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FACTS

In *Brown v. Board of Education*[1] the United States Supreme Court ruled that the "separate but equal" doctrine was wholly offensive to the United States Constitution and has no place in the field of public education.[2] The Court later ordered an end to segregated public education "with all deliberate speed."[3] Almost forty years later, the public universities of Mississippi continue to be virtually all-black or all-white. In *United States v. Fordice*, the Court decided what standards apply in determining whether a state has met its affirmative duty to dismantle a prior de jure racially segregated public university system.[4]

In 1848 the University of Mississippi was founded as an institution of higher education, established exclusively for white persons. Over the next century, Mississippi established four more exclusively white institutions and three exclusively black institutions.[5] Mississippi continued its policy of de jure segregation until 1962 when the first black student, James Meredith, was admitted by court order into the University of Mississippi. Despite Meredith's admission, each of the states seven institutions of higher education retained its predominantly single-race character. In 1969 the United States Department of Health, Education and Welfare (HEW) requested that Mississippi devise a plan to dismantle its former de jure segregated university system. The Board of Trustees of State Institution of Higher Learning (the Board) submitted a Plan of Compliance and thereafter a modified plan. The Board adopted the modified plan, although it was rejected by HEW.[6]

In 1975, private petitioners sued alleging Mississippi had maintained its racially segregated dual educational system in violation of the United States Constitution and Title VI of the Civil Rights Act of 1964.[7] The United States intervened on behalf of the plaintiffs claiming that Mississippi's dual system of higher education violated the Equal Protection Clause of the Fourteenth Amendment and Title VI.[8]

The parties attempted to achieve voluntary dismantling of the prior segregated system by identifying different program "missions" at each institution of higher education. These missions were categorized as comprehensive, urban, and regional.[9] These mission designations were insufficient to achieve integration. By the time plaintiffs proceeded to trial, ninety-nine percent of the state's white students were at historically white institutions and seventy-one percent of black students were at historically black institutions. In 1987 the parties proceeded to trial, concluding that a voluntary resolution could not be achieved.

At trial, on the issue of whether defendants had taken sufficient affirmative action to dismantle its prior system of de jure segregation, plaintiffs argued that the state continued to enforce race-based policies among its universities. The state claimed that the mere evidence of racially identifiable universities was not unlawful, given students' freedom of choice and the universities' varying missions. The trial court found that Mississippi had fulfilled its af-

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[1] 347 U.S. 483 (1954).

[2] *Id.* at 495.

[3] *Brown v. Board of Education* (*Brown* II), 349 U.S. 294, 301 (1955).

[4] United States v. Fordice, 112 S.Ct. 2727, 2732 (1992).

[5] *Id.* at 2732 (The white institutions include Mississippi State University (1880), Mississippi University for Women (1895), University of Southern Mississippi (1912), and Delta State University (1925). The black institutions include Alcorn State University(1871), Jackson State University (1940) and Mississippi Valley State University (1950)).

[6] *Id.* at 2732-2733 (HEW rejected the Plan of Compliance as failing to comply with Title VI of the Civil Rights Act because it did not go far enough in the areas of student recruitment and enrollment, faculty hiring, elimination of unnecessary duplication and institutional funding).

[7] *Id.* at 2733. *See also Ayers v. Allain*, 674 F.Supp. 1523 (1987).

Title VI provides in part: "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."

[8] *Fordice*, 112 S.Ct. at 2733 (1992).

[9] *Id.* ("Comprehensive" universities were classified as those with the greatest resources and program offerings. The three institutions (University of Mississippi, Mississippi State University, and Southern Mississippi) included

firmative duty to dismantle the former de jure segregated system of higher education.[10] The court of appeals reheard the case en banc and affirmed the decision of the district court.

The court of appeals concluded that Mississippi had fulfilled its affirmative duty to dismantle its prior segregated system by adopting and implementing good-faith race-neutral policies governing its university system.[11] The court determined that these policies allowed students seeking higher education to voluntarily choose the institution of their choice. Although this standard was not sufficient to dismantle a dual system of primary or secondary schools,[12] the court of appeals believed universities "differ in character fundamentally" from the lower levels of schools enough to apply the Supreme Courts decision in *Bazemore v. Friday*.[13]

The United States Supreme Court granted the writs of certiorari filed by the United States government and the private petitioners.

