CASENOTES

CONSTITUTIONAL LAW—Facially Race-Neutral Policies Governing Public Colleges and Universities Are Not Sufficient to Meet a State's Affirmative Constitutional Obligation to Disestablish a Prior De Jure Segregated School System—*United States v. Fordice*, 112 S. Ct. 2727 (1992).

I. INTRODUCTION

A. *Facts and History*

Mississippi maintains eight public universities, each officially segregated by race prior to 1962.[1] Historically, five are all-white schools: the University of Mississippi (established in 1848), Mississippi State University (established in 1880), Mississippi University for Women (established in 1885), University of Southern Mississippi (established in 1912), and Delta State University (established in 1925).[2] Three are historically all-black schools: Alcorn State University (established in 1871), Jackson State University (established in 1940), and Mississippi Valley State University (established in 1950).[3] Mississippi's de jure[4] segregation in these schools continued despite the United States Supreme Court rulings in *Brown I*[5] and *Brown II*,[6] which mandated the end of racially segregationist state policies in public schools.[7]

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1. United States v. Fordice, 112 S. Ct. 2727, 2732 (1992). For a more detailed historical overview of these specific schools, see *id.* at 2732-35; Ayers v. Allain, 674 F. Supp. 1523, 1526-30 (N.D. Miss. 1987).

2. United States v. Fordice, 112 S. Ct. at 2732.

3. *Id.*

4. "De Jure" is best defined in practice through a historical perspective:

> It was not enough for African-Americans to be second class citizens, denied the franchise and consigned to inferior schools. African-American subordination was reinforced by a racialist punctilio dictating separate seating on public accommodations, separate water fountains and rest rooms, separate seats in court-houses, and separate Bibles to swear in African-American witnesses about to give testimony before the law. The list of separations was ingenious and endless. African-Americans became like a group of American untouchables, ritually separated from the rest of the population.

Raymond T. Diamond & Robert J. Cottrol, *Codifying Caste: Louisiana's Racial Classification Scheme and the Fourteenth Amendment*, 29 LOY. L. REV. 255, 264-65 (1983).

5. Brown v. Board of Educ., 347 U.S. 483 (1954) (Brown I).

6. Brown v. Board of Educ., 349 U.S. 294 (1955) (Brown II).

7. United States v. Fordice, 112 S. Ct. 2724, 2732 (1992) (citing Brown v. Board of Educ., 347 U.S. at 495 (Brown I) (holding state "separate but equal" policies in public education illegal); Brown v. Board of Educ., 349 U.S. at 301 (Brown II) (holding states must discontinue segregated public schools "with all deliberate speed")).

The issue in *Fordice* may be characterized as an application of the *Brown* mandates in the higher education context. *See infra* note 43.

In 1962, the first black student was admitted to the University of Mississippi pursuant to a court order.[8] Mississippi state universities, however, remained almost exclusively "single-race" institutions from 1962 until 1975.[9] Statistics for the 1974-75 Mississippi school year indicated between 4.1 and 13 percent black enrollment in the historically white universities and between 96 and 100 percent black enrollment in the historically black universities.[10]

In 1969, the United States Department of Health, Education and Welfare (HEW) requested state officials to develop a plan to "disestablish the formerly *de jure* segregated university system" in Mississippi.[11] HEW acted to enforce Title VI of the Civil Rights Act of 1964.[12]

Mississippi responded through its Board of Trustees in 1973 with a "Plan of Compliance" proposing to set numerical goals on enrollment of "other-race" students, hire "other-race" faculty members, and institute remedial programs and special recruitment efforts.[13] HEW rejected the plan for not meeting the Title VI requirements.[14] Specifically, HEW found the plan failed to ensure a student's free choice of schooling through appropriate "student recruitment and enrollment, faculty hiring, elimination of unnecessary program duplication, and institutional funding practices."[15]

The Board maintained the plan was in compliance with Title VI.[16] Despite HEW's rejection of the Board's plan, Mississippi adopted it.[17] HEW's efforts were further curtailed by the Mississippi legislature, which refused to fund the plan until 1978 and then at only half the proposed funding level.[18] HEW's rejection of Mississippi's plan and the legislature's stonewalling efforts precipitated this lawsuit.[19]

B. *Procedure and the Lower Court's Rulings*

In 1975, private petitioners[20] brought suit against the Governor of Mississippi, the Board of Trustees of State Institutions of Higher Learning, and

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8. United States v. Fordice, 112 S. Ct. at 2732 (citing Meredith v. Fair, 306 F.2d 374, 378-79 (5th Cir. 1962)).

9. *Id.* at 2732-33.

10. *Id.* at 2733 n.2

11. *Id.* at 2732.

12. *Id.* Title VI states: "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 (1988).

13. United States v. Fordice, 112 S. Ct. 2727, 2732-33 (1992).

14. *Id.* at 2733.

15. *Id.*

16. *Id.*

17. *Id.* (citing Ayers v. Allain, 674 F. Supp. 1523, 1530 (N.D. Miss. 1987)).

18. *Id.*

19. Ayers v. Allain, 674 F. Supp. at 1530.

20. The suit was initiated by a class of black citizens defined as "all black citizens residing in Mississippi, whether students, former students, parents, employees, or taxpayers, who have been, are, or will be discriminated against on account of race in receiving equal educational opportunity

other state officials.[21] Petitioners alleged violations of the Fifth, Ninth, Thirteenth, and Fourteenth Amendments, 42 U.S.C. Sections 1981 and 1983, and Title VI.[22] Specifically, they alleged Mississippi had maintained the racially segregative effects of the prior dual system of higher education.[23] The United States, through the Attorney General, intervened as a plaintiff to enforce Title VI and the Fourteenth Amendment Equal Protection Clause to require state officials to dismantle Mississippi's dual system of university education.[24]

Twelve years of settlement efforts between the parties resulted in inconsequential gains in minority enrollments in the historically white institutions and few majority enrollments in historically black institutions.[25] The parties proceeded to trial in 1987 in the United States District Court for the Northern District of Mississippi to determine if Mississippi had "taken the requisite affirmative steps to dismantle its prior *de jure* segregated system."[26]

The district court filed extensive findings of fact following the trial.[27] These findings included a historical overview of the Mississippi institutions[28] and current developments with respect to the state's practices in student admission, recruitment, and retention practices;[29] faculty recruitment;[30] institutional classification and assignment of missions, including duplication of programs between the schools;[31] land grant activities;[32] university finance and funding;[33] facility descriptions;[34] and governance.[35]

In the district court's conclusions of law, the court noted disagreement on whether the "affirmative duty" to reform previously maintained dual school systems in elementary and secondary schools, as announced in *Green v. New Kent County School Board*,[36] applied equally in the higher education context.[37] After

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and/or equal employment opportunity in the universities operated by said Board of Trustees." *Id.* at 1526.

