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Bid Whist, Tonk, and *United States v. Fordice*: Why Integrationism Fails African-Americans Again

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The seminal race relations issue in U.S. society today is how to promote successful integration while respecting the differences that still separate the races. The author examines this problem through the lens of United States v. Fordice. In Fordice, the Supreme Court found discrimination in Mississippi's post-secondary educational system. While the Court required the integration of the state's predominantly white colleges, it refused to mandate equal funding for publicly supported historically black colleges and universities. The author argues that Fordice was wrong because Brown v. Board of Education was wrong: both cases failed to distinguish between the final goal of integration in an ideal society and the process of integration. The process by which the final goal is achieved requires voluntary rather than forced integration. It requires protection of the unique African-American culture or nomos, particularly in the context of education. Being able to choose whether or when to integrate depends upon the freedom to choose a predominantly or historically black college or a predominantly white college. The ideal integrated society 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 predominantly black colleges.

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INTRODUCTION

The seminal race relations issue facing our society today is how to promote successful integration while respecting the differences that still separate the races. In examining this issue, this Article takes *United States v. Fordice*,¹ as its starting point. In *Fordice*, the Supreme Court found *de facto* discrimination in Mississippi's post-secondary educational system, but rejected an effort by African-American plaintiffs to obtain funding for publicly supported historically black colleges and universities in Mississippi equal to that afforded Mississippi's predominantly white colleges.² As a result of *Fordice*, it appears that these historically black colleges will be merged into Mississippi's white colleges, all under the guise of "integration." Indeed, *Fordice* is the logical and compelling end to the line of cases that began with *Brown v. Board of Education*³ and its explicit adoption of integrationism.

This Article argues that *Fordice* was erroneously decided for a variety of reasons having nothing to do with the body of traditional, incremental constitutional scholarship that typically addresses such questions as whether the Supreme Court followed or departed from precedent in deciding a particular case. Similarly, this analysis of *Fordice* is not premised on some meta-normative theory as to whether the Court should take an originalist or nonoriginalist position on racial discrimination and equal protection issues.⁴ Instead, the Article argues that the Supreme Court's decision in *Fordice* is wrong as a matter of social policy because it is built upon a premise of integrationism, first articulated in *Brown*, that has failed our society. Simply put, *Fordice* is wrong because *Brown* was a mistake.

As in *Brown*, the integrationism articulated by the *Fordice* Court is seriously flawed because it conflates the process of integration with the ideal of integration.⁵ Both the 1954 and the 1992 Courts failed to recognize and appreciate the social realities that preclude the attainment of

1. 112 S. Ct. 2727 (1992).

2. In using the lower case "black" to refer to historically black colleges I am in no way implying that the lower case term indicates a lower or subordinate status for historically black colleges when compared to historically white colleges. See, e.g., Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1332 n.2 (1988) (noting that the "naming of Americans of African descent has had political overtones throughout history").

3. 347 U.S. 483 (1954).

4. See, e.g., John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385 (1992) (interpreting Section 1 of the 14th Amendment on the basis of its drafting history and historical context).

5. In the context of education, the process/ideal dichotomy of integration has even more significance. The integration of schools is part of the process by which the ideal society is ultimately achieved. Integration itself serves a dual role. First, it is the method or mechanism of implementation by which the ideal racially harmonized society is achieved. Its secondary, albeit no less important, role is that of metric, measuring whether the ideal society has been achieved. These two roles of integration are often conflated.

meaningful integration through simple judicial or legislative fiat. Only by acknowledging and accommodating the reality of the unique and separate African-American culture or *nomos* will the *process* of integration ever move forward to accomplish the *ideal* state of integration sought by *Brown* and its progeny.

To support this conclusion, Part I briefly examines the *Fordice* decision, with special emphasis placed on the Court's rejection of the plaintiffs' equal funding claim and the remedy of forced integration likely to be fashioned by the lower court on remand. Part I then explains that the Court's willingness to countenance such a remedy stems from its assumption that the type of integration mandated by *Brown v. Board of Education* is in the best interests of the African-American community. History has revealed otherwise.

Part I explains that the *Brown* approach to integration has led to a deepening of racial divisions because it fails to acknowledge the existence of a unique African-American community with its own *nomos* and values.⁶ The Court's continued ignorance of this separate *nomos* or culture illustrates its continued conflation of the ideal of integration with the process needed to bring society to that point. The ideal of integration can only be achieved by respecting this unique culture through the maintenance and operation of *separate* institutions that allow African-Americans to join together "in collective associations which have . . . educational and social dimensions."⁷

Otherwise, as is currently the case, the courts are embracing a social reality that does not exist: a society in which race is viewed as an irrelevant characteristic. From this base assumption, courts then reach the similarly wrongheaded conclusion that race is not a relevant or permissible characteristic in the implementation of an educational system. Part I concludes with an examination of the result of the Court's continued ignorance of the unique African-American culture in formulating inte-

6. One definition of *nomos* has been provided by Professor Weinreb:

Greek philosophy made a crucial distinction between *physis* . . . and *nomos*. The usual translation of *physis*, from which we get the word 'physics' and its cognates, is 'nature'; and the translation of *nomos* is 'convention.' 'Physis,' however, had normative significance that ordinarily our references to nature specifically exclude. And although 'nomos' was dependent in some way on human will, it was not whatever was posited, merely as such. *Nomos* referred to the ways of the community, as established but also, more significantly, as valid. Nevertheless it was not unalterable, and it was the *nomos* of a particular community.

Lloyd L. Weinreb, *What Are Civil Rights?*, SOC. PHIL. & POL'Y, Spring 1991, at 1, 2. The concept of *nomos* is elaborated *infra* notes 72-78 and accompanying text.

7. Richard A. Wasserstrom, *Racism, Sexism, and Preferential Treatment: An Approach to the Topics*, 24 UCLA L. REV. 581, 605, 609 (1977). Moreover, pursuant to my conception of the ideal society, racial differences are either viewed positively under the philosophy of diversity or simply allowed pursuant to the philosophy of tolerance. See *infra* notes 193-204. As a result, in certain institutions like post-secondary schools, racial differences are not only maintained, they are exploited and reinforced.

gration policy—coercive assimilation, a process which may deepen the racial divisions already present.

Given the need to protect African-American culture if viable integration is to be achieved, Part II next turns to the role that education plays in fostering the *nomos* of a community, paying particular attention to the proper role that recognition of race and, concomitantly, culture should play in the design and implementation of a post-secondary educational system. Discussion focuses on the transitional role of education, demonstrating that secondary and post-secondary education act as transmitters of cultural norms and as bridges between childhood and adulthood. For this reason, the roles that secondary and post-secondary educational institutions play for African-Americans are critical to the preservation of the African-American culture and somewhat different from the roles these institutions play for other racial communities. These unique roles justify the continued viability and use of historically or predominantly black colleges.

Accordingly, Part II then discusses the societal benefits that accrue through a process of integration that allows African-Americans to *freely* choose whether and when to integrate into mainstream society and culture. The availability of this choice is necessarily dependent upon the freedom of African-Americans to attend either a predominantly or historically black college or a predominantly white college.

To illustrate the importance of this freedom of choice, Part II elaborates upon the *nomos* or shared values of the African-American community by examining the popular card games of Tonk and Bid Whist. These two card games represent a microcosm of the African-American community. The metaphor of Tonk and Bid Whist is used to compare the choices that were available to African-American students before *Fordice* with the choices now available to those same students after *Fordice*. The metaphor demonstrates that the world is richer and improved for both African-Americans and whites when society allows African-Americans to choose when they wish to leave the world of Tonk and Bid Whist for the world of Poker and Bridge.⁸

Part II concludes with a rebuttal to those who would portray the maintenance of historically or predominantly black institutions as contrary to the fundamental tenets of liberalism. Once the historically subordinate position of African-Americans in this society is recognized, maintenance of separate minority institutions may be more accurately

8. The metaphor should not be read to imply that Poker and Bridge are better or worse for African-Americans than Tonk and Bid Whist. However, implicit in my analysis is the recognition that because of the way our society is currently structured, the norm of assimilation rather than integration is the vehicle by which African-Americans are currently incorporated into American society. If the "ideal" version of integration were truly taking place in American society, perhaps the most popular card games in America would be Tonk and Bid Whist.

characterized as an equalization action, rather than the grant of a special privilege. Thus, the right to attend predominantly or historically black colleges is in accord with liberalism, which seeks to guarantee that individuals are not penalized because of their natural or social endowment.

The third and last part of this Article demonstrates that *Fordice* will generate more harm than good. Asserting that one's racial identity is constitutive of one's personal identity, Part III cites the historical legacy of racism to support the use of predominantly black colleges. It contends that the "ideal society" can be achieved only through a transitive stage in which racial differences are truly respected and treated in a way similar to the way we currently treat religious differences. While the contention that separate black colleges should be supported and maintained may at first glance seem inconsistent with traditional notions of integration, Part III argues that it is only by providing choice—even if that choice legitimates predominantly or historically black colleges—that African-Americans will be afforded equal opportunity in our educational system.

Part III next anticipates the claims made by those supporting the decision in *Fordice*. The substance of these claims is that the maintenance of predominantly or historically black colleges is racially discriminatory, philosophically and politically indefensible, and ultimately justificatory of the maintenance of "all-white" educational institutions. Part III rejects these claims by arguing that the continued viability of predominantly or historically black colleges, and the benefits provided thereby, do not legitimate the maintenance of all or predominantly white educational institutions in which African-Americans suffer discrimination or outright exclusion.

This Article concludes by contending that given this society's past and present, the only appropriate result in *Fordice* should have been the maintenance, at an improved funding level, of predominantly or historically black colleges, while at the same time preserving equal opportunity for African-Americans to attend predominantly white educational institutions. It is only by providing this choice that African-American students will be afforded equal opportunity in our post-secondary educational institutions. By permitting the elimination of historically black colleges, the Court in *Fordice* prevented African-American students from selecting *when* integration should occur. It is only when those students are sufficiently mature, confident, and equipped to enter the predominantly white society that meaningful integration will occur.

"Forced" integration of the type mandated by *Fordice*, if not doomed to failure, will certainly be less successful than the "voluntary" integration that occurs when individuals are given the choice whether and when to integrate. In the end, *Fordice* severely retards progress toward integration as envisioned in our ideal society.

I

SITUATING *FORDICE* IN A POST-*BROWN* REALITY

[M]y understanding of a segregated school system, or a segregated community, or a segregated school, is a school that's controlled by people other than those that go there.

....

On the other hand, if we can get an all-black school, that we can control, staff it ourselves with the type of teachers that have our good at heart, with the type of books that have in them many of the missing ingredients that have produced this inferiority complex in our people, then we don't feel that an all-black school is necessarily a segregated school. It's only segregated when its controlled by someone from outside. I hope I'm making my point. I just can't see where if white people can go to a white classroom and there are no Negroes present and it doesn't affect the academic diet they're receiving, then I don't see where an all-black classroom can be affected by the absence of white children. . . .

So, what the integrationists, in my opinion, are saying, when they say that whites and blacks must go to school together, is that the whites are so much superior that just their presence in a black classroom balances it out. I can't go along with that.⁹

—Malcolm X, 1964

A. United State v. Fordice: *A Paradoxical Critique*

Fordice is an unremarkable expansion of school desegregation law and, in conjunction with *Freeman v. Pitts*,¹⁰ marks the end of an era in constitutional law.¹¹ In *Fordice*, an eight to one opinion, the Court addressed an issue that was first raised in a 1975 lawsuit. Plaintiffs challenged Mississippi's system of higher education. The racial makeup of the student bodies of five of its public institutions of higher learning (University of Mississippi, Mississippi State, Southern Mississippi, Delta State, and Mississippi University for Women) were and are almost exclusively white; three other schools (Jackson State, Alcorn State, and Mississippi Valley) were and are almost exclusively African-American. In particular, plaintiffs alleged that Mississippi maintained a racially segregated system of post-secondary education in violation of the Fifth, Ninth, Thirteenth, and Fourteenth Amendments, 42 U.S.C. §§ 1981 and

9. MALCOLM X, BY ANY MEANS NECESSARY: SPEECHES, INTERVIEWS, AND A LETTER 16-17 (George Breitman ed., 1970).

10. 112 S. Ct. 1430 (1992) (holding that the district court has authority to relinquish supervision and control over a school district in incremental stages before full compliance with desegregation order has been achieved).

11. See Kevin Brown, *Has the Supreme Court Allowed the Cure for De Jure Segregation to Replicate the Disease?*, 78 CORNELL L. REV. 1, 4 (1992).

1983, and title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d.¹² The United States intervened and filed a complaint alleging that State officials violated the Equal Protection Clause of the Fourteenth Amendment and title VI by failing to dismantle Mississippi's dual system of higher education.¹³

The Court held that many of Mississippi's educational policies and practices were "racially neutral" on their face, but led to the maintenance of segregated institutions of higher education in violation of the Equal Protection Clause. In particular, the Court focused on the State's admission policy that required higher American College Testing Program (ACT) scores at the five white institutions than at the predominantly black ones. This policy had the segregative effect of channeling African-American students to the predominantly black colleges. The higher ACT standard applied to all white institutions and the lower ACT standard to all black institutions, irrespective of the schools' "programmatic missions."¹⁴

The Court traced the differential admissions to the *de jure* system and held that it was originally adopted for a discriminatory purpose.¹⁵ In rejecting the State's claim that the racially neutral character of the differential ACT admission policy immunized it from attack under the Equal Protection Clause, the Court noted that the differential standard was not related to any sufficiently established educational purpose.

In the next to last paragraph of the opinion, the Court finally addressed the private plaintiffs' request that the State rectify its violation of the Equal Protection Clause by funding Mississippi's predominantly or historically black colleges at the same level as the state's white colleges:

If we understand private petitioners to press us to order the upgrading of Jackson State, Alcorn State, and Mississippi Valley *solely* so that they may be publicly financed, exclusively black enclaves by private choice, we reject that request. The State provides these facilities for *all* its citizens and it has not met its burden under *Brown* to take affirmative steps to dismantle its prior *de jure* system when it perpetuates a separate, but "more equal" one. Whether such an increase in funding is necessary to achieve a full dismantlement under the standards we have outlined, however, is

12. *United States v. Fordice*, 112 S. Ct. 2727, 2733 (1992).

13. *Id.*

14. *Id.* at 2739-40. In 1981, the State classified the programmatic missions of Mississippi's public universities as follows: the University of Mississippi, Mississippi State, and Southern Mississippi were classified as "comprehensive" universities; Mississippi Valley State, Delta State, Alcorn State, and Mississippi University for Women were classified as "regional" universities; and Jackson State was classified as an "urban" university. *Id.* at 2742.

15. *Id.* at 2738-39.

a different question, and one that must be addressed on remand.¹⁶

In fairness, one can argue that the Court left open the issue of equal funding for predominantly or historically black colleges, holding only that Mississippi's higher education system was separate and unequal. Indeed, Justice Thomas, in his concurring opinion, noted that the Court's opinion did not "foreclose the possibility that there exists 'sound educational justification' for maintaining historically black colleges *as such*.'" ¹⁷

However, the Court's unwillingness to define an appropriate remedy has clearly left the door open on remand for a remedy that will result in the closure of Mississippi's predominantly black colleges, a solution "which for blacks seems to be turning victory into defeat."¹⁸ Indeed, such a result seems virtually preordained in light of shrinking state coffers, a problem which has already led other states to consider consolidating predominantly white and predominantly black colleges.¹⁹ As of this writing, the plan proposed by the district court is to shut down Mississippi Valley State University and merge Alcorn State, which at 122 years is the nation's oldest black land-grant college, with predominantly white Mississippi State University. Jackson State, the lone remaining black university, would be "enhanced and improved."²⁰

Those supporting the closure of historically black colleges or the proposed merger with white schools believe forced integration will eradicate the separate school systems that are a product of Mississippi's state-enforced segregation.²¹ On the surface, this claim is quite appealing. How could anyone who believes in racial equality and equal opportunity support the maintenance of separate schools for whites and blacks, even if both races received "equal" opportunities and a comparable education? Were the Supreme Court to so hold, its opinion would be met with horror and, in all likelihood, federal legislation designed to overrule that opinion.²²

It seems counterintuitive to criticize a decision in which an instance

16. *Id.* at 2743.

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

18. Mary Jordan, *In Mississippi, an Integration Uproar*, WASH. POST, Nov. 17, 1992, at A1.

19. The latest state to propose merging predominantly or historically black colleges with white colleges is Louisiana. See, e.g., Sandra Sanchez & Gary Fields, *Black, White La. Colleges Must Merge*, USA TODAY, Dec. 24, 1992, at 1A (discussing federal district court order that predominantly white Louisiana State become the "focal point of a system encompassing traditionally black Grambling State and Southern University").

20. Jordan, *supra* note 18, at A1.

21. *Id.* at A14.

22. For example, the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991), was conceived and passed primarily as a means of effectively overruling restrictive civil rights rulings handed down by the Rehnquist Court. See, e.g., Stephen A. Plass, *Bedrock Principles, Elusive Construction, and the Future of Equal Employment Laws*, 21 HOFSTRA L. REV. 313, 352 (1992); Christopher E. Smith, *Justice Antonin Scalia and Criminal Justice Cases*, 81 KY. L.J. 187, 187 n.1 (1992-93).

of institutionalized segregation is found to be violative of the Equal Protection Clause, and integration is prescribed in order to provide "better" educational opportunities for African-Americans. Twenty to thirty years ago this Article would not have been written. The views presented herein would have been so far outside the mainstream that, frankly, they would have been unthinkable by an African-American scholar employed at a prestigious law school. Quite the contrary, the views expressed herein might have been more easily attributed to an avowed racist.

What has caused this radical shift in thought and perception? Quite simply, it is the recognition that integrationism has failed to help African-Americans to achieve progress in this society. Put another way, it is the recognition that the decision in *Brown v. Board of Education* was a mistake.²³

B. Paradox Unraveled

Almost forty years ago, the Supreme Court declared segregation unconstitutional in *Brown v. Board of Education*.²⁴ The decision was in response to the deplorable conditions in which African-Americans were educated and forced to live—conditions which were the result of legally sanctioned segregation.²⁵ However, there is overwhelming statistical and sociological evidence that in the years since *Brown* virtually no progress has been made in truly integrating our society.²⁶ Indeed, contemporary American society may be more segregated, more separate in its racial

23. See, e.g., Drew S. Days, III, *Brown Blues: Rethinking the Integrative Ideal*, 34 WM. & MARY L. REV. 53 (1992) (suggesting that growing numbers of African-Americans are turning away from the integrative ideal).

24. 347 U.S. 483 (1954).

25. In *Plessy v. Ferguson*, 163 U.S. 537 (1896), overruled by *Brown v. Board of Educ.*, 347 U.S. 483 (1954), the Supreme Court held that segregation of races was constitutional so long as the facilities and conditions for blacks were equal in quality to those provided for whites. This became known as the "separate but equal" doctrine. However, the segregation was far from "separate but equal"; "virtually all facilities and services for blacks were fewer in number, much lower in quality, or more inaccessible than those for whites." A COMMON DESTINY: BLACKS AND AMERICAN SOCIETY 58 (Gerald D. Jaynes & Robin M. Williams, Jr., eds., 1989) [hereinafter A COMMON DESTINY]. This picture is well-illustrated by Maurice R. Davie, writing in the late 1940s:

The most conspicuous forms of racial segregation . . . are in residential areas; in educational, recreational, and other public institutions; in quasi-public or privately operated institutions under public control, such as railroads, steamship lines, streetcar and bus systems, and hospitals; in private business establishments, such as hotels and restaurants; and in other private commercial and professional services, such as department stores, mortuary establishments, and doctors' offices. These are the more common and visible forms of separation; actually it pervades, in some degree or other, practically the whole range of social behavior.

MAURICE R. DAVIE, NEGROES IN AMERICAN SOCIETY 287 (1949).

26. For an expanded discussion of the statistical data supporting the conclusion that African-Americans have made little progress in American society since the *Brown* decision, see Alex M. Johnson, Jr., *Defending the Use of Quotas in Affirmative Action: Attacking Racism in the Nineties*, 1992 U. ILL. L. REV. 1043, 1046-54.

make-up in every important index than it ever has been.²⁷

After the Supreme Court declared in *Brown* that desegregation should proceed "with all deliberate speed,"²⁸ it initially seemed as if the inequalities between African-Americans and whites could be eliminated. A combination of desegregation and other economic and legal events gave African-Americans opportunities which could be, and often were, used to improve their economic and social status.²⁹ From the decade before *Brown* to the early 1970s, African-Americans made improvements in life expectancy, education, occupation, income, and political participation—including the election of many African-Americans to office.³⁰

The promise of *Brown* and the opportunities for African-Americans that followed it were, however, short-lived. Economic decline, combined with a shift in white attitudes in the mid-1970s, closed many of the doors which had previously been opened for African-Americans.³¹ As Jaynes and Williams reported, "[t]he greatest economic gains for blacks occurred in the 1940s and 1960s. Since the early 1970s, the economic status of blacks relative to whites has, on average, stagnated or deteriorated."³²

The gains made by African-Americans during the Civil Rights era have led many people to believe that racism and segregation are relics of the past. Some even think that African-Americans have an advantage in our society.³³ Such delusions, however, are merely the product of a dec-

27. See DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* (1993) (contending that racial segregation as measured by housing patterns has increased to produce a hyper-segregated society).

