Brown and the Desegregative Ideal:

Location, Race, and College Attendance Policies

IHELG Monograph

05-10

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1982-2002
BROWN AND THE DESEGREGATIVE IDEAL:
LOCATION, RACE, AND COLLEGE ATTENDANCE POLICIES

Michael A. Olivas†

INTRODUCTION

Elementary and secondary schools are often thought of as defining place. The "neighborhood school" is a fixture of U.S. home buying and educational policymaking, deeply etched into tradition and realtors' steering practices.¹ In a sense, the iconic Brown v. Board decision was about place—whether or not Linda Brown and her black classmates could attend a neighborhood school for white children, or whether they would be consigned to geographically

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inconvenient schoolhouses for black children, physically segregated and stigmatized as inferior.\textsuperscript{2} Few persons, however, consider the relationship between higher education institutions and place.

Although \textit{Brown} concerned primary and secondary public education, the road to \textit{Brown} ran through several higher education cases in which black students were denied admission into predominantly white colleges and universities.\textsuperscript{3} In these cases, the relevant universities crucially influenced place as states physically excluded Blacks from these white public spaces.\textsuperscript{4} In response, states erected black colleges,\textsuperscript{5} started black law schools,\textsuperscript{6} paid for scholarships for Blacks to attend colleges or professional schools in other states,\textsuperscript{7} or required Blacks to sit, eat,


\textsuperscript{4} \textit{See} \textsc{Gil Kujovich, Equal Opportunity in Higher Education and the Black Public College: The Era of Separate but Equal}, 72 Minn. L. Rev. 29, 30 (1987) (describing the history of public black colleges).

\textsuperscript{5} \textit{See Gaines}, 305 U.S. at 339.

\textsuperscript{6} \textit{See generally} \textsc{J. Clay Smith, Jr., Emancipation: The Making of the Black Lawyer,} 1844-1944 33–65 (tracing the development of black law schools).

\textsuperscript{7} \textit{See Gaines}, 305 U.S. at 342–43 (quoting Missouri law authorizing the State to pay fees for blacks to take courses at universities in adjacent states rather than allowing them to attend
and study in designated segregated areas within the university’s facilities. A stunning photograph shows G.W. McLaurin, the first Black to attend class at the University of Oklahoma, sitting in an anteroom adjacent to the regular classroom, separated from his white classmates. McLaurin was further assigned “a special desk in the library and a special room in the student union building [to] eat his meals.” Clearly, space counts in college, and always has.

I

DESEGREGATION REMEDIES AS CONTROLS OVER PLACE

The original Adams litigation, which required college desegregation, initiated widespread changes in universities’ admissions policies that influenced and continues to influence the racial dynamics of universities. Several southern states acted slowly to implement the holding, particularly addressing white institutions’ need to admit black students even though the rise of standardized testing meant that few black students could present satisfactory test scores; black colleges also had to encourage the enrollment of white students despite white students not 

public colleges in those states). These “scholarships” were one of the truly pernicious means that white educators used to exclude blacks from attending colleges in their own states of residence.


9 MICHAEL A. OLIVAS, THE LAW AND HIGHER EDUCATION: CASES AND MATERIALS ON COLLEGES IN COURT 983 (2ND ED.1997).


wanting to attend black colleges where historical resource allocations did not make the professional programs of these institutions attractive to a wide range of students.\textsuperscript{13} When the Supreme Court held that Mississippi had to eliminate the vestige of its dual system of public higher education in \textit{United States v. Fordice}, the issues of remedies played out with dramatic effects in terms of place and location.\textsuperscript{14} The district court fashioned a remedy under the following Supreme Court order:

\begin{quote}
If the State perpetuates policies and practices traceable to its prior system that continue to have segregative effects—whether by influencing student enrollment decisions or by fostering segregation in other facets of the university system—and such policies are without sound educational justification and can be practicably
\end{quote}


\textsuperscript{14} See 505 U.S. 717, 743 (1992).
eliminated, the State has not satisfied its burden of proving that it has dismantled its prior system. Such policies run afoul of the Equal Protection Clause, even though the State has abolished the legal requirements that whites and blacks be educated separately and has established racially neutral policies not animated by a discriminatory purpose.\textsuperscript{15}

The district court in the case attempted to apply this standard in several respects: admissions policies, program allocations, and institutional mergers.\textsuperscript{16}

A. Admissions Policies

Although the relationship between higher education admissions and desegregation remains one area where extensive litigation and analysis continues, \textit{Fordice}, the Supreme Court case preceding the remedial proceedings in \textit{Ayers}, illustrates the intersection of admissions policies, race, and place. The \textit{Fordice} case is important both for its status as a belated, post-\textit{Brown} implementation ruling addressing the obligations of white and black institutions of higher education, and for its value in addressing race in the context of higher education admissions. Before remanding the case, the Supreme Court had looked carefully at schools’ reliance upon test scores and the racial consequences of differential test score cutoffs.\textsuperscript{17} \textit{Fordice}, therefore, is a direct successor to \textit{Bakke}, the first Supreme Court case brought by a white plaintiff to address race in higher education admissions, and was the only college admissions case in the twenty-five years between \textit{Regents of the Univ. of California v. Bakke} and \textit{Gratz v. Bollinger} and \textit{Grutter v.}

\textsuperscript{15} \textit{Id.}, 731–32.

\textsuperscript{16} \textit{Ayers v. Fordice}, 879 F. Supp. 1419 (N.D. Miss. 1995).

\textsuperscript{17} \textit{See Fordice}, 505 U.S. 717, at 735–38.
In *Fordice*, the Supreme Court determined that the reliance upon standardized scores constituted a vestige of *de jure* segregation that continued to have segregative effects.19

*Fordice* logically extended *Brown v. Board of Education*20 to address Mississippi’s 1963 imposition of an ACT requirement.21 Mississippi did not employ standardized admissions tests until 1963, after James Meredith’s widely publicized denial of admission to the University of Mississippi (UM) in 1962.22 By using the ACT as an entrance standard where white students in Mississippi achieved significantly higher ACT scores than did black students, UM clearly undertook to provide groundcover for its failure to recruit blacks or admit them into undergraduate programs before or since *Brown*, decided nearly a decade before.23 After the *Meredith* court ordered UM to admit Meredith, UM and several other state institutions began to require ACT test scores of fifteen, a number between the state’s median black ACT score of seven and the median white score of eighteen.24 The *Meredith* decision also struck down UM’s

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19 See *Fordice*, 505 U.S. 717, at 737–38.

20 For an excellent study of the important cases of *Brown I and Brown II*, including the postsecondary issues, see COTTROL ET AL., *BROWN V. BOARD OF EDUCATION* 119-207 (2003).

