked appeals to black self-interest.\textsuperscript{75}

In addition, the plaintiffs were motivated to act by two larger national trends: (1) the state of desegregation law in higher education was largely unclear, and (2) HEW, which was charged with the power to enforce Title VI of the 1964 Civil Rights Act, had yet to develop coherent enforcement standards. Green had established the principle that states had the "affirmative duty" to dismantle former \textit{de jure} systems of segregated schools. However, it was unclear what the implications of that ruling were for higher education; nor

\textsuperscript{75}At the same time, black colleges, while promoting an image of themselves as universities for all the people, struggled with the question of how to be schools which appealed to all while maintaining a black cultural ethos. Efforts by black colleges to attract a larger white clientele have often fueled criticism and resentment from black students and faculty, who feel that whites were now receiving preferential treatment at their expense (Preer, 1982). Nevertheless, despite the public stances of many black colleges that they are universities for all races, their critics have accused them of being only interested in preserving themselves as all-black enclaves. The criticisms of black colleges "ran the gamut": it was alleged that (1) black colleges have a vested interest in maintaining mediocrity; (2) black colleges have difficulty retaining good faculty, and that bright students do not develop intellectually there; (3) some have denounced the administrative leadership of black campuses as a clique of autocratic, incompetent, mismanagers who are more interested in protecting their turf than in raising the academic standards of the institutions they purport to lead; and (4) black college students must be educated in an integrated setting if they are to compete in American society (Roebuck and Murty, 1993).
was it clear what it should mean for elementary and secondary education. Chapter Three noted that the Supreme Court in ASTA and Norris sidestepped two opportunities to clarify the meaning and scope of the state's "affirmative duty" to desegregate in higher education. Federal courts, lacking guidance from the Supreme Court, were left struggling to define the appropriate constitutional remedies themselves; as a result, conflicting interpretations of the Green standard had emerged in the federal courts. Lacking judicial precedents in higher education, federal judges attempted to draw on the experience of elementary and secondary education, often with problematic results.

The unsettled state of higher education desegregation law complicated HEW's predicament. Federal regulators have wide discretion to promulgate rules based on their interpretation of laws and judicial decisions. The problem for HEW in this case, however, was that it simply was not clear what the law was. Adding to their troubles was a lack of experience in higher education desegregation; HEW officials were accustomed to the more familiar problems associated with affecting desegregation at the elementary and secondary levels (Ayers, 1984, 134). Even in 1980, after a decade of experience, an OCR official said that the agency did not know what would be the effect of eliminating "unnecessary program duplication" on the states' systems of higher education (Bryson, quoted in Ayers, 1984, 134). In fact, during the Adams case, HEW had
cited its inexperience in higher education as a justification for its failure to develop comprehensive desegregation criteria; Judge Pratt, however, was not sympathetic to the government's plea and ordered the agency to commence enforcement proceedings.

Not only was the law unclear and the federal government lacked experience in higher education, but the question of what should happen to black colleges in the desegregation process perplexed HEW's bureaucrats. Solomon Arbeiter, coordinator for higher education in OCR from 1967 to 1969 recalled how confusion and ambivalence toward black colleges paralyzed the agency's efforts to develop coherent policies. Though he envisioned desegregation as a process that would bring about the elimination of the racial identifiability of educational institutions, he found within the agency a great deal of sympathy toward the plight of black colleges:

Even within the federal government there arose a great deal of honest concern about the future of black colleges. Should they be preserved as enclaves for the education of blacks or should they be blended into a total system for blacks and whites? At times I had the feeling that the same people who wanted to establish quantitative goals for minority enrollment and other aspects of desegregation also were most sympathetic toward arguments for minority self-determination. These officials saw no moral or legal ambivalence in taking those positions. They wanted strong enforcement of desegregation and yet they maintained it was both morally and legally proper to have separate minority programs, activities and institutions (Arbeiter, quoted in Preer, 1982, 196).

In retrospect, Arbeiter marveled at how a policy matter of such high importance could essentially be allowed to go
unaddressed for several years (Ibid, 196). But desegregation policy in higher education at the federal level did exactly that—mainly because federal regulators had no clear idea of what integration or desegregation should mean. And the existence of publicly funded black colleges only complicated their dilemma. Nor did the Adams decisions simplify HEW's problem. Adams said that the desegregation process must take into account the important role that black colleges play in assuring access to higher education for blacks and the real possibility that desegregation might negatively impact black access to postsecondary educational opportunities. But the court gave HEW no guidelines of how to fulfill that charge. Also, HEW officials interpreted the adversary positions taken by the LDF and the NAFEO in the Adams litigation as evidence that African Americans—the intended beneficiaries of integration—were not of one mind as to what the correct policy should be. As a result, the task of crafting desegregation remedies under Title VI involved HEW administrators in the "tug-of-war" between competing civil rights groups who had sharply contrasting visions of the appropriate goals and strategies that were appropriate in the desegregation process (Ayers, 1984, 130-131).

Furthermore, what passed for federal enforcement efforts during this period was a model of inconsistency. The track record of HEW and the Department of Justice demonstrated not only a clear definition of desegregation, but revealed how
vulnerable the regulatory zeal of these agencies were to political pressures. For example, five of the ten original Adams states submitted desegregation plans, all of which were rejected on the grounds that they were not specific enough in detailing how the states proposed to transform their dual systems of higher education into unitary ones (Adams, 1993). Yet, at the same time that HEW was rejecting the plans from the states, it had established no desegregation criteria of its own. Pursuant to the Adams decisions in 1973, eight of the ten Adams states submitted desegregation plans which OCR subsequently accepted; however, the agency still had failed to develop any comprehensive guidelines. Even more revealing of the federal government's erratic compliance efforts was the case of Mandel v. HEW (411 F. Supp. 542 [D.C.D. 1976]) where the state of Maryland successfully obtained an injunction against further OCR involvement in the state's higher education system because the court found the agency guilty of "arbitrary and capricious" enforcement of the law.

Furthermore, the failure of HEW to formulate a coherent policy unveiled the vulnerability of the agency's enforcement efforts to political pressures. In some instances, federal agencies significantly modified, or failed to initiate entirely, enforcement efforts in order to avoid offending powerful politicians.76 At other times, federal policy

76For example, the government's decision not to challenge segregated higher education in Alabama was attributed to Governor George Wallace's political clout (Preer, 1982, 197).
vaccillated due to changes in who occupied the White House. New presidents designated political appointees in critical policymaking positions, and these new appointees often implemented new policies over the objections of career bureaucrats and agency lawyers who were more familiar with the cases in question.77 Thus, HEW's critics no longer simply charged the agency with failing to promulgate clear guidelines. They also accused the federal government of lacking the political will to enforce the standards that it had.78

The Reagan administration's 1981 decision to reverse OCR's threat to cut off federal funds to North Carolina was attributed to Senator Jesse Helms' political standing with the Reagan White (Dentler, Balzell, and Sullivan, 1984, 110; Ayers, 1984, 133).

77 For example, OCR's decision in 1970 that it would no longer rely on threats to cutoff federal aid to states reflected the Nixon administration's fulfillment of a campaign promise to change the way the federal government approached desegregation (Preer, 1982, 198; Orfield, 1996). Similarly, when Ronald Reagan became president in 1981, the Reagan Justice Department accepted a consent decree settlement in North Carolina that the Carter Justice Department had previously rejected (Miller, 1982; Dentler, Balzell, and Sullivan, 1984). The settlement ended a bitter struggle between North Carolina and the federal government in which HEW had initiated proceedings to cut off federal funds to the state. The consent decree reflected the administration's rejection of the use of threats to cut off federal aid to prod states to dismantle desegregation.

78 The agency approved consent decree settlements in North Carolina and Louisiana in 1981 (Miller, 1982; Prestage and Prestage, 1987; Samuels, 1991). Commentators accused the Reagan administration of accepting plans which did not meet the standards of the Revised Criteria adopted in 1978 (Miller, 1982; Dentler, Balzell, and Sullivan, 1984; Ayers, 1984). They pointed out that the consent decrees fell short of the Criteria's guidelines with respect to enhancing black institutions by giving them priority consideration for high demand programs. The effect of such enhancements would bring increased funding, prestige, and serve to equalize the
The unsettled state of higher desegregation law and the uncertain regulatory environment heightened the anxieties of supporters of black colleges. Thus, the Ayers plaintiffs were asserting a measure of self-determination when they filed the case. While federal intervention was welcomed in the case, policy vacillations at HEW and the Department of Justice made the federal government an uncertain and unreliable ally. From the very beginning, the Ayers plaintiffs and the Department of Justice had different agendas. The Black Mississippians' Council was determined that the process of desegregation focus on expanding black access to white universities while strengthening black colleges at the same time. However, the curriculums of black institutions, thereby providing programmatic inducements to white students to consider black colleges at the same time. Thus, the two pressing concerns of black institutions - equalization and desegregation - could be satisfied in one stroke.

The Reagan administration refused to insist on these types of enhancements, and chose not to order the politically unpopular proposal of removing academic programs from white campuses to black ones. The administration's approach was consistent with its overarching conservative philosophy of government which, when applied to higher education desegregation, sought to minimize judicial intervention in state educational matters. While both consent decrees mandated that the states spend extra monies on black colleges, critics charged that the majority of the new dollars were concentrated in programs which were unlikely to have any positive desegregative effect on black campuses. The effect of the Louisiana and North Carolina decrees, they concluded, would actually increase unnecessary program duplication rather than reduce it. Therefore, critics accused the Reagan Justice Department of approving plans that actually violated federal desegregation standards. The administration defended its approach, insisting that it simply had an opposing view of the legitimate role of the federal government than groups such as the NAACP Legal Defense Fund (Miller, 1982; Dentler, Baltzell, and Sullivan, 1984; Ayers, 1984).
Justice Department was primarily concerned with enforcing the "just schools" standard in higher education, but it was not clear what the federal government meant by desegregation (Brown, 1993, 121-123).

Mississippi responded to the Ayers complaint, as well as the federal government's intervention into the case, with determined opposition. The state proceeded to implement its own Plan of Compliance despite the federal government's objections. The college board partially financed the state's defense by assessing each of the universities in proportion to its state appropriation, creating the ironic situation of Mississippi's black colleges contributing financially to advance the cause of positions that they were opposed to (Peoples, 1995, 315).

However, state officials realized that a frontal attack on the Brown decision at this late date would be futile. Instead, Mississippi pursued a different strategy: the state insisted that compliance with Brown required the implementation of race-neutral, "colorblind" policies in higher education. The effect of the Brown decision, the argument went, was to vindicate Justice Harlan's lonely dissent in Plessy when he argued that "our Constitution is colorblind." Henceforth, the state's obligation was to promulgate educational policies without regard to race. Remedies that suggested, for example, that traditionally black universities must now be enhanced to compensate for historical underfunding were in
fact "race-conscious" policies that were impermissible under the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964.

In this sense, the Mississippi case was one battlefront in a larger national debate over the meaning of the civil rights revolution of the 1960's. In Chapter One, it was argued that political conflicts concerning issues of racial policies between liberals and conservatives since the mid-1960's have revolved primarily around the question of the best means to achieve racial justice. Mississippi's arguments fell squarely within the conservative orbit: the state argued that race consciousness in the determination of public policy constituted a *prima facie* violation of the American principle that each citizen be judged based on his or her own merit. Conservatives increasingly began to object to policies such as busing, affirmative action, and minority set-aside programs because, in their view, these policies practiced the very evil the civil rights movement tried to eradicate. Liberals were accused of abandoning an emphasis on affirming the worth of every individual (which represented the "best" in American traditions) to promoting policies which required "equality of results" or "proportional representation." These ideas, according to conservative critics, were "un-American" (Glazer, 1975, D'Souza, 1995). In the same way, the state of Mississippi asserted that the black plaintiffs in *Ayers*, by insisting that the Equal Protection Clause required the
enhancement of historically black colleges, had advanced two arguments which fundamentally violated the American Creed. In the first place, they asserted that African Americans were seeking proportional representation in college admissions, college graduation, faculty and administrative hiring, and in state appropriations to historically black colleges. Second, the remedies favored by the petitioners, in the state's view, were tantamount to assertions of "group rights." Mississippi denied that the African American community had a constitutional right to educational institutions with equal resources as white institutions, arguing that the Fourteenth Amendment offered protection to individuals, not groups.

Furthermore, evidence began to mount that the more conservative vision of civil rights was gaining momentum. After a series of court decisions that expanded the courts' ability to foster desegregation, the Supreme Court in Milliken v. Bradley (418 U.S. 717 [1974]) struck down a Detroit metropolitan desegregation plan that involved the urban and suburban districts.\(^7\) Since whites had been moving in ever growing numbers to the suburbs since the end of World War II (J. Patterson, 1997), Milliken significantly reduced the

\(^7\)The plaintiffs in Milliken argued that Detroit's public schools were already 65 percent black, and a Detroit-only remedy would not substantially alter the racial composition of the city's schools. However, in a 5-4 holding, the Supreme Court ruled that the district court had made no determination of liability in the suburban districts; therefore, an interdistrict remedy exceeded the remedial power of the court.
desegregative effect of court-ordered busing plans in many Northern and Western metropolitan school districts (Wilkinson, 1979; Orfield, 1996; Smith, 1996). Milliken reflected the public mood: surveys indicated that close to 90 percent of whites preferred neighborhood schools over busing and (much to the chagrin of many civil rights activists) busing was opposed by a sizable segment of the black community.\(^8^0\)

In another decision that would make it harder to effect desegregation in the suburbs, the Supreme Court in *Pasadena Board of Education v. Spangler* (427 U.S. 424 [1976]) ruled that school districts were not required by the Constitution to make annual adjustments of the racial composition of their student bodies if the changes were the result of shifting demographic patterns within their communities. The justices emphatically rejected the district court's insistence that there be no school "with a majority of any minority stu-

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\(^8^0\)As late as 1989, white opposition to busing still hovered near 80 percent (Rossell, 1994, 642). Even more interestingly, a sizable number of African Americans preferred neighborhood schools over busing; Rossell (1994) reported that between 1972 and 1991, black support for busing never surpassed 60 percent, and dipped below 50 percent in nine of the twenty years surveyed (Ibid, 642). For example, in Boston bitter antagonisms emerged between the NAACP Legal Defense Fund, which supported court-mandated busing, and African American community activists who favored neighborhood schooling (Bell, 1980). Louisville was characterized by a gradual buildup of black opposition to busing: a poll conducted by the University of Louisville Urban Studies Center indicated that 63 percent of blacks approved busing in the first year of mandatory busing (1977-1978). By the next school year, the figure had dropped to 49 percent (Wilkinson, 1979, 245).
dents, setting aside the view that the absence of numerical parity among the races was *prima facie* evidence of violations of equal protection within the meaning of the Fourteenth Amendment. The demographic changes, the Court concluded, were due "to a normal pattern of people moving into, out of, and around the school system" (Ibid, 425) and were not related to policies enacted by school officials. Therefore, the district was not required to make policy adjustments in the absence of a finding that the racial imbalances resulted from state action.

Furthermore, the belief that race was an inherently illegitimate basis with which to ground public policy was receiving increasing support from the Supreme Court. While this argument had been traditionally advanced by the NAACP and other civil rights groups to challenge racial segregation, it left two questions unresolved. First, did compliance with the Equal Protection Clause require a showing that state policies were enacted without a discriminatory purpose or did plaintiffs merely need to demonstrate that the policies in question had "racially disparate effects" regardless of their intent? The Supreme Court in *Washington v. Davis* (426 U.S. 229 [1976]) ruled that plaintiffs had to prove that it was

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the intent of defendants to subordinate them because of their race in order to prevail in racial discrimination suits. Proving discriminatory intent presented African American plaintiffs with a substantially greater burden of proof than alleging discriminatory impact. Mississippi's defense in the higher education desegregation case relied on the doctrine of discriminatory intent. The state contended that its current policies governing college admissions, faculty and administrative hiring, institutional missions, and funding were based on nonracial considerations and indicated no evidence of discrimination.

Finally, in one of the most important civil rights cases in the post-Brown era, the Court in a 5-4 holding ruled in Regents of University of California v. Bakke (438 U.S. 265 [1978]) that an admission policy which reserved a set number of slots for minority applicants at the University of California-Davis Medical School unconstitutionally discriminated against Allan Bakke, a white applicant. Bakke charged that he had been denied admission while minority applicants with inferior academic qualifications had been admitted. Justice

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82 In Washington, black applicants to the District of Columbia Police Department challenged the constitutionality of a verbal ability test required of all applicants. African American applicants failed the test at a rate four times that of whites. The plaintiffs alleged that such a racially disparate result was unconstitutional. The Court argued that only official conduct having a discriminatory purpose violated the Equal Protection Clause. Justice White wrote that simply the fact that blacks scored significantly lower on the test did not make it unconstitutional.
Powell, writing for the majority, suggested that policies simply predicated on compensating African Americans for historical patterns of discrimination impermissibly made them "special wards" of the state, who were entitled to more equal protection than others (Ibid, 294-295). For many African Americans, Powell’s words sounded chillingly similar to a memorable paragraph that succinctly represented the essence of the Court’s opinion in The Civil Rights Cases:

When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men’s rights are protected (109 U.S. 3, 24 [1883]).

Powell wrote, "The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color" (438 U.S. 265, 289-290). The majority opinion in Bakke implied that much of the cumulative effects of centuries of racial discrimination was too remote to remedy. Plaintiffs had to prove how racial discrimination unconstitutionally abridged their liberties in the "here and now." Similarly, Mississippi maintained that a ruling requiring the state to make massive investments at the historically black colleges to compensate for past discriminatory policies would unconstitutionally punish the state for past, as opposed to present discrimination. Such remedies were not only beyond the scope of the
Equal Protection Clause, they argued, but they violated a basic principle of fairness: in essence, the sons were being asked to suffer for the sins of the fathers.

Mississippi pointed largely to two significant developments as evidence that its higher education system was in compliance with the spirit of the Brown decision: (1) the revision of admissions requirements for the state’s universities, and (2) the establishment of "mission designations" for the respective institutions.

The new admissions requirements relied almost exclusively on ACT scores as the basis for automatic admission to the state's universities. The new policies developed in response to concerns voiced by faculty and staff persons about high numbers of entering freshmen in state universities who were unprepared for college-level work. Starting in the fall of 1977, no student would be admitted to the senior colleges with an ACT score of less than 9; however, schools were permitted to establish and maintain higher minimum requirements.83 High school grades were not to be considered

83Not surprisingly, the historically white institutions had higher ACT requirements than their black counterparts. Initially, all of the white institutions had a minimum ACT score of 15 for automatic admission. Later, the state authorized these institutions to admit a select number of "high risk" students who fell short of this "magic number;" the number of students admitted on this basis should not exceed 5% or 50 students (whichever number was greater). Some black critics particularly scorned this loophole, viewing it as a deliberate effort to subsidize the athletic programs of Ole Miss, Mississippi State, and Southern Mississippi. In 1987, Mississippi University for Women received authorization to raise its ACT minimum to 18. Applicants to MUW could be
as a factor in determining eligibility because of concerns about "grade inflation."