28. *Brown v. Board of Educ.* (Brown II), 349 U.S. 294, 301 (1955).

29. These events include the following: (1) the urbanization and northern movement of the African-American population from 1940 to 1970; (2) the civil rights movement; and (3) the high and sustained rate of national economic growth during 1940-70. See *A COMMON DESTINY*, *supra* note 25, at 7.

The gains made by African-Americans may seem significant, even startling, but the truth is that because they had been oppressed for so long, African-Americans simply had nowhere to go but up once the mechanisms for their systemic oppression were removed.

30. Bart Landry, *Black Americans: The Unfinished Agenda*, WASH. POST, Dec. 17, 1989, at X4 (reviewing *A COMMON DESTINY*, *supra* note 25).

31. This change in attitudes and the subsequent decline in advancement opportunities for African-Americans is well illustrated by two Supreme Court decisions that addressed affirmative action. The decisions in *Regents of the University of Cal. v. Bakke*, 438 U.S. 265 (1978), and *DeFunis v. Odegaard*, 416 U.S. 312 (1974), caused a fear of litigation among college admissions boards that resulted in defensive admissions practices inconsistent with aggressive affirmative action programs. See Anthony J. Scanlon, *The History and Culture of Affirmative Action*, 1988 B.Y.U. L. REV. 343, 355; see also ALEX M. JOHNSON, JR., ET AL., *THE EFFICACY OF AFFIRMATIVE ACTION IN LEGAL EDUCATION* (arguing for an aggressive and expansive use of affirmative action, including the use of quotas) (forthcoming, on file with author).

32. *A COMMON DESTINY*, *supra* note 25, at 6.

33. For example, see Alan Freeman, *Antidiscrimination Law: The View from 1989*, 64 TUL. L. REV. 1407, 1408 (1990), stating:

[M]any believe that blacks and other minorities luxuriate in preferential treatment at the expense of victimized and innocent whites. They believe that, if minorities have not

ade of willfully denying the realities of black-white relations. The realities paint a bleak picture.³⁴ African-Americans and other minorities are no better off, and in many ways are worse off, than they were before *Brown*.³⁵ "At all levels of education, income and occupational status, blacks are very highly segregated from whites."³⁶

African-American income remains significantly below that of white income,³⁷ and unemployment rates remain significantly higher.³⁸ Little progress has been made toward integration in the housing context.³⁹ In some cities, segregation of neighborhoods, schools, city services, and

benefited from antidiscrimination laws and remain poor and powerless, it is their own fault for not mustering the skill or will to make it.

Indeed, the belief that African-Americans are advantaged in present society has led Donald Trump to make this preposterous statement:

A well-educated Black has a tremendous advantage over a well-educated white in terms of the job market. And, I think sometimes a Black may think that they don't really have the advantage . . . but I've said on occasion—even about myself—*If I were starting off today, I would love to be a well-educated Black because I really believe they do have an actual advantage today.*

Donald Trump on *R.A.C.E.* (NBC television special), *quoted in* HAKI R. MADHUBUTI, *BLACK MEN: OBSOLETE, SINGLE, DANGEROUS?* at Introductory Note (1990) (ellipsis in original) (emphasis added).

34. See, e.g., Richard P. Thornell, *The Future of Affirmative Action in Higher Education*, 29 *How. L.J.* 259, 269 (1986) (taking issue with the contention that civil rights laws have essentially eliminated the problems of race and sex discrimination); Walter Shapiro, *Unfinished Business*, *TIME*, Aug. 7, 1989, at 12 (debunking myth that affirmative action has provided African-Americans with a level playing field).

35. Author Jonathan Kozol echoed this sentiment in a recent interview: "America is 'at a juncture comparable to what the Supreme Court faced in 1954, although I think the situation we're facing today is even grimmer.'" Larry Tye, *Vision, Hard Choices Needed to Make Integration Work*, *BOSTON GLOBE*, Jan. 8, 1992, at 12.

36. Douglas S. Massey, *Racial Segregation Itself Remains a Corrosive Force*, *L.A. TIMES*, Aug. 13, 1989, at V5. A study by Massey and Denton, which measured segregation along five dimensions (evenness, exposure, clustering, centralization, and concentration), showed that blacks are the only minority group which experiences extreme segregation on all five dimensions. Massey termed this condition "hypersegregation." Hypersegregation results in extreme social isolation and causes, among other things, a concentration of poverty, labor force withdrawal, and unemployment in inner-city black neighborhoods. See Douglas S. Massey & Nancy A. Denton, *Hypersegregation in U.S. Metropolitan Areas: Black and Hispanic Segregation Along Five Dimensions*, 26 *DEMOGRAPHY* 373, 389 (1989).

37. Per capita income for African-Americans is about six times its level before *Brown*, which sounds quite impressive. However, in 1984, African-American income still was only 57% of white income, which demonstrates not only how much further African-Americans have to go to achieve true economic equality, but also how badly off they were economically in the pre-*Brown* era. Michael H. Cottman, *U.S. Racial Gap Persists 20 Years After Kerner Report*, *NEWSDAY*, July 28, 1989, at 7. For African-American male college graduates, the most likely beneficiaries of affirmative action, income in 1984 was only 74% of their white counterparts'. Shapiro, *supra* note 34, at 14.

38. Employment rates of African-Americans have fallen relative to whites since 1954, and unemployment rates for African-Americans remain about twice as high as for whites. A *COMMON DESTINY*, *supra* note 25, at 17. In 1985, the jobless rate of African-American high school male dropouts in their early 20s was 43%, an increase of over 30% since 1973. Walter Shapiro, *The Ghetto: From Bad to Worse*, *TIME*, Aug. 24, 1987, at 18, 19.

39. On a scale of 0-100, with 100 equalling total segregation, the 1980 average for the 16 metropolitan areas with the largest African-American populations was approximately 80. See A *COMMON DESTINY*, *supra* note 25, at 27; see also MASSEY & DENTON, *supra* note 27; Sharman

churches remains as complete as when it was legislated and enforced judicially.⁴⁰ Poverty in these neighborhoods contributes to the depressingly familiar conditions of inner-city life—crime,⁴¹ violence, early pregnancy, and drug use.⁴²

Furthermore, significant problems still remain with educational achievement. Differences in socioeconomic status, when combined with residential separation, produce large disparities between African-Americans and whites:

Black high school dropout rates remain higher than those for whites, black performance on tests of achievement lags behind that of whites, and blacks remain less likely to attend college and to complete a college degree. After the mid-1970s, the college-going chances of black high school graduates have declined, and the proportion of advanced degrees awarded to blacks has decreased.⁴³

The decline in college attendance cannot be attributed to changes in

Stein, *Study Challenges Notions of "Black Flight,"* CHI. TRIB., Mar. 29, 1990, at 1, 21 (arguing that discrimination and segregation have persisted in housing).

40. For example, in the Chicago area in 1980, whites lived in neighborhoods that were 90% white and 4% African-American. This is in stark contrast to African-Americans in Chicago, Cleveland, and Detroit, who lived in neighborhoods that were over 80% African-American. A COMMON DESTINY, *supra* note 25, at 90-91. In their study on the extent of segregation in residential areas, Massey and Denton determined that

roughly one-quarter of the American black population lives in an urban environment that is hypersegregated. . . . Residents of such an environment would be very unlikely to come into regular contact with a member of Anglo society, except through participation in the labor force, an option that is denied to the quarter of central-city blacks who are under- or unemployed.

Massey & Denton, *supra* note 36, at 382. Massey and Denton further discerned that only 2% of metropolitan African-Americans live in a residential pattern which may be considered "integrated," that is, experience low segregation on at least four of the five dimensions upon which the study was based. *Id.*

41. See, e.g., Regina Austin, "The Black Community," *Its Lawbreakers, and a Politics of Identification*, 65 S. CAL. L. REV. 1769, 1780-81 (1992) (noting connection between poverty and criminal activity).

42. "Our results suggest that the extremity of black residential segregation and its unique multidimensional character may help explain the growing social and economic gap between the black underclass and the rest of American society." Massey & Denton, *supra* note 36, at 389. Discrimination and prejudice also keep middle-class African-Americans from leaving the inner-city and breaking the cycle of oppression and poverty. *Id.* Middle-class families often experience difficulties moving out because property values have declined and there are few buyers for their homes. Stein, *supra* note 39, at 21. If buyers are found, African-Americans often face discriminatory realtors, lenders, and the prospect that few middle-class neighborhoods will welcome them. Margaret L. Usdansky, *Housing Act Fails to Eliminate Bias Against Minorities*, USA TODAY, Nov. 11, 1991, at 2A.

43. A COMMON DESTINY, *supra* note 25, at 378. There has been a marked decline of African-American high school graduates attending college. The rate of African-American high school graduates attending college in 1973 was about 30%; that rate rose steadily until it peaked at 48% in 1977, when it was virtually equal to the attendance rates of white high school graduates. *Id.* at 338-39. Since then, however, the college attendance rate of African-Americans has fallen continuously, and in 1986, only 36.5% of African-American high school graduates entered college immediately

economic status, geographic location, or gender composition.⁴⁴ Nor can the decline be explained by a downturn in African-American academic achievement relative to whites, as African-American achievement levels are on the rise.⁴⁵ Rather, declining college attendance may be due in large part to a decrease in the amount of financial aid available to all students, but which is especially detrimental to African-Americans.⁴⁶

Negative educational impact can also be traced to continuing *de facto* neighborhood segregation, which has led to diminished and disparate resources and funding for schools with a majority of African-American students. Public schools are dependent upon the property tax base of the communities in which they are located for a significant amount of their funding. Accordingly, because schools attended by African-American students are typically located in communities where property values are low, it is much more difficult for them to raise needed tax dollars than it is for predominantly white schools in wealthy suburbs.⁴⁷ Although many states contribute funds to make up the deficit that property taxes do not cover, these funds are simply inadequate to ensure the proper education of young, poverty-stricken African-Americans.⁴⁸ As a result, schools attended by African-Americans are

after graduation. *Id.* at 339. In comparison, the college entry rate for whites has risen almost continuously from 48% in 1973 to 57% in 1984. *Id.*

African-Americans also lag far behind whites in college completion rates. In 1960, less than 6% of African-American men and women had completed college. *Id.* While that figure rose to 11% of African-American men and 12% of African-American women in 1980, it still is dismal when compared with completion rates of white men and women in 1980, which were 25.5% and 22%, respectively. *Id.* at 340.

44. *Id.* at 341.

45. *Id.* at 342.

46. Over the 10-year period from 1975-1976 to 1985-1986, outright grants as a percentage of all financial aid declined from 80 percent to 46 percent, while loans increased from 17 percent to 50 percent as a percentage of financial aid. This change has probably reduced blacks' college-going chances more than those of whites.

Id. at 343. From a purely economic perspective, African-Americans anticipate a lower rate of return on their investment in education than whites do. *Id.* at 372. Since the expected rewards are less, African-American students will borrow less money relative to their white peers. *Id.* at 343. Moreover, African-American students tend to come from low-income families. *Id.* at 343-44. For such families, the typical college debt of \$10,000 to \$12,000 is virtually overwhelming. *Id.* at 344.

The financial picture is only getting worse for students coming from low-income families. For example, a recently enacted federal law will increase federal grants and loans to middle-income college students, ignoring the greater needs of poor students. See Higher Education Amendments of 1992, Pub. L. No. 102-325 § 422, 106 Stat. 448, 535 (1992); see also *What's News*, WALL ST. J., Feb. 24, 1992, at A1. Furthermore, the hostility of the Bush Administration's Department of Education toward minority scholarships worsened the plight of minority students. See Jay B. Howd, Comment, *Race-Exclusive Scholarships in Federally-Assisted Colleges and Universities—Will They Survive?*, 16 S. ILL. U. L.J. 451 (1992) (criticizing the administration's harsh position); Rachel Spector, Note, *Minority Scholarships: A New Battle in the War on Affirmative Action*, 77 IOWA L. REV. 307, 341 (1992) (stating race-targeted scholarships "send[] a clear welcoming message" to minority students).

47. See, e.g., JONATHAN KOZOL, *SAVAGE INEQUALITIES* 119-24 (1991).

48. For example, in Long Island segregation causes blacks to be "taxed at a disproportionately high rate for inferior schools. And state aid formulas, designed to give more aid to property-poor

markedly inferior to those attended predominantly by whites. The funding deficits that produce inferior educational opportunities for African-Americans and neighborhood segregation exacerbate the problems engendered by the resurgence of segregation in the nation's schools: racial isolation, crime, increased drop-outs, teenage pregnancies, and other social ills.⁴⁹

The foregoing statistical and sociological review has but scratched the surface of the problem of continuing segregation in the United States. *Brown* has failed. Despite this failure, however, *Fordice* perpetuates *Brown* and the legacy of segregation it has engendered. Confusing the process of integration with its vision of ideal integration and thereby implicitly ignoring the unique African-American cultural community, the Court has paradoxically endorsed a process of integration doomed to fail. As the following sections will show, not until the African-American culture is recognized and preserved by the integration process will the downward spiral of racial unrest and segregation be checked.⁵⁰

1. *Forced Integration and the Unique Nomos of the African-American Community*

There has been much discussion in recent years concerning the existence of the voice of color and its appropriate use by scholars of color. Elsewhere I have analyzed the debate over the existence of the voice of color and argued that such a voice exists.⁵¹ I have asserted that it is nonstigmatizing, and it can be articulated by some but not all scholars of color, when they speak to certain issues (e.g., race-related ones) "because scholars of color have shared the molding experiences created by racism that caused the voice of color to emerge."⁵² I have also argued that the real issue is not so much the existence and appropriate use of voice, but whether the existence and use of voice signifies and validates the existence of a separate African-American community that is at odds with the traditional liberal view of "integration" and its conception of

districts, are thwarted by local assessment practices that overvalue property in most black communities." Robert Fresco & Michael D'Antonio, *Equal Funding, But Unequal*, NEWSDAY, Sept. 19, 1990, at 40. Further complicating the financial picture of inner-city schools is their increasingly prominent role as social service centers for deprived and troubled youth. These schools face higher costs for student health care, counseling, social services, and maintenance than do schools located in the suburbs. *Id.*

49. See Larry Tye, *US Sounds Retreat in School Integration*, BOSTON GLOBE, Jan. 5, 1992, at 1, 14-15.

50. It can be argued that the *Fordice* opinion, like *Brown*, will perpetuate and preserve the separate African-American community or *nomos*. That particular notion of integration—that is, assimilation—does not comport with a true or ideal version of integration in which equality and diversity are truly respected and tolerated. For a discussion of the ideal version of integration, see *infra* notes 193-204 and accompanying text.

51. See Alex M. Johnson, Jr., *The New Voice of Color*, 100 YALE L.J. 2007 (1991).

52. *Id.* at 2012.

American society as a melting pot.⁵³

In essence, the voice of color pertains directly to the claims made in this Article; all these claims emanate from the theory that the African-American community is unique in American society because of the historical forces that shaped it. African-Americans—like Native Americans—can claim that they have their own culture,⁵⁴ language,⁵⁵ and religions,⁵⁶ each a product of their subordinated position in American society.⁵⁷ African-Americans, however, have no geographic lands to call their own, nor any claim that their unique culture existed prior to and independently of majoritarian culture. Nonetheless, the absence of those factors is not dispositive of my claim that the presence of an African-American culture, language, and religion signifies the existence of a separate community, the “nation within the nation” claimed by African-American nationalists.⁵⁸

African-Americans belong to a unique ethnic group. Their ethnicity simultaneously constitutes who they are and separates them from whites who, although they belong to many different ethnic groups, do not and cannot belong to the ethnic group composed of African-Americans. This country’s legacy of racism and focus on skin color forbid it. African-Americans, like members of other ethnic groups, derive two primary benefits from their membership in their unique ethnic group: “distinctiveness” and “separateness.”⁵⁹ Moreover, membership in an ethnic group, like one’s racial identity, is not chosen voluntarily. One is born into an ethnic group and can only change that membership with difficulty.⁶⁰

53. See *id.* at 2015-18.

54. See, e.g., John O. Calmore, *Critical Race Theory, Archie Shepp, and Fire Music: Securing an Authentic Intellectual Life in a Multicultural World*, 65 S. CAL. L. REV. 2129 (1992). But see Austin, *supra* note 41, at 1769 (claiming that, to some degree, the “Black Community” is a merely fictional myth).

55. See, e.g., Henry L. Gates, Jr., *The Blackness of Blackness: A Critique of the Sign and the Signifying Monkey*, in BLACK LITERATURE AND LITERARY THEORY 285 (Henry L. Gates, Jr., ed., 1984) (discussing the unique nature of Black English and African-American writers’ adaptive uses of standard literary forms).

56. See, e.g., E. FRANKLIN FRAZIER, *THE NEGRO CHURCH IN AMERICA* (2d prtg. 1975); Anthony E. Cook, *Beyond Critical Legal Studies: The Reconstructive Theology of Dr. Martin Luther King, Jr.*, 103 HARV. L. REV. 985, 1015-23 (1990).

57. The analogy between African-Americans and Native Americans supports the contention that *Fordice* was incorrectly decided. Like Native Americans who attend tribal colleges designed to meet the special needs of their culture, African-Americans seek continued public support and funding of predominantly or historically black colleges to meet their special needs. See Ben N. Campbell, *Funding For Tribal Colleges Getting Short Shrift*, USA TODAY, Dec. 15, 1992, at 11A (“[Tribal] colleges teach math and science, English, history and business management as well as American Indian philosophy, traditions and languages. Like the predominantly black and women’s colleges, these schools meet the special needs of their students.”).

58. See, e.g., *infra* notes 193-95 and accompanying text.

59. Jennifer Roback, *Plural But Equal: Group Identity and Voluntary Identification*, SOC. PHIL. & POL’Y, Spring 1991, at 60, 60 (comparing the utility of separateness and diversity).

60. While it might be argued that it is possible to change one’s membership in an ethnic group

The African-American ethnic group, like many other ethnic groups, provides valuable socializing functions. One learns and is enriched by societal and cultural norms, effectively supplementing the family's socialization role.⁶¹ In addition to teaching and enforcing appropriate social norms of behavior, ethnic groups also serve quasi-governmental functions such as "low-cost enforcement" of social norms:

Assuming that members of ethnic groups are more likely to have continuous dealings with each other than with outsiders, the probability of defection diminishes inside the group.

This common core of trust is a significant public good for the members of the group that possess it. Ethnic attachments can provide a significant substitute for contract law. That is, members of ethnic groups that have substantial continuous dealings with each other can develop norms of cooperation, promise-keeping and honesty.⁶²

Membership in an ethnic group thus serves a valuable, although not easily quantifiable, societal function. However, the fact that membership in an ethnic community is valuable does not mean that ethnic interaction is wrong or undesirable. Any attempt to maintain ethnic purity or enforce ethnic separation harkens back to the absurdities of the "Jim Crow" era.⁶³ Virtually all would agree that there are significant advantages to repeated and voluntary interactions between members of various ethnic groups. It seems to follow logically, then, that integration between the different and distinct groups should be encouraged rather than discouraged. "In addition to the gains from trade, there may be additional benefits to integration. We may wish to ensure that the institutions of society are open to everyone, out of a concern for justice. It would be unjust to have powerful social institutions which systematically exclude certain groups."⁶⁴

Accordingly, integration of educational institutions is often thought to benefit both students and society.⁶⁵ Yet integration may not be the

by marrying into another ethnic group, such a change "does not change one's own past or negate one's own experience with solving problems in the manner learned from the family of origin." *Id.* at 62.

61. An ethnic group is an umbrella group that encompasses more than one family; it performs many functions that are similar to those performed by an extended family. Think of the ethnic group as an extension of smaller family groupings. The ethnic group, in this context, picks up where the family leaves off; it assists or supplements families in doing their work. Different groups function in different ways, and some groups are more successful than others in performing the various functions that people need.

Id.

62. *Id.* at 62-63 (footnote omitted).

63. *See id.* at 73.

