

ARE STATE-SUPPORTED HISTORICALLY BLACK COLLEGES AND UNIVERSITIES JUSTIFIABLE AFTER *FORDICE*?—A HIGHER EDUCATION DILEMMA

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I. INTRODUCTION

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.¹

As the above statement suggests, Historically Black Colleges and Universities (HBCUs) continue to play a significant role in the development and education of African Americans. Eliminating these institutions will likely increase the educational disparity between African and Anglo-Americans since HBCUs maintain higher graduation rates for their black students than do predominately white colleges and universities.² Despite the above observation, the continued

* J.D. Candidate, May 2000, the Florida State University College of Law. The Author is an alumnus of a public Historically Black University, Florida A&M University (FAMU). The Author wishes to express that many public Historically Black Colleges and Universities (HBCUs), like FAMU, are still needed to provide an education to African-American students. America's capitalistic structure is not yet diversified enough to eliminate public HBCUs, which are one of the greatest sources of African-American scholars, educators, and business people. The Author hopes to see public HBCUs flourish. The Author also wishes to express his appreciation to Professor Steven Gey of the Florida State University College of Law for his thoughtful comments and suggestions.

1. CARNEGIE COMMISSION ON HIGHER EDUCATION, FROM ISOLATION TO MAINSTREAM: PROBLEMS OF THE COLLEGES FOUNDED FOR NEGROES 11 (1971).

2. See SERBRENIA J. SIMS, DIVERSIFYING HISTORICALLY BLACK COLLEGES AND UNIVERSITIES—A NEW HIGHER EDUCATION PARADIGM 10 (1994). "The Carnegie Commission . . . predicted that the total number of black students enrolled in all types of higher education institutions would have to in-

existence of state-supported HBCUs poses a serious social and legal dilemma. Supporters of desegregation have fought hard to establish legal rules that forbid denying an individual access to higher education because of his or her race. However, these same supporters want to preserve and enhance HBCUs, recognizing the vital role that these institutions play. The dilemma, then, centers on preserving state-supported HBCUs while at the same time demanding full integration of traditionally white institutions.

In 1992 the United States Supreme Court further complicated the dilemma in *United States v. Fordice*.³ In *Fordice*, the Court addressed the issue of “whether states that maintained racially segregated systems of higher education are obligated to take steps beyond adopting race-neutral admissions policies to desegregate their educational institutions.”⁴ The Court answered this question in the affirmative and decided that race-neutral policies alone are not enough to rectify remnants of prior *de jure* segregation.⁵ Instead, the Court adopted a standard requiring states to eliminate all policies that continue to have a discriminatory effect and that are traceable to the prior *de jure* system.⁶ The Court, however, left unanswered the question of whether public HBCUs are constitutionally justifiable under this new standard. Instead, the Court complicated matters by leaving in place a standard that, on its face, suggests that public HBCUs are no longer constitutional.

This Note criticizes the applicability of the educational standard set forth in *Fordice*. Particularly, this Note discusses the legal ramifications of the *Fordice* standard as it relates to HBCUs. First, Part II will describe the history and origin of HBCUs and, specifically addresses, how and why they were established. Part III examines the case law governing the desegregation of public schools, including the rationale and policy reasons underlying the law. Specifically, Part III reviews the educational standards set forth in *Brown v. Board of Education*⁷ and its progeny.

In light of this historical background, Part IV examines two possible interpretations of the *Fordice* standard as it relates to the survival of HBCUs and addresses many of the concerns that Justice Scalia noted in his *Fordice* dissent. Additionally, Part IV discusses the potential effects that these interpretations may have on HBCUs, especially HBCUs located in close proximity to traditionally white institutions.

Part V analyzes the two opposing standards set forth in *Bazemore v. Friday*⁸ and *Fordice*, focusing on why the appropriate standard to govern HBCUs should be the *Bazemore* standard. Part V addresses the advantages and disadvantages of maintaining HBCUs and ultimately illustrates how HBCUs can

crease to about two million by the twenty-first century in order to reach educational parity with white students.” *Id.* (citing CARNEGIE COMMISSION ON HIGHER EDUCATION, *supra* note 1, at 11).

3. 505 U.S. 717 (1992).

4. Leland Ware, *The Most Visible Vestige: Black Colleges After Fordice*, 35 B.C. L. REV. 633, 633 (1994) (citing *Fordice*, 505 U.S. at 729).

5. See *Fordice*, 505 U.S. at 729. *De jure* means “Of Right.” BLACK’S LAW DICTIONARY 425 (6th ed. 1990). In the context of this Note, the phrase refers to the period when racial segregation was lawfully permitted in public schools.

6. See *Fordice*, 505 U.S. at 729.

7. 347 U.S. 483 (1954).

8. 478 U.S. 385 (1986).

survive the negative interpretation of the *Fordice* standard and continue to play a vital role in American society.

II. THE ORIGIN OF HISTORICALLY BLACK COLLEGES AND UNIVERSITIES

A. *The Origin of Private HBCUs*

What exactly is a Historically Black College or University? Section 322 of Title III of the Black College and University Act proffers the following definition:

[A]ny historically Black college or university that was established prior to 1964, whose principal mission was, and is, the education of Black Americans, and that is accredited by a nationally recognized accrediting agency or association determined by the Secretary (of Education) to be a reliable authority as to the quality of training offered according to such an agency or association, making reasonable progress toward accreditation.⁹

The origin of HBCUs can be divided into two categories: the establishment of private HBCUs and the establishment of public HBCUs. Most private HBCUs originated during the post-Civil War era when Christian missionaries undertook efforts to provide freed slaves with a basic education.¹⁰ During this period, “a number of the nation’s most prestigious black institutions of higher learning were founded, including Virginia Union and Shaw Universities (1865), Fisk University and Lincoln Institution (1866), Talladega College and Howard University (1867), . . . and Cheyney State Teachers College (1873).”¹¹

B. *The Origin of Public HBCUs*

The inception of public institutions of higher education in general began in 1862 when Congress passed the First Morrill Act.¹² This Act provided each state with a federal land grant to promulgate the creation of liberal and practical education for the industrial classes.¹³ Many blacks, however, could not take advantage of the public education because the First Morrill Act did not obligate states to create land-grant colleges for blacks and because many states forbade blacks from attending the white public institutions.¹⁴ The obligation to publicly educate blacks did not occur until Congress passed the Second Morrill Act in 1890.¹⁵

9. SIMS, *supra* note 2, at 5-6 (quoting Section 322 of Title III of the Black College and University Act).

10. See JACQUELINE FLEMING, *BLACKS IN COLLEGE* 4 (1984).

11. SIMS, *supra* note 2, at 6.

12. First Morrill Act, ch. 130, § 1, 12 Stat. 503, 503 (1862) (codified as amended at 7 U.S.C. § 301 (1994 & Supp. IV 1998)).