When the new requirements failed to significantly address the problems associated with the academic preparedness of freshmen, the state implemented remedial studies programs in 1979. Three years later, in the midst of a downturn in the state's economy, Mississippi eliminated the program. Determining that the remedial programs were both ineffective and too costly in the face of anticipated budget cuts, the Board of Trustees in July, 1982 adopted a high school preparatory curriculum aimed at positively effecting the academic preparedness of incoming students.84

The state's refusal to include high school grades when making admissions decisions particularly incensed many black Mississippians. Recognizing that blacks did not perform as well on the ACT as whites, many African Americans believed that the new standards were directed at them (Petitioners' Brief, United States v. Fordice). They accused the state of

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admitted if they scored between 15 and 17 on the ACT and had a cumulative grade point average of 3.0 on a 4.0 scale. Those who scored between 15, and 17 on the ACT, yet failed to earn a 3.0 could be admitted on an exceptional basis. In contrast, the black institutions all have a minimum ACT score of 13; however, they admit students who score between 9 and 12 on an exceptional basis. Students who score below 9 must attend a junior college before they can be eligible to transfer to a senior college (Ayers v. Allain, 676 F. Supp. 1523, 1532-1534).

84The new curriculum was to consist of required courses in the sciences, math, and English. It was scheduled for implementation in the fall of 1986.
setting up new, more sophisticated barriers to obstruct black access to higher education within the state. The state argued that the new policies were justified on educational grounds. Mississippi had a legitimate interest in enacting policies that sought to enhance the pool of qualified college applicants. The state no longer forbade blacks from enrolling in white institutions by law; if African Americans failed to meet the admissions requirements of the state’s universities, official policy was not to blame. Mississippi’s argument echoed a familiar refrain: in the post-Brown era, blacks have no one to blame for "failing to make it" but themselves (Parent, 1985).

Secondly, in 1981, after an extensive review of the curricular offerings at each university, the Board of Trustees issued "mission designations" for each public institution. These missions were clustered in three categories: comprehensive, urban, and regional universities. "Comprehensive" institutions were defined as those universities offering the widest variety of degree offerings and receiving the greatest levels of funding. The Board recognized the University of Mississippi, Mississippi State University, and Southern Mississippi as comprehensive universities. These institutions were authorized to continue offering doctoral programs and to assert leadership in various disciplines. Jackson State, the sole urban university, was assigned a more limited research and degree mission tailored toward its urban setting. Despite
the university's requests, the Board denied Jackson State a leadership role in any particular field. The remaining universities - Mississippi University for Women, Delta State, Alcorn State, and Mississippi Valley - were classified as "regional" universities. These institutions were permitted to maintain their limited graduate offerings (provided some of them gain or retain accreditation), but were principally designed as baccalaureate-degree granting universities. No doctoral programs were to be offered by these institutions (U.S. Exhibit 683, "Mission Statements," 1991, 275-277; Ayers v. Allain, 676 F. Supp. 1523, 1538-1542).

The black colleges and the Ayers plaintiffs protested bitterly against the new missions designations. They argued that while the institutional missions appeared "race-neutral" on their face, the state's policies did not address a century of official neglect of black higher education. This past history, plaintiffs insisted, created a "cumulative deficit" which the state was now obliged to remedy. The new designations, they argued, served to "freeze in place" the unequal advantages that white institutions had enjoyed throughout the era of de jure segregation (Petitioners' Brief, United States v. Fordice in Kurland and Casper, 1993). State officials denied that the Equal Protection Clause required them to remedy the "cumulative deficit" that the Ayers plaintiffs alleged existed. While acknowledging that previous state conduct had indeed discriminated against the rights of
African Americans, Mississippi officials now argued that present policies had made a decisive break with the state's segregated past. Decisions regarding the missions of public universities were legitimate issues of state policy that were independent of any racial considerations. The state insisted that the decisions regarding missions designations were made for educational reasons and in view of Mississippi's limited resources (Respondents' Brief, United States v. Fordice in Kurland and Casper, 1993).

Twelve years of negotiations failed to break the impasse between the parties. In 1987, the case proceeded to trial. The litigation embarked on a course that would ultimately lead it to the Supreme Court. The journey of the Ayers case through the federal courts is the subject of the next section of this chapter.

The Case Goes to Trial

Both the private petitioners and the Justice Department insisted that Mississippi had not done enough to eliminate the de jure segregated system. Specifically, they contended that the use of the ACT as the basis for automatic admission to the state's universities unconstitutionally discriminated against African Americans. The plaintiffs complained that "more inclusive" alternatives to primary reliance on the ACT were available, but the state had rejected them.85 They also

85In 1985, 72 percent of white students in Mississippi scored 15 or better on the ACT, whereas only 30 percent of black students achieved that mark, a difference of nearly two
noted that even ACT officials had encouraged college administrators to not rely exclusively on the results of one examination when making admissions decisions; rather, ACT officials advised universities to take into account a whole battery of factors (such as high school grades and faculty recommendations). The plaintiffs also railed against the institutional missions designations, arguing that they flowed out of the historical racial identities of the state's universities and served to perpetuate the unequal status of the predominately black institutions.

While both the private petitioners and the Justice Department contended that the state unnecessarily duplicated a high proportion of the academic programs at black and white universities, the United States emphasized this aspect of the case more than the Ayers plaintiffs (United States' Brief, United States v. Fordice in Kurland and Casper, 1993). This reflected the fact that the "bottom line" of the federal government's case was that Mississippi's higher education system violated Green's mandate that dual systems of education be eliminated "root and branch."86 By contrast, the

and a half times. However, the disparity between the high school grades of black and white Mississippians was not nearly as large: 43.8 percent of white high school students and 30.5 percent of black students earned at least a 3.0 grade point average, and 62.2 percent of whites and 49.2 percent of blacks earned at least a 2.5 (505 U.S. 717, 737).

86 For example, the Justice Department cited Geier v. University of Tennessee (597 F.2d. 1056 [6th Cir. 1979]) where the court stated, "the Green requirement of an affirmative duty applies to public higher education as well

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Ayers plaintiffs, while invoking Green, emphasized what they believed to be the state's remedial duty under HEW's Revised Criteria pursuant to Title VI. These guidelines, they maintained, supported their claim that the enhancement of black universities was necessary in order to "remove the badge of inferiority" from these institutions, and insure that every student's choice of which university be unhindered by state policies that racially discriminated against predominately black schools (Petitioners' Brief, United States v. Fordice, in Kurland and Casper, 1993). At any rate, the plaintiffs were in harmony on one fundamental point: compliance with Brown, Green, and Title VI of the Civil Rights Act of 1964 required more than simply the enactment of nondiscriminatory policies. The ASTA standard, they contended, was not the controlling law in this case.

The state, while acknowledging that white universities had initially used the ACT to deny blacks access to their as to education at the elementary and secondary school levels. . . it is only the means of eliminating segregation which differ" (Ibid, 1065). The United States stressed that Geier gave federal courts wide discretion to order even "radical" remedies to eliminate segregation in state systems of higher education. The Ayers plaintiffs also utilize the Geier case in their arguments because it grants the courts greater latitude to craft remedies and it, like Green, imposes on the state the burden to implement remedies which "realistically promise to work. . . now" (391 U.S. 430, 441). However, this precedent is listed only as a footnote in their briefs because the Sixth Circuit Court of Appeals in Geier upheld the merger of a black and white public institution. The Ayers plaintiffs were determined to resist the merger of black and white institutions as a desegregation remedy at all costs.
institutions, denied that the primary motive for the current use of the ACT was to impose barriers to black admission to predominately white institutions. Rather, the Board saw the need to address the academic preparedness of college freshmen. The state defended the missions designations as sound educational policies based on the reality of its limited resources. These policies, Mississippi concluded, met the "good faith" standards of ASTA, and therefore the state was obligated to go no further. They rejected the plaintiffs' contention that the continued racial identifiability of the state's universities proved that the state had not meet its "affirmative duty" to desegregate under Green.87

In addition, the state relied on Bazemore v. Friday (478 U.S. 385 (1986). Bazemore involved the persistence of racial identifiability within the 4-H and homemaker clubs of the North Carolina Extension Service. Pursuant to Title VI of the Civil Rights Act of 1964, the state's Extension Service discontinued its policy of assigning students to particular clubs based on race. However, despite the fact that students were free to choose any particular club, a great number of all-white and all-black clubs remained. The Supreme Court

87As of the 1985-86 academic year, over 99 percent of white undergraduate students attended a historically white institution; at the graduate level the figure was 96.6 percent. Black students were concentrated primarily at the historically black institutions, though to a lesser extent; in 1985-86, 70.3% of black undergraduates attended a historically black institution; at the graduate level, the figure was 63.7% (Petitioners' Brief for Writ of Certiorari, United States v. Fordice, in Kurland and Jasper, 1993, 36).
ruled that the mere existence of clubs of one race did not prove a violation of the Fourteenth Amendment. The Court's majority concluded that the Service had implemented nondiscriminatory admissions policy and that the racial composition of the clubs reflected the voluntary choices of the participants. Thus, the promulgation of racially neutral admissions policies, the Court declared, satisfied the Extension Service's remedial duty under the Equal Protection Clause.

Mississippi analogized the Bazemore decision to higher education. In the first place, participation in the 4-H and homemakers' clubs, like choosing to attend college, constituted a "voluntary" act. ASTA, which the state insisted was the proper remedial standard for desegregation in public higher education, had stressed the voluntary nature of attending college. Thus, where participation in programs operated by the state was noncompulsory (as opposed to the compulsory nature of elementary and secondary education), the Equal Protection Clause only required the state to implement nondiscriminatory admissions and hiring practices. The continued racial identifiability of Mississippi's universities, the state continued, reflected the voluntary choices of students and parents and were not traceable to the state's segregated past (Respondents' Brief in Opposition to Writ of Certiorari, United States v. Fordice, in Kurland and Casper, 1993).

The district court in Ayers accepted all of the state's contentions (Ayers v. Allain, 674 F. Supp. 1523 [N.D. Miss. [145x158] Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.
1987]). The plaintiffs appealed to a three-judge panel of the Fifth Circuit Court of Appeals. The three-judge panel reversed the district court's holding in February, 1990, declaring that the vestiges of Mississippi's de jure segregated system of higher education remained substantially intact (893 F.2d 732 [5th Cir. 1990]). However, the state appealed to the full Fifth Circuit and on September 28, 1990, the full court affirmed the district court's decision (914 F.2d 676 [5th Cir. 1990]). The plaintiffs filed for a writ of certiorari to the Supreme Court; on April 15, 1991, the Supreme Court agreed to hear the appeals in the Ayers case (Walton, 1997, 162).

The Supreme Court issued its ruling in United States v. Fordice on June 26, 1992. The next section discusses the Court's decision and its rationale.

The Supreme Court Rules

In an 8-1 decision, the Supreme Court reversed the ruling of the full Fifth Circuit, declaring that the state of Mississippi had not done enough to meet its "affirmative duty" to desegregate as described in Green. Justice Byron White, writing for the majority, stated that though the state had enacted policies that were race-neutral on their face, these policies substantially restricted a student's choice as to which institution he or she would enter. The state, White went on, bore the responsibility of either justifying these policies or eliminating them.
In particular, the Supreme Court made the following determinations in its decree:

(1) First of all, the Supreme Court rejected out of hand the state’s contention that it had fulfilled its remedial duty to desegregate by implementing race-neutral admissions and hiring policies. While the majority accepted the view that the context of higher education afforded a measure of "freedom of choice" to students that made it fundamentally different from elementary and secondary education, the Court refused to accept ASTA's mandate that states adopt "good faith" race-neutral policies as the appropriate legal standard in higher education desegregation cases. White wrote:

    Our decisions establish 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. Thus, we have consistently asked whether existing racial identifiability is attributable to the State... and examined a wide range of factors [emphasis added] to determine whether the State has perpetuated its formerly de jure segregation in any facet of its institutional system (505 U.S. 717, 728).

Thus, the Supreme Court held that the district court and the Fifth Circuit Court of Appeals, by relying on ASTA and Baze-more, had construed the state’s "affirmative duty" too narrowly.

(2) The majority concluded that the state’s use of the ACT was "constitutionally suspect" despite Mississippi’s denial that the policy had a discriminatory intent. They noted that the ACT policy originated in 1963 during a period of active resistance to integration by the state and argued
that the change of the state's purpose for the requirement in "mid-stream" did not eliminate its discriminatory effects. The Court also rejected the state's premise that high school grades should not be considered as a predictor of college academic performance, noting that even ACT officials discourage universities from relying solely on test scores when making admissions decisions (505 U.S. 717, 734-737).

(3) The Court accepted the United States' contention that the state of Mississippi unnecessarily duplicated a wide range of academic programs and that this practice served to perpetuate the "separate but equal" system of public institutions (505 U.S. 717, 738-739). The district court found that 34.6 percent of the undergraduate programs at the historically black institutions were "unnecessarily duplicated" by historically white universities; at the graduate level, 90 percent of the program offerings at black universities were unnecessarily duplicated by white universities. However, the district court declined to rule that these facts had anything to do with perpetuating the racial identities of these institutions. The Supreme Court ruled that the district court's reasoning ignored the fact that the very nature of the dual system required duplicative programs for two types of schools, and the "present unnecessary duplication is a continuation of this practice" (Ibid, 738). Brown II, White argued, placed the burden on the state to prove that these programs can be educationally justified; thus, the district
court impermissibly shifted the burden of proof to the plain­
tiffs to demonstrate the constitutional defect of unnecessary
duplication (Ibid, 739).

(4) The Court’s majority determined Mississippi’s 1981
mission designations, when linked with differential admis­
sions standards at black and white universities and the
existence of unnecessary program duplication, probably
"interfere with student choice and tend to perpetuate the
segregated system" (Ibid, 741). The justices stressed that
they did not mean to imply that the assignment of different
admissions to institutions within a state higher education
system would raise constitutional questions if one or more of
those institutions either became or remained predominately
black. Rather, the issue was whether the state had engaged in
discriminatory conduct and/or had sufficiently dismantled the
remnants of its de jure dual system. Because the Court’s
majority was troubled by Mississippi’s admissions policies
and the widespread duplication of programs at the state’s
universities, they found it difficult to assume at face value
that the mission designations were benign.

(5) The Court refused to address the question of whether
the state would be required to upgrade Jackson State, Alcorn
State, and Mississippi Valley as part of the desegregation
remedy (Ibid, 743). Instead, the justices wondered if it was
wise for a poor state such as Mississippi to maintain eight
public universities. Citing United States v. Louisiana (718
F. Supp. 499 [E.D. La. 1989]), White asserted that closure of one or more institutions would decrease the discriminatory effects of the current system in Mississippi (Ibid, 742). However, the Court declined to rule on whether the closure or merger of institutions was required, suggesting that the elimination of program duplication and the revision of admissions criteria might eliminate the need for such a radical remedy (Ibid).

Because the Supreme Court believed that the district court and the Court of Appeals had utilized the wrong legal standards, it remanded the case back to the district court with a series of instructions. First of all, the state had the burden of reconsidering all of its admissions policies with the goal of eliminating all discriminatory effects while at the same time maintaining "sound educational" practices. Secondly, the district court were to inquire as to the practicality of eliminating the discriminatory effects of the mission designations. Thirdly, the court was to consider a wide range of alternatives to reduce duplication and waste within the system, including, if deemed necessary, the merger of institutions. Finally, the issue of whether the enhancement of historically black institutions is a necessary requirement for desegregation to occur was remanded to the lower courts (Ibid, 743).

Justice Clarence Thomas, the lone African American on the Court, wrote a concurring opinion which argued that the
continued existence of historically black colleges was consistent with "sound educational" policies. Black colleges, he argued, had served many important educational, cultural, and psychological roles in preparing African Americans for the transition into the larger white society. "It would be ironic, to say the least," Thomas observed, "if the institutions that sustained blacks during segregation were themselves destroyed in an effort to combat its vestiges" (United States v. Fordice, 505 U.S. 717, 749 [J. Thomas, concurring, 1992]).

Justice Antonin Scalia dissented, arguing that the Court's standard in Fordice placed an "unsustainable burden" on the states. He complained that the ruling resembled the Green standard which the Court had previously required for public schools. The Green mandate, Scalia contended, did not apply in the context of higher education. "The constitutional evil of the 'separate but equal' regime that we confronted in Brown I was that blacks were told to go to one set of schools, whites to another," he protested. Bazemore's standard for dismantling a dual system, Scalia argued, should have provided the controlling law in Fordice. Scalia also complained that the Fordice ruling was too vague and provided little in the way of guidance to the lower courts.

Furthermore, he hinted that Fordice, rather than serving the interests of African Americans, "is as likely to subvert as to promote the interests of those citizens on whose behalf
the present suit was brought" (United States v. Fordice, 505 U.S. 717, 749 [J. Scalia, dissenting]). While rejecting the private petitioners' claim that the Constitution required the state to equalize funding at the black institutions, Scalia maintained that the Constitution did not prevent a state from equalizing funding between traditionally black and white universities if it chose to. However, he charged that the Court's ruling in Fordice had effectively precluded states from adopting that very option. Fordice had extended the Green mandate to higher education; by implication, Scalia reasoned that the Court had endorsed the compulsory-integration philosophy which formed the underpinnings of Green. The Fordice standard jeopardized all policies that have the effect of preserving the existence of historically black institutions, as well as any proposals that might enhance them. Such a result should not be surprising, he continued. It had always been the goal of Green to eliminate black schools. "While that may be good social policy," Scalia wrote, "the present petitioners, I suspect, would not agree" (505 U.S. 717, 750 [J. Scalia, dissenting, 1992]). He concluded that an individual citizen is done a severe disservice when the state, in the name of maximizing integration, minimizes diversity and "vitiates" his choices (Ibid, 750).

Scalia's final point was well taken by many African Americans who were carefully following the Fordice case. The Supreme Court had adamantly rejected Mississippi's argument
that nondiscriminatory policies sufficiently satisfied a state's duty to remedy past segregative practices in higher education. Rather, the justices accepted the plaintiffs' contention that facially neutral policies may be wholly inadequate to overcome the effects of years of separtism and may actually aid in perpetuating the vestiges of segregation. On this score, the supporters of black colleges were pleased with this portion of the Court's reasoning. But the Court refused to consider an equalization remedy favored by the black plaintiffs. Thus, Ware commented that "although the United States prevailed in *Fordice*, in reality Jake Ayers and the other private plaintiffs lost" (1994, 671). The *Fordice* ruling left the future of historically black colleges in considerable doubt. The Court questioned the economic feasibility of the state of Mississippi's decision to maintain eight universities, raising fears that *Fordice* provided the legal justification for states to close black colleges in the name of fiscal responsibility.\(^8\) The *Ayers* litigation had been initiated with the expressed purpose of improving the black institutions as black institutions. *Fordice* did not

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\(^8\)In Mississippi's case, those fears turned out to be justified. At a status and scheduling conference on October 22, 1992, the Board of Trustees issued a one-hundred page report which proposed, among other remedies, the closure of Mississippi Valley and the merger of Alcorn State University with Mississippi State University. The state's proposal generated a firestorm of protest from African Americans. However, because the proposal also recommended the merger of Mississippi University for Women with the University of Southern Mississippi, an unusual black-white political alliance was forged (Mercer, 1992; Fienberg, 1994).
answer the question of whether African Americans had a constitutional right to equally funded public colleges where they were in the majority.

_Fordice_ failed to provide the lower courts with a framework for what the Court would consider as an appropriate remedy to satisfy the requirements of _Brown_ and _Green_. In essence, _Fordice_ defined what desegregation in higher education was _not_, not what it was. While relying on precedents established in public school desegregation cases, the Court neglected to clearly articulate the extent to which those principles apply in the context of higher education. This lack of specificity gives lower courts little direction, and promises to encourage more litigation in the future to sort out this legal dilemma. For the supporters of black colleges, the _Fordice_ ruling provided no assurance that the desegregation process would not culminate in the elimination of these institutions (Brown, 1992; Weeden, 1992; Smith, 1993; Brown-Scott, 1994; Washburn, 1994).