HOLDING

While it did not dispute the district court's factual findings, the Supreme Court vacated its decision and ruled that the district court and court of appeals had erred in concluding as a matter of law that Mississippi had complied with the Equal Protection Clause of the Fourteenth Amendment in the operation of its university system.[14] The courts below did not apply the correct legal standard.[15]

The court of appeals and the district court found that the adoption and implementation of race-neutral policies alone were sufficient to demonstrate that the state had completely abandoned its prior dual system. The Supreme Court held that such policies alone do not suffice to demonstrate that the State has completely abandoned its prior segregated system.[16] The Court reasoned that although a state dismantles its segregative admissions policies, there may still be state action that is traceable to the state's prior segregated system, and therefore continues to foster segregation.[17]

The proper inquiry is "whether existing racial identifiability is attributable to the state, and whether the state has perpetuated its former segregation in any facets of its system."[18] The Court noted that if remnants of policies traceable to the prior system existed without sound educational justification and could be practicably eliminated, then the State has not satisfied its burden of proving the prior system had effectively been dismantled. The Court remanded the proceedings.[19]

APPLICATION/ANALYSIS

In the majority opinion, written by Justice White, the Court held that at least four policies of Mississippi's university system are, though race-neutral, constitutionally suspect because they reduce individual choice and contribute to racial identifiability of the State's public universities. These policies are admission standards, program duplication, institutional mission assignments, and continued operation of all eight public universities.[20] The Court concluded that on remand Mississippi must justify these policies or eliminate them.

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in this category were exclusively white under the prior de jure segregated system. Jackson State, the sole "Urban" university, was assigned a more limited research and degree mission, geared towards its urban setting. The "Regional" universities were envisioned as those institutions primarily educating undergraduates. The regional designation included institutions that, prior to desegregation, had been exclusively white (Delta State and Mississippi University for Women) and exclusively black (Alcorn State and Mississippi Valley)).

[10] *Id.* at 2734-2735 (The district court further concluded that the affirmative duty to dismantle a prior de jure segregated system did not require "achievement or any degree of racial balance.")(quoting *Ayers*, 674 F.Supp. at 1553 (1987)).

[11] *Id.* at 2735.

[12] *See Green v. New Kent County School Board*, 391 U.S. 430 (1968) (holding that Connecticut's "freedom of choice" plan unconstitutional because it did not end systematic segregation in the state. The Court ordered Connecticut to adopt effective policies aimed at desegregating prior dual school systems. In achieving this, the Court implied that the State must integrate primary and secondary school systems.).

[13] 478 U.S. 385, 408 (1986)(distinguishing primary and secondary schools and club participation by the voluntary nature of participation. Although the clubs were racially identifiable, the Court found the adoption of race-neutral admission policies satisfied the duty to disestablish the formerly segregated clubs. *Bazemore* established a lower standard for desegregating voluntary school-affiliated activities by requiring implementation of race-neutral policies which need not achieve integration in order to pass constitutional scrutiny.).

[14] *Fordice*, 112 S.Ct. at 2743.

[15] *Id.*

[16] *Id.* at 2735.

[17] *Fordice*, 112 S.Ct. at 2736.

[18] *Id.* at 2730.

[19] *Id.* at 2743.

[20] *Id.* at 2738.

Mississippi's admission standards are not only traceable to the prior segregated system and originally adopted for a discriminatory purpose, but the standards also have present discriminatory effects. The district court found that every college-bound Mississippi resident under twenty-one must take the American College Testing Program (ACT).[21] Every resident who scores at least fifteen on the ACT qualifies for admission to four of the five historically white institutions.[22] Mississippi University for Women requires a score of eighteen for automatic admission.[23] Those who score thirteen or fourteen qualify for admission to one of the three historically black institutions.[24] In 1985, seventy-two percent of white Mississippi high school seniors achieved an ACT composite score of fifteen or better, while less than thirty percent of black high school seniors earned that score.[25] The Court stated, "without doubt these requirements restrict the range of choices of entering students in a way that perpetuates segregation."[26]

