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 SCALIA, concurring in the judgment in part and dissenting in part.

With some of what the Court says today, I agree. I agree, of course, that the Constitution compels Mississippi to remove all discriminatory barriers to its state-funded universities. *Brown* v. *Board of Education*, 347 U. S. 483 (1954) *(Brown I)*. I agree that the Constitution does not compel Mississippi to remedy funding disparities between its historically black institutions (HBIs) and historically white institutions (HWIs). And I agree that Mississippi's American College Testing Program (ACT) requirements need further review. I reject, however, the effectively unsustainable burden the Court imposes on Mississippi, and all States that formerly operated segregated universities, to demonstrate compliance with *Brown I*. That requirement, which resembles what we prescribed for primary and secondary schools in *Green* v. *New Kent County School Board*, 391 U. S. 430 (1968), 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.

Before evaluating the Court's handiwork, it is no small task simply to comprehend it. The Court sets forth not one, but seemingly two different tests for ascertaining compliance with *Brown I*—though in the last analysis they come to the same. The Court initially announces the following test, in Part III of its opinion: all policies (i) “traceable to [the State's] prior [*de jure]* system” (ii) “that continue to have segregative effects—whether by influencing student enrollment decisions or by fostering segregation in other facets of the university system—”must be eliminated (iii) to the extent ``practicabl[e]” and (iv) consistent with ``sound educational'' practices. *Ante*, at 12. When the Court comes to applying its test, however, in Part IV of the opinion, ``influencing student enrollment decisions'' is not merely one example of a ``segregative effec[t],'' but is elevated to an independent and essential requirement of its own. The policies that must be eliminated are those that (i) are legacies of the dual system, (ii) “contribute to the racial identifiability” of the State's universities (the same as (i) and (ii) in Part III), and in addition (iii) do so in a way that *“substantially restrict[s] a person's choice of which institution to enter”* (emphasis added). *Ante*, at 13. See also *ante*, at 15, 19, 21–23.

What the Court means by “substantially restrict[ing] a person's choice of which institution to enter” is not clear. During the course of the discussion in Part IV the requirement changes from one of strong coercion (“substantially restrict,” *ante,* at 13, “interfere,” *ante*, at 21), to one of middling pressure (“restrict,” *ante*, at 15, “limi[t],'' *ante*, at 21), to one of slight inducement (“inherent[ly] self-selec[t],” *ante*, at 15, n. 9, “affect,” *ante,* at 19, 23). If words have any meaning, in this last stage of decrepitude the requirement is so frail that almost anything will overcome it. Even an open-admissions policy would

fall short of ensuring that student choice is un*affected* by State action. The Court's results also suggest that the "restricting-choice" requirement is toothless. Nothing else would explain how it could be met by Mississippi's mission designations, program duplication, and operation of all eight formerly *de jure* colleges. Only a test aimed at state action that "affects" student choice could implicate policies such as these, which in no way *restrict* the decision where to attend college. (Indeed, program duplication and continuation of the eight schools have quite the opposite effect; they *multiply*, rather than restrict, limit, or impede the available choices.) At the end of the day, then, the Court dilutes this potentially useful concept to the point of such insignificance that it adds nothing to the Court's test except confusion. It will be a fertile source of litigation.

Almost as inscrutable in its operation as the "restricting-choice" requirement is the requirement that challenged state practices perpetuate *de facto* segregation. That is "likely" met, the Court says, by Mississippi's mission designations. *Ante*, at 21–22. Yet surely it is apparent that by designating three colleges of the same prior disposition (HWIs) as the *only* comprehensive schools, Mississippi encouraged integration; and that the suggested alternative of elevating an HBI to comprehensive status (so that blacks could go there instead of to the HWIs) would have been an invitation to continuing segregation. See *Ayers* v. *Allain,* 674 F. Supp. 1523, 1562 (N.D. Miss. 1987) ("Approximately 30% of all black college students attending four-year colleges in the state attend one of the comprehensive universities"). It appears, moreover, that even if a particular practice does not, in isolation, rise to the minimal level of fostering segregation, it can be aggregated with other ones, and the *composite* condemned. See *ante*, at 19–20 ("by treating [the] issue [of program duplication] in isolation, the [district] court failed to consider

the combined effects of unnecessary program duplication with other policies, such as differential admissions standards"); *ante,* at 21–22 ("when combined with the differential admission practices and unnecessary program duplication, it is likely that the mission designations . . . tend to perpetuate the segregated system"). It is interesting to speculate how university administrators are going to guess which practices a district judge will choose to aggregate; or how district judges are going to guess when disaggregation is lawful.