21. *Id.* at 1525.

22. United States v. Fordice, 112 S. Ct. 2727, 2733 (1992); *see supra* note 12 (quoting the text of Title VI).

23. United States v. Fordice, 112 S. Ct. at 2733.

24. *Id.*

25. *Id.* at 2733-34 (citing Ayers v. Allain, 893 F.2d 732, 734-35 (5th Cir. 1990)).

26. *Id.* at 2734.

27. *Id.* at 2724 (citing Ayers v. Allain, 674 F. Supp. 1523 (N.D. Miss. 1987)).

28. Ayers v. Allain, 674 F. Supp. at 1526-30.

29. *Id.* at 1530-37.

30. *Id.* at 1537-38.

31. *Id.* at 1538-43.

32. *Id.* at 1543-46.

33. *Id.* at 1546-48.

34. *Id.* at 1548-50.

35. *Id.* at 1550.

36. Green v. New Kent County Sch. Bd., 391 U.S. 430 (1968). In *Green*, the elementary and secondary school board adopted a free-choice plan in response to increased pressure to dismantle its prior de jure segregative policies and comply with the *Brown II* mandates. *Id.* at 432-33. Writing for the Court, Justice Brennan rejected the free-choice plan as a sufficient desegregation technique, holding "'freedom of choice' is not an end in itself." *Id.* at 440. The *Brown II* mandate imposed an "affirmative duty" on school districts to take whatever steps necessary to convert a dual elementary and secondary school system into a "unitary system in which racial discrimination

reviewing a Fifth Circuit case[38] and its interpretation of *Bazemore v. Friday*,[39] the district court concluded Mississippi's duty to desegregate in the university context did not include a duty to restrict free choice or achieve "any degree of racial balance" as in the elementary and secondary school context.[40] Thus, the district court held the relevant inquiry was whether current state education policies and practices were racially neutral, developed and implemented in good faith, and not contributing to racial identifiability of the universities.[41]

Under this standard, the district court found no violation of federal law in any of the state's policies or practices in light of the "free-choice" attendance policy in the Mississippi university system.[42] In sum, the court held "current actions on the part of defendants demonstrate conclusively that the defendants are fulfilling their affirmative duty to disestablish the former *de jure* segregated system of higher education."[43]

On appeal, a panel on the Court of Appeals for the Fifth Circuit reversed, holding Mississippi failed to meet the duty mandated by *Brown* and *Green*,[44] reasoning student "[f]reedom of choice is not a panacea" even in the higher

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would be eliminated root and branch." *Id.* at 437-38. *Green*, therefore, mandates integration. *Id.* The Court looked to "every facet of school operations," including faculty, staff, transportation, extra-curricular activities, and facilities, in determining whether the prior de jure system had been cured. *Id.* at 435. For a concise, annotated discussion of the *Green* decision, see DERRICK BELL, RACE, RACISM AND AMERICAN LAW § 7.4.1 (3d ed. 1992).

The issue in *Fordice* is essentially the application of *Green* to the higher education context. *See* United States v. Fordice, 112 S. Ct. 2727, 2753 (1992) (Scalia, J., dissenting); *infra* notes 205-06 and accompanying text.

37. United States v. Fordice, 112 S. Ct. at 2734 (citing Ayers v. Allain, 674 F. Supp. 1523, 1552 (N.D. Miss. 1987)).

38. Alabama State Teachers Ass'n v. Alabama Pub. Sch. & College Auth., 289 F. Supp. 784 (M.D. Ala. 1968), *aff'd*, 393 U.S. 400 (1969) (per curiam). In that case, a three judge panel in the Alabama District Court held the construction of an "extension campus" of Auburn University would not perpetuate the state's dual system of higher education. *Id.* at 789. The court found justifiable reasons for expansion and good faith on the part of the state. *Id.* The court reasoned the extension campus would be just a school, not a white or "Negro" school. *Id.*

39. Bazemore v. Friday, 478 U.S. 385 (1986). The Court in *Bazemore* determined a less rigorous standard than *Green* governed a desegregation case in the university context. *Id.* at 408 (White, J., concurring). White's concurring opinion was adopted by the Court per curiam. *Id.* at 386-87.

In *Bazemore*, the issue was whether 4-H clubs run through a North Carolina University extension program were subject to an affirmative duty of integration. *Id.* at 387-88. The Court found no constitutional violation based on the club's adoption of race-neutral admission policies and elimination of prior discriminatory practices. *Id.* at 408 (White, J., concurring). Justice White reasoned that "however sound *Green* may have been in the context of the public schools, it has no application to this wholly different milieu." *Id.* (White, J., concurring).

40. United States v. Fordice, 112 S. Ct. at 2734-35 (citing Ayers v. Allain, 674 F. Supp. at 1553).

41. *Id.* at 2735 (citing Ayers v. Allain, 674 F. Supp. at 1554).

42. Ayers v. Allain, 674 F. Supp. 1523, 1564 (N.D. Miss. 1987).

43. United States v. Fordice, 112 S. Ct. 2727, 2735 (1992) (citing Ayers v. Allain, 674 F. Supp. at 1564).

44. Ayers v. Allain, 893 F.2d 732, 756 (5th Cir. 1990).

education context.[45] Shortly thereafter, the Fifth Circuit sitting en banc[46] affirmed the ruling of the district court and held Mississippi's race-neutral policies sufficient to meet the state's constitutional obligations to end prior de jure segregation.[47]

The United States Supreme Court granted certiorari.[48] In an eight-to-one decision, the Court *held*, vacated, and remanded.[49] Facially race-neutral policies governing public colleges and universities are not sufficient to meet a state's affirmative constitutional obligation to disestablish a prior de jure segregated school system. *United States v. Fordice*, 112 S. Ct. 2727 (1992).

II. DETERMINATION OF LIABILITY

Justice White, writing for the majority,[50] noted Mississippi has a constitutional duty to dismantle its prior de jure segregated school system in higher education to comply with *Brown II*[51] and its progeny.[52] Thus, Justice White reasoned, the issue was whether Mississippi had complied with its "affirmative duty to dismantle its prior dual university system."[53]

To meet this obligation, Mississippi had to eliminate any remaining policies or practices connected to its prior de jure dual system "that continue[d] to foster segregation."[54] If Mississippi's current policies or practices were causally connected to the "existing racial identifiability" of the school system, the state had failed to meet its constitutional obligation.[55] As past cases applied this stan-

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45. *Id.* at 751 (citing Green v. New Kent County Sch. Bd., 391 U.S. 430, 440 (1968) ("[I]n desegregating a dual system a plan utilizing 'freedom of choice' is not an end in itself.")).

