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Overview of Supreme Court Opinion in United States v. Fordice

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OVERVIEW OF SUPREME COURT OPINION IN UNITED STATES v. FORDICE

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On June 26, 1992, the United States Supreme Court issued its opinion in United States v. Fordice, (Slip Opinion page nos. follow) and determined that the principles of Brown v. Board of Education (Brown I), 347 U.S. 483 (1954); Brown v. Board of Education, 349 U.S. 294 (1955) (Brown II), applied in the context of a public university system operated by the State of Mississippi. In an 8-1 decision, the Court found that the State of Mississippi does not fulfill its mandate under Brown merely by adopting race-neutral admissions policies where other existing policies traceable to the segregative de jure system are still in place. The Court also enunciated the proper standard for the lower court to use in determining whether a State has sufficiently eliminated all aspects of its de jure discriminatory policies.

A. FACTS

Mississippi's public university system dates back to 1848, when the University of Mississippi was founded to educate white persons. Additional, segregated institutions were later founded,

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and to date there remain four institutions originally formed to educate white persons (hereinafter historically white institutions or HWIs): Mississippi State University (1880), Mississippi University for Women (1855), University of Southern Mississippi (1912), and Delta State University (1925). In 1871 the State founded Alcorn State University in 1871 as "an agricultural college for the education of [the State's] black youth." Fordice at 2. Two more Historically Black Colleges and Universities (HBCUs) were subsequently founded by the State: Jackson State University (1940) to train Black teachers, and Mississippi Valley State University (1950) for vocational training.

Despite the Supreme Court's holding in Brown I and Brown II, Mississippi's segregated public college system continued. Attendance of the first Black student at the University of Mississippi had to be ordered by the court. Meredith v. Fair, 306 F.2d 374 (5th Cir.), cert. denied, 371 U.S. 828 (1962). However, in the years that followed, the "segregated public university system in the State remained largely intact." Fordice at 2.

The Department of Health, Education and Welfare (HEW) took measures to enforce Title VI of the Civil Rights Act in 1969, and "requested that the State devise a plan to disestablish the formerly de jure segregated" system. Fordice at 3. Four years later, the State submitted a "Plan of Compliance" which outlined measures to improve opportunities for students in the university system. HEW rejected the Plan of Compliance. The Board of Trustees, which oversees Mississippi's public university system,

amended the plan, but HEW found the Plan, even with modifications, unsatisfactory. The Board adopted the Plan anyway.

In 1981, the Board designated to each of the State's eight institutions "mission Statements" which identified the purpose of each institution. Three predominantly white universities were designated as "comprehensive" (University of Mississippi, Mississippi State, and Southern Mississippi) and were subject to the greatest amount of resources and program offerings. Jackson State University, was designated as the sole "urban" university with less funding for research and academic programs. The remaining institutions, two HWIs and two HBCUs, were designated as "regional," and has the most narrow academic objectives.

B. Majority Opinion Written by Justice White

The Court acknowledged that "there was no dispute that the State of Mississippi had a constitutional duty to dismantle the dual school system once operated and mandated." The primary issue is "whether the State has met its affirmative duty to dismantle its prior dual university system." Fordice at 8 (emphasis added). Justice White wrote that prior Supreme Court cases established that a State's obligations under the constitution were not met until the State "eradicates policies and practices traceable to its prior de jure dual system that continue to foster segregation." Id.

The Court determined that although "a student's decision to seek higher education has been a matter of choice," vestiges of a university system's de jure segregative policies goes beyond recognition of the State's adoption and implementation of race-

neutral admissions policies. The Court wrote:

> That college attendance is by choice and not by assignment does not mean that a race-neutral admissions policy cures the constitutional violation of a dual system. In a system based on choice, student attendance is determined not simply by admissions policies, **but also by many other factors. Although some of these factors clearly cannot be attributed to State policies, many can be.**

Fordice at 9-10 (emphasis added). Further, the Court determined that there still remain discriminatory effects from "policies traceable to the de jure system", the policies must be "reformed to the extent practicable and consistent with sound educational practices."

