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Nos. 90-1205, 90-6588

Supreme Court, U.S.
FILED
SEP 6 1991
OFFICE OF THE CLERK

In The

# Supreme Court of the United States

October Term, 1991

UNITED STATES OF AMERICA,

*Petitioner,*

vs.

RAY MABUS, GOVERNOR OF MISSISSIPPI, ET AL.,

*Respondents.*

JAKE AYERS, JR., ET AL.,

*Petitioners,*

vs.

RAY MABUS, GOVERNOR OF MISSISSIPPI, ET AL.,

*Respondents.*

**On Writs Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## BRIEF FOR RESPONDENTS

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## QUESTIONS PRESENTED

1. The private petitioners' question concerning the scope of the legal duty to disestablish should be more precisely stated under the court of appeals' opinion as follows:

> Whether Mississippi's affirmative duty to disestablish its prior system of de jure segregation in higher education extends beyond discontinuing prior discriminatory practices and adopting and implementing for years good-faith, race-neutral policies and procedures which afford all students real freedom of choice.

2. The private petitioners' question concerning the applicability of Title VI regulation 34 C.F.R. § 100.3(b)(6)(i) should be more precisely stated on this record as follows:

> Whether Title VI and 34 C.F.R. § 100.3(b)(6)(i) impose on Mississippi an affirmative duty to disestablish its prior system of de jure segregation in higher education beyond the adoption and years of implementation of genuine nondiscriminatory policies coupled with substantial affirmative efforts to promote desegregation which afford all students real freedom of choice.

3. The United States' question misconstrues the court of appeals' opinion. The proper question is as follows:

> Whether the district court's finding that the continued racial identifiability of Mississippi universities persists today as the result of free and unfettered choice of students and personnel and despite the State's substantial affirmative good-faith efforts in "other-race" recruitment and resource allocation is clearly erroneous.

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## BRIEF FOR RESPONDENTS

The State of Mississippi respondents[1] submit this consolidated response to the briefs separately filed by the

[1] Respondents are the Governor, the Commissioner of Higher Education, the Board of Trustees of State Institutions of

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private petitioner class of black citizens and the United States.

## STATEMENT OF THE CASE

The State of Mississippi admittedly maintained a segregated system of higher education through at least 1962. The Board of Trustees and the universities subsequently implemented, however, nonracial admissions and employment practices. Moreover, by the mid-1970's State policies clearly extended beyond the genuine operation of the universities without regard to race. The Board affirmatively acted to send the unmistakable message that discriminatory practices were affairs of the past. Since that time the State has faithfully implemented nonracial practices coupled with good faith affirmative efforts to encourage further desegregation.

The petitioners' statements of the case unduly emphasize historical acts of state-imposed segregation of a long since concluded discriminatory era. While predominantly black and, to a lesser extent, predominantly white universities do remain, the record, district court opinion and court of appeals opinion preclude any notion of mechanical equation of Mississippi's system today

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Higher Learning, the individual members of the Board of Trustees, Delta State University, Mississippi State University, Mississippi University for Women, the University of Mississippi, the University of Southern Mississippi, and the chief administrative officer of each of these five universities. Unless the context otherwise requires, references in this brief to "the State" include all respondents. References to "the Board" address the Board of Trustees of State Institutions of Higher Learning.

with its distant unconstitutional past. The petitioners' statements are incomplete; they do not portray fairly the record as a whole or the lower courts' extensive findings. Consequently, extensive supplementation is required.

1. *The Parties' Contentions at Trial.* Petitioners advanced their claims for "disestablishment" on two largely conflicting fronts. First, they asserted the State unlawfully "discriminated" against the predominantly black universities in the allocation of resources. (Amended Complaint, R. 40-41, ¶¶ 3(b), (c), (d); Complaint in Intervention, R. 94, ¶ 16) Petitioners urged substantial institutional enhancement because of the predominant presence of blacks at these institutions. Indeed, private petitioners specifically sought the "equalization" of resources between the predominantly black and predominantly white universities. (Amended Complaint, R. 77-78, Prayer for Relief, ¶ A(2)) Second, petitioners demanded a greater black presence at the predominantly white universities. Yet petitioners advanced no contentions specifying the alleged degree of racial balance required or what efforts or results would allegedly be enough to constitute "disestablishment."[2]

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[2] Thus, petitioners' proof overwhelmingly consisted of quantitative institutional comparisons according to predominant racial presence. Purported funding, program, facilities and land grant analyses were driven by race with virtually no consideration of normative educational criteria. The United States refused to submit a single government representative for deposition on any issue. (Notice of 30(b)(6) Deposition, R. 1162-63; Motion for Protective Order, R. 1168-70) No spokesman for the Department of Education testified at any time.