22 See Meredith v. Fair, 305 F.2d 343, 361 (1962).

23 See *Fordice*, 505 U.S. at 734.

24 See id. at 733–34.
requirement of recommendation letters from UM alumni, which virtually guaranteed that no black students could present a complete admissions portfolio.²⁵

In Fordice, the Supreme Court was particularly skeptical of the ACT test requirement because of the segregative history of its use in Mississippi, because the ACT was used as a sole criterion in defiance of the ACT test maker’s recommendations, and because even institutions with similar academic missions and state-designated equivalence weighted ACT scores differently.²⁶ For instance, Mississippi University for Women used an automatic cutoff ACT admissions score of eighteen, but the historically black Alcorn State and Mississippi Valley State Universities—also state institutions—required a minimum ACT score of thirteen.²⁷ Thus, “[t]hose scoring 13 or 14, with some exceptions, are [generally] excluded from the five historically white universities and if they want a higher education must go to one of the historically black institutions or attend junior college with the hope of transferring to a historically white institution.”²⁸ Justice White emphasized that the lower courts did not articulate an educational justification for disparities in ACT entrance requirements or whether such requirements could practicably be eliminated.²⁹ White further noted that the ACT requirements were traceable to a discriminatory purpose that “seemingly continues to have segregative

²⁵ See Meredith, 305 F.2d at 352–53.

²⁶ See 505 U.S. at 736–37.

²⁷ See id., at 734.

²⁸ Id. at 734–35.

²⁹ Id. at 735.
effects[,] the State has so far failed to show that the ‘ACT-only’ admissions standard is not susceptible to elimination without eroding sound educational policy.”

The Fordice Court remanded the case for reconsideration in light of Mississippi’s affirmative duty to dismantle its formerly de jure segregated system of higher education. Even after the district court reviewed Mississippi’s plan for remediation, historically white institutions maintained their ACT requirement of a fifteen; the historically black institutions, however, lowered the bar from a score of thirteen to an eleven, with provisions to admit students in exceptional cases with scores as low as nine. On remand, using language from Fordice that struck down actions that would channel students into racially identifiable institutions by their race, the district court determined that differential ACT score admission standards would re-segregate students by their race. The court then ordered that UM adopt Mississippi’s plan, which required higher scores overall, considered student’s grade point averages, a community college system with some open admissions in regards to test scores, and a summer preparatory program for remediation purposes. The Fifth Circuit affirmed these remedial provisions upon appeal by the black plaintiffs, but reversed the district court’s holding that the use of ACT cutoff

30 Id., at 737–38.

31 See id. at 743; Ayers v. Fordice, 879 F. Supp. 1419 (N.D. Miss. 1995), aff’d, 99 F.3d 1136 (5th Cir. 1996) (table), aff’d in part, rev’d in part, 111 F.3d 1183 (5th Cir. 1996) (en banc).

32 Ayers, 879 F. Supp. at 1431.

33 See id. at 1434.

34 See id. at 1477–79, 1482 (discussing admission standards and preparatory programs).
scores to award scholarships had no discriminatory purpose, finding such cutoffs traceable to \textit{de jure} segregation.\textsuperscript{35}

B. Program Allocations and Institutional Mergers

In upholding the settlement agreement eventually reached between the private parties, who were supported by the United States in trying to compel desegregation of Mississippi’s higher education system and the State of Mississippi, the circuit court reviewed the agreed upon program duplication efforts and program approval policies.\textsuperscript{36} At the operational level, the issue was the extent to which historically black institutions would be permitted to develop high-demand and desirable specializations, such as postbaccalaureate professional schools—engineering, MBA, law, pharmacy—and doctoral programs.\textsuperscript{37} Thus, Jackson State University was awarded attractive programs in allied health professions, engineering, social work, urban planning, and business.\textsuperscript{38} For Alcorn State University, the legislature ordered and the court approved the establishment of an MBA graduate program.\textsuperscript{39}

These new programs would be prestigious curricular additions and might attract non-black students, whereas whites would not otherwise likely attend black colleges if they had alternative majority opportunities.\textsuperscript{40} Although there had been a study to determine whether or not a law school or pharmacy school should be established at Jackson State University, state

\textsuperscript{35} See Ayers, 111 F.3d 1183, 1209 (1997) (en banc).

\textsuperscript{36} See Ayers v. Thompson, 358 F. 3d 356, 361 (5th Cir. 2004).

\textsuperscript{37} See id. at 364.

\textsuperscript{38} Id. at 363.

\textsuperscript{39} Id. at 364.

\textsuperscript{40} See Ayers, 111 F.3d at 1213–14.
officials determined that existing public college programs in these two prestigious fields were sufficient for Mississippi’s needs and purposes.\textsuperscript{41} The success of these new programs, of course, depended on adequate funding and in all, the state agreed to appropriate more than $245 million over seventeen years to fund new programs at the three historically black institutions.\textsuperscript{42} The circuit court was impressed by this aggregate amount, characterizing it as “generous,”\textsuperscript{43} yet the annual amount is less than $15 million, split across several schools and unadjusted for inflation. Moreover, an endowment for “other-race” marketing and recruitment was established in the amount of $70 million, to be paid over the course of fourteen years, with promised “best efforts” to raise another $35 million from private sources.\textsuperscript{44} In the best of worlds, a fully funded $105 million endowment would generate only $4-5 million annually to be split among the three colleges.\textsuperscript{45} In response to the testimony that historically black institutions are more able to attract white students where the same programs are not offered at proximate institutions, the court had previously ordered that the State consider merging Delta State University and Mississippi Valley State.\textsuperscript{46} The State subsequently determined, however, and the Court agreed

\textsuperscript{41} \textit{Id.} at 364.

\textsuperscript{42} \textit{Id.} at 366.

\textsuperscript{43} \textit{Id.} at 373.

\textsuperscript{44} \textit{Id.} at 366.

\textsuperscript{45} See Mimi Lord, TIAA-CREF Institute \textit{Research Guide}, No. 79, \textit{Highlights of the NACUBO Endowment Study} at table 8 (March 2004) (depending upon institutional practice, the annual spending rate from endowments averages between 3.6 percent and 5.3 percent).

\textsuperscript{46} See Thompson, 358 F.3d at 362; Ayers \textit{v. Fordice}, 111 F.3d 1183 (5th Cir. 1996) (en banc).
that such a merger was not efficacious, and added several new academic programs to Mississippi Valley State University instead. 47 The total amount of money for all program allocations, including capital projects, was approximately $500 million over seventeen years. 48 By January 2004, virtually all the technical features of the thirty-year case had been settled, including attorney's fees, upon the Fifth Circuit's holding that the settlement agreement approved in the district court was valid. 49 The plaintiffs have now appealed their case to the Supreme Court, as they had requested far more than the decree accorded them. 50

Despite the efforts in Fordice to address Mississippi's segregated higher education system, the decision has been critiqued for its asymmetric result. 51 "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

47 Id. at 364.

48 Id. at 359.

49 Id. at 367.

50 See Ayers v. Thompson, 358 F.3d 356 (5th Cir. 2004), petition for cert. (filed, May 20, 2004) (No. 03-10623); Sara Hebel, Federal Court Upholds Plan to Settle Mississippi Desegregation Case, CHRON. OF HIGHER EDUC., Feb. 6, 2004, at A22 (describing how opponents of the settlement agreement believe that the decision 'leaves black students worse off' than before Fordice); Court Denies Latest Appeal in Mississippi Desegregation Case, BLACK ISSUES IN HIGHER EDUC., Feb. 26, 2004, at 10.