The Court appears to suggest that a practice that has been aggregated and condemned may be disaggregated and approved so long as it does not *itself* "perpetuat[e] the segregated higher education system," *ante*, at 23—which seems, of course, to negate the whole purpose of aggregating in the first place. The Court says:

> "Elimination of program duplication and revision of admissions criteria may make institutional closure unnecessary. . . . [O]n remand, this issue should be carefully explored by inquiring and determining whether retention of all eight institutions itself . . . perpetuates the segregated higher education system, whether maintenance of each of the universities is educationally justifiable, and whether one or more of them can be practicably closed or merged with other existing institutions." *Ante,* at 22–23.

Perhaps the Court means, however, that even if retention of all eight institutions is found by itself *not* to "perpetuat[e] the segregated higher education system," it must *still* be found that such retention is "educationally justifiable," or that none of the institutions can be "practicably closed or merged." It is unclear.

Besides the ambiguities inherent in the "restricting choice" requirement and the requirement that the challenged state practice or practices perpetuate

segregation, I am not sanguine that there will be comprehensible content to the to-be-defined-later (and, make no mistake about it, outcome-determinative) notions of “sound educational justification” and “impracticable elimination.” In short, except for the results that it produces in the present case (which are what they are because the Court says so), I have not the slightest idea how to apply the Court's analysis—and I doubt whether anyone else will.

Whether one consults the Court's description of what it purports to be doing, in Part III, *ante*, at 8–12, or what the Court actually does, in Part IV, *ante*, at 13–24, one must conclude that the Court is essentially applying to universities the amorphous standard adopted for primary and secondary schools in *Green* v. *New Kent County School Board*, 391 U. S. 430 (1968). Like that case, today's decision places upon the State the ordinarily unsustainable burden of proving the negative proposition that *it* is not responsible for extant racial disparity in enrollment. See *ante*, at 8. *Green* requires school boards to prove that racially identifiable schools are *not* the consequence of past or present discriminatory state action, *Swann* v. *Charlotte-Mecklenburg Bd. of Education,* 402 U. S. 1, 26 (1971)); today's opinion requires state university administrators to prove that racially identifiable schools are *not* the consequence of any practice or practices (in such impromptu “aggregation” as might strike the fancy of a district judge) held over from the prior *de jure* regime. This will imperil virtually any practice or program plaintiffs decide to challenge—just as *Green* has—so long as racial imbalance remains. And just as under *Green*, so also under today's decision, the only practicable way of disproving that “existing racial identifiability is attributable to the State,” *ante*, at 8, *is to eliminate extant segregation, i.e., to assure racial proportionality in the schools*. Failing that, the State's only

defense will be to establish an excuse for each challenged practice—either impracticability of elimination, which is also a theoretical excuse under the *Green* regime, see *Board of Education of Oklahoma City* v. *Dowell,* 498 U. S. ––– (1991) (slip op., at 10–11), or sound educational value, which (presumably) is not much different from the "important and legitimate ends" excuse available under *Green,* see *Dayton Board of Education* v. *Brinkman,* 443 U. S. 526, 538 (1979).

Application of the standard (or standards) announced today has no justification in precedent, and in fact runs contrary to a case decided six years ago, see *Bazemore* v. *Friday*, 478 U. S. 385 (1986). The Court relies primarily upon citations of *Green* and other primary and secondary school cases. But those decisions left open the question whether *Green* merits application in the distinct context of higher education. Beyond that, the Court relies on *Brown I*, *Florida ex rel. Hawkins* v. *Board of Control of Fla.*, 350 U. S. 413 (1956) (*per curiam*), and *Gilmore* v. *City of Montgomery*, 417 U. S. 556 (1974). That reliance also is mistaken.

The constitutional evil of the "separate but equal" regime that we confronted in *Brown I* was that blacks were told to go to one set of schools, whites to another. See *Plessy* v. *Ferguson*, 163 U. S. 537 (1896). What made this "even-handed" racial partitioning offensive to equal protection was its implicit stigmatization of minority students: "To separate [black students] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." *Brown I,* 347 U. S., at 494. In the context of higher education, a context in which students decide whether to attend school and if so where, the only unconstitutional

derivations of that bygone system are those that limit access on discriminatory bases; for only they have the potential to generate the harm *Brown I* condemned, and only they have the potential to deny students equal access to the best public education a State has to offer. Legacies 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 these consequences.