13. See *id.*

14. See Paul E. Barton, *Students at Historically Black Colleges and Universities* (last modified Mar. 6, 1999) <<http://etsis1.ets.org/research/pic/hbctoc.html>>.

15. Second Morrill Act, ch. 841, § 1, 26 Stat. 417, 418 (1890) (codified as amended at 7 U.S.C. § 321 (1994 & Supp. IV 1998)).

Under the Second Morrill Act, states were required either to provide separate educational facilities for black students or to admit them to existing white facilities.¹⁶ In response to this Act, coupled with the Supreme Court's "separate but equal" doctrine enunciated in *Plessy v. Ferguson*,¹⁷ the southern states chose to establish "separate but equal" public institutions for blacks.¹⁸ These black institutions, however, were not equal to their white counterparts.¹⁹ Instead, the black institutions received less funding, which resulted in inferior facilities and educational services.²⁰ Nevertheless, despite the inequalities that existed and still exist within public HBCUs, many of these institutions have survived and enjoy long-standing reputations for educating and graduating successful African Americans. Whether these institutions will continue to survive is a lingering question that HBCUs have faced since the Supreme Court's desegregation decree in *Brown v. Board of Education*.²¹

III. *BROWN* AND ITS PROGENY

A. *The Brown Standard*

Until 1954, the *Plessy v. Ferguson* "separate but equal" doctrine solidified the existence of HBCUs. African Americans and Anglo-Americans were educated separately in their respective institutions. In 1954, however, the Supreme Court revisited the "separate but equal" doctrine in the landmark decision, *Brown v. Board of Education*. In an effort to ensure equal protection under the law for blacks and eradicate discrimination, the *Brown* Court held that state-mandated segregation of public educational facilities was inherently unconstitutional under the Equal Protection Clause of the Fourteenth Amendment.²²

Theoretically, after this decision, all state public school systems were to be desegregated; however, *Brown* was ambiguous in that it did not address any solutions to remedy such segregation. Therefore, a majority of the southern states ignored *Brown* and continued to operate segregated public school systems.²³ In response, the Supreme Court issued *Brown II*,²⁴ demanding the desegregation of all public schools with "all deliberate speed."²⁵ The Court, however, still failed to address the ambiguity of the previous *Brown* decision, and southern states found ways to continue to resist desegregation.²⁶

After *Brown*, the only clear standard was that state-mandated segregation was unconstitutional. It remained unclear whether *Brown* applied only to ele-

16. *See id.* § 323.

17. 163 U.S. 537 (1896).

18. At least one black public institution of higher learning was established in each of the southern states. *See Ware, supra* note 4, at 636.

19. *See id.*

20. *See id.* at 637.

21. 347 U.S. 483 (1954).

22. *See id.* at 495.

23. *See Ware, supra* note 4, at 646.

24. 349 U.S. 294 (1955).

25. *Id.* at 301.

26. *See* Robert McKay, "With All Deliberate Speed," *A Study of School Desegregation*, 31 N.Y.U. L. REV. 991 (1956).

mentary and secondary schools, or if it also applied to postsecondary schools. Moreover, both *Brown* and its sequel left still another question: How would the *Brown* standard affect people's "freedom to choose" which school to attend? The answer to this question directly impacts the future existence of public HBCUs. If *Brown*, or its progeny, mandates desegregation regardless of choice, then the continued existence of public HBCUs would certainly be unconstitutional.

B. *The Green Standard*

The Supreme Court finally addressed the "freedom of choice" issue in its 1968 decision in *Green v. County School Board of New Kent County*.²⁷ The issue in *Green* was whether adopting a "freedom of choice" plan, which allowed students to attend the public school of their choice, complied with the standard set forth in *Brown*.²⁸ According to the facts in *Green*, the New Kent County School Board operated a discriminatory, segregated school system for eleven years after *Brown* was initially decided.²⁹ White students went to one school, black students went to another, and, due to the school board's attempt to maintain a segregated system, many students were not allowed to attend the schools closest to them.³⁰ In order to receive federal funding, the school board adopted a "freedom of choice" plan to show that it was complying with the desegregation order mandated by *Brown*.³¹

The Court, however, found that the New Kent County School Board's attempt to implement such a plan did not satisfy the intended standard set forth in *Brown*.³² Particularly, the Court held that "localities that had maintained de jure systems of segregation could not satisfy their constitutional obligations merely by adopting [race neutral] 'freedom of choice' policies."³³ Furthermore, the Court set forth a standard compelling states that operated a dual system to take affirmative steps to convert their dual system to a unitary one in "which racial discrimination would be eliminated root and branch."³⁴ The Court, however, did not hold that "freedom of choice" plans were, themselves, unconstitutional.³⁵

Arguably, *Green* only applies to elementary and secondary schools.³⁶ Thus, *Green* did absolutely nothing to clarify *Brown* regarding the issue of whether *Brown* affects the viability of public HBCUs. Furthermore, none of the Su-

27. 391 U.S. 430 (1968).

28. *See id.* at 432.

29. *See id.* at 433. The New Kent County School Board "continued the segregated operation of [its public schools] after the *Brown* decisions, presumably on the authority of several statutes enacted by Virginia in resistance to [the *Brown*] decisions. . . . One statute, the Pupil Placement Act [was] not repealed until 1966." *Id.* at 432-33.

30. *See id.* at 432.

31. *See id.* at 433-34.

32. *See id.* at 437.