The Court rejected application of the analysis contained in Bazemore v. Friday, 478 U.S. 385 (1986) as inapplicable in higher education. In Bazemore, the Court had held that the State was not responsible for the factors upon which people selected particular 4-H Clubs that were funded through the State. In Fordice, the Court found that "Bazemore plainly does not excuse inquiry into whether Mississippi has left in place certain aspects of its prior dual system that perpetuate the racially segregated higher education system." Fordice at 12. Where the State "perpetuates policies traceable to its prior system that continue to have segregative effects ... and [where] such policies are without sound educational justification and can be practicably eliminated, the State has not satisfied its burden that it has dismantled its prior system ...." Id. The Court found that the standard applied by the district court was erroneous because it failed to make these inquiries required for compliance of the university system under

the Equal Protection Clause.

The Court held that had the district court applied the correct legal standard, it would have found from the record that there are "several surviving aspects of Mississippi's prior dual system which are constitutionally suspect." Fordice at 13. Although the policies are "race-neutral on their face," Justice White wrote that they "substantially restrict a person's choice of which institution to enter and they contribute to the racial identifiability of the eight public universities." The Court mandated that Mississippi justify its policies "or eliminate them." Id. Certain remnants of the Mississippi's prior de jure segregated system highlighted by the Court are policies concerning admissions, program duplication, mission statements, and maintenance of all eight of the systems educational institutions.

1. Admissions

The Court found that the present standard for "automatic" admissions, which relies on higher ACT scores for admission to the HWIs than for the HBCUs, has its roots in the prior de jure system, was originally implemented "for a discriminatory purpose," and still causes "present discriminatory effects." Fordice at 13-14.[1] The Board attempted to justify the differential admissions policies in the 1970s by determining that the lower ACT minimum scores for admission to the HBCUs was necessary because "too many students

[1] The court noted that in 1985, 72% of white high school students in Mississippi scored 15 or better on the act, whereas less than 30% of all blacks earned that score. Thus, "it is not surprising then that Mississippi's universities remain identifiable by race. Fordice at 15.

with lower scores were not prepared for the historically white institutions...." Fordice at 16. However, the Court determined that the differential standards "requires further justification in terms of sound educational policy." Fordice at 17.

The Court also found problematic the fact that the comprehensive institutions would not consider the applicant's high school grades as a factor to predict college performance. The record established before the district court studies showing that the gap between grades achieved by Black and white students is narrower than performance on the ACT. Justice White wrote that these studies would "suggest[] that an admissions formula which included grades would increase the number of Black students eligible for automatic admissions to all of Mississippi's universities." Fordice at 17. Thus, with respect to the State's admissions standards, the Court found that sole reliance on ACT scores as a method for maintaining a dual system is traceable to the prior de jure segregated system and "seemingly continues to have segregative effects...." Fordice at 18. "The State has so far failed to show that the ACT-only admission standard is not susceptible to elimination without eroding sound educational policy."

2. Program Duplication

The district court found that many programs offered at the HBCUs were unnecessarily duplicated by the HBIs, e.g. 29% of undergraduate programs, and 90% of graduate programs. Fordice at 18. The court found that it "can hardly be denied that such

duplication was part and parcel of the prior dual system of higher education -- the whole notion of 'separate but equal' required duplicative programs in two sets of schools -- and that the present unnecessary duplication is a continuation of that practice."

The Court determined that the district court erroneously placed the burden to prove the constitutional defect of unnecessary duplication on the aggrieved plaintiffs. Fordice at 19. Rather, the Court found that under Brown, the "burden of proof falls on the State, and not the aggrieved plaintiffs" to establish whether such duplication of programs facilitates the State's prior de jure segregated system. Id. In addition, the Court found erroneous the district court's failure to recognize any "educational justification" for the program duplication.[2]

3. Institutional Mission Designations

The court of appeals found that "the institutional mission designations adopted in 1981 have as their antecedents the policies enacted to perpetuate racial separation during the de jure segregated regime." Fordice at 21. Notwithstanding this fact, the court of appeals upheld this aspect of the State's system as acceptable because of the State's good faith neutral admissions

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[2] Strangely, the district court observed that program duplication by the State "cannot be justified economically or in terms of providing quality education." Fordice at 19. However, the lower court determined that there was no proof that the elimination of program duplication would decrease institutional racial identifiability, affect student choice, or promote educationally sound policies. Fordice at 19. The majority in Fordice found that the district court failed in its analysis to consider whether, in facilitating program duplication, the State satisfies its duty to dismantle its prior de jure system.