Our decisions immediately following *Brown I* also fail to sustain the Court's approach. They, too, suggest that former *de jure* States have one duty: to eliminate discriminatory obstacles to admission. *Brown* v. *Board of Education*, 349 U. S. 294 (1955) (*Brown II*), requires States "to achieve a system of determining admission to the public schools on a nonracial basis," *id.*, at 300–301, as do other cases of that era, see, *e.g., Cooper* v. *Aaron,* 358 U. S. 1, 7 (1958); *Goss* v. *Board of Ed. of Knoxville,* 373 U. S. 683, 687 (1963).

Nor do *Hawkins* or *Gilmore* support what the Court has done. *Hawkins* involved a segregated graduate school, to be sure. But our one-paragraph *per curiam* opinion supports nothing more than what I have said: the duty to dismantle means the duty to establish non-discriminatory admissions criteria. See 350 U. S., at 414 ("He is entitled to prompt admission under the rules and regulations applicable to other qualified candidates"). Establishment of neutral admissions standards, not the eradication of all "policies traceable to the *de jure* system . . . hav[ing] discriminatory effects," *ante,* at 10, is what *Hawkins* is about. Finally, *Gilmore*, quite simply, is inapposite. All that we did there was uphold an order enjoining a city from granting exclusive access to its parks and recreational facilities to segregated private schools and to groups affiliated with such schools. 417 U. S., at 569. Notably, in the one case that does bear

proximately on today's decision, *Bazemore*, *supra*, we declined to apply *Gilmore*. See *Bazemore, supra*, at 408 (WHITE, J., concurring) ("Our cases requiring parks and the like to be desegregated lend no support for requiring more than what has been done in this case").

If we are looking to precedent to guide us in the context
of higher education, we need not go back 38 years to *Brown I*, read between the lines of *Hawkins*, or conjure authority (*Gilmore*) that does not exist. In *Bazemore* v. *Friday, supra,* we addressed a dispute parallel in all relevant respects to this one. At issue there was state financing of 4–H and Homemaker youth clubs by the North Carolina Agricultural Extension Service, a division of North Carolina State University. In the *Plessy* era, club affiliations had been dictated by race; after 1964, they were governed by neutral criteria. Yet "there were a great many all-white and all-black clubs" at the time suit was filed. 478 U. S., at 407. We nonetheless declined to adopt *Green's* requirement that "affirmative action [be taken] to integrate" once segregated-by-law/still segregated-in-fact state institutions. 478 U. S., at 408. We confined *Green* to primary and secondary public schools, where "schoolchildren must go to school" and where "school boards customarily have the power to create school attendance areas and otherwise designate the school that particular students may attend." 478 U. S, at 408. "[T]his case," we said, "presents no current violation of the Fourteenth Amendment since the Service has discontinued its prior discriminatory practices and has adopted a wholly neutral admissions policy. The mere continued existence of single-race clubs does not make out a constitutional violation." *Ibid.*

The Court asserts that we reached the result we did in *Bazemore* "only after satisfying ourselves that the State had not fostered segregation by playing a part

in the decision of which club an individual chose to join," *ante,* at 11—implying that we assured ourselves there, as the Court insists we must do here, that none of the State's practices carried over from *de jure* days incidentally played a part in the decision of which club an individual chose to join. We did no such thing. An accurate description of *Bazemore* was set forth in *Richmond* v. *J. A. Croson Co.*, 488 U. S. 469 (1989): "mere existence of single-race clubs . . . cannot create a duty to integrate," we said *Bazemore* held, "in absence of *evidence of exclusion by race,*" 488 U. S., at 503 (emphasis added)—*not* "in absence of evidence of state action playing a part in the decision of which club an individual chose to join." The only thing we "satisfied ourselves" about in *Bazemore* was that the club members' choices were "wholly voluntary and unfettered," 478 U. S., at 407—which does not mean the State "play[ed] [no] part in the decision of which club an individual chose to join," however much the Court may mush the concepts together today. It is on the face of things entirely unbelievable that the previously established characteristics of the various all-white and all-black 4–H Clubs (where each of them met, for example) did not even play a part in young people's decisions of which club to join.