To further complicate matters, _Fordice_ occurred in a context where many urban social districts in America were as segregated as ever (Wilson, 1987; Rossell, 1990; Chubb and Moe, 1990; Kozol, 1991; Reich, 1991; Massey and Denton, 1993; Armor, 1995). At the same time, Supreme Court decisions were making it easier for local school districts to be released from longstanding desegregation orders, despite evidence that substantial levels of racial segregation continued to persist.
in many school districts.\(^8\) The Court’s majority seemed to believe that the effects of the period of legal segregation were "too distant" to explain the persistence of racially identifiable schools. The further the nation moves from 1954, the Court appeared to say, the less likely that racial segregation can be attributable to the vestiges of *de jure* racial discrimination. In the current climate, courts seem more willing to assume that high concentrations of racially segregated schools reflect the voluntary choices of parents and students.

At the same time, the *Fordice* decision extended the *Green* principle from the elementary and secondary level to higher education. It has already been observed that federal judges tend to look to precedents from elementary and secondary cases when deciding postsecondary desegregation cases.

\(^8\)Those decisions included *Missouri v. Jenkins*, 110 S. Ct. 1651 (1990), *Oklahoma City Public Schools v. Dowell*, 498 U.S. 237 (1991), and *Freeman v. Pitts*, 503 U.S. 467 (1992). In *Dowell* and *Pitts*, the Supreme Court held that court supervision of the school districts in question was no longer appropriate because the districts had effected desegregation compliance. The Court made these decisions despite evidence of substantial levels of racial segregation in both cases. The Court concluded that the continued racial identifiability of the schools reflected normal demographic shifts in the population and were unrelated to state policies. In *Jenkins*, the Court struck down a district court order imposing a tax on the Kansas City School District as part of a desegregation order. The majority argued that the federal court had exceeded its remedial authority by imposing a tax on the citizenry without their consent. For some liberals, these decisions signaled a decided shift of the Court toward the right and away from the mandate of *Brown*; Gary Orfield’s new book, for example, is entitled *Dismantling Desegregation: The Quiet Reversal of Brown v. Board of Education* (1996).
On one hand, Fordice, as an extension of Green, defined the remedial duties of states beyond the narrow interpretation of the ASTA standard; on the other hand, the most recent precedents at the elementary and secondary level have limited the remedial powers of the courts to effect racial balance in the public schools. Given these contradictory trends, it is unclear how federal courts will apply the Fordice standard to future higher education desegregation cases. In short, Fordice raised more questions than it answered.

Thus, thirty eight years after Brown, the state of the law in higher education desegregation remained unclear. The fact that such a result could still exist in the 1990’s could not have been anticipated by those who fought to secure the Brown decision. The fact that the Fordice decision left the status of publicly-supported black universities unclear was seized upon by critical race theorists as an opportunity to indict the Court (Calmore, 1992; Johnson, 1993). Johnson (1993) argued that "Fordice is wrong because Brown v. Board of Education is wrong; both cases fail to distinguish between the goal of integration in an ideal society and the process

90Critical race theorists maintain that racism is a fundamental feature of American political culture and the dominant values of the American Creed - particularly as they inform American legal jurisprudence - devalue or delegitimize critical aspects of African American culture. They reject interpretations of Brown that require the elimination of majority-black institutions as inherently racist. Critical race theorists support the continued existence of historically black colleges as part of their overarching worldview of multiculturalism.
of integration" (Ibid, 1). Fordice, Johnson charged, did not fundamentally challenge any of the assumptions of Brown, including the notion that there were few, if any, redeeming qualities about African American culture that were worth preserving. "The ideal integrated society," Johnson concluded, "can only be achieved through a transitional stage in which racial differences are truly respected, a stage which requires the public maintenance of and support for predominately black colleges" (Ibid).

Others viewed the state of affairs as part of a social retreat on civil rights similar to the post-Reconstruction era (P. T. Smith, 1991; Kilmartin, 1992; Norwood, 1992; Orfield, 1996). These commentators interpreted the Brown decision as committing the nation to the pursuit of racial justice; thus, they saw the conservative ascendancy under the Reagan and Bush administrations as a repudiation of those ideals (Cruse, 1986). Just as disturbing to some of these commentators was the fact that many African Americans themselves were taking the initiative to argue for majority black schools, Afrocentric curricula, and all-black male academies (Hacker, 1990; Steele, 1993; Orfield, 1996). Orfield maintained that history was sadly repeating itself again: in the 1990's, both prominent blacks and whites were arguing that segregation should be given a chance to work.

Is either interpretation correct? Has the Brown decision, in essence, been "quietly reversed" as Gary Orfield
suggests? One hundred years after the reversal of black gains during the Reconstruction period, is history repeating itself? Or was the Brown decision fundamentally flawed to begin with - particularly as it related to the future of majority-black institutions? Were the assumptions of Brown inherently racist (as some suppose), thus producing the climate for an inevitable "black backlash?" Considering the opinion in Brown and the assumptions that informed it, should we not be surprised that, thirty eight years later, the state of the law in higher education desegregation (despite the Fordice decision) is still clouded? These questions form the basis for Chapter Five.
Brown as a Cultural Icon

In Chapter One, it was argued that the Brown decision wedded the ethos of the American Creed with America's historic treatment of African Americans as second-class citizens. Brown denied racial segregation constitutional sanction by appealing to the values of the American Creed. In effect, the civil rights movement did not raise "new" issues within the American context; rather, these were "old" issues (e.g., the meaning of "equality," "equal protection of the laws," etc.) that were being applied to modern conditions. Put another way, Brown, and the civil rights movement which followed, could be considered "the unfinished work of the American Revolution." The antidiscrimination principle of Brown triumphed, in large part, because it could be rather easily harmonized with the national narrative - that the individual is the basis for society and a just government was one which maximizes individual freedom (McCloskey and Zaller, 1984). Indeed, Brown's status as a "cultural icon" (Peller, 1997, 192) is largely because it is seen as a validation of the nation's first principles (Kluger, 1975; Wilkinson, 1979). In time, Brown laid the groundwork for the expansion of the antidiscrimination principle to include gender, religion, national origin, sexual orientation, age, and disability (Gewirtz, 1997).
However, as this dissertation has shown, the Supreme Court's pronouncement in *Brown I* that "separate educational facilities are inherently unequal" hardly settled the matter. What did it mean for higher education, and did it mean that state-supported black colleges were also unconstitutional? Or was *Brown's* target the state's imposition of segregation, and schools or colleges that are predominately of one race do not necessarily violate the Equal Protection Clause? Does *Brown* merely require that states enact racially nondiscriminatory policies or does it impose on them the burden to compensate individuals and institutions (such as black universities) that were systematically mistreated under the Jim Crow system? Also, how far may federal judges go to prod states to dismantle former *de jure* systems of higher education? In short, while *Brown* has become an "American cultural icon," it is a highly contested one: Americans have had some very deep differences with respect to the public policy implications of *Brown*.

*Fordice* represents the first time that the Supreme Court ruled in a case involving desegregation of a state system of higher education. The Court ruled that while Mississippi's "race-neutral" policies do not satisfy the state's remedial duty to eliminate the vestiges of racial discrimination in higher education. But the justices did not specify what remedies would satisfy the state's mandate - meaning that one is left with as many questions as answers.
In Chapter Five, it will be argued that the fundamental problem with *Fordice* is not simply that it is unclear or ambiguous; rather, it does not reexamine any of the suppositions of *Brown v. Board of Education*. The fact that *Brown* is an American cultural icon explains not only the fact that none of the parties involved questioned its moral authority; it also explains the hesitancy of the Court to revisit it. It will be argued that *Brown* is intimately intertwined with America's historic sense of mission and the fact that racial segregation violated the nation's highest principles. Second, it will be shown that *Brown* occurred in the context of the Cold War when the United States was consciously portraying itself as a moral example to the world. This period made America uniquely sensitive to moral appeals about the persistence of legal segregation in the Southern United States. Third, it will be shown that *Brown* personifies the American Creed in the sense that its early critics were dismissed as "legalists" and "irrelevant." To *Brown*'s defenders, it was as "self-evident" as the Declaration of Independence itself.

However, though the American Creed has provided a common rallying point for eliminating legal segregation, it has been less successful at building policy consensus since the civil rights legislative victories of the 1960's. Desegregation in higher education represents one of those policy domains where the liberal tradition leads to widely divergent policy preferences. It will be argued that the American Creed complicates
the ability of federal courts to craft remedies in higher education desegregation because it is fundamentally a theory of a limited role for the state. Brown does not challenge the basic relationship between the American state and society; thus, remedies that might involve significant federal intervention (such as busing or massive enhancement of black universities) are difficult to justify and maintain. In addition, the ease with which Brown was assimilated into the national narrative has turned out to be a "double-edged sword," because it has been attacked, revised, and reinterpreted both from the black left and the conservative right. Finally, it will be argued that Fordice demonstrates that the Brown decision continues to tyrannize the debate of how best to expand educational opportunities for African Americans and other disadvantaged groups in American society.

**America as a Symbol of Democratic Revolution**

In Chapter One, it was argued that America seemed to be the practical fulfillment of the "state of nature" as conceptualized by Hobbes and Locke. European colonists found America to be a land unencumbered by the class and clerical oppressions that afflicted their native lands. How then, could a nation which never experienced a true feudalism, which theoretically represented an idyllic "state of nature" and had the historical luxury of being "born free" become a universal symbol of social emancipation during the eighteenth century? The power of Jefferson's words presupposed a vision
of America as a creative and redemptive force in the world -
a view which had taken deep roots in European thought long
before the first shots were fired at Lexington and Concord.
From the time of Columbus' voyages, European writers and
thinkers romantically portrayed America as a "Garden of Eden"
or as the "Adam of the West" (Davis, 1966); indeed, the fact
that St. Thomas More chose the Western Hemisphere as the
setting for his novel Utopia was no accident. As Davis wrote:

While a growing literature celebrated America as a
symbol of nature, free from the avarice, luxury, and
materialism of Europe, promoters and colonizers saw
the virgin land as a place for solving problems and
satisfying desires. This was true of the conquistadores
who tried to recreate the age of chivalric romance; it
was true of the Jesuits who followed Manuel da Nobrega
to Brazil, determined to purify morals and spread the
faith; it was true of the English Puritans who sought
to build a New Jerusalem as a model of piety for the
rest of the world; it was true of the drifters and
ne'er-do-wells, the bankrupts and sleazy gentlemen, who
fluttered to the New World like moths drawn to a light.
In America things would be better, for America was the
Promise Land (1966, 6).

America offered Europe - and by extension, humankind -
the hope of redemption, the opportunity to build anew, the
chance to build a new civilization that had profited from her
forefathers' mistakes. Indeed, the "state of nature" metaphor
was the latest of a series of metaphors used to describe
America as "a place of new beginnings." It was this vision of
the New World which gave America its almost magical lure. By
the time of the Declaration of Independence, this portrait
was taken for granted. European liberals had come to view
America as the hope for mankind, and the new political and
social institutions in the fledgling republic appeared to be "clearly modeled on nature's simple plan" and seemed to have "fulfilled the ancient dream of a more perfect society" (Ibid, 7).

Hence, it was precisely this portrait which made slavery such a moral dilemma in America. In a land purportedly "free" of the oppressions found in Europe, American slavery took on the appearance of an "original sin." It could hardly be overlooked that the words of the Declaration of Independence were written by a slaveholder. One needed to explain how, in an age of "enlightenment," the institution of slavery had revived - especially considering the fact that it had disappeared in much of Europe (Davis, 1966). Indeed, many colonial leaders conceded that unless the slaves were freed, the moral legitimacy of their revolution would be seriously compromised (Davis, 1966; Jordan, 1968; Berlin, 1975). America's problem was complicated by the very intellectual boldness of the Declaration of Independence - specifically, its claims that its ethics were "self-evident." Jefferson emphasized the universality of the American experience. American notions of "inalienable rights" were portrayed as reflecting both "the laws of nature and the laws of God." This implied harmony between the American philosophy of government and the actual way human beings were best designed to behave; in other words, the Declaration of Independence spoke of the concept of inalienable rights as if they were empirical, scientific.
facts that reflected the wisdom of God Himself. The Revolution, then, would span the gap between the Creator's ideal of universal liberty and human usurpations of that divinely-ordained state through reason - an eighteenth century version of the "science of politics." If this were true, how could slavery be part of the perfect design of republican government? Consequently, America's status as a moral example of democratic revolution has, from its beginning, inhered within it the ideological ammunition for black protest. This section elaborates on how the specifics of America's historical development have facilitated black political agitation in the United States. This understanding is essential to put the Brown decision in its proper context.

First of all, unlike the European liberal, the American was fortunate in that he did not have to directly implicate organized religion as an apologist for the aristocratic status quo. In the first place, the Protestant work ethic placed a premium on values such as self-control, frugality, achievement, hard work, and industry - values that harmonized well with the capitalist creed (Weber, 1976; Bell, 1976; McCullough, 1991). By giving the marketplace a spiritual mission, the American capitalist did not face the European problem of needing to attach morality to capitalist accumulation (Hartz, 1955). Furthermore, the rather belated attempt of the British Parliament to establish Anglicanism and Roman Catholicism as the official religions of the colonies, in
that it occurred on the eve of war, was almost providential in its timing. Genuinely outraged by these actions, ministers denounced the British king and interpreted the subsequent outbreak of hostilities in apocalyptic terms (Sandoz, 1990). Thus, the Founding Fathers never needed to develop a "political religion" to counter a religious orthodoxy which defined resistance to the structures of corporate society as sin. Partly for this reason, the Americans refused to join the French philosophes in their crusade to discredit organized religion entirely and to create a humanistic utopia (Hartz, 1955; Voegelin, 1975). Not only could the British monarch not rely on the ecclesiastical establishment to rally to his defense, but organized religion turned out to be a fairly useful ally for the rebellious Americans.

The fact that the American Revolution did not banish religion to the abyss meant that it could still be appealed to in the hope of making demands on the political system. It is well known that religion has played a central role in defining African American identity and shaping community culture (Kluger, 1975; Levine, 1977; Sobel, 1979; Lincoln, 1984; Allen, Dawson, and Brown, 1989; 1990; Smith and Seltzer, 1990; Moses, 1993; Walton, 1997). Henry (1990) has shown that African American political culture is unique and distinct from the overarching American political culture because it is rooted in a black church tradition that blends sacred and secular vision, provides and endows African American
people with a 'moral vision' that is not found in mainstream American politics. "This moral/religious tradition," Hanes Walton wrote, "affixes justice on a permanent rather than a relative basis" (1997, 87). Blacks and whites, thus, have utilized the weapons of religion to draw attention to moral injustices meted out to African Americans because of their race.

Because the Founding Fathers did not need to directly confront organize religion in order to justify their revolution, they were never required to repudiate another concept which would help to ideologically underwrite African American protest movements: the belief in "natural law" that they had inherited from their European ancestors. In pre-Christian Europe, whenever the elected "lawman" explained the law to the people, "he was not assumed to make the law or invent it but to expound something which existed prior to and independent of himself" (Myrdal, 1944, 15). This tendency to believe in the idea of a "higher law" undergirding the entire legal system was reinforced by the influence of Christianity in the West. The English Parliament, which functioned largely as a high court than a legislature in the modern sense until the late 1600's, saw itself not as "creating law," but rather "declaring" or "explaining" the law that already existed (Myrdal, 1944, 15; Huntington, 1968, 112). Hence, the belief in a "higher law" to which all human laws are thus subject has created in America a peculiar respect for judicial
institutions, law and order, and a cult of constitutional worship (Myrdal, 1944, 12; Hartz, 1955, 9). As Corwin argues:

... The legality of the Constitution, its supremacy, and its claim to be worshipped [author’s emphasis], alike find common standing ground on the belief in a law superior to the will of human governors (1929, 5).

Not only were the Americans not forced to repudiate natural law, they "breathed new life" into the concept at the same historical moment when European liberals were trying to annihilate it (Voegelin, 1975).

Moreover, the "higher law" background of the Constitution gave anti-slavery forces an ideological platform to challenge the "peculiar institution" (Stamp, 1957). America's natural law tradition allowed abolitionists to castigate the institution of slavery as a sinful human innovation opposed to the laws of God. Hence, William Lloyd Garrison could denounce the Constitution as a "compact with Hell" and remain within the American tradition. In addition, Americans tend not only to conclude that certain laws are "unjust," but also to feel morally obligated to disobey them. John Brown justified his ill-fated insurrection on these grounds. Martin Luther King defended the strategy of civil disobedience to oppose racial segregation by the same reasoning (King, 1963). Paradoxically, the belief that human law must be a reflection of "higher law" - a tradition which has helped to create a profound respect for law and order in America - also allows some Americans to disregard the law in service to what they perceive to be a higher principle (Myrdal, 1944, 16).
America's lack of a feudal past allowed it to synthesize Puritan piety, Enlightenment rationalism, and natural law theory - ideals which would have been socially combustible in much of Europe - into a comprehensive national identity. While the absence of the identical social conditions that existed in Europe did not eliminate all of the potential conflicts between these competing worldviews (nor does it today), America's revolutionary moment did not require an all-out war of attrition between these ideologies. These ideals, both separately and collectively, forged a sense of America as a "chosen people" with an almost messianic mission in the world. Jefferson expressed this sentiment during his second inaugural address:

I shall need, too, the favor of that Being in whose hands we are, who led our forefathers, as Israel of old, from their native land, and planted them in a country flowing with all the necessaries and comforts of life; who has covered our infancy with his providence, and our riper years with his wisdom and power; and to whose goodness I ask you to join with me in supplications, that he will so enlighten the minds of your servants, guide their councils, and prosper their measures, that whatsoever they do, shall result in your good, and shall secure to you the peace, friendship, and approbation of all nations (Jordan, 1968, 573).

In this passage, Jefferson explicitly compared the settling of America with Israel's exodus from Egypt. Thus, from a variety of routes - New England Puritanism, Enlightenment rationalism, the material abundance of the American continent, millenial visions of utopia, or a combination of all of these - it was possible to conclude that America indeed was
the Promise Land and Americans were the chosen people. Black and white Americans have exploited America’s messianic self-concept to advance the cause of equality for African Americans throughout the nation’s history. Indeed, they have argued that America ran the risk of losing its "most favored nation" status with Providence if she failed to square the actual treatment of blacks with the nation’s ideals (Davis, 1966; Jordan, 1969; Moses, 1993; Walker, 1992).

