Desegregation of Public Institutions of Higher Education: Merger as a Remedy

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DESEGREGATION OF PUBLIC INSTITUTIONS OF HIGHER EDUCATION: MERGER AS A REMEDY

Geier v. University of Tennessee
597 F.2d 1056 (6th Cir.), cert. denied, 100 S. Ct. 180 (1979)

Twenty-six years have passed since the United States Supreme Court declared in Brown v. Board of Education\(^1\) that segregation of public school children on the basis of race was violative of the equal protection clause of the fourteenth amendment.\(^2\) In 1955, a year following the historic Brown I decision, the Court in Brown II \(^3\) first considered the complex issue of the relief to be granted black students denied equal protection as a result of public school segregation. The Court required school districts to make "a prompt and reasonable start"\(^4\) towards establishing a nondiscriminatory system.

After a decade of relative inaction on the part of school authorities, the obligation to desegregate school systems once segregated by law greatly expanded as the courts vested local officials with affirmative duties to initiate desegregation/integration plans at the elementary and secondary levels. In the area of public higher education, however, many southern university systems remained marked by racial separation,\(^5\) and the nature and scope of a state's duty to remedy this situation had not been clearly delineated by the courts.

Thirteen years after Brown II directed officials of segregated school districts to proceed to dismantle them with "all deliberate speed,"\(^6\) the only step taken by Tennessee authorities to dismantle the dual system of public higher education had been to initiate a policy of open admissions; a policy which produced little in the way of results. In 1968, approximately eleven percent of the 57,000 students attending Tennessee's public universities were black.\(^7\) Despite an official open-
door policy of admissions, the formerly white institutions had black enrollments varying between six-tenths of one percent to a high of about seven percent. On the other hand, the traditional black school, Tennessee State University, located in Nashville, retained a black enrollment in excess of ninety-nine percent.

Between 1968 and 1977, the United States District Court for the Middle District of Tennessee attempted to deal with the manifold problems of eliminating the vestiges of state-imposed segregation, with particular emphasis on Nashville where both Tennessee State University and an extension of the predominantly white University of Tennessee were situated. The protracted litigation concerning the affirmative measures to be taken to remedy the Nashville situation culminated in 1979 in a decision by the United States Court of Appeals for the Sixth Circuit, Geier v. University of Tennessee, which affirmed the district court's order to merge Tennessee State University and University of Tennessee at Nashville.

This case comment will focus on the Sixth Circuit's opinion in Geier. The comment will attempt to place the decision in perspective through a brief review of the pertinent desegregation cases and background of the Nashville litigation. The Geier holding will then be presented and analyzed. It will be shown that, as a matter of law, the affirmative duty to desegregate officially established dual systems of education extends to institutions of higher learning, and that when this duty is not met, the courts may use their equitable powers to fashion appropriate relief. This comment will question the rationale and scope of the merger order, particularly in relation to the dilemma posed when desegregation requirements may serve to endanger the valued role of

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8. In 1968, Tennessee State University was known as Tennessee Agricultural & Industrial State University. To prevent confusion, however, Tennessee State University will be used in the text of this comment. Brief for Appellee, supra note 5, at 4 n.12.

9. In 1968, the percentage of black students in Tennessee's public universities was as follows:

<table>
<thead>
<tr>
<th>University</th>
<th>Percent Black</th>
</tr>
</thead>
<tbody>
<tr>
<td>Austin Peay State University</td>
<td>6.7</td>
</tr>
<tr>
<td>East Tennessee State University</td>
<td>1.1</td>
</tr>
<tr>
<td>Memphis State University</td>
<td>7.6</td>
</tr>
<tr>
<td>Middle Tennessee State University</td>
<td>1.5</td>
</tr>
<tr>
<td>Tennessee State University</td>
<td>99.4</td>
</tr>
<tr>
<td>Tennessee Technical University</td>
<td>0.6</td>
</tr>
<tr>
<td>University of Tennessee</td>
<td>1.2</td>
</tr>
</tbody>
</table>

Brief for Appellee, supra note 5, at 5-6.

10. Compulsory racial segregation in Tennessee was mandated by the 1870 Constitution. Tenn. Const. of 1870, art. II, § 12 (1870).

black colleges and universities. Finally, this comment will consider the probable impact of the Geier decision on other historically segregated public college systems.

DESEGREGATION AS A CONSTITUTIONAL DUTY: AN OVERVIEW OF SUPREME COURT DECISIONS

Although the Supreme Court in Brown II had ordered the elimination of racial segregation in public schools, it proposed neither standards by which to measure compliance nor a time framework other than "all deliberate speed." As a consequence of active southern resistance to any type of desegregation and a lack of judicial guidelines, the period between 1954 and 1968 was characterized by evasive and delaying tactics in the implementation of desegregation. In 1968, the Court articulated, in Green v. County School Board, the goal and standard by which a state's fulfillment of its duty under the equal protection clause was to be measured: complete integration and transition "to a unitary, non-racial system of public education." School boards were charged with an affirmative duty to produce plans that realistically worked to eliminate "root and branch" state imposed systems of public education.

The nature and scope of desegregation remedies were specifically addressed by the Supreme Court in two key decisions. In the first, Swann v. Charlotte-Mecklenburg Board of Education, the Court estab-

12. 349 U.S. at 294-301. One of the first federal district court decisions to interpret Brown I declared that integration was not required: "all that [Brown I] has decided, is that a state may not deny to any person on account of race the right to attend any school that it maintains .... The Constitution ... does not require integration. It merely forbids discrimination. It does not forbid such segregation as occurs as the result of voluntary action." Briggs v. Elliott, 132 F. Supp. 776, 777 (E.D.S.C. 1955).


14. 391 U.S. 430 (1968). In Green, the Court held that the freedom of choice plan adopted by New Kent County, Virginia was unacceptable because the dual system had not been effectively abolished. Id. at 441. The two county public schools remained racially segregated. During the three years that New Kent County had operated under a freedom-of-choice plan, eighty-five percent of the black pupils remained in all-black schools, and no white pupil had chosen to attend the former black school. Id. at 430. In the Court's view, such plans, where they failed to result in a unitary, nonracial system, were not to be regarded as ends in themselves but rather one of the means to undo segregation. If they failed to accomplish this, other means were to be sought. Id. at 440-42.

15. Id. at 436.

16. Id. at 437-42.

lished guidelines to assist the district courts in fashioning remedies where school authorities failed to adopt and effectuate adequate desegregation plans. This decision asserted the broad power of the district courts to design remedies that would assure a unitary school system. The scope of the remedial action was to be determined by the nature of the violation.

The nature of the violation became the Court’s focus in the second major opinion involving appropriate desegregation remedies, *Milliken v. Bradley.* Here, for the first time, the Supreme Court considered a remedy that extended beyond a single school district. In striking down a metropolitan-wide interdistrict order designed to promote school integration, the Court held that an interdistrict remedy could not be imposed unless the violations within one district produced “a significant segregative effect in another district.”

The *Brown, Green, Swann,* and *Milliken* decisions, as well as the great majority of cases involving school desegregation, dealt with elementary and secondary school districts. However, despite the fact that the Supreme Court has not delivered a full opinion on the extension of *Green* and *Swann* to higher education, it has never specifically exempted colleges and universities from the affirmative duty imposed at the lower school levels. The expression used by the Court in its

18. The Charlotte-Mecklenburg school officials had been unable to formulate an acceptable desegregation plan. As a result, the district court appointed an expert in educational administration and approved his plan which involved the pairing and clustering of schools, *id.* at 8-10, and the busing of students. *Id.* at 30. The Supreme Court addressed the scope of judicial remedies at great length. Lower courts were permitted to use mathematical ratios as a starting point in shaping a remedy, but not as an inflexible requirement. *Id.* at 25. School officials had the burden of satisfying the court that the continued existence of one race schools within their district was not the result of present or past discriminatory action. *Id.* at 26. Alteration of attendance zones was a permissible method of achieving nondiscriminatory pupil assignment. *Id.* at 28. Consideration of future construction as well as the closing of old schools were found to be properly within the scope of a remedial order. *Id.* at 20-21.

19. *Id.* at 16.


21. *Id.* at 744. Previously, the Supreme Court had decided that state or local officials could not manipulate school boundary districts so as to create smaller districts from school systems under desegregation orders where the effect would be to hinder desegregation in the remainder of the county. See *United States v. Scotland Neck Bd. of Educ.*, 407 U.S. 484 (1972); *Wright v. Council of the City of Emporia*, 407 U.S. 451 (1972).