33. Ware, *supra* note 4, at 646-47 (citing *Green*, 391 U.S. at 440).

34. *Green*, 391 U.S. at 437-38; *see also* Cooper v. Aaron, 358 U.S. 1, 7 (1958) (implementing *Green*).

35. *See Green*, 391 U.S. at 439.

36. *Brown* dealt solely with state-imposed segregation practices in elementary and secondary schools where attendance is mandatory and students have no freedom to attend a school of their choice. Thus, arguably, this standard does not apply to postsecondary institutions where students have the ultimate choice as to which institution they want to attend.

preme Court's decisions pertaining to desegregation in higher education post-*Green* help clarify the effects of *Brown* on public HBCUs.³⁷ Subsequent cases have only required states "to achieve a system of determining admission to . . . public schools" using a non-discriminatory, non-segregated basis.³⁸

C. *The Bazemore Standard*

Not until 1986, in *Bazemore v. Friday*,³⁹ did the Court clarify *Green*'s "freedom of choice" standard. In *Bazemore*, the Court addressed the issue of whether voluntarily segregated, state-supported organizations comply with *Brown*'s desegregation regime absent evidence that the segregation is based on discrimination.⁴⁰ The organizations involved in *Bazemore* were a 4-H Club and the North Carolina Agricultural Extension Service, a division of the North Carolina State University.⁴¹

According to the facts in *Bazemore*, prior to the Civil Rights Act of 1964,⁴² the Extension Service was divided into two segregated branches, a white branch and a "Negro branch."⁴³ After Congress enacted the Civil Rights Act, the two branches unified into a single branch; however, some of the disparities that existed prior to the Act were not eliminated.⁴⁴ The black employees, therefore, brought an action against the Service under Title VII of the Civil Rights Act alleging racial discrimination.⁴⁵

The *Bazemore* Court held that "[t]he mere continued existence of single-race clubs does not make out a constitutional violation."⁴⁶ The Court went on to hold that a segregated, state-supported organization will pass constitutional muster if the "racial imbalance . . . was the result of [the] wholly voluntary and unfettered choice of private individuals."⁴⁷ In coming to this conclusion, the Court noted that evidence of discrimination is the key to determining unconstitutional segregation.⁴⁸ Thus, if a state-supported organization of voluntary association is segregated by choice, absent discrimination against any particular group, then that organization will satisfy the *Brown* standard. The Court further declined to ap-

37. The Supreme Court cases following *Brown* required states to eliminate all vestiges of discriminatory segregation. *See, e.g.*, *Goss v. Board of Educ.*, 373 U.S. 683, 687 (1963); *Cooper v. Aaron*, 358 U.S. 1, 7 (1958).

38. *Brown v. Board of Educ.*, 349 U.S. 294, 300-01 (1955).

39. 478 U.S. 385 (1986).

40. *See id.* at 407.

41. *See id.* at 389.

42. Civil Rights Act of 1964, 42 U.S.C. § 2000 (1999).

43. *See Bazemore*, 478 U.S. at 390.

44. *See id.* at 391. After the unification of the two branches, salary and promotion disparities continued to exist between the Extension Service's white and black personnel. *See id.* The black employees alleged that the Service "failed to recruit, hire, and assign blacks on an equal basis with whites; had denied blacks the same compensation, terms, conditions, and privileges as were provided to whites; had segregated blacks in work assignments; [and] had failed to establish selection standards sufficiently objective to prevent discrimination in hiring and promotion; . . ." *Id.* at 393 n.3.

45. *See id.* at 391. Particularly, the black employees alleged that the Service violated the First, Fifth, and Fourteenth Amendments to the Constitution. *See id.*

46. *Id.* at 408.

47. *Id.* at 407 (affirming the district court's finding that the Extension Service did not violate the Constitution because the "Service has had a policy that all voluntary clubs be organized without regard to race and that each club certify that its membership is open to all persons regardless of race").

48. *See id.*

ply the *Green* duty-to-integrate standard.⁴⁹ Instead, the Court limited the *Green* standard to public elementary and secondary schools where children have no choice but to attend state-designated schools.⁵⁰

While logic would indicate that the *Bazemore* standard would appropriately address public HBCUs,—segregated by *choice*—the Supreme Court instead created a new standard and further confused the issue of constitutionality of public HBCUs.

D. The Fordice Standard

Instead of adopting what seemed to be a relevant standard in *Bazemore*, the Supreme Court, in 1992, opted to create a new standard to determine the constitutionality of public HBCUs. *United States v. Fordice*⁵¹ involved the question of whether a state can satisfy its duty to dismantle its prior dual-university system, set forth in *Brown*, by adopting and implementing race-neutral policies.⁵²

According to the facts of *Fordice*, Mississippi operated eight separate public, postsecondary institutions.⁵³ Four of the institutions, Mississippi State University, Mississippi University for Women, University of Southern Mississippi, and Delta State University, were established post-Civil War, exclusively to educate Mississippi's Anglo-American citizens.⁵⁴ The other three institutions, Alcorn State University, Jackson State University, and Mississippi Valley State University, were established during the same period exclusively to educate the state's African-American citizens.⁵⁵ More than thirty years after the Supreme Court ordered all states to desegregate their schools via the *Brown* decision, the Mississippi university system remained significantly segregated.⁵⁶ There was no state requirement that the schools be segregated, so the schools arguably remained segregated by choice.⁵⁷

Under *Bazemore*'s "freedom of choice," race-neutral standard, Mississippi's university system may have passed constitutional muster. However, the Supreme Court adopted a new standard, somewhat reminiscent of the *Green* standard, and held that race-neutral policies alone do not satisfy a state's affirmative duty to dismantle formerly segregated systems.⁵⁸ Moreover, the Court noted that if a state university system has policies in force that can be traced to a dual, *de jure* system, and those policies have a discriminatory effect, they must be "re-

49. *See id.* at 408.

50. *See id.*

51. 505 U.S. 717 (1992). In *Fordice*, the Court refused to adopt *Bazemore*'s "freedom of choice" standard to govern public HBCUs. Instead, the Court created a standard where "freedom of choice" alone is no longer sufficient to justify the continued maintenance of public HBCUs. *See id.* at 729.

52. *See id.* at 727-28.

53. *See id.* at 721-22.