51 See Johnson, supra note 13, at 1468.
black colleges.”52 Given these unequal opportunities, black students receive dissimilar educational experiences at historically black colleges, contrasted with the resources available at Mississippi’s predominantly white institutions.53 *Fordice* also incorrectly assumes that white and black students have similar educational experiences at the same white college.54 In deciding “that society need only provide Whites and Blacks with one [ well-financed ] publicly-financed school system based on the assimilationist model[,]”—even if both sectors were available to members of all races—“the court 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 legitimize the existence of all-white schools.”55 This fear would be unfounded if blacks and whites had genuinely-free choice to attend predominantly white or predominantly black colleges.56 Moreover, predominantly white institutions in Mississippi are likely remain at predominantly white, regardless of the result in *Fordice*.57

Eleven years after this critique, the result of *Fordice* seems a mixed bag—both sectors will likely remain racially-identifiable, allowing black colleges to continue, but with only modestly-increased resources. Jackson State clearly benefits and will do so at a higher level,

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52 *Id.*
53 *Id.*
54 *Id.*
55 *Id.*
56 *Id.*
57 See *id.*
with the additional programs and program authority. The infusion of overall resources resulting from *Fordice*, however, is unlikely to substantially alter the trajectories of any of these schools.

II

RACIAL COLLEGE SAGAS AND THE POLITICS OF COLLEGE LOCATION

Novelists suggest that you can never go home again, but for many persons, it is a fact of life that the accident of geography can be a powerful benefit or detriment. If one resides in a benefit-rich environment, the odds of success are immeasurably enhanced, and area residents simply become accustomed to privilege. Its inverse, growing up in a poor area or resource-poor environment can put inhabitants at a clear disadvantage. Metaphors such as being behind at the starting gate, coming from the wrong side of the tracks, digging out of a hole, achieving despite the odds, battling the built-in headwind, swimming against the tide—all these powerful images invoke the struggle of not being born in a fortunate place, of not being to the manor born, and of having to overcome life’s disadvantages. Tomas Rivera wrote of the grinding poverty of children and farmworker families in the migrant stream, who never are able to settle into a secure place. Bigger Thomas finds himself unable to extricate himself from the ghetto life into which he is born in native son.

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58 See Ayers v. Thompson, 358 F. 3d 356, 363 (5th Cir. 2004).


60 Richard Wright, *NATIVE SON* (1940).
This notion that place matters is not only a common theme of our poets and novelists, but a stock in trade of our most eloquent and accomplished demographers, sociologists, and other scholars. William Julius Williams, for example, has chronicled and measured the serious disadvantages of place and life chances as a result of the devastating effects of poverty and location. Reading the work of Jonathan Kozol situates damaged children in dangerous and hopeless places.

To be sure, people overcome their circumstances every day, and escape their fates and low estates. These are the metaphors and life stories that motivate and inspire. But the fact remains that one's place in life is both geographic and poetic, both demographic and folkloric. Much can turn on place and locale.

A. Houston, Texas

Entire states or cities have racial college histories, each with their own ethnic sagas, racial siting decisions, and evolving demographics which turn on place and locale. Consider the college locale decisions of Houston, Texas, a large southern town that grew into a major city in the 20th Century. The first real college, Rice University, was situated in a remote site and was chartered in 1891 as a college for “the instruction of the white inhabitants of the City” that was “to be free and open to all”; this charter provision was interpreted by its trustees to require that

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no tuition be charged to those white students.\textsuperscript{63} Seventy-five years later, the University went to court to reconstitute its charter in order to admit non-white students and charge tuition.\textsuperscript{64} The court agreed that the University could do so in 1966, reformulating its charter by use of the \textit{cy pres} doctrine, which allows a trust document to be reformulated when its essential attributes are no longer feasible or efficacious.\textsuperscript{65} In 1931, Houston’s school district chartered a junior college, one that grew into a small private institution open only to Whites, until the State of Texas reconstituted the University of Houston (UH) into a public institution in 1963 and it began to admit black students.\textsuperscript{66} During the 1950’s, UH had begin to admit a few Mexican Americans, without drawing attention to this practice.\textsuperscript{67} The UH Law School, established in 1947, graduated

\footnotesize

\textsuperscript{64} See \textit{id.} at 287.

\textsuperscript{65} See \textit{id.} at 285.

\textsuperscript{66} See \textsc{Amilcar Shabazz}, \textsc{Advancing Democracy: African Americans and the Struggle for Access and Equity in Higher Education in Texas} 206–07 (2004). The State actually enacted legislation making UH a state institution in 1961, but allowed UH a two year phase-in period. \textit{See id.}

\textsuperscript{67} Author interview with Edward C. Apodaca, Assistant Vice Chancellor for Enrollment Management, University of Houston, Sept., 2004. Amilcar Shabazz’s authoritative work on the desegregation of Texas higher education refers briefly to the interaction between Mexican-Americans and African-Americans on school desegregation issues. Shabazz, \textit{supra} note 62, at 58, 240. For example, he notes that Thurgood Marshall interacted with George I. Sanchez, who had been involved in \textit{Mendez v. Westminster}, 64 F. Supp. 544 (S.D. Cal. 1946), a successful
its first Mexican American student in 1960, and its first Asian American student in 1969, and its first African American graduate in 1970. In fact, the law school was ineligible to join the prestigious Association of American Law Schools until 1966, due to its racially-restrictive practices.

1946 desegregation case brought by Mexican Americans in California. See id. Shabazz notes that this connection is “heretofore unexamined,” but indeed this is not new ground. See id. at 240; see also Juan F. Perea, The Black/White Binary Paradigm of Race: The “Normal Science” of American Racial Thought, 85 CAL. L. REV.1213, 1242-50 (1997) (noting the importance of Mexican American desegregation efforts to later segregation cases); Vicky L. Ruiz, “We Always Tell Our Children They Are Americans”: Mendez v. Westminster and the California Road to Brown v. Board of Education, C. BD. REV., Fall 2003, at 26 (stating that Thurgood Marshall filed an amicus brief on behalf of the NAACP in Mendez). It is also clear that civil rights lawyers took note of Mendez on the road to Brown. See, e.g., Constance Baker Motley, The Historical Setting of Brown and Its Impact on the Supreme Court’s Decision, 61 FORDHAM L. REV. 9, 13 (1992) (noting how the Mendez decision inspired the “social science” approach used to attack segregation in Brown).


In 1947, Texas established its first public college in Houston as the Texas State University for Negroes (TSUN),\(^\text{70}\) after a black student was rejected from the University of Texas Law School (UT) "solely because [he] was a Negro" and successfully challenged the state’s law school admissions policies.\(^\text{71}\) This successful challenge by Heman Marion Sweatt struck down the admissions policy of the State’s first public law school, but did not require the State to admit Blacks to its law school.\(^\text{72}\) Rather, the State only had to provide a "substantially equal" law school open to Blacks and established TSUN, an evening law school for Blacks in the state capital.\(^\text{73}\) The programs so lacked in quality and resources that the Supreme Court eventually found that there was not "substantial equality in the educational opportunities offered white and Negro law students by the state," and ordered the white institution to admit black students.\(^\text{74}\) In the wake of Sweatt, several black students sought admission to UT programs outside of the Law School, and Texas' Attorney General opined the Sweatt was applicable to all other degree programs not offered at comparable schools.\(^\text{75}\) UT enrolled its first black student to

\(^{70}\) See Texas Southern University (citing TSUN as the "first state-supported" college in Houston), at http://www.tsu.edu/about/history (last visited Sept. 19, 2004).