But for African Americans, the nation’s sense of "manifest destiny" went deeper: blacks - and some whites - have tended to assume that their experience of oppression in the United States has endowed them with a "special righteousness" before God (Higgins, 1990; Moses, 1993). In other words, not only is America a chosen nation, but African Americans are a chosen people within that nation (Moses, 1993, 228). Black Christian tradition has self-consciously appropriated this imagery; hence, black Christians drew analogies between their enslavement and that of Israel, and the sufferings of Christ (as well as that of other Biblical heroes), were not unlike their own (Sobel, 1979; Moses, 1993). Consequently, Harriet Tubman was memorialized as the "Moses of her People," and leaders like Frederick Douglass, Marcus Garvey, and Martin Luther King were (and still are) treated like "black messiahs" (Moses, 1993). King’s last speech before his assassination, in which he claimed to have "gone up to the mountain-top" evoked images of Moses leading the people of Israel to
the Promise Land. This tendency is not confined to black Christianity; in fact, the Nation of Islam has borrowed the same imagery. Malcolm X and Louis Farrakhan have relied on the metaphor of America as Egypt and black Americans as Israel to buttress their moral/secular visions (Haley, 1992; Lincoln, 1984). The pervasiveness of this view is evidenced by the prevalence of Biblical metaphors found in a number of popular books on the civil rights movement and the black experience; these include Bearing the Cross (Garrow, 1986), Parting the Waters (Branch, 1988), Pillar of Fire (Branch, 1998), Roll, Jordan, Roll (Genovese, 1976), and And the Walls Came Tumbling Down (Abernathy, 1989), to name a few. Thus, not only were African Americans struggling to secure their rights, they believed that they were right (Strickland, 1979, 5). Many black political and religious leaders maintained (though not always explicitly) that they spoke with a unique moral voice which America needed to listen to if she was to fulfilled her destiny.

Hence, the American Creed represented a synthesis of Enlightenment rationalism, Puritan piety, and the tradition of natural law - and these three strands of thought combined to produce America's concept of itself as a "light to the world. Not only have African Americans accepted key tenets of American messianism, but they have seen themselves as having a special role to play within the "chosen nation." The fact that America's national consciousness evolved as a "flight
from the European struggle" has meant two things: not only was there not an indigenous aristocracy that counterrevolutionaries could possibly restore, but it could not be argued that the march of capitalism had uprooted traditional shared understandings between lord and peasant, a point of departure for which socialism depends (Hartz, 1955; Moore, 1966). As a result, America's Creed assumes that its historical experience provides an objective model for the rest of the world.

As Hartz writes:

This then is the mood of America's absolutism: the sober faith that its norms are self-evident. It is one of the most powerful absolutisms in the world, more powerful even than the messianic spirit of the continental liberals which... the Americans were able to reject. That spirit arose out of contact with an opposing way of life, and its very intensity betrayed an inescapable element of doubt. But the American absolutism, flowing from an honest experience with universality, lacked even the passion that doubt might give. It was so sure of itself that it hardly needed to become articulate... it has refused to pay its critics the compliment of an argument (1955, 58-59).

Thus, the Lockian settlement provides the background for the Brown decision. The end of World War II thrust the United States on center stage in world affairs as leader of "The Free World." Embroiled in an ideological war with communism, the United States was consciously promoting its version of democratic capitalism as the most enlightened pattern of national development that the emerging nations of Asia, Africa, and Latin America could adopt. In this context, the nation's lingering problem of racial segregation stood out as a profound embarrassment. Segregation had begun to undermine
American prestige in the world. Justice Department attorneys utilized this very argument in their amicus curiae brief before the Supreme Court in the Brown cases:

It is in the context of the present world struggle between freedom and tyranny that the problem of racial discrimination must be viewed. The United States is trying to prove to the people of the world, of every nationality, race, and color, that a free democracy is the most civilized and most secure form of government yet devised by man. We must set an example for others by showing firm determination to remove existing flaws in our democracy.

The existence of discrimination against minority groups in the United States has an adverse effect upon our relations with other countries. Racial discrimination furnishes grist for the Communist propaganda mills, and it raises doubts about even among friendly nations as to the intensity of our devotion to the democratic faith. . . . The segregation of school children on a racial basis is one of the practices in the United States that has been singled out for hostile foreign comment in the United Nations and elsewhere [italics added]. Other peoples cannot understand how such a practice can exist in a country which professes to be a staunch supporter of freedom, justice, and democracy. The sincerity of the United States in this respect will be judged by its deeds as well as by its words (Brief of the United States as Amicus Curiae, in Kurland and Casper, 1975, 121; 123).

As we have seen, America's view of itself as a "City on a Hill" was not new - in fact, this metaphor had a long history. What was new was that the United States, in the ideological environment of the Cold War, was consciously exporting this vision to the rest of the world (Hartz, 1955; Huntington, 1968; Moses, 1993; Dudziak, 1995). As a conse-
quence, black leaders capitalized on America's new role in the world to justify their claims against the state.91

Because African Americans and liberal whites have found the nation's first principles useful, revolutionary theory-building has been rendered less necessary. "Like most Americans," Harold Cruse lamented, "Negroes are profoundly anti-theoretical" (1967, 92). Black liberation movements have concentrated primarily on pragmatic solutions to the problems faced by blacks. Brown illustrates the pragmatism of American liberals because it represents two tendencies which flow out of America's philosophical consensus: the belief in the power of law and science to solve major policy issues.

The resilience of the American Constitution after over two hundred years cannot be explained without reference to the nation's unanamity on first principles. The American concept of judicial review, for example, could only exist in a society with fundamental ideological consensus. As Hartz argues, "the removal of high policy to the realm of adjudication implies a prior recognition of the principles to be legally interpreted" (1955, 9). Having settled society's fundamental moral problem, the American is free to concern

91 For example, King compared the "jet-like speed" that the nations of Africa and Asia were moving toward independence with the "horse and buggy pace" that African Americans were moving toward gaining a cup of coffee at a lunch counter (King, 1964). In another example, Malcolm X's threat to charge the United States with human rights violations before the United Nation was no doubt motivated in part by a desire to embarrass America in its new international role (Moses, 1993, 231-232).
himself with concrete cases. Moreover, the natural law tradition has further magnified the importance of law in America (Corwin, 1928; Myrdal, 1944). Thus, the reverence for law in America largely substituted for the Old World's preoccupation with political philosophy (Myrdal, 1944; Hartz, 1955).

Thus, when the NAACP opted for the legal approach to remedy the problem of racial discrimination (as opposed to other alternatives that could have been pursued) they testified to their basic faith in the legitimacy of the American constitutional order. As a result, when leftist critics challenged the NAACP's legal program during the 1930's, the organization countered by romanticizing the law. The NAACP and its allies conceived of the courts as "objective" and "dispassionate" arenas; hence, judicial interpretations of the law carried the same force as the laws of science. They reasoned court decisions that undermined the premises of Plessy could rise above tyrannical nature of public opinion (which tended to be very hostile to civil rights) because, unlike executive or legislative acts, judicial decrees were "above politics" (Thompson, 1935; Locke, 1935; Kluger, 1975; Tocqueville, 1988; Smith, 1996).

Not only does Brown reflect the NAACP's faith in the law, but it represented the faith in the power of science (in this case social psychology) as a legitimator of public policy. It also reflected the basic pragmatic orientation of the NAACP. Indeed, Thurgood Marshall invited the social sci-
entists to participate in the deliberations for the Brown cases because he considered their testimony an effective way to demonstrate the harms of segregation (Kluger, 1975; Cross, 1989). Even more so than reliance on law, science is reputed as being "objective," "value-free," and "dispassionate" (Kuhn, 1962). What better way, the NAACP reasoned, to make a controversial legal argument than by appealing to an objective source? In doing so, the NAACP’s lawyers were behaving like Americans. After all, America’s reverence for science can be traced back at least to the bold claim of the Declaration of Independence that the new nation would build its political foundation on reason (as opposed to Old World "tradition").

In relying on the social sciences to buttress their legal arguments, the NAACP was helped immensely by the political tenor of the times. In the first place, Roosevelt’s New Deal, by relying on economic experts to shape economic policies geared to fight the Great Depression, legitimized the use of social science expertise in formulating matters of high policy. Second, World War II and the emerging Cold War witnessed the institutionalization of a "foreign policy establishment" which consisted of a class of experts which revolved between Wall Street, the Pentagon, and the nation’s Ivy League universities (J. Patterson, 1997). In addition, America had just fought a war against the horrors of fascism, most vividly personified by Hitler’s atrocities against the
Jews. While Social Darwinism had once provided a rationale for Jim Crow segregation and the science of eugenics (and its racist implications), the horrors of Auschwitz made such theories appear intellectually and morally indefensible to many Americans. In short, the post-World War II period was an ideological boon for liberals: with the memories of Nazi concentration camps still fresh on American minds, they were able to discredit "scientific racism" and portray prejudice and discrimination as social problems that were rooted in ignorance and irrationality (Arendt, 1958; D'Souza, 1995).

With the nation exporting its version of Lockianism, the nation focused on the problem of legal segregation at home. This led many Northern whites to render a rather harsh critique of the South. Since America truly was "the light of the world," the South, according to this view, simply was on the "wrong side of history." Northern liberals conceived the South as a strange place in desperate need to be saved from itself. Peller (1997) makes this point rather forcefully:

Brown was part of a broad critique of and intervention into the status quo culture of southern life; in general terms, the trajectory of northern regulation was to replace the all-white, Old South patriarchial ruling class with a somewhat integrated, rationalist, and technocratic New South leadership, both literally in terms of political office, and more generally in terms of everyday cultural and ideological legitimacy in diverse institutions (199).

But this intervention went deeper than the sense that Northern culture was more "enlightened" than that of the South. Social science lent support to the notion that the
experience of slavery and discrimination had psychologically damaged the black man's personality. The assumption that blacks had "low self-esteem" and/or actually "hated themselves" served as the dominant paradigm in social psychology until the mid-1960's (Cross, 1991). The assumption that black children were "culturally deprived" not only served as an underlying rationale for integration, but for a host of enrichment programs that were instituted during the War on Poverty such as Head Start (Peller, 1997, 206).

As a consequence of slavery and segregation, African American culture, according to many social scientists, either did not exist at all, or to the extent that it did, merely represented a pathetic, dysfunctional imitation of white cultural norms (Frazier, 1939; Myrdal, 1944; Kardiner and Ovesey, 1951; Clark and Clark, 1939; 1947; 1950; Silberman, 1964; Moynihan, 1965; Cruse, 1986; W. Cross, 1991; Peller, 1997). At any rate, the "liberal party line" was that race and culture should make no difference: the sin of segregation lay in its refusal to treat African Americans as individuals.

Furthermore, since liberals defined racism as irrational, they reasoned that the problem could thereby be solved by education. If segregation caused personality damage in black children, as the doll tests alleged, the NAACP and other liberals reasoned that integration was the solution. Public school integration, by increasing interracial contact, would prove that racism was merely based on irrational fears
that have no basis in fact (Arendt, 1958; Wilkinson, 1979; Cruse, 1986; Armor, 1995; D'Souza, 1995). Moreover, since education in America has historically embodied the hope for the future, the public schools seemed the natural place to start the process of confronting the nation's racial problem (Myrdal, 1944; Arendt, 1958; Reitman, 1992). Once it became abundantly clear that merely outlawing segregated public schools would not move the South to yield, liberals argued that activist government (legitimized by Franklin Roosevelt's New Deal), should now be applied to protect and expand the rights of southern blacks. As the civil rights movement gained momentum, some Northern elites and opinion makers treated the South (the "Great Perpetuator" of legal segregation) as if it were not even part of America (Rowan, 1951; Wilkinson, 1979; Williams, 1987; Peller, 1997).

Thus, Brown united two of America's deities: its reverence for law and its uncritical faith in science and reason. Because the Lockian settlement has weakened the American philosophical tradition, law and science are adhered to with religious-like conviction. This explains three characteristics of Anglo-American legal jurisprudence that legal scholar Patricia Williams identifies: (1) the tendency to define mutually exclusive categories that purport to simplify the complexities of life (e.g. rights/needs, moral/immoral, public/private, white/black); (2) the belief in the existence of transcendent, acontextual legal truths or pure
procedures; and (3) the a priori assumption that there exist objective "unmediated" voices by which those transcendent, universalist truths find their expression, such as judges, lawyers, logicians, and scientists (1991, 8-9). Consequently, American law and science, in that their legitimacy is based on their claims to universality and neutrality, mutually reinforce each other. Thus, the belief that law and science provide an objective arbiter to settle morally troubling questions (such as the legitimacy of racial segregation) is another way of restating the basic faith of American liberals in the American Creed.

Finally, the legitimacy of integration was further underscored by the fact that the decision of the Court was unanimous. The unanimity of the Court reinforced the view among liberal integrationists that they were right and the South was wrong. Implementing the Brown decision became a moral crusade: the confrontation was between enlightened integrationists and traditional, backward Southern racists.

In summary, Brown personified the American Creed itself. It incapsulated the ancient millenial visions of liberty and perfectibility that Europeans brought to the New World that allowed America to become the revolutionary symbol of the overthrow of the class and clerical tyrannies that had so bedeviled the Old World. It also recognized that, in marked contrast to Justice Roger Taney's infamous remark that the black man has "no rights a white man is bound to respect,"
the Court affirmed that African Americans did have rights, and states could not arbitrarily abridge them. Brown, and the civil rights movement which followed it, was seen as both a reaffirmation of America's first principles and an extension of those principles to new contexts (McCloskey and Zaller, 1984). Furthermore, America's new international role made it more difficult for the nation's long-standing racial divide to be put on "the back burner." Just as Cold War liberalism motivated American initiatives like the Alliance for Progress and the Peace Corps, it inspired Northern whites to join the "Freedom Rides" and to work side-by-side with Mississippi blacks during "Freedom Summer." Brown appealed to the reputation of law and science as "value-neutral arbiters of truth" to legitimize federal intervention aimed at overturning the South's system of legal segregation.

Nevertheless, despite the fact that supporters could easily interpret Brown as consistent with American principles, questions arose immediately about the Court's reasoning in the Brown decision. As Chapter Three noted, Brown left many significant questions unanswered, including whether the existence of state-supported black colleges and universities necessarily offended the Constitution. The fact that many of these criticisms were largely dismissed as "legalistic" and not taken seriously underscores the extent to which the Brown decision embodies the American Creed. However, it left many integrationists unprepared for the assault from the Black
Power insurgency from the left as well as Nixon's "southern strategy" from the right. The next section discusses some of the shortcomings of Brown that were identified by many legal scholars and why these critiques were largely ignored.

**Brown and its Critics**

Not surprisingly, Southerners lambasted the Court's decision in Brown; however, criticism was not limited to simply die-hard segregationists determined to maintain "segregation now, segregation forever" (a slogan made famous by Alabama Governor George Wallace); on the contrary, many friendly critics also came forward who were sympathetic to the ruling in Brown but who nonetheless voiced grave doubts about the Court's reasoning. The critiques of Brown can be grouped in four categories: (1) the view that Brown's reading of the historical context of the Fourteenth Amendment was inaccurate; (2) serious questions about the social science evidence upon which the Court depended; (3) the view that the Court's legal reasoning in Brown left much to be desired; and (4) the sense that Brown's declaration that "separate educational facilities are inherently unequal" made black colleges constitutionally suspect at best, and ripe for extinction at worst.

Graham (1954) criticized the Court for concluding that the intent of the Fourteenth Amendment "could not be determined with any degree of certainty" (347 U.S. 483, 489), maintaining that the justices interpreted the congressional
debates in terms of the issues of the 1950’s and not the 1860’s. In Chapter Two, it was shown that while some Northern Republicans, most notably Charles Sumner, wanted to integrate the schools, that position never held a majority during the Reconstruction debates from 1865 to 1875 (Avins, 1967; Klu-ger, 1975; Kaczorowski, 1987). Consequently, a strict adher­ence to "original intent" would have yielded a result unfavorable to the NAACP’s position. Rather, he maintained that the Fourteenth Amendment was written in "declaratory" terms; in other words, rather than the government conferring rights on the freedmen (which meant conceivably that Congress could take those rights away if it wished) it had merely declared the rights that they already had. Graham argued that the "declaratory" nature of the Fourteenth Amendment had been modeled after the Declaration of Independence; thus, he con­cluded that it was Congress’ intent to extend the protections of the Declaration of Independence and the Constitution to the newly freed slaves. Had the Court chosen to emphasize the declaratory nature of the Fourteenth Amendment Court, Graham reasoned, it could have put forth a rationale for Brown that was more faithful to the facts as opposed to pondering about the differences between the role of education in the 1860’s as opposed to the 1950’s.

Other commentators concentrated on Clark’s study which appeared to provide much of the underpinnings for the Court’s
decision. Brown, by relying heavily on social science evidence seemed to imply that its legitimacy hinged on the quality of that testimony. Thus, if the findings of the NAACP’s social scientists were later disproved, should the result in Brown be dismissed as well? Because Brown relied on social science evidence, it also followed that the opponents

*Cahn (1955) questioned the science behind Clark’s study. He thought that the Court’s conclusions in Brown were based on a common sense application of equal application of the laws rather than the social science evidence. He thought it rather silly to try to prove that segregation harms black children; Cahn likened it to theorizing about whether "fire burns." He wondered if the sample size was large enough to make the sweeping conclusions that the NAACP drew. Ernest van den Haag (1957; 1960) went much further in his criticism of the doll study. Like Cahn, he questioned the size of the sample, Clark’s failure to account for sample bias, and the lack of a control group. However, he also pointed to an apparent contradiction between the results of the doll tests and an earlier study conducted by Clark and his wife Mamie which employed similar methods as the ones used in the segregation cases (Clark and Clark, 1952). The Clarks surveyed two sample populations of black children (one in Arkansas and one in Massachusetts) and found that the behavior which allegedly proved personality damage - rejection of colored dolls by black children - actually occurred more often among northern-born children in nonsegregated schools than southern children attending segregated schools (165). More pointedly, van den Haag doubted whether Clark’s studies reveal anything meaningful about the issue of personality damage anyway. If a child identified "white" with "nice," might he identify himself with white if he thought of himself as nice? Clark apparently did not consider that possibility. Furthermore, Western culture, as well as other cultures where the terms "black" and "white" do not have racial overtones, associate black with evil and white with purity. Though conceding that segregation may have reinforced those impressions, van den Haag maintained that Clark’s findings simply did not prove that the reactions of the children were attributable to school segregation and not some other cause. His review of the social science testimony left him "disturbed about the disrepute his [Clark] ‘evidence’ could not fail to bring social science if it were taken seriously. And it seems to be" (1960, 69).
of remedies hailed as the logical derivatives of Brown, such as mandatory busing orders, would enlist the tools of social science to determine if integration actually "delivered" the academic and social benefits that it promised. Therefore, by appealing to the social sciences, Brown served to further politicize scholarly discourse of the study of academic achievement, particularly as it related to minorities (Armor, 1995; D’Souza, 1995; Orfield, 1996).

Some critics pointed out what they perceived to be as deficiencies in the legal reasoning itself that were distinct from its reliance on the doll tests. For example, why did the Court neglect to cite Harlan’s dissent from the Plessy case? Brown’s rationale implied that Plessy was based merely on "bad sociology" and not "bad law," as these critics maintained (Kluger, 1975; Wilkinson, 1979). In addition, Chief Justice Warren claimed that it was unnecessary to determine whether compulsory racial segregation also violates the Due Process Clause of the Fifth Amendment because the issue of racial segregation in public schools was disposed on equal protections grounds. But why not? The Court did not say. The justices were also criticized because the Brown opinion made scant reference to legal precedents concerning the issue of racial discrimination; by 1954, a fairly impressive number of legal precedents had accumulated with respect to racial discrimination that the Court could have easily referred to as it set forth to explain Brown to the country. Weschler
(1959) complained that the Warren Court failed both to articulate a neutral principle for its conclusion that racially segregated public schools were unconstitutional and a standard by which other types of statutory segregation could be judged.