22. The district court’s order would have effectively necessitated the consolidation of Detroit’s school district with fifty-three other districts in the metropolitan area. 418 U.S. at 743.

23. *Id.* at 744-45. The record before the Court contained evidence of de jure segregation only in the Detroit schools. Therefore, to impose a remedy on the outlying districts was wholly impermissible in the opinion of the Court. *Id.* at 745.

24. It was, in fact, in the sphere of higher education that the judicial attack on “separate but equal” began in 1938. See *The Affirmative Duty to Integrate,* supra note 13, at 669-71. The principles of *Brown I* were quickly extended to higher education when the Court affirmed a ruling that a state must have a nondiscriminatory admissions policy. *Frasier v. Board of Trustees*, 134 F. Supp.
Brown and Green decisions was simply "public education."25

DESEGREGATION OF PUBLIC HIGHER EDUCATION: FEDERAL DISTRICT COURT CASES

The federal district courts, on the few occasions that they have considered the issue of segregated public higher education, have expressed divergent views over the extent of the duty to go beyond the establishment of open admissions policies. Judicial reluctance to become involved in remediing these situations was accompanied by a noticeable absence, until 1978, of any HEW desegregation guidelines under title VI of the 1964 Civil Rights Act26 regarding federally assisted university programs.

The first court to grapple with the scope of the affirmative duty to desegregate institutions of higher learning was the United States District Court for the Middle District of Alabama in Alabama State Teachers Association v. Alabama Public Schools & College Authority.27 In ASTA, the plaintiffs sought to enjoin the state from the proposed construction and operation of a degree-granting extension of Auburn University in the city of Montgomery. Plaintiffs alleged that consideration had not been given to the probable effect of this action upon the elimination of Alabama's dual university system, and that the construction of a branch of predominantly white Auburn would increase the racial disparity between Auburn and predominantly black Alabama State College, also located in Montgomery.28 The ASTA court acknowledged its competency to review decisions concerning the impact of site selection for new school construction or expansion upon desegregation at the elementary and secondary levels; however, it concluded that courts should not become involved in this type of educational policy

589, 592-93 (M.D.N.C. 1955), aff'd per curiam, 350 U.S. 979 (1956). "There is nothing in the quoted statements of the [U.S. Supreme Court] to suggest that the reasoning does not apply with equal force to colleges as to primary schools." 134 F. Supp. at 592. See also Lucy v. Adams, 350 U.S. 1 (1955).

25. Brown I spoke of "separate but equal" as having no place "in the field of public education." 347 U.S. at 495. The Green Court spoke of a "unitary, nonracial system of public education" as the ultimate goal. 391 U.S. at 436.


27. 289 F. Supp. 784 (M.D. Ala. 1968), aff'd per curiam, 393 U.S. 400 (1969). It was not, however, the first time that the United States District Court for the Middle District of Alabama had dealt with the issue of segregated colleges. The court had previously recognized an affirmative duty to dismantle the dual system by requiring state colleges to refrain from discrimination in admissions and to begin to desegregate their faculties. See Lee v. Macon County Bd. of Educ., 267 F. Supp. 458 (M.D. Ala.), aff'd sub nom. Wallace v. United States, 389 U.S. 215 (1967).

decision at the university level. In the opinion of the ASTA court, the scope of the affirmative duty to desegregate should not be extended as far at the university level.  

According to the ASTA court, nondiscriminatory admission and employment policies promulgated and administered in good faith alone satisfy the affirmative duty in higher education. The decision stressed the substantial differences between elementary and secondary school systems and those of higher education. Up to the college level, public schools are free and compulsory, and one school is basically similar to another in terms of goals, courses, facilities, and teacher training. Higher education, however, is neither free nor compulsory, and offers enormous diversity in all of these areas. The court also noted that freedom to choose one's college has had a long tradition and performs an important function by fitting the right school to a particular student. The court expressed the belief that the problem of racial imbalance in higher education would be resolved when effective desegregation plans were developed at the lower school levels. On appeal to the Supreme Court in 1969, ASTA was summarily affirmed in a memorandum decision with two Justices dissenting.

This limited view of the scope of remedial action at the university level was rejected by a three judge district court in Norris v. State Council of Higher Education. The plaintiffs in Norris charged that Virginia continued to operate a racially identifiable dual system of higher education and sought to enjoin the escalation of predominantly white Bland College from a two-year to a four-year school. The plaintiffs contended that such escalation would lead to a duplication of offerings and frustrate efforts of neighboring predominantly black Virginia State College to desegregate. The court granted the injunction, but refused to require a merger of the two schools on the basis that Bland provided

29. Id. at 787-88.
30. Id. at 789-90.
31. Id. at 788.
32. Id. at 790.
33. Id.
34. Alabama State Teachers Ass'n v. Alabama Pub. Schools & College Auth., 393 U.S. 400 (1969). Justice Douglas, in his dissent, said that the delineation between lower and higher education in terms of the duty to desegregate was an "amazing statement" insofar as the forerunners of Brown I were cases involving institutions of higher education. Id. at 402 n.2. (Douglas, J., dissenting.)
36. 327 F. Supp. at 1369. The court pointed out that if Bland were to become a four-year college, white students, many of whom went to Virginia State after two years at Bland, would be more likely to seek degrees from the identifiable "white" school. Id. at 1371.
a useful function as a two-year college and had not demonstrated a need for additional facilities. The court also refused to grant the plaintiffs' request for an order directing state authorities to submit a plan for the desegregation of Virginia's universities and colleges. Without commenting on the merits of this request, the court denied the relief on procedural grounds.

In reaching its decision, the Norris court refused to accept ASTA's distinction between the extent of the duties entailed in the desegregation of higher and lower education. Instead, it held that the Supreme Court's positive mandate in Green v. County School Board to take affirmative action to eliminate dual educational systems "defined a constitutional duty owed as well to college students." Although the means of achieving this may differ, the duty of the state is as exacting. Thus, the court concluded that if admissions programs have not abolished the racial identity of its colleges, the state must look to other remedies.

Addressing the argument that the ASTA decision, summarily affirmed by the Supreme Court, was the controlling law of the case, the court attempted to distinguish the facts in that situation from those in Virginia. The court further asserted that it did not believe that the silent affirmance of ASTA in a one sentence memorandum decision by the Supreme Court indicated approval of every statement in the district court's opinion: removed from its context, the ASTA holding did not provide a universal definition of a state's duty to abolish its dual systems of higher education.

The ambiguity which is always inherent in summary affirmances was highlighted when the Supreme Court af-

37. Id. In fact, Virginia State did not press for a merger. Id. at 1373.
38. The plaintiffs had requested the governor and the State Council of Higher Education to prepare such a plan, but the court found that control of the colleges was vested in each college's board of visitors. Relief was denied because the proper parties had not been sued. Id.
40. 327 F. Supp. at 1373.
41. Id.
42. The attempt to distinguish the cases was not particularly convincing. The court in Norris suggested that in the ASTA situation the proposed branch of Auburn was to be a "new school" and, therefore, had no racial identification. The record in ASTA simply did not support plaintiffs' speculations that the new branch would be primarily for white students. Id. at 1372. The fact that Alabama State did have a racial identification was ignored by the Norris court as well as the fact that Auburn, itself, was identifiably white. The situation in Norris was viewed differently by the court. According to the court in Norris, expansion of the already existing Bland College, identifiably "white," would largely duplicate the offerings of "black" Virginia State. The two cases were further distinguished by the Norris court on the basis that in ASTA the court found both the state and Auburn to have been acting in good faith in complying with a court order to integrate its faculty. Id.
43. Id.
44. A summary affirmance of an appeal before the Supreme Court is a disposition on the
firmed Norris, also without opinion, in 1971.

THE HISTORY OF THE GEIER LITIGATION

Sanders v. Ellington

In order to understand, as well as to evaluate, the Sixth Circuit’s decision in Geier v. University of Tennessee, it is essential to review the series of opinions and orders rendered by the United States District Court for the Middle District of Tennessee during the eight-year span in which it considered the problems posed by Tennessee’s racially dual system of higher education.

Sanders v. Ellington,45 handed down one month after the ASTA ruling in 1968,46 was the first decision in the protracted Geier litigation,47 and one that represented a far different approach to the problem of segregated public universities than that taken by the Alabama court.