46. Ayers v. Allain, 914 F.2d 676 (5th Cir. 1990) (en banc).

47. United States v. Fordice, 112 S. Ct. at 2735 (citing Ayers v. Allain, 914 F.2d at 678).

48. United States v. Fordice, 111 S. Ct. 1579 (1991).

49. United States v. Fordice, 112 S. Ct. 2727, 2743 (1992).

50. Justice White wrote the majority opinion and was joined by Chief Justice Rehnquist, and Justices Blackmun, Stevens, O'Connor, Kennedy, Souter, and Thomas. *Id.* at 2731. Justices O'Connor and Thomas each filed separate concurring opinions. *Id.* Justice Scalia, in a separate opinion, concurred in part and dissented in part. *Id.*

51. Brown v. Board of Educ., 347 U.S. 483 (1954) (Brown II).

52. United States v. Fordice, 112 S. Ct. at 2735; *see supra* note 7 (discussing the rulings in *Brown I* and *Brown II*).

53. United States v. Fordice, 112 S. Ct. at 2735.

54. *Id.*

55. *Id.* at 2735 (citing Freeman v. Pitts, 112 S. Ct. 1430, 1443 (1992); Bazemore v. Friday, 478 U.S. 385, 407 (1986) (White, J., concurring); Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 434 (1976); Gilmore v. City of Montgomery, 417 U.S. 556, 566-67 (1974)).

In *Gilmore*, the Court sustained an injunction barring exclusive and temporary use of public recreational facilities by segregated private schools. Gilmore v. City of Montgomery, 417 U.S. at 569. Such use, the Court reasoned, interfered with a federal court order mandating desegregation. *Id.*

In *Spangler*, the Court overturned a district court order prohibiting, without exception, a "majority of any minority students" to enforce a desegregation order in the Pasadena, California school district. Pasadena City Bd. of Educ. v. Spangler, 427 U.S. at 434. The Court found no current policy or practice traceable to Pasadena's prior de jure segregation policies. *Id.*

dard, a broad range of factors became relevant in determining whether any facet of a state's system was perpetuating its former de jure segregative policies.[56]

Before addressing and applying factors that appeared relevant to Mississippi,[57] Justice White discussed whether higher educational school systems require a different or alternative standard than that applied to elementary and secondary schools.

A. *Residual, but Neutral, Discriminatory Policies and Practices as a Basis for Liability: A New Standard*

The majority rejected the lower courts' adoption of a different standard applicable to higher educational school systems.[58] Justice White recognized the obvious distinctive characteristics of the Mississippi higher educational school system from the elementary and secondary systems in the state.[59] For example, attendance at a higher educational institution is entirely voluntary, the state does not assign students to specified higher educational institutions, and each higher educational school offers a different range of specialization in its curriculum.[60]

In such a system of free choice, however, state admissions policies are but one factor among many factors contributing to actual student attendance.[61] Some factors may be attributable to prior de jure segregation fostering continued segregation despite the end to the state's segregative admissions policy.[62] Thus, the Fourteenth Amendment is offended "[i]f policies traceable to the *de jure* system are still in force and have discriminatory effects."[63]

In *Freeman*, the Court permitted a district court to relinquish supervision and control in incremental stages over its desegregation order compliance. Freeman v. Pitts, 112 S. Ct. 1430 (1992). See *supra* note 39 for the holding in *Bazemore*.

56. United States v. Fordice, 112 S. Ct. 2727, 2735 (1992) (citing Board of Educ. v. Dowell, 498 U.S. 237, 250 (1991); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 18 (1971); Green v. New Kent County Sch. Bd., 391 U.S. 430, 435-38 (1968)).

The Court in *Swann* held the "most important indicia" of an unconstitutionally segregated system include the state's policies and practices relating to those factors expressed in *Green*. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. at 18. Thus, the state was required to rid the system of any invidious racial distinctions in those areas. *Id.*

In *Dowell*, the Court held a dissolution of desegregation decree for Oklahoma's elementary and secondary school system was proper only if the school board showed good faith compliance and elimination of vestiges of past de jure discrimination. Board of Educ. v. Dowell, 498 U.S. at 250. The Court cited *Swann* and *Green* to instruct the district court on remand to consider whether the school system's policies or practices in student assignments, faculty, staff, transportation, extracurricular activities, or facilities contributed to the segregative conditions in the schools. *Id.* See *supra* note 36 for the facts and holding in *Green*.

57. *See infra* part II.B.

58. United States v. Fordice, 112 S. Ct. at 2735-36.

59. *Id.* at 2736.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* (citations omitted).

Moreover, lower courts' reliance on *Bazemore*[64] was misplaced.[65] Justice White distinguished *Bazemore*, because in *Bazemore* "any racial imbalance resulted from the wholly voluntary and unfettered choice of private individuals" and not by any lingering discriminatory state policies or practices.[66] In the present case the district court, however, did not inquire whether "Mississippi ha[d] left in place certain aspects of its prior dual system that perpetuate[d] the racially segregated higher education system."[67]

Justice White then announced the proper test for the district court to apply on remand: The state has the burden of proving it has dismantled its prior de jure system "[i]f 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 eliminated."[68]

B. *A Guide for the District Court on Remand*

Finding Mississippi's facially race-neutral policies "substantially restrict a person's choice" in choosing to attend any of the eight Mississippi universities,[69] the majority selected four "suspect" state policies for the district court to analyze further on remand.[70] These state policies included admission standards, program duplication, institutional mission assignments, and continued operation of all eight public universities.[71] The majority clearly expressed, however, this discussion was only a "highlight" of the state's practices and the district court on remand should be free to inquire into any other challenged policies or practices brought before it.[72]

1. *Admission Standards*

First, the Court held Mississippi's admission prerequisite to historically white universities of minimum scoring on the American College Testing Program (ACT) was constitutionally suspect.[73] The Court summarily rejected the state's proffered justification for its policy to redress the problem of student unpreparedness: "Obviously, this mid-passage justification for perpetuating a policy enacted originally to discriminate against black students does not make the present admissions standards any less constitutionally suspect."[74]