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Mississippi's defenses were primarily represented in two ultimate alternative contentions: (i) the State has fulfilled its duty to disestablish state-imposed segregation by implementing and maintaining good faith, nondiscriminatory and nonracial admissions and operational policies with respect to students, faculty and staff; and alternatively (ii) given the nondiscriminatory policies, the State in any event has fulfilled its duty through its affirmative good faith efforts to attract qualified black students and personnel to predominantly white universities and qualified white students and personnel to predominantly black universities. Given the existence of such genuine policies, the State maintained that the mere continued existence of predominantly black and predominantly white universities is not unlawful considering individual freedom of choice and the varying objectives and advantages of such institutions. (Pretrial Order, R. 1376, Exh. F Def. Statement of Contested Issues of Law)

Hence, the State's proof delineated the substantial efforts expended to further desegregation to the point of establishing the virtual exhaustion of feasible student, faculty and staff recruitment procedures. Board witnesses

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The United States even declined to involve the United States Department of Agriculture which established and administered many of the land grant policies challenged. Petitioners simply ignored the State's substantial efforts to increase the presence of other-race students, faculty and staff. To be sure, petitioners' standardized testing witness criticized the State's use of the American College Test (ACT), but he also declined to address the determinative issue of an appropriate admissions standard.

focused upon the legitimate educational criteria adhered to in admission, employment and resource allocation practices. The State proved the admission policies are not the cause of any institutional racial identifiability. The State demonstrated the absence of any racial pattern in the provision of resources. The record as a whole thereby reflects a system genuinely untainted by discriminatory actions, purposes, or effects.

2. *The Factual Record.* HEW's Office of Civil Rights contacted the Board in 1969 and the early 1970's in conjunction with OCR's ongoing review of state systems of higher education once segregated by law. The Board advised OCR that the Mississippi system already complied with all legal requisites. Nevertheless the Board indicated the State would take further affirmative steps to enhance desegregation. (Exh. Bd-001, J.A. 898) The Board and OCR could not agree, however, regarding an acceptable statewide approach to promotion of further desegregation.[3] The absence of an agreement with OCR notwithstanding, the Board elected to implement a formal plan to foster desegregation which became known as the

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[3] A major sticking point was the absence of a comprehensive approach to desegregation of the junior (community) college system. The state-supported establishment for higher education includes 15 junior colleges and 8 universities. It is not, however, a single system. Each junior college has its own local governing board. The pervasive presence of the junior colleges is significant. They span the entire State. They are accessible to virtually all Mississippi citizens. They actually enroll over 60% of all Mississippi high school graduates electing to participate in public higher education. (P.A. 119a; Exh. Bd-185 at 1-3, J.A. 1201-02)

"Plan of Compliance." (P.A. 119a;[4] Exh. Bd-019, Bd-020, J.A. 904)

From the very outset of Plan development and implementation the Board declared the State's commitment to equal educational opportunity with irrefutable clarity. The Plan of Compliance identified its "basic objective" as "the improvement of educational opportunities for all citizens of the State of Mississippi with particular emphasis on equal access and retention for members of minority races"; the Plan repeatedly asserted as its fundamental goal the attraction of other-race students, faculty and staff to each university. (Exh. US-1 at 3, 6, 12, J.A. 66, 68, 73) The Board directed the universities to implement the Plan to the best of their abilities. The Board pointedly responded to institutional questions concerning interpretation of the commitments under the Plan. For example, the Board explicitly instructed: "official representatives of institutions are not to become directly involved with employers, schools, realtors, athletic officials, medical care providers, and all others who do not have a nondiscriminatory policy regarding race"; "recruiting of students is prohibited at schools that have not filed with the Board . . . a nondiscriminatory policy"; and each university is to "pay careful attention" to the "commitments to employment and promotions of university

