SUPREME COURT OF THE UNITED STATES

NOS. 90–1205 AND 90–6588

UNITED STATES, PETITIONER
90–1205 *v.*
KIRK FORDICE, GOVERNOR OF MISSISSIPPI, ET AL.

JAKE AYERS, ET AL., PETITIONERS
90–6588 *v.*
KIRK FORDICE, GOVERNOR OF MISSISSIPPI, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[June 26, 1992]

JUSTICE O'CONNOR, concurring.

I join the opinion of the Court, which requires public universities, like public elementary and secondary schools, to affirmatively dismantle their prior *de jure* segregation in order to create an environment free of racial discrimination and to make aggrieved individuals whole. See *Brown* v. *Board of Education*, 349 U. S. 294, 299 (1955) (*Brown II*); *Milliken* v. *Bradley*, 418 U. S. 717, 746 (1974). I write separately to emphasize that it is Mississippi's burden to prove that it has undone its prior segregation, and that the circumstances in which a State may maintain a policy or practice traceable to *de jure* segregation that has segregative effects are narrow. In light of the State's long history of discrimination, and the lost educational and career opportunities and stigmatic harms caused by discriminatory educational systems, see *Brown* v. *Board of Education*, 347 U. S. 483, 494 (1954) (*Brown I*); *Sweatt* v. *Painter*, 339 U. S. 629, 634–635 (1950); *McLaurin* v. *Oklahoma State Regents for Higher Ed.*, 339 U. S. 637, 640–641 (1950), the courts below must carefully examine Mississippi's proffered justifications for maintaining a remnant of *de jure* segregation to ensure that such rationales do not merely mask the perpetuation of discriminatory practices. Where the State can accomplish legitimate

educational objectives through less segregative means, the courts may infer lack of good faith; "at the least it places a heavy burden upon the [State] to explain its preference for an apparently less effective method." *Green* v. *New Kent County School Bd.*, 391 U. S. 430, 439 (1968). In my view, it also follows from the State's obligation to prove that it has "take[n] all steps" to eliminate policies and practices traceable to *de jure* segregation, *Freeman* v. *Pitts*, 503 U. S. ___, ___ (1992) (slip op., at 15), that if the State shows that maintenance of certain remnants of its prior system is essential to accomplish its legitimate goals, then it still must prove that it has counteracted and minimized the segregative impact of such policies to the extent possible. Only by eliminating a remnant that unnecessarily continues to foster segregation or by negating insofar as possible its segregative impact can the State satisfy its constitutional obligation to dismantle the discriminatory system that should, by now, be only a distant memory.