policies. Id. The Court overruled the court of appeals on this issue, finding that "different missions assigned to the universities ... limits to some extent an entering student's choice as to which universities to seek admittance." Id. When combined with other aspects of the university system, the Court determined that the this aspect, too, "perpetuate[s] the segregated system." Fordice at 22. Given the discriminatory purpose for which the policy has its ties, the Court held that the district court must determine whether the mission policy is necessary to satisfy sound educational practices. Fordice at 21-22.

4. Maintaining all eight universities

The Court found that the State attempted to satisfy its constitutional obligations by maintaining all eight universities. However, the Court also found that "the existence of eight [institutions] ... was undoubtedly occasioned by State laws forbidding the mingling of the races." Fordice at 22. Given the close proximity of some institutions, the Court noted the district court's observance that "continuing to maintain all eight universities in Mississippi is wasteful and irrational[,]" especially given the limited financial resources available to the State for funding higher education. Id. Although the majority opinion suggested that "closure of one or more institutions would decrease the discriminatory effects of the present system," the Court did not reach the issue whether closure is required under the constitution. Id. Thus, the Court remanded this issue for the district court to resolve.

To conclude, the Court remanded the case to the district court for examination of each of these policies under the proper constitutional standard. The Court noted that just because an "institution is predominantly white or Black does not in itself make out a constitutional violation." Fordice at 23. However, the State will not be permitted to leave in place policies traceable to its segregated past when such policies facilitate the racially identifiability of the universities, especially when they can be practicably eliminated without eroding sound educational policies. Id.[3]

C. Concurring Opinion by Justice O'Connor

Justice O'Connor agrees that public universities must "affirmatively dismantle their prior de jure segregation" in order to have effectively eliminated the effects of that discrimination. J. O'Connor Concur, Op., at 1. Justice O'Connor "emphasize[s] 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." Id. Justice O'Connor indicates, citing Green v. New Kent County School Board, 391 U.S. 430 (1968), that any justification for maintaining a remnant of the State's prior discriminatory past should be viewed very

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[3] The Court rejected any proposal by private petitioners that it mandate the upgrading of the HBCUS, stating that such a mandate would make the schools "publicly financed black enclaves..." However, the Court recognized the possibility of increased funding for the HBCUS as part of the State's obligation to achieve full dismantlement of the state's segregated past. Fordice at 23-24.

skeptically, and that the State has a "heavy burden" to justify maintaining that policy. Further, the State must also show that "it has counteracted and minimized the segregative impact of such policies to the extent possible." Id. Concur, Op., at 2.

D. Concurring Opinion by Justice Thomas

Justice Thomas agrees with the majority opinion that policies traceable to the State's prior de jure system that cause discriminatory effects must be "reformed to the extent practicable and consistent with sound educational policies." J. Thomas Concur, Op., at 1. However, Justice Thomas indicates that the "standard is different from the one adopted ... in Green ... because it does not compel the elimination of all observed racial imbalances...." Id. In that regard, writes Justice Thomas, the Court's opinion does not signify the "destruction of historically Black colleges or the severing of those institutions from their distinctive histories and traditions." Id. at 2. Absent a current discriminatory purpose, where policies traceable to a State's segregative past are challenged, the court must determine whether the policy produces adverse impacts and whether there exists any educational justification for the policies.

Further, in analyzing the burden of proof, Justice Thomas indicates, citing Washington v. Davis, 426 U.S. 229 (1976), that the State has a higher burden of proof of disproving discriminatory intent, even though the standard announced by the majority opinion

does not rely on the Washington case.[4] In Washington v. Davis, the Court placed the burden on plaintiffs to prove the existence of discriminatory purpose or intent in cases involving testing of applicants for public jobs. Justice Thomas suggests that in the context of higher education, the Washington v. Davis test "flips," so that the burden of proof not fall on the shoulders of the plaintiff, but rather on the State to show an absence of discriminatory intent and discriminatory effect, and any sound educational reasons for the policy.