64. *Id.* at 67.

65. Education is another institution of power, wealth, and advancement; partly for this reason, education has been the focus of many integration efforts. Before discussing this motive for integration, note that many arguments in favor of integration are actually

only appropriate means for realizing the benefits of ethnic interaction.

Integrated schools are desirable because we want opportunities for advancement, wealth, and power to be available to everyone. However, if education *proper* were the source of advancement, wealth, and power, this objective could be achieved simply by subsidizing education, and *not necessarily by integrating the schools*. Thus, the real argument is that majority schools provide opportunities for advancement, wealth and power, while black or other ethnically segregated schools do not provide such opportunities. Therefore, we must integrate the schools in order to provide non-white children with the same opportunities for advancement, wealth, and power that white children have.⁶⁶

The argument that African-American students should be forcibly "integrated" into predominantly white institutions to provide them with the same opportunities for advancement, wealth, and power available to white college students typically takes one of three forms. First, African-American college students can succeed only if they share an environment with white students such that the African-American students are influenced and possibly absorbed by the white community with its concomitant norms and values. Second, "the schools actually provide very little education, but really provide a signalling or screening mechanism to employers and others. In this case, the status of the educational institution confers status and power upon those who attend it."⁶⁷ Third, because whites are unable or unwilling to fund predominantly or historically black colleges at the same level as predominantly white schools, the black colleges cannot provide African-Americans with equal opportunities for advancement, wealth, and power.

The first two arguments in favor of forced integration must be rejected for obvious historical reasons. Scores of African-American students have attended largely or exclusively black colleges and universities with "lesser" reputations (when viewed from the majoritarian's perspective) than white schools and later excelled in their chosen fields. As Justice Thomas noted in his concurring opinion:

Despite the shameful history of state-enforced segregation, [historically black colleges] have survived and flourished. Indeed, they have expanded as opportunities for blacks to enter historically white institutions have expanded. Between 1954 and 1980, for example, enrollment at historically black colleges increased

arguments about gains from trade. That is, we can imagine parents, teachers, and administrators actively seeking a diverse student body for the educational and academic advantages it might bring to all the students.

Id. at 68.

66. *Id.* at 68-69 (emphasis added).

67. *Id.* at 69.

from 70,000 to 200,000 students, while degrees awarded increased from 13,000 to 32,000. . . . I think it is undisputable that these institutions have succeeded in part because of their distinctive histories and traditions; for many, historically black colleges have become "a symbol of the highest attainments of black culture."⁶⁸

Thus the absence of white students, and the lack of reputational cachet (especially outside the African-American community) for most predominantly or historically black colleges, has not impeded African-Americans from attaining advancement, wealth, and power.⁶⁹ The third argument in favor of mandatory integration must also be rejected because it destroys the ethnicity of African-Americans. Specifically, it forces African-American students to adopt the ethnicity of the white majority as a cost of obtaining the same opportunities for advancement, wealth, and power afforded white college students.

Mandatory integration of our educational system simply does not respect the ethnicity of African-American students. Because it eliminates the African-American student's choice between a predominantly black or white college, forced integration has the painful and paradoxical result of failing to properly assimilate African-Americans into the larger society. African-Americans will not *choose* to integrate, to become part of the larger body in all facets of society, until it is in their interest to do so. In other words, African-American students, both individually and as a group, will not *choose* to integrate unless the choice is "Pareto superior."⁷⁰ Forcing them to integrate when they prefer not to will have a counter-productive effect.

Consider as a hypothesis that the ethnic groups commonly regarded as not fully integrated or assimilated into American life—for example, American Indians and [African-Americans]—have had problems precisely because the political process has repeatedly thwarted this process of individually selecting the appropriate level and type of integration or assimilation. Native Americans have had their trading rights with Anglo-Americans restricted both before and after the reservation system. At times,

68. *United States v. Fordice*, 112 S. Ct. 2727, 2746 (1992) (Thomas, J., concurring) (quoting J. PREER, *LAWYERS V. EDUCATORS: BLACK COLLEGES AND DESEGREGATION IN PUBLIC HIGHER EDUCATION* 2 (1982)).

69. The colleges founded for Negroes are both a source of pride to blacks who have attended them and a source of hope to black families who want the benefits of higher learning for their children. They have exercised leadership in developing educational opportunities for young blacks at all levels of instruction, and especially in the South, they are still regarded as key institutions for enhancing the general quality of the lives of black Americans.

Id. (quoting CARNEGIE COMM'N ON HIGHER EDUC., *FROM ISOLATION TO MAINSTREAM: PROBLEMS OF THE COLLEGES FOUNDED FOR NEGROES* 11 (1971)).

70. "A Pareto-superior transaction is one that makes at least one person better off and no one worse off." RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 13 (4th ed. 1992).

the United States government has pursued an active policy of "Americanizing the Indians," which attempted to regulate everything from traditional property rights systems, family relations, and inheritance systems to the wearing of long hair by Indian men.

[African-Americans] descended from slaves have been regulated in their relations with white society for all but a very few years. For most of those years, the regulations were designed to prohibit, limit, and control the degree of contact between [African-Americans] and whites. These laws have attempted to regulate everything from interracial marriage, interracial schooling, and contracts between the races to seating arrangements on streetcars. The more recent attempts to require integration, such as the recent attempts to assist Native Americans in preserving their tribal identity, address the content of the policies but not the underlying structure of the problem. Ethnic identity and integration continue to be seen as appropriate objects of political action within the wider community.⁷¹

Thus the existence of a separate African-American community and ethnicity, rather than serving as a justification for forced integration, instead mandates the continued operation of predominantly or historically black colleges. These schools transmit those amorphous values unique to the African-American community, its *nomos*.⁷² Robert Cover defines *nomos* as a community's "normative universe," the "commonalities of meaning that make continued normative activity possible."⁷³ Of course, for *nomos* to have any meaning, one must define the community whose "commonalities of meanings" or values are addressed. Moreover, one must define and describe the normative activity of that community.

But *nomos* means more than simply the concept of the normative universe. Contained within the concept of a normative universe is the notion that the state of the universe, our surroundings, have a "history and destiny, beginning and end, explanation and purpose."⁷⁴

A *nomos*, as a world of law, entails the application of human will to an extant state of affairs as well as toward our visions of alternative futures. A *nomos* is a present world constituted by a system of tension between reality and vision.

....

The intelligibility of normative behavior inheres in the com-

71. Roback, *supra* note 59, at 78 (footnotes omitted).

72. For an in-depth discussion of *nomos* and what that term entails, see Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983).

73. *Id.* at 4, 14. For further commentary on Cover's notion of *nomos*, see Frank I. Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986).

74. Cover, *supra* note 72, at 5.

munal character of the narratives that provide the context of that behavior. Any person who lived an entirely idiosyncratic normative life would be quite mad. The part that you or I choose to play may be singular, but the fact that we can locate it in a common "script" renders it "sane"—a warrant that we share a *nomos*.⁷⁵

Professor Cover posits the concept of a community of interpretation in which the community generates norms internally; these norms are then offered to the larger society as a model.⁷⁶ Given the history and continued existence of segregation in American society,⁷⁷ the African-American community constitutes a separate and distinct community with a unique *nomos*. Moreover, the unique *nomos* of the African-American community is maintained, strengthened, and transmitted by African-American educational institutions, including predominantly or historically black colleges.⁷⁸ African-Americans are situated in an experiential reality that affects every important facet of their lives. The norms or *nomos* generated by that different experiential reality are worth maintaining.

To establish the contention that the African-American community is both separate, unique, and capable of generating its own *nomos*, two distinct methodological paradigms are relevant. First, one could look to statistical evidence demonstrating the continued segregation of the African-American community in current society.⁷⁹ Second, one could examine recent legal scholarship that supports the notion that this separate African-American community has a voice that is different from that of the majoritarian community and is capable of producing its own *nomos*.

I have already discussed the first paradigm. As for the second, Mari

75. *Id.* at 9-10.

76. This succinct way of thinking about a very complex article is presented in William N. Eskridge, Jr., *A Social Constructionist Critique of Posner's Sex and Reason: Steps Toward A Gaylegal Agenda*, 102 YALE L.J. 333, 374 n.213 (1992) (book review).

77. See *supra* notes 21-49 and accompanying text.

78. As Kevin Brown points out, educational institutions serve a socializing function that reflects the norms or *nomos* of the community as well as society:

As one commentator notes, "the choice of values to be transmitted [in public schools normally] lies . . . with the political majority or interest group in charge of the school system." Historically, because education has been primarily a local and state matter, schools are concerned with the inculcation of local community values. While there is broad agreement about fundamental values in the abstract, when applied to concrete situations, that broad agreement often breaks down. When the Supreme Court accepts some decisions by politicians and school officials and rejects others, it is essentially choosing one value over another. From the perspective of the socializing function of public schools, the Court, in approaching public education issues, should be concerned about public schools inculcating the "proper" values.

Brown, *supra* note 11, at 10-11 (quoting Stephen Arons & Charles Lawrence III, *The Manipulation of Consciousness: A First Amendment Critique of Schooling*, 15 HARV. C.R.-C.L. L. REV. 309, 316 (1980)) (alterations in original) (footnotes omitted).

79. See *supra* notes 32-49 and accompanying text.

Matsuda was one of the first scholars to point out that persons of color are uniquely affected when they are relegated to a subordinated position in American society because of their race. Her premise is that people of color, because of their status as victims of racial oppression, have distinct normative insights. In other words, she contends that one's position in the social structure of race relations makes a qualitative difference in how one sees and experiences the world.⁸⁰ The subordinated status of persons of color creates in African-Americans a duality—a double consciousness—that pervades the way they examine issues.⁸¹ Moreover, this racial consciousness or *nomos* is not limited by class boundaries.⁸² The unifying theme is race.

Gary Peller expands on Matsuda's pioneering work by examining the works of the earliest African-American nationalists.⁸³ According to Peller, these nationalists believed that the subordinated status of African-Americans created a unique black or African-American culture.⁸⁴ Neil Gotanda similarly contends that the African-American community is a unique repository of cultural and social values that the assimilationist version of integration devalues and ignores.⁸⁵ Finally, in examining the subordinated status of African-Americans, T. Alexander Aleinikoff,

80. Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 324-26 (1987).

81. As observed by Matsuda:

The dissonance of combining deep criticism of law with an aspirational vision of law is part of the experience of people of color. These people have used duality as a strength, and have developed strategies for resolving this dissonance through the process of appropriation and transformation. . . . The consciousness [that W.E.B. Du Bois] described includes both mainstream American consciousness, and the consciousness of the outsider. . . . These two viewpoints can combine powerfully to create a radical constitutionalism that is true to the radical roots of this country.

Id. at 333-34.

For an in-depth discussion of the "otherness" or distinctiveness that supplies the voice of color with much of its power, see Alex M. Johnson, Jr., *Defending the Use of Narrative and Giving Content to the Voice of Color: Rejecting the Imposition of Process Theory in Legal Scholarship* (forthcoming, on file with author).

82. A minority perspective cuts across class lines. Reading the editorials and letters in *Black Enterprise*, a slick and conventional magazine directed at an audience of black entrepreneurs, reveals that even economically successful black capitalists are critical of the Reagan Administration's effect on the poor. There is something about color that doesn't wash off as easily as class. The experience of racism, it seems, causes the normative choices of black capitalists to diverge from the choices of others in their class.

Matsuda, *supra* note 80, at 360-61 (footnote omitted).

83. Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758.

84. [Black nationalists] saw African[-]Americans in terms of traditions and communities that provide the historical context for individual identity. . . .

....

The conception that African[-]Americans created "a concrete national culture" and constitute an integral, historically created national community within the structure of American social relations is crucial to understanding the divergent ways that nationalists and integrationists understand racial domination.

Id. at 794-95.

85. The assimilationist color-blind society ignores, and thereby devalues, culture-race. Culture-race includes all aspects of culture, community, and consciousness. The term

Derrick Bell, and Patricia Williams each have concluded that oppression is an integral facet of the African-American experience and one that differentiates African-Americans from both whites and other minorities.⁸⁶

My point is simply this: African-Americans have built upon their ethnicity and *nomos* to create their own unique community. Integral to the continued health of that community is the successful transmission of its values from one generation to the next, a task that falls largely upon the family and members of the community itself, but also upon its schools.⁸⁷ As the next Section of this Article demonstrates, however, the current reliance on "neutral" norms in formulating integration policy has led to the implicit rejection of this African-American *nomos*.

2. Ignoring Reality: Integration and Assimilation

The facts underlying *Fordice* are a product of our past, directly traceable to Mississippi's system of *de jure* discrimination in higher education.⁸⁸ The State of Mississippi acted in a racist fashion in creating a separate and inferior post-secondary educational system for African-Americans. Yet instead of truly integrating its educational system when legally required to do so by federal law, the State chose to maintain its racially segregated schools through sham and artifice.

The State, however, was not satisfied with merely maintaining separate post-secondary educational institutions segregated by race. Its attitude toward historically or predominantly black colleges was so affected by systemic racism that these institutions, when measured by every important metric, were seriously underfunded when compared to separate but allegedly comparable white institutions. As a result, the separate black colleges were vastly inferior to the white colleges.

Fordice thus represents a microcosm of the racial issues with which this society is currently grappling. More importantly, *Fordice* provides a glimpse into the future of race relations. Addressing social systems like this one is the most serious issue facing the legal community at the begin-

includes, for example, the customs, beliefs, and intellectual and artistic traditions of Black America, and institutions such as Black churches and colleges.

With two notable exceptions, the Court has devalued or ignored Black culture, community, and consciousness. Its opinions use the same categorical name—Black—to designate reified systemic subordination (what I have termed historical-race) as well as the cultural richness that defines culture-race. Only by treating culture-race as analytically distinct from other usages of race can one begin to address the link between the cultural practices of Blacks and the subordination of Blacks, elements that are, in fact, inseparable in the lived experience of race.

Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1, 56 (1991) (emphasis added) (footnotes omitted).

86. See, e.g., DERRICK BELL, *AND WE ARE NOT SAVED* (1987); PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* (1991); T. Alexander Aleinikoff, *A Case for Race Consciousness*, 91 COLUM. L. REV. 1060 (1991).

87. See *infra* notes 132-35 and accompanying text.

88. *United States v. Fordice*, 112 S. Ct. 2727, 2732 (1992).

ning of the millennium: how do we remedy the racial disparities and inequalities created as a result of this society's racist past and history?

Finally forced by the remand in *Fordice* to deal with the mess it had created, the State fashioned a remedy premised on a notion of "integration." The remedy foisted upon the victims of the State's racist act is not compensatory, but assimilationist. It requires a forward-looking act premised on a perception of what society should look like, while ignoring what modern American society actually looks like. The remedy contemplated in *Fordice* ignores the transitional steps that must be taken to ensure the evolution of society from what it looks like today to what the ideal society should look like tomorrow.

Perhaps most damning, the Court's idealized vision of what society should look like tomorrow is premised on white norms and culture that implicitly reject the true or idealized version of integrationism. This assimilationist vision is detrimental to the welfare of African-American students because they are forced to compete on a "level playing field" that ignores their own unique culture and community and forcibly places them in an environment in which the chances of failure are significantly increased.⁸⁹

The result in *Fordice* was neatly anticipated by Gary Peller in his seminal article, *Race Consciousness*.⁹⁰ Peller argues that the ideology of integrationism as used by the courts and white society means "equal treatment according to neutral norms. . . . Once neutrality replaced discrimination, equal opportunity would lead to integrated institutions; experience in integrated institutions would, in turn, replace the ignorance of racism with the knowledge that actual contact provides."⁹¹ Peller accurately points out that the notions of reason and neutrality supporting the integrationist philosophy legitimate current social practices that have a discriminatory impact. These practices are deemed fair because of their neutrality and objectivity.

In *Fordice*, this ideological basis of integrationism seems to be the driving force. The Court wholeheartedly embraces neutral and equal principles, but it does so in a fashion that is somewhat disingenuous. The

89. Although the force used is not physical, the elimination of historically black colleges "forces" Mississippi's African-American students to attend the State's white colleges because many if not most of those students cannot afford to attend private colleges or public schools in other states.

90. Peller, *supra* note 83.

91. *Id.* at 770 (footnote omitted). More particularly, the ideology of integrationism is premised on a philosophy of universalism:

A commitment to a form of universalism, and an association of universalism with truth and particularism with ignorance, forms the infrastructure of American integrationist consciousness. This universalism is the common theme that connects the integrationist analytic distinctions between reason and prejudice, objectivity and bias, neutrality and discrimination, and integration and segregation. Each dichotomy envisions a realm of impersonality, understood as the transcendence of subjective bias and contrasted with an image of a realm of distortion where particularity and stereotype reign.

Id. at 772 (footnote omitted).

Court rejects the notion that Mississippi could rely solely on the use of the ACT test score in determining whether or not a student would be admitted to one of its colleges.⁹² Nevertheless, the Court implies that the use of the ACT combined with another neutral norm (e.g., grades) is perfectly permissible even if the result is the exclusion of the same number of African-Americans excluded by the use of the ACT as a sole qualifier. Consequently, a sliding scale that embraces a student's ACT score and grades, but which is not animated by racial bias and results in the exclusion of African-Americans, is perfectly legitimate because the exclusion results from the use of fairly applied, neutral, and objective standards.

The use of a neutral standard that nonetheless results in the continued advancement of whites to the detriment of African-Americans is unchallenged:

From within the integrationist ideology of neutral standards, no conceptual base existed from which integrationists could question whether "standards," definitions of "merit," and the other myriad features of the day-to-day aspects of institutional life constructed or maintained during segregation might have reflected deeper aspects of a culture within which the explicit exclusion of blacks seemed uncontroversial. And integrationists, organizing their perception of racial justice around images of objectivity, rationality, and neutrality, never considered whether this language for distinguishing the worthy from the unworthy itself might serve to help justify racial domination—if not to its victims, then at least to white beneficiaries who need to believe that their social positions are the result of something more than the brute fact of social power and racial domination.⁹³

With its commitment to neutrality and universalism, school integration of the type mandated by *Fordice* represents integrationism in its purest social form.⁹⁴ Most importantly, integrationism represents a clear rejection of African-American nationalism (separatism), which is equated with white supremacy and racism.⁹⁵ Nationalism as espoused by African-Americans in the Sixties and Seventies is relevant to understanding the implications of the *Fordice* opinion because the nationalist critique of integrationism highlights the shortcomings inherent in the opinion. As Peller notes, African-American nationalism in the Sixties and Seventies challenged universalist assumptions regarding the reigning "distribution of power and privilege in America."⁹⁶ Nationalism

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

93. Peller, *supra* note 83, at 778.

94. *See id.* at 779-82.

95. *See id.* at 788-89.

96. *Id.* at 790.

exposed the fallacy of basing integration on "neutrality."

African-American nationalism threatens integration in two ways: it fails to "transcend" race consciousness and "it assume[s] that *power* determine[s] the distribution of social resources and opportunities, rather than reason or merit."⁹⁷ Nationalists contend that qualitative cultural differences between African-American and white cultures should result in local control of schools in African-American communities rather than the "commitment to centralization and expertise"⁹⁸ espoused by integrationists. Nationalists also "view[] race in the particular context of American history, where racial identity [is] seen as a central basis for comprehending the significance of various social relations as they are actually lived and experienced, and within which the meaning of race [is] anything but symmetrical."⁹⁹

In contrast to the integrationist premise that blacks and whites are essentially the same, the idea of race as the organizing basis for group consciousness asserts that blacks and whites are different, in the sense of coming from different communities, neighborhoods, churches, families, and histories, and of being in various ways foreigners to each other. . . . [T]he image of [African-American] nationhood locates differences between whites and blacks in social history, in the temporal context in which all national identity must come into being. . . .

. . . .

. . . [N]ationalists articulated what might be seen as an "historicized" view of social relations.¹⁰⁰

Nationalists vehemently opposed integration of schools for several reasons. First, taking African-American children and enrolling them in predominantly white institutions controlled by the white community made control of the schools by the African-American community impossible. Nationalists contended that, as a result, integration caused African-Americans to lose power over one of the few social institutions that they previously controlled.¹⁰¹ Second, and more importantly, integration was opposed because the assimilationism inherent in integration required African-Americans to embrace white norms.¹⁰²

Accordingly, although there was nothing intrinsic to the liberal theory of integrationism that required public school integration to proceed by closing black schools, firing black teachers and administrators, and integrating black children into formerly white

97. *Id.*

98. *Id.* at 791.

99. *Id.*

100. *Id.* at 792-94 (footnote omitted).

101. *Id.* at 795.

102. *Id.* at 796.

schools, the mainstream discourse of school integration perceived implementation in terms of "symmetry" and "quality," rather than in terms of the particular needs of the black community to use schools as a base of empowerment and unity for the community as a whole. . . .