54. *See id.* at 721.

55. *See id.* at 721-22.

56. *See id.* at 724-25. At the time of this suit, the predominately white universities averaged between 80-91% white students while 71% of the state's black students went to the predominately black universities, where the make-up of the population was from 92-99% black. *See id.* at 725.

57. Mississippi argued that it had fulfilled the obligation to dismantle the segregated system by imposing race-neutral policies with regards to admissions, hiring, and general operations. *See id.*

58. *See id.* at 729.

formed to the extent practicable and consistent with sound educational practices.”⁵⁹ The Court stated:

If the State perpetuates policies and practices traceable to its prior 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 State has not satisfied its burden of proving that it has dismantled its prior system.⁶⁰

The *Fordice* Court found that the Mississippi university system had “several surviving aspects” of a prior discriminatory segregated system.⁶¹ First, Mississippi’s university system had discriminatory policies that restricted admission “in a way that perpetuate[d] segregation.”⁶² Second, the programs at the respective white and black institutions were “unnecessarily duplicated” in a way that fostered the unconstitutional “separate but equal” standard outlawed in *Brown*.⁶³ Third, Mississippi’s institutional mission classification limited the program scope of the black universities.⁶⁴ Finally, maintaining eight educational institutions made Mississippi’s university system appear to perpetuate segregation.⁶⁵ Thus, Mississippi’s system did not withstand constitutional scrutiny.⁶⁶

Another very important aspect of the *Fordice* decision is the dicta regarding Mississippi’s black institutions. The Court implied that by maintaining a racially identifiable university, a state walks a narrow line that borders on unconstitutionality.⁶⁷ Also, the Court noted that closing or merging one or more institutions would remedy the discriminatory effects of the existing system.⁶⁸ The ambiguous standard set forth in the Court’s holding, coupled with various possible interpretations of the Court’s dicta, suggest that public HBCUs are unconstitutional and should be merged or closed to comply with the desegregation order mandated in *Brown*.

59. *Id.*

60. *Id.* at 731.

61. *Id.* at 732-33.

62. *Id.* at 734. I will refer to this aspect as *Fordice*’s “admission standard.” According to Mississippi’s university admission policy, the predominately white institutions had a higher ACT admissions requirement than the predominately black institutions. Students scoring less than 15 on the ACT were excluded from attending the predominately white institutions and instead were only qualified to attend the black institutions. Moreover, in 1985, 72% of Mississippi’s white high school seniors achieved high enough ACT scores to attend the white universities while less than 30% of the black students achieved such a score. Thus, a disproportionate number of black students were forced to attend predominately black postsecondary institutions. *See id.*

63. *See id.* at 738 (indicating that “34.6[%] of the 29 undergraduate programs at [Mississippi’s] historically black institutions are ‘unnecessarily duplicated’ by the historically white universities, and . . . 90[%] of the graduate programs at the historically black institutions are unnecessarily duplicated”).

64. *See id.* at 741. I will refer to this aspect as *Fordice*’s “mission standard.” The Court found that “[Mississippi’s] institutional mission designations . . . have as their antecedents . . . policies enacted to perpetuate racial separation . . .” *Id.* at 740.

65. *See id.* at 742.

66. *See id.* at 732-33.

67. *See id.* at 743.

68. *See id.* at 742.

IV. POSSIBLE INTERPRETATIONS OF THE *FORDICE* STANDARD

A. *Interpretations in Favor of Maintaining Public HBCUs*

What does the *Fordice* standard really mean? To date, only two jurisdictions have had the opportunity to interpret the ambiguous *Fordice* standard as it relates to the future role of HBCUs, and neither one directly addressed the issue.⁶⁹ However, other interpretations have proven that there is a clear dichotomy in the way that the standard applies to these institutions. One interpretation favors the continued existence of public HBCUs, and the other interpretation indicates that the *Fordice* standard would require eliminating HBCUs.

One of the interpretations favoring maintaining public HBCUs is proffered by the United States Department of Education.⁷⁰ In 1994 the Department of Education (DOE) issued a Notice of Application of Supreme Court Decision, which announced its interpretation of *Fordice* as it relates to the continued existence of public HBCUs.⁷¹ The DOE interpreted *Fordice* in a manner consistent with existing DOE regulations, requiring courts to use a broad range of factors to determine whether a state's policies perpetuate segregation.⁷² Under the guise of the *Fordice* standard, the Department confirmed its commitment to preserve public HBCUs. The notice provides that:

States may not place unfair burdens upon black students and faculty in the desegregation process. Moreover, the Department's "Revised Criteria" recognize that State systems of higher education may be required, in order to overcome the effects of past discrimination, to strengthen and enhance traditionally or historically black institutions. The Department will strictly scrutinize State proposals to close or merge traditionally or historically black institutions, and any other actions that might impose undue burdens on black students, faculty, or administrators or diminish the unique roles of those institutions.⁷³

Although the DOE's interpretation of *Fordice* has a profound impact on the future existence of public HBCUs, its interpretation may hold little weight if HBCUs are deemed unconstitutional by the judiciary. Thus, to ensure the continued existence of public HBCUs, there needs to be a judicial interpretation corresponding with the federal agency's interpretation; otherwise, opposing interpretations will call into question the stability of the HBCU.

69. See *United States v. Louisiana*, 9 F.3d 1159, 1164 (5th Cir. 1993) (addressing the issue of the constitutionality of maintaining a dual, *de jure* public university system). Although *Louisiana* interpreted *Fordice* not to require the closing of its public HBCU, it was done so in dicta. The issue in the case was not whether public HBCUs are constitutional but, instead, whether its four-board system governing the institutions was unconstitutional. See *id.* at 1165; see also *Knight v. Alabama*, 14 F.3d 1534, 1540 (11th Cir. 1994) (addressing the issues of maintaining dual missions, land grant funding, and curriculum). Like *Louisiana*, *Knight* failed to address the constitutionality of HBCUs under the *Fordice* standard. See *id.*

70. The United States Department of Education is a federal agency primarily responsible for enforcing Title VI of the Civil Rights Act of 1964. Thus, the agency's interpretation has a profound impact on the continued existence of public HBCUs.