Plaintiff Geier (nee Sanders), along with other private plaintiffs,48 filed the action seeking to enjoin the identifiably white University of Tennessee from constructing a new facility for the expansion of its merits and, as such, is considered to have precedential value. C. WRIGHT, LAW OF FEDERAL COURTS 551 (3d ed. 1976). As viewed by the Court itself, however, summary dispositions do not have the same precedential value as would an opinion treating the question on the merits. Edelman v. Jordan, 415 U.S. 651, 671 (1974). Such an affirmance leaves uncertainty as to whether the Supreme Court endorsed the reasoning of the lower court, found that the appellant had not met his burden of proof, or believed that the case did not at that time involve a substantial federal question. G. GUNThER & N. DOWLING, CASES AND MATERIALS ON CONSTITUTIONAL LAW 62 (8th ed. 1970). Justice Brennan spoke of the inherent ambiguity of summary dispositions: “When presented with the contention that our unexplained dispositions are conclusively binding, puzzled state and lower courts are left to guess as to the meaning and scope of our unexplained dispositions. We ourselves have acknowledged that summary dispositions are ‘somewhat opaque’ . . . .” Colorado Springs Amusement v. Rizzo, 428 U.S. 913, 919 (1976) (Brennan, J., dissenting). For a discussion of the precedential aspects of summary affirmances, see Note, Summary Disposition of Supreme Court Appeals: The Significance of Limited Discretion and a Theory of Limited Precedent, 52 B.U. L. REV. 373 (1972).

47. The reported district court opinions involved in this litigation were all written by Judge Gray. They are, in addition to Sanders: Geier v. Dunn, 337 F. Supp. 573 (M.D. Tenn. 1973) and Geier v. Blanton, 427 F. Supp. 644 (M.D. Tenn. 1977). The appeal of the latter ruling resulted in the Geier v. University of Tennessee opinion.
48. The original plaintiffs were: a member of the faculty at Tennessee State University; a member of the faculty of the University of Tennessee at Nashville; a black student at Tennessee State University; a black senior student at Wilson County High School; and the father of this last student. The defendants included the Governor of Tennessee, the chairmen of the boards of trustees and administrative officials of the two universities, the Tennessee Higher Education Commission, its chairman, the chairmen of all state boards of education, HEW, and the United States Office of Education. The action was later dismissed against the federal defendants. Sanders v. Ellington, 288 F. Supp. 937, 939 (M.D. Tenn. 1968).
Their claims for relief were based on the allegations that Tennessee was maintaining a segregated university system in violation of the fourteenth amendment; that the proposed expansion of UT-N would be duplicative of programs and services already offered at Tennessee State University, an identifiably black school also located in Nashville; and that the result of such competition would be the perpetuation of TSU as a black institution, thus impeding the disestablishment of the dual system of higher education. Soon after the litigation commenced, the United States intervened as a party plaintiff urging the court to require the state defendants to present a plan designed to produce meaningful desegregation of Tennessee's public universities.

Following a hearing, district court Judge Gray found that the dual system of higher education in Tennessee had not been effectively dismantled. Using Green v. County School Board as precedent, Judge Gray determined that there was an affirmative duty imposed upon the state to desegregate all of its schools. According to the court, open door university admissions policies did not, alone, discharge a state's constitutional obligation where no genuine progress toward desegregation had occurred and where there was no real prospect of progress. This position was later to be cited with approval in Norris v. State Council of Higher Education, although the relief granted in Sanders was considerably broader insofar as the defendants were ordered to submit a comprehensive plan for dismantling Tennessee's dual system of higher

49. The University of Tennessee Nashville Center [hereinafter referred to as UT-N] was established in 1947 as a segregated white school to provide evening courses for persons not able to attend regular day classes. It also operated the school of social work for the University of Tennessee [hereinafter referred to as UT] as well as a two-year day program in nursing. Aside from the nursing program, it was not a degree-granting day institution in 1968. 288 F. Supp. at 941.

50. Geier v. Blanton, 427 F. Supp. 644, 645 (M.D. Tenn. 1973). Tennessee State University [hereinafter referred to as TSU] was established in 1912 to train black students in agriculture, home economics, various trades, and to prepare teachers for the black elementary and secondary schools in the state. Id. at 645 n.2.

51. Id. at 645. The Geier v. Blanton decision provides a better summary of the early history of the litigation than does the Sanders opinion.


55. 288 F. Supp. at 942.

Judge Gray ordered the defendants in *Sanders* to submit a plan designed to effect the desegregation of the state's public universities with particular attention to the situation at TSU where ninety-nine percent of its approximately 4,300 students were black. He expressed the belief that without desegregation, TSU would continue to deteriorate as an institution of higher learning. However, Judge Gray refused to enjoin UT's proposed construction since there was no indication in the record that UT intended to make the Nashville center a degree-granting day institution and, thus, bring it into direct competition with TSU. Judge Gray specifically pointed out that his refusal to grant injunctive relief was not based on the recent Alabama district court's decision in *ASTA* in which similar injunctive relief had also been denied. No plan, other than an open door policy, had been formulated to desegregate TSU, and the total ineffectiveness of that policy mandated further action.

**Geier v. Dunn**

The first desegregation plan under Judge Gray's order was submitted by the defendants in April 1969. The court found the plan lacking in specificity and withheld its approval. The defendants were required to file another report showing precisely what had been accomplished on each item of their proposal. A year later, the new report indicated that while substantial progress was generally being made on a state-wide scale in attracting blacks to the state colleges, the plan had

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57. It should be recalled that the *Norris* court did not order the desegregation of Virginia State College, nor did it grant the plaintiff's request for submission of a state-wide plan. See notes 35-38 *supra* and accompanying text.
58. 288 F. Supp. at 940.
59. *Id.* at 943.
60. *Id.* at 941.
62. The plan submitted on April 1, 1969 relied primarily upon the efforts of each institution to increase minority enrollment. The plan stated the defendants' commitment to increase the number of black students in the state's traditionally white institutions, to provide financial aid for black students, to recruit both white students and white faculty at TSU, to upgrade TSU's physical appearance, and to give attention to developing and publicizing academic programs which would attract white students to TSU. *Geier v. Dunn*, 337 F. Supp. 573, 574 (M.D. Tenn. 1972).
63. The report of April 1, 1970 stated that the number of black students enrolled in Tennesee's public colleges and universities (exclusive of TSU) had increased 42.2 percent, from 2,720 students to 3,869, between the academic year 1968-69 and the academic year 1969-70. There had also been an increase of 53 percent in the amount of financial aid utilized by black students. Less satisfactory results were shown, however, in the increase of black faculty members in the former white institutions. This figure showed a rise of only 0.5 percent. 337 F. Supp. at 575.
been ineffective regarding desegregation of TSU.\textsuperscript{64} Subsequent reports and hearings\textsuperscript{65} before the court revealed that the original state plan had no prospect of working. Following a hearing on the progress to date, Judge Gray issued a memorandum opinion in 1972, \textit{Geier v. Dunn}.\textsuperscript{66}

In \textit{Geier v. Dunn}, the court again rejected the defendants' contention, based upon \textit{ASTA}, that a good faith open admission policy satisfies fourteenth amendment requirements.\textsuperscript{67} \textit{Norris v. State Council of Higher Education}\textsuperscript{68} had been decided by this time, and Judge Gray was evidently concerned with resolving the dilemma posed by the Supreme Court's silent affirmances of both \textit{ASTA} and \textit{Norris} with their contradictory views regarding the sufficiency of open-admissions policies. He concluded that both decisions were actually consistent with the Supreme Court's holding in \textit{Swann v. Charlotte-Mecklenburg Board of Education}\textsuperscript{69} which emphasized the broad range of an equity court's power to fashion a remedy which balances the interests to be protected against the nature of the violation. Judge Gray believed that the \textit{ASTA} court, on the basis of the evidence before it, decided that Alabama educational officials had considered the impact of the new construction on the dual system and that, under the circumstances, to substitute the court's judgment for that of the state officials would have been presumptuous.\textsuperscript{70} He noted \textit{ASTA}'s express recognition of the affirmative duty to dismantle the dual university system and asserted that the \textit{ASTA} court evidently felt that the open door policy would bring about such a result. If, however, the preferred open-admissions approach were to fail, Judge Gray had no doubt that the interests of the state in establishing its own educational policy would be outweighed by constitutional dictates.\textsuperscript{71}

In \textit{Geier v. Dunn}, Judge Gray's attention was focused on TSU.