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[4] Citations to the lower court opinions will be referenced to the appendices following the United States' petition in which the opinions have been reproduced. Designations will be "P.A. [page]."

personnel" identified in the Plan. (Exh. Bd-020, J.A. 904-06) The universities have properly responded.[5]

a. *Student Recruitment*. Each institution expends every reasonable effort to increase other-race student participation. (Exh. US-960 at 10, J.A. 778-79; Exh. US-965 at 91, J.A. 796-98; Exh. US-962 at 125; Exh. US-964 at 31; T. 3493-94, J.A. 1708; US-967 at 12-13; Exh. Bd-010 thru Bd-018) It is not just a matter of all student recruiters seeking other-race students, for the universities also employ minority recruiters charged with this specific responsibility. Moreover, the universities do not limit such desegregative efforts to specifically employed staff; they involve other-race students, faculty and alumni, sometimes as multi-racial teams, in their recruitment efforts. (P.A. 134a; *e.g.*, Exh. Bd-105 at 5, J.A. 913-14; Bd-069 at 5, Bd-044 at 6-7 & Bd-129 at 18; US-964 at 19-20, 25-26 & 39-40; Exh. US-962 at 9, 22 & 49; Exh. US-961 at 20, 28-29; Exh. US-950 at 17; US-967 at 7, 9 & 47; Exh. US-965 at 15-16 & 18-22; Exh. US-960 at 20, J.A. 779) Representatives of the predominantly white universities annually visit more than 100 predominantly black high schools, and representatives of the predominantly black universities expend similar efforts with respect to predominantly white high schools. (P.A. 134a-35a; *e.g.*, Exh.

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[5] The Board has required, and the institutions have provided, annual reports exhibiting the affirmative efforts expended toward increasing other-race presence at each university. Following a detailed format established by the Board, the 109 comprehensive "implementation reports" submitted by the universities as of the time of trial demonstrate not only these efforts but also each institution's recognition of the State's serious commitment to affirmative action. (Exh. Bd-021 thru Bd-129)

Bd-105 at 41-60, J.A. 946-72; Exh. Bd-033 at Attmt 1; Exh. Bd-021 thru Bd-129, listings of schools recruited)

University publications and promotional activities are significant components of the minority recruitment endeavors. The universities consciously depict other-race students in recruitment brochures and other university publications. (*E.g.*, T. 3493, J.A. 1708; Exh. Bd-129 at 18, Bd-069 at 5 & Appendix, Bd-044 at 7; Exh. US-962 at 19-20) Indeed, they specifically design many such publications exclusively to appeal to other-race students. (Exh. Bd-133, J.A. 997; Bd-140 thru Bd-144, J. A. 1012-95; Bd-159, J.A. 1113; Bd-104 at 5, Appendix B; Bd-121, Annex C; Exh. US-964 at 32-33; Exh. US-965 at 22-24; Exh. US-961 at 37) The universities similarly utilize public media devices such as news releases, promotional radio spots, public service announcements, newspaper advertisements, and display sponsorships to emphasize other-race participation in campus life. (P.A. 134a; Exh. Bd-033 at 4; Exh. Bd-069 at 5-6; Exh. Bd-071 at 3; Exh. Bd-077 at 8; Exh. US-962 at 19-20) Still additional examples of the State's commitment to increase other-race enrollment include financial assistance and minority scholarship programs, consortiums, cooperative, graduate and professional opportunities programs with junior colleges and universities with substantial other-race enrollment, sponsorship of programs with particular other-race appeal such as "Black History Week" and "Black Awareness Month," and maintenance of campus offices of minority student affairs. (Exh. Bd-033 at 5; Exh. US-967 at 54; Exh. US-964 at 35-36; Exh. Bd-102 at 21, 32, 34, Appendix L; Exh. Bd-104 at 5 & Appendix H; Exh. Bd-058 at 21-22; Exh. Bd-068 at 14; Exh. Bd-114 at 5-7, 16)