71. See Notice of Application of Supreme Court Decision, 59 Fed. Reg. 4271 (Dep't Educ. 1994).

72. See *id.* at 4272.

73. *Id.*

Another interpretation favoring HBCUs is Justice Thomas' concurrence in *Fordice*.⁷⁴ According to Justice Thomas, the majority's standard did not go so far as to compel the elimination of public HBCUs.⁷⁵ Instead, Justice Thomas interpreted the Court's standard as allowing the maintenance of public HBCUs if they are consistent with "sound educational practices,"⁷⁶ and they are educationally justifiable.⁷⁷ Justice Thomas argued that HBCUs are educationally justifiable and, thus, constitutionally acceptable because these institutions have "distinctive histories and traditions"⁷⁸ and because they are "a symbol of the highest attainments of black culture."⁷⁹ Justice Thomas further recognized that while a state could not "maintain such traditions by closing particular institutions," states are not necessarily foreclosed from "operat[ing] a diverse assortment of institutions—including historically black institutions—open to all on a race-neutral basis"⁸⁰

Justice Thomas' argument, however, fails to recognize that others may understand and apply the *Fordice* standard in a different manner. Justice Thomas notes that no one would likely argue that HBCUs lack "'sound educational justification."⁸¹ Nevertheless, as discussed below, there are prominent legal arguments against the educational justification for public HBCUs.

B. Interpretations Against Maintaining Public HBCUs

Judge Constance Baker Motley presented a compelling interpretation of the *Fordice* standard that would require eliminating public HBCUs.⁸² Like Justice Thomas' concurrence, Judge Motley's interpretation of the standard focuses on the Supreme Court's statement, "consistent with sound educational practices."⁸³ Also, Judge Motley agrees that the proper interpretation of *Fordice* requires that HBCUs be educationally justifiable to pass constitutional muster.⁸⁴ Judge Motley departs from Justice Thomas' view, however, in that she interprets *Fordice* to indicate that public HBCUs are no longer educationally justifiable and, therefore, should be merged with traditionally white institutions or closed altogether.⁸⁵

74. See *United States v. Fordice*, 505 U.S. 717, 745 (1992) (Thomas, J., concurring). Justice Thomas states in his concurrence that he does not understand the majority opinion in *Fordice* to forbid a state from maintaining public HBCUs. See *id.* at 749 ("It would be ironic . . . if the institutions that sustained blacks during segregation were themselves destroyed in an effort to combat its vestiges.")

75. See *id.* at 749.

76. *Id.* at 747 (quoting the majority, with emphasis).

77. See *id.*

78. *Id.* at 748.

79. *Id.* (quoting *J. PREER, LAWYERS V. EDUCATORS: BLACK COLLEGES AND DESEGREGATION IN PUBLIC HIGHER EDUCATION 2* (1982)).

80. *Id.* at 748-49.

81. *Id.*

82. See *JUDGE CONSTANCE B. MOTLEY, EQUAL JUSTICE UNDER THE LAW: AN AUTOBIOGRAPHY 25* (1998).

83. *Id.* at 191, 238.

84. See *id.* Judge Motley acknowledges that "[a]fter *Fordice*, . . . Southern states may not act on the . . . desire . . . to . . . preserve black colleges that were set up under Jim Crow; unless such continuation is 'educationally justifiable.'" *Id.* at 238.

85. See *id.* at 238-39.

In contrast to Justice Thomas, Judge Motley's position declines to recognize the distinctive histories and traditions of public HBCUs as an educational justification. Instead, she argued that complete diversification is the proper standard and that "[s]tate segregated black colleges bear the same stigma as the Jim Crow railroad car or the back of the bus [and] that era [she believes,] is gone with the wind."⁸⁶ Furthermore, Judge Motley argues that in conjunction with the *Fordice* standard it would be "utterly confusing" to allow public HBCUs to remain open for educationally sound reasons.⁸⁷ Instead, Judge Motley argues that a better interpretation of *Brown* and its progeny would require integrating all black public colleges, to ensure white attendance, and thus promote desegregation.⁸⁸

Based on Judge Motley's argument and interpretation of *Fordice*, public HBCUs do not fit within the Court's constitutional framework. This interpretation, however, directly opposes the DOE's interpretation and the desires of many public HBCU supporters. Did the Supreme Court really intend to dismantle public HBCUs as Judge Motley's interpretation suggests? This lingering question, based on the ambiguity of the *Fordice* standard, is what Justice Scalia feared in his *Fordice* dissent.

Justice Scalia's interpretation of the *Fordice* majority opinion convincingly illustrates the inherent ambiguity in the *Fordice* standard. According to Justice Scalia, the *Fordice* standard's ambiguity poses a dilemma to future judicial interpretations.⁸⁹ Justice Scalia's interpretation of the standard requires states to prove that HBCUs are not the consequence of prior de jure regimes or, if they are, they must be educationally justifiable.⁹⁰ This standard, according to Justice Scalia, would be impossible to overcome since all HBCUs were established during an era when dual systems were the norm.⁹¹

Moreover, under Justice Scalia's interpretation of the majority's standard, the only way that a state could disprove that it perpetuates existing racial identifiability within its university system would be to eliminate segregation by ensuring racial proportionality.⁹² In addition, Justice Scalia did not envision how, under the *Fordice* majority's standard, any public HBCU could be educationally justifiable.⁹³ According to Justice Scalia, the only educational value a public HBCU could offer would be to foster "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 [*Brown* and its progeny]."⁹⁴ Thus, the Court's standard, according to Justice Scalia, will ultimately eliminate public HBCUs, a result that ironically opposes the very reason *Fordice* was brought in the first place.⁹⁵

86. *Id.* at 239.

87. *Id.* at 240.

88. *See id.*

89. *See United States v. Fordice*, 505 U.S. 717, 753 (1992) (Scalia, J., dissenting).

90. *See id.*

91. *See id.*

92. *See id.*

93. *See id.* at 759.

94. *Id.* at 759-60.

95. *See id.* at 760.