They were also disturbed by what they saw as the Court's remedy to the problem of compulsory segregation: compulsory congregation (van den Haag, 1957; Weschler, 1959). Ernest van den Haag saw Brown as an attempt to compel whites to esteem blacks equally, an effort he predicted would never succeed. Instead, the Court's logic implied that segregation would become a privilege for the rich who would be able to enroll their children in private education whereas poor whites, lacking this option, would resent being forced to associate with blacks against their will (1957, 165). Weschler asserted that the only "neutral" principle which he could conceive of basing Brown on was the idea that racial segregation violated the individual's freedom of association. However, Weschler confessed his uncertainty about whether this position was logically consistent: the rights of African Americans to associate with whomever they choose regardless of racial considerations had to be balanced against the rights of white Americans to refuse such associations. Hence, Weschler remained unclear about whether Brown could be sustained on
freedom of association grounds; nevertheless, he was convinced that Brown was the correct result but was incorrectly decided.

Taken together, these criticisms exposed significant flaws in Brown's reasoning, some of which would continue to haunt the effort to implement the Court's mandate for many years to come. It appeared that the Court assumed that its logic was "self-evident." Lengthy dissertations on the evils of the segregated system of the South were not necessary; everybody knew what the Court meant. The more the justices elaborated, the more they would alienate; Chief Justice Warren wanted to preserve the unanimity of the Court. Many of the broader social implications of the decision, such as the fate of majority-black institutions, were either avoided or ignored. Hence, Brown, in opting for brevity, masked the nature of the complicated issues that lay ahead:

... Brown never explained - indeed, never tried to explain - its crucial conclusion that segregated schools, however equal their facilities, still intangibly harmed black children. True, Brown kept repeating this conclusion, at least five separate times. But the Court essentially asked the country to take it on faith: that because nine justices thought segregation wrong, it must be so (Wilkinson, 1979, 35).

The fact that many of these criticisms were dismissed as "legalistic" and not taken seriously was central to the entire history of the effort to implement Brown. After all, Brown represented the reaffirmation of the national faith in the dignity of the individual and his right to "pursue happiness," a moral question that had been settled long ago. This
"old principle" was simply being applied to an "old problem" - the issue of race. Thus, the ease with which Brown could be assimilated with the national narrative and American ideas of progress gave its advocates a much lower burden of proof. Brown was just as "self-evident" as the Declaration of Independence itself. The Court could be forgiven if its logic was sloppy or inconsistent - the fact that the justices' opinion reaffirmed some of the nation's most cherished values overshadowed any shortcomings in Brown's prose. As a result, some of Brown's defenders behaved as if the Court's opinion - as well as their interpretations of its meaning - were logically self-evident and did not need to be defended at all.93

93 A few examples will suffice to make the point. While conceding that Brown was not "tightly reasoned," Bender (1972) argued that the Court's decision was "right. . . . if the Court had waited until an airtight opinion could be written (I still couldn't write one), it would have sadly failed the country and the Constitution" (26). Beiser (1976) took his Bender's pragmatism one step further: he suggested that racial segregation was such a grievous evil that the Court need not apologize for its ruling, so long as "desirable results" were achieved. Bender wrote, "Does anyone doubt today. . . . that legally enforced racial segregation in Southern public schools hurt blacks more than it did whites" (1976)? He typified the view that Brown represented the common sense principle that segregation unconstitutionally harmed African Americans and therefore hardly needed to be explicitly defended since it was so obvious (Wilkinson, 1979, 35). When asked whether segregation offended the American principle of equality, Black wrote:

I think we ought to exercise one of the sovereign prerogatives of philosophers - that of laughter. The only question remaining (after we get our laughter under control) is whether the segregation system [in the South] answers this description. Here I must confess a tendency to start laughing all over again (1960, 424).
In addition, it was demonstrated in Chapters Three and Chapter Four that the 1950's and 1960's were characterized by massive resistance to the Brown decision in the South. The images of nine frightened black students in Little Rock, Arkansas being escorted to class by National Guardsmen over the protests of an angry white mob simply made a much deeper impression on national consciousness than the dispassionate critiques of the Brown decision by legal academics. Indeed, the South's response to integration fortified the conviction of integrationists that they were right and white Southern segregationists were wrong. In the highly charged ideological climate of the 1950's and early 1960's, the high priests of academia probably never had a chance. Now was the time for action, not philosophying. The real question seemed to be how much political capital would the federal government and the political parties be willing to risk on behalf of civil rights.

Moreover, the fact that these critiques were dismissed by the NAACP and other civil rights activists as "technical" and "legalistic" is precisely the point - because that is what they were. Brown's early critics challenged its legal reasoning, its fidelity to the historical context of the Fourteenth Amendment, the social science testimony, and some of its practical implications. They failed to address its most basic assumption - whether the American Creed itself could adequately deal with the problem of race. As a conse-
quence, Brown's belief in the universality of the American Creed was allowed to go unchallenged.

Not only did Brown's early critics not challenge the Creed, their "ivory tower critiques" revealed that they were trapped in an intellectual dungeon of their own making. Brown challenged an established view of liberal legal jurisprudence that began in the late nineteenth century and crystallized in 1905 with *Lochner v. New York*\(^4\) concerning the proper role of the courts. Liberals denounced *Lochner*, maintaining that the Court's "liberty of contract" doctrine presupposed that workers and capitalists had equal bargaining power. In a period when workers' strikes were often stamped out by the police and "company goons," such thinking was incredibly out of step with the reality of the labor market, liberals fumed. In dissent, Justice Brandeis wrote that *Lochner* was not based on a correct understanding of the law, but rather "upon an economic theory which a large part of the country does not entertain" (198 U.S. 45, 75). Accusing the Supreme Court of enacting its own economic and social preferences into law, liberals countered by developing the doctrine of judicial restraint - the view that courts should ordinarily defer to the policies of the legislature (Horwitz, 1979, 600; Peller, 1997, 204). Arguing that the Constitution created only one

\(^4\)198 U.S. 45 (1905). In *Lochner*, the Supreme Court invalidated a New York minimum wage law, arguing that the state law violated the Fourteenth Amendment by abridging the rights of workers and capitalists to contract with respect to wages and working conditions.
branch - the legislature - with the mandate to make political choices, the theory of judicial restraint became a staple of liberal theories of jurisprudence for half a century.

The consequence of the doctrine of judicial restraint was the loss of faith in the courts as a vehicle for social change. The post-Lochner era led many legal scholars to conclude that the law merely reflected social forces. Law had become too formalistic and legalistic, and had lost touch with social realities. By the 1920's, this thinking had given rise to the only native American school of legal jurisprudence - legal realism (Horwitz, 1979, 602). Legal realists assumed that since law reflected social forces, it was both impossible and undesirable for it to serve as a catalyst for social reform (Ibid, 602). Under the tutelage of the legal realists, law was stripped of its traditional moral content. Having rejected the natural law tradition, many liberals lost faith in the capacity of law to articulate the "dreams, hopes, and aspirations of a community" (Ibid). Indeed, one of the consequences of this view (which was discussed in Chapter Two) was that many leftist intellectuals considered the NAACP's proposed legal campaign against segregation as well-intentioned but doomed to fail. Taken together, the doctrine of judicial restraint and legal realism contributed to the view that the courts were an improper place to initiate any mass movement for social change.
Brown, however, called into question matters that many liberal legal scholars thought were settled. To them, what was unforgivable about Lochner was that the Supreme Court had enacted its own social and economic preferences into law; now, the Brown court appeared to have done the same thing. Even worse, liberals based their opposition to decisions like Lochner on abstract theories about the proper role of the courts within American constitutionalism; what they failed to acknowledge was that the doctrine of judicial restraint and the school of legal realism emerged principally as a reaction to a series of judicial decisions that liberals opposed on political grounds. But Brown was a decision in which many liberals favored the result; however, the Court’s ruling in the segregation decisions resembled the very brand of legal jurisprudence that they despised. Trapped in an intellectual web that they had spun themselves, some of the liberal legal scholars who criticized the Brown decision were, in reality, 

95Further evidence that liberal arguments for judicial restraint emerged more as a result of the political context of the times than the Founders’ original understanding of the courts’ role lies in the fact that liberals such as Justices Holmes, Brandeis and Frankfurter considered Chief Justice John Marshall one of their heroes. Justice Marshall, however, could not be accused of modest uses of judicial power. "Heroic judges," the proponents of judicial restraint seemed to be saying, "should be confined to the mythic past when judges were larger than life" (Horwitz, 1979, 600). While Marshall’s exercises of judicial authority may have been necessary during those embryonic years to carve out a special role for the Supreme Court within America’s constitutional order, many liberals acted as if "the age of heroic judges had passed and judicial modesty remained the only virtue" (Ibid, 600).
"fighting the last war" (Ibid, 603). Thus, it was no wonder that many of their criticisms centered on Brown's lack of a "neutral" principle or the search for an unambiguous purpose for the Fourteenth Amendment which ostensibly would have provided a better rationale for the Court's decision (Graham, 1954; Weschler, 1959; Pollak, 1959).

Further, the sense that the South's determination to circumvent Brown had created a constitutional crisis also meant that for these "doubting Thomases" some of their best arguments would be used to justify a degree of judicial intervention in the South that their own theories of judicial restraint could not have tolerated. Indeed, in a climate of massive resistance to desegregation, strict adherence to a theory of judicial restraint seemed to make little sense to Brown's defenders. It soon became apparent that merely striking down Plessy in education and allowing blacks and whites to go to whatever schools they liked - the so-called "freedom of choice" plans - would not integrate the schools; this view was crystallized by the Supreme Court's opinion in Green when it announced that Brown did not simply require school districts to outlaw segregation, but it placed on them an "affirmative duty" to desegregate. Thus, the view that the state act as a neutral arbiter - neither unjustly favoring blacks or whites - was labeled as "naive" or "impractical" at best (Meuller and Schwartz, 1960; Miller and Howell, 1960) or "reactionary," "racist," at worst (Peller, 1997, 204).
In addition, Green defined compliance with Brown in terms of whether states and school districts had made acceptable, measurable progress toward integration (391 U.S. 430 [1968]). Increasingly, the principle that Brown represented simply "color-blindness" - that Brown meant blacks and whites were equal before the law but race should not be taken into account - was rejected by many liberals. "Color-blindness" was linked with the equality that the Lochner court alleged existed between labor and capital; in theory, labor and capital might have equality, but the theory did not work in the real world (Peller, 1997, 204). Similarly, laws banning racial discrimination against African Americans made them the equals of whites in theory, but the consequences of slavery and segregation meant that they were not the equals of whites of whites in fact. Many liberals concluded that remedies to address racial discrimination had to be "color-conscious" in order to identify whether racism was still being practiced and thus avoid the Lochner problem (Ibid, 204). Moreover, the social science component of Brown represented the ideal for which the legal realists had strived for - the goal of making law conform to "the actual social conditions to which it was applied rather than to an abstract idealization of formal equality in the face of empirical inequality" (Ibid, 205).

Thus, the period between 1954 and 1968 was characterized by a major transformation in the thinking of many liberals on civil rights. At the time of Brown, the NAACP and other
liberals were arguing that racial segregation unconstitutionally used color as a basis for denying African Americans equality under the law. The principle that blacks not be judged by the color of their skin, "but the content of their character" easily harmonized with traditional American understandings of individualism (McCloskey and Zaller, 1984). By the time Green was decided in 1968, the country had witnessed more than a decade of Southern attempts to delay, circumvent, and outright defy Brown's mandate. Many liberals saw "color-blindness" as naive and unrealistic in light of the difficulties encountering in trying to make integration a reality. Rather than arguing that color should make no difference, as liberals had traditionally maintained, it would be necessary, at least in the short run, to take color into account in order to effectively monitor the process of redressing racial discrimination. Thus, they jettisoned theories of a limited role of the courts in favor of proactive government intervention to bring about desegregation. The courts' more activist posture toward desegregation during the late 1960's and early 1970's reflected the application of New Deal liberalism to civil rights (Carmines and Stinson, 1989; Edsall and Edsall, 1991; Crump, 1993; Orfield, 1996; Smith, 1996; Peller, 1997).

However, this transformation in liberal civil rights advocacy sowed the seeds for the undoing of Brown. As liberals began to steadily move away from "color-blindness" to "color-consciousness," conservatives accused them of aban-
drowning the American Creed. It was inappropriate for the government to take race into account, it was argued. As the images of nonviolent black demonstrators being beaten by racist white Southern policemen gave way to the urban riots of Watts, Detroit, Cleveland, and Newark, African Americans no longer appeared like sympathetic victims to many white Americans (Edsall and Edsall, 1991). The tumultuous combination of urban unrest and anti-Vietnam protest effectively weakened the New Deal coalition, paving the way for Richard Nixon’s narrow victory in the presidential election of 1968. One of Nixon’s campaign promises was to slow the pace of "forced desegregation"; though not rejecting Brown in principle (as racist Southern politicians had), Nixon denied that the federal government should play an activist role in bringing integration about. The "judicial restraint" arguments that an earlier generations of liberals had erected in response to an economically conservative Court were now being employed to curb judicial activism in school desegregation. Nixon’s message of allowing desegregation "conforming to local conditions" was just what many Southerners wanted to hear (Preer, 1982; Carmines and Stinson, 1989; Edsall and Edsall, 1991; Orfield, 1996; Smith, 1996).

Second, the more activist posture of the federal courts raised the specter that the implementation of Brown would mean that historically black colleges had no place in the new dispensation. Chapter Three discussed the debate among many
leading black educators during the 1950's and early 1960's, many of whom were gravely concerned that the implementation of a desegregation-only remedy would have disastrous implications for African American students, faculty, and administrators. However, the South's massive resistance to any kind of integration meant that the debate about the future of black colleges was largely confined to the intelligentsia until the mid-1960's. With the full force of Southern state governments united against integration of the public schools and the universities, bold assertions of "black autonomy" would have played into the hands of the segregationists. The political imperatives of the 1950's and early 1960's, thus, postponed the "black backlash" against integration until the late 1960's. Even when black educators voiced fears about the implications of integration, they were very careful not to directly criticize Brown (Thompson, 1958; Nabrit, 1958; Moon, 1962; Kujovich, 1987).

With the rise of the Black Power movement, many blacks began to have second thoughts about integration. The Supreme Court's statement that "separate is inherently unequal," as well as the efforts of the NAACP's social scientists and lawyers may have unwittingly injured the pride of African Americans. Brown asserted that even if school facilities were equal, racial segregation still intangibly harmed black children. Thus, the Court seemed to equate separate education with unequal education. The most militant advocates of Black
Power equated integration with cultural genocide. However, as noted in Chapter Three, Brown failed to specify if the "harm" of segregation was caused by the state's imposition of it, or if racial segregation "harmed" blacks and offended the Constitution irrespective of whether it was freely chosen or not. Thus, black college presidents interpreted Brown as not requiring the merger or elimination of black institutions but forbidding states from legally restricting the schools which African Americans could attend. At the same time, they coopted the liberal embrace of "color-consciousness" to argue that historically black colleges still served a critical need for black students during this critical period of transition from Jim Crow segregation to integration. In calling for states to enhance black colleges, they were not only trying to remedy past underfunding of black institutions; in addition, many African Americans were advocating an activist role for the government in remedying the "vestiges of segregation." However, by insisting that the desegregation process did not necessarily preclude the existence of black colleges, they were destined for a head-on collision with black and white liberals who saw black colleges as an artifact from the Jim Crow past that must now be eliminated.

Thus, the attempt to apply Brown to higher education raised doubts about whether the Supreme Court's decision was based on an adequate understanding of the problem of unequal educational opportunity in the first place. Furthermore, the
fact that efforts to extend Green's "affirmative duty" to desegregate in higher education occurred in the midst of an increasingly conservative political and legal climate seemed to indicate that the old legal realists had been right all along - the courts indeed were the wrong place to attempt an effort at massive social reform. However, the journey from Brown and Fordice does more than merely confirm the doubts of the legal realists about efficacy of the courts. Because desegregation in higher education cannot avoid the issue of state-supported black universities, is Brown even relevant? Questioning the relevance of Brown to solving this major policy question is another way of asking if the American Creed provides an adequate analytical lens to remedy the problems associated with race. As noted earlier, Brown has become an American cultural icon precisely because it can be readily harmonized with the nation's traditional understandings of liberty, equality, and individualism.

However, key aspects of America's historical development raise serious questions about the efficacy of the American Creed to deal with problems associated with race. The next section discusses these matters in greater detail.

The Limitations of the American Creed to the Black Experience

As noted in Chapter One, the American Creed, by proclaiming the "self-evident truth" of the fundamental equality of all men, unites African Americans and other historically "outgroups" into the American fold in a manner that is truly
extraordinary (Myrdal, 1944, 13). The beauty of the American Creed for African Americans is that it unites Protestant evangelical piety, Enlightenment rationalism, and natural law into a cohesive worldview. They were not forced to resolve any of the tensions between these frameworks; hence, blacks never needed to "import" a theory of revolution from abroad (such as Marxism) to justify their protest movements; a ready-made rationale was already available.

However, Tocqueville also noted that Americans have the luxury of living in a democratic society "without having to endure a democratic revolution" ([1835]: 1988), he had in mind the revolutions in Europe, in particular, the most recent one in his native France. The Americans did not have to rebuild a new society on the ashes of an old one. The image of America as a redemptive force in the world and the sense that it was the carrying out of modernity's rejection of tradition in favor of reason as the basis for politics was so taken for granted that it was not hard to imagine why Jefferson could declare certain "truths" to be self-evident. Unlike Locke, Jefferson had no one comparable to a Filmer as an opponent; there simply was not an entrenched aristocracy in America which had to be demolished. Neither was there an ancient social order which counterrevolutionaries could
nostalgically point to in the event that America's democratic experiment encountered a serious crisis.96

Agreeing with Tocqueville's observation, Hartz asked, "Can a people that is born equal ever understand peoples elsewhere that have become so? Can it ever lead them? . . . . Can it understand itself" (1955, 66, 309)? Hartz' question cuts to the core of the dilemma which Brown presents because it challenges the presupposition that the American Creed has universal applicability. In addition, it must be recalled that Brown occurred in a political climate when the United States was evangelistically spreading the gospel of democratic capitalism as if its institutions could be applied universally all over the world. If America's social norms are not as "self-evident" as the Creed implies, then not only may it not necessarily inhere within it universal lessons for the world, but it may have difficulty addressing some of America's own problems. Therefore, to the extent that the Brown decision was partly motivated as an "object lesson" for the

96Hartz argues that the lack of an "old regime" in America was precisely the intellectual problem that Southern apologists for slavery from 1830 onward had, a problem that they never solved. Lacking a true American feudalism, some Southern aristocrats turned to Europe as a model - which, from the standpoint of the dogmatism of the American Creed, was a fruitless exercise. Trying to defend slavery as a "right to property" while pointing to European feud-alism could not work because America theoretically personified what Europe was not - particularly freedom. The fact that the arguments of the Southern apologists have largely been forgotten, Hartz concludes, is a powerful testament to the tyrannical hold that the liberal tradition has on the American mind (1955, 145-200).
rest of the world, it may be an inadequate instrument to address the problem of unequal educational opportunities for African Americans (depending on how it is interpreted and implemented). More fundamentally, Hartz implied that it is America's absolute moral certainty that its historical experience inheres within it universal lessons for the nations of the world that is precisely the problem.