\(^{71}\) Sweatt v. Painter, 339 U.S. 629, 631 (1950); Shabazz, supra note 62, at 3.

\(^{72}\) Sweatt, 339 U.S. at 632.

\(^{73}\) Id.

\(^{74}\) See id. at 632–636 (noting the vast disparity between UT Law School and TSUN in terms of faculty numbers and quality, library resources, scholarship funds, extra-curricular opportunities, reputation, prestige, and tradition).

\(^{75}\) See Shabazz, supra note 62, at 109–10.
graduate in 1950 in architecture.\textsuperscript{76} TSUN’s law school eventually moved 120 miles from the state capital to Houston, where it became a historically black law school, one that exists to this day, and with approximately one-quarter of its enrollment Mexican Americans.\textsuperscript{77} For a number of years, even as the city grew, TSUN was the only public university in Houston, where it shared a city street as a border with the private white institution established originally by the Houston school district.\textsuperscript{78} The District also maintained a K-14 junior college as well, until the 1980’s, when it became a local community college with its own publicly-elected trustees and independent tax base.\textsuperscript{79} By the 1970’s, Houston’s public university had eclipsed the historically

\textsuperscript{76} Id. at 110–13.

\textsuperscript{77} See Texas Southern University (describing the unique history of TSU, which began as the first historically black law school), at http://www.tsu.edu/about/history (last visited Sept. 19, 2004); ABA/LSAC Official Guide to ABA-Approved Law Schools, 2004 Ed. (2003) at 696.

\textsuperscript{78} See supra note 66. The two institutions share Scott Street.

\textsuperscript{79} See Houston Community College System (describing the history of Houston’s community colleges), at http://hccs.edu/bond/facts.html (last visited Sept. 19, 2004). For studies of the Houston Independent School District (HISD), which gave birth to the Houston College for Negroes, which later became Texas Southern University (1935), the Houston Junior College, which later became the University of Houston (1927), and the Houston Community College System (1989), see generally WILLIAM HENRY KELLAR, MAKE HASTE SLOWLY: MODERATES, CONSERVATIVES AND SCHOOL DESEGREGATION IN HOUSTON (1999) (describing the origins of Houston’s segregated school system, and the city’s post-\textit{Brown} desegregation of the Houston Independent School District); GUADALUPE SAN MIGUEL, JR., BROWN, NOT WHITE: SCHOOL INTEGRATION AND THE CHICANO MOVEMENT IN HOUSTON (2001) (examining the Houston
black TSUN in size and prestige, and it began to add branch campuses in the heart of downtown, in the white suburbs where NASA was built, and in a rural area some distance from the city. These four campuses led to differentiated missions for each, and the entire system grew to over 50,000 students. The “main,” or “central campus” offers all the doctoral programs, intercollegiate athletic programs, and professional programs, such as the law school, architecture, optometry, and pharmacy programs. The upper-division campus near NASA provided for the many students sent from local two-year colleges, an open-door downtown college offered baccalaureate programs and became a predominantly minority student body, and the rural campus shared its location with a rural community college. In addition to the dozens of smaller private colleges and larger public two-year institutions in Houston, the system added suburban learning center sites in growing parts outside of city in the 1990’s, more than twenty-five miles from the downtown and main campus hubs. These remote higher education facilities did not

school district’s effort to circumvent desegregation by classifying Mexican Americans as “whites”). For a self-serving narrative of reform in HISD, see generally DONALD R. McADAMS, FIGHTING TO SAVE OUR URBAN SCHOOLS . . . AND WINNING! (2000) (discussing an ethnographic study of a Houston inner-city high school, and exploring how Anglo educators’ concept of “care” affects minority students). The “win” in Houston has been quite contested, especially in light of recent controversies over dropout data being falsified and how “zero tolerance” policies evolved. See Rachel Graves, Backlash Growing Over Zero Tolerance, HOUS. CHRON., Apr. 18, 2004, at 1A (reviewing concerns with zero-tolerance discipline policies); Jason Spencer, Assistant Principal Files Whistle-Blower Suit (discussing data fraud in HISD dropout records), HOUS. CHRON, Apr. 17, 2004, at 29A; Jason Spencer, HISD Focuses on Achievement Gap, HOUS CHRON., May 16, 2004, at 1A (discussing racial isolation in HISD schools).
have their own faculties, but were intended to develop into their own campuses as the state desired to expand and accommodate the non-urban growth areas.\textsuperscript{80}

Racial factors similarly influenced Houston’s agricultural college character, as the city grew towards the direction of Texas’ agricultural college—Texas A&M University. Rather than admit blacks to A&M, Texas established a rural HBCU, the Agricultural and Mechanical College of Texas for Colored Youth, in 1876, which was located between the A&M campus and Houston, and was part of the state’s separate-but-equal segregated land grant college system.\textsuperscript{81} By the year 2000, the re-named Prairie View A&M University was part of Houston’s suburban ring, approximately forty miles from the downtown area, on the same road that led to the state capital.

Houston’s rich and complex college history remains dynamic and changing, as the city itself ebbs and flows. Houston’s population has increased to over 4.3 million people, becoming the Nation’s fourth largest city.\textsuperscript{82} Immigration and in-migration have created a larger, diverse, and international populace. The 2002 Census data revealed that of Houston’s population, African Americans comprise twenty-five percent, Mexican Americans and other Latinos forty


percent, Asians six percent, and Anglos twenty-nine percent. As a result, the city’s largest public institution, which still shares a street border with the now predominantly black and Chicano HBCU, has become a campus with no single racial group in the majority. It will soon be eligible to become a Hispanic Serving Institution, when Hispanics comprise twenty-five percent of its population. The city’s major school district enrolls 211,000 students, of whom fewer than ten percent are Anglo, and there are over a dozen neighboring school districts, each becoming larger and more diverse.

The HBCU is open admission and competes for other open admissions students with the larger public institution’s 9,000 student Downtown College (formerly the South Texas Junior College); the two campuses are less than two miles apart, one in a prime downtown location, and the HBCU in a deteriorating mixed residential and light industrial area. The HBCU is sandwiched between the campus that eclipsed it when the state transformed the white-by-practice

\textit{Id.}


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private college in 1963, and the one that duplicated its mission and overlapped its target population in the 1970’s, when the state created it in the choice downtown service area. After its birth as an institution designed to keep blacks out of the state capital’s white public campus, the population’s reactions to the HBCU were mixed; historical records show a slow and grudging integration of the city’s public dental and medical schools. 86

And thus, Houston’s racial college character was forged from elements of white private colleges and segregated public institutions. Locale and racial identity gave birth to these campuses and the state was the parent, creating separate and unequal institutions, building parallel campuses with adjoining borders and service areas, and spending extraordinary legal and political resources to maintain these insular enterprises. An alternative, parallel world, where Rice University was open tuition-free to all inhabitants, or where the state had built the University of Texas and Texas A&M University as integrated institutions in Austin and College Station, and where Blacks were not consigned to Texas Southern University or Prairie View A&M University, would look quite different. Likewise, imagine if the University of Houston was a private institution, open to all, or if Houston’s first public institution had been integrated, rather than a TSU born of racial necessity, a UH made public to eclipse the neighboring black institution or a UH-Downtown created by the state to further marginalize TSU and compete with its mission.