Justice Scalia argued that the elimination of public HBCUs is not mandated by the Constitution, and that elimination would do a disservice to those students who choose to attend such institutions.⁹⁶ Justice Scalia argued that Supreme Court precedent does not compel eliminating such institutions and that, ideally, the *Bazemore* standard should determine the constitutionality of HBCUs.⁹⁷

Based on public policy and the rationale behind *Brown* and its progeny, I agree. The *Fordice* majority opinion exposed the viability of public HBCUs to detrimental interpretations. To eliminate all ambiguity regarding this issue and to avoid any further confusion, the Supreme Court should adopt the *Bazemore* freedom of choice standard as the standard to govern public HBCUs.

V. *BAZEMORE*: THE BETTER STANDARD

The better standard to govern the existence of public HBCUs is the *Bazemore* “freedom of choice” standard. Unlike the ambiguous *Fordice* standard, the *Bazemore* standard clearly provides the best solution regarding the existence of public HBCUs. Moreover, the *Bazemore* standard is consistent with *Brown* and its progeny.

The *Fordice* standard inappropriately distinguished the *Green* standard from the *Bazemore* standard. As applied, the two standards, in fact, constitute a single, unitary standard. They are the same standard as set forth in *Brown* and its progeny, which prohibits states from engaging in discriminatory segregation. The only distinguishing factor between *Bazemore* and *Green* is that in *Green*, “freedom of choice” was not *really* “freedom of choice” because the elementary and secondary school students in *Green* did not *have* a choice but to attend school. In postsecondary education, however, students have the choice to attend school. Moreover, the *Green* Court did not hold the “freedom of choice” standard itself unconstitutional.⁹⁸ The Court held that states could not satisfy their constitutional obligation to eliminate discriminatory segregation by simply adopting “freedom of choice” policies.⁹⁹ Thus, even under *Green*, “freedom of choice” policies should satisfy constitutional scrutiny if such policies do not perpetuate racial discrimination.

The problem, however, as it applies to public HBCUs, is that these institutions were founded for the purpose of *promoting* discriminatory segregation.¹⁰⁰ Therefore, one could argue that “freedom of choice” policies could never justify maintaining public HBCUs because the existence of these institutions will always perpetuate racial discrimination. This argument, however, misconstrues the true meaning of discrimination. In my opinion, discrimination, in the context of this Note, occurs when an individual does not have the “true” opportunity to choose which particular institution he/she wants to attend. As Justice Thomas correctly notes, African Americans are attracted by distinctive history

96. *See id.* According to Justice Scalia, “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.” *Id.* (quoting *Ayers v. Allain*, 914 F.2d 676, 687 (5th Cir. 1990)).

97. *See Fordice*, 505 U.S. at 761-62.

98. *Green v. County School Bd. of Kent County*, 391 U.S. 430, 439 (1968).

99. *See id.* at 440.

100. *See Barton, supra* note 14.

and tradition associated with HBCUs that transcends the discriminatory origins of many HBCUs. The only standard that accurately addresses this opportunity is the *Bazemore* standard.

Accordingly, the *Bazemore* standard is the better standard for three reasons. First, the *Bazemore* standard provides the same solution to the problem presented in *Fordice*. The Supreme Court did not have to create a new standard. Second, the *Bazemore* standard best comports with the rationale underlying *Brown* and its progeny. Finally, and perhaps most important, eliminating public HBCUs would be counter-productive and detrimental to those who stand to benefit from the many positive aspects offered by HBCUs. Thus, courts should not adhere to the vague *Fordice* standard since this standard could potentially eliminate such institutions.

First, the Supreme Court did not have to create a new standard to satisfy the *de jure* segregation problems at issue in *Fordice*. As previously noted, the problem with Mississippi's university system, in *Fordice*, was that the system continued to maintain policies and practices that utilized ACT test scores to restrict African Americans' choices regarding which universities to attend.¹⁰¹ Therefore, the state's policies discriminated against African Americans. To address this concern, the Supreme Court could have used the *Bazemore* standard and reached the same conclusion without conflating the issue regarding the constitutionality of public HBCUs.

The primary component underlying the *Bazemore* standard was evidence of discrimination as determinative of unconstitutional segregation. Thus, if a state-supported organization is segregated by choice but does not discriminate against any particular group, then it will satisfy the Court's *Brown* standard. In the alternative, if the state has discriminatory policies perpetuating segregation, then those policies would not satisfy *Brown* and, therefore, would be unconstitutional. Accordingly, since, in *Fordice*, the Mississippi university system's policies and practices discriminated against African Americans in a way that perpetuated segregation, under the more appropriate *Bazemore* standard, those policies would be unconstitutional. This is precisely the same result as was achieved under the *Fordice* standard.¹⁰²

Second, *Brown* and its progeny stood for the same proposition mentioned above: that discriminatory segregation is unconstitutional. Moreover, *Brown* comports with adopting the *Bazemore* standard over the *Fordice* standard. The *Brown* Court intended to provide an end to discriminatory segregation, thus providing African Americans with the opportunity to attend their choice of schools. Moreover, *Brown* attempted to ensure that African Americans did not receive an inferior education. Under the *Fordice* standard, however, a potentially paradoxical situation arises. The *Fordice* standard suggests that public HBCUs should be eliminated.¹⁰³ Yet, eliminating these institutions would diminish the very choice that *Brown* provided.

101. See *Fordice*, 505 U.S. at 734. The policies and practices of Mississippi's system did not discriminate against Anglo-Americans because they were free to attend any of the eight Mississippi universities. See *id.*; see also *supra* Part III.D.

102. See *Fordice*, 505 U.S. at 729.

103. See *Ware*, *supra* note 4, at 672.

Third, the power structure within America's capitalistic setting continues to be dominated by Anglo-Americans. The only way that African Americans and other minorities can overcome this hurdle is if they enjoy equal opportunity to obtain the requisite knowledge from a postsecondary institution. Unfortunately, due to decades of past discrimination against African Americans, many blacks still require the nurturing environment and social benefits that public HBCUs provide.¹⁰⁴ Moreover, statistics show that eliminating these institutions will greatly decrease the pool of available educated African Americans that is necessary to replenish and diversify today's professional workforce.¹⁰⁵ Thus, eliminating these institutions would further perpetuate the discriminatory segregation of America's workforce.