While this dissertation has argued throughout that African Americans subscribe to the same American Creed that white Americans do, both groups have been conditioned by different historical experiences. These experiences have produced distinct differences in cultural perspective between whites and blacks. Thus, the belief that the Creed is "self-evident" poses three specific problems which have handicapped the effort to implement desegregation which will be explored in the remainder of this chapter:

(1) America's historical experience has given rise to the view that "the government that governs best is the one which governs least." However, African Americans associate their greatest political, social, and economic gains with historical periods characterized by significantly more interventionist government than traditional understandings of the American Creed idealize. These differences in historical perspective often cause whites and blacks to have starkly different views about the proper role of government.
(2) The fact that the American Creed idealizes the limited state (without adequately justifying its legitimate role) particularly weakens the courts, which is inherently the weakest branch of government. Courts must ultimately depend on the cooperation of the other branches of government as well as the willingness of the populace in order to implement its decisions. They have little power to enforce decisions on their own, particularly politically unpopular ones (such as school desegregation). Consequently, because African Americans have concentrated a disproportionate amount of their energies trying to achieve desegregation through the courts, the institutional weaknesses of the judicial branch become especially problemmatic.

(3) Liberals based their support for integration in the 1940’s and 1950’s on the reputed "objective" and "value-neutral" pillars of law and science, two of the major derivatives of the Creed. By assuming the universality of the American Creed, the liberal consensus of the late 1940’s and 1950’s failed to consider if its so-called "value-neutral" consensus about race was rooted in Eurocentric (and even racist) assumptions. Viewed in this light, it begs the question of whether the Supreme Court in Brown adequately considered the distinctive nature of African American political culture when it made its decision.

The next section focuses on the historical origins of America’s limited view of the state and the formidable
obstacles that it poses for implementing what are perceived as "big government" solutions (such as desegregation).

The American Creed and the Role of the State

For the purposes of this study, what is especially noteworthy about the American Revolution is its uniqueness, not its universality. What distinguished America from Europe was its lack of a feudal past, and this fact profoundly shaped the nature of its revolution and political culture (Hartz, 1955; Huntington, 1968). The distinction between America and Europe implies that certain aspects of the American case either cannot be applied to other contexts, or if it can, it cannot be applied in the exact same manner. Moreover, it also means that the details of America's historical development do not necessarily inhere within them a blueprint for solving contemporary domestic issues, such as the problems that the modern civil rights movement confronted the nation with in the 1950's (some of which remain largely unsolved). In this section, it will be argued that America's lack of a feudal past has caused Americans to ascribe a significantly more limited role for the state than in other countries - and this predisposition directly affects racial politics in America.

Without a feudal order to destroy, the American was free to define his revolution as a struggle to limit government. Indeed, the American republic premised itself upon a profound distrust of government. The separation of powers between the executive, legislative, and judicial branches and the divi-
sion of sovereignty between the central government and the states stood out as a monument to the Founders' distrust of centralized authority. At the heart of the colonists' dispute with Britain was their rejection of Parliament's claim to absolute sovereignty, particularly in the area of taxation. British policies during the 1760's and 1770's were viewed by their subjects as "usurpations" of the powers traditionally exercised by their local assemblies (Hartz, 1955; Huntington, 1968; Peterson, 1976).

By contrast, the European liberal faced the dual problem of checking the arbitrary use of power by government while simultaneously preserving democratic reforms against any potential restoration of the old regime by the aristocratic classes. The American only needed to limit power; the European liberal had to both limit power and keep it at the same time. Thus, they could not challenge the absolute monarchies of their day without dreaming of centralizing power themselves (Tocqueville, 1988; Hartz, 1955). European liberals talked about "enlightened despots" who would "reorder society along rational lines" (Hartz, 1955, 44), language which many Americans would have found to be "dishonest doubletalk."

While Americans praised Montesquieu's scheme of checks and balances because it divided sovereignty, European liberals blasted him for precisely that reason - that is, it shattered the very unity of power upon which liberals had placed their hope.
Therefore, the absence of a preexisting feudal order caused Americans and Europeans to define the role of the state in a liberal society very differently:

There are two sides to the Lockian argument: a defense of the state that is implicit, and a limitation on the state that is explicit. The first is found in Locke’s basic social norm, the concept of free individuals in a state of nature. This idea untangled men from the myriad associations of class, church, guild, and place, in terms of which feudal society defined their lives; and by doing so, it automatically gave the state a much higher rank in relation to them than ever before. The state became the only association that might legitimately coerce them at all. . . . When Locke came to America, however, a change appeared. Because the basic feudal oppressions of Europe had not taken root, the fundamental social norm of Locke ceased in large part to look like a norm and began, of all things, to look like a sober description of fact. When the Americans moved from that concept to the contractual idea of organizing the state, they were not conscious of doing anything to fortify the state, but were conscious only that they were about to limit it. One side of Locke became virtually all of him [author’s emphasis] (Hartz, 1955, 60).

In other words, the European liberal needed to explicitly defend the legitimacy of the state’s role in society while simultaneously limiting its role in certain areas in order to make his case against absolute monarchies. The American version of Lockianism, by contrast, has only been concerned with limiting the state. The American revolutionary never bothered to defend the legitimacy of the state because he considered it a necessary evil that must be limited. The Founders’ preoccupation with designing a political system which renders swift political change virtually impossible was a testament to their desire to weaken government. Moreover,
this framework could not have worked in a society where there existed fundamental disagreement on the notion of limited government.

Having defined their revolution in this manner, slogans such as "less government," "states' rights," and "laissez-faire economics" have become, for some Americans, the National Holy Writ. However, rather than seeing this view of the state as the product of the political struggles of the 1760's and 1770's, the American view of the limited state is defined in universal, transcendent terms. The Creed is lifted out of its political and historical context and becomes one of the "laws of nature and the laws of God."

This aspect of the American Creed creates significant political obstacles for the majority of African American political leaders, who tend to favor more activist government intervention on issues pertaining to civil rights. Blacks have consistently given the Democratic party, which tends to favor more activist government than Republicans on civil rights, approximately 90 percent of their vote since 1964 (Cross, 1987; Carmines and Stinson, 1989; Edsall and Edsall, 1991). When conservatives argue against affirmative action, minority set-asides, busing to achieve desegregation, court orders requiring school districts to equalize funding between rich and poor schools, and the requirement that states make massive investments in historically underfunded black universities, they appeal to the nation's ancient distrust of the
federal government. African Americans and liberal whites, on the other hand, interpret the hard-fought struggles to secure the civil rights victories of the 1950’s and 1960’s as evidence that the rights of minorities cannot be left to the states and the private market. Hence, African Americans, firm believers in the American Creed, find themselves appealing to the very federal government that the Creed says cannot be trusted.

However, the problem for African Americans is deeper than merely the fact that they tend to be politically more left-of-center than the majority of the nation’s population. Given America’s predisposition toward defining the whole of Locke as limiting the state (without defending its legitimate role), political gains by African Americans that are based on expansions of federal power rest on an unstable foundation. This is because the liberal rationale for "activist government" has been based on a pragmatic response to specific shortcomings of laissez-faire capitalism and the doctrine of "states' rights," rather than on a philosophical defense of the state. Hence, the fundamental problem with Brown, and by extension, for the civil rights movement, is that it appealed to the American Creed for intellectual and moral support in order to expand the role of the federal government in protecting the rights of blacks; however, the civil rights community has largely failed to understand that the Creed itself is a theory of limited government. It must be recalled
that many of the civil rights victories of the 1950's and the 1960's represent the redefinition of New Deal liberalism to encompass African American concerns (Carmines and Stinson, 1989; Edsall and Edsall, 1991). Consequently, it also follows that the collapse of the traditional Democratic New Deal coalition means that policies predicated on the civil rights consensus of the mid-1960's might have trouble sustaining themselves as the American political pendulum swings back to its more natural position. Viewed in this light, the conservative assault on affirmative action is not simply an example of "white backlash" as many liberals insist (Curry, 1996), but stands as a testament to the failure of the left to ground its agenda in a philosophical defense of the state.

Liberals have neglected to defend the state for one basic reason: they are Americans. As the intellectual hiers of Jefferson, Americans have a tendency to view the American Revolution not as an event, but as a "process" that had "only fairly begun in 1776, nor had it ended in 1783" (Peterson, 1976, 27). Consequently, the principles of the American Revolution in need of constant reinterpretation by each succeeding generation. This dynamic dimension of the American Creed allows politicians, activists, and social reformers of various ideological stripes to rationalize their agendas as consistent with either the "true intent" or a "modern construction" of the American Dream or both. Brown constituted this very type of reinterpretation; in effect, the
Court said that it did not matter what the framers intended the Fourteenth Amendment to mean in 1868. What mattered was what the Court thought in 1954. As a consequence, civil rights liberals portrayed themselves as carriers of the "spirit" of the American Revolution (Cahn, 1955; McCloskey and Zaller, 1984). In addition, the Cold War atmosphere of the 1950's encouraged Americans to think that they, not the Soviets, were "the most revolutionary society in the world" (Hartz, 1955, 305-306). Thus, the nation's historic spirit of social experimentation embodied in the American Creed combined with the politics of the times to "sanctify" the mission of implementing the Brown decision and discouraged a thorough critique of the American view of the state and its relationship to society.

Moreover, when American liberals (like their conservative counterparts) start from the premise that their system is already the best in the world, why would they be expected to attack one of the "sacred cows" of American politics - the limited view of the state? When one conceives of his country as the example the world should follow, even the most zealous of reformers (regardless of whether they are from the left or the right), would not propose a fundamental restructuring of the American house. Instead, they would rather remodel it, add an extra room or put on a "fresh coat of paint" on it. The New Deal liberal has been a reformist, not a revolutionary. With that thought in mind, the New Deal liberal objects
to "laissez-faire economics" because the stock market crash of 1929 reveals the excesses of unregulated capitalism, not because it is a distortion of the Lockian theory of the state. In America, the greatest expansions in federal power have been in response to crises: the Civil War, the Great Depression, World War II, and the civil rights movement. On one score, these crises reveal that the pragmatic nature of the American Creed gives it a unique advantage over European ideological systems; that is, it allows the American Creed to "reinvent itself" to respond to changed circumstances that those trapped in more rigid ideological categories cannot possibly do.\(^7\)

However, when the crises begin to fade from the nation’s collective memory, policies which were legitimized by those circumstances can sometimes fall out of favor as the public

\(^7\)Hartz argues that the New Deal constitutes a shining example of American pragmatism and the ability of the Creed to reinvent itself conveniently to deal with political and economic crises. He points out that the New Deal shows the dogmatism of America’s devotion to Locke. Not only was Roosevelt able to coopt much of the agenda of the socialists and the communists, he was able to do it without acknowledging the leftists’ critique of his program at all. Had Roosevelt been in Europe, he could not brought about an unprecedented increase in the size of the federal bureaucracy without qualifying himself. For example, Roosevelt would have had to say that though the New Deal was increasing the size of the state, he still believed in the sanctity of private property and opposed government collectivization of major industries. True enough, many of his conservative opponents branded his proposals as "socialist" and "un-American," but Roosevelt was hardly a spokesperson for the socialist themes of "class solidarity." Indeed, his demonization by conservatives and the weakness of the radical left made Roosevelt’s New Deal program "the only game in town" for the practical liberal (1955, 259-283).
shifts its attention to other matters. This fact partially explains Northern lack of political will to vigorously intervene in the South on behalf of civil rights during the 1880's and 1890's, which helped to create the judicial-political climate for \textit{Plessy} (Kluger, 1975; Wilkinson, 1979; Cruse, 1986; Lofgren, 1987; Franklin and Moss, 1987; Kousser, 1990; Orfield, 1996). But the shift in public opinion points to the more basic problem: the reforms enacted during the Reconstruction debates presumed that the freed slaves could be fully incorporated as citizens without fundamentally redefining the role of the American state.

African Americans, the one ethnic group with the greatest potential to pose a revolutionary threat to American democracy (as well as the greatest need to think beyond the Creed's view of the state) have historically been among the greatest apostles of the American version of Lockianism. Even when African American thinkers have bitterly protested the treatment of their people in America, they have found it difficult to think beyond the American frame of reference; indeed, it has been the inability, in the main, of African American intellectuals to think beyond the American perspective that is for Cruse "the crisis of the Negro intellectual" (1984). Moreover, African Americans have been the most faithful members of the New Deal liberal constituency (T. Cross, 1987; Carmines and Stinson, 1989; Edsall and Edsall, 1991;
Smith, 1996); hence, their political strategies suffer from the same liabilities that have afflicted American liberals more generally.

Fundamentally, the only grievance that the majority of black Americans have against America is racism; thus, rather than challenging the relationship the Creed exposes between the state and society, African Americans leaders have principally concerned themselves with the practical consequences of racial discrimination against their people. Those few black leaders who have espoused revolutionary theories have been no more successful than white radicals at attracting a large following to their cause because the black masses have been largely uninterested in programs calling for the revolutionary restructuring of American society; rather, they simply want what they believe is their "fair share" of the American Dream of economic and social mobility (Cruse, 1984; Hochschild, 1995; R. Smith, 1996).

In summary, the facts of America's historical development have given rise to a limited view of the state that is uniquely American. The uniqueness of the American experience raises doubts about the ability of America's past to instruct not only other nations of the world - which is precisely what America's Cold War ideology was attempting to do - but herself. The Lockian settlement, because of its predisposition toward viewing the state as a "necessary evil" rather than a "positive good," only illustrates the critical need for a
philosophical defense of the state by liberals. However, this has been precisely what liberals have failed to do. Because black and white liberals adhere to the faith of the same American Creed as their political adversaries, they have largely failed to see the need for a fundamental critique of the American version of Lockianism. Since America's ascent to the apex of world power has "validated" American Lockianism, strategies favored by the left have the highest burden of proof. Yet, as the largely pragmatic justification for Brown illustrates, the political groups in America with the greatest need for political philosophy seem to be the very ones least interested in it.

The failure of African Americans and their white liberal allies to ground Brown in a philosophical defense of the role of the state draws attention to the efficacy of one of the principal tactics employed by the left: the reliance by liberals on the courts and the tools of social science to affect broad social change. Brown, as noted earlier, is an example of the American tendency to appeal to law and science - which are purportedly "value-free" and "objective" - as a substitute for political philosophy. But if the American Creed itself is not universal (but is, in fact, the product of a particular historical experience), then it raises the question of whether two of the concrete ways the Creed manifests itself (America's reverence for law and science) are also problematic. That is the subject of the next section.
Brown and the Relationship Between Science, Law, and Culture

Since the American Creed itself has legitimized the view that the state's role should be limited, then it follows that this orthodoxy weakens the power of the courts, which must depend on the other branches of government to enforce its decisions. Rosenberg (1991) has shown that the courts are an especially blunt instrument with which to effect social change. Courts, he explained, generally lack effective tools (whether they include positive inducements to encourage compliance or punitive measures to punish parties who refuse to cooperate) to force compliance in the absence of the willingness of the parties to honor judicial decrees. Because courts depend on the other branches of government for enforcement, they do not propose radical social reforms very often; hence, the Supreme Court is an inherently conservative institution. Also, the judicial system affords the opportunity for considerable delay of social reform through endless motions, appeals, motions, and other measures (18). Using desegregation in education, abortion, and environmentalism as case studies, Rosenberg concludes that the courts are actually better at mobilizing those opposed to major social reforms than they are at promoting social reform.98

98In his examination of the Brown decision, Rosenberg found that the period between 1954 and 1964 - when the Supreme Court was the principal arm of the federal government that was squarely on the side of desegregation - little actual integration occurred. He attributed the rapid progress of desegregation in the South after 1964 to massive infusions of federal aid to education, the threat of federal aid cut-
Not only does Rosenberg's account raise serious questions about Brown's significance (as popularized by the media and legal scholars), but it calls into question the long-term efficacy of relying on legal strategies to expand the rights of African Americans since Brown. The basic difference between the Black Mississippians' Council for Higher Education and the NAACP Legal Defense Fund during the 1970's was on the role of black colleges; both organizations believe that the courts offer a promising avenue for pursuing their agendas. While many African American activists regretted that the Court refused to order the state of Mississippi to make dramatic improvements at the state's black universities, the real question is whether a court decision more to their liking, in and of itself, would have actually mattered. As

offs to school districts that refused to desegregate, and Southern business interests who saw integrated schools as a means of attracting out-of-state industries to their communities. These changes, Rosenberg reasoned, should be attributed to the convergence of the coercive power of the legislative and executive branches of the federal government and Southern business interests (in response to the direct action campaigns in the South by blacks). The courts, he concluded, were largely ineffective at overcoming the deep-seated racial prejudices that were at the heart of school segregation. In fact, he pointed out that Brown was more effective at mobilizing Southern opposition than it was at bringing about positive change. Rosenberg added that there is little evidence to support the commonly held belief that the Brown decision served as an inspiration for black civil rights workers; he countered that the Montgomery bus boycott, the charismatic leadership of Martin Luther King, the sit-ins, the demonstrations, and the Freedom Rides exerted a far greater influence on the decisions of African Americans to participate in the movement than the symbolism of Brown. (131-142).
the history of Brown has made abundantly clear, judicial decision and judicial implementation are two fundamentally different things.

Tocqueville (1988) noted the tendency in America for political problems to be transformed into legal ones. However, there is evidence that the "legalization" of political problems carries with it its own set of difficulties. Horwitz (1979) has argued persuasively that Brown, by judicializing the problem of race relations, has also distorted the nature of the dilemma and frustrated efforts toward finding equitable remedies. First of all, he points out that the American legal system is "overwhelmingly geared to a conception of redressing individual grievances, not of vindicating group rights or generalized patterns of injustice" (610). This perspective, flowing from the atomistic individualism of Locke, strips minority plaintiffs of their group identity. As a result, they have little basis with which to raise claims that have resulted from injustices that society has inflicted on their ancestors. Viewed from this angle, the decision in Bakke makes perfect sense. Thus, it was not surprising that the state of Mississippi accused the Ayers plaintiffs of claiming "group rights" for advocating that the state be required to financially and programmatically compensate black universities for its unconstitutional actions in the past. The plaintiffs had no choice but to try to demonstrate that their claims were not inconsistent with a traditional
American conception of individual rights. Constrained by the premises of American constitutionalism, the Ayers plaintiffs were forced to portray black Mississippians as an abstract collection of individuals, divorced from their context of historical oppression, but who nevertheless have constitutional grievances against the state. By insisting on a radical distinction between individual identity and group identity (and extending constitutional sanction to the former and not the latter), the liberal tradition often has immense difficulty conceptualizing the social consequences of racial discrimination.

Secondly, Williams (1991) contends that the ability of African Americans to combat racial discrimination through the courts is hampered by another basic tenet of Anglo-American jurisprudence: its search for, and the assumption that there exist "transcendent, acontextual, universal truths or pure procedures" (8). This perspective helps explain the American reverence for "the rule of law" (Myrdal, 1944). This worldview is problematic, Williams argues, because of it tends "to disparage anything that is nontranscendent (temporal, historical), or nonuniversal (specific) as 'emotional,' 'literary,' 'personal,' or just Not True" (9). Coupled with the orientation of courts to conceptualize rights only in individualistic terms, the penchant of courts to search for universalistic principles implies that judges need not necessarily take the special history of African Americans
into account. Thus, Justice Powell could write the majority opinion in Bakke as if the Fourteenth Amendment had no special historical meaning for African Americans. Claims rooted in history have a more difficult burden of proof in the courts. Therefore, this bias represents a significant challenge for the Ayers plaintiffs because they have based their case for enhancements of black universities largely on the state of Mississippi’s past conduct.