From the nationalist viewpoint, integration has meant the loss of local institutions in the African-American community geared to the needs and aspirations of African-Americans¹⁰³

What is so ironic about the nationalist critique of integrationism is not only that history has validated the nationalist fear of integration, but that the same integrationist philosophy continues to be imposed on African-Americans in the Nineties. Indeed, it was inevitable that *Fordice* would result in the dismantling of predominantly or historically black colleges because

[w]ithin the integrationist vision, once race consciousness (and other "biases") are removed, neutral, objective social practices remain. Thus, the logic of conducting school integration by closing black schools and firing black teachers and principals was premised on the ability to identify "quality" schools, teachers, and administrators in a neutral, objective way. In these neutral terms, black schools were closed because they were inferior as a result of discrimination between white and black institutions under segregation.¹⁰⁴

To summarize, *Brown*, *Fordice*, and a generation of school desegregation cases premised on a similar assimilationist vision of integration quite logically result in the destruction of African-American schools. This is a tragic loss because African-Americans themselves control these institutions and, as explored in Part II, influence the norms and culture of their community in the process. Those norms are sacrificed in the Court's decisions because, in reality, "everyday institutional practices embody 'white norms' that are camouflaged by a stance of cultural neutrality presented as 'perspectivelessness.'"¹⁰⁵ Lost in the forced movement of African-American students from predominantly or historically black colleges to white colleges are the customs and heritage that embody and form the African-American community. That loss, as revealed in the next Section, continues to undermine the goals of integration policy.

103. *Id.* at 797-98 (footnote omitted).

104. *Id.* at 799-800.

105. *Id.* at 758-59; see also *supra* notes 89-94.

C. *When Cultures Clash: Liberal Integrationism Creates Coercive Assimilation*

While the plight of African-Americans has not measurably improved in the two generations since *Brown*,¹⁰⁶ the landmark decision did possess significant value as the symbolic end to the "separate but equal" doctrine first articulated in *Plessy v. Ferguson*.¹⁰⁷ The Court decided *Brown* in part on its finding that segregated schools generated feelings of inferiority on the part of African-American students deprived of the opportunity to attend schools with white students.¹⁰⁸ In light of their subordinated social status and historical experience of slavery, African-Americans' perception that separation was a badge of inferiority is certainly understandable.

But something odd happened as *de jure* segregation disappeared and *de facto* segregation took its place.¹⁰⁹ Ironically, a significant portion of the African-American community came to view the liberal notion of integration as undesirable. African-Americans who supported integrationism as a means of improving the plight of African-Americans won the initial battle but lost the war.¹¹⁰ Between 1954 and 1992, the African-American community developed in such a way that the Court's assimilationist brand of integration came to be perceived as a badge of inferiority by African-Americans,¹¹¹ thus bringing it full circle to *Plessy*.

106. See *supra* notes 32-49 and accompanying text.

107. 163 U.S. 537 (1896), *overruled by* *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

Although in its essence race relations [in 1954] were not fundamentally different from the present, in posture, style, and spirit there is a vast gulf between now and then. *Plessy v. Ferguson*'s[] separate but equal doctrine was the national norm, and court indifference had made separate but unequal the reality. Blatant, open, raw racism, churlish and uncivilized, was a fact of life in the South, and we were told that the South's outrageously demeaning race relations mores would never change.

Robert L. Carter, *A Reassessment of Brown v. Board*, in *SHADES OF BROWN: NEW PERSPECTIVES ON SCHOOL DESEGREGATION* 21, 21-22 (Derrick Bell ed., 1980) [hereinafter *SHADES OF BROWN*].

Brown . . . deserves our attention [for] its recognition of the importance of symbolism in the struggle for power. In attacking segregated schools the NAACP's early lawyers were not simply seeking access to the more abundant resources that were made available to white children. They were also challenging a system that labeled them and their brothers and sisters as inferior, untouchable, and unfit to assume the responsibilities of power.

Charles R. Lawrence III, *Education for Black Power in the Eighties: Present Day Implications of the Bakke Decision*, 10 NAT'L BLACK L.J. 58, 59 (1987).

108. See *Brown v. Board of Educ.*, 347 U.S. 483, 493-94 (1954). The Court's finding in this regard was well-supported by numerous psychological studies concluding that African-Americans had a negative self-image as a result of segregation. *Id.* at 494 n.11.

109. For a discussion of the harmful effects of Supreme Court opinions in cases involving *de jure* segregation of public schools, see *Brown*, *supra* note 11.

110. For a discussion of the debate between African-American integrationists and African-American nationalists who initially opposed integration, see Peller, *supra* note 83.

111. That badge of inferiority is created in two different ways. First, integration denigrates African-American cultural and community norms by requiring slavish adherence to white norms. See *supra* notes 94-103 and accompanying text. Second, integration distorts the way in which the efforts of African-Americans to integrate educational and other institutions are viewed:

The new racist ideology began by declaring that racial discrimination had been eliminated.

Integrationists presented a brand of integration that was dichotomous; it was both a process and an ideal. It was assumed that once African-Americans and whites were able to inhabit the same physical environment (the process), African-Americans and whites would begin to respect each other as individuals and view race as an irrelevant characteristic like eye color (the ideal).¹¹²

The elimination of official segregation following *Brown* rehabilitated the African-American consciousness. African-Americans who internalized the message of integration were freed from the negative messages fostered by the doctrine of separate but equal. African-Americans began to internalize the meta-values inherent in liberal political philosophy and the vision of society presented by integrationists.¹¹³ Moreover, African-Americans internalized *Brown's* formal declaration of equality.

The problem with integrationism, then, is not the societal message that *Brown* eliminated, but the message that supplanted it. The notion of an ideal society in which race is an irrelevant characteristic became displaced when that notion failed to reflect social reality, which is that integration as a process has never achieved true success, and that integration as an ideal has not been accomplished.¹¹⁴ The contradiction between the ideal vision of integration and the reality of daily life has caused a cognitive dissonance to infiltrate the mindset and *nomos* of the African-American community.

This cognitive dissonance is exacerbated when the "neutral" nature of integration is manipulated on terms prescribed by and beneficial to

If whites could be made to believe that equality had been achieved, then programs designed to improve the status of minorities would be viewed as giving those minorities an unfair advantage or so-called "reverse discrimination." The ideological illusion is achieved as follows: (1) First, it is declared that racial discrimination no longer exists. If this is so, then Black and white individuals are similarly situated (*i.e.*, neither is burdened by his race and so they must be treated similarly, as individuals who are judged solely on the basis of merit); (2) If this similar treatment results in a condition that burdens Blacks more than it does whites, it is nevertheless proper because it pursues the honorable, universally shared value of color-blindness and individual merit; (3) Unspoken and more insidious is the third step, and that is if Blacks continue to fail under this so-called similar treatment, it must be because they are somehow inferior. This is the false ideology of equal opportunity. It is perhaps more poisonous than the segregationist creed because of its inherent claim to support the highest of ideals.

Lawrence, *supra* note 107, at 60. For further discussion of the fallacy of equal opportunity in the context of the debate over the efficacy of affirmative action, see JOHNSON ET AL., *supra* note 31.

112. This ideal is developed *infra* note 145 and accompanying text.

113. Modern liberal philosophy is based on the "postulate of equality," the normative proposition that all individuals are morally equal. See *infra* note 205. Implicit in the postulate of equality are the notions that every person has the right to be treated equally and that each should have equal access to resources. See Ronald Dworkin, *What is Equality? Part I: Equality of Welfare*, 10 PHIL. & PUB. AFF. 185, 185-88 (1981).

114. See, e.g., Days, *supra* note 23, at 55-56 (discussing "the continuing legacy of segregation within desegregated systems"); see also *supra* notes 32-49 and accompanying text.

whites and destructive to the African-American culture.¹¹⁵ Such limited use of integration violates the postulate of equality and fundamental liberalism of Rawlsian philosophy.¹¹⁶ In effect, integration as it exists in this society violates Rawls' "just society" because the distribution of "primary goods" such as education is not "fair."¹¹⁷

Under Rawlsian theory, in order to determine if the distribution of primary goods within society is fair, one must first measure the distribution of goods that would accrue to a person in the "original position" and use that as the metric by which to evaluate the distribution.¹¹⁸ In other words, societal distributions and institutions must be justified without regard to the position in which the individual finds himself. As a result, the privileged members of society cannot choose a system that merely validates the existing distribution of entitlements as a means of maintaining their favored position in society.¹¹⁹

Persons in the original position evaluate competing social institutions and the distribution of entitlements through a "veil of ignorance" that precludes them from being aware of their individual characteristics, including, presumably, race.¹²⁰ Pursuant to the first principle of justice under this veil of ignorance, parties would decide that "each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others."¹²¹ Additionally, under the second principle of justice derived from the veil of ignorance, "social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone's advantage, and (b) attached to positions and offices open to

115. Translated from judicial activity in racial cases both before and after *Brown*, this principle of "interest convergence" provides:

The interests of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites; however, the fourteenth amendment, standing alone, will not authorize a judicial remedy providing effective racial equality for blacks where the remedy sought threatens the superior social status of middle- and upper-class whites.

Derrick Bell, *Brown and the Interest-Convergence Dilemma*, in *SHADES OF BROWN*, *supra* note 107, at 91, 95; see also Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 *YALE L.J.* 470 (1976) (discussing difficulties in obtaining school desegregation remedies that emphasize racial balance).

116. See JOHN RAWLS, *A THEORY OF JUSTICE* 60-62 (1971).

117. Rawls defines "primary goods" as those things that every rational person desires, irrespective of that person's lifetime aspirational goals. *Id.* at 62, 92.

118. Once the whole arrangement [the distribution of primary goods] is set up and going, no questions are asked about the totals of satisfaction or perfection. Things work themselves out according to the principles that would be chosen in the original position. On this conception of social justice, then, expectations are defined as the index of primary goods that a representative man can reasonably look forward to.

Id. at 94-95.

119. See *id.* at 136 ("Somehow [by using the veil of ignorance in the original position] we must nullify the effects of specific contingencies which put men at odds and tempt them to exploit social and natural circumstances to their own advantage.").

120. See *id.* at 137 ("[N]o one knows his place in society, his class position or social status . . .").

121. *Id.* at 60.

all.”¹²² This “difference principle” thus requires those in the original position to select among competing institutions so as to maximize the utility of the least advantaged class as measured by the distribution of primary goods.¹²³ Under this theory, the legislature’s primary task in a just society is to enact “social and economic policies . . . aimed at maximizing the long-term expectations of the least advantaged.”¹²⁴

This brief survey of Rawls’ political philosophy is not meant as a comprehensive explication of the philosophical underpinnings of integrationism.¹²⁵ Rather, it is an attempt to contrast reality with ideal to emphasize how the reality of integration differs from the ideal version of integration. The gap between reality and ideal creates a cognitive dissonance in African-Americans who embrace the ideal of integration but not its current application, which primarily benefits whites.

One can argue that under both the postulate of equality and the difference principle, African-American society and white society should respect the norms of the other. However, because that respect is not always forthcoming, it is illogical to require one community to adapt to the norms of the other. Integration fails to merge these two societies because the dominant white society refuses to honor African-American society in a manner that gives it equal respect and rights. The African-American community can accede to this limited, illiberal form of integration and merge into the larger society, or it can maintain its own values and its own community, a community in which the ideal society does not mean immersion in the dominant society.

Assimilationist integrationism demands that African-Americans relinquish the unique norms and institutions of their community on terms which obliterate those norms and institutions. Integration into the dominant society becomes a form of “coercive assimilation,”¹²⁶ similar in many ways to the integration of the Native American culture into white society:

Where blacks [were] forcibly *excluded* (segregated) from white society by law [before *Brown*], Indians—aboriginal peoples with their own cultures, languages, religions and territories—[were] forcibly *included* (integrated) into that society by law. That is what [is] meant by coercive assimination [sic]—the practice of compelling, through submersion, an ethnic, cultural and linguistic minority to shed its uniqueness and identity and mingle with the

122. *Id.*

123. *Id.* at 82-83.

124. *Id.* at 199.

125. The relevance of Rawls’ political philosophy became apparent to me when I read a brief summary of Rawls’ philosophy in an unlikely place: Robert K. Rasmussen, *An Essay on Bankruptcy, Default Rules, and Social Justice*, 1994 U. ILL. L. REV. (forthcoming) (manuscript at 2-10, on file with author).

126. See WILL KYMLICKA, *LIBERALISM, COMMUNITY, AND CULTURE* 145 (1989).

rest of society.¹²⁷

Such a process constitutes *de facto* colonialism and must be rejected.¹²⁸

Forced integration of this sort does not comport with Rawls' postulate of equality, nor is it, in his words, "fair" or just. Coercive assimilation is just as wrong and harmful as the forced exclusion of African-Americans that was mandated by the doctrine of "separate but equal." This is because assimilating African-Americans into mainstream culture without respecting the cultural, social, and institutional norms that developed in pre-*Brown* African-American society creates as much a badge of inferiority as the doctrine of "separate but equal" did.

The major difference between the badge of inferiority created by "separate but equal" and the badge of inferiority created by coercive assimilation is that African-Americans now have a choice. African-Americans are now in a position to choose whether or not to maintain their separate society and its distinct norms and institutions. Prior to *Brown*, such a choice did not exist; the doctrine of "separate but equal" isolated African-Americans from white society. *Brown* eliminated that barrier, allowing African-Americans to shed their perceived badge of inferiority.

Brown's failure, however, lay in its acceptance of a monolithic, color-blind society premised on the continued supremacy of white cultural norms, without regard to the role to be played by African-American cultural norms. *Brown* failed because it did not acknowledge the prior development of a unique African-American community with its own cultures, languages, religions, and territories. Instead, it presupposed the existence of an African-American community that *truly was separate but equal* in every respect to the dominant white community. Indeed, the entire philosophical and remedial value of *Brown* depends on the Court's assumption that African-American society was *separate but equal* to the white community. But African-Americans did not enjoy equality prior to *Brown*,¹²⁹ nor, for that matter, have they enjoyed equality at any time since *Brown*. Equality means not only equality in terms of physical entitlements and resources, but also equality with respect to culture, language, and other norms.

Integration, as developed in *Brown* and reiterated in *Fordice*, fails to

127. Michael P. Gross, *Indian Control for Quality Indian Education*, 49 N.D. L. REV. 237, 244 (1973).

128. See, e.g., Peller, *supra* note 83, at 809-10 (analyzing American racism as a form of colonialism).

129. See, for example, Carter, *supra* note 107, at 22, stating:

In the South [before *Brown*] black children were openly shortchanged in per capita pupil allocations and in every other educational resource. We knew of no publicly financed segregated black school that could conceivably be considered the equivalent of its white counterpart. It seemed self-evident that segregation was the malfunction in the system that relegated blacks to inferior educational status and that integration was the only tool that could accomplish the necessary adjustment.

respect both the African-American community as a distinct cultural community and the concomitant claims made by individual African-Americans to protect that unique community.¹³⁰ Both *Brown* and *Fordice* are premised on the notion that we are but one community, geographically separated in major urban areas but culturally prepared to merge. Given that a separate and distinct African-American cultural community does in fact exist, however, integration, to the extent that it embodies this type of coercive assimilation, is doomed to fail.

Instead, the existence of a unique African-American community requires that a different approach be taken in order to merge the two disparate cultures. As the next Part demonstrates, embracing cultural pluralism while rejecting coercive assimilation does not necessarily lead to the permanent maintenance of two separate societies. By first acknowledging the existence of a different cultural community (represented in the next Part by the existence and use of Bid Whist and Tonk), and then respecting the right to remain in or leave that community to become part of the larger community (i.e., respecting whether and when to integrate voluntarily), it is possible to articulate an expanded version of liberalism in which integrationism and nationalism can co-exist.

II

SITUATING *FORDICE* IN A WORLD OF DIVERSE RACIAL COMMUNITIES: THE ARGUMENT FOR CHOICE

In this Part, I turn from isolating the problem—coercive assimilation and the failure of integration—to targeting one step in the solution—the continued maintenance and operation of predominantly or historically black colleges. These colleges are defended as necessary and beneficial for two interrelated reasons. First, the colleges serve as transmitters and preservers of African-American culture, a culture that must be respected if integration is ultimately to succeed. Second, and in a similar vein, the colleges are necessary as a cultural buffer. They provide African-Americans the benefits of the choices of whether or not to “integrate” into mainstream society at all, and when to integrate, now or at a point later in life when they are ready to undertake the arduous transition into a mainstream culture that casts them as the “other.”

In order to illuminate further the societal advantages of maintaining predominantly or historically black colleges, I will next introduce the card games of Tonk and Bid Whist. These games are but one illustration of the unique African-American culture, a culture that must be preserved if integration is to progress and succeed. Finally, I address the implications of maintaining and preserving the separate practices of the African-

130. An analogous claim is made with respect to Canadian aboriginal culture in KYMLICKA, *supra* note 126, at 150-51.

American community through quasi-segregative¹³¹ institutions like predominantly or historically black colleges in a society premised on equality and liberalism. I will argue that liberalism and cultural pluralism are not necessarily incompatible, concluding that the value of cultural membership can be maintained in a liberal society.

A. Post-Secondary Schools as Transmitters of Cultural Norms: A "Thick" View

Elementary and secondary schools play a multifaceted role in American society. At one level, for example, they might be seen as publicly paid baby-sitters. But schools do much more than simply baby-sit our children; they also educate them. Indeed, most people probably consider the transmission of information and knowledge from teacher to student to be the primary or even the sole function of schools. These simplistic visions of the role schools play in society represent what might be called a "thin" definition of the objectives of public education.

The mission of our public school system is, however, much broader than that acknowledged by either of the two "thin" definitions presented above. A primary function of public instruction, including that at the post-secondary level, is also to "produce citizens"—what has been characterized elsewhere as the socializing function of public schools.¹³² Upon completion of her academic training, the student enters society at large, usually as a member of the workforce. To become a *productive* member of society, however, she must not only be academically proficient, but also sufficiently imbued with society's cultural values.¹³³

From the perspective of both the secondary and post-secondary educator, then, the mission of the educational system must be to produce a student who can perform capably in society on many different levels. Thus, public educational institutions must do more than simply transmit bare facts and statistics. They must also instill and reinforce in students the important customs, values, and principles learned in the family, church, and community.¹³⁴

131. I characterize these institutions as "quasi-segregative" because, although whites can and do attend these institutions, the very benefits these institutions provide to the African-American community derive largely from the fact that they are predominantly African-American.

132. See, e.g., Brown, *supra* note 11, at 7-11.

133. Public schools perform a number of functions for American society. The two most important overlap: value inculcation and academic training. Public schools are social institutions that cultivate America's youth. They inculcate cultural values, including political and social attitudes, opinions and beliefs. For example, schools foster such values as respect for our country, tolerance for political and religious diversity, commitment to self-sufficiency, and commitment to discharge faithfully the duties imposed by citizenship. Schools teach these values by selecting and excluding the materials that teachers present to students. They also instill values through a myriad of administrative rules and regulations governing student and teacher conduct.

Id. at 7-8 (footnotes omitted).

134. "The Supreme Court's education jurisprudence has long recognized the importance of

The school also shapes the values embraced by the community. In other words, the school does not operate in isolation from the community whose values it transmits. While interpreting, promoting, and transmitting values to the student, the school is simultaneously shaping and being shaped by those values. Thus, the school is both a product of the community and an instrument in shaping the *nomos* of the community.

Although schools located in diverse locales share the same overarching institutional mission, the manner in which they develop necessarily changes with the community in which those schools are located, as does their vision of the appropriate *nomos* to transmit. An elementary school in the South Bronx, for example, is very different from an elementary school located in East Los Angeles. The school and the *nomos* it transmits will reflect those differences, notwithstanding that the public school system was originally organized on the "common school" principle as a means of instilling common societal norms in students.¹³⁵

B. *The Benefits Provided by Choice*

In his seminal article, *Racism, Sexism, and Preferential Treatment: An Approach to the Topics*, Richard Wasserstrom points out that confusion about racism and sexism is engendered by the different perspectives that are utilized in discussions of these issues.¹³⁶ Wasserstrom describes three perspectives from which racism and sexism can be examined: (1) the social realities—the present; (2) the ideal—the future; and (3) the instrumentalities—the bridge between the present and the future.¹³⁷ In *Fordice*, the Court conflated the social realities with the social ideal and, most damagingly, failed to provide a method of implementation to achieve the ideal postulated in the opinion. The Court's neglect of the method of implementation will result in the worsening of the social realities, further delaying the accomplishment of the social optimum or ideal.