\textsuperscript{64} White enrollment at TSU had decreased from forty-five to forty-four students, and one additional white faculty member had joined the staff. Geier v. Blanton, 427 F. Supp. 644, 647 (M.D. Tenn. 1977).

\textsuperscript{65} The plaintiffs filed a motion on June 3, 1970 contending that the defendants had not set forth a plan for the dismantling of the dual system of public higher education. The defendants filed another progress report on June 14, 1971 which again emphasized the efforts of the individual institutions to solve the problem. However, as of 1972, the freshman class at TSU was 99.9 percent black. Geier v. Dunn, 337 F. Supp. 573, 575-76 (M.D. Tenn. 1972).

\textsuperscript{66} 337 F. Supp. 573 (M.D. Tenn. 1972).

\textsuperscript{67} \textit{Id.} at 580.


\textsuperscript{69} 402 U.S. 1 (1971).


\textsuperscript{71} 337 F. Supp. at 580.
Since 1968, the court had pursued a two-pronged approach with regard to the state's dual higher educational system: one prong dealt with the state-wide system composed of predominantly white institutions, the other with the Nashville situation. Outside of Nashville, Judge Gray found the defendants to be making progress towards desegregation at an acceptable rate of speed. The exception to this was the phenomenon of a black TSU which negated the defendants' contention that the dual system was being dismantled. Aware that, as a practical matter, affirmative remedies at the college level would differ from those in the sphere of lower education, the court ordered the defendants to submit a plan within six weeks which, at a minimum, would allocate programs to the TSU campus sufficient to ensure a substantial white presence on that campus by the beginning of the next academic year, September 1972. The court recognized that compliance with this order would not adequately desegregate TSU and, therefore, further ordered the consideration of additional methods, the report of which was to be prepared within six months. The defendants were directed to specifically consider the feasibility of a consolidation or merger of TSU and UT-N, as well as the feasibility of a consolidation of undergraduate and graduate curricula of the state's colleges in the general Nashville area.

Geier v. Blanton

Following the 1972 memorandum opinion and order, additional party plaintiffs were given permission to intervene. The defendants filed new proposals for desegregating both the faculty and student body of TSU. Further reports indicated that progress at TSU remained minimal. As a result, the court ordered defendants to submit an in-
terim plan ready for implementation in the 1974-75 school year. 80

This interim plan, proposed by the Tennessee Higher Education Commission and the State Board of Regents, TSU's governing board, admitted the inability of the two universities to reach agreement and contained a statement recommending court action to bring about some exclusive program allocations to TSU. 81 During 1974-76, plaintiffs and defendants submitted long-range plans 82 and progress reports to the court, but the lack of success in eliminating the dual system in Nashville remained evident. The enrollment at TSU in 1976 was eighty-five percent black and twelve and one-half percent white, with almost half of the white students taking courses off-campus. Black enrollment at UT-N was slightly more than twelve percent. 83 In June 1976, the court denied the defendants' motion for summary judgment and set the case for hearing final proof on the progress to date and prospects for the future. 84

After reviewing the final report, 85 Judge Gray, in 1977, wrote a second memorandum opinion, Geier v. Blanton. 86 He concluded that, after eight years, the defendants' approaches to the problem had neither worked nor offered any real hope for progress in the future. 87 After the litigation began, UT-N developed into a four-year, degree-granting institution and had fostered competition with TSU for white students, thus impeding efforts to dismantle the dual system. 88 "Radical remedies" were now needed. Therefore, Judge Gray ordered a merger of the two schools as proposed by the plaintiffs, under the gov-

81. The interim plan stated that, due to the lack of agreement as to UT's future role in Nashville, the defendants had been unable to reach interim accords regarding program allocations, cooperative programs, or other joint endeavors. Id. In 1974, the court did order exclusive allocation of graduate education courses to TSU. Id. at 649.
82. The defendants' long-range plan proposed the continuation of joint and cooperative programs between the two schools and projected goals and timetables for black student enrollment. The long-range plan of the original plaintiffs proposed the absorption of UT-N by TSU. The United States also called for the merger of the two institutions under the dominance of TSU over a period of five years. Id. at 649.
83. Id. at 652.
84. Id. at 649-50.
85. The final progress report of February 1976 showed that the enrollment at TSU was 85 percent black and about 12.2 percent white, although the proportion of whites on the main campus remained at 7 percent due to the fact that almost half of TSU's white students were taking courses at off-campus centers. Faculty desegregation had made little progress. In addition, 68.8 percent of TSU's faculty was black. Id. at 652.
87. Id. at 657.
88. UT-N still operated primarily, however, as a part-time, degree-granting, evening school, but the court believed that much of the enrollment at both schools was a vestige of former segregation and that TSU must attract the white adult evening student to UT-N if it were to prosper. Id. at 653.
ernance of TSU’s governing board, the State Board of Regents.89

In support of the merger remedy, Judge Gray relied upon expert testimony, including that offered by the defendants' own experts.90 All of the witnesses believed that merger constituted an acceptable means of desegregating the Nashville area, and most of them viewed merger as the best long range solution. Furthermore, most of the witnesses believed that one institution of higher education in Nashville would eventually evolve.91 There was little testimony given in support of a merger under the UT Board of Trustees, and the court felt that neither the record nor the historical facts would justify such a result.92 TSU was a university with a sixty-one year history and a merger under the control of UT would eliminate TSU as an educational institution “with all the concomitant losses entailed therein.”93

The merger was to take effect by July 1, 1980.94 Admitting that merger was a drastic remedy, the court found that such action did not exceed the state’s “egregious examples of constitutional violations.”95 The defendants appealed to the United States Court of Appeals for the Sixth Circuit in Geier v. University of Tennessee96 where the Sixth Circuit affirmed the district court decision.

**Geier v. University of Tennessee: The Sixth Circuit Decision**

**The Majority Opinion: Affirmance of the District Court**

When the Majority Opinion: Affirmance of the District Court

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89. Control of Tennessee’s public institutions of higher education has not been under a single governing body in recent years. In 1972, the Tennessee legislature created the State Board of Regents which governs regional and community colleges. TSU has been under the authority of the State Board of Regents while UT has been governed by its own board. The Tennessee Higher Education Commission has some authority over all public colleges and universities. Geier v. University of Tennessee, 597 F.2d 1056, 1058 (6th Cir.), cert. denied, 100 S. Ct. 180 (1979).

90. 427 F. Supp. at 657.
91. Id. at 659.
92. Id. at 660.
93. Id.
94. Id. at 661. As directed in the judgment, the State Board of Regents filed the plan of merger on May 11, 1977. The court ordered it to be put into effect, overruling motions to strike. The intervening plaintiffs had filed objections setting forth the inadequacy of the plan. Both parties then filed notice of appeal. The appeal by the plaintiffs was primarily concerned with plans outside the Nashville area and was treated by the Sixth Circuit in Richardson v. Blanton, 597 F.2d 1078 (6th Cir. 1979), a decision handed down the same day as Geier.
95. 427 F. Supp. at 660.
96. 597 F.2d 1056 (6th Cir.), cert. denied, 100 S. Ct. 180 (1979). Judge Lively was joined by Judge Peck. Judge Engel delivered a separate dissenting opinion.
the position of the defendants/appellants\(^9\) was basically the same as it had been since 1968. The defendants contended that the state had met its constitutional obligation by instituting an "open door" admissions policy; that the present preponderance of black students at TSU resulted from their own freedom of choice rather than from any current unconstitutional state actions; that the mere fact of the existence of predominantly black TSU was not evidence of violation; and, therefore, since no present violation existed, there was no authority for the district court to impose a remedy.\(^9\)

The defendants charged that the district court had applied an impermissible constitutional standard by concluding that the existence of a predominantly black institution of higher education in a free-choice system, in and of itself, created a dual system of higher education which offended the Constitution. The Sixth Circuit, however, felt that this was not an accurate statement of Judge Gray's ruling.\(^9\) Judge Gray had found TSU to be the "heart of the dual system," a system created originally by law and one which had not been dismantled. It was not the existence of a black institution in and of itself which had been held to be a continuing constitutional violation.\(^10\)

With regard to the central issue, a state's duty to remove the vestiges of state-imposed segregation, the court found the Supreme Court's decision in *Green v. County School Board*\(^10^1\) to be controlling. School boards have an "affirmative duty" to convert to a unitary system in which racial discrimination would be totally eliminated. Citing *Norris v. State Council of Higher Education*\(^10\)\(^2\) for the proposition that *Green* was applicable to public higher education, Judge Lively, writing for the Sixth Circuit, suggested that he, as well as the commentators\(^10\)\(^3\) on the subject, had concluded that the ASTA holding was too restrictive with