The district court also found that there was unnecessary duplication of programs at the universities.[27] Unnecessary duplication refers to instances where two or more institutions offer the same non-essential or non-core programs. All duplication of nonbasic liberal arts and science courses at the undergraduate level and any duplication at the graduate level are considered "unnecessary". The district court found that 34.6% of twenty-nine undergraduate programs at historically black institutions (HBIs) are unnecessarily duplicated by historically white institutions (HWIs), and ninety percent of the graduate programs at the HBIs are unnecessarily duplicated at HWIs.[28] Duplication is a legacy of separate but equal.[29]

Addressing Mississippi's scheme of institutional mission classification, the Court found that when combined with the admission policies and unnecessary program duplication, "it is likely that the mission designations interfere with student choice and tend to perpetuate the segregated system."[30] On remand, the lower court must inquire as to the practicability of their elimination.

Finally, the Court addressed the question of the existence of eight universities. The Court found that the existence of eight universities was a result of the prior segregated system. Though the Court explicitly declined to say whether closure of some of the eight universities was constitutionally required, it remanded to the district court the question of whether the retention of the eight universities created under segregation "perpetuates the segregated higher education system."[31]

The Court concluded that the eradication of prior de jure segregated systems of higher education requires that policies rooted in the system which served to maintain racially identifiable institutions be eliminated.[32] The Court further held that a school can be racially identifiable only if it is not the result of policies and practices rooted in the state's former segregated system.[33] Finally, the Court remanded the question of whether increased funding to HBIs was necessary to assist in eliminating the prior de jure segregated system.[34]

In her concurring opinion, Justice O'Connor emphasized that it is Mississippi's burden to prove the legitimate educational objectives of a policy with segregative effects.[35] Moreover, she would require that the state show that it has minimized the impact of these policies to the extent possible.[36]

Justice Thomas concurred separately to emphasize that the standard set in this opinion for institutions of higher education is different from that used in the grade-school context.[37] According to Justice Thomas, *Fordice* "portends neither the destruction of historically black colleges nor the severing of those

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[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] *Id.* at 2738-2739.
[26] *Id.* at 2739.
[27] *Id.* at 2740.
[28] *Id.*
[29] *Id.* at 2741.
[30] *Id.* at 2742. Under the present system the "flagship institutions" ("comprehensive" mission statements) of Mississippi's university system are all HWIs. These institutions receive the most funding, have the most specialized programs, and developed the most diverse curriculum. The HBIs in contrast had much more limited academic missions. The court found these differences more than coincidental, concluding that the "mission designations adopted in 1981 have as their antecedents the policies enacted to perpetuate racial separation during the de jure segregated regime."
[31] *Id.* at 2743.
[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] *Id.* at 2743.
[36] *Id.* at 2744.
[37] *Id.* at 2744; *See also Swann v. Charlotte-Mecklenberg Board of Education*, 402 U.S. 1, 22-31 (1971)(authorizing lower courts to reassign students to eliminate racial imbalance).

institutions from their distinctive histories and tradition."[38] Justice Thomas noted that in order for a challenged higher educational policy to fail constitutional muster, the policy must have begun during the segregation period, must produce adverse impacts, and must have no sound educational justification.[39]

Concurring and dissenting, Justice Scalia was highly critical of several aspects of the test adopted by the majority. First, Justice Scalia contended that the majority's test lacked clarity and was incomprehensible.[40] Such a test, in his opinion, would have district court judges guessing "when desegregation is lawful."[41] Second, Justice Scalia believed that the majority mistakenly applied to universities the standard used in elementary and secondary schools.[42] Third, Justice Scalia criticized the majority's opinion because it might preclude a state from adopting a policy where HBIs and HWIs receive equal funding.[43]

CONCLUSION

The existence of HBIs has been the subject of much discussion in recent years. Advocates of HBIs point to their function in the African-American community as learning environments free of racism and as opportunities for the development of self-esteem and racial pride.

Some defend HBIs as necessary and beneficial for two interrelated reasons. First, the colleges serve as transmitters and preservers of African-American culture. Second, the colleges are necessary as a cultural buffer, where they allow African-Americans the choice of whether and when to integrate into mainstream society.[44]

HBIs traditionally have compensated for poor high school training with admissions and support programs structured to ameliorate the effects of discriminatory systems of early years. College-bound African-Americans find healing and reassurance at HBIs. They also enjoy greater academic success, which prepares them to pursue graduate study or employment in predominantly white institutions.