Perversely, the Court in *Fordice* focuses on only one facet of the racial reality by noting that Mississippi's system of higher education is a product of a prior *de jure* segregated system.¹³⁸ The Court's focus on the State's actions ignores the social reality of the people primarily affected by past discriminatory practices—the African-American students—and leads to a remedy in which the interests of those students are sacrificed under the guise of equality in order to protect and preserve the rights of

education's socializing function. Many of the Court's recent opinions involving public schooling embrace value-inculcation as the primary role of public education." *Id.* at 8 (citing supporting cases).

135. See, e.g., James S. Coleman, *Changes in the Family and Implications for the Common School*, 1991 U. CHI. LEGAL F. 153, 153.

136. See Wasserstrom, *supra* note 7, at 583.

137. *Id.*

138. See Brown, *supra* note 11, at 43-47 (discussing the effect of Mississippi's prior practice of *de jure* segregation on *Fordice*).

the State. By ignoring the plight of those affected by the State's actions, the Court has provided the normative justification for the closure of all publicly funded historically black colleges.¹³⁹

The social reality of Mississippi's African-American students is two-fold. First, as a result of the inferior education they receive in segregated primary and secondary schools, many African-American students are ill-prepared to compete academically with whites in an "integrated" environment.¹⁴⁰ When these African-American students are forced to compete with white students for places or resources in the integrated environment mandated by the Court in *Fordice*, they find themselves at a competitive disadvantage. The students who are the victims of the initial discriminatory acts that led the Court to order integration are victimized again. The Court's failure to order equalization of funding as the remedy for the State's actions—actions which placed them at a competitive disadvantage in the first place—forces them to compete on what, ostensibly, is now a "level playing field," but which in reality is something quite different.

The second aspect of the social reality created by the previously segregated educational system is the psychological effect such segregation has on both the victims of the segregation and those benefiting from it. Segregation has created an environment in which African-Americans have developed their own community and their own community norms in response to their subordinated position in American society.¹⁴¹ This community provides a nurturing environment in which African-Americans can develop relatively free of the effects of the prejudices and harms inflicted upon them solely because of their race or ethnicity.

This nurturing environment should be viewed as temporary or transitory in many respects. One may presume that this African-American community, free of the influences of majoritarian culture, serves as a base from which African-Americans eventually enter or integrate into mainstream society and culture.¹⁴² Consequently, even though the college

139. See *supra* notes 16-20 and accompanying text.

140. See *supra* note 43 and accompanying text.

141. See *supra* notes 54-86 and accompanying text.

142. This assertion, of course, is a gross overstatement and over-simplification. Given the way integration works in this society, it is impossible to claim that white or mainstream majoritarian culture does not have any impact on African-American culture. See *infra* notes 166, 173-74 and accompanying text. African-Americans must, by-and-large, embrace majoritarian culture to be successful in this society, and it would be idiotic to state or assume that there is some African-American culture that is not influenced—if not totally shaped—by majoritarian culture. The "American" in "African-American" is a reflection of the fact that those of African descent in America are affected by majoritarian culture. See generally Johnson, *supra* note 51, at 2015-20 (discussing the "different voice" articulated by African-Americans, which was and is created in the crucible of subordination). It would be equally foolish to suggest that African-American culture does not affect or influence majoritarian culture in many subtle and not so subtle ways, ranging from literature, arts, sports, and popular culture to politics. My point here is to suggest that when African-Americans are segregated by *their choice*, they are able to develop free of any interaction

students most intimately affected by *Fordice* are those African-Americans most likely, based on their level of educational attainment, to interact more freely with whites in majoritarian culture, it is important that these individuals have access to a nurturing environment. These students should not be forced to confront and address their subordinated status in their voluntary interactions with whites until they are ready, willing, and able to do so.¹⁴³

Instead of this approach, the Court adopted the perspective of Wasserstrom's social ideal.¹⁴⁴ The Court's *sub rosa* ideal is clearly assimilationist. In the Court's view of an ideal nonracist society, "the race of an individual would be the functional equivalent of the eye color of individuals in our society today. In our society no basic political rights and obligations are determined on the basis of eye color. No important institutional benefits and burdens are connected with eye color."¹⁴⁵

The Court correctly concludes that the current structure of higher education in Mississippi is impermissible, but does not base its conclusion on the fact that African-American colleges are inadequately funded. Instead, the Court's view of the ideal society and its inattention to current social reality leads it to adopt the assimilationist approach it has taken since *Brown* that the appropriate manner in which to eradicate illegal racism is to promote integration. This form of integration requires African-Americans to give up their institutions, and any hope of upgrading their educational systems, in order to participate in the white educational system. Integration in this context means simply adding African-Americans to the previously all-white educational system.

I term the Court's system of assimilation "idealized" because its view of race relations assumes that equality and the ideal society can be achieved simply by causing the races to mix. It ignores the cold reality of historical, statistical, and empirical evidence to the contrary.¹⁴⁶ Furthermore, the system assumes that providing educational opportunity to whites and African-Americans on an equal basis will have the effect of producing a society in which race will be an irrelevant characteristic in awarding educational entitlement. In this "process theory" approach, the substance of the result is virtually ignored and the past becomes irrelevant, even if that past dooms those who are forced to participate in the process to an inferior status.¹⁴⁷

with whites which would make them consciously confront their "difference" when dealing with either other African-Americans or whites.

143. See *infra* notes 159-76, 205-12 and accompanying text.

144. Wasserstrom, *supra* note 7, at 603-04.

145. *Id.* at 604 (footnote omitted).

146. See *supra* notes 24-49 and accompanying text.

147. Another way to understand this approach is to examine it in the context of the affirmative action debate. Those opposed to affirmative action claim that as long as the process that awards the

Equal opportunity means very little for those who are not qualified to take advantage of that opportunity on the terms that it is offered.¹⁴⁸ The Court apparently assumes that as long as there is equal opportunity, which it equates with equal procedures, in Mississippi's educational system of universities and colleges, then the ideal society will ultimately be achieved. In the post-secondary education context, the Court's reasoning is fallacious. If African-Americans are not prepared to compete equally with whites in that process or if they choose not to compete because of the assimilationist nature of the competition,¹⁴⁹ process is exalted over substance and the ideal will never be achieved.

What is interesting and unique about *Fordice* is the role that "choice" played in the Court's decision, and how that decision will affect the "choice" that African-American students in Mississippi will have in the future to attend a post-secondary institution. The Court made much of the fact that unlike elementary and secondary education, one *chooses* to attend a post-secondary educational institution. This element of choice may result in students voluntarily choosing to attend predominantly white or predominantly black institutions of higher education.¹⁵⁰ However, under the guise of integrationism, the Supreme Court removed a choice that African-American students had prior to *Fordice*: the ability to attend a predominantly black college. The only choice now available to African-Americans choosing to attend a public university in Mississippi is to attend a predominantly or historically white institution with its concomitant values. The choice to remain in a nurturing environment is eliminated. This is consistent with the history of integration as a tool to benefit whites, regardless of the harm to African-Americans.¹⁵¹

Throughout, I have attempted to articulate a principled defense for the continued maintenance of separate, predominantly or historically black colleges. However, that is not to say that African-Americans must be compelled to attend these predominantly or historically black colleges. In the ideal society as I picture it, race is recognized as a factor to be prized for the benefits it provides society. At the very least, racial catego-

entitlement, e.g., a seat in law school, is fair and neutral, no action need be taken to assist those who have historically been discriminated against in obtaining the entitlement. In other words, no affirmative assistance need be given to those who were discriminated against. Those supporting affirmative action in this context contend that affirmative action must be used in conjunction with neutral principles in order to remedy the effects of past discriminatory acts. For an in-depth analysis of the issues raised by affirmative action in legal education, see JOHNSON ET AL., *supra* note 31.

148. The Court's approach, although well intentioned, can be faulted because even if it is assumed that integrationism (née assimilationism) is the most appropriate vehicle to achieve racial equality in this society, the Court fails to provide a method of implementation to achieve that state of racial equality.

149. See Jordan, *supra* note 18, at A14.

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

151. See *supra* note 115 and accompanying text.

rizations are tolerated because of the prohibitive societal costs incurred if they are not tolerated.¹⁵² Yet the twin principles of diversity and tolerance must give way, in some degree, to recognition that the mainstream norm and culture in this society is predominantly white. African-Americans may comprise a "nation within a nation,"¹⁵³ but in order for the African-American nation to survive and flourish, it must have positive relations with the larger nation of which it is a component. Until the assimilationist or ideal version of integration is achieved, and as long as they are committed to remaining a part of this society, African-Americans must confront the fact that they will comprise the minority of the society with which they must interact.

The continued minority status of African-Americans necessitates the continued use of integration. It is unrealistic and historically inaccurate to assume that whites will readily integrate themselves into African-American neighborhoods, schools, and jobs.¹⁵⁴ However, the minority status of African-Americans does not necessitate the forced type of integration mandated by *Fordice*. True racial progress can only be achieved when whites acknowledge and are exposed to the cultural norms—the *nomos*—of African-Americans, and vice versa. This process of exposure, what I characterize as the *process* of integration rather than the *ideal* of integration, is important because only after the process of integration has been accomplished can the ideal of integration be achieved.

For African-Americans who are the product of a segregated environment, education provides the cultural and intellectual tools necessary to make the transition from a predominantly African-American environment to a predominantly white environment. The problem with *Fordice* is that it forces the student's transition to take place immediately after high school and forecloses the option she had prior to *Fordice* of instead choosing to enter the mainstream environment after college or during professional school. Prior to *Fordice*, an African-American student who attended, as I did, a high school of 4000 or more students, ninety-nine percent of whom were African-Americans, could choose to attend MVSU or Alcorn State and not have to confront the difficult transition from student to "minority" that occurs when the student attends a predominantly white institution or obtains a job at a predominantly white business.

152. See *infra* notes 201-03 and accompanying text.

153. See *infra* notes 193-95 and accompanying text.

154. The movement by African-Americans into white communities, jobs, and educational institutions with its concomitant embracing of white norms is often decried by African-American nationalists as entailing the loss of what is unique about African-American culture. This Article takes no position on whether or not African-Americans must assimilate the norms of white institutions—with the concomitant loss of African-American norms—in order for the ideal version of integration to be achieved. My thought is that the ideal vision of integration may be achieved without requiring African-Americans to lose their unique cultural heritage and identity.

The transition from person (how one is viewed within the African-American community) to minority (how one is viewed by majoritarian society) is a daunting one that some are never able to complete successfully. Predominantly or historically black colleges provide a safe sanctuary for African-Americans who choose not to confront their minority status at the time of their matriculation into a post-secondary educational institution.¹⁵⁵

1. *You can take the boy out of Princeton, but you can't take Princeton out of the boy.*¹⁵⁶

"Hi, I'm Alex, from Los Angeles, you must be either Lester or Conrad?"

"Lester, I'm from New York, Jamaica Queens to be exact. I haven't seen Conrad, I assume he'll be here. So, tell me, what part of L.A. are you from?"

"L.A., South-Central to be exact. I went to George Washington High. How about you, where'd you go to school?"

"Archbishop Malloy, it's a Catholic school in Queens. I ran track there."

A month has elapsed, by which time Lester and Alex are as thick as thieves. Conrad, their roommate from Hookstown, Pennsylvania is essentially on the outside looking in, as he went to a small high school in a farming community. He has very little in common with either Alex or Lester because he didn't attend a predominantly or historically black high school (as Alex did) or live in a predominantly or historically black neighborhood in the inner city (as both Alex and Lester did).

"I can't get over this. My high school had more students than this. There were 1050 students in my graduating class."

"Yea, well, Archbishop Malloy was much smaller, it was a lot like this. Except we didn't have any women. Man, I was looking forward to coming to college for that reason alone."

"I hear you man, but you know there are only about forty black women in our class and there are at least eighty brothers, not counting the upperclassmen who'll be vying for the sisters."

"Why limit yourself to sisters? There's a big world out there brother and right now, we're happening. I saw that chick in Politics scoping you, you know the one that sits in front of you. Go for it."

"Ah man I can't do that, that would be disrespecting the sisters. I

155. Similarly, African-American students who attended predominantly white secondary educational institutions may choose to attend predominantly African-American colleges to escape the pressures they felt as minorities at white high schools.

156. I heard James "Jimmy" Stewart, Princeton, Class of 1932, see 2 WHO'S WHO IN AMERICA 3239 (47th ed. 1992), make this statement to the Triangle Club, the campus drama group at Princeton, on one of his return trips to Princeton.

don't want to get *that* reputation. Plus, I have to tell you man, I have never even talked to a white girl in my life. I wouldn't know what to do."

"What you talking about, didn't you have white girls in your high school?"

"Naw man, I told you my school had 4000 students and only five of them were white, they were guys, and they were cooler than I was 'cause they had to be in order to survive in that place."

"Yea, I hear you, and that's deep man. Where I went to school, I was a novelty. White girls from our sister school wanted to go out with me to prove how liberal they are. I didn't mind."

"Well that scene ain't for me. I can't hang. That's why I didn't go to that beer blast at the eating club last week. I heard that brothers don't go to eating clubs—too white. Instead I went over to the Third World Center and hung out with some people visiting from Rutgers and Trenton State."

Three weeks have elapsed and it is two days before midterms begin.

"Alex, why aren't you studying? You haven't picked up a book yet. We've got midterms starting in two days. Get your act together."

"What are you talking about, I'm ready. I went to the classes and read the material when it was assigned. That's what I did in high school and I did OK there."

"Well, this isn't high school. Haven't you noticed a big difference during the class discussions? These people are sharp. There are no dopes here like in high school. When you talk in class, don't you feel like you're not the smartest person in the class, like you were in high school?"

"Ah man, I don't speak in class any more. I never raise my hand and if they call on me I just say I don't know."

"What are you talking about—don't you know participating in class is important? That's part of your grade."

"I tried, but it was too embarrassing. I felt like everyone was looking at me, you know I was the only black in the discussion group. Then I really screwed up one day, I made the mistake of trying to use a word that I knew the meaning of but I had never heard. I think it was exacerbate. I pronounced it exacer-bate, man they laughed at me. I knew what it meant and I used it correctly, it's just that no one in my family or in my school used that type of word. How the hell was I supposed to know how to pronounce it? After that I said forget it, I'm not going to subject myself to that crap again."

"Yea, I hear you. But you still have to study, man those essay questions can be tough."

"Yea, I meant to ask you about that Lester. How do you approach essay questions? I never had one in high school. All my tests were true/false or multiple choice. I never had to write an essay question in my life.

Don't even talk to me about writing a paper—which I'm supposed to do for the English Lit. course. I'll take care of that when I get to it."

"Did you go see that tutor at the Third World Center, you know the one who was going to go over the old exams with you?"

"No, I didn't have time. You know I had to work the grill at the Student Union last night to make enough money to fly home over Christmas. You're lucky that you only have to catch a bus to get to New York."

"Well, that may be true, but at least you get to go to California."

"Anyway, I guess I'll just take my chances with the exam. After all, how bad could it be? I was seventh in my class in high school, and I never had to do anything special to get those grades. It can't be that different, can it?"

Two weeks later.

"So man, how'd you do?"

"Lester man, I can't believe it. This is the first F I got in my life and I got three of them. My best grade is a D in Sociology. Man, I'm gonna flunk out. How embarrassing. My family and the people in the neighborhood are going to trip out. I hope you did better than I did, I know how badly you want to go to med school."

"Well Organic Chemistry kicked my ass—I got a D+—but I'm doing OK in everything else. Mostly Bs. I just have to work harder in Organic Chemistry. But it's cool, almost everyone in the class got a C or below. I think that's the way the class works. It works you to death and scares you to death to see if you have what it takes to become a doctor. The main thing is getting you situated and straight. We can't have you pulling those types of grades. Let me see those exam answers. Is that it? Where's the rest of it?"

"What are you talking about? That's it. They asked questions and I answered them. Here, look at this one from Sociology. I was sure it had something to do with Weber's theory of hierarchical organization and that's what I said: 'Weber's theory of hierarchical organizational structures provides the answer.' I looked it up and that's right. I can't understand why I only got ten of fifty points for that question."

"Well its obvious. You can't simply state the answer. You have to explain why it's the answer and tailor the answer to fit the facts of the question. Look at my answer. Here I start by stating the precise issue presented by the question. Then I discuss the alternative approaches one can take to answer the question. I pick one and explain why it's the correct or most appropriate one given the circumstances. Finally, I discuss the implications of my choice and how it leads to the right result. You see, basically I have not only answered but defended and explained my answer to the question."

"Well, shit. Nobody ever told me that. This is basically bullshit.

Giving the instructor a bunch of crap back that she already knows in a fancy package to make her realize that you were there, listened to the party line, and now agree to the crap they've been giving us in the class."

"Yea, that's it, you got it man."

Seven months later, Alex is home in L.A. visiting his best friend, Fred, after *successfully* completing his first year at Princeton.

"What's happening, Fred? How you been man?"

"Cool, how was school? What's it like living in the Big Apple? It must be great. Hey isn't that where they filmed Shaft and Superfly? Oh man, I dug those flicks."

"No, I wasn't living in New York. I mean, I visited with my roommate Lester, who's from Queens, but Princeton, the university that I attend, is in Princeton, New Jersey."

"Oh, I gottcha. But still, man how are the honeys, it must be righteous to be in school with all those chicks."

"It was alright. Actually, there weren't that many black women on campus. Most of the time, we spent the weekend either studying or visiting other schools checking out the other schools. I met some nice people, made some good friends, but it is very good to be home. How are things with you, you still going out with Terry?"

"Yea, we're still going together, but as far as I'm concerned it ain't gonna be an exclusive thing for very long. Ever since we had the baby, man, she hasn't been spending enough time with me. So I been checking out the other ladies. Hey, hey, plenty more where that came from. You down with that?"

"Not really man. I met this woman at Princeton and we're pretty tight. Who knows, some day I may even marry her. I got her picture, you want to see it?"

"Yea sure. Man are you crazy, that ho's white, no disrespect meant brother."

"None taken. But that's what's good about being in college meeting different people, experiencing different things. I love it."

"Yea, right. I'm going to the store to get a 40 or a short dog of wine. You gone hang?"

"No, I don't want anything to drink; I've got to go; I've got a job interview for a job this summer downtown. It's some Princeton grad, class of '38 who likes to assuage his conscience by hiring black Princeton undergrads for summer jobs in his law firm as stockboys or putting them in the mailroom. It doesn't sound like a lot of fun, but it pays very well."

"Yea, well I ain't into that forty hour thang, but if you wit it, that's fine by me. Look man, I gotta split. Places to go, people to see. It's good catching up with you and all but you've changed my man. I don't think we gonna be doing too much hanging this summer. Half the time I can't even understand you. You don't have to impress me throwing

those big words around. I know you a college boy and I proud of you. One of the homeys is going to make it."

"What are you talking about? I haven't changed, I'm still the same old A.J., the guy you've known since junior high school."

Frankly, I do not know if you can take Princeton out of the boy, but I do know that some of Princeton became part of the boy, and that acculturation was not an easy, painless process. In the transition from my neighborhood and my high school to the rarefied atmosphere of Princeton University, I faced innumerable challenges. I had to adjust not only to being away from home for the first time in my life, but, more importantly, to being a minority, with all the positive and negative consequences that flowed from that characterization. Before I widen the horizon to address the negative consequences that result from being an African-American at a predominantly white institution, I'll close my personal history by noting that the transition from the inner city to Princeton was not totally successful. In 1973, following completion of my sophomore year, I transferred to Claremont Men's College, a small private school in Southern California, in part so that I could live at home, in my community, where I felt more comfortable, while completing my undergraduate degree.

2. *The Hidden Costs Generated by Integrating College Campuses*

I start with the assumption that the continued popularity of predominantly or historically black colleges proves that they are providing a valuable service to our society. Their popularity persists despite an environment in which funding is problematic and in which African-Americans have the opportunity to matriculate, for example, at either Morehouse College or the University of Georgia.¹⁵⁷ The colleges fill a unique niche in our educational system and thus should be maintained.

The cost of *Fordice*, which eliminates choice for African-American students, is difficult to quantify. It is best measured in two interrelated ways: first, by examining the personal costs that will be incurred by African-Americans forced to attend predominantly white colleges in lieu of black colleges; second, by examining what integration costs the African-American community and majoritarian society. Most African-Americans who choose to attend predominantly white institutions of higher education are making an important choice. They are subjecting themselves to alien institutions in which their minority status puts them at a degree of risk not faced by white students.¹⁵⁸ The resulting dynamic

157. *United States v. Fordice*, 112 S. Ct. 2727, 2736 (1992) ("[A] student's decision to seek higher education has been a matter of choice.").