In accordance with Justice Thomas' concurrence,¹⁰⁶ the continued success of public HBCU graduates demands that these institutions flourish.¹⁰⁷ Moreover, the DOE recognizes the importance of maintaining these institutions.

VI. CIRCUMVENTING THE NEGATIVE INTERPRETATIONS

For the reasons stated above, the *Bazemore* standard should supplant the *Fordice* standard with regards to public HBCUs. However, since *Fordice* failed to directly address these institutions, lower courts have the power to interpret *Fordice* in a manner that may negatively impact HBCU status by forcing them to either merge with existing majority institutions, or close.¹⁰⁸ Accordingly, public HBCUs should protect themselves by circumventing possible negative interpretations.

State university systems with public HBCUs can protect themselves against the effects of negative interpretations of *Fordice* in one of two ways. They can either require their public HBCUs to implement a diversification policy and actively increase recruitment efforts to attract non-African American students, or they can restructure their university system into a tier system and rank the missions of their universities so that their universities do not perpetuate a dual system. Both methods would circumvent any possible negative effects of *Fordice*, however, both alternatives have advantages and disadvantages. For the reasons stated below, the former protective measure would be more beneficial than the latter. Currently, both methods have been explored and are being implemented in various states.¹⁰⁹

104. Private HBCUs also provide the same nurturing environment and social benefits; however, since the schools are private, tuition is often considerably more expensive, which diminishes the opportunity for many blacks to attend.

105. See S. HILL, NATIONAL CENTER FOR EDUCATION STATISTICS, THE TRADITIONALLY BLACK INSTITUTIONS OF HIGHER EDUCATION 1860 TO 1982, xiv-xv (1985).

106. See *Fordice*, 505 U.S. at 748 (Thomas, J., concurring).

107. Between 1954 and 1982, enrollment at HBCUs increased from 70,000 students to 200,000 students and the number of degrees awarded at these institutions increased from 13,000 to 32,000. See HILL, *supra* note 105, at xiv-xv.

108. See *Fordice*, 505 U.S. at 752 (Scalia, J., dissenting).

109. Tennessee uses a court-mandated diversification policy at the public HBCU, Tennessee State University (TSU), and Florida has a university system that categorizes its public HBCU, Florida Agricultural and Mechanical University (FAMU), in a separate tier than Florida State University (FSU), a public majority institution located in the same city. See Chaka M. Patterson, *Desegregation as a Two-Way Street: The Aftermath of United States v. Fordice*, 42 CLEV. ST. L. REV. 377, 431 (1994). In 1979,

A. Diversification

One way HBCUs can circumvent negative interpretations of *Fordice* and ensure their viability is to diversify¹¹⁰ and actively increase enrollment of non-African American students.¹¹¹ According to Justice Scalia and Judge Motley, *Fordice* requires public HBCUs to be “educationally justifiable,” a standard that these institutions arguably cannot meet because they infringe upon the integration philosophy underlying *Brown* and its progeny.¹¹² Therefore, to comply with *Fordice*, Justice Scalia and Judge Motley argue that public HBCUs should be merged with majority institutions or closed.¹¹³

Public HBCUs, however, can continue to exist as such and still meet the “educationally justifiable” standard set forth in *Fordice*. The key is *moderate* diversification—actively increasing non-African-American student enrollment while maintaining a significant percentage of African-American students.¹¹⁴ Using moderate diversification policies, public HBCUs could continue to play a significant role in educating African Americans, satisfy the *Fordice* standard by discontinuing policies perpetuating racial identifiability, and satisfy the integration philosophy underlying *Brown*. For example, one HBCU that has such a policy is Tennessee State University (TSU). TSU has implemented a diversification policy to actively attract non-African American students and faculty.¹¹⁵ With this diversification policy, TSU currently has a student body and faculty composition comprised of a significant percentage of Anglo-Americans.¹¹⁶ Although TSU actively recruits non-African American students, it is still considered an HBCU and continues to educate a significant number of African Americans.

In support of the diversification argument, proponents claim several advantages to diversifying public HBCUs. First, some argue that increasing the number of white students at public HBCUs will diminish negative criticism of these institutions because white students will experience the beneficial aspects of public HBCUs.¹¹⁷ Others argue that white students at predominately black col-

TSU was ordered to merge with the Nashville campus of the University of Tennessee in an effort to increase racial diversity at TSU. See *Grier v. University of Tennessee*, 597 F.2d 1056, 1064 (6th Cir. 1979). Currently, TSU has a significant population of Anglo-American students and faculty. See Patterson, *supra*.

110. According to Patrick Hill, a leading author on the subject of diversity in educational settings, a diverse university is one where “a spirit of civility and mutual respect abounds, when all groups feel equally well-placed and secure within the community because all participate in that spirit.” SIMS, *supra* note 2, at 2 (quoting Hill).

111. Proponents of educational diversification believe that the success of HBCUs is dependent upon these universities’ strong commitment to diversify. See *id.* at 12.

112. See JUDGE MOTLEY, *supra* note 82, at 238-39; see also *Fordice*, 505 U.S. at 753-54 (Scalia, J., dissenting).

113. See *id.*

114. Charles V. Willie, author of *Black Colleges Should Recruit More White Students*, suggests that the foundations that supported increased enrollment of African Americans at predominately white schools during the 1960s should be the same foundations that support the increased enrollment of Anglo-Americans at predominately black schools today. Charles V. Willie, *Black Colleges Should Recruit More White Students*, THE CHRON. HIGHER EDUC., March 13, 1991, at A48.