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64. Bazemore v. Friday, 478 U.S. 385, 407 (1986); see *supra* note 39 and accompanying text for the lower courts' reasoning and apparent reliance on *Bazemore*.
65. United States v. Fordice, 112 S. Ct. 2727, 2736-37 (1992).
66. *Id.* at 2737 (citing Bazemore v. Friday, 478 U.S. at 407).
67. *Id.*
68. *Id.*
69. *Id.* at 2738.
70. *Id.* at 2738-43.
71. *Id.* at 2738.
72. *Id.*
73. *Id.*
74. *Id.*

Also, the Court noted the discriminatory and segregative effects of the ACT minimum score requirement restricted the choices available to entering students.[75] Under the Mississippi system, an applicant with a fifteen on the ACT automatically gained acceptance to any of the five historically white universities, except for Mississippi University for Women, which required an eighteen or 3.0 high school grade point average.[76] The historically black universities, however, only required a thirteen ACT score for automatic acceptance.[77] Because black students historically scored significantly lower on the ACT than their white counterparts,[78] the effects of these requirements "fall disproportionately on black students wishing to attend" historically all-white Mississippi higher education institutions.[79]

The Court refused to accept the various justifications accepted by the lower courts for the ACT automatic admission requirements, including differing programmatic missions and differing mission assignments, as well as providing quality undergraduate education.[80] The historical discriminatory purpose underlying the establishment of automatic admissions for minimum ACT scores was apparently crucial to the Court's refusal to accept these justifications.[81] Accordingly, the Court held the current ACT requirement may be upheld by the district court only if the state can show "further justification in terms of sound educational policy."[82]

Moreover, the state's failure to use an applicant's high school grade point average, exclusive with or in conjunction with an ACT score, was "constitutionally problematic."[83] The state's justification for this policy, accepted by the district court and court of appeals, was its concern over grade inflation and "lack of comparability in grading practices and course offerings among the State's diverse high schools."[84] Because the policy was originally adopted to foster a segregated school system and continued to effectuate a racially segregated student body, the Court instructed the district court to uphold the "ACT-only" practice only upon showing the elimination of the practice would erode "sound educational policy."[85]

2. *Program Duplication*

Second, the Court found the district court's treatment of duplicative programs among the Mississippi universities "problematic."[86] The district court defined "unnecessary" duplication as "'instances where two or more institutions

75. *Id.* at 2738-39.
76. *Id.* at 2739.
77. *Id.*
78. *Id.* at 2740 n.10 (citing Ayers v. Allain, 674 F. Supp. 1523, 1535 (N.D. Miss. 1987)).
79. *Id.* at 2739-40.
80. *Id.*
81. *Id.* at 2740 (citing Ayers v. Allain, 914 F.2d 676, 692 (5th Cir. 1990)).
82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.* at 2741.

offer the same nonessential or noncore program.'"[87] Finding the unnecessary duplication statistically probative,[88] the district court nonetheless upheld the practice, finding it was not necessarily associated with the state's prior de jure policies and was a justifiable method of enhancing student choice among competing Mississippi universities.[89]

The Supreme Court held the district court misapplied the burden of proof on this issue as falling on the plaintiff.[90] The state has the burden to "establish that it has dismantled its prior *de jure* segregated system."[91] Finding Mississippi did not meet its burden, the Court reasoned "unnecessary" programs, by definition, lack any educational justifications.[92] The Court found nothing in the record to justify the duplicative program practices as educationally or economically necessary.[93] Additionally, the Court chastised the district court for treating the program duplication issue in "isolation" rather than considering how the practice blended with other state policies when "evaluating whether the State had met its duty to dismantle its prior *de jure* segregated system."[94]

3. *Institutional Mission Assignments*

Third, the Court questioned the discriminatory effects of the state's assignment of institutional missions[95] to the eight Mississippi universities.[96] During the period of legalized segregation, the historically all-black Mississippi state universities were more limited than the all-white universities in their state assigned academic missions, which caused inequalities in funding, program specialization, and curriculum functions between the all-white and all-black schools.[97] For example, Alcorn State was designated in its mission "to serve as 'an agricultural college for the education of Mississippi's black youth,'"[98] although the University of Mississippi, Mississippi State University, and the University of Southern Mississippi were considered "flagship institutions" for whites only.[99]

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87. *Id.* at 2740 (quoting Ayers v. Allain, 674 F. Supp. 1523, 1540 (N.D. Miss. 1987)).
88. *Id.* at 2740-41 (citing Ayers v. Allain, 674 F. Supp. at 1541).
89. *Id.* (citing Ayers v. Allain, 674 F. Supp. at 1541).
90. *Id.* at 2741.
91. *Id.* (citing Brown v. Board of Educ., 349 U.S. 294, 300 (1955) (Brown II)).
92. *Id.*
93. *Id.*
94. *Id.*
95. States commonly classify higher education institutions according to "mission." Ayers v. Allain, 674 F. Supp. 1523, 1539 (N.D. Miss. 1987). "Mission" is synonymous with "role and scope," the determination of which is based on several factors, including "the number and level of degree programs offered by an institution, the fields in which degrees are granted, the extent to which an institution conducts and receives funding for research, and areas of public service responsibility." *Id.*
96. United States v. Fordice, 112 S. Ct. 2727, 2741-42 (1992).
97. *Id.* at 2742 (citing Ayers v. Allain, 674 F. Supp. at 1526-28).
98. *Id.* at 2741 (citing Ayers v. Allain, 674 F. Supp. at 1527).
99. *Id.*

In 1981, Mississippi amended the mission statements of the eight universities to conform to each institution's then-existing status.[100] Thus, each of the eight universities was classified as either "comprehensive," "regional," or "urban."[101] The three historically all-white "flagship" schools were termed "comprehensive."[102] Delta State University, Mississippi University for Women, Alcorn State University, and Mississippi Valley State University were considered "regional."[103] Jackson State University was deemed "urban."[104]

These designations did not, however, satisfy the Court as complying with the new standard: "The institutional mission designations adopted in 1981 have as their antecedents the policies enacted to perpetuate racial separation during the *de jure* segregated regime."[105] The Court found these differing mission statements among the eight universities "surely" limit student choice in applying to a Mississippi university.[106] As the court of appeals noted, the mission statements in the historically all-black schools "'had the effect of maintaining [a] more limited program scope.'"[107]

Thus, on remand, the state must prove the mission designations do not "interfere with student choice" or "tend to perpetuate the segregated system."[108] Absent sound educational justification, discriminatory missions must be eliminated.[109]

4. *Continued Operation of All Eight Public Universities*

Finally, the Court questioned whether the state could justify continued operation of all eight public universities.[110] Without dispute, the original establishment of eight universities was designed to foster the segregated school system.[111] The district court found, however, fiscal irresponsibility by the Mississippi legislature in funding more institutions than necessary or practicable was simply a policy choice and not subject to constitutional scrutiny.[112] The Court disagreed, noting the number of institutions available to applicants "unquestionably" affects student choice in light of "admissions, program duplication, and institutional mission designations."[113] Thus, the Court instructed the district court to determine on remand whether the effect on student choice by

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100. *Id.* at 2742.