The *Fordice* opinion jeopardizes the continued status of HBIs. While the majority's goal is to achieve racial balance in the university system, such a goal may be attained at the expense of HBIs.

The majority's opinion threatens the continuance of HBIs by making their existence constitutionally questionable. The Court stated that in order for Mississippi to meet its constitutional obligation, it must prove that it has eliminated any policies and practices which are rooted in its former educational system and which continues to foster segregation. Because most, it not all, HBIs were a product of the prior dual educational system, and because the continuance of HBIs arguably foster segregation, the majority's test creates a presumption of a constitutional violation.

This result was emphasized further in Justice Whites's opinion when he made clear that in order for Mississippi to achieve integration it would have to adopt policies that would reduce the racial identifiability of its colleges.[45]

The standards[46] set out in *Fordice* are vague and fail to instruct the lower courts and educational institutions how these standards should be applied. Both the lower courts and educational institutions will be forced to develop standards as they go along, which could have disparate results.

For example, in response to the standards set out by the Court, the Mississippi public university system initiated a plan that proposed to close Mississippi Valley State and merge Alcorn State with

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[38] *Fordice*, 112 S.Ct. at 2745 (1992).

[39] *Id.*

[40] *Id.* at 2747. Justice Scalia viewed the majority's opinion as stating two separate tests which achieved the same results. The first test, set out in Part III of the majority's opinion, asserts that all policies "traceable to [the] prior system that continue to have segregative effects . . . must be eliminated to the extent practicable and consistent with sound educational practices." The second test, set out in Part IV of the majority's opinion required the elimination of policies that (i) "are legacies of the dual system, (ii) contribute to the racial identifiability of the state's universities . . . and in addition do so in a way that substantially restrict a person's choice as to which institution to enter."

[41] *Id.* at 2748.

[42] *Id.* at 2748. Scalia compares this decision with the Court's opinion in *Green*; *See supra* note 12.

[43] *Id.* at 2752.

[44] *See* Johnson, *Bid Whist, Tonk, and United States v. Fordice: Why Integrationist fails African-Americans Again*, 81 Calif. L. Rev. 1401, 1432 (1993).

[45] *Fordice*, 112 S.Ct. at 2743 (Justice White stated: "If we understand private petitioners to press us to order the upgrading of Mississippi's black colleges solely so that they may be publicly financed, exclusively black enclaves by private choice, we reject that request").

[46] Standards such as "practicable elimination," "sound educational practices," and "substantially restricting a person's choice" were used by the Court.

predominantly white Mississippi State.[47] This proposal would effectively close two of the three HBIs in Mississippi.

The *Fordice* standard will likely cause other states to initiate plans similar to that of Mississippi's in order to avoid action under the Equal Protection Clause of the Fourteenth Amendment and Title VI. As stated by Justice Thomas in *Fordice*: "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."[48]

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Note: On March 7, 1995 the United States District Court issued a Memorandum Opinion and Remedial Decree on *United States v. Fordice*, No. 4:75CV009-B-O, 1995 WL 101597 (N.D.Miss. March 7, 1995).

The Court found the present admission standards of the Mississippi University System was not only traceable to the de jure system originally adopted for discriminatory purposes, but also has present discriminatory effects. *Id.* at 68. The Court ordered that the admission requirements of the university system be modified to eliminate the differential admission standards between HBIs and HWIs. *Id.*

The Court also found that program duplication continues to be pervasive in the university system although all program duplication is not segregative in effect. *Id.* The Court ordered an institutional study be conducted concerning the program duplication between universities in the system. *Id.* In addition, the Court found that the proposed enhancements of Jackson State University realistically promise to further desegregation of that institution and ordered their implementation. *Id.*

Finally, the Court unable to determine whether the merger between Delta State University and Mississippi Valley State University was educationally sound, directed further study on the issue whether the proposed consolidation is the most feasible and educationally sound means of accomplishing desegregation in the Delta. *Id.*

The Court ordered that a monitoring Committee be established to monitor the implementation and obligations imposed by its decree. *Id.*

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[47] *See* Smothers, *Blacks and Whites Condemn Plan to Integrate Mississippi Campuses*, The New York Times, Oct. 23, 1992, at A1, A23.

[48] *Fordice*, 112 S.Ct. at 2746.