B. Nashville, Tennessee

86 See Shabazz, supra note 62, at 78–81. Interestingly, the University of Texas Medical Branch in Galveston admitted its first black student in 1949, but “reconstituted” his admission so his degree was actually from the “Texas State University for Negroes Medical Branch”—a nonexistent institution. See id.
The higher education system in Nashville, Tennessee has a similar racial birthright. For many years, only Tennessee State University, a historically black college, provided public higher education in this southern city, while Vanderbilt University thrived as an exclusively white private college.\textsuperscript{87} The public flagship University of Tennessee (UT) in Knoxville also grew up White and privileged, until the late 1960’s when UT officials cast their eyes on Nashville where many of their alumni moved and where, like Houston officials, they desired a metropolitan downtown presence. In 1968, UT established a downtown campus (UT-N) to offer business and other programs desirable to Nashville residents, until both white and black citizens successfully alleged that establishing a Nashville campus further maintained a dual system of higher education.\textsuperscript{88} Although by this time all public colleges were legally open to all races, no historically white public college in the state enrolled more than 7 percent black students, while TSU enrolled virtually all black students.\textsuperscript{89} The UT-N campus and the other extension centers established by UT were slightly more integrated than was UT generally—approximately 80

\textsuperscript{87} \textit{See Geier v. Blanton}, 427 F. Supp. 644, 645 (M.D. Tenn. 1977). \textit{See generally Edwin Mims, History of Vanderbilt University}. \textit{Many other cities have such racial cartographies. For an interesting study of New Orleans, see Amy E. Wells, Good Neighbors: Distance, Resistance, and Desegregation in Metropolitan New Orleans, 39 URB. EDUC. 408 (2004); See also Kevin Gotham, Race, Real Estate, and Uneven Development: The Kansas City Experience, 1900-2000 (2002); David Sibley, Geographies of Excusion (1995).}

\textsuperscript{88} \textit{See Geier}, 427 F. Supp. at 645.

\textsuperscript{89} \textit{See id.}
percent of students were white.\textsuperscript{90}—UT-N’s location in downtown Nashville, however, thwarted any possibility that TSU, located in a less desirable part of town, could diversify its student body by attracting upwardly-mobile downtown Nashville professionals, either black or white.\textsuperscript{91} Thus, establishing UT-N in Nashville further marginalized the traditionally black university and impeded on its ability to foster diversity, while extending the reach and influence of the traditionally white institution in the larger polity.\textsuperscript{92}

The racially charged turf war in Nashville was not UT’s first incursion on another public university’s neighborhood. The State of Tennessee had engaged in the same racial politics of location in the 1950’s, when UT established a downtown regional center in Memphis, despite Memphis State University’s (MSU) prior claim to metropolitan Memphis.\textsuperscript{93} The competition favored UT, as a UT degree carried more prestige than did an MSU degree at the time.\textsuperscript{94} “For reasons unknown to many but understood by a few, many University of Tennessee downtown students drove past the Memphis State University campus to take classes.”\textsuperscript{95} A dozen years later, MSU established its own downtown regional center to thwart UT’s attempt to gain

\textsuperscript{90} See id. at 652.

\textsuperscript{91} See id.

\textsuperscript{92} See id.; supra Part I.A.; see also Geier v. Alexander, 801 F. 2d 799, 800 (6th Cir. 1986) (approving the use of racial quotas to aid in eliminating vestiges of segregation in Tennessee’s higher education institutions).


\textsuperscript{94} See id.

\textsuperscript{95} Id. (internal citations and quotations omitted).
“resident center status” and diminish the appeal of UT’s Memphis center. Eventually, MSU and UT founded a Joint University Center directed by MSU.

The more racially contentious problem in Nashville, however, would not be so easily resolved. The state finessed the issue for a number of years, undertaking studies and trying to enact cooperative programs, thereby delaying the resolution of this sensitive and complex political problem. In 1977, this complex problem came to a head when a district court ordered a merger of TSU and UT-N, noting the state’s inability to remedy the dual system of segregated higher education, and further mandated that TSU absorb the downtown UT-N facility as its own downtown campus. To those UT partisans who argued that this merger remedy was unfair to the University of Tennessee, the court responded: “[c]ertainly, it cannot be argued that TSU would be overwhelmingly black today if it had not been established as an institution for Negroes. Merger is a drastic remedy, but the State’s actions have been egregious examples of constitutional violations.”

The United States was back in federal court less than a decade later, attempting to turn back the clock by intervening to argue that merger was not an appropriate remedy. The Department of Justice objected on the grounds that the merger was an impermissible racial

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96 See id.

97 Id. MSU has since been re-named as the University of Memphis.


100 Id. at 660.

remedy and an abuse of the court’s discretionary authority. In 1986, the Sixth Circuit rejected this late effort with thinly-veiled disdain:

All of the parties directly involved in this case agreed to settle it after sixteen years of litigation. In the early years it was the United States that exhorted the court to broaden its remedial orders while the state sought to restrict them. At the very time the state became convinced that its earlier efforts had failed to eliminate the vestiges of its past discriminatory practices, the Department of Justice was urging the court to pull back—a truly ironic situation.

The district court rejected the argument that it could not properly conclude from the record that the low minority enrollment in Tennessee’s public professional schools resulted from past discriminatory practices. The district court was fully justified in making this determination. Applicants do not arrive at the admissions office of a professional school in a vacuum. To be admitted they ordinarily must have been students for sixteen years. Students applying for post-graduate schooling in the 1983-84 school year would have begun school at age six in 1967 and would have entered college in 1979. The district court had made consistent findings between 1968 and 1984 that the public colleges and universities of Tennessee had not eliminated the vestiges of their years of operation under state-imposed segregation. The district court could also take judicial notice of findings by the district courts and this court that those vestiges had not been eliminated from many of the public school systems of Tennessee, all of which were operated under the same state-imposed system of separate schools for the two races.

Although the merger plan had called for the newly-configured TSU to be approximately half white students and half black students by 1992-93, its overall racial composition settled at one-quarter white students and three-quarters black students. In contrast, at the flagship

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102 See id. at 803–04.

103 Id. at 809 (citations omitted).

104 See www.tnstate.edu (TSU Quick Facts, stating 2004 enrollments)
campus of the University of Tennessee, in Knoxville, the black enrollment in 2002 was a mere seven percent.  

The litigation in Tennessee did not exist in isolation; in fact, the U.S. Department of Health, Education, and Welfare (HEW) had been sued by the NAACP Legal Defense Fund in 1970 to require HEW to enforce Brown at the level of higher education. This litigation strategy was risky, not because it was unwarranted, but because a primarily white, southern judiciary could have reacted to the failure to desegregate with a variety of remedies, not all of them favorable. Judges could react by closing white institutions that had benefited from historical political privilege, merging or reconstituting the activities into a hybrid directed by white institutions, merging or reconstituting the activities into a hybrid directed by black colleges—as in Nashville, or by closing black institutions and forcing white colleges to accommodate the displaced students. 