Bazemore's standard for dismantling a dual system ought to control here: discontinuation of discriminatory practices and adoption of a neutral admissions policy. To use *Green* nomenclature, modern racial imbalance remains a "vestige" of past segregative practices in Mississippi's universities, in that the previously mandated racial identification continues to affect where students choose to enroll—just as it surely affected which clubs students chose to join in *Bazemore*. We tolerated this vestigial effect in *Bazemore*, squarely rejecting the view that the State was obliged to correct "the racial segregation resulting from [its prior] practice[s]." 478 U. S., at

417 (Brennan, J., dissenting in part). And we declined to require the State, as the Court has today, to prove that no holdover practices of the *de jure* system, *e.g.,* program offerings in the different clubs, played a role in the students' decisions of which clubs to join. If that analysis was correct six years ago in *Bazemore*, and I think it was, it must govern here as well. Like the club attendance in *Bazemore* (and unlike the school attendance in *Green*), attending college is voluntary, not a legal obligation, and which institution particular students attend is determined by their own choice, not by ``school boards [who] customarily have the power to create school attendance areas and otherwise designate the school that particular students may attend.'' *Bazemore*, *supra*, at 408. Indeed, *Bazemore* was a more appealing case than this for adhering to the *Green* approach, since the 4–H Clubs served students similar in age to those in *Green,* and had been "organized in the public schools" until the early 1960's. 478 U. S., at 417.

It is my view that the requirement of compelled integration (whether by student assignment, as in *Green* itself, or by elimination of nonintegrated options, as the Court today effectively decrees) does not apply to higher education. Only one aspect of an historically segregated university system need be eliminated: discriminatory admissions standards. The burden is upon the formerly *de jure* system to show that that has been achieved. Once that has been done, however, it is not just unprecedented, but illogical as well, to establish that former *de jure* States continue to deny equal protection of the law to students whose choices among public university offerings are unimpeded by discriminatory barriers. Unless one takes the position that *Brown I* required States not only to provide equal access to their universities but also to correct lingering disparities between them, that is, to remedy institutional noncompliance with the "equal" requirement of

Plessy, a State is in compliance with *Brown I* once it establishes that it has dismantled all discriminatory barriers to its public universities. Having done that, a State is free to govern its public institutions of higher learning as it will, unless it is convicted of discriminating anew—which requires both discriminatory intent and discriminatory causation. See *Washington* v. *Davis,* 426 U. S. 229 (1976).

That analysis brings me to agree with the judgment that the Court of Appeals must be reversed in part—for the reason (quite different from the Court's) that Mississippi has not borne the burden of demonstrating that intentionally discriminatory admissions standards have been eliminated. It has been established that Mississippi originally adopted ACT assessments as an admissions criterion because that was an effective means of excluding blacks from the HWIs. See *Ayers* v. *Allain,* 674 F. Supp., at 1555; *Ayers* v. *Allain,* 914 F. 2d 676, 690 (CA5 1990) *(en banc).* Given that finding, the District Court should have required Mississippi to prove that its continued use of ACT requirements does not have a racially exclusionary purpose and effect—a not insubstantial task, see *Freeman* v. *Pitts,* 503 U. S. –––, ––– (slip op., at 4) (SCALIA, J., concurring).

I must add a few words about the unanticipated consequences of today's decision. Among petitioners' contentions is the claim that the Constitution requires Mississippi to correct funding disparities between its HBIs and HWIs. The Court rejects that, see *ante*, at 23—as I think it should, since it is students and not colleges that are guaranteed equal protection of the laws. See *Sweatt* v. *Painter*, 339 U. S. 629, 635 (1950); *Missouri ex rel. Gaines* v. *Canada*, 305 U. S. 337, 351 (1938). But to say that the Constitution does not *require* equal funding is not to say that the Constitution *prohibits* it. The citizens of a State may conclude that if certain of

their public educational institutions are used predominantly by whites and others predominantly by blacks, it is desirable to fund those institutions more or less equally.