158. I say "most" because some African-Americans, especially those whom I have characterized as integrationist, may not experience the same hostile or alien environment when they attend a predominantly white institution. These African-American students are fortunate in the

significantly impacts them, the community from which they come, and the community into which they are being integrated.

The personal costs incurred by African-Americans are caused by the loss of choice provided to African-American students who have, to that point, been "sheltered" in the African-American community. The students are forced into a hostile environment whether they are ready for it or not.¹⁵⁹ This hostile environment has a detrimental effect on African-American students' performance at college.

The racial dynamic—arising out of occasional blatant racism, recurrent subtle remarks or unconscious behavior, and an ever-present white norm that is the foundation of institutional racism—conspires to create a cognizable injury to black students in predominantly white schools. It alters students' conditions of education just as courts have recognized racial harassment on the job alters conditions of employment. Racism adds to the stress and anxiety that diminish any person's ability and desire to excel in an academic environment, especially one leading to a professional world known to contain further racial roadblocks to career advancement and hospitable working conditions. The racial dynamic to which black students are subjected at predominantly white colleges contributes to stress that has a detrimental effect on personal well-being as well as academic performance.¹⁶⁰

sense that the predominantly white college campus poses no threat or challenge to them or their identity, oftentimes because they grew up and went to school in an "integrated," predominantly white environment. For example, consider STEPHEN L. CARTER, REFLECTIONS OF AN AFFIRMATIVE ACTION BABY 47-48 (1991), reviewing his own high school days:

My father taught at Cornell, which made me a Cornell kid, a "fac-brat," and I hung out with a bunch of white Cornell kids in a private little world where we competed fiercely (but only with one another—no one else mattered!) for grades and test scores and solutions to brain teasers. We were the sort of kids other kids hated: the ones who would run around compiling lists of everyone else's test scores and would badger guidance counselors into admitting their errors in arithmetic (no computers then) in order to raise our class ranks a few notches. . . . (No one had yet told me that standardized tests were culturally biased against me.) Like the rest of the fac-brats, I yearned for the sobriquet "brilliant," and tried desperately to convince myself and everyone else who would listen that I had the grades and test scores to deserve it.

Of course, these integrationist African-Americans are not the ones harmed by *Fordice*—it is nationalist and desegregationist African-Americans who bear the burden most heavily. By "nationalist," I mean those who want very little to do with whites. I use the term "desegregationist" to refer to those African-Americans who "identify" with other African-Americans, yet feel comfortable interacting with whites.

159. The hostility, or at least puzzlement, one hears among many white students toward distinctly black cultural centers, student groups, and social events arises from white students' lack of recognition that the overwhelmingly white campuses themselves are in some sense large white cultural centers—ones in which black students are likely to have difficulty feeling at home. Thus, white students' assertions that they only want all people treated the same, without the separatism of institutions such as black cultural centers, are often experienced by minority students as demands that they assimilate into white-dominated institutions and culture. That white norm extends even into the classroom.

Darryl Brown, Note, *Racism and Race Relations in the University*, 76 VA. L. REV. 295, 315 (1990).

160. *Id.* at 324-25 (footnotes omitted).

Those not ready for immersion into that hostile environment in which overt¹⁶¹ and covert¹⁶² racist acts become a daily part of their educational experience may choose not to go to college:

Tamla Moore, an MVSU sophomore, lives at home with her unemployed parents. Asked whether she would attend a white college if MVSU closes, she said, "I just got out of high school, and I don't want to go through all that racial tension again. . . ."

Moore recalled with relief that, at MVSU, she does not face incidents such as the time a white student smeared what looked like blood on his face and told their high school principal that blacks had beaten him.¹⁶³

In light of accounts like these, is it any mystery that many African-Americans choose to attend predominantly or historically black colleges, even though these schools have allegedly "inferior" facilities and are underfunded, when the alternative is to attend an institution in which learning takes place in a hostile environment? The only mystery is why any African-American would choose to attend a predominantly white college when a predominantly or historically black college is available.

Beyond individual costs, *Fordice* imposes costs on both the African-American community and majoritarian society. *Fordice* forces all African-Americans—nationalists, integrationists, and desegregationists alike—into an environment in which only integrationists may be ready

161. The reports of racist incidents on college campuses recur continually in the popular press. The National Institute Against Prejudice and Violence collected reports of seventy-eight incidents of racial violence or allegations of prejudice that occurred in the spring semester of 1988 alone, and that did not purport to be a comprehensive survey. The recurrence of old-fashioned intentional racism on campuses is the most obvious form of hostility, and a sampling demonstrates the ferocity of some such incidents, which have variously involved: graffiti containing swastikas and antiblack epithets; cross-burning; the protesting of an all-white fraternity's "White History Week" party; the shouting of racial slurs; the distribution of openly hostile leaflets; racial brawls; and black student class boycotts and protests. The comprehensive list of such incidents is much longer, and that list does not include unreported incidents, which may well be the majority.

Id. at 315-16 (footnotes omitted).

162. The phenomenology of black students' experience with racism on white campuses leaves no doubt of the existence and effect of subtle (or unconscious) racism. One does not have to talk to many black college students before hearing stories about some suspicious official asking them to show ID's at the entrance of their own campus buildings because he suspected they did not belong there; of white students moving to a new seat when a black classmate sat too close; of black students rarely being invited to join study groups with whites; of white fraternity members handing out invitations on a campus sidewalk but not offering them to minority students. Despite formal equality and race neutrality in institutional policy as well as law, American universities are still infested with myriad, recurrent reminders of racism.

Id. at 317-18 (footnotes omitted); see also Andrea Stone & John Larrabee, *Racism Taints Universities' Hallowed Halls*, USA TODAY, Nov. 9, 1992, at 6A ("One in four black, Hispanic, Asian or Native American college students experiences slurs, harassment or assault each year, says Adele Terrell, whose National Institute Against Prejudice and Violence surveyed more than 30 campuses.").

163. Jordan, *supra* note 18, at A14.

and capable of competing.¹⁶⁴ More importantly, it forces desegregationist African-Americans, who envision their successful integration into mainstream white culture at some point in their lives, to make college their point of integration irrespective of their desires. Finally, it forces those nationalists who would choose not to integrate to forgo their nationalist philosophy or forgo publicly financed higher education.

This "cost" is directly related to the fact that, although integration as a process leads to the admission of African-Americans to formerly all-white institutions, integration as an ideal has failed to eliminate inequalities and racism. The integration ideal will continue to fail because predominantly white colleges mask norms that create an environment in which African-Americans are considered "them" or the "other."

[M]any white[] [students] tend to think that racism has largely disappeared, at least in any form that could serve as an impediment to opportunity and achievement. White students have a very hard time understanding how their predominantly white campuses can seem hostile to people of color; how their campus social life is a distinctly "white culture," even when the major institutions within it are not explicitly labeled the "white student union," "white student newspaper," or "white debating club." It does not occur to most white students that their indifference or hostility to the Martin Luther King national holiday, for example, is evidence of attitudes on racial issues that differ tremendously from their black colleagues. It does not occur to most white students that the major, campus-sponsored concerts of white music groups constitute distinctly *white* cultural events.¹⁶⁵

In other words, it does not occur to white students that there is a unique African-American *nomos* worthy of their respect.

C. *Tonk and Bid Whist*

The popular card games of Bid Whist and Tonk are African-American versions of the card games Bridge and Poker, respectively. Indeed, some will no doubt argue that Tonk and Bid Whist are mere derivations of Bridge and Poker, perhaps the two most preeminent card games in America. What is revealing is that African-Americans continue to play card games (Tonk and Bid Whist) that are strikingly similar to Bridge and Poker in most respects, but remarkably different in others,

164. While one might make the argument that integrationist African-Americans are also detrimentally affected by *Fordice*, at least to the extent that they are foreclosed from experiencing the *nomos* of the African-American community as expressed in predominantly black colleges, the likelihood that this putative injury rivals that imposed on nationalist and desegregationist African-Americans is remote and far-fetched.

165. Brown, *supra* note 159, at 314-15 (footnote omitted).

while continuing to play Bridge and Poker.¹⁶⁶

As a student or a faculty member, I have had intimate contacts with African-American students at eight post-secondary institutions. None of these institutions are predominantly or historically African-American, but each of them has a discrete, identifiable minority population.¹⁶⁷ The one universal characteristic of each institution's African-American population was that the African-American students played Bid Whist and Tonk. Indeed, recalling my undergraduate days at Princeton, Bid Whist served as the major social event and recreational activity at the Third World Center at which minority students congregated.

Bid Whist served as an ice-breaker or entree into the social community that gathered at institutions such as the Third World Center on various campuses on the East Coast. As a member of an African-American drama group during my sophomore year at Princeton, I had occasion to travel to numerous other colleges at which we performed. What I remember so vividly about that time of my life were the numerous Bid Whist games played at these foreign institutions before and after the performances. New acquaintances and friendships were established through these card games. (A lot can be learned about the character of an individual across a card table.) Moreover, it was not uncommon to receive flyers from African-Americans at other predominantly white institutions inviting students (whom I presume were African-Americans, although they were not designated as such) to play in upcoming Bid Whist "tournaments" at the host school.

Furthermore, these two card games, especially Bid Whist, served as a great social segregator among African-Americans. At the time I went to college (1971-75), African-American students could be divided roughly into three categories: (1) nationalists who wanted very little to do with white students; (2) desegregationists, who clearly "identified" with the African-American community, but also felt comfortable interacting with white students; and (3) assimilationists, those African-American students who did not "identify" with other African-Americans and made a conscious choice not to interact with other African-Americans, in favor of socializing exclusively with whites.¹⁶⁸

166. One of the nation's leading Bridge players is Second Circuit Court of Appeals Judge Amalya Kearse, an African-American. This fact was relayed to me by my former colleague Lynn Baker, a former Kearse clerk.

167. In chronological order the schools are the following: Princeton University, Claremont McKenna College, U.C.L.A. Law School, the University of Minnesota School of Law, the University of Virginia School of Law, the University of Texas School of Law, Washington University School of Law (St. Louis), and Stanford Law School.

168. Throughout the Article, I have referred to the doctrine of integration and the philosophy of integrationism. However, in my tripartite definition of African-American students who attended colleges in 1971-75, I have characterized these students as "nationalists," "desegregationists," and lastly, "assimilationists." I have not characterized any of these students as "integrationists" because I believe that the concept of integration and integrationism means different things for those applying

"Identifying" with the African-American community is a term of art which requires some explanation. "Identifying" does not mean identifying oneself as an African-American to whites and other African-Americans. To the contrary, the first part of "identifying" is the visual identification and recognition of an individual as an African-American.¹⁶⁹ The second and much more difficult part of "identifying" is dependent upon whether an individual who is visibly African-American under the rule of recognition, or who acknowledges her African-American heritage under the rule of descent,¹⁷⁰ chooses to acknowledge this status by acknowledging the presence—and thus the shared subordinated experience—of other African-Americans. It is as simple as one African-American saying hello to another African-American as they pass each other on a predominantly white campus, even though they may never have seen each other before, and even though neither would do the same—that is, say hello—if the other party was not an African-American.

Another aspect of "identifying" that deserves mention is its transcendence of class lines. For example, it was common to see upper-middle class African-American students speak to and acknowledge the presence of an African-American janitor at Princeton. From that simple gesture of acknowledging another African-American's presence, a gesture that takes place in a myriad number of ways millions of times a day, one African-American can determine whether another African-American is willing to talk to or be seen with other African-Americans.

Tonk and Bid Whist were frequently used as methods to demarcate nationalists and desegregationists, who "identify," from assimilationists, who may not. This is not to say that every African-American student who fell into the first two categories knew how to play Tonk and Bid Whist,¹⁷¹ but a significant percentage of the African-American students who were nationalists or desegregationists played both games. Of course, it is probably also true that a fair number of assimilationist students could play Tonk or Bid Whist and had encountered these two games at

the definition in majoritarian culture and those on whom it is applied. Thus, it is my contention that many majoritarian integrationists actually propose a method of integration which favors and produces "assimilationist" African-American students. In contrast, I contend that in an ideal society, African-American students who are "desegregationists" will or should be the norm.

169. For an in-depth discussion of the phenomenon of "passing," see Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1710-14 (1993). Although it is possible that certain African-Americans may "pass" as white, under the rule of recognition, the overwhelming majority of African-Americans are easily identifiable as African-Americans: "Any person whose Black-African ancestry is visible is Black." See Gotanda, *supra* note 85, at 24.

170. The rule of descent: "Any person with a known trace of African ancestry is Black, notwithstanding that person's visual appearance . . ." *Id.*

171. As a matter of fact, my college roommate who attended a predominantly white Catholic high school in New York City had no idea about how to play either game. However, after learning how to play Bid Whist, he became an exceptional player.

some point in their lives. However, if they were familiar with these uniquely African-American card games, they typically refused to play them with other African-Americans.

My point is simply this: now that the reader has some familiarity with the significance of Tonk and Bid Whist in, at least, the African-American college community, the obvious question is why is there a need for such African-Americanized versions of card games given the existence and popularity of their counterparts, Poker and Bridge? Furthermore, why is it that Tonk and Bid Whist serve the unique identifying and uniting roles that I have addressed above?

The continued existence and use of Tonk and Bid Whist to separate nationalists and desegregationists, on one hand, from assimilationists, on the other hand, illustrates the necessity and continued use of predominantly or historically black colleges. Nationalists would naturally rather play Tonk and Bid Whist, games associated with and unique to the African-American community, than any type of card game that is associated with mainstream white culture, which they explicitly reject.¹⁷² Desegregationists would continue to play Tonk and Bid Whist with other African-Americans for a lot of different reasons, including the fact that, having learned these unique games and having an audience comprised of people who also know how to play these games (i.e., nationalists and other desegregationists), it is easier to continue to play Bid Whist and Tonk even if some or most African-Americans also know how to play Poker and Bridge.

Assimilationists, on the other hand, would refuse to play or even learn how to play, because Tonk and Bid Whist represent something to which they philosophically object: the existence of a separate and unique African-American community that stands apart from the mainstream culture or community. For the assimilationist African-American, Poker or Bridge serves as a vehicle to integrate society because those games are played not solely with other African-Americans but primarily with whites. The assimilationist African-American would meet and compete with the whites on their terms, with their games, and under their rules.

There is, however, a more compelling and substantive reason why nationalists and desegregationists continue to play these unique games while assimilationists refuse to do so. Tonk and Bid Whist continue to be played because they symbolize African-Americans' unique and subordinated status in this society. The games neatly capture the position of African-Americans in today's society, potentially on the precipice of true integration. Like many other social institutions found in the African-American community, Bid Whist and Tonk mirror, to a large

172. See Peller, *supra* note 83, at 795-802 (discussing the reasons why nationalists rejected integration of public schools).

extent, their counterpart institutions in white society. There is no question that such white counterpart institutions served as models for their original African-American analogues. However, due to the historically segregated nature of American society, African-American institutions developed and evolved separately over time. They maintained their necessary elements, discarded unnecessary elements, and, most importantly, added those elements that make the institutions successful in the African-American community.¹⁷³ Tonk and Bid Whist are no doubt like this—derived from card games played by whites but subtly changed to make the game more attractive to African-Americans.¹⁷⁴

Bid Whist and Tonk, like many other African-American institutions, are maintained because they are ours: they provide us with a safe harbor for the preservation of the idiopathic rules, customs, and norms that developed in our community while we were kept separate from whites by law. This safe harbor also allows those who choose not to fully embrace the norms of white society to retain a place in an African-American community in which confrontation between African-American norms and conflicting white norms never takes place. Moreover, this safe harbor protects African-American culture, because when the assimilationist version of integration occurs African-American culture is typically not merged into majoritarian culture but obliterated by it—leaving no trace of what was once a unique cultural vehicle.

This cultural destruction explains why nationalists choose to play Tonk and Bid Whist: the games do not require the sublimation or supplantation of African-American values by those of the mainstream white community. Desegregationists continue to play Bid Whist and Tonk for two reasons. First, Bid Whist and Tonk serve as important learning tools whose lessons will be utilized by the African-American when interaction with the dominant white community is desired. For example, the similarities between these African-American games and Poker and Bridge allow the African-American to easily take up those white counterparts if

173. In this respect, these two card games, Tonk and Bid Whist, have followed the development and achieved the unique status of African-American churches with their emotional preaching style and the extensive use of spirituals. In other words, although the origins of both the African-American churches and card games may be traced to majoritarian models, these derivations are now imbued with unique attributes reflective of their community.

174. Tonk, for example, is largely a game of luck in which the player's strategy plays a smaller role than it does in Poker. Also, given the small amount of money involved in each hand, Tonk is accessible to all African-Americans and not simply those with substantial resources, as is rarely the case in Poker. Tonk is not structured as a progressive gambling game in which the "pot" to be won may vary significantly in any given game. Similarly, because Bid Whist is relatively simple compared to Bridge, almost everyone in the African-American community who chooses to play, can play. Moreover, most Bid Whist is played under so-called "rise and fly" rules, meaning that the team losing one hand has to rise and fly (leave the table) so that the next team can sit down and challenge the winners. This allows for a very fast turnover on the tables so that the interaction among the teams is quite good. In these respects, the game is more social and less competitive than Bridge.

and when she *chooses* to do so. Second and more importantly, desegregationists continue to play Tonk and Bid Whist—both before entering the white community and after their “successful integration” into that larger community—because Tonk and Bid Whist represent their heritage and are constitutive of their basic identity.

Cultural membership affects our very sense of personal identity and capacity.

The connection between personal identity and cultural membership is suggested by a number of considerations. Sociologists of language note that our language is not just a neutral medium for identifying the content of certain activities, but “itself is content, a reference for loyalties and animosities,” a “marker of the societal goals, the large-scale value-laden arenas of interaction that typify every speech community.” . . . Likewise cultural heritage, the sense of belonging to a cultural structure and history, is often cited as a source of emotional security and personal strength. It may affect our very sense of agency. This has been recognized not only by sociologists, but also by the leaders of racist and oppressive regimes around the world, who have tried to destroy and degrade the cultural heritage of the people they oppress in order to undermine their sense of personal efficacy.¹⁷⁵

In order to integrate properly into society, African-Americans, like other ethnic groups, must proceed on their own terms from a position of strength and solidarity. The African-American community and the dominant white community cannot become one through forced integration, because that process reflects no choice and has the effect of locking African-Americans into inferior positions in society. Indeed, if anything is to be learned from this country’s history, it is that people truly become a part of America’s melting pot only when they enter the mix voluntarily, from a position of strength rather than from a position of weakness.

What separates this view of integration, which is premised on diversity and tolerance,¹⁷⁶ from segregationism, which is premised on racial domination and superiority, is that it looks forward to a time when people will attain the idealized state of one community. Its goal is positive, but it recognizes that the ideal vision of integration cannot be mandated by either legislative or judicial fiat. This vision of integrationism is different from the brand of integrationism embodied by *Fordice*. It rejects assimilationism and argues that integration is not a cultural one-way street in which African-Americans must absorb white norms in order to be assimilated into American society. Rather, when integration does

175. KYMLICKA, *supra* note 126, at 175 (quoting JOSHUA A. FISHMAN, *THE SOCIOLOGY OF LANGUAGE* 4 (1972)) (citation omitted).

176. See *infra* notes 193-204 and accompanying text.

occur, African-Americans should have as much influence on whites as whites have on African-Americans.

The assimilationist version of integrationism, premised on traditional liberalism, presupposes a homogenous community in which all the members of society inhabit one cultural community. However, the continued existence of Tonk and Bid Whist demonstrate that African-Americans have developed their own community with norms that must be respected and internalized in the larger pluralistic society. The problem with *Fordice* is that, in its quest for equality through an assimilationist version of integration, it does not respect this separate culture. It forces African-Americans to abandon Tonk and Bid Whist in favor of Poker and Bridge.

D. Defending the Integrity of the African-American Community Under Liberalism

This Section presents a philosophical basis for supporting the continued existence of predominantly or historically black colleges while remaining true to the fundamental tenets of liberalism.¹⁷⁷ To develop this basis, I will first summarize arguments made by Will Kymlicka. These arguments are then used to support the contention that the existence and protection of separate minority cultures and communities are not incompatible with the notion of liberalism.

Kymlicka's basic argument is that because cultural membership is an important right or "primary good," when African-Americans demand special rights (here, the right to attend predominantly or historically black colleges), they are merely seeking the respect they believe is owed them as members of their cultural community.¹⁷⁸ This request for special rights can be said to violate the postulate of equality¹⁷⁹ because by definition it creates costs for other people whose rights and resources are restricted.