115. See Patterson, *supra* note 109, at 431 and accompanying text.

116. See *id.*

117. See SIMS, *supra* note 2, at 27.

leges, especially white males, develop stronger, positive self-concepts because they are forced to learn the value of “earning the approval of others.”¹¹⁸ Finally, proponents have argued that diversity at these institutions may increase interracial harmony between white and black students.¹¹⁹

Conversely, those in favor of maintaining an African-American majority at public HBCUs propose that diversification at HBCUs has disadvantages as well. For example, some argue that a predominately black student body allows African-American students the opportunity to discover and understand certain race-specific social and political issues.¹²⁰ Furthermore, HBCUs may be considered less important to white students because white students do not necessarily share the same social and political concerns as black students. Black students, therefore, may be better served if they are allowed to attend predominately black institutions.¹²¹ Another argument against diversifying public HBCUs is that in doing so, African-American culture may be lost.¹²² According to this argument, HBCUs traditionally guard African-American culture and history and would, therefore, “be handicapped in continuing this tradition if white minorities are allowed to alter their cultural heritage in any way.”¹²³

Moderate diversification of public HBCUs would not prevent black students at these institutions from understanding and addressing their particular social and political issues, nor would it disturb the cultural history of these institutions. Moreover, because of the possible detrimental effects that a negative interpretation of *Fordice* could have on public HBCUs, and because HBCUs can be diverse and continue to maintain and promote African-American history and tradition, the benefits of diversification outweigh the disadvantages.

B. The Tier System

Another way public HBCUs can circumvent unfavorable interpretations of *Fordice* is for the state in which the HBCU is located to restructure its university system in a manner that eliminates the dual system. Public HBCUs exist because of the prior *de jure* segregated system enunciated in *Plessy v. Ferguson*.¹²⁴ Due to *Plessy*'s “separate but equal” standard, most public HBCUs are structured in a manner similar to Mississippi's in *Fordice*. For example, most public HBCUs are located in close proximity to and have duplicate, or “dual,” education programs as offered by a nearby, majority institution. Therefore, as Justice Scalia argued, it is nearly impossible for public HBCUs to ad-

118. *Id.* A 1978 study of white students at public HBCUs revealed that, “[a]fter being a minority on black campuses, whites saw themselves differently. They began to understand how others perceived them and their way of life.” *Id.*

119. *See id.* The 1978 study also showed that whites attending public HBCUs are less likely to be racially prejudiced against blacks and that these students are more aware of current race relations. *See id.* at 27-28. “Additionally, 75[%] to 80[%] of [white students attending HBCUs] said that their education had heightened their appreciation of different ways of life and caused them to be more concerned about equal opportunity for all . . .” *Id.* at 28.

120. *See id.* at 29.

121. *See id.*

122. *See id.*

123. *Id.* at 30.

124. 163 U.S. 537, 551 (1896).

here to *Fordice*'s "unnecessary duplication" standard¹²⁵ and establish that they do not have a dual, segregated system because that is precisely why these HBCUs were originally founded.¹²⁶

There is, however, one way that states operating public HBCUs can elude *Fordice*'s "unnecessary duplication" standard. States can restructure their university system so that public HBCUs do not have the same mission or educational programs as majority institutions located nearby. Florida, for example, has such a system. Prior to *Fordice*, FAMU, an HBCU and FSU, a majority institution, located in the same city, arguably had unnecessary, duplicate missions and educational programs. The primary difference was that one institution had a predominately white student body and the other a predominately black student body. After *Fordice*, however, the Florida Board of Regents restructured Florida's university system so that FAMU now offers different educational programs and has a different mission than FSU.¹²⁷

Although, implementing a tier system similar to that in Florida may circumvent unfavorable interpretations of *Fordice*, HBCUs may still face potential problems using this option. First, if states adopt a tier/mission classification regime they run the risk of violating *Fordice*'s "mission standard."¹²⁸ States may, however, avoid this problem if they can show that their particular classification regime does not perpetuate segregation.¹²⁹ Second, public HBCUs operating within a tier/mission classification framework will never have the opportunity to compete with their predominately white counterpart because the public HBCU and the majority institution will, by virtue of the tier system itself, never be similarly classified. In Florida, for example, FAMU will always be in a lower tier than FSU; if it were to ever move into the same tier the problem of violating *Fordice*'s "unnecessary duplication" standard would necessarily resurface. Therefore, since restructuring public HBCUs using a classification regime imposes detrimental disadvantages to these institutions, moderate diversification is the better option and, further, avoids possible ramifications of violating *Fordice* under unfavorable interpretations of the *Fordice* standard.

VII. CONCLUSION

In deciding *Brown* and its progeny, the Court sought to prohibit states from discriminating against African Americans and to ensure that students could attend the school(s) of their choice; many African Americans have chosen to attend public HBCUs. Now, however, some twenty-eight years later, the Supreme Court, in *Fordice*, has attacked the viability of public HBCUs and, arguably,

125. See *supra* text accompanying note 63.

126. See *United States v. Fordice*, 505 U.S. 717, 749 (Scalia, J., dissenting in part, concurring in part).

127. FAMU is now a "Comprehensive" university while FSU is now a "Research" university. See FLORIDA BOARD OF REGENTS, 1998-2003 STRATEGIC PLAN 2 (Nov. 1998). Also, it is only alleged that the Board of Regents structured the two universities this way in an effort to prevent negative interpretations of *Fordice*.

128. See *supra* text accompanying note 64.

129. The *Fordice* majority did not say that mission classifications were, themselves, unconstitutional; the problem with Mississippi's classification regime in *Fordice* was that it was found to perpetuate discriminatory segregation. See *Fordice*, 505 U.S. at 740-741.

has left room for implementing a standard that would ultimately eliminate the very choice *Brown* and its progeny provided—the choice for African Americans to attend public HBCUs. This decision seems to directly contradict the Court's intentions, as set forth in 1954.¹³⁰ *Brown* was intended to ensure that blacks were afforded the opportunity to attend the school of their choice. Should it matter if their choice happens to be a predominantly black institution?

In contrast to *Fordice*, the better standard to determine the viability of public HBCUs is the *Bazemore* “freedom of choice” standard. Nevertheless, in the wake of the *Fordice* decision, public HBCUs must take preventive measures to ensure their existence. The best way to accomplish this is through diversification.

The continued existence of HBCU[s] does not constitute a threat to racial equality because these colleges and universities are open to members of all racial and ethnic groups. Just as with other specialized institutions, such as religious colleges and women's colleges, HBCU[s] provide a choice for those seeking educational environments that are consistent with their personal values and experiences. So long as these institutions are open to all applicants, they enhance equality and expand opportunities for blacks without restricting the options of others.¹³¹

130. See *Brown v. Board of Education*, 347 U.S. 483, 495 (1954).

131. See *SIMS*, *supra* note 2, at 12.