Furthermore, the State's commitment need not be measured exclusively by efforts to attract other-race students. Once enrolled, other-race students enjoy completely desegregated campus environments. Minority students have significantly participated and succeeded at each institution. They have been elected to the universities' "Hall of Fame," to "Who's Who in American Colleges and Universities," "Mr. University" and homecoming queen. Blacks have participated in intercollegiate or intramural athletics, as varsity cheerleaders, in scholastic honorary societies, in bands and in performing groups. They have assumed leadership positions in a host of student government, school publication, residence hall and other student associations. (P.A. 135a; T. 3444, J.A. 1691; Exh. Bd-042 at 15; Exh. Bd-101 at 40-45; T. 3509-10, J.A. 1713-14; Exh. Bd-068 at 9-12; Exh. Bd-083, § 7.g; Exh. Bd-125 at 14, 22; Exh. Bd-034 at 9-10; Exh. Bd-045 at 10-11, 15-16; Exh. Bd-033 at 6; Exh. Bd-057 at 12-13; Exh. Bd-055 at 15-16; Exh. Bd-101 at 41-43; Exh. Bd-128 at 30-32; Exh. Bd-042 at 15; Exh. Bd-103 at 24)

Racial percentages are by no means determinative, but the substantial "statistical success" of the universities in student recruitment should not be overlooked. The actual representation of blacks in the freshman classes at Delta State University, Mississippi State University, Mississippi University for Women, and the University of Southern Mississippi is statistically in parity with the representation of blacks in the qualified pools. No statistical distinction according to race can be drawn at these predominantly white universities; qualified blacks and

qualified whites are equally likely to enroll.[6] (T. 4219, J.A. 1856-57)

b. *Admission Standards.* As in most states, a university education is not immediately available in Mississippi to all high school graduates, white or black. An aspiring first-time freshman student must complete a university preparatory curriculum and achieve a satisfactory score on the ACT.[7] Successful completion of certain essential

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[6] Private petitioners, but not the United States, attempt to utilize the University of Mississippi's (UM) absence from this list of institutions as evidence of discrimination. They of course ignore the obvious implications of such a blanket contention for the predominantly black universities. Private petitioners do also emphasize isolated individual complaints of blacks at UM, which complaints are largely unfounded. (T. 1393-96, J.A. 1474-76; T. 1441-43, J.A. 1491-93; T. 2693-2705, J.A. 1597-1604; T. 2775, J.A. 1634) Clearly any alleged statistical shortfall or solitary grievances at UM cannot be attributed to any lack of genuine institutional commitment to nondiscriminatory policies and affirmative action. UM's other-race procedures are the same as, or in some instances even more elaborate than, those of other predominantly white institutions who may have enjoyed greater "statistical success." (T. 4118-32, J.A. 1837-46; Exh. US-962 at 9, 26-30, 119-25; Exh. Bd-094 thru Bd-105; Exh. Bd-140 thru Bd-147, J.A. 1012-1095; Exh. Bd-104 at 30-31 & Bd-103 at 28) The achievements of black students at UM are numerous and demonstrate UM's acceptance of black students into mainstream campus life. (Exh. Bd-100 at 80-85 & Bd-101 at 40-46) UM has dedicated over $6,000,000 of its own institutional funds to affirmative action. (T. 4132, J.A. 1845) The district court correctly found no evidence that the comparatively low black enrollment results from official action. (P.A. 186a)

[7] The current admission standards are set forth in exhibit Bd-183a. (J.A. 1174) They have been pointedly summarized by

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academic courses in high school significantly contributes to academic readiness for the university experience. (T. 3573-84) The ACT is indisputably a reliable instrument used nationwide as an integral component of college admission standards. Not an aptitude test, the ACT is a standardized measurement of developed academic abilities deemed important for success in college. (T. 3711-14, J.A. 1759-61) The positive relationship between performance on the ACT and academic achievement has been clearly demonstrated at Mississippi universities. (P.A. 129a; T. 3458-59, 3726-28, 3763-64; US-967 at 75-78; Exh. Bd-275)

The universities' particular curriculum and ACT requisites are in no respect rigorous. No specific grade point average is even required. The ACT scores needed for automatic admission are extremely modest levels of achievement. Scores of 15 are only on the verge of a freshman reading level. (P.A. 130a; Exh. Bd-190 at 5-10) Nonetheless, students who score as low as 9 on the ACT are still considered for admission under exceptions policies. Students who achieve a 9 on the ACT English and social studies tests are only reading at a ninth grade level.[8] (T. 3732-33, J.A. 1769) Thus, the requisite score

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both lower courts. (P.A. 7a-8a, 126a-28a) These present standards are plainly not limited to performance on standardized tests. It should probably be noted that the ACT organization has changed the test grading practices since trial. For example, a score of 15 in 1987 would be an 18 in 1991. This change is, however, of no substantive consequence here.