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9. The appellees were the original plaintiffs with the addition of the State Board of Regents, a defendant below.
9b. Id. at 1065.
10. *Id.* Judge Gray had used the term "heart of the dual system" when referring to TSU, the only black state college. Geier v. Blanton, 427 F. Supp. 644, 650 n.14 (M.D. Tenn. 1977). As the court stated in an earlier opinion: "[T]he phenomenon of a black Tennessee State, so long as it exists, negates both the contention that defendants have dismantled the dual system of public higher education . . . and the contention that they are . . . on their way toward doing so." Geier v. Dunn, 337 F. Supp. 573, 576 (M.D. Tenn. 1972).
regard to the sufficiency of open admissions policies.\textsuperscript{104} Asserting the facts in the present case to be "closely analogous" to those in \textit{Green}, where schools remained segregated despite freedom of choice plans,\textsuperscript{105} the court indicated that the inaction resulting from failure of the various desegregation plans for TSU was a violation of the Constitution.\textsuperscript{106}

Regarding the propriety of merger as a remedy, the \textit{Geier} court concurred with the findings that the rapid increase in the size of the student body and development of UT-N into a degree-granting branch impeded the process of desegregating TSU.\textsuperscript{107} Several expert witnesses had testified that older working students were the most likely source of white students for a traditionally black urban university.\textsuperscript{108} Thus, although primarily a night school, UT-N provided the greatest obstacle to TSU's desegregation efforts.

Because TSU was considered to be the heart of the dual system in Tennessee, the Sixth Circuit concurred with the district court's finding that TSU necessitated special attention. Applying the equitable principles discussed by the Supreme Court in \textit{Milliken v. Bradley (Milliken II)},\textsuperscript{109} Judge Lively held that the merger remedy ordered by the district court "was related to the condition found to offend the Constitution"\textsuperscript{110} and was within the equitable power of that court. This "condition" was the failure to dismantle the dual system, a failure essentially due to TSU's inability to attract white students because of the competition from UT-N. Black students had a constitutional right to attend a unitary university system, a right denied them by state action. The merger

\textsuperscript{104} 597 F.2d at 1065.
\textsuperscript{105} \textit{Id.} at 1066. \textit{See also} note 14 \textit{supra}.
\textsuperscript{106} 597 F.2d at 1067.
\textsuperscript{107} \textit{Id.} In the nine years following the initiation of this suit, UT-N had grown from a small extension program of 1,788 students to a degree-granting institution of 5,828 students. \textit{Geier v. Blanton}, 427 F. Supp. 644, 652 (M.D. Tenn. 1977). On October 18, 1968, two months after the district court's first desegregation order, UT-N was authorized by the UT Board of Trustees to grant baccalaureate degrees. Brief for Appellee, \textit{supra} note 5, at 19.
\textsuperscript{108} 597 F.2d at 1067. In 1972, the Tennessee Higher Eduation Commission (THEC) stated: "The only successful large scale desegregation of formerly black institutions has come by attracting adult, largely part-time, commuting students, mostly enrolled in evening classes." Brief for Appellee, \textit{supra} note 5, at 19.
\textsuperscript{109} 433 U.S. 267 (1977). In \textit{Milliken II}, the Court relied on the following cases: \textit{Swann v. Charlotte-Mecklenburg Bd. of Educ.}, 402 U.S. 1, 15-16 (1971) (if "school authorities fail in their affirmative obligations . . . judicial authority may be invoked" and the nature of the desegregation remedy is to be determined by the nature and scope of the constitutional violation); \textit{Milliken v. Bradley (Milliken I)}, 418 U.S. 717, 738-46 (1974) (the remedy must be related to "the condition alleged to offend the Constitution" and must be remedial in nature); \textit{Brown v. Board of Educ. (Brown I)}, 349 U.S. 294, 299 (1955) ("school authorities have the primary responsibility for elucidating, assessing and solving [segregation] problems"). \textit{See} 597 F.2d at 1068.
\textsuperscript{110} 597 F.2d at 1068.
remedy would restore the victims of segregation to their "rightful place." The appellants argued that the merger order was the equivalent of an "interdistrict order" which had been proscribed by the Supreme Court in *Milliken v. Bradley (Milliken I).* Judge Lively stated that this argument failed for two reasons. First, there was no special public interest issue involving "local control" since the defendants in *Geier* had state-wide jurisdiction over their respective systems; and second, the Court in *Milliken I* provided that an interdistrict remedy might be appropriate where discriminatory acts of one school district result in racial segregation in an adjacent one. For the *Geier* court, the finding that the defendants' actions perpetuated segregation in the Nashville area was sufficient to uphold a *Milliken I* "inter-board" remedy.

Judge Lively also responded to the contention that UT was an "innocent party" because there had been no finding that its recent actions were designed to perpetuate segregation. In Judge Lively's opinion, this argument was without merit. De jure segregation was maintained prior to 1960 by exclusion of whites from UT, and the duty to dismantle properly fell on both UT and TSU. After the initiation of open-admissions policies, the effects of previous segregation remained; since the policies of the UT Board of Trustees had contributed to the segregated system, there was no legal reason why it should not be required to participate in dismantling it. Judge Lively viewed the Sixth Circuit decision in *Newburg Area Council v. Board of Education* as con-
trolling in Geier. In Newburg, the court found that when two school districts had committed acts of de jure segregation and had failed to eliminate all of its vestiges, an interdistrict remedy was appropriate. 119

In its conclusion affirming the district court’s holding, the Geier majority again stressed that the defendants’ insistence upon treating the existence of TSU as an isolated unconstitutional condition was erroneous. TSU had been found to be the “core” of a violation permeating the entire system. 120 The Sixth Circuit agreed with Judge Gray’s determination that some progress towards desegregation was being made state-wide, but that if the Nashville situation were rectified, greater progress throughout the system could be expected. 121

The Dissenting Opinion: Inappropriateness of the Merger Remedy

Judge Engel dissented from the majority opinion in Geier on the basis that the merger remedy violated the principles set forth in Milliken II: 122 the remedy extended beyond the constitutional wrong ascribed to UT. 123 Judge Engel agreed with the majority’s view that UT’s continued expansion would place it in direct competition with TSU 124 and with the majority’s conclusion that since both university systems had been part of a de jure segregation system, it was UT’s duty to stop impeding TSU’s legitimate efforts to integrate. 125 The problem, however, was that the remedy did not respond to the ill. Judge Engel

119. 510 F.2d at 1358-59. The court in Newburg distinguished its situation from Milliken I where the interdistrict remedy had been held to be broader than the constitutional violation. Id. at 1360.
120. 597 F.2d at 1071.
121. Id. The Sixth Circuit decided the issue of state-wide desegregation in the companion case to Geier. In the companion case, Richardson v. Blanton, 597 F.2d 1078 (6th Cir. 1979), Judge Lively upheld the district court’s finding “that desegregation was progressing at an acceptable rate outside Nashville and that the proposed long-range plan submitted by the defendants indicated prospects for continued progress.” Id. at 1086. A plaintiff-appellant Richardson (a plaintiff-appellee in Geier) appealed from that portion of the district court’s final judgment which approved the defendants’ long-range plan concerning the desegregation of higher education outside the Nashville area. Id. at 1079.
122. Milliken v. Bradley, 433 U.S. 267 (1977). Judge Engel stated: The well-settled principle that the nature and scope of the remedy are to be determined by the violation means simply that federal-court decrees must directly address and relate to the constitutional violation itself. Because of this inherent limitation upon federal judicial authority, federal-court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate the Constitution or does not flow from such a violation.