Third, courts, by nature, tend to limit the nature and scope of conflicts based on fundamental disagreements over principle (Horwitz, 1979, 610). In some cases where such basic disagreement exist, courts may even struggle to define the problem - such as the problems that federal courts have had in defining desegregation as well as specifying the remedial measures necessary to eradicate the remnants of de jure discrimination. The tendency of courts to constrict the nature of controversial political and legal questions is further aggravated by the proclivity of judges to decide issues on the narrowest possible grounds for decisionmaking (Ibid). In Fordice, the Supreme Court, while finding Mississippi’s policies governing higher education constitutionally suspect, avoided one of the most contentious issues - whether the state was constitutionally required to make substantial improvements at the black universities. Because courts often decide deeply divisive issues based on narrow principles, this not only prolongs legal controversies for years; it
creates the paradoxical situation where parties can "win" on principle but "lose" in reality if the court ultimately rejects the remedies that the parties favor. Thus, it took seventeen years for the Ayers plaintiffs to win a judgment by the nation's highest court against the state; however, the goal which motivated the suit in the first place - the desire to enhance Mississippi's black universities as black universities - remains incomplete. Fordice illustrates how parties involved in a lawsuit can "win" and "lose" at the same time because of the way judges makes decisions.

Brown and its progeny points to a fourth problem that the legalization of racial problems presents: by concentrating on public schools and state universities, the legal battles over desegregation have discouraged a more systemic approach to educational policymaking. Segregation in the public schools since Brown is highly correlated with segregated housing patterns (Horwitz, 1979; Massey and Denton, 1993; Armor, 1995; Orfield, 1996; Patterson, 1997), which may be related to job discrimination. By defining desegregation as principally a legal problem, the fact that African Americans disproportionately are more likely to have inferior educational opportunities than whites is not seen as one of the consequences of social and economic inequality more broadly. Educational problems are confused with legal ones, problems which ultimately have political and economic origins (Preer, 1982; Armor, 1995).
Nonetheless, because public schools and state universities are "public," judicial scrutiny is seen as more legitimate; whereas, housing and job discrimination involves areas considered "private" and best left to the free choices of individuals (Horwitz, 1979, 612). This "public-private" distinction discourages courts from taking a more systemic view of the problem of unequal educational opportunities. Instead, courts focus on those institutions for which they can more readily exercise judicial control — in this case, public schools and state universities. Brown presents no basic challenge America’s traditional attachment to capitalism and the belief that government should intervene in the marketplace as little as possible. Since American capitalist ideology accepts inequality as not only inevitable but a necessary incentive for industry and hard work, courts are reluctant to be involved in directly attacking social and economic inequality. Thus, by concentrating on public schools and state universities, courts merely address the symptoms and not the sources of the inequalities that Brown was ostensibly meant to remedy.

The irony of Brown, then, is that it targets the public schools, "the weakest and most vulnerable of American institutions" (Horwitz, 1979, 612) with the weakest branch (the judiciary) of an American state which is also weak (because of the American Creed, the fragmentation of American political institutions, and federalism). As a result of Brown, the
public schools and the state universities have been called upon to shoulder the greatest burden for solving the problem of racial injustice.

This is a hope which the public schools and the state universities never had a possibility of fulfilling. Brown not only embodied the historic faith in education that was shared by black and white Americans, but occurred in an age where the post-World War II economic boom had generated the greatest expansion in educational opportunities in the nation's history. Communities across the nation were building new schools and improving existing ones to meet demand. The G.I. bill had made a college education accessible to many working class Americans for the first time. Even the international climate served to strengthen public education; when, the Soviets launched Sputnik, Americans panicked at the thought that the Soviet Union might have technological superiority over the United States (K. Alexander and M. Alexander, 1985; Cremin, 1989; Patterson, 1997).

However, Arendt (1958) observed that while faith in the power of education generally characterized Western democracies, no nation more literally believed in the culturally redemptive power of education than the United States. She warned that the Brown decision reflected an American overconfidence in the power of education or "enlightenment" to solve difficult social problems such as racism. The faith in "enlightenment" manifests itself in the Court's reliance on
arguments rooted in social science reasoning for its ruling in Brown. Embodied in the Court’s rationale is the Enlightenment’s confidence that the vices of human civilization (such as racism) must eventually crumble under the weight of advances in scientific knowledge.

Arendt predicts that desegregation as a solution to the race problem could never work, no matter how well intended. Forcing black and white children to attend the same schools, she continued, could not solve the race problem because the children would have to grow up in a world with the very adults who could not solve the problem in the first place. Arendt’s criticism directly contradicts the traditional view of the efficacy of public education - most explicitly expoused by Dewey, and the use of the courts to bring about the desired end. Cruse (1986) agrees: "As an institution, a public school is created by and reflects the dominant values of the surrounding adult society, not the other way around" (73).

Nevertheless, the view that integration has an inherent "social enlightenment benefit" has profoundly influenced the debate over desegregation. Similar arguments are relied upon to justify affirmative action in the workplace and at state universities.99 Associate Justice Thurgood Marshall expressed

99Proponents insist that "diversity" has an inherent educational and economic benefit. However, these arguments "do not fly" with many Americans because the practical and scientific orientation of the American Creed gives greater legitimacy to positions which can be easily quantified or
this viewpoint in his dissent in *Milliken* when he wrote, "... unless our children begin to learn together, there is little hope that our people will ever learn to live together" (418 U.S. 717, 783 J. Marshall, dissenting). Arendt suggests that the American faith in the power of education, which is clearly reflected in *Brown*, is tragically misplaced. Reitman (1992) echoes Arendt's assessment of American culture, arguing that America suffers from an "educational messiah complex" - the belief that every social problem, ranging from racism, to environmental degradation, to teenage promiscuity, to AIDS - can be solved by the schools.¹⁰⁰

explained in "cost-benefit" terms. It is difficult to "quantify" the educational benefits of diversity when African Americans score significantly below whites and Asians on standardized tests. Government policies which appear to favor individuals or groups seen as "less qualified," according to the American Creed, come to be seen as abuses of state power. However, it usually does not occur to many Americans that the standards themselves which are used to decide who is "qualified" may actually be culturally biased (Gardner, 1993; D'Souza, 1995; Delpit, 1995).

¹⁰⁰But Reitman carries his analysis even further. He concludes that the American cultural tendency to "dump problems on the schools" not only has the effect of politicizing education - but rather, it is actually a form of social avoidance whereby one generation "passes the buck" for dealing with difficult political issues to its children. Not only do Americans fail to tackle these issues, Reitman continues, but they convince themselves that by placing ever-increasing demands on the schools that they are in reality handling their problems. Thus, engaging in bruising battles over educational reform, sex education, after school programs, censorship of books, and the content of the curriculum substitute for the irreplaceable activity of citizens and other social institutions in confronting pressing issues. Moreover, the schools offer a convenient "scapegoat" for nearly every social problem. For example, the Education Department's "Nation at Risk" report on the status of public education in 1983 blamed the schools for the fact that the...
The tendency to divorce the problem of educational inequality from its social and economic context affects not only federal judges. For example, many liberals who favor the continuation of mandatory busing to achieve desegregation emphasize its purported social and educational benefits. Advocates of busing maintain that the problem with segregated schools is one of poverty and not race (Orfield, 1996). But if the root of the problem is poverty, then it does not necessarily follow that the solution is a one-hour ride on a school bus to an entirely different neighborhood. It might actually be more reasonable to argue that remedies which attack the underlying economic inequalities of inner-city United States appeared to be losing its economic supremacy to Germany and Japan. However, while the 1990’s have witnessed an economic expansion in the United States (while other Western economies have not performed nearly as well) it is interesting that public education gets none of the credit for the good economy. Americans seem to have a love-hate relationship with the public schools; on one hand, they are supposed to save us and conversely, they are the source of all of our problems.

Liberals such as Gary Orfield (1996) maintain that mandatory busing that involve the more affluent suburban districts should be continued (and expanded in some areas). Busing is needed not because black or Latino-majority schools are inferior not because of their racial composition; rather, integration exposes minority students to a superior "opportunity structure." That is, desegregated schools tend to have better resources, a stronger curriculum, and produce graduates who are more likely to go to college. Segregated schools are "inherently unequal" because race is highly correlated with poverty. Similar arguments are advanced to discourage blacks from enrolling in black universities: predominately white universities have better facilities, superior resources, a stronger curriculum, and graduates of these institutions are more likely to get a job or admitted to graduate or professional school.
neighborhoods vis-a-vis the suburbs may be more fruitful than concentrating on the schools alone. As recent judicial trends have placed busing on an increasingly slippery foundation, many African Americans have become more vocal in insisting that their neighborhood schools should be strengthened and enhanced, even if they are segregated (Steele, 1993; Shujaa, 1996). However, many of the remedies proposed (such as Afro-centric curricula, all-black male schools, increased funding for inner-city schools) are no more systemic than the busing remedies that they would like to replace. Thus, the tendency to overemphasize the virtue of the public school, historically an American problem, has been further aggravated by Brown.

When the NAACP rejected DuBois' argument that some forms of segregation are not only not harmful, but may even be necessary for African American advancement, the organization was also rejecting a systemic approach to the problem of racial inequality. DuBois felt that what African Americans really needed were independent bases of political and economic power. However, the dispute with DuBois served only to harden the NAACP's belief in the rightness of the legal approach. However, the danger of the legal approach is that it provides a tempting alternative to the democratic process. Thayer (quoted in Rosenberg, 1991, 12) warned long ago against the "tendency of the common and easy resort" to the courts, particularly to invalidate acts of the democratically
accountable branches would "dwarf the political capacity of the people" (Ibid, 12). More recently, McCann, in studying litigation-prone activists has found that the "legal rights approach to expanding democracy has significantly narrowed their conception of political action itself" (quoted in Rosenberg, 1991, 12). The legal approach, when linked with New Deal liberalism, further institutionalized the protest tradition in black America. Consequently, African Americans, by appealing to the federal government (and particularly the courts) are saying, implicitly, that the solutions to their grievances lie outside their community. Furthermore, the sense that white America has "wronged" black people implies that it is the larger society that needs to change. In choosing the legal approach, the NAACP unwittingly tilled the soil for the "system-blame" mentality of the 1960's, much of which is still present today (O. Patterson, 1997).

By the mid-1930's, DuBois believed that it was humiliating for blacks to continue to try to force themselves into institutions where they were not wanted. DuBois' detractors portrayed him as a bitter old man who had become disillusioned. Still fighting the last war, DuBois' views were branded as "Washingtonism" and the worst sort of "Uncle

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102 DuBois' call in the mid-1930's for black self-segregation evoked memories of Booker T. Washington's program of economic uplift for blacks at the turn of the century. Because Washington did not place the struggle for political and social equality on the same plane as other black activists (like DuBois), he was accused of "selling out" the black race. Washington's famous "Atlanta Exposition" speech
Tomism" (Cruse, 1986; Moses, 1993). The speed with which the NAACP dispensed with DuBois revealed its fidelity to the liberal tradition.

However, at the same time, the NAACP also rejected two components of the American Creed with a long tradition in the African American community - pragmatism and self-determination. DuBois' call for voluntary segregation implied that African Americans could not afford to wait for "the hearts of white men to change" before they developed their own strategy for economic survival. The Great Depression, in DuBois' mind, had made it crushingly apparent that African Americans had no viable strategy of economic survival in America. As the history of African American churches and schools indicated, the black self-help tradition could be traced back to the antebellum period. In summary, it was not necessary to conclude, as the NAACP's leadership did, that racial segregation was inherently harmful.

However, DuBois represented a viewpoint which the NAACP had rejected as heresy: that race does and should matter. Moreover's Hitler's atrocities and liberal social science opinion seemed to vindicate them: the belief that race makes

In 1895 was dubbed the "Atlanta Compromise" by his detractors. Dissatisfaction with Washington's program led DuBois and others to found the Niagara Movement, and eventually the NAACP. Thus, by 1935, a generation of black civil rights leaders had grown up with a derisive view of Booker T. Washington. Consequently, when DuBois himself argued for black self-segregation in the 1930's, he was accused of high treason. In a sense, DuBois was "reaping what he had sown" (Cruse, 1986).
a difference was inherently racist, irrational, ignorant, opposed to American notions of individual equality, and ultimately dangerous. Anyone who thought that race did matter was no better than a Southern racist (Wilkinson, 1979; D'Souza, 1995; Peller, 1997).

Thus, Brown created the very dilemma which DuBois prophesized: the belief among many African Americans that integration, supposedly a strategy for their liberation, was itself inherently racist. Brown assumed that educational equality would be achieved by a legal remedy. It apparently had not occurred to many of the liberal lawyers and social scientists who concluded that racially segregated schools were inherently unequal that this conviction had any racial connotations. Brown, as well as the Coleman report and other studies afterwards, was based on a rational interpretation of the Fourteenth Amendment, and was supported by value-neutral, dispassionate social science, or so it was argued. Thus, by defining the issue in "legal" and "sociological" terms, liberals did not see themselves acting as "racists." White public schools and state universities were superior to black ones on neutral, acultural grounds.

This view was premised, in part, on the mistaken notion that the Constitution "usually provides clear, self-executing commands" (Horwitz, 1979, 603). But the very nature of constitutional provisions and laws is that their meaning is subject to interpretation, debate, and reinterpretation. Most
searches for a clear and unambiguous "intent of the framers" prove to be inconclusive, especially when the focus is on intentionally ambiguous terms such as "due process" or "equal protection under the laws" (Ibid, 603). Moreover, the process of crafting laws and constitutional amendments, because it is inherently a political one, requires compromises and concessions in order to be accomplished; therefore, attempts to discover the "clear intent of the framers" are usually futile. This fallacy encourages litigants to emphasize the parts of the historical record that seem to strengthen their case and minimize or explain away contradictory evidence. For this reason, the NAACP’s lawyers focused on evidence that seemed to imply that the framers envisioned the Fourteenth Amendment would give Congress broad discretion to strike down state laws that treated the ex-slaves as a separate and unequal caste. The South’s attorneys, on the other hand, emphasized those parts of the record that could be construed to mean that Congress could have never intended the Fourteenth Amendment to forbid states from establishing racially segregated schools (including the prejudices of members of the 39th Congress).

Any system of judicial review ultimately involves judges making choices among competing values. Moreover, the choices made by judges are not necessarily "the last word;" rather, their meaning and their validity are interpreted, debated, reinterpreted, or even rejected. The conservative and black
nationalist critiques of desegregation are excellent examples of this process at work. Therefore, it is not surprising that Brown is a cultural icon that sometimes means radically different things to different people. The basic fallacy of the NAACP’s reliance on the courts is that it overlooked the fact that the judicial branch is, in the final analysis, a political institution. The ideological and policy preferences of federal judges can never be "neutral principles of constitutional law" (Weschler, 1959); instead, they are inherently political with political consequences. Also, federal judges are not immune from the political pressures which affect the other branches of government. Therefore, the belief that the courts represent a neutral forum for the redress of grievances is a myth.\textsuperscript{103} It was the Supreme Court’s narrow interpretation of the Fourteenth Amendment in

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\textsuperscript{103}Smith (1996) recounts an incident which illustrates that how this view manifested itself politically. Between 1969 and 1974, Presidents Nixon and Ford introduced several resolutions designed to restrict the power of federal courts to order mandatory busing as a means of achieving school desegregation. Several bills and amendments were passed by the House but were either defeated or significantly watered down by the Senate. All of these measures were vigorously opposed by the NAACP and other traditional civil rights organizations. During the controversy, several members of the Congressional Black Caucus proposed a compromise whereby, in exchange for restrictions on court-imposed busing orders, that Congress would substantially increase funding for urban school districts with high minority populations. However, the NAACP and other traditional civil rights leaders successfully blocked these initiatives, arguing that such remedies should not be pursued in Congress. Rather, blacks should rely on the courts to protect their rights for fear that it would set a precedent that legitimizd the interference with the constitutional rights of African Americans by the so-called "political branches" of government (168-169).}
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The *Slaughterhouse Cases* which paved the road for the doctrine of "separate but equal;" similarly, the same Supreme Court, in *Milliken v. Bradley* made desegregation of Northern metropolitan school districts practically impossible to achieve. The courts, far from being a neutral tribunal, represent temporary political majorities that are subject to change.

Moreover, this perspective did not account for the fact that the social science paradigms which they relied on for their "unbiased" conclusions about black culture and the white South were themselves Eurocentric and culturally biased (Blassingame, 1972; Wilkinson, 1979; Preer, 1989; W. Cross, 1991; Peller, 1997). Even worse, *Brown* was premised on "bad science." William Cross (1991), in a devastating critique, showed that Kenneth Clark committed serious methodological errors.\(^{104}\) More recent scholarship has found little evidence that African Americans have more psychologically damaged personalities than whites; in fact, African Americans often score higher than whites on measures of personal self-esteem.

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\(^{104}\)Three fundamental errors the Clarks (as well as other social scientists made during similar studies) are identified by Cross. First, the subjects in the studies are small children (ranging from ages three to seven), yet conclusions are drawn about the psychological health of African American adults. Second, although only one attitude was measured (racial preference), conclusions are drawn about the personalities of the subject, as if both racial preference and personality development had been measured. Third, anecdotal evidence from the children’s behavior and speech was interpreted as "proof" of "mental health," or more precisely, "psychological damage" (Cross, 1991, 10).

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(Armor, 1995; O. Patterson, 1997). *Brown* argued that racial segregation was wrong partly because it made blacks feel bad about themselves; however, recent studies demonstrating no significant self-esteem gap between black and white Americans undermines one of the basic premises of *Brown*. In addition, a number of scholars have found that black universities serve many beneficial psychosocial roles for their predominately black clientele; indeed, some African Americans exhibited higher academic performance in a majority-black setting (Fleming, 1981; Allen, 1987; 1991; 1992; Harvey and Williams, 1989; Rosenwald and Murty, 1993).

Consequently, though there was no specific language in the *Brown* opinion which required that desegregation be implemented by closing all-black schools and firing black teachers and black administrators, many liberals pressed forward without recognizing how these actions might be interpreted in the African American community. Moreover, even if one assumes that these policies were the "right" ones to pursue at the elementary and secondary level, that did not mean that they necessarily applied to higher education. Yet, the NAACP Legal Defense Fund in the early 1970's seemed determined to implement desegregation in higher education, even if it meant the elimination of black universities. Often, many liberals acted as if either African American culture did not exist at all, or if it did, there were few if any redemptive qualities of black culture that were worth preserving. Consequently, the
fears that many blacks expressed about the implications of eliminating black colleges were not seen as legitimate (Frazier, 1939; Myrdal, 1944; Stamp, 1956; Moynihan, 1965; Cruse, 1986; Cross, 1991; Shujaa, 1996; Peller, 1997). The failure of many liberals to understand or appreciate African American culture was partly a function of their tendency to condemn Southern culture generally as inconsistent with the American Creed and an embarrassment to the nation’s international image (Wilkinson, 1979; Cruse, 1986; Rosenberg, 1991; Moses, 1993; Dudziak, 1995; Peller, 1997). Convinced of their own objectivity, many liberals insisted that their interpretation of Brown was the only correct one and dismissed the concerns voiced by some blacks about the manner in which Brown was being implemented. Thus, liberals unwittingly created the circumstances for the "black backlash" against integration of the late sixties and the seventies.