[8] Ninety-five percent of all students tested nationwide score 9 or above and over 70% of all students score 15 or above. (P.A. 130a; Exh. US-874 at 9) Nine out of every ten ACT-

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levels at Mississippi universities differ dramatically from institutions having highly selective or even selective policies. (T. 3729-30, J.A. 1768) The Board's admission standards are also less demanding than NCAA Proposition 48, the well-known national policy for athletes.[9] (P.A. 131a-32a; T. 358-485, J.A. 1730-31)

Furthermore, no applicant to a public university is ever ultimately denied the opportunity to obtain a university degree for failure to achieve a particular ACT score, including even the 9. Admission is at most deferred. Students may attend a public junior college without test score requirements and transfer after successful completion of as few as 15 hours. Thousands of students elect to attend junior colleges in Mississippi; substantial numbers of these students subsequently transfer to public universities. (P.A. 133a; Exh. Bd-185, J.A. 1201-06; T. 3445-46, J.A. 1692; T. 3504-05, J.A. 1711; T. 3724-25, J.A. 1767)

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tested students in Mississippi, including 80% of all black students, score 9 or above. (T. 3730-31, J.A. 1768-69) The mean ACT score for blacks who evidence genuine aspirations for a university education by completing the high school college preparatory curriculum was 14.3 in 1986. (P.A. 132a; Exh. Bd-170) An expert for the United States appropriately characterized scores of 10 and 11 as "drastically low" and certainly not indicative of academic readiness for university instruction. (P.A. 130a-31a; Exh. Bd-463 at 160-61, J.A. 1304-05)

[9] The Court should recall when evaluating the petitioners' admission challenges that the NCAA standard of an ACT score of 15 plus a 2.0 high school grade average with no exceptions applies uniformly to universities nationwide. (T. 3584-85, J.A. 1730-31)

An ACT regional vice president with extensive experience in utilization of the ACT in college admissions standards persuasively testified to the reasonableness of the Board's present standards, including specifically the use of the ACT. While acknowledging that Board practices may not comport precisely with every ACT suggestion, the ACT executive repeatedly emphasized the reasonableness of the standards. He appropriately evaluated the Board's use of the ACT in the context of the scores required, other educational criteria considered, and transfer policies. (T. 3698-3710, 3715-33, J.A. 1753-69; Exh. US-970 at 124-26, 133-34, Dep. Exh. 5) The ACT executive directly confronted the very ACT-published statement on which petitioners so heavily rely. In his professional judgment the admission standards in their totality (*i.e.*, the inclusion of modest ACT scores, high school academic achievement as measured by courses taken, multiple "high risk" criteria such as high school grades, class rank, extracurricular activities, special talents, and recommendations, and liberal transfer policies) are consistent with ACT's encouragement of utilization of criteria in addition to test scores in making admission decisions. (T. 3735-36, J.A. 1769-70)

Today's admission standards simply cannot be credibly attributed to State actions of the now distant early 1960's. The relevant admission standard actions have been taken by an altogether different Board under totally different circumstances based upon different, reasonable educational criteria and with different, reasonable educational objectives. Nothing in Board actions evidences purposeful discrimination or any impermissible perpetuation of ACT utilization.

The Board implemented the pertinent admission standards in 1976 out of a systemwide concern for student quality. This concern addressed not just the quality of entering students but also the level of university instruction and quality of graduates. The Board understandably lacked confidence in grades due to grade inflation and lack of uniform course content in Mississippi high schools. It selected the ACT test and composite scores of 15 and 9 only after consultation with ACT. Moreover, the Board has always viewed the ACT requirements as modest to terribly low. The Board in any event has always recognized the substantial presence of open admission junior colleges and implemented liberal transfer policies. (P.A. 121a-23a, 179a; T. 3550-63, J.A. 1717-24; Exh. Bd-180)

Furthermore, except for Mississippi University for Women, modifications to the admission standards since 1976 have not included an increase in ACT score requirement at the predominantly white universities. Rather, the Board has mandated exceptions to the minimum for unqualified admission involving multiple education criteria. It first confronted the continued inability of low achieving students to perform adequately in college not by raising admission standards but by implementation of costly developmental education programs. The Board implemented the high school course requirements, a measure of academic achievement in addition to the ACT, only after surveying high school educators to confirm the availability of such a college preparatory curriculum to all students. (P.A. 123a-25a; T. 3566-67, 3571-81, J.A. 1726-30) Furthermore, all relevant admission standard actions have been taken at times when the Board's and

institutions' substantial commitments to increase minority presence were otherwise evident.