Complicating these alternatives is the fact that the demographics surrounding these institutions were often in flux. An area’s growth could be so pronounced that several racially distinct institutions could coexist, which appears to have happened in Houston with Texas

105 See Brief Historical Sketch of the University of Tennessee, at http://web.utk.edu/~mklein/brfhst.html (describing the student body today as ‘moderately diverse’); see also UT Fact Book 2002-03, at http://oira.tennessee.edu/facts/fb/fb02/student.pdf (providing fall 2002 data).

106 See Adams v. Richardson, 480 F. 2d 1159 (D.C. Cir. 1973).

107 The Geier case continues to this date. Geier v. Sundquist, 372 F. 3d 784 (6th Cir. 2004) (dispute over attorney fees).
Southern University, the University of Houston, and UH-Downtown, or the demography could change so substantially that a college of one race could morph into a college with a different racial character. For instance, Bluefield State College in West Virginia, an historically black school, became a predominantly white institution over time; the University of Houston changed from a private white college and then became a public institution without a single racial majority. An area’s racial calculus could also so dramatically change over time that its local colleges simply reflected changes in their communities. For example, the rise of Asian student enrollment in California colleges, particularly the University of California at Berkeley, is surely due to changes in immigration policy, Asian achievement, and other historical developments in the years following World War II internment practices. Texas Rio Grande Valley institutions such as Laredo State University, Pan American University, and Texas Southmost College became predominantly Mexican-American or Mexican, although the original institutions were

108 See Parsons, supra note 80, at 1; supra note 96 (discussing enrollment growth in UHS institutions). With additional enrollment growth, the public colleges in Houston are bursting at the seams. See id.

109 See Bluefield State College, Self-Study Report 13 (Dec. 10, 2001), available at www.bluefield.wvnet.edu/self-study.pdf (last visited Sept. 19, 2004). Bluefield State College was established as an historically black college in 1895. Id. By 2001, its black enrollment had shrunk to 7 percent of the total, prompting a self-motivated inquiry about attracting minority students. Id. at 19.

not historically Hispanic; in addition, each of these institutions was absorbed into a larger institutional system, creating TAMU-Laredo International University, UT-Pan American/Edinburg, and UT-Brownsville. A similar pattern held true for many other community colleges that have become predominantly minority campuses, especially as the urbanization of minority populations affected higher education in the 20th Century.

III.

MEXICAN AMERICANS AND THE POLITICS OF REGION, PLACE, AND COLLEGE CHOICE

For Mexican Americans, contesting the politics of college place has taken a different route than that occasioned by the separate-but-equal route of Brown. Education was poor and inadequate for Mexican Americans in the 20th Century, and while de jure segregation affected Mexican Americans in ways different than did the racism aimed at Blacks in Texas, the end results were very similar. As one example, very few Mexican-origin children graduated from


\[\text{112}\] MICHAEL A. OLIVAS, THE DILEMMA OF ACCESS: MINORITIES IN TWO YEAR COLLEGES 193-203 (1979) (revealing that community colleges in urban areas have higher minority enrollment than those in rural areas).

high school or attended college.\textsuperscript{114} And, few attended professional schools, such as law school, even in large cities such as Houston, Dallas, or San Antonio. Even Catholic institutions did poorly in serving Mexican Americans, despite the overwhelming majority of Mexican Americans being Catholic.\textsuperscript{115}

Since its founding in 1968, the Mexican American Legal Defense and Education Fund (MALDEF) has litigated many cases involving education, voting rights, immigration, language rights, employment discrimination, and other civil rights affecting Mexican-Americans.\textsuperscript{116} In


\textsuperscript{114} See SAN MIGUEL, supra note 79, at 32–33.


\textsuperscript{116} Id. at 169 – 186. For a study of earlier Mexican American legal efforts at eradicating racism, see George A. Martinez, Legal Indeterminacy, Judicial Discretion, and Mexican-American Litigation Experience, 1930-80, 27 U.C. DAVIS L. R. 555 (1994);Ricardo Romo, Southern California and the Origins of Latino Civil-Rights Activism, 3 W. LEGAL HIST. 379.
choosing to address higher education cases, MALDEF has brought two suits involving college location and siting issues, Richards v. League of United Latin American Citizens (LULAC)\textsuperscript{117} and Garcia v. California Polytechnic State University, San Luis Obispo (CSU-SLO).\textsuperscript{118} In the first case decided in 1993, MALDEF brought suit against the State of Texas for its regional inequities in choosing sites for colleges, allocating sites for colleges, and allocating higher education resources.\textsuperscript{119} In the latter, the suit was brought in California to strike down admissions (1990). In the interest of full disclosure, the author has served as a MALDEF board member since 2003;

\textsuperscript{117} 868 S.W.2d 306 (Tex. 1993).


\textsuperscript{119} See Richards, 868 S.W.2d at 308. In a series of news articles, Russell Gold detailed the effects of the Texas Border Initiative on the regions’ colleges. See Russell Gold, College Initiative’s Future Will Find Funding Tougher?, SAN ANTONIO EXPRESS-NEWS, Nov. 25, 1997, at 1A; Russell Gold, Pork Fattens Border Initiative, SAN ANTONIO EXPRESS-NEWS, Nov. 24, 1997, at 1A; Russell Gold, S. Texas Universities Make Strides, Still Lag, SAN ANTONIO EXPRESS-NEWS, Nov. 23, 1997, at 1A. In 2003, Matt Flores followed up with another look at the Initiative a decade after its inception. See Matt Flores, College Economics Test, SAN ANTONIO EXPRESS-NEWS, Feb. 23, 2003, 1A [hereinafter College Economics]; Texas Educators are on Edge at the Top, SAN ANTONIO EXPRESS-NEWS, Feb. 25, 2003, at 1A; UTSA’s Climb to Top-Tier Status is Getting Tougher, SAN ANTONIO EXPRESS-NEWS, Feb. 24, 2003, at 1A.
practices that favor white applicants within CSU geographic “service areas.” Brought in 2004, Garcia is now pending. Both cases are complex and nuanced assaults upon state practices that limit the accessibility of higher education for Mexican American populations, and turn on issues of where one resides, or in other words, the politics of place.

III

THE POLITICS OF UNIVERSITY ADMISSIONS AND PLACE

One’s location determines, as a large number of life’s advantages and opportunities are parceled out by residence, duration, domicile, and location. There is extensive legal and sociological literature on these the legal rights and opportunities that vary by residence, and literally hundreds of relevant court decisions. The concepts of “neighborhood schools,” voting districts, tax obligations, in-state tuition, eligibility for certain resources and exposure to


124 See Jeffrey A. Groen & Michelle J. White, In-State Versus Out-of-State Students: The Divergence of Interest Between Public Universities and State Governments, 88 J. PUB. ECON.
certain regulations, and many legal statuses derive from place—even the same crimes committed in different jurisdictions can have vastly different consequences. Although there is a system of comity among states for reciprocal arrangements and full faith and credit among political entities, there is an important issue of federal jurisdiction that can preempt various state laws, such as a uniform immigration or national security regime that can trump state residency matters.