Furthermore, this view also acted as if schools themselves were acultural institutions and a policy of integrating black children into all-white schools did not raise significant issues of cultural assimilation (Peller, 1997, 206). A number of scholars have demonstrated that there are significant cultural differences between African Americans and whites which must be taken into account in a classroom setting (Smitherman, 1977; Kochman, 1981; Heath, 1983; Shade, 1981; 1982; 1997; Delpit, 1995). But the orthodox view of liberal social scientists in the 1950’s (which still has many
adherents) is that, even if cultural differences do exist between whites and other minorities, it is illegitimate to take them into account. All students, after all, should be held to the same standard. This tendency is further reinforced by the increasing confidence in the efficacy of "universal methods" such as standardized testing\textsuperscript{105} to measure academic achievement and "hold schools accountable for results" (Chubb and Moe, 1990; Fiske, 1991; Gardner, 1993; Murray and Herrstein, 1994; D’ Souza, 1995; Orfield, 1996).

Fordice is the product of the "black backlash" to integration, as defined by the NAACP Legal Defense Fund in the seventies. The LDF in Adams seemed to assume that the Green standard, announced in elementary and secondary education, should be applied to higher education. In fact, the LDF’s lawyers pursued the extension of the Green mandate to higher

\textsuperscript{105}Since the national scare generated by the Education Department’s "A Nation at Risk" report on the status of public education, the use of standardized testing as a means of measuring academic progress has intensified. The premise behind testing is that "academic progress" of all students, regardless of race, can be readily quantified in ways which are objective and nondiscriminatory. Those subjects which lend themselves readily to this type of assessment, such as science and mathematics, are seen as accurate barometers of what students actually know; with respect to other subjects, "value is assigned to those aspects which can be efficiently assessed (grammar rather than "voice" in writing; facts rather than interpretation in history)" (Gardner, 1993, 165). What is usually ignored, however, is the rather arbitrary nature of what is considered "useful knowledge" and whether the content of these assessments (as well as the skills these instruments claim to measure) tell us anything meaningful about what children know anyway (Ibid, 161-183).
education before its effects on elementary and secondary education could be assessed and without consulting black educators in the planning of the suit (Preer, 1982, 199). The LDF seemed unable to adequately distinguish between legal issues and questions of educational substance. The NAFEO countered that the LDF had not considered whether the context of higher education warranted different solutions than the remedies that had been tried in elementary and secondary education (especially as they related to historically black colleges). The Black Power ethos, which has persisted long after the movement itself has fallen out of vogue, had encouraged many blacks to believe that the schools were being desegregated on white terms (Wilkinson, 1979; Dempsey and Noblit, 1996). Many African Americans who were not satisfied with the way desegregation was implemented in the public schools were determined that historically black universities not undergo the same experience (Bell, 1979; Preer, 1982).

Hence, an ironic confluence of forces has coalesced to preserve historically black universities. Many conservatives viewed HEW's attempts to enforce Title VI of the Civil Rights Act of 1964 during the 1970's as an example of "unwarranted federal intervention in the affairs of the states." Thus, they have tended to endorse a less agressive approach to desegregation enforcement from the federal level. Therefore, if significant levels of segregation persist in the universities, so be it. The mere fact that universities are predo-
minately of one race does not constitute *prima facie* evidence of a constitutional violation, the *Fordice* court declared. The issue is whether the state has fettered the choices of individuals in such a manner that produces racial segregation (505 U.S. 717; *United States v. Fordice*, 505 U.S. 717, 745 J. Thomas, concurring; *United States v. Fordice*, 505 U.S. 717, 749 J. Scalia, dissenting). Hence, conservative notions of individual freedom end up supporting the continuation of historically black universities. This is the identical argument that Isiah Madison, convenor of the Black Mississippians' Council on Higher Education made pursuant to the filing of the *Ayers* lawsuit, though from a completely different political persuasion. *Brown*, Madison argued, freed African Americans to choose whatever institutions of higher education they wished. If that meant historically black universities, then so be it.

The Court’s decision in *Fordice* is a clear reaffirmation of *Brown*. In fact, the legitimacy of *Brown* was never in dispute by any of the parties. What *is* in dispute is what *Brown* means in higher education - and specifically, how much power do federal judges (as representatives of the state) have and what remedies satisfy a state’s constitutional duty to eliminate the vestiges of segregation in higher education. However, *Fordice* applies the *Green* standard to higher education without specifying whether remedies developed at the elementary and secondary level fit the postsecondary context. Also,
the Supreme Court, during the same term, continued the trend of restricting the power of federal courts in public school desegregation cases (Freeman v. Pitts, 503 U.S. 467 [1992]). Thus, the Court failed to consider colleges and universities on their own terms, and how (or if) Brown even applies to the question of desegregating state systems of higher education at all.

Furthermore, the Ayers plaintiffs, by insisting on the enhancement of black universities, are arguing for the very type of "big government" solution that conservatives adhor. Justices Thomas and Scalia, the two most conservative members of the Court, express sympathy for the plight of black universities. However, they argue that there is no authority under the Constitution to require the state of Mississippi to enhance Jackson State, Alcorn, and Mississippi Valley. True to their conservative philosophy, education is primarily a state matter. Thus, if a state chose to remedy past funding inequities at black colleges, it would have that right. But the federal courts do not have the power to order states to do so. Considering the fairly conservative mood of the courts, Fordice implies that there might be considerable state-by-state variation on this question, and a precedent in one state may not necessarily be binding on another. In light of the "track record" of Southern states with respect for providing for black higher education, it remains to be seen
whether Fordice's implicit trust of the states can resolve the thorny issues that continue to characterize desegregation in higher education.

The American Creed as a Double Edged Sword

This dissertation has argued throughout that African Americans and whites share the same American Creed but for different reasons. For the white majority, the Creed captures the essential meaning of the American Revolution - the dignity of the individual human being, the fundamental equality of all men, certain unalienable rights to freedom, justice, and, and, and equal opportunity. These values represent the highest law of the land. The fact that the Declaration of Independence was written and signed by slaveholders - especially in view of America's image in the European mind as the "hope for the world" - constituted the greatest moral problem of American democracy. However, African Americans have endorsed this same creed, and have coopted its values to struggle for political, social, and economic equality in the United States. Thus, in one of history's greatest ironies, the very population with the greatest interest in debunking American democracy has been among the most ardent apostles of America's version of Lockianism.

It has also been argued that American faith in the central importance in education represents one of the most powerful deductions from the Lockian settlement. Education in America is deemed essential to foster the values of citizen-
ship consistent with democratic self-government and to equip students to successful compete in a market economy. For African Americans, education takes on an additional significance: historically it had been denied them. Education, in the black community, has been intimately connected with freedom. The legal struggle for desegregation represents a chapter in that struggle.

Brown v. Board of Education embodies the American Creed and the sense that its principles had not been extended to African Americans on the same basis. Four decades later, Brown is now considered one of the heroic moments in American history. Its principles are endorsed across the political spectrum. However, as our study of desegregation in higher education has shown, Brown is a highly contested political icon which means different things to different people, depending on their political persuasion. The attempt to apply Brown to higher education unavoidably raising the question of the constitutional status of historically black universities. The resolution of this issue is intertwined with a deeper debate about the role of government and whether the ideal of "color-blindness" can be reconciled with policies which explicitly take race into account.

It is at this point where the historical experiences of whites and blacks radically diverge. The American Creed is fundamentally a theory of a limited state; Locke in America has been about limiting the state rather than defining its
legitimate role. African Americans associate their greatest gains with a more interventionist state; however, because they adhere to the same liberal tradition, they tend to neglect to philosophically defend the state’s role. Hence, as the period of legal segregation recedes further and further into the past, policies premised on past discrimination against African Americans have been more difficult to justify politically.

This is one of the fundamental problems with Brown. The Court, in a sense, could almost be forgiven for assuming that everyone knew what it meant. After all, segregation was still a very pervasive reality in the 1950’s. The supporters of Brown could easily say: of course, separate schools are bad under all circumstances. Therefore, Brown is inherently logical. However, the problem of defining the appropriate remedies to implement Brown, particularly in higher education, remains. Brown implied that the problem of racism could be solved without any fundamental changes in the American view of the state’s legitimate role. Consequently, the struggle to remedy past racial discrimination has occurred in a legal context of individualism which has no conception of "group rights" and is, in the long term, biased against claims rooted in history. This predisposition of the American Creed raises the question of whether Bellah is right: despite considerable "lip service" to toleration for individual and cultural differences, the American Creed does not provide its
citizens with adequate analytical tools to understand those who are historically, economically, and socially different (1985, 206).

Thus, though African Americans share the same belief in the Creed as white Americans, it frequently leads to quite different policy preferences and ideological positions. But the fact that whites and blacks adhere to the liberal tradition does not necessarily mean that a solution to the problem is easy. This point is illustrated by an analogy from Hartz’ comparison of the differences between the American and European perspective on democratic revolution:

This is not a problem of antitheses such, for example, as we find in Locke and Filmer. It is a problem of different perspectives on the same ideal [my emphasis]. But we must not for that reason assume that it is any less difficult of solution; it may in the end be more difficult since antitheses define each other and hence can understand one another, but different perspectives on a single value may, ironically enough, lack this common ground of definition [my emphasis] (1955, 66).

In other words, the fact that white and African Americans share the liberal tradition may be precisely the problem. By the 1980’s, nearly all whites agreed that blacks "should be able to attend the same schools as whites, have the same chances for jobs as whites, live where they choose, and otherwise have the same freedom of movement and personal choice" (Hochschild, 1995, 56). This represents a significant change in public opinion from the 1950’s, when less than a majority of white Americans believed these same things (Hochschild, 1995; D’Souza, 1995; S. Thernstrom and A. Thernstrom,
1997). However, as the period of legal segregation recedes further into the past, white Americans see racial discrimination steadily decreasing in America; consequently, whites sometimes ask "what's all the fuss about" (Hochschild, 1995, 61).

Black Americans, on the other hand, see considerably more racial inequality (Hochschild, 1995, 60-61). Blacks have tended to favor policies that proactively intervene in the marketplace to help them "catch up" with whites in the Lockian race, insisting that policies outlawing racially discriminatory practices are insufficient to remedy the cumulative effects of slavery and segregation. In doing so, the majority of black political leaders has "bucked the tide" of a conservative political climate which emphasizes traditional American notions of limited government intervention in the economy and society. However, by largely failing to philosophically defend the state, liberals, in effect, assume that, in light of America's racial past, that their policy preferences are self-evident. Therefore, when conservative disagree with them, liberals ("still fighting the last war") find it easy to label their political opponents as "racists" or "intolerant." However, many conservatives also believe that African Americans should be treated as the equals of whites; they disagree with liberals about the best way to achieve a racially just society. Conservatives charge liberals with deserting the American Creed by embracing policies
that favor "special groups," require "proportional representation," and "undermine merit." Thus, all sides lay claim to the American Creed, but each group insists that its interpretation - and its alone - is the only morally correct one.

Thus, the American Creed is a mixed blessing for African Americans: on one hand, it has been a very useful ideological underpinning for black protest. At the same time, it avails their political opponents powerful ammunition to delegitimize black political movements. Consequently, the same arguments that the NAACP relied on to strike down state laws requiring segregation of the public schools have been appropriated by the state of Mississippi to argue that the Constitution does not require it to make massive investments at its black universities to compensate them for its past conduct during the Jim Crow era.

Another development which raises questions about the efficacy of the American Creed to deal with race is the secularization of American culture (Hunter, 1990; McCullough, 1991; Moses, 1993; Whitehead, 1994). Tocqueville (1988) observed that religion acted as an important bulwark for American democracy (287-301). Indeed, America's historic sense of Divine Providence has provided the moral ammunition to challenge the nation's treatment of African Americans (Davis, 1966; King, 1986; Moses, 1993; Walker, 1992). However, American individualism encourages each citizen to develop his own morality; the result, McCullough concludes,
is that ethical questions in American politics become exceedingly problematic in an environment with no shared moral consensus. This breakdown of moral consensus, McCullough argues, along with a loss of a sense of community, erodes the basis for both rational political discourse and collective action on the part of citizens. Moreover, atomistic individualism, the presupposition of American political life, undermines the society's capacity to critique itself. This is true, McCullough argues, whether the specific social criticisms originate on the political left or right:

Liberals who undertake to go beyond description to prescription are at a loss for conceptual categories adequate to the task, for their dependence on the unstable combination of the assumptions of economic individualism and welfare statism give them no grounds for critical transcendence of the society as it exists. Indeed, the problem is more fundamental: They have no grounds for value judgements at all. By assuming a separation between description ("fact") and prescription ("value"), they undercut any basis for anything they would say in prescription.

Conservatives can denounce society from the perspective of the ideal of moral community, but without breaking with classical economic liberalism (the core of modern conservatism), they are unable to offer much more than a utopian appeal to adopt a pure form of laissez-faire capitalism. Radicals attack capitalism with moral fervor; their critique of institutional structures and processes is often penetrating and difficult to refute. In "unmasking" morality, however, they cannot account for their own moral passion or give more than an ideological (class-interest bound) explanation of society, which must include the critics themselves (42-43).

The implications of McCullough's analysis on black politics in general and the politics of desegregation in general are quite serious. First of all, a culture of
individualism lacks the conceptual tools to discern the moral legitimacy of competing claims on the political system; in the absence of such criteria, only the most powerful and influential prevail in the political game. African Americans, who tend to have less political influence, have relied heavily on morally-based political appeals; indeed, underneath the legal and social scientific arguments put forth in desegregation lawsuits are moral appeals to the values of the American Creed. However, a climate that either lacks the interpretive skills to process such appeals or assigns them to the "trash bin of interest group liberalism" severely diminishes the effectiveness of moral suasion as a political strategy.

Yet, the "saving grace" of the American Creed may be its pragmatic orientation. The New Deal, as was argued earlier, illustrates the unique ability of the American Creed to "reinvent itself" to deal with a national emergency. The Creed's fundamental pragmatism means that it inheres within it a dynamism that enables its values to be appropriated to meet new exigencies. And the changes in the global economy may provide those very circumstances for a reinvention of the American Creed.

The Information Age, with the revolutionary changes it is bringing about in the workplace, requires a more educated and highly-skilled population than at any time in history (Wilson, 1978; Johnston and Packer, 1987; Reich, 1991; Fiske,
1991; Gill, 1992; Obiakor and Barker, 1993; O. Patterson, 1997). At the same time, income inequality between the rich and poor of all races has been growing since the 1970's (Harrington, 1984; Phillips, 1990; Reich, 1991; Edsall and Edsall, 1991; Schwartz and Volgy, 1992). In addition, African Americans, Latinos, and immigrant groups represent the fastest growing sectors of the labor force, but are more likely to be at the bottom of the socioeconomic ladder. The new information economy represents a historic opportunity to redefine the role of the federal government in a twenty-first century capitalist economy. As part of this larger debate, the supporters of historically black universities could argue for the existence and strengthening of their institutions as a valuable source of integrating African Americans and others into the mainstream of the global economy. The future of black colleges could be linked to the exponential rise in the importance of education in the new economy. Chief Justice Warren's observation in Brown that a child denied the right to an education cannot "reasonably be expected to succeed in life" (347 U.S. 483, 494) is more true now than when it was written in 1954. For this reason, the view that Brown was, or is, inherently flawed (Johnson, 1993) is an unnecessarily harsh judgment. Brown, because it embodies the American Creed, can be reinterpreted to fit realities not contemplated by the Court or the NAACP's lawyers and social scientists.
However, though the pragmatism of the Creed constantly keeps the door open for an expansion and redefinition of the state’s role, it is not inevitable that it will do so. Indeed, there are other developments which suggest just the opposite. The collapse of the Soviet Union has been occasioned with a chorus of celebration - a vindication of America’s Cold War strategy and even the declaration of "the end of history." The spread of democratic regimes throughout Latin America, Eastern Europe, and in some parts of Asia and Africa only confirm this confidence. Furthermore, the fact that America’s economy in the 1990’s has significantly outperformed those of Western Europe and Japan only strengthen America’s self-confidence: it is hard not to notice that America’s economic competitors have significantly greater social entitlement programs, which make it more difficult for them to compete with the United States in the new environment. The recent economic downturns in Asia only reinforce the age-old American tendency of believing that the world’s problems would be solved if other countries would be more like America. The United States’ position vis-a-vis its major economic rivals only strengthens the hand of those who believe in the further devolution of power from the federal government to the states - particularly as it relates to education. Fordice is an example of the faith in devolution of power to the states. Furthermore, while macroeconomic change affects all Americans regardless of race (and creates
the potential for multi-racial political coalitions), there still remain powerful incentives to emphasize the "politics of racial identity" and to use race as a wedge-issue in American politics,¹⁰⁶ even if some of these tactics corrode political discourse (Edsall and Edsall, 1991; D'Souza, 1995; Curry, 1996; O. Patterson, 1997; S. Thernstrom and A. Thernstrom, 1997).

Thus, as Louis Hartz observes, a "liberal society analysis" of American politics, in contrast to the Progressive scholarship that dominated the first half of the twentieth century, cannot guarantee a "happy ending" to the American story:

The Progressives, for one thing, always had an American hero available to match any American villain they found, ¹⁰⁶ The fact that race is intimately intertwined with the philo-sophical dispute between conservatives and liberals about the role of government sometimes give rise to perverse political incentives on both sides. Liberals sometimes feel compelled to deny the fact that considerable racial progress has occurred since the 1950's and 1960's; listening to the rhetoric of many liberal intellectuals, one would sometimes think almost no progress has been made in American race relations at all (D'Souza, 1995; S. Thernstrom and A. Thernstrom, 1997; O. Patterson, 1997). Liberals emphasize what they see as the continued effects of racial inequality as the rationale for more government programs. Conservative intellectuals, on the other hand, emphasize race because it provides an effective way of demonstrating the failure of Great Society programs of which they are ideologically opposed to (Murray, 1984; Steele, 1986; Edsall and Edsall, 1991; Murray and Herrstein, 1994; D'Souza, 1995; S. Thernstrom and A. Thernstrom, 1997; O. Patterson, 1997). However, some versions of the conservative critique of New Deal liberalism overemphasizethe failure of government programs and come close to outright denying that government intervention on issues related to race has had any positive effect at all (Harrington, 1984; Jones, 1987).
a Jefferson for every Hamilton. Which meant in their
demonology the nation never really sinned: only its
inferior self did, its particular will, to use the lan-
guage of Rousseau. The analyst of American liberalism
is not in so happy a spot, for concentrating on unities
as well as conflict, he is likely to discover on occa-
sion a national villain, the tyrannical force of Loc-
bian sentiment, whose treatment requires a new experi-
ence for the whole country rather than the insurrection
of part of it. . . . So that the liberal society ana-
lyst is destined in two ways to be a less pleasing
scholar than the Progressive: he finds national weak-
nesses and can offer no assurances on the basis of
the past that they will be remedied (1955, 31-32).

The American Creed provides a powerful source of na-
tional unity for black and white Americans. However, fundamental
differences rooted in history create an ideological gulf as
to what its practical implications are for the role of the
state in American society. There is a tendency to appeal to
the past to answer questions about the present — either
because it represents some ideal state of equality or because
the shortcomings of the past have policy implications in the
present. But the key test for the American Creed’s ability to
deal with race may be whether or not it enables blacks and
whites to transcend the limitations of their national experi-
ence. As Hartz concludes, "... instead of recapturing our
past, we have got to transcend it. As for a child who is lea-
ving adolescence, there is no going home again for America"
(1955, 32). Whether twenty-first century America is "up for
the task" remains, of course, an open question.
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Candidate: Albert L. Samuels

Major Field: Political Science


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Dean of the Graduate School

EXAMINING COMMITTEE:

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Date of Examination: June 12, 1998