101. *Id.* Comprehensive universities were those with the greatest variety of undergraduate and graduate programs. *Id.* Regional universities offered primarily undergraduate programs. *Id.* Urban universities were defined by their urban location. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.* (quoting Ayers v. Allain, 914 F.2d 676, 690 (5th Cir. 1990) (en banc)).

108. *Id.*

109. *Id.*

110. *Id.* at 2742-43.

111. *Id.* at 2742.

112. *Id.* (citing Ayers v. Allain, 674 F. Supp. 1523, 1564 (N.D. Miss. 1987)).

113. *Id.*

retaining all eight universities perpetuates the segregated school system in Mississippi.[114]

The majority went on to suggest merger or closure of one or more universities as a potential solution to the problem.[115] Although such an action may not be constitutionally required, at least in the record presented to the Supreme Court, closure would "certainly" decrease the discriminatory effects of the present system.[116] Accordingly, the district court was ordered on remand to determine if the state could justify the maintenance of all eight universities and "whether one or more of them can be practicably closed or merged with other existing institutions."[117]

C. *The Majority's Conclusion*

Because Mississippi had impeded the free choice of college bound applicants, the state was required to "take the necessary steps to ensure that this choice now is truly free" in dismantling its prior de jure segregative system.[118] Although the actual segregation of the school cannot alone sustain a constitutional violation, liability will be found if the state leaves in place policies "rooted in its prior officially-segregated system that serve to maintain the racial identifiability of its universities" unless those policies rest on sound educational rationales.[119]

The majority expressly rejected the plaintiff's plea for upgraded and increased public financing exclusively for the historically all-black Mississippi universities unless such actions can be established as a prerequisite to "a full dismantlement" under the new Supreme Court standard.[120]

III. CLARIFICATION OF THE COURT'S DECISION

A. *Justice O'Connor's Concurrence*

Justice O'Connor, although joining the majority opinion, wrote separately to underscore the state's burden to prove the complete dismantling of its prior de jure segregative policies and the "narrow" circumstances that would allow the state to continue a policy or practice rooted in its discriminatory past.[121] Because of Mississippi's past policies and practices, Justice O'Connor instructed the district court to "carefully examine" the state's proffered justifications to guard against potential pretextual motives masking "the perpetuation of discriminatory practices."[122] Thus, if "less segregative means" are available to meet legitimate

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114. *Id.* at 2743.
115. *Id.* at 2742-43.
116. *Id.*
117. *Id.* at 2743.
118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.* at 2743-44 (O'Connor, J., concurring).
122. *Id.* at 2744 (O'Connor, J., concurring).

educational objectives, the district court is authorized to infer lack of good faith, rebuttable by a "heavy burden" for the state to disprove.[123]

Justice O'Connor quoted *Freeman v. Pitts*[124] as requiring Mississippi to show it has taken "all steps" necessary to eliminate any policy or practice remaining from its years of de jure segregation.[125] Thus, if the state can show certain remnants of its prior discriminatory policy are essential to accomplish legitimate goals, it must also show it has "counteracted and minimized the segregative impact of such policies to the extent possible."[126]

B. *Justice Thomas's Concurrence*

> *It would be ironic, to say the least, if the institutions that sustained blacks during segregation were themselves destroyed in an effort to combat its vestiges.*[127]

Justice Thomas, also joining the majority opinion,[128] wrote separately to distinguish the majority holding from the holding in *Green* and its progeny, regarding proper remedies for the district court to consider.[129] Specifically, Justice Thomas wrote the majority opinion intends neither to eliminate all racially identifiable schools in the Mississippi higher education system nor to destroy the historically black colleges and their "distinctive histories and traditions."[130]

Justice Thomas noted *Green* sets up an almost "irrebuttable" presumption that a racially imbalanced school system has resulted primarily from intentional state action established by formerly discriminatory state policies,[131] thus permitting "radical" judicial remedies, such as student reassignment, designed to decrease racial imbalances.[132] This approach, although used in the elementary and secondary level school districts, is inapplicable in the higher education context.[133] Thus, the district court's task on remand is merely to scrutinize the state's policies and policy justifications offered by state officials, rather than attempt to cure the actual imbalances.[134]

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123. *Id.* (O'Connor, J., concurring) (quoting Green v. New Kent County Sch. Bd., 391 U.S. 430, 439 (1968)); *see supra* note 36 (providing a factual summary and the holding in *Green*).

124. Freeman v. Pitts, 112 S. Ct. 1430, 1443 (1992); *see supra* note 55 (providing the holding in *Freeman*).

125. United States v. Fordice, 112 S. Ct. 2727, 2744 (1992) (O'Connor, J., concurring).

126. *Id.* (O'Connor, J., concurring).

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

128. *Id.* at 2744 (Thomas, J., concurring).

129. *Id.* (Thomas, J., concurring) (citing Green v. New Kent County Sch. Bd., 391 U.S. 430, 439 (1968)).

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

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

132. *Id.* at 2743-44 (Thomas, J., concurring).

133. *Id.* at 2745 (Thomas, J., concurring) (citing Green v. New Kent County Sch. Bd., 391 U.S. at 2735 n.4).

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

Clarifying the standard announced by the majority in identifying invalid state policies, Justice Thomas stated a finding of specific intent to discriminate by the state is not necessary for a finding of an unconstitutional policy, if the policy began in the former de jure segregation years, produced discriminatory impacts, and continued absent a sound educational justification.[135] Thus, "it is safe to assume that a policy adopted during the *de jure* era, if it produces segregative effects, reflects a discriminatory intent."[136]

The state, therefore, bears the "risk of nonpersuasion" of discriminatory intent for future policies and practices because the state created the original unlawful conduct[137] and intentional discriminatory conduct is presumed to continue through time.[138] Relevant factors on the issue of intent are the historical roots of the policy, the extent of the adverse impact, and the persuasiveness of the justifications offered as a defense.[139]

Regarding the state's justification defense on remand, Justice Thomas adopted the majority's "sound educational" policy/practices standard[140] and apparently rejected standards recognized in prior cases.[141] Thus, the remedies to be considered on remand should be analyzed in light of the impact on the state higher education system as a whole and its students.[142]