123. 597 F.2d at 1071.
124. Judge Engel had no doubt that UT would eventually establish a four-year university program in Nashville. Id. at 1072. UT had become a degree-granting institution in 1971. Id. at n.3.
125. Id. at 1073 n.6.
NOTES AND COMMENTS

proposed to vacate the judgment of the district court and remand for
further proceedings in accordance with the aim of confining UT-N to
providing only such courses and activities which it offered prior to its
1969 expansion.126

The dissent argued that the majority was in error when it found
Newburg Area Council v. Board of Education127 to be controlling in the
instant litigation. The Nashville situation more nearly resembled Mul-
ken I because the acts of UT, in Judge Engel's opinion, did not create
the segregation at TSU.128 According to Judge Engel, UT had clearly
participated in acts of de jure discrimination, and the vestiges of such
actions were properly the subject of remedial action by the court.129
Judge Engel saw no basis, however, for concluding that in the noncom-
peting curricular areas, UT had contributed to TSU's present racial
composition. Thus, to go further than preventing UT-N from hinder-
ing TSU's desegregation efforts would result in the court's imposing a
remedy that exceeds any constitutional violation by UT or UT-N.130

Judge Engel believed that the failure spoken of by the majority to
remove the vestiges of state-imposed segregation was actually the fail-
ure of the state to obtain for TSU a racially balanced faculty or to
persuade either black applicants to go elsewhere or white applicants to
attend TSU.131 According to the dissent, it was unfair to place the
blame solely upon UT, particularly in view of the fact that the court
had found the integration of faculty and student body at UT to be pro-
ceeding at a constitutionally permissible rate.132

Judge Engel placed the responsibility for the failure to integrate
TSU on its own desire to retain an identity as a respected black univer-
sity. TSU's policies, themselves, served as a deterrent to attracting
white students.133 Judge Engel expressed sympathy for what he consid-

126. Id. at 1077. Judge Engel noted in his dissent that should such a solution not be amenable
to UT-N, it could always enter into an agreement with TSU similar to the one in effect in Mem-
phis, where UT voluntarily relinquished its control over a night school to the predominantly black
Memphis State University. Id. at 1076. Judge Engel believed that such voluntary action repre-
sented a "world of difference" from action required by the courts. Id.
128. Judge Engel argued that in Newburg Area Council the two districts had not only failed to
eliminate segregation but had in fact combined to perpetuate it. 597 F.2d at 1073 n.6.
129. Such action was taken by the Sixth Circuit in the companion case decided along with
130. 597 F.2d at 1073 n.6.
131. Id. at 1073.
132. Id. at 1073-74. Between 1969 and 1975, black enrollment at UT had gone from 3.2 per-
cent to 6.4 percent and at UT-N from 7.4 percent to 12.7 percent. At TSU, black enrollment had
declined from 99 percent to 85 percent. Id. at 1074 n.7.
133. Id. at 1075.
erred to be TSU's efforts to retain its black identity, noting that several witnesses had testified as to the importance of blacks being able to create and control strong universities which could provide opportunities to students who might not otherwise receive a higher education. Other witnesses had spoken of the need to allow black colleges to develop along their own lines and had expressed concern that these schools were threatened by integration.

The dissent argued that it was not within the power of the court to compel students to choose to attend a particular university. Although the racial makeup of the enrollment at TSU should more accurately reflect the racial population as a whole, Judge Engel would not require it as long as the racial imbalance was the result of personal choice and not compelled by state action. By terminating UT-N's expanded programs, competition within TSU would be significantly reduced, thereby enabling it, through its own good faith efforts, to attract white students. Although it might take longer to achieve greater integration at TSU through this "more neutral policy," in Judge Engel's opinion, it would be far more preferable both in terms of impact and principle. The pressures for a four-year university in Nashville were evident, and white students would be persuaded to attend TSU once, through its own policies, TSU became less identifiable as a black institution. Judge Engel believed that there were sound historical reasons for the development of parallel systems of public higher education throughout the United States, and usually these systems had nothing to do with considerations of race. "Until a system itself is employed to impose or foster segregated educational experience, its integrity should be respected by our courts."

On July 1, 1979, less than three months following the Geier decision, the merger between TSU and UT-N was effectuated. This fol-

134. Id. at 1075 n.9.
135. Id. HEW desegregation guidelines, promulgated in 1978, also recognized the unique importance of black universities. See text accompanying note 179 infra.
136. 597 F.2d at 1077.
137. Id.
138. Id. at 1076. Judge Engel suggested that if there were to be a merger at all, the logical choice would be to have UT absorb TSU because TSU remains disproportionate racially as compared to the rest of the system. Judge Engel recognized, however, the unworkability of such a plan: faculty and admission standards vary so greatly that it would result in a genuine deprivation of opportunity for both black staff and students. Id. at 1077. This is the sole reference to different admission standards in any of the opinions. Admissions criteria apparently were not raised as an issue by any of the litigants.
139. Id. at 1077.
140. The plan of merger presented by the State Board of Regents and accepted by the Geier court provided detailed guidelines in the area of curricular requirements, faculty employment
lowed denial of motions to stay the order brought before both the Sixth Circuit and United States Supreme Court. The Supreme Court denied certiorari in October 1979.141

**ANALYSIS OF GEIER v. UNIVERSITY OF TENNESSEE**

*The Constitutional Violation*

The Sixth Circuit's affirmance of the district court's findings was consistent with legal principles enunciated by the Supreme Court on numerous occasions. Of critical importance in this litigation was the fact that de jure racial segregation had been practiced in Tennessee until 1960, some six years after *Brown v. Board of Education (Brown I).* 142 A primary contention of the defendants was that UT was an innocent party, and that the district court had never found any intent to perpetuate segregation in its recent actions. 143

As the court in *Geier* correctly pointed out, UT's reliance on *Washington v. Davis* 144 was misplaced. *Washington* set forth criteria for determining when unconstitutional racial discrimination has occurred in situations of de facto, not de jure segregation. 145 The Supreme Court has never held that post-*Brown* lack of discriminatory intent was sufficient to overcome the affirmative duty to dismantle the dual system. On the contrary, reaffirming the principles set forth in *Green v. County School Board* 146 the Court in one of its most recent decisions on the subject, *Dayton Board of Education v. Brinkman,* 147 stated that "[g]iven

- rights, provisions for participation by former UT-N students in student government, and guarantees of participation by former UT-N faculty in administrative and faculty committees. The plan also provided for the newly expanded TSU to fully utilize all facilities and operate fourteen hour per day programs. *Id.* at 1064.

141. 100 S. Ct. 180 (1979). Judge Engel's dissenting opinion was mentioned by UT in its petition for certiorari to the Supreme Court insofar as it supported petitioner's contention that the remedy imposed by the majority exceeded the constitutional wrong, thus violating *Milliken I* principles. Petitioner's Brief for Certiorari at 15. UT clearly did not approve of the dissent's proposal to restrict UT-N to those programs which it offered prior to its expansion in 1969.


143. 597 F.2d at 1070.

144. 426 U.S. 229 (1976). *Washington* involved the validity of a qualifying test for positions in a police department. The Court held that a law alleged to be racially discriminatory must be traced to a racially discriminatory purpose. Racially discriminatory impact is not enough. *Id.* at 239.

145. *Id.* at 240. Similarly, appellants' use of Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977), in their petition for certiorari was inappropriate. *Arlington Heights* emphasized the evidentiary data relevant to finding discriminatory purpose. Courts, however, uniformly have found the requisite discriminatory purpose in the case of state-imposed dual educational systems.

146. 391 U.S. 430 (1968).

147. Dayton Bd. of Educ. v. Brinkman, 99 S. Ct. 2971 (1979). *See also* Columbus Bd. of Educ. v. Penick, 99 S. Ct. 2941 (1979). These companion cases were decided on July 2, 1979, three
intentionally segregated schools in 1954... the Court of Appeals was quite right in holding that the [school] [b]oard was thereafter under a continuing duty to eradicate the effects of that system. The Court in Brinkman further indicated that the measure of a school board’s post-Brown conduct is the “effectiveness, not the purpose, of the actions in decreasing or increasing the segregation caused by the dual system.” Abandonment of prior discriminatory purpose is not enough. School boards have the responsibility to see that their policies are not used to perpetuate the dual system.

An Affirmative Duty Exists to Dismantle Dual Systems of Public Higher Education

In determining that an affirmative duty to eliminate the present effects of past discrimination extends to higher education, the Sixth Circuit followed a doctrine clearly set forth in a variety of racial discrimination cases dealing not only with education but housing, voting, and employment as well. There is no basis for the assumption that public higher education is an exception to this doctrine. The courts have recognized, however, that the nature of the remedies may differ from those used at the elementary and secondary levels.