Nor can it be legitimately asserted that the admission standards discriminatorily affect blacks. Black students do on the average score somewhat lower on the ACT than do white students, but a variety of socioeconomic factors, and not simply race, affect a student's level of academic development. (P.A. 130a; Exh. Bd-172 at 3, 10; Exh. US-874 at 7-8) Blacks' disproportionate elections in high school not to take a college preparatory curriculum contribute to the disparity. (P.A. 130a; T. 2284, 2314) Nonetheless, virtually no black students are denied admission to the predominantly white universities for low ACT scores. For example in 1986, Mississippi State University denied admission to no applicant scoring above 11 on the ACT; the University of Mississippi denied admission to only nine black freshmen applicants who completed the admission process; and the University of Southern Mississippi has been unable in recent years to fill its quota of students who score below 15 because of an insufficient number of applicants whose high school record otherwise warranted admission. (P.A. 131a; T. 3440-41, J.A. 1688-89; T. 4165-66, J.A. 1846; Exh. US-964 at 140, 144-45)

The record similarly establishes that utilization of the ACT composite score of 15 is simply not the cause of the racial identity of the predominantly black institutions. An eminently qualified statistician demonstrated at trial that these institutions are not predominantly black because black students who first prefer to attend a predominantly white institution were "channeled" to black universities after failing to obtain a 15. (P.A. 184a; T. 4228-29, J.A.

1859) Moreover, petitioners' conclusory contentions that the State's use of the ACT "perpetuates duality" wholly fail to account for the existence of large numbers of whites who themselves score below 15. Indeed, there are greater numbers of whites than blacks at such low levels of academic development who certainly have the same opportunity as black students to choose a predominantly black university. (Exh. US-894i, 894j, J.A. 639-40, 645)

The petitioners' challenges to utilization of the ACT should also be examined in light of the United States Secretary of Education's confrontation of the well-known educational crisis facing this Nation. The National Commission on Excellence in Education created by the Secretary unequivocally recommends that universities "adopt more rigorous and measurable standards, and higher expectations, for academic performance and student conduct . . . and raise their requirements for admission." The Secretary specifically directs that "standardized tests of achievement (not to be confused with aptitude tests) . . . be administered . . . particularly from high school to college . . . to certify the student's credentials." (Exh. Bd-201 at 9, 11, 12, 27 & 28, J.A. 1216-23) The admission concerns confronted by the Board over the past decade and the remedial actions taken are among the various findings and implementing recommendations of the Secretary's blue ribbon task force. (T. 3585-91, 3600-02, 3618-20, 3625)

c. *Faculty and Staff Employment.* At trial petitioners did not challenge the significant statistical presence of other-race faculty at the predominantly black universities. The United States abandoned its faculty and staff employment contentions altogether before the court of appeals and does so again before this Court. Private petitioners do continue to allege underrepresentation of

black faculty at the predominantly white institutions. They do so, however, in the teeth of overwhelming proof of considerable affirmative efforts to attract, employ, and retain black faculty and in utter disregard of State satisfaction of any realistic statistical expectation.

The predominantly white universities have deployed a host of strategies to attract and retain qualified black faculty. (P.A. 136a) For example, they maintain formal equal employment opportunity and affirmative action programs and employ equal opportunity officers. (T. 3431, J.A. 1683; T. 3498-99, J.A. 1710; T. 4119, J.A. 1837-38) Positions are widely publicized in the prominent higher education publications, including publications of special minority interest. (Exh. US-758, US-946 at 114, J.A. 772; US-959 at 14) The universities actively recruit at the graduate schools of predominantly black universities, participate in cooperative and faculty exchange programs, and develop black faculty from the ranks of their own graduate students. The severe financial crisis notwithstanding, special funds