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SUPREME COURT OF THE UNITED STATES

Syllabus

UNITED STATES *v.* FORDICE, GOVERNOR OF MISSISSIPPI, ET AL.

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

No. 90-1205. Argued November 13, 1991—Decided June 26, 1992¹

Despite this Court's decisions in *Brown v. Board of Education (Brown I)*, 347 U.S. 483, and *Brown v. Board of Education (Brown II)*, 349 U.S. 294, Mississippi continued its policy of *de jure* segregation in its public university system, maintaining five almost completely white and three almost exclusively black universities. Private petitioners initiated this lawsuit in 1975, and the United States intervened, charging that state officials had failed to satisfy their obligation under, *inter alia*, the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964 to dismantle the dual system. In an attempt to reach a consensual resolution through voluntary dismantlement, the State Board of Trustees, in 1981, issued "Mission Statements" classifying the three flagship white institutions during the *de jure* period as "comprehensive" universities having the most varied programs and offering doctoral degrees, redesignating one of the black colleges as an "urban" university with limited research and degree functions geared toward its urban setting, and characterizing the rest of the colleges as "regional" institutions which functioned primarily in an undergraduate role. When, by the mid-1980's, the student bodies at the white universities were still predominantly white, and the racial composition at the black institutions remained largely black, the suit proceeded to trial. After voluminous evidence was presented on a full range of

¹Together with No. 90-6588, *Ayers et al. v. Fordice, Governor of Mississippi, et al.*, also on certiorari to the same court.

educational issues, the District Court entered extensive findings of fact on, among other things, admissions requirements, institutional classification and missions assignments, duplication of programs, and funding. Its conclusions of law included rulings that, based on its interpretation of *Bazemore v. Friday*, 478 U.S. 385, and other cases, the affirmative duty to desegregate in the higher education context does not contemplate either restricting student choice or the achievement of any degree of racial balance; that current state policies and practices should be examined to ensure that they are racially neutral, developed and implemented in good faith, and do not substantially contribute to the racial identifiability of individual institutions; and that Mississippi's current actions demonstrate conclusively that the State is fulfilling its affirmative duty to disestablish the former *de jure* segregated system. In affirming, the Court of Appeals left largely undisturbed the lower court's findings and conclusions.

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Held:

1. The courts below did not apply the correct legal standard in ruling that Mississippi has brought itself into compliance with the Equal Protection Clause. If the State perpetuates policies and practices traceable to its prior *de jure* dual 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, the policies violate the Clause, even though the State has abolished the legal requirement that the races be educated separately and has established racially neutral policies not animated by a discriminatory purpose. *Bazemore v. Friday, supra*, distinguished. The proper inquiry asks whether existing racial identifiability is attributable to the State, see, e. g., *Freeman v. Pitts*, 503 U.S. ___, and examines a wide range of factors to determine whether the State has perpetuated its former segregation in any facet of its system, see, e. g., *Board of Education of Oklahoma City v. Dowell*, 498 U.S. ___, ___. Because the District Court's standard did not ask the appropriate questions, the Court of Appeals erred in affirming the lower court's judgment. Pp.8-13.

2. When the correct legal standard is applied, it becomes apparent from the District Court's undisturbed factual findings that there are several surviving aspects of Mississippi's prior dual system which are constitutionally suspect; for even though such policies may be race-neutral on their face, they substantially restrict a person's choice of which institution to enter and they contribute to the racial identifiability of the eight public universities. Mississippi must justify these policies, as well as any others that are susceptible to challenge by petitioners on remand under the proper standard, or eliminate them. Pp.13-14.

(a) Although the State's current admissions policy requiring higher minimum composite scores on the American College Testing Program (ACT) for the five historically white institutions than for the three historically black universities derived from policies enacted in the 1970's to redress the problem of student unpreparedness, the policy is constitutionally suspect because it was originally enacted in 1963 by three of the white universities to discriminate against black students, who, at the time, had an average ACT score well below the required minimum. The policy also has present discriminatory effects, since a much higher percentage of white than of black high school seniors recently scored at or above the minimum necessary to enter a white university. The segregative effect of

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this standard is especially striking in light of the differences in minimum required entrance scores among the white and black regional universities and colleges with dissimilar programmatic missions, and yet the courts below made little effort to justify those disparities in educational terms or to inquire whether it was practicable to eliminate them. The State's refusal to consider high school grade performance along with ACT scores is also constitutionally problematic, since the ACT's administering organization discourages use of ACT scores alone, the disparity between black and white students' high school grade averages is much narrower than the gap between their average ACT scores, most States use high school grades and other indicators along with standardized test scores, and Mississippi's approach was not adequately justified or shown to be unsusceptible to elimination without eroding sound educational policy. Pp.14-18.

(b)The District Court's treatment of the widespread duplication of programs at the historically black and historically white Mississippi universities is problematic for several reasons. First, it can hardly be denied that such duplication represents a continuation of the "separate but equal" treatment required by the prior dual system, and yet the court's holding that petitioners could not establish a constitutional defect shifted the burden of proof away from the State in violation of *Brown II, supra*, at 300, and its progeny. Second, implicit in the court's finding of "unnecessary" duplication is the absence of any educational justification and the fact that some if not all duplication may be practically eliminated. Finally, by treating this issue in isolation, the court failed to consider the combined effects of unnecessary duplication with other policies in evaluating whether the State had met its constitutional duty. Pp.18-20.

(c)Mississippi's 1981 mission assignments scheme has as its antecedents the policies enacted to perpetuate racial separation during the *de jure* period. When combined with the differential admission practices and unnecessary program duplication, it is likely that the mission designations interfere with student choice and tend to perpetuate the segregated system. On remand, the court should inquire whether it would be practicable and consistent with sound educational practices to eliminate any such discriminatory effects. Pp.20-22.

(d)Also on remand, the court should inquire and determine whether the State's retention and operation of all eight higher educational institutions in an attempt to bring itself into constitutional compliance actually affects student choice and perpetuates the *de jure* system, whether maintenance of each

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of the universities is educationally justifiable, and whether one or more of them can practicably be closed or merged with other existing institutions. Though certainly closure of one or more institutions would decrease the system's discriminatory effects, the present record is inadequate to demonstrate whether such action is constitutionally required. Pp.22-23.

(e)In addition to the foregoing policies and practices, the full range of the State's higher educational activities, including its funding of the three historically black schools, must be examined on remand under the proper standard to determine whether the State is taking the necessary steps to dismantle its prior system. Pp.23-24.

914 F.2d 676, vacated and remanded.

WHITE, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and BLACKMUN, STEVENS, O'CONNOR, KENNEDY, SOUTER, and THOMAS, JJ., joined. O'CONNOR, J., and THOMAS, J., filed concurring opinions. SCALIA, J., filed an opinion concurring in the judgment in part and dissenting in part.