Both the district and appellate courts properly rejected the defendants’ argument, based on ASTA, that the duty to dismantle a dual educational system is met when an institution of higher education institutes a good faith, nondiscriminatory policy with respect to its admission of students and its hiring of faculty and staff. The position taken months after Geier. The cases were cited in the Brief for the United States in Opposition to the Petition for a Writ of Certiorari. United States Brief in Opposition to Certiorari at 24. Both desegregation orders involved Ohio districts charged with operating racially segregated systems at the time of Brown I. In neither case had the dual system been mandated by statute in 1954, thus giving rise to an objection that the distinction between de facto and de jure segregation had been eliminated, rendering all school systems “captives of remote and ambiguous past.” Columbus Bd. of Educ. v. Penick, 99 S. Ct. 2941, 2953 (1979) (Rehnquist, J., dissenting). See also Keyes v. School Dist. No. 1, 413 U.S. 189 (1973), where Justice Rehnquist in his dissent argued that, contrary to situations of system-wide de jure segregation, the existence in Denver of a few racially gerrymandered attendance boundaries did not necessitate the finding of a “dual” school system for the entire metropolitan district. Id. at 257-58.

in *Geier*, as well as in *Norris v. State Council of Higher Education*, emphasized the need to gauge the effectiveness of open-admissions plans, not merely their existence. Aside from the dicta in the *ASTA* opinion, a case of first impression, there is no basis for deciding that a policy irrespective of its effectiveness will be deemed sufficient to discharge the state’s affirmative duties.

In the *Geier* litigation, the defendants urged the court to accept the idea that freedom of choice, a recognized and important aspect of higher education, was relevant to the question of whether continued black predominance at TSU was in violation of the Constitution. Judge Lively’s affirmance of the conclusion that it was a violation was based upon the fact that the effects of prior segregation lingered long after the cessation of discriminatory practices. Freedom of choice did not realistically exist in the Nashville area because students were choosing, in effect, between historically one-race schools, and considering UT’s prestige and TSU’s black history, students were presented with a “loaded game board.” Their choice was not truly free or just coincidental, but was rather predetermined by past segregation. Such a situation required affirmative action.

The Merger Remedy

One argument concerning the imposition of a merger was that it was a cross-district remedy forbidden by *Milliken v. Bradley* (*Milliken I*). The Sixth Circuit correctly concluded that Judge Gray’s order was within the ambit of permissible interdistrict remedies based upon the finding that the actions of UT had perpetuated segregation by


155. *Alabama State Teachers Ass’n v. Alabama Pub. Schools & College Auth.*, 289 F. Supp. 784, 787 (M.D. Ala. 1968), *aff’d per curiam*, 393 U.S. 400 (1969). The court stated that it was “reluctant at this time to go much beyond preventing discriminatory admissions.” 289 F. Supp. at 787. One might, therefore, draw the conclusion that the *ASTA* court in proper circumstances would, in fact, require additional measures to be taken.

156. *See Petitioner’s Brief for Certiorari* at 18.

157. 597 F.2d at 1070. In his dissent, Judge Engel also concluded that “[t]he overriding truth remains that the racial identifiability of TSU has thus far impaired its attractiveness to white applicants.” *Id.* at 1077.


159. In the depositions of several witnesses, factors involved in the attendance pattern at TSU and UT-N became clear. Because of the effects of racial dualism, many whites took courses at UT-N at night rather than at TSU, even when the latter’s program was objectively superior. Brief for Appellee *supra* note 5, at 23. One of the defendants’ expert witnesses testified that over the years the racial identifications of the schools had become fixed in the minds of citizens. These identifications had become a larger factor in student choice than the actual programs offered by the schools. *Id.* at 24.

bringing UT-N into direct competition with TSU. *Milliken* does not apply to the facts of this case because both UT and TSU are instrumentalities of the state with state-wide jurisdiction, not truly independent political entities exerting jurisdiction over adjacent districts.\(^{161}\)

Considering the *Geier* record, there was a strong basis for finding a constitutional violation. Once the district court had determined that such a violation existed, the court possessed broad equitable powers to fashion a remedy.\(^ {162}\) Although there can be no doubt that the merger order was within the district court’s discretion, some of the assumptions underlying its imposition should be examined.

The first assumption to consider is that the merger will, in fact, contribute to the dismantlement of the dual system of higher education. Although TSU, as a result of the merger, will have a substantial number of white students enrolled in its newly acquired evening division, there is no assurance that the full-time, day division will achieve any greater degree of integration. Judge Engel, in his dissent, pointed out that one cannot compel a white college student to attend a school which he identifies as black,\(^ {163}\) and there is little to suggest that TSU’s day program will lose that identification. Certainly, the head count of students at TSU will show a sizeable percentage of white students and, to that extent, the school’s overall racial makeup will be altered. The question remains, however, as to whether this constitutes meaningful desegregation in the sense of fostering integration within the day division. Achieving desegregation by such means may well be a classic example of form over substance.

Another of the court’s assumptions is related to the idea that TSU was “the heart of the dual system.”\(^ {164}\) The court expressed belief that the merger remedy it imposed would result in further progress being made state-wide in eliminating the vestiges of segregation from the other virtually all white, public universities in Tennessee.\(^ {165}\) It is difficult to understand the logic of the court’s reasoning when it suggests that an increased white presence at TSU will result in an increased black presence at other universities. There is no indication that the court expected any of TSU’s black students to be displaced to other schools by the influx of white students. On the contrary, TSU, as a

\(^{161}\) See text accompanying notes 112-14 supra.
\(^{162}\) See *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971).
\(^{163}\) 597 F.2d at 1074.
\(^{164}\) See note 100 supra and accompanying text. See also *Richardson v. Blanton*, 597 F.2d 1078, 1083 (6th Cir. 1979).
\(^{165}\) 597 F.2d at 1071.
consequence of the merger, will have the added resources and physical plant of UT-N and, therefore, would not appear to be forced to turn away black applicants.

If the court had been concerned solely with eliminating the vestiges of the dual system, one may question why a remedy involving greater integration of TSU and other nearby state universities was not considered. Within a forty mile commuter radius of Nashville, there were two predominantly white colleges offering full-time day programs. It would seem that through plans such as faculty sharing, exclusive program allocations, or establishment of attendance zones, to name only a few, considerably greater progress towards creating a unitary system of higher education might have occurred. Clearly, however, the focus of the court was on Nashville itself and the competition between the two universities, as well as on the future viability of TSU.

A third assumption is that without desegregation, TSU would continue to deteriorate as an institution of higher education. Evidently, this was one of the reasons why the merger was finally imposed, although during the years between 1968 and 1976, enrollment at TSU increased from approximately 4,500 to 6,138. As Judge Gray stated: “It is clearly apparent on the record that something must be done for that school and that the one thing that is absolutely essential is a substantial desegregation of that institution." Unfortunately, the district court never discussed what was so “clearly apparent” to it, nor the basis for concluding that a predominantly black university could not remain viable. The Sixth Circuit noted Judge Gray’s deterioration theory, but

166. UT never suggested such a remedy during the nine-year litigation prior to the appeal despite the order in Geier v. Dunn, 337 F. Supp. 573 (M.D. Tenn. 1973), to consider curriculum consolidation. UT, however, did propose for the first time in its appellate brief an alternate remedy of geographical assignment of students attending schools in the area. The Sixth Circuit did not respond to the proposal. See Brief for Appellee, supra note 5, at 59 n.139.

167. The schools were Austin Peay State University and Middle Tennessee State University. See The Affirmative Duty to Integrate, supra note 13, at 694 n.133.

168. In the companion case of Richardson v. Blanton, 597 F.2d 1078 (6th Cir. 1979), Judge Lively stated: “The court and the original plaintiffs proceeded on the premise that the essential first step in achieving a unitary system must occur in Nashville.” Id. at 1083.

169. In the 1968 Sanders opinion, Judge Gray stated:
I have been concerned by a fact that clearly appears from the record, although it was not specifically commented on by any witness, that the failure to make A & I [TSU] a viable, desegregated institution in the near future is going to lead to its continued deterioration as an institution of higher learning. I think everybody recognizes that.


170. See Brief for Appellee, supra note 5, at 20.

171. 288 F. Supp. at 943.
made no comment upon it. One might speculate that both courts believed that as opportunities for blacks to attend other state schools expand, TSU would become less attractive and lose enrollment. If this were the case, then, arguably, the problem of the dual system would eventually be eliminated by black students freely choosing the schools they wish to attend. By linking the prospect of TSU's deterioration to the insufficiency of its white enrollment, the district court implied that black schools must have white students to remain viable. This is an astonishing presumption and one which the court ought not to have left unexplained.