Such constitutionally permissible justifications exist, Justice Thomas suggested, for "maintaining historically black colleges *as such*."[143] Statistics show phenomenal increases in enrollment and degrees earned in black colleges over the years.[144] These accomplishments are directly attributable to the existence of historically black colleges:

> The colleges founded for Negroes are both a source of pride to blacks who have attended them and a source of hope to black families who want the benefits of higher learning for their children. They have exercised leadership in developing educational opportunities for young blacks at all levels of instruction, and, especially in the South, they are still regarded as key institutions for enhancing the general quality of the lives of black Americans.[145]

Thus, the black colleges have become "'a symbol of the highest attainments of black culture'" as reflected in their distinctive histories and

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135. *Id.* (Thomas, J., concurring).
136. *Id.* (Thomas, J., concurring).
137. *Id.* (Thomas, J., concurring).
138. *Id.* (Thomas, J., concurring).
139. *Id.* (Thomas, J., concurring) (citing Washington v. Davis, 426 U.S. 229, 242 (1976)).
140. *Id.* (Thomas, J., concurring).
141. *Id.* (Thomas, J., concurring) (citing Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526, 538 (1979) (holding *Green* dictates an otherwise unconstitutional policy justified only if it serves "important and legitimate ends"); Board of Educ. v. Dowell, 498 U.S. 237, 256 (1991) (holding a policy may be justified if its elimination is not "practicable")).
142. *Id.* at 2745-46 (Thomas, J., concurring) (citing Brown v. Board of Educ., 349 U.S. 294, 300 (1955) (Brown II)).
143. *Id.* at 2746 (Thomas, J., concurring).
144. *Id.* (Thomas, J., concurring).
145. *Id.*

traditions.[146] The traditions and histories constitute valid justifications to permit a state to operate a diversity of public universities including those "that might disproportionately appeal to one race or another."[147] Mississippi, therefore, is not constitutionally *forbidden* to maintain its historically black institutions even though the state is not *required* to do so.[148] This standard, Justice Thomas reasoned, may be inferred from the majority's language that colleges and universities "are not fungible" and are thus not subjected to the same remedies as elementary and secondary schools.[149]

IV. JUSTICE SCALIA'S OPINION

Justice Scalia concurred in part and dissented in part.[150] He agreed Mississippi is required, under the Constitution,[151] to remove discriminatory barriers at the state-run universities, and this requirement does not mandate equal funding between the historical white and historical black institutions.[152] He also agreed Mississippi's ACT admissions requirements needed to be reviewed.[153] Justice Scalia rejected, however, the majority's "effectively unsustainable burden" on the state to prove compliance with the mandates of *Brown I*.[154] The majority's standard, bearing a striking resemblance to the elementary and secondary school desegregation requirements announced in *Green*,[155] "has no proper application in the context of higher education, provides no genuine guidance to States and lower courts, and is as likely to subvert as to promote the interests of those citizens on whose behalf the present suit was brought."[156]

In Part I[157] of his dissent, Justice Scalia criticized the majority for being too ambiguous in announcing its test and applying it inconsistently.[158] For Justice Scalia, three questions arose in interpreting the majority opinion.[159] First, Justice Scalia questioned what the Court meant by state practices "substantially restrict[ing] a person's choice."[160] In its application, the majority crafted this

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146. *Id.* (quoting JEAN PREER, LAWYERS V. EDUCATORS: BLACK COLLEGES AND DESEGREGATION IN PUBLIC HIGHER EDUCATION 2 (1982)).

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

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

149. *Id.* (Thomas, J., concurring); *see supra* notes 64-73 and accompanying text.

150. United States v. Fordice, 112 S. Ct. 2727, 2746 (1992) (Scalia, J., dissenting).

151. *Id.* (Scalia, J., dissenting) (citing Brown v. Board of Educ., 347 U.S. 483, 495 (1984) (Brown I)).

152. *Id.* (Scalia, J., dissenting).

153. *Id.* (Scalia, J., dissenting).

154. *Id.* (Scalia, J., dissenting).

155. *Id.* (Scalia, J., dissenting) (citing Green v. New Kent County Sch. Bd., 391 U.S. 430, 439 (1968)).

156. *Id.* at 2746-47 (Scalia, J., dissenting).

157. *Id.* at 2747-49 (Scalia, J., dissenting).

158. *Id.* at 2747 (Scalia, J., dissenting).

159. *Id.* at 2747-48 (Scalia, J., dissenting).

160. *Id.* (Scalia, J., dissenting).

language several different ways,[161] resulting in a "toothless" test "so frail that almost anything will overcome it."[162] All state action, or lack of, "affects" student choice even absent a policy or practice "restricting" an applicant's choice of alternatives.[163] The test, as announced and applied, results only in "confusion" and will be a "fertile source of litigation."[164]

Second, Justice Scalia questioned what the majority meant by state practices that perpetuate de facto segregation.[165] The Court's expressed authorization for the district court to aggregate state practices together to "rise to the level of fostering segregation,"[166] results in guesswork for judges and school administrators attempting to comply with the standard.[167] Moreover, the majority's language in its application to scrutinizing a state practice "itself" as perpetuating a segregated school system seems to negate the announced aggregation standard altogether.[168]

Finally, Justice Scalia addressed how to interpret "sound educational justification" and "impracticable elimination."[169] Justice Scalia found the Court's language with its application[170] to be incomprehensible, unmistakingly "result oriented," and an indirect application "to universities the amorphous standard adopted for primary and secondary schools in *Green*."[171] Thus, the majority's opinion requires the state "to prove that racially identifiable schools are *not* the consequence of any practice or practices . . . held over from the prior *de jure* regime."[172] The only way to prove this "negative proposition" is "*to assure racial proportionality in the schools*"[173] or to rely on theoretical affirmative defenses of "impracticability of elimination"[174] or "sound educational value" or both.[175]

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161. *Id.* (Scalia, J., dissenting) (quoting *id.* at 2738 ("substantially restrict"), 2742 ("interfere"), 2739 ("restrict"), 2742 ("limi[t]"), 2739 n.9 ("inherent[ly] self-selec[t]"), 2741, 2743 ("affect")).

162. *Id.* (Scalia, J., dissenting).

163. *Id.* (Scalia, J., dissenting).

164. *Id.* (Scalia, J., dissenting).

165. *Id.* (Scalia, J., dissenting).

166. *Id.* at 2747-48 (Scalia, J., dissenting); *see supra* note 101 and accompanying text.

167. United States v. Fordice, 112 S. Ct. 2727, 2748 (1992) (Scalia, J., dissenting).

168. *Id.* (Scalia, J., dissenting); *see supra* notes 118-20 and accompanying text.