Although the public HBCUs were founded as a tool of segregation, Justice Thomas indicates that "there exists 'sound educational justification' for maintaining historically Black colleges" because these institutions have expanded educational opportunities for Black students. Justice Thomas states that the HBCUs offer "institutional diversity" that can and should survive under the Court's majority opinion. Specifically, Justice Thomas states,

> Although I agree that a State is not constitutionally required to maintain its historically black institutions as such ... 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.

J. Thomas Concur. Op., at 5.

E. Justice Scalia, concurring in the judgment in part and dissenting in part

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[4] This burden could favor the HBCU's argument relative to funding because funding disparities is a remnant of past discrimination.

Although Justice Scalia agrees that the standard of Brown I does apply in the context of public higher education, he reject the burden of proof required by the State under the Court's majority opinion. Justice Scalia finds that the requirement resembles that stated in Green, and thus has no "proper application in the context of higher education." J. Scalia Dissent, Op., at 1.

At the outset, Justice Scalia is very critical of the various standards provided by the majority opinion, and finds the Court's opinion ambiguous and confusing. J. Scalia Dissent, Op., at 2-6. Justice Scalia takes a much narrower view of the standard for desegregating in higher education. Justice Scalia seems to side with the State of Mississippi, finding that in the context of higher education the only unconstitutional "derivations of that bygone system" are those policies that limit opportunity, or admission, on a discriminatory basis. Id. at 6. Further, Justice Scalia states that discrimination in higher education is most appropriately analyzed under the Court's opinion in Bazemore.

> 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 * * * Like club attendance in Bazemore ... attending college is voluntary, not a legal obligation, and which institution particular students attend is determined by their own choice....

Id. at 9.

Under Justice Scalia's analysis, the only discriminatory

barrier to higher education can be "discriminatory admissions standards." Id. at 10.[5] Justice Scalia writes that once such barriers are eliminated, a State is "free to govern its public institutions ... as it will...." However, where new discriminatory barriers to admissions arise, there must be a finding of discriminatory intent and causation. Id. at 10, citing Washington v. Davis.

Justice Scalia warns that the test provided by the majority opinion, i.e., "compelled integration," will result in the "elimination of predominantly black institutions." J. Scalia Dissent Op., at 10, 12. He indicates that the majority opinion dissuades measures by a State to provide equal funding of HBCUs and HWIs, id. at 11, stating that the Court's prohibitory language against "duplicate programs" inhibits such equal funding as "part and parcel of the prior dual system." Id. Justice Scalia finds that the continued existence of HBCUs "is not what the Court's test is about, and has never been what Green is about." Id. at 12.

In conclusion, we recommend, respectfully, that the members of NAFEO read the Fordice opinion, as well as the legal representatives of the HBCUs. The opinions of NAFEO's members should be sent to NAFEO's Washington offices so that they can be assembled and distributed to all concerned parties, perhaps in

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[5] Under Justice Scalia's narrow analysis, the only area of review for the district court would be a determination as to whether Mississippi's reliance on the ACT discriminatorily excludes Black students from the HWIs. J. Scalia Dissent., Op., at 10.

pamphlet form. We urge the members of NAFEO to pay close attention to the educational soundness that your schools represent and have represented for decades. We all know what HBCUs represent to the stability of many southern communities and beyond: a source of value to aid the continued transformation of a nation in need of a more educated population. This is the message as HBCUs enter the New Century. One might wonder the condition of the nation if HBCUs and the people that ran them at great sacrifice had succumbed to those who would have left Black people uneducated. They defied the odds, even with inadequate State funding to buy books for the libraries, upgrade plant, pay adequate faculty salaries, and to provide adequate student aid. But, those students kept on coming, unjustly having been determined to be too inferior to compete in the marketplace of ideas. But, the HBCUs kept on teaching, and placed before them role models, who had broken ground in the marketplace of ideas. The discussions on what the Fordice decision means will continue. Let us keep our focus on mission and purpose; and, on the marketplace of diverse ideas.

Thank you.[6]

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[6] See J. Clay Smith, Jr., "Historically Black Colleges and Universities are Justified," paper, issued Aug. 4, 1992. at NAFEO Presidential Peer Seminar, Hilton Head Island, South Carolina.