Perhaps the best way to understand the imposition of the merger of the two universities under the direction of the TSU governing board is to recognize the dilemma facing both the district and Sixth Circuit courts in the Geier litigation. One of the most perplexing problems facing any court dealing with historically black public universities is how to satisfy the constitutional requirements for desegregation without endangering the valued cultural, psychological, and remedial aspects of these schools. The threat to the existence of black colleges under desegregation plans is very real, and cognizance of the problem has made the formulation of these plans all the more difficult. Experience has shown that when a state abolishes black colleges as a means of dismantling a dual system, many black students may be unable to gain admittance to other schools.

Concern for the unique role of the traditionally black institutions of higher education was expressed in a series of decisions in connection with a lawsuit brought to require HEW to take action to enforce provisions of title VI of the 1964 Civil Rights Act with respect to

172. 597 F.2d at 1059-60.
173. For a discussion of the role of black colleges, see The Affirmative Duty to Integrate, supra note 13, at 676-81.
174. The abolishment of the black junior colleges in Florida in the early 1960's resulted in a marked decline of black students attending the new consolidated junior college system. Id. at 677-78.
175. See Adams v. Richardson, 356 F. Supp. 92 (D.D.C.) (ordering HEW to take enforcement action), aff'd, 480 F.2d 1159 (D.C. Cir. 1973) (affirming the order but directing HEW to obtain acceptable desegregation plans before beginning enforcement proceedings); Adams v. Califano, 430 F. Supp. 118 (D.D.C. 1977) (a second supplemental order rejecting state plans as not in compliance with title VI and ordering HEW to publish desegregation criteria).
176. Title VI of the Civil Rights Act of 1964 provides:

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. 42 U.S.C. § 2000d (1976). Under title VI, HEW is required to attempt to secure voluntary compliance after a determination has been made that the vestiges of segregation in public higher education have not been eliminated by a state. If voluntary compliance is not forthcoming, HEW is
public universities. In one of these cases, *Adams v. Richardson*, the United States Court of Appeals for the District of Columbia Circuit indicated that an appropriate statewide plan for the desegregation of universities must take into consideration the special problems of minority students and of black colleges which fulfill a crucial need and play a significant role in the higher education of black students.

In response to a court order arising out of the *Adams* litigation, HEW published in 1978, for the first time, desegregation guidelines for higher education. The guidelines state that desegregation plans must take into account the unique importance of black colleges and reflect an awareness that the transition to a unitary system must not be accomplished by disproportionately burdening black students, faculty, or institutions.

Although concern for the special role and value of black colleges was not specifically discussed by the *Geier* majority, this issue had been brought to the attention of the Sixth Circuit. Certainly, it had been a factor in Judge Gray's district court order as evidenced by his statement of the "concomitant losses" that would result if TSU were eliminated as a school via merger with UT-N under the auspices of the University of Tennessee Board of Trustees. Judge Gray also had noted the HEW litigation which cautioned against sacrificing black institutions to the goal of desegregating public higher education.

The recognition of the significance of TSU's future viability gives rise to the fourth assumption underlying the merger order: that merger, in fact, will serve as a means of preserving that institution's role. There can be little doubt that this assumption is well-founded. TSU, as a consequence of the merger, has at its disposal UT-N's resources in terms of physical plant, academic programs, and faculty—in addition to funds generated by the rapidly expanding evening division. TSU's

required to seek enforcement administratively or through the courts. 42 U.S.C. § 2000d-1 (1976); 45 C.F.R. §§ 80.7(d)(1), 80.8 (1979).

177. 480 F.2d 1159 (D.C. Cir. 1973).
178. *Id.* at 1165.
180. 43 Fed. Reg. 6658 (1978). These guidelines took special note of the opinions delivered by the district court in the *Geier* litigation. *Id.* at 6660.
181. *See id.* Other major ingredients of an acceptable desegregation plan would include: (1) a statewide approach to the problem as mandated in *Adams v. Richardson*, 480 F.2d 1159, 1164-65 (D.C. Cir. 1973); (2) the establishment of numerical goals and timetables to serve as indices by which to measure progress; and (3) the development of special plans tailored to fit the special characteristics of higher educational institutions.
182. *See Judge Engel's dissenting opinion,* 597 F.2d at 1075 n.9.
184. *Id.* at 650 n.14.
black identity is not jeopardized by the merger. An increased white presence in the day division is likely to be gradual, and the school should be able to continue to serve the needs of its black students at the same time as it broadens its appeal and attracts greater numbers of white students. TSU's position assuredly has been enhanced, and the goal that it may become a major integrated urban university now appears feasible.

Whether the court's assumptions concerning the effects of the Nashville merger are substantially accurate insofar as they point to an increase in integration state-wide and a meaningfully integrated student body at TSU, the fact remains that TSU has been greatly strengthened. The Sixth Circuit's affirmanance of the merger was an appropriate and important decision because in the process of remediing a blatant constitutional violation, the court did not place an undue burden on the black institution nor did it sacrifice TSU's significant function within the public university system of Tennessee.

SIGNIFICANCE OF THE GEIER V. UNIVERSITY OF TENNESSEE DECISION

Geier is the first federal appellate decision to affirm an order to desegregate an historically black, public university.\(^{185}\) By upholding the "drastic" remedy of merger, the Sixth Circuit set an example that might well motivate other states with dual systems of higher education to critically examine their affirmative duties with an eye towards developing meaningful and workable desegregation programs of their own. Geier demonstrates that the courts will act forcefully if the appropriate state educational authorities are indecisive or unwilling to act.

At the present time, ten states\(^{186}\) have been cited by HEW's Office for Civil Rights as continuing to operate segregated systems of higher education in violation of title VI of the 1964 Civil Rights Act. The Geier decision provides considerable incentive for states to submit acceptable plans to HEW, under the recently published guidelines, if they wish to avoid a court imposed remedy. Geier also provides an important precedent for seeking affirmative relief directly under the fourteenth amendment, in addition to the relief afforded under title VI now that desegregation criteria have been promulgated.\(^ {187}\)

\(^{185}\) See Brief for Appellee, supra note 5, at 27 n.97.

\(^{186}\) The ten states are: Arkansas, Florida, Georgia, Louisiana, Maryland, Mississippi, North Carolina, Oklahoma, Pennsylvania, and Virginia. 43 Fed. Reg. 6658, 6658 n.2. (1978).

\(^{187}\) It should be noted that the original Geier litigation was brought under title VI as well as the equal protection clause of the Constitution. Brief for Appellee, supra note 5, at 48 n.134.
There are presently fifteen black public colleges in other southern and border states which have situations similar to the one in Nashville: a history of de jure segregation and a black public college located in the same geographic area as another public college, predominantly white, with which it competes for students. The Geier decision has special relevance for these schools although due to the increasing concern for the viability of black colleges, one might not expect to find a merger order where, due to size or program limitations, it would be the black school that would logically be merged into the white.

CONCLUSION

Twenty-six years after Brown, the courts are still actively involved in school desegregation issues. Concerned with both the viability of a black university and the constitutional mandate to eliminate the vestiges of state-imposed segregation, the Geier court affirmed a "radical" solution that ordered the merger of two universities in the Nashville area in an effort to eliminate vestiges of a dual system. The Sixth Circuit found that the repeated failures of a state, through its instrumentalities, to effectively desegregate its institutions of higher learning was a continuing constitutional violation; that a state's affirmative duty is as exacting in higher education as in elementary and secondary; and that the actions of UT in expanding the program at UT-N perpetuated segregation by impeding desegregation of TSU. As a result, the district court's order merging the two institutions was upheld.

From the time of the ASTA decision, attention began to focus on the duty to dismantle dual systems of higher education. The Nashville litigation, culminating in Geier, plays an important role in defining the scope of this duty as well as the power of the courts to fashion remedies in an area where deference to state control over higher educational policies had become the established practice. The message is clear: states must take affirmative measures to effectively desegregate

Neither the district court nor Sixth Circuit discussed the statute. The courts decided the issue solely on the basis of the constitutional violation. This was possibly due to the fact that in 1968 no actions concerning dual systems of higher education had ever been brought under title VI, and the extent of the duty to desegregate at the university level was uncertain.

188. Brief for Appellee, supra note 5, at 26-27. As of 1976, eleven of these historically black public colleges were more than 90 percent black; three were between 80 percent and 89 percent black; and one was 71.2 percent black. Id. at 27 n.96. See id. at Addendum C, p. 75A for the enrollment in each of these situations and a comparison with their predominantly white competitors.

the remnants of their dual university systems, or the courts will do it for them.

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