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 THOMAS, concurring.

``We must rally to the defense of our schools. We must repudiate this unbearable assumption of the right to kill institutions unless they conform to one narrow standard.'' W.E.B. Du Bois, Schools, 13 The Crisis 111, 112 (1917).

I agree with the Court that a State does not satisfy its obligation to dismantle a dual system of higher education merely by adopting race-neutral policies for the future administration of that system. Today, we hold that ``[i]f policies traceable to the *de jure* system are still in force and have discriminatory effects, those policies too must be reformed to the extent practicable and consistent with sound educational policies.'' *Ante*, at 10. I agree that this statement defines the appropriate standard to apply in the higher-education context. I write separately to emphasize that this standard is far different from the one adopted to govern the grade-school context in *Green* v. *New Kent County School Bd.*, 391 U. S. 430 (1968), and its progeny. In particular, because it does not compel the elimination of all observed racial imbalance, it portends neither the destruction of historically black colleges nor the severing of those institutions from their distinctive histories and traditions.

In *Green*, we held that the adoption of a freedom-of-choice plan does not satisfy the obligations of a formerly *de jure* grade-school system should the plan fail to decrease, if not eliminate, the racial imbalance within that system. See *id.*, at 441. Although racial imbalance does not itself establish a violation of the Constitution, our decisions following *Green* indulged the presumption, often irrebuttable in practice, that a presently observed imbalance has been proximately caused by intentional state action during the prior *de jure* era. See, *e.g.*, *Dayton Bd. of Ed.* v. *Brinkman*, 443 U. S. 526, 537 (1979); *Keyes* v. *School Dist. No. 1*, *Denver, Colo.,* 413 U. S. 189, 211 (1973). As a result, we have repeatedly authorized the district courts to reassign students, despite the operation of facially neutral assignment policies, in order to eliminate or decrease observed racial imbalances. See, *e.g.*, *Swann* v. *Charlotte-Mecklenburg Board of Ed.*, 402 U. S. 1, 22–31 (1971); *Green*, *supra*, at 442, n. 6.

Whatever the merit of this approach in the grade-school context, it is quite plainly not the approach that we adopt today to govern the higher-education context. We explicitly reject the use of remedies as ``radical'' as student reassignment—*i.e.*, ``remedies akin to those upheld in *Green*.'' *Ante*, at 10, n. 4; see also *ante*, at 9. Of necessity, then, we focus on the specific *policies* alleged to produce racial imbalance, rather than on the *imbalance* itself. Thus, a plaintiff cannot obtain relief merely by identifying a persistent racial imbalance, because the district court cannot provide a reassignment remedy designed to eliminate that imbalance directly. Plaintiffs are likely to be able to identify, as these plaintiffs have identified, specific policies traceable to the *de jure* era that continue to produce a current racial imbalance. As a practical matter, then, the district courts administering our standard will spend their time determining whether such policies have been adequately justified—a far narrower, more manageable task than that imposed

under *Green*.

A challenged policy does not survive under the standard we announce today if it began during the prior *de jure* era, produces adverse impacts, and persists without sound educational justification. When each of these elements has been met, I believe, we are justified in not requiring proof of a present specific intent to discriminate. It is safe to assume that a policy adopted during the *de jure* era, if it produces segregative effects, reflects a discriminatory intent. As long as that intent remains, of course, such a policy cannot continue. And given an initially tainted policy, it is eminently reasonable to make the State bear the risk of nonpersuasion with respect to intent at some future time, both because the State has created the dispute through its own prior unlawful conduct, see, *e.g.*, *Keyes*, *supra*, at 209–210, and because discriminatory intent does tend to persist through time, see, *e.g.*, *Hazelwood School Dist.* v. *United States*, 433 U. S. 299, 309–310, n. 15 (1977). Although we do not formulate our standard in terms of a burden shift with respect to intent, the factors we do consider—the historical background of the policy, the degree of its adverse impact, and the plausibility of any justification asserted in its defense—are precisely those factors that go into determining intent under *Washington* v. *Davis*, 426 U. S. 229 (1976). See, *e.g.*, *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U. S. 252, 266–267 (1977). Thus, if a policy remains in force, without adequate justification and despite tainted roots and segregative effect, it appears clear—clear enough to presume conclusively—that the State has failed to disprove discriminatory intent.

We have no occasion to elaborate upon what constitutes an adequate justification. Under *Green*, we have recognized that an otherwise unconstitutional policy may be justified if it serves

``important and legitimate ends,'' *Dayton*, *supra*, at 538, or if its elimination is not ``practicable,'' *Board of Ed. of Oklahoma City* v. *Dowell*, 498 U. S. ___, ___ (1991) (slip. op., at 11). As JUSTICE SCALIA points out, see *post*, at 5–6, our standard appears to mirror these formulations rather closely. Nonetheless, I find most encouraging the Court's emphasis on ``sound *educational* practices,'' *ante*, at 10 (emphasis added); see also, *e.g.*, *ante*, at 12 (``sound educational justification''); *ante*, at 17 (``sound educational policy''). From the beginning, we have recognized that desegregation remedies cannot be designed to ensure the elimination of any remnant at any price, but rather must display ``a practical flexibility'' and ``a facility for adjusting and reconciling public and private needs.'' *Brown* v. *Board of Ed.,* 349 U. S. 294, 300 (1955). Quite obviously, one compelling need to be considered is the *educational* need of the present and future *students* in the Mississippi university system, for whose benefit the remedies will be crafted.

In particular, we do not foreclose the possibility that there exists ``sound educational justification'' for maintaining historically black colleges *as such*. Despite the shameful history of state-enforced segregation, these institutions have survived and flourished. Indeed, they have expanded as opportunities for blacks to enter historically white institutions have expanded. Between 1954 and 1980, for example, enrollment at historically black colleges increased from 70,000 to 200,000 students, while degrees awarded increased from 13,000 to 32,000. See S. Hill, National Center for Education Statistics, The Traditionally Black Institutions of Higher Education 1860 to 1982, pp. xiv-xv (1985). These accomplishments have not gone unnoticed:

> ``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.'' Carnegie Commission on Higher Education, From Isolation to Mainstream: Problems of the Colleges Founded for Negroes 11 (1971).

I think it undisputable that these institutions have succeeded in part because of their distinctive histories and traditions; for many, historically black colleges have become ``a symbol of the highest attainments of black culture.'' J. Preer, Lawyers v. Educators: Black Colleges and Desegregation in Public Higher Education 2 (1982). Obviously, a State cannot maintain such traditions by closing particular institutions, historically white or historically black, to particular racial groups. Nonetheless, it hardly follows that a State cannot operate a diverse assortment of institutions—including historically black institutions—open to all on a race-neutral basis, but with established traditions and programs that might disproportionately appeal to one race or another. No one, I imagine, would argue that such institutional *diversity* is without ``sound educational justification,'' or that it is even remotely akin to program *duplication*, which is designed to separate the races for the sake of separating the races. The Court at least hints at the importance of this value when it distinguishes *Green* in part on the ground that colleges and universities ``are not fungible.'' *Ante*, at 9. Although I agree that a State is not constitutionally *required* to maintain its historically black institutions as such, see *ante*, at 23–24, I do not understand our opinion to hold that a State is *forbidden* from doing so. 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.