126 See Christopher T. Corson, Reform of Domicile Law for Application to Transients, Temporary Residents and Multi-Based Persons, 16 COLUM. J.L. & SOC. PROBS. 327, 329 (1981) (“Such [domicile-based] laws govern many public, family and professional affairs and include amenability to service of process when outside the state . . . state voting, income taxation . . . marriage, divorce, child custody, professional licensing and eligibility for certain programs.”).


In higher education, this complex algebra of place delegates the statewide coordination of governance of higher education to the institutional boards of trustees and statewide higher education agencies who execute the legislative and corporate requirements to establish and locate colleges.\(^{129}\) And, where a college is located can apportion access in a way that benefits or harms certain citizens.

**A. Richards v. LULAC**

For Mexican Americans in Texas, place counts, especially in determining who goes to local colleges. Forty-one counties form the border between Texas and Mexico, from El Paso in the west to Brownsville in the east, where the Gulf Coast begins.\(^{130}\) This swath is hundreds of miles long and stretches from Ciudad Juarez to Matamoros, along the Rio Grande River; it is widely referred to as “the Borderlands” or “la Frontera.”\(^{131}\)

The plaintiffs in *Richards* charged that state authorities denied equitable higher education funds to the Border Area, thereby denying equal access to college to the predominant Mexican American population as compared to the rest of the state’s population, which was predominantly

\(^{129}\) Michael A. Olivas, *State Law and Postsecondary Coordination, 7 R. HIGHER EDUC.* 357 (1984). This does not refer to various zoning or local taxation issues concerning colleges, which are another interlocking and extensive concern.


of Anglo or non-Mexican origin. The trial court agreed with the plaintiffs, and the court found that under the State’s reasons, this misdistribution violated Article I, Section 3 of the Texas State Constitution and Section 106.001 of the Texas Civil Practice and Remedies Code.

During an extensive jury trial in state court, the plaintiffs entered into the record “certain statistical matters” that showed substantial disparities in the higher education resources available to the area’s residents. The court noted that about twenty percent of all Texans live in the border area, which only receives approximately ten percent of the State funds for public universities in that region. Fifty percent of the public university students in the border area are Hispanic, as compared to 7 percent in the rest of Texas, and border area students travel significantly further—nearly 200 miles—than the average university student to reach the nearest


133 See id. at 310. Article I, § 3, the equal rights clause of the Texas Constitution, provides that “[a]ll free men, when they form a social compact, have equal rights, and no man, or set of men, is entitled to exclusive public emoluments, or privileges, but in consideration of public services. Section 3(a) specifies that “[e]quality under the law shall not be denied or abridged because of sex, race, color, creed, or national origin. This amendment is self-operative.” And, Section 106.001 states that “[a]n officer or employee of the state or a political subdivision of the state who is acting or purporting to act in an official capacity may not, because of a person’s race, religion, color, sex, or national origin: . . . (5) refuse to grant a benefit to the person; [or] (6) impose an unreasonable burden on the person.”

134 Id. at 309, 311-14.
public university offering a broad range of masters and doctoral programs, which are rarely offered at border universities.\textsuperscript{136} After noting that “these disparities exist against a history of discriminatory treatment of Mexican Americans in the border area (with regard to education and otherwise), and against a present climate of economic disadvantage for border area residents,” the trial court had held that the Texas system of higher education discriminated against Mexican Americans, depriving them of equal educational opportunity and denying them equal rights by spending less state resources in areas significantly populated by Mexican Americans, particularly the border area.\textsuperscript{137}

The Texas Supreme Court unanimously reversed the trial court decision, holding that an equal rights violation based upon a “geographical classification” “cannot be sustained,”\textsuperscript{138} nor could its corollary race or national origin claim.\textsuperscript{139} The Texas Supreme Court denied the trial court’s reasoning, holding that the plaintiffs “failed to establish that the Texas university system policies and practices are in substance a device to impose unequal burdens on Mexican Americans living in the border region.”\textsuperscript{140} The court determined that the plaintiff’s theory of the case was both underinclusive and overinclusive:

\begin{quote}
Whatever the effects of the Texas university system policies and practices, they fall upon the \textit{entire region} and everyone in it, not just upon Mexican-Americans within the region. Conversely, they do not fall upon Mexican-Americans outside the region. The same decisions that plaintiffs allege show discrimination against Mexican Americans in the border area serve, at the same time, to afford greater benefits to the larger number
\end{quote}

\textsuperscript{135} \textit{Id.} at 309.
of Mexican Americans who live in metropolitan areas outside the border region.\textsuperscript{141}

Although the plaintiffs were unsuccessful in the Texas Supreme Court, the war was won in the Texas Legislature, where border-area legislators directed substantial resources to border colleges, including doctoral and other graduate programs and a pharmacy school, and substantially-upgraded facilities and programs. Unlike the one-time infusion of dollars and modest increases involved in the \textit{Fordice} settlement, this initiative brought substantial program resources, program authorization, and political prestige to the border area institutions.\textsuperscript{142} For example, the colleges that had been small institutions with their own boards of trustees were admitted into the larger and more powerful flagship University of Texas (UT) and Texas A&M University (TAMU) systems.\textsuperscript{143} A dozen years later, it seems clear that the region has benefited from the political settlement, even if the case originally seemed lost.

B. \textit{Garcia v. California State Polytechnic University}

In a second case turning on geography, MALDEF filed suit in 2004 challenging the admissions practices of California State Polytechnic University, San Luis Obispo (CSU), which combine standardized test scores and regional criteria based upon residence in certain geographic “service areas.”\textsuperscript{144} The plaintiffs have charged CSU with using a “rigid mathematical formula”

\textsuperscript{136} See id.

\textsuperscript{137} See id. at 310.

\textsuperscript{138} Id. at 311.

\textsuperscript{139} Id. at 311-312.

\textsuperscript{140} Id. at 312.
that heavily weights the SAT and awards points for living in chosen neighborhoods. The complaint alleges that CSU awards “250 points to students living within a specific geographic area around the Cal Poly SLO campus, its so-called ‘service area.’” The complaint further states that

Cal Poly SLO’s geographical preference for applicants living within its ‘service area’ also results in an adverse disparate impact against Latino, African American, and Asian American students. For high school aged individuals residing within Cal Poly SLO’s designated ‘service area,’ whites are overrepresented, while Latinos, Asian Americans, and African Americans are underrepresented in comparison to their populations statewide. Therefore, Latinos, Asian Americans, and African Americans are eligible for the “service area” bonus at lower rates than whites. These differential rates result in a discriminatory effect on Latinos, African Americans, and Asian Americans.

The data reveal that the chosen “service area” is disproportionately white. Of high school aged students in California, 37.5 percent are white (55 percent in the CSU-SLO service area), 40.1 percent are Latino (35.3 percent), 10.8 percent are Asian (3.4 percent), and 7 percent are

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141 See sources cited supra note xxx.

142 See Flores, College Economics, supra note 119, at 1A.

143 See Russell Gold, South Texas Universities Make Strides, Still Lag, SAN ANTONIO EXPRESS-NEWS, Nov. 23, 1997, at 1A (noting the success of the Border Initiative but also commenting that “South Texas absorbed the $500 million like a desert does a brief rain, leaving the schools shortchanged in many ways”).