169. United States v. Fordice, 112 S. Ct. at 2748 (Scalia, J., dissenting); *see supra* note 72 and accompanying text.

170. United States v. Fordice, 112 S. Ct. at 2748 (Scalia, J., dissenting); *see supra* part II.B.

171. United States v. Fordice, 112 S. Ct. at 2748 (Scalia, J., dissenting) (citing Green v. New Kent County Sch. Bd., 391 U.S. 430, 439 (1968)).

172. *Id.* (Scalia, J., dissenting).

173. *Id.* (Scalia, J., dissenting).

174. *Id.* at 2748-49 (Scalia, J., dissenting) (citing Board of Educ. v. Dowell, 498 U.S. 237, 250 (1991)); *see supra* note 56 (providing the holding in *Dowell*).

175. United States v. Fordice, 112 U.S. 2727, 2748-49 (1992) (Scalia, J., dissenting) (citing Dayton Bd. of Educ. v. Brinkman, 443 S. Ct. 526, 538 (1979) (interpreting *Green* to provide an "important and legitimate ends" defense)).

Part II[176] of Justice Scalia's dissent related to the majority's alleged misapplication of prior Supreme Court cases.[177] First, *Brown I* was designed to eliminate the "'feeling of inferiority'" associated with school segregation.[178] This interest is not implicated, however, when students choose to attend a racially identifiable school as in the Mississippi higher education context.[179] Thus, "[l]egacies of the dual system that permit (or even incidentally facilitate) free choice of racially identifiable schools—while still assuring each individual student the right to attend *whatever* school he wishes—do not have" the consequences *Brown I* was designed to cure.[180] Subsequent cases to *Brown I* only impose on the state the duty to establish nondiscriminatory admissions criteria, not the elimination of all policies and practices traceable to the de jure system perpetuating segregated schools.[181]

Bazemore,[182] although distinguished by the majority, should be controlling in this case.[183] *Bazemore* stands for the proposition that "*evidence of exclusion by race*" is necessary to attach a duty to integrate in the higher education context;[184] thus, wholly voluntary segregation by students is not actionable.[185] It is impossible to believe prior segregative policies did not, in some way, affect the segregative system at issue in *Bazemore*.[186] Thus, *Bazemore*'s standard requiring only race-neutral policies and nondiscriminatory practices controls here.[187]

Because forced integration is entirely inapplicable in the context of higher education, the only state practices that need to be eliminated are the discriminatory admission standards.[188] Once the state shows these practices are eliminated, an actual segregative effect cannot by itself invoke state liability.[189] Here, the district court and court of appeals found the ACT requirements were originally designed to exclude blacks from the historically all-white universities.[190] Justice

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176. *Id.* at 2749-51 (Scalia, J., dissenting).

177. *Id.* at 2749 (Scalia, J., dissenting).

178. *Id.* (Scalia, J., dissenting) (quoting Brown v. Board of Educ., 347 U.S. 483, 494 (1954) (Brown I)).

179. *Id.* (Scalia, J., dissenting).

180. *Id.* (Scalia, J., dissenting).

181. *Id.* at 2749-50 (Scalia, J., dissenting) (citing Gilmore v. City of Montgomery, 417 U.S. 556, 569 (1974)); Goss v. Board of Educ., 373 U.S. 683, 687 (1963); Cooper v. Aaron, 358 U.S. 1, 7 (1958); Florida *ex rel.* Hawkins v. Board of Control, 350 U.S. 413, 413-14 (1956) (per curiam); Brown v. Board of Educ., 349 U.S. 294, 300-01 (1955) (Brown II).

182. *See supra* note 39 (discussing *Bazemore*).

183. United States v. Fordice, 112 S. Ct. 2727, 2750 (1992) (Scalia, J., dissenting).

184. *Id.* (Scalia, J., dissenting) (citing City of Richmond v. J.A. Croson Co., 488 U.S. 469, 503 (1989) (interpreting *Bazemore*)).

185. *Id.* (Scalia, J., dissenting) (citing Bazemore v. Friday, 478 U.S. 385, 407 (1986)).

186. *Id.* (Scalia, J., dissenting); *see supra* note 39 (providing the factual details in *Bazemore*).

187. United States v. Fordice, 112 S. Ct.. at 2750-51 (Scalia, J., dissenting).

188. *Id.* at 2751 (Scalia, J., dissenting).

189. *Id.* (Scalia, J., dissenting) (citing Washington v. Davis, 426 U.S. 229, 242 (1976) (holding discriminatory intent and discriminatory causation are required to find a violation of the Equal Protection Clause of the Fourteenth Amendment).

190. *Id.* (Scalia, J., dissenting) (citing Ayers v. Allain, 914 F.2d 676, 690 (5th Cir. 1990) (en banc)); Ayers v. Allain, 674 F. Supp. 1523, 1555 (N.D. Miss. 1987).

Scalia joined in the majority in so far as it held Mississippi failed to meet its burden to show it had eliminated intentional discriminatory admission standards.[191] On remand, the state should be required to prove no discriminatory purpose or effect of the ACT admission requirements to constitutionally continue its practices.[192]

Justice Scalia continued in Part III[193] of his opinion to predict the impact of the majority's opinion. First, Justice Scalia interpreted the majority to foreclose the state's ability to fund both historically all-white and all-black institutions equally or facilitate in any way the continued existence of predominately black institutions.[194] Because these policies would be traceable to the prior de jure system, would have segregative impacts, and would be unjustifiable as furthering "sound educational value," they could not pass the majority's test.[195] Such was the result in *Green* for the elementary and secondary context.[196] Here, the majority's test "is designed to achieve . . . the elimination of predominantly black institutions."[197] This result, Justice Scalia argued, "perpetuates the very stigma of black inferiority that *Brown I* sought to destroy" and is, therefore, bad constitutional law.[198] Even Congress may have acted illegally under the majority's test when it authorized special funding to historically all-black colleges and universities.[199]

In conclusion, Justice Scalia noted the differing interpretations of the majority opinion[200] and predicted this case would one day be known as adopting the *Green* standard.[201] The *Green* result will not be effectuated, however, because of the majority's prohibition of the *Green* remedies and the "virtually standardless discretion conferred upon district judges . . . to pretty much [do] what they please."[202] Justice Scalia concluded:

> What I do predict is a number of years of litigation-driven confusion and destabilization in the university systems of all the formerly *de jure* States, that will benefit neither blacks nor whites, neither predominantly black institutions nor predominately white ones. Nothing good will come of this judicially ordained turmoil, except the public recognition that any court that

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191. United States v. Fordice, 112 S. Ct.. 2727, 2751 (1992) (Scalia, J., dissenting).