Kymlicka correctly points out, however, that differences which arise as a result of a person's circumstance (her social environment or natural endowments such as skin color) are not chosen.¹⁸⁰ Using Rawlsian ter-

177. Certain assumptions are made in order to address the central issue presented by this Section. Thus, I assume, as stated elsewhere, the existence of a separate African-American community which has its own unique *nomos* and cultural practices. See *supra* notes 51-58 and accompanying text. Furthermore, I assume that this *nomos* and these unique cultural practices are worthy of continued protection through the maintenance of community-enrolled institutions such as predominantly or historically black colleges that cater to their unique needs. See *supra* notes 59-86 and accompanying text. Once these assumptions are made, however, a problem is created for those who support liberalism and the notion of equality that is represented by the assimilationist version of integrationism.

178. KYMLICKA, *supra* note 126, at 183-84.

179. See *supra* notes 116-21 and accompanying text.

180. KYMLICKA, *supra* note 126, at 186.

minology, such differences of circumstance are morally arbitrary.¹⁸¹ Liberalism and liberals support compensating individuals "who suffer from disadvantages in social environment or natural endowment."¹⁸² Consequently, if the request made by African-Americans for continued maintenance and operation of predominantly or historically black colleges is grounded in unequal circumstances rather than in the desire for greater choices than afforded other groups, African-Americans have "a legitimate claim to special public subsidy, since [they are] not responsible for the costs of [their] disadvantageous circumstances."¹⁸³

Critics may reply to the claim that African-Americans are entitled to public financial support of predominantly or historically black colleges by noting that African-Americans are free to support private colleges, such as Morehouse College, with their own funds. If predominantly or historically black colleges are so important to African-Americans, they can vote with their pocketbooks and not impose any costs on society.¹⁸⁴ However, once the existence of a separate African-American cultural community created by social subordination is recognized, publicly supported African-American colleges can be defended as a response to the unequal circumstances that created the separate community rather than as a product of mere choice or shared choices.

The existence of predominantly or historically black colleges like Jackson State and Mississippi Valley State University is extremely vulnerable—as made evident by the *Fordice* opinion—to the decisions of the majority community. African-Americans residing and voting in Mississippi are outvoted by conservative whites¹⁸⁵ and therefore lack control over the distribution of resources (tax dollars) crucial to their survival. Whites, on the other hand, do not have to worry about whether the continued existence of their institutions will be vulnerable to the strength of a dominant majority. "As a result, [African-Americans] have to spend their resources on securing the cultural membership which makes sense of their lives, something which [white] people get for free. And this is true regardless of the costs of the particular choices [African-American] or [white] individuals make."¹⁸⁶

181. See RAWLS, *supra* note 116, at 75-102.

182. KYMLICKA, *supra* note 126, at 186.

183. *Id.*

184. Or, as Kymlicka states, "The existence of special political rights would mean that they don't have to pay for the costs of their desires, or base their decision of what life they should lead on considerations of its cost to others." *Id.* at 187.

185. This is demonstrated by the election of conservative, intolerant individuals like Governor Fordice, who has publicly declared that America is a "Christian nation." Thomas B. Edsall, *GOP Unity Session Ends in Discord: Mississippi Gov. Fordice Insists the U.S. 'Is a Christian Nation,'* WASH. POST, Nov. 18, 1992, at A1.

186. KYMLICKA, *supra* note 126, at 187.

Contrast that with a case that is at once more fanciful and more realistic. Two ships, one very large and one quite small, shipwreck on the island, and to ensure a smooth

This unbalanced state of affairs creates a dilemma for African-Americans who wish to maintain their unique cultural identity and community. African-American students who wish to attend predominantly or historically black colleges resent the fact that white students possess and utilize their own educational resources, free of any challenge, while African-American students must necessarily rely on the largess provided by that same dominant white majority. If predominantly or historically black colleges are not publicly subsidized, African-American students who choose to live and work in their own culture must expend some of their own limited resources to do so. African-Americans must incur this additional cost in order to secure the existence of their cultural community. This is a cost which the members of the majority culture do not incur, but which in no way reflects different choices about the good life or about the importance of cultural membership within it. As Kymlicka states:

In other words, rather than subsidizing or privileging their choices, the special measures demanded by [African-Americans] serve to correct an advantage that [white] people have before anyone makes their [sic] choices. For the whites who wish to bid for resources . . . the security of *their* cultural community is not in question. They are bidding solely on the basis of what is useful in pursuing the goals that they have chosen to pursue, secure in the knowledge that their context of choice is protected. For [African-Americans], on the other hand, it is necessary to outbid [white] people just to ensure that their cultural structure survives, leaving them few resources to pursue the particular goals they've chosen from within that structure.¹⁸⁷

Seen in this light, *Fordice* mandates that African-Americans pay for what whites get for free: secure cultural membership in their educational institutions. Special political rights, like the maintenance of predominantly or historically black colleges, correct the inequality and injustice that arise before people even make choices about their lifestyle. These

auction, they proceed by entering bids into the ships' computers without ever leaving the ship (information about the nature of the resources was perhaps readily available in publications, or was gathered by a scouting party from one ship and communicated via the computer). The auction proceeds and it turns out that the passengers of the two ships are very similar in the distribution of different ways of life chosen—e.g. roughly 10 per cent from each ship bid for those resources that suit a contemplative life-style, 20 per cent bid for resources that suit an entrepreneurial life-style, and so on. Finally the resources are all bid for, but when they disembark from the ship they discover for the first time, what had been obscured by the use of a common computer language, that the two ships are of different nationalities. The members of the minority culture are now in a very undesirable position. Assuming, as is reasonable, that their resources are distributed evenly across the island, they will now be forced to try to execute their chosen life-styles in an alien culture—e.g. in their work, and, when the state superstructure is built, in the courts, *schools*, legislatures, etc.

Id. at 188 (emphasis added).

187. *Id.* at 189.

special rights are incompatible with liberalism. Liberalism seeks to guarantee that individuals are not penalized or disadvantaged because of their natural or social endowment and that the fate of individuals rests with their own voluntary choices about how to lead their lives.¹⁸⁸

[I]t must be recognized that [African-Americans] can face inequalities which are the product of their circumstances or endowment, not their choices or ambitions. And since this inequality would remain even if individual members of [the African-American community] no longer suffered from any deprivation of material resources, temporary affirmative action programmes are not sufficient to ensure genuine equality. Collective rights may be needed.¹⁸⁹

These collective rights must be sufficient to override decisions of the majority that have the effect of undermining the existence of the African-American community. Moreover, the costs of maintaining the cultural community should not be borne by individual members.¹⁹⁰ Maintenance of predominantly or historically black colleges is a collective right which can be justified "as [an] appropriate measure[] for the rectification of an inequality in circumstances which affects [African-Americans] collectively."¹⁹¹

III

SITUATING *FORDICE* IN THE IDEAL SOCIETY

Fordice symbolizes the reasoning of a long line of cases, beginning with *Brown v. Board of Education*, in which the Court has sought to achieve the social ideal with very little recognition of social reality. At the time of *Brown*, such an approach may have been justified given the novelty of the issue at that point in the development of American jurisprudence.¹⁹² However, that approach is completely unjustified now,

188. See Ronald Dworkin, *What is Equality? Part II: Equality of Resources*, 10 PHIL. & PUB. AFF. 283, 311 (1981).

189. KYMLICKA, *supra* note 126, at 190 (footnote omitted).

190. *Id.* at 192.

191. *Id.* at 194. This leads to the following conclusion:

People should have, as part of the respect owed them as members of a cultural community, the opportunity to have a public education in the language of their community; but whether they have the opportunity to have a publicly funded education in another language is perhaps a matter of policy (just as subsidizing cultural exchanges is), with people neither having a right to it nor a right to prevent it.

Id. at 195.

192. Compare, however, Wasserstrom's view that even in its own time, *Brown* was fundamentally flawed because its remedial component sacrificed the interests of African-American students for those of white students. *Brown* mandated that the African-American students remain in inferior educational institutions until whites were ready to accept them instead of strengthening these inferior educational institutions in the interim or requiring whites to attend the inferior institutions. Wasserstrom argues that this remedy represented a form of institutional racism that

given that *Brown* and opinions like it have failed to alter the existing social reality.

As an alternative, I propose my vision of the ideal society, in which racial and cultural diversity are valued as products of our past society and tolerated and respected in our dealings in present society. The ideal version of integration, nonassimilationist and truly integrative of pluralistic cultural practices and norms, may be achieved in future society by treating racial and cultural differences based on race as meriting the same sort of treatment that religious differences receive in our society. I posit a transitory stage in race relations in which differences are recognized in order for true integration to take place. This transitory stage supports the continued use and equal funding of predominantly or historically black colleges as institutions in which cultural differences are viewed as strengths and not weaknesses.

I also anticipate possible objections to my defense of historically black colleges by rejecting the claim that such a defense legitimates the existence of all or predominantly white colleges from which African-Americans are principally or totally excluded.

Finally, I question the notion that the remedy mandated by *Fordice*—essentially forcing African-Americans to attend predominantly white schools—is truly illustrative of any notion of integration. *Fordice* mandates coercive assimilation. Predominantly white colleges are not “neutral” environments in which African-Americans and whites can meet and learn as equals. Rather, such colleges are institutions that maintain and promote white norms. Such schools mask a white cultural perspective or norm that has the effect of stifling or eradicating the consciousness of African-American students. Thus, the continued maintenance and operation of predominantly or historically black colleges is unobjectionable and justifiable as an effective counterbalance to the maintenance of white culture through predominantly white colleges. Instead of eliminating or merging historically black colleges into white colleges through coercive assimilation, these schools should receive increased funding to attain the same level of excellence as their white counterparts.

A. The Ideal Society: Diversity and Tolerance

Certainly, it is difficult to take issue with a Court opinion that envisions whites and African-Americans peaceably attending the same educational institutions. All right-minded people would likely agree that such a goal is both legitimate and admirable. Because of its ahistorical approach, however, this idealized view of race relations is susceptible to criticism. Specifically, it presupposes a present without a past, ignoring

was indeed reflective of the existing social realities at the time the opinion was rendered. See Wasserstrom, *supra* note 7, at 599-601.

the effect of that past on the present and, ultimately, its lingering effect on the future. The result is a society that can never achieve its goals.

The past has produced a present in which the "black experience" is qualitatively different than that experienced by whites in this society. The commonality of that experience has produced an African-American identity and group consciousness and has led to the development of what has been called an "organic community."¹⁹³ In one sense, African-Americans constitute a "nation within a nation."¹⁹⁴ This nation is an inevitable product of our social history:

[The separate African-American nation] is different from other emergent nations only in that it consists of forcibly transplanted colonial subjects who have acquired cohesive identity in the course of centuries of struggle against enslavement, cultural alienation, and the spiritual cannibalism of white racism. This common history which the Black people of America share is manifested in a concrete national culture with a peculiar "spiritual complexion," or psychological temperament. Though the Black nation expresses its thoughts, emotions, and aspirations in the same tongue as American whites, the different conditions of existence . . . have, from generation to generation, welded the bonds of a national experience as different from that of white existence as day is from night. And what differentiates nations from one another are dissimilar conditions of life.¹⁹⁵

Given the way in which race has so thoroughly affected the development of American society, it is impossible to believe that the assimilationist model of integration¹⁹⁶ can be achieved in the near or immediate future. That fact, however, is insufficient justification for refusing to aspire to a better, idealized version of society premised on a more realistic vision of this society's present state.

My ideal society is one in which race is, during a transition period, viewed and thought of in much the same way as we view religion; at worst, as a matter to be tolerated, at best, as one to be prized as a product of our diversity.¹⁹⁷ In this ideal society, race is taken into account not in

193. See Peller, *supra* note 83, at 791.

194. *Id.* at 792 (citing MARTIN R. DELANY, *THE CONDITION, ELEVATION, EMIGRATION AND DESTINY OF THE COLORED PEOPLE OF THE UNITED STATES* 203 (1852)).

195. Peller, *supra* note 83, at 793 (quoting address by Dr. C. Munford, Black National Revolution in America, Utah State University (May 1970)) (ellipsis in original).

196. I continue to characterize the type of integration ordered in *Brown* and *Fordice* as assimilationist because it presupposes an ideal society in which race is not only an irrelevant characteristic in awarding entitlements, but is also an irrelevant societal concept. See Wasserstrom, *supra* note 7, at 604.

197. By treating race like religion, I am not advocating that we publicly fund religious universities like Notre Dame (Catholic) or Yeshiva (Jewish). Quite the contrary, the government and American society have by-and-large treated religion "neutrally," neither establishing a state religion nor proscribing religious affiliations or organizations. See, e.g., Church of the Lukumi

awarding entitlements, but as an important characteristic that is acknowledged and that mandates limited differential treatment. This recharacterization of race is accomplished through the adoption of a multichromatic conception of race that respects racial diversity rather than condemning it. Similarly, diversity is viewed as part of society's strength rather than as part of its weakness. It is only through this transitory stage in which diversity is prized or simply tolerated that the ideal society can ultimately be achieved.

The concepts of diversity and tolerance support the view that racial differences should be acknowledged and embraced as both an existing social reality and as a positive social good.¹⁹⁸ According to the ideal of diversity, a multichromatic society is a positive good.¹⁹⁹ Society, it is argued, would be worse off if everyone were a member of the same race or cultural group. The benefits gained by having a multichromatic society are viewed as outweighing the costs created by having such a society.²⁰⁰ Somewhat similarly, the argument for tolerance posits that multichromaticism should be maintained if only because the cost of achieving monochromaticism is too high relative to its possible benefits.

Adopting a multichromatic conception of race comports more accurately with current social reality than other conceptions of race and is, thus, more easily attainable. The assimilationist's monochromatic version of ideal society will be difficult, if not impossible, to attain because it requires a paradigmatic shift in the way Americans think about race and their social identity without providing a clear vision of what a truly monochromatic society looks like. In certain respects, the idealized version of integration contemplated by assimilationists is akin to a person's conception of heaven: one may have a basic sense of what it is like and desire to gain admission to it, but it is impossible to articulate precisely

Babalu Aye v. City of Hialeah, 113 S. Ct. 2217 (1993). Race, however, has been treated radically differently from religion, as is evidenced by the differing treatment of religion and race in the Constitution. Compare U.S. CONST. art. I, § 2, cl. 3 (for purposes of apportionment of representatives, slaves considered three-fifths of a person), amended by U.S. CONST. amend. XIV with U.S. CONST. amend. I (Free Exercise Clause and Establishment Clause). Throughout American history, and until very recently, the federal, and to a greater extent state, governments have been involved in regulating and maintaining racial categories that have led to a social construction of race in which there is a dominant race, whites, and a subordinate or oppressed race, blacks or African-Americans.

198. As Neil Gotanda puts it: "As a social ideal, tolerance is the acceptance of race as a necessary evil. Diversity, on the other hand, considers race to be a positive good." Gotanda, *supra* note 85, at 60.

199. Wasserstrom, *supra* note 7, at 604.

200. Here, one can only assume that the benefits outweigh the costs, as it is impossible to measure and compare the benefits and costs engendered by a monochromatic society versus a multichromatic society. Even if metrics could be used to measure the benefits and gains created by our current multichromatic society, there would be no way to compare those costs and benefits against a baseline monochromatic society because that society does not exist and can only be hypothesized.

what it looks like or precisely how to get there. In other words, assimilationist integration requires one to rely on faith rather than on reality.

A monochromatic society can only truly be achieved through blending the races until they disappear into some version of Mulatto.²⁰¹ However, given the binary construction of race as a social category in American society, such an outcome is unlikely. Alternatively, those who are not part of the dominant racial group, such as African-Americans, would have to be removed from society or their very difference (which is constitutive of their classification as "African-Americans") would have to be eliminated. This, of course, is contrary to our liberal democratic political philosophy.

An idealized diversity-based view of society, on the other hand, does not require a paradigmatic shift in the way one thinks about race and one's social identity. Most of us already think of religion in that very same "ideal" way:²⁰² differences in religious practices are widely accepted and celebrated. Thus, it may be simple for members of society to extrapolate from their views on religious diversity to allow for the contention that racial diversity strengthens society rather than weakens it.

One might also rely on the doctrine of tolerance to achieve the ideal social reality. Once again, an analogy to religion is appropriate. Even those who believe that having only one religion is a positive state of affairs may regard diverse religious practices and beliefs as necessary and, therefore, tolerable, because the costs of attaining religious homogeneity far outweigh any possible benefits.²⁰³ Borrowing from this analytical approach, one may argue that different racial groups must be tolerated and respected because the costs of achieving a monochromatic society are too high.

Regardless of which conceptual vehicle—diversity or tolerance—one chooses for achieving the ideal society, each approach supports the continued use and operation of separate, predominantly or historically black colleges in the ideal society. As Wasserstrom points out (with my emendation to reflect race rather than religion):

Under neither ideal would it be thought that the allocation of basic political rights and duties should take an individual's [race] into account. We would want equalitarianism or nondiscrimination even in respect to most important institutional benefits and

201. For a discussion of the treatment of Mulattos in America and how their presence challenges the binary conception of race, see Alex M. Johnson, Jr., *Homosexuals, Mulattos and Religious Differences: Invisible Differences That Threaten* (forthcoming, on file with the author).

202. Many, of course, reject the notion of religious diversity and ascribe to the view that there is but one religion. See Edsall, *supra* note 185, at A1. It is assumed that those who reject religious diversity as being inappropriate for our society also reject any vision of the ideal society that is not premised upon white majoritarian dominance.

203. Wasserstrom, *supra* note 7, at 604-05.

burdens—for example, access to employment in the desirable vocations. Nonetheless, on both views it would be deemed appropriate to have some institutions (typically those which are connected in an intimate way with [race]) which do in a variety of ways take the [race] of members of the society into account. For example, it might be thought permissible and appropriate for members of a [racial] group to join together in collective associations which have [racial], *educational* and social dimensions. And on the individual, interpersonal level, it might be thought unobjectionable, or on the diversity view, even admirable, were persons to select their associates, friends, and mates on the basis of their [racial] orientation. . . . The picture is a more complex, less easily describable one than that of the assimilationist ideal.²⁰⁴

The next Section articulates the role that institutionalized education plays in the ideal world. The role is visualized as one in which race is affirmatively taken into account and choices are provided to students concerning which school they should choose to attend. It is this role that was expressly rejected by the Court in *Fordice*.

B. *The Ideal Society: The Role of Race in Education*

One who supports the continued funding and operation of predominantly or historically black colleges must address what I characterize as the “reverse discrimination” argument. This argument posits that predominantly or historically black colleges cannot be defended philosophically unless one is willing to concede either that support of these colleges legitimates the creation and maintenance of predominantly white colleges (thereby reinventing the doctrine of “separate but equal”), or that the maintenance of such colleges violates the “postulate of equality.”²⁰⁵ The “reverse discrimination” argument also provides that support of historically or predominantly black colleges is contrary to this society’s idealized philosophic norms because it provides an entitlement to African-Americans mandating that their race be taken into account in a way that does not respect nor tolerate diversity.

Looked at somewhat differently, interrelated issues arise. First, why should schools be allowed to take race into account under my vision of an ideal society in which diversity or tolerance is prized? Are schools appropriate institutions to divide the population based on race? Are they connected with race in such an intimate way that it is appropriate to maintain predominantly black colleges? I have already answered these

204. *Id.* at 605 (emphasis added).

205. The postulate of equality is a normative proposition providing that all individuals are morally equal, a conclusion which proscribes “using differences of status or birth as the basis for treating persons unequally.” MICHEL ROSENFELD, *AFFIRMATIVE ACTION AND JUSTICE* 20-21 (1991).

questions in the affirmative.²⁰⁶

The task I undertake here, however, is to answer another question raised by the “reverse discrimination” argument: why is it permissible to take race into account for the purpose of maintaining predominantly or historically black schools but not exclusively white schools? The answer is that acknowledgment of racial differences to support these colleges is proper in light of two related considerations: the subordinated position of African-Americans in contemporary society and the fact that those predominantly white schools viewed as “integrated” in fact embody white norms and have already taken race into account via white race consciousness. Thus, the maintenance of predominantly or historically black colleges is an effective counterbalance to white dominance of predominantly white institutions.

1. *Subordination v. Domination: Another Justification for a Different Experience*

The strongest argument against the existence of predominantly or historically black colleges is that these schools provide a benefit to African-Americans—education in a predominantly African-American environment—simply because they are persons of color.²⁰⁷ It is alleged that in order to be in complete accord with the postulate of equality, the immutable characteristic of skin color must be viewed as irrelevant. Thus race is an unjustifiable basis for the maintenance of separate post-secondary educational institutions.