145 See id. at 7, ¶ 26.

146 Id. at 7, ¶ 27.
black (2.4 percent).\textsuperscript{147} In the designated service area, 1.9 percent of all statewide white students reside, 1.2 percent of all statewide Latino students, .5 percent African Americans, .4 percent Asians.\textsuperscript{148} Due to the case being recently filed, it is difficult to assess how the trial judge will consider these discrepancies.

As in the “geographical classification” strategy attempted in Texas, political factors undoubtedly underpin the admissions cartography.\textsuperscript{149} Those schools in the San Luis Obispo service area may or may not have been chosen for their racial characteristics, but it is hard to imagine that race was not a factor in their designation. And, while it is not essential that high-achieving schools are predominantly White or Asian, the complex calculus of high school attendance line drawing is rarely race-free, just as race is often a factor in the checkerboard of housing patterns.\textsuperscript{150} But in virtually every state, a relatively small number of feeder high schools routinely send their graduates to certain colleges, and this channeling process has a powerful racial and ethnic influence as well.\textsuperscript{151} Texas acknowledged this “channeling” effect and its enactment of the Top Ten Percent Plan has broadened the number of high schools who send

\textsuperscript{147} “Percentage of California High Schoolers in Service Area” Table.

\textsuperscript{148} Id.


\textsuperscript{150} See Charles Lawrence, Segregation "Misunderstood": The Milliken Decision Revisited, 12 U.S.F.L. REV. 15, 15–16 (1977); Leland Ware, Race and Urban Space: Hypersegregated Housing Patterns and the Failure of School Desegregation, 8 WIDENER L. SYMP. 55, 55–57 (2002);

\textsuperscript{151} See generally, RENDON ET AL, supra note 120.
graduates to the State’s flagship public colleges.\textsuperscript{152} Moreover, the colleges have broadened their recruitment efforts beyond the traditional schools, to reach a wide array of schools with promising applicants.\textsuperscript{153} This result has drawn substantial fire from some parents and others, but it is clearly in colleges’ interest to recruit from a broader pool and assure a wider stream of applicants.\textsuperscript{154}

CONCLUSION

All these technical issues aside, university admissions have been a front burner issue in recent years, with race chief among the topics. Although race and college admissions intersect at the institutional level, it remains important not to lose sight of the individualized impact of these important policy choices. \textit{Breaking Away}, the wonderful 1979 film about the “cutters” in Bloomington, Indiana, illustrates the consequences of college location choices for communities


\footnotetext{\textsuperscript{154} See Torres, \textit{supra} note 152 at 1604 (“[T]he efforts of the University of Texas . . . have yielded a more qualified entering class of students than conventional admissions programs and conventional affirmative action policies.”).}
and individuals. In the movie, the students at Indiana University, located in a quintessential Midwestern college town, feel and act superior to the locals or children of residents. The locals are disparagingly referred to by the more advantaged outsiders who attend IU as “cutters,” or stone-cutters, as the local quarries provide the building blocks and foundation for construction facilities all over the world. In the movie, the local resident cutters resent the outsider college students and rarely attend college themselves.

I do not personally resonate or fully identify with issues of place and college; I attended a local hometown college in Santa Fe, New Mexico (the College of Santa Fe), but not because of its location. In fact, place per se never drove my choice of higher education institutions; rather, other personal choices and considerations led me to the venues I entered, and I was fortunate to have had a wide range of options, all of them affirmative and within my unsure grasp. I attended CSF because I was a student for the Catholic priesthood and that is where my Archbishop assigned me. I was admitted and received a scholarship. After my first year, he assigned me to a more national seminary, the Pontifical College Josephinum in Worthington, Ohio, where I graduated in 1972, after studying eight years to become a priest. I then left these studies and undertook graduate work at Ohio State University, a campus that enrolled more students than the number of persons who lived in Santa Fe at the time, and attended Georgetown University Law Center—a school I chose because it was Catholic, because friends had attended, and because it allowed me to attend at night and work while earning my J.D. Nevertheless, I certainly can

155 BREAKING AWAY (Twentieth Century Fox 1979).

156 See id.

157 See id.

158 See id.
appreciate how geography affects opportunity. I probably chose the seminary route because of the influence of priests in my neighborhood parochial school(s). After my parents had six children, my liquor store clerk father was able to attend the local college (the University of New Mexico in Albuquerque), transforming our family’s life as he became a successful accountant and as we had four more children. My father could not have done all this in Tierra Amarilla, the small northern New Mexico town where my grandfather grew up. “Place” would have made it impossible for my family to transform itself. Immigrant families in New York City had the opposite opportunity structure, as the City University campuses extended extraordinary tuition-free opportunities to many poor children. Rice University in Houston offered the same, at least to the “white inhabitants” of the city. So I understand that place counts, location counts, even if it did not do so directly for me.

The importance of place and location in higher education will continue for at least the foreseeable future, over and above Grutter reaffirming the affirmative action practices allowed after Bakke. This will be so, particularly if states remain strapped for funds or choose not to support colleges at reasonable levels, a development that is seriously undermining efforts towards universal access. For example, competition and cutbacks in California, the largest and most extensive higher education system, will affect equity and college enrollment in ways not


yet fathomed or discernable.\textsuperscript{161} And race, as always, is a fugue that runs through these politics.\textsuperscript{162} Alex Johnson’s arguments concerning \textit{Fordice} go directly to the crux of the issue:

What is lacking in the Court’s approach is some recognition that secondary and post-secondary educations 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 \textit{Fordice} and practiced in America merely requires assimilation of African-Americans into white culture and does not integrate the cultures and \textit{nomos} of the African-American and white communities into each other.\textsuperscript{163}


\textsuperscript{162} For example, in states such as Michigan anti-\textit{Grutter} referendum movements have begun to surface, such as one led by Jennifer Gratz. \textit{See} Alyson Klein, \textit{Affirmative-Action Opponents Suffer Setbacks in Colorado and Michigan, CHRON OF HIGHER EDUC.}, Apr. 9, 2004, at A23; Robert E. Pierre, \textit{Affirmative Action Foes Seek Mich. Referendum: Initiative Would Amend State’s Constitution, WASH. POST.}, Mar. 5, 2004, at A3.

\textsuperscript{163} \textit{See} Johnson, \textit{supra} note 13, at 1469.
The moral force and eloquence of Brown should not be forgotten, but nor should the massive resistance to its true implementation.\textsuperscript{164} There is a natural human tendency, one to which we are all subject, to view things as being better and more understandable than their reality. In truth, college admissions is a simple concept but an enormously complex transaction.\textsuperscript{165} The role of residence, location, and locale is an understated factor in this phenomenon, one that is an important determination in the scheme of luck and merit that


In a truly ironic fashion, after states have neglected to adequately finance HBCU’s, white legislators point to poor finances as reasons to close them. See Robert Gullick, Hobby Backs Takeover of TSU: Wants It Closed, HOUS. CHRON., Aug. 25, 1999, at A1 (documenting the Texas Lt. Governor insisting that Texas Southern University should be closed); Ron Nissimov, Scholarly Struggle: Black Colleges Still Feel Impact of Segregation, HOUS. CHRON., Feb.18, 2001 (same).

ultimately results in our children making their ways to college classrooms. *Brown* was in one important sense about place. And place matters.