192. *Id.* (Scalia, J., dissenting) (citing Freeman v. Pitts, 112 S. Ct. 1430, 1437 (1992) (Scalia, J., concurring)).

193. *Id.* at 2751-53 (Scalia, J., dissenting).

194. *Id.* at 2752-53 (Scalia, J., dissenting). ***But see supra*** notes 142-157 and accompanying text.

195. *Id.* (Scalia, J., dissenting).

196. *Id.* (Scalia, J., dissenting) (citing Green v. New Kent County Sch. Bd., 391 U.S. 430, 442 (1968) (holding racially identifiable schools are prohibited)).

197. *Id.* at 2752 (Scalia, J., dissenting).

198. *Id.* (Scalia, J., dissenting).

199. *Id.* at 2753-54 (Scalia, J., dissenting) (citing Strengthening Historically Black Colleges and Universities, 20 U.S.C. §§ 1060-63(c) (1990); 34 C.F.R. § 608.2(b) (1991) (providing specific funding designations to historically black institutions in Mississippi)).

200. *Id.* at 2753 (Scalia, J., dissenting).

201. *Id.* (Scalia, J., dissenting).

202. *Id.* (Scalia, J., dissenting).

would knowingly impose it must hate segregation. We must find some other way of making that point.[203]

V. CONCLUSION

The Supreme Court's ruling in *Green*[204] triggered a new era in school desegregation cases designed to eliminate the racial identifiability of higher education institutions through mandated integration.[205] After *Fordice*, that era is not only permitted, but encouraged to continue, despite the appalling destruction of the sacred black institutions to which Justice Thomas referred.[206]

Justice Thomas wrote separately apparently fearing the majority opinion could be interpreted as a requirement to dismantle the historically black institutions with their rich histories and traditions.[207] This fear is not farfetched and, in some circumstances, has become reality and triggered mixed reactions.[208] In fact, this result is mandated if the state cannot meet its burden to prove its present

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203. *Id.* (Scalia, J., dissenting).

204. Green v. New Kent County Sch. Bd., 391 U.S. 430, 439 (1963); *see supra* note 36 (providing additional details on *Green*).

205. Gil Kujovich, *Equal Opportunity in Higher Education and the Black Public College: The Era of Separate But Equal*, 72 MINN. L. REV. 29, 169 (1987); *cf.* BELL, *supra* note 36, § 7.13.3.

For example, in Norris v. State Council of Higher Educ., 327 F. Supp. 1368, 1372-73 (E.D. Va.), *aff'd*, 404 U.S. 907 (1971), the court interpreted *Green* to mandate the conversion of "white colleges and black colleges to just colleges." In Geier v. Dunn, 337 F. Supp. 573, 581-82 (M.D. Tenn. 1972), the court ordered the all-black Tennessee State University (TSU) to design specific programs to ensure a "white presence" and desegregate its virtual all-black faculty. Several years later, the Sixth Circuit affirmed a district court's plan to merge TSU with a nearby two-year, 90% white college. Geier v. University of Tenn., 597 F.2d 1056, 1071 (6th Cir.), *cert. denied*, 444 U.S. 886 (1979).

206. *See supra* notes 143-149 and accompanying text.

207. *See supra* part III. B.

208. On October 22, 1992, in response to *Fordice*, Mississippi proposed to the Mississippi District Court the closing of at least one of the historically all-black schools and merging yet another with one or more historically all-white state universities. Eric Harrison, *For Blacks, a Crisis on Campus*, L.A. TIMES, Nov. 1, 1992, at A1. In order to comply with *Fordice*, black Mississippi legislators have proposed more funding to be channeled to the historically all-black schools to upgrade libraries and equipment, enhance graduate programs, and strengthen campus security. Paul Barton, *Bills Would Direct Funds to Black Colleges*, COM. APPEAL, Feb. 23, 1993, at A8. Such a proposal would lead to intense opposition in light of *Fordice* as a continuation of Mississippi's former de jure system. *See supra* notes 193-199 and accompanying text.

The response to closure and merger plans by students and alumni associated with the historically all-black schools was outrage. *See Mississippi Rallies to Oppose College Closures, Mergers*, COM. APPEAL, Feb. 20, 1993, at A8. Since the proposal, 20 rallies were planned across Mississippi to voice opposition to the school closings. *Id.*

In Tennessee, where the historically all-black Tennessee State University is being merged by court order only to attract white students, one alumnus was quoted as saying: "For me it's like the genocidal destruction of the school. . . . It's the destruction of the culture." Harrison, *supra* note 208.

policies and practices comply with the affirmative defenses announced in the new test.[209]

Such an interpretation of *Fordice* would severely limit the last affirmative action option open to remedy the effects of past discrimination in light of *Regents of the University of California v. Bakke*[210] and virtually mandate the destruction of predominately all-black colleges and universities. This was the result the plaintiffs intended to guard against when they filed this suit in 1975.[211]

Thus, *Fordice* could be a major defeat to the black plaintiffs and a partial victory for the state in its refusal to cure the effects of its prior de jure discrimination. The only true winners are, as in so many cases, the lawyers who bill by the hour. More litigation is the only certainty in the interpretation of *Fordice*.

The Supreme Court may be hailed as decisively mandating the end to residual state practices traceable to prior de jure segregative policies. Unfortunately, we are left to wade through a myriad of dispute and confusion, as we have since *Brown*, before any good will result. Even more disturbing, however, is the precarious fate befalling on the historically all-black institutions of higher education. The elimination of these institutions would destroy the only positive result of the many embarrassing years of segregation this country has endured. Obviously nothing has been learned from our prior costly mistakes.

Michael N. Dolich

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209. *See* United States v. Fordice, 112 S. Ct. 2727, 2753-54 (1992) (Scalia, J., dissenting); *supra* notes 193-199.

210. Regents of Univ. of Cal: v. Bakke, 438 U.S. 265 (1978). In *Bakke*, the Court severely limited the state's ability to affirmatively base admission criteria on race to remedy prior effect of discrimination against blacks and other minorities. *Id.*

After *Bakke*, the issue was left open whether predominately black universities could legally maintain racial quotas in an effort to rescue the victims of prior de jure discrimination:

> Black colleges should be able to [legally justify resistance to forced integration in higher education] by pointing out that they and those they serve were victims and not perpetrators of racial discrimination. Black colleges were never responsible for the exclusion of whites, and requiring them to adhere to quotas designed to alter the all-white composition of schools that resisted *Brown* will constitute a racial quota precisely the type condemned by five Justices in *Bakke*.

BELL, *supra* note 36, § 7.13.1.

211. *Id.*