Ironically enough, however, today's decision seems to prevent adoption of such a conscious policy. What the Court says about duplicate programs is as true of equal funding: the requirement "was part and parcel of the prior dual system." *Ante*, at 19. Moreover, equal funding, like program duplication, facilitates continued segregation— enabling students to attend schools where their own race predominates without paying a penalty in the quality of education. Nor could such an equal-funding policy be saved on the basis that it serves what the Court calls a "sound educational justification." The only conceivable *educational* value it furthers is that of fostering schools in which blacks receive their education in a "majority" setting; but to acknowledge that as a "value" would contradict the compulsory-integration philosophy that underlies *Green*. Just as vulnerable, of course, would be all other programs that have the effect of facilitating the continued existence of predominantly black institutions: elevating an HBI to comprehensive status (but see *ante*, at 20–22, where the Court inexplicably suggests that this action may be required); offering a so-called Afrocentric curriculum, as has been done recently on an experimental basis in some secondary and primary schools, see Jarvis, *Brown* and the Afrocentric Curriculum, 101 Yale L. J. 1285, 1287, and n. 12 (1992); preserving eight separate universities, see *ante*, at 22–23, which is perhaps Mississippi's single policy most segregative in effect; or providing funding for HBIs as HBIs, see Pub. L. 99–498, Title III, §301(a), 100 Stat. 1294, 20 U. S. C. §§1060–1063c, which does just that.

But this predictable impairment of HBIs should come as no surprise: for incidentally facilitating—

indeed, even tolerating—the continued existence of HBIs is not what the Court's test is about, and has never been what *Green* is about. See *Green*, 391 U. S., at 442 ("The Board must be required to formulate a new plan and . . . fashion steps which promise realistically to convert promptly to a system without a 'white' school and a 'Negro' school") (footnote omitted). What the Court's test is designed to achieve is the elimination of predominantly black institutions. While that may be good social policy, the present petitioners, I suspect, would not agree; and there is much to be said for the Court of Appeals' perception in *Ayers*, 914 F. 2d, at 687, that "if no [state] authority exists to deny [the student] the right to attend the institution of his choice, he is done a severe disservice by remedies which, in seeking to maximize integration, minimize diversity and vitiate his choices." But whether or not the Court's antagonism to unintegrated schooling is good policy, it is assuredly not good constitutional law. There is nothing unconstitutional about a "black" school in the sense, not of a school that blacks *must* attend and that whites *cannot*, but of a school that, as a consequence of private choice in residence or in school selection, contains, and has long contained, a large black majority. See *McLaurin* v. *Oklahoma State Regents for Higher Ed.*, 339 U. S. 637, 641 (1950). (The Court says this, see *ante*, at 23, but does not appear to mean it, see *ante*, at 10, n. 4). In a perverse way, in fact, the insistence, whether explicit or implicit, that such institutions not be permitted to endure perpetuates the very stigma of black inferiority that *Brown I* sought to destroy. Not only Mississippi but Congress itself seems out of step with the drum that the Court beats today, judging by its passage of an Act entitled "Strengthening Historically Black Colleges and Universities," which authorizes the Education Department to provide money grants to historically black colleges. 20 U. S. C. §§1060–1063c.

The implementing regulations designate Alcorn State University, Jackson State University, and Mississippi Valley State University as eligible recipients. See 34 CFR §608.2(b) (1991).

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The Court was asked to decide today whether, in the provision of university education, a State satisfies its duty under *Brown I* by removing discriminatory barriers to admissions. That question required us to choose between the standards established in *Green* and *Bazemore,* both of which cases involved (as, for the most part, this does) free-choice plans that failed to end *de facto* segregation. Once the confusion engendered by the Court's something-for-all, guidance-to-none opinion has been dissipated, compare *ante*, (O'CONNOR, J., concurring), with *ante*, (THOMAS, J., concurring), it will become apparent that, essentially, the Court has adopted *Green.*

I would not predict, however, that today's opinion will succeed in producing the same result as *Green*—*viz*., compelling the States to compel racial "balance" in their schools—because of several practical imperfections: because the Court deprives district judges of the most efficient (and perhaps the only effective) *Green* remedy, mandatory student assignment, see *ante*, at 10, n. 4; because some contradictory elements of the opinion (its suggestion, for example, that Mississippi's mission designations foster, rather than deter, segregation) will prevent clarity of application; and because the virtually standardless discretion conferred upon district judges (see Part I, *supra*) will permit them to do pretty much what they please. 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 predominantly white ones. Nothing good will come of this judicially ordained turmoil, except the public

recognition that any Court that would knowingly impose it must hate segregation. We must find some other way of making that point.