This argument, however, relies on misleading terminology in order to reach its conclusion that the existence of predominantly or historically black colleges is impermissible. The assertion that African-Americans benefit simply because they are persons of color is false. The assertion ignores important justifications for using race to provide societal benefits to persons of color because of their subordinate status in American society. Reference to the ongoing affirmative action debate will be useful in illustrating this point:

To say that someone favors a person “*simply because* that person is black (or female)” implies that there is no further reason, purpose, or justification, as if one merely had an utterly arbitrary preference for dark skin as opposed to light skin or female anatomy over male anatomy. But no serious advocate of affirmative action [or, for that matter, predominantly or historically black colleges] thinks [that the existence of those schools] is justified by such personal preferences. On the contrary, advocates argue that,

206. See *supra* notes 158-63, 193-204 and accompanying text.

207. The defense of predominantly black colleges set forth here flows from and is part of a larger debate over the efficacy of affirmative action in education. For more on that debate, see generally JOHNSON ET AL., *supra* note 31.

given our historical situation, quite general principles of justice or utility justify the temporary classificatory use of race and gender. That being black or white, male or female, does not in itself make anyone morally better or more deserving is acknowledged on all sides.

. . . .
 . . . The proper conclusion, then, is not that any [educational system] that makes use of race and gender categories is simply committing the same old wrongs in reverse. The worst wrongs of the past went far beyond merely the arbitrary use of categories; moreover, it has yet to be established that the new use of these categories in [post secondary educational institutions] is in fact arbitrary (like the old use). An arbitrary category is one used without good justification; the charge that [predominantly or historically black colleges] use race and gender categories unjustifiably is just what is at issue, not something we can assume at the start.²⁰⁸

Indeed, any legitimate discussion of the arguments justifying predominantly or historically black colleges must be set in a contextual framework centered firmly in the reality of this society's past, present, and future race relations. This point is illuminated by reference to the arguments themselves, most of which can be divided into two distinct groups: those that are forward-looking and those that are backward-looking. The utilitarian forward-looking justifications for predominantly or historically black colleges embody a preventative focus both on maintaining predominantly black colleges for those students who choose to attend them and safeguarding the benefits those colleges offer to future society.²⁰⁹ Conversely, the backward-looking justifications for maintaining predominantly or historically black colleges embody a remedial focus on reparations for injuries caused by past wrongs.²¹⁰

208. Thomas E. Hill, Jr., *The Message of Affirmative Action*, SOC. PHIL. & POL'Y, Spring 1991, at 108, 113-14.

209. In the context of using affirmative action to "integrate" predominantly white institutions, the forward-looking argument is as follows:

[S]ome argue that affirmative action will ease racial tensions, prevent riots, improve services in minority neighborhoods, reduce unemployment, remove inequities in income distribution, eliminate racial and sexual prejudice, and enhance the self-esteem of blacks and women. Some have called attention to the fact that women and minorities provide alternative perspectives on history, literature, philosophy, and politics, and that this has beneficial effects for both education and research.

Id. at 116.

210. Once again, the debate over affirmative action provides valuable insight:

A radically different strategy for justifying affirmative action is to rely on backward-looking arguments. Such arguments call our attention to certain events in the past and assert that *because* these past events occurred, we have certain duties now. The modern philosopher who most influentially endorsed such arguments was W.D. Ross. He argued that there are duties of fidelity, justice, gratitude, and reparation that have a moral force independent of any tendency these may have to promote good consequences. . . . The

Although both of these temporal perspectives provide legitimate rationales for the maintenance of predominantly or historically black colleges, there is a third temporal perspective that provides an equally valid rationale for maintaining predominantly or historically black colleges. This temporal perspective is centered on neither the past nor the future, but rather is centered on the present. A central purpose of maintaining predominantly or historically black colleges should be to communicate a much-needed message—"mutual respect, trust, and fair opportunity for all."²¹¹

The message is . . . not just a means to future good relations or a dutiful payment of a debt incurred by our past. It is [a message] called for by the ideal of being related to other human beings over time, so that our histories and biographies reflect the responses of those who deeply care about fair opportunity, mutual trust, and respect for all.²¹²

2. *The Postulate of Equality and the Propriety of Race-Consciousness in Predominantly or Historically Black Colleges*

In focusing on a contextual approach that is based on contemporary society, the "postulate of equality," the normative proposition that all individuals are morally equal as individuals,²¹³ is the proper starting point. The postulate of equality focuses on the individual and her treatment in society. It requires that goods be distributed, if enough are available, in a manner that allows each individual to realize fully the goals of her life plan. With respect to the distribution of scarce goods such as admission to post-secondary schools, a just method of distribution must be enacted that does not violate the postulate of equality, which itself "condemns using differences of status or birth [or color] as the basis for treating persons unequally."²¹⁴

Two very different goals can be utilized to measure the utility and fairness of methods of distribution of scarce resources or goods. The first is *equality of result*, which requires that each member of the subject class receive the same amount of the good allocated. The second is *equality of opportunity*, which mandates that each member of the subject class have the same or equal opportunity to obtain the scarce good. Where equality of opportunity is the ultimate goal, not all persons will wind up with the scarce good, but each will have a formal procedural right to obtain the

Rossian principle that is often invoked in affirmative action debates is a principle of reparation.

Id. at 117 (footnote omitted).

211. *Id.* at 123.

212. *Id.* at 127.

213. ROSENFELD, *supra* note 205, at 20-21.

214. *Id.* at 21.

good.²¹⁵

In the context of admission to post-secondary schools, what is sought to be achieved in the admissions process is equality of opportunity rather than equality of result. Not all applicants can possibly receive an equal share of the resource being distributed. The problem with employing equality of opportunity as a measure of the fairness of distribution of goods, however, is that there are two analytically distinct types of equality of opportunity, "prospect-regarding equality of opportunity" and "means-regarding equality of opportunity." Prospect-regarding equality exists when two or more persons have equal opportunities for obtaining the desired good. A lottery is a perfect example of prospect-regarding equality of opportunity. By contrast, means-regarding equality of opportunity exists when competitors for the scarce resource have the same tools for obtaining the desired good.²¹⁶ Even when a means-disadvantaged competitor receives additional tools to obtain the scarce resource (for example, a secondary education), however, the means-regarding equality of opportunity that is achieved is *marginal*. "In other words, in the context of inequality in initial circumstances—that is the prevailing circumstances immediately preceding the allocation of equal means—the institution of marginal means-regarding equality of opportunity is unlikely to bring about equality of result or prospect-regarding equality of opportunity."²¹⁷

Applying these theories of opportunity to the debate over the continued operation of predominantly or historically black colleges leads one to conclude that true means-regarding equality cannot be attained so long as admission to post-secondary schools is based upon the false premise that educational training has been provided equally to different segments of society. If two competing claimants for the same position have received significantly different training or education, it stands to reason that the claimant who received the better training or education will prevail.²¹⁸ Even if both claimants have received the same training or

215. *Id.* at 23-24.

216. *Id.* at 25.

To illustrate this, let us suppose that two persons, one being twice as strong as the other, compete for a single good G that can only be obtained through the exertion of physical strength. Without tools other than their brute strength, their prospects for obtaining G are unequal. Moreover, if they are both given the same instrument—say an instrument that is capable of increasing its user's physical strength by a factor of two—they will both possess means-regarding equal opportunity, but their prospects would remain unequal. Conversely, to grant them prospect-regarding equality of opportunity, it will be necessary to provide them with unequal tools for enhancing physical strength. In this latter case, the allocation of unequal means becomes a prerequisite to the achievement of prospect-regarding equality of opportunity.

Id.

217. *Id.* at 25-26.

218. If, however, the job competition were not just unless all competitors had achieved the same level of educational proficiency, then what would be called for would be global equality in education. In this latter case, the achievement of a genuine means-regarding

education, however, means-regarding equality of opportunity will not be achieved if the competing claimants began the process with vastly different attributes or entitlements. Thus, the attainment of true means-regarding equality—and, as a function, equality of result and prospect-regarding equality—requires more than simply the provision of marginal means-regarding equality of opportunity:

Let us assume that, for several generations, members of the elite class have received outstanding educations while members of socially disadvantaged classes have received virtually none. In that case, merely prescribing [or providing] the same education[al opportunity] for all might fail to end socially relative differences in prospects in the competition for scarce [resources]. Indeed, the elimination of all socially relative differences in prospects might well require remedial programs for the disadvantaged, or some other *marginally* unequal treatment of the privileged and the underprivileged likely to lead eventually to global equality in education. In short, inasmuch as fair equality of opportunity requires the eradication of social disadvantages, it may justify unequal allocations of certain relevant goods.²¹⁹

Predominantly or historically black colleges are in a unique position to respect and acknowledge the differential treatment that African-American students have received in secondary and elementary education.²²⁰ These colleges are in a unique position to provide the nurturing environment in which these same students can ameliorate the effects of their past educational disadvantages—disadvantages which, as the preceding discussion suggests, cannot be remedied simply by *Fordice*'s guarantee of equal access to predominantly white colleges. In this sense, predominantly or historically black colleges can be regarded as equalizing entitlements accorded African-American students on the basis of their history, their present position in society, and their anticipated future position in society.

3. *Majoritarian Colleges Mask White Race Consciousness and Norms*

Implicit in the argument against maintaining predominantly or historically black colleges is the view that predominantly white colleges are neutral environments in which whites and African-Americans are able to coexist equally and peacefully side-by-side. Of course, such a notion is as unrealistic as the view that meaningful integration can be achieved sim-

equality of opportunity in the competition for jobs would depend on the realization of equality of results in education. It becomes apparent that equality of opportunity with respect to the allocation of one scarce good may sometimes depend on the achievement of equality of result with respect to the allocation of another good.

Id. at 28.

219. *Id.* at 29.

220. See *supra* note 43 and accompanying text.

ply by declaring integration to be the law of the land or by declaring that schools must be desegregated. White colleges simply do not provide an environment that is equally hospitable to whites and African-Americans, a fact made evident by the rise in racially motivated attacks and intimidation taking place on predominantly white campuses across the country.²²¹

Predominantly white colleges are imbued with what has been characterized in analogous contexts as "white race consciousness."²²² Kimberlé Crenshaw was one of the first to argue that common institutional practices, such as those employed at predominantly white educational institutions, embody "white norms" hidden beneath the appearance of cultural neutrality or "perspectivelessness."²²³

Similarly, Neil Gotanda has argued that our notion of a "color-blind constitution" masks "whiteness" as ethnicity and creates what he characterizes as "white racial privilege":

A crucial dimension of whiteness is white racial privilege. Whiteness becomes a political issue where an entrenched position of dominance is challenged.

A different dimension of "whiteness" is ethnic or national heritage. The immigrant origins of ethnic white European-Americans are accepted and often embraced, though not always denominated as racial. Whiteness as racial dominance substantially overlaps, and sometimes supersedes, the ethnic experience. Indeed, some of the most deeply embedded explicit racial violence and assertions of racial inferiority have come from "white ethnic" enclaves. European ethnicity has a social existence apart from racial domination. But the separation of racial subordination from such ethnicity can be a complex political and social enterprise.²²⁴

Ironically, it seems that the white race consciousness pervasive in social institutions controlled by whites is perpetuated by the fact that whites rarely have to think about their racial identity and the positive benefits they receive as a result of that identity.²²⁵

221. See *supra* notes 161-63 and accompanying text.

222. See, e.g., Aleinikoff, *supra* note 86, at 1066-69; Barbara J. Flagg, "Was Blind, But Now I See": *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 957, 969-80 (1993).

223. See Kimberlé W. Crenshaw, *Foreword: Toward a Race-Conscious Pedagogy in Legal Education*, 11 NAT'L BLACK L.J. 1, 2-3 (1989) (arguing that the daily culture of law schools embodies a false assumption of "perspectivelessness"); Kimberlé W. Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1379-81 (1988) (discussing the concept of white norms).

224. Gotanda, *supra* note 85, at 61 (footnotes omitted).

225. The most striking characteristic of whites' consciousness of whiteness is that most of the time [whites] don't have any. I call this the *transparency* phenomenon: the tendency of whites not to think about whiteness, or about norms, behaviors, experiences, or

Recognizing the existence of white racial privilege, African-American nationalists have long contended that both the process and ideal versions of integrationism must be rejected because " 'integration' is a subterfuge for the maintenance of white supremacy"²²⁶ and represents "a form of painless genocide."²²⁷ Consequently, in the Sixties and Seventies African-American nationalists objected to integrationism in large part because they perceived integration as a vehicle through which white norms would be imposed on African-Americans by the educational institution and would supplant valuable African-American cultural norms.²²⁸ This view was premised on the belief that, when "integrated," predominantly white schools would not adopt or incorporate African-American norms, but would instead force African-American children to conform to the white norms that had previously been developed in those institutions.

The perception that society is divided into "us" and "them" pervades race relations in this country. While African-Americans perceive themselves as members of a social minority (what the majority would refer to as "them"), the white majority thinks of itself as "us," a term it invokes to distinguish itself from nonwhite minorities. These perspectives naturally influence the manner in which whites and African-Americans analyze issues and approach each other in different environments, including post-secondary institutions.

What our educational system has failed to adopt is a social philosophy that transcends the barrier separating "us" and "them." In other words, what remains lacking after *Fordice* is an educational environment in which the ideal of integration is truly prized or, at a minimum, in

perspectives that are white-specific. Transparency often is the mechanism through which white decisionmakers who disavow white supremacy impose white norms on blacks. Transparency operates to require black assimilation even when pluralism is the articulated goal; it affords substantial advantages to whites over blacks even when decisionmakers intend to effect substantive racial justice.

Flagg, *supra* note 222, at 957.

226. STOKELY CARMICHAEL & CHARLES V. HAMILTON, *BLACK POWER: THE POLITICS OF LIBERATION IN AMERICA* 54 (1967).

227. Peller, *supra* note 83, at 791 (quoting Ronald S. Browne, *A Case for Separation, in SEPARATISM OR INTEGRATION: WHICH WAY FOR AMERICA* 7 (R. Browne & B. Rustin eds., 1968)).

228. [N]ationalists asserted that school integration meant the adaptation of blacks to white norms—to quote Carmichael, integration entailed "taking black children out of the black community and exposing them to white middle-class values." Of course, there was no analytically intrinsic content to the idea of integration that mandated that school integration proceed on the basis of white cultural norms—just as there was nothing intrinsic to the concept of integration that entailed Robert Browne's image of "the Negro . . . transform[ing] himself into a white black-man." But Carmichael and Browne highlighted an aspect of American racial integration buried in the mainstream ideology of neutrality and universalism, but central to the black nationalists' analysis—a consideration of the cultural terms on which integration in social institutions would proceed. According to Harold Cruse, the commitment to integration embodied absorption into white culture through the failure to recognize the integrity of the black culture created in conditions of domination.

Peller, *supra* note 83, at 796 (footnote omitted) (alterations in original).

which the ideals of diversity or tolerance are embraced as valid goals. *Fordice* fails to mandate equal funding for Mississippi's predominantly or historically black colleges so as to provide African-American students with an educational environment that allows them to rise above their subordinated social status as "them" and compete with whites on equal terms within their own black colleges.²²⁹

The *Fordice* approach, however, is flawed because it relies on two false assumptions. First, *Fordice* assumes the education African-Americans will receive at Mississippi's predominantly white institutions will be comparable to the educational experience they would have received at the State's predominantly or historically black colleges. It is not. Second, *Fordice* assumes African-American students attending a predominantly white college will receive an educational experience comparable to that of a white student attending the same white college. They do not.

The *Fordice* Court embraced the integrationist view that society need only provide whites and African-Americans with one publicly-financed school system based on the assimilationist model. Thus, although Mississippi's dual school system was already ostensibly integrationist, at least in the sense that members of each race could attend educational institutions predominated by the other race, the Court concluded that such a dual system simply did not fit within its assimilationist model. The Court thus implicitly rejected the view that true equality can be attained by maintaining predominantly or historically black schools, perhaps out of fear that allowing predominantly or historically black colleges to exist undisturbed would legitimate the existence of all-white schools. However, such a fear is fallacious. First, the choice to attend either a predominantly white or predominantly black college is (or at least was prior to *Fordice*) a free one. Second, the fear that a contrary result in *Fordice* would lead to the maintenance of separate white institutions is illusory because those predominantly white institutions already exist and will likely remain predominantly if not overwhelmingly white.

CONCLUSION

Fordice represents the end of a highly volatile era in constitutional jurisprudence.²³⁰ The Court's opinion in *Fordice* will probably sound the death knell for predominantly or historically black colleges by allowing for a remedy that will effectively eliminate public financial support for those colleges. Moreover, the Court attempts to preclude scrutiny of its decision in *Fordice* by wrapping it in the philosophies of "choice" and "neutral" assimilationism. *Fordice* undermines the educational exper-

229. See *supra* notes 18-20 and accompanying text.

230. Three months earlier, the Court had decided *Freeman v. Pitts*, which is discussed *supra* at notes 10-11 and accompanying text; see also *Brown*, *supra* note 11, at 4.

iences and development of African-Americans at the university level by giving courts the discretion to choose not to remedy fully actionable cases of discrimination in educational institutions.

What is so troubling about *Fordice* and its adoption of choice and "neutral" assimilationist principles is not just that it forecloses African-Americans from complaining about their exclusion from predominantly white educational institutions, but that it acts to sever the tie between African-American students and their own community. Following the Court's decision in *Fordice*, the African-American student no longer has the choice to attend a nurturing educational institution that reflects her cultural *nomos*. What is lacking in the Court's approach is some recognition that secondary and post-secondary education are related. Tremendous dissonance is created by the fact that African-Americans are forced to take part in a segregated, predominantly African-American educational and social system at the elementary and secondary level, and then channeled into a different segregated, post-secondary educational system that employs the cultural norms of the white community from which the African-American student is otherwise disassociated.

This dissonance is exacerbated by the Court's failure to recognize the costs incurred in the transition from one system to the other, a failure which stems from its flawed view of the white system of post-secondary education as the ideal integrationist system. Of course, that system is not truly integrationist. The brand of integration mandated by *Fordice* and practiced in America merely requires assimilation of African-Americans into white culture and does not integrate the cultures and *nomos* of the African-American and white communities into each other.

Throughout this Article, I have consciously avoided addressing one of the questions most commonly raised in discussions of *Fordice*: how does one eliminate a discriminatory educational system when there is no money to upgrade predominantly or historically black colleges to the level of predominantly white colleges?²³¹ The conceptual racism that question embodies justifies ignoring it. In other words, by characterizing the standard in terms of what is accorded to whites, the question itself proceeds from a racist premise.

Equality in this context should not only be a matter of transferring resources from the white colleges to the predominantly or historically black colleges, even if that conception of resource equalization would pass constitutional muster.²³² When additional resources are unavailable to raise the level of funding of predominantly black colleges to white

231. See, e.g., William Raspberry, *Mississippi Quandary*, WASH. POST, Nov. 27, 1992, at A31.

232. Incidentally, any remedy which has the effect of weakening predominantly white colleges while strengthening predominantly or historically black colleges may not be viewed as optimal. A Pareto-superior position is one in which resources are added to the educational pot and the predominantly or historically black colleges are raised to the level of predominantly white colleges.

colleges, what is racist is that no thought is given to the possibility of transferring resources from predominantly white colleges to predominantly black colleges. Similarly, is it not possible that a fair solution to the problem of unequal educational opportunities lies in a requirement that white students attend predominantly or historically black colleges while African-Americans attend the previously predominantly white colleges until the funding and operation of the schools is equalized? (My guess is that if the Court took this approach, funding would quickly materialize so as not to disadvantage the white students who are forced to attend predominantly black colleges.) After all, it was those white students who were the beneficiaries of the better schools all along.²³³

This sort of conceptual racism was implicit in the remedy provided by *Brown v. Board of Education*, which rejected sending whites to predominantly black schools.²³⁴ Thus, it is not surprising that this same strand of conceptual racism is part and parcel of the remedy provided by *Fordice*. It is, however, extremely sad and instructive on how little we have traveled as a society on racial issues in the two generations since *Brown*.

233. This paraphrases a point made by Wasserstrom in his critique of *Brown v. Board of Education*. Wasserstrom, *supra* note 7, at 601. Wasserstrom's response to this question is apropos to the question posed in the text: "But this is simply not the way racial matters are thought about within the dominant ideology." *Id.*

234. *Id.* at 599-602. In other words:

What seems to me to be most objectionable, and racist, about *Brown II* is the uncritical acceptance of the idea that during this process of change, black schoolchildren would have to suffer by continuing to attend inadequate schools. The Supreme Court's solution assumed that the correct way to deal with this problem was to continue to have the black children go to their schools until the black schools were brought up to par or eliminated. That is a kind of conceptual racism in which the legal system accepts the dominant racist ideology, which holds that the claims of black children are worth less than the claims of white children in those cases in which conflict is inevitable.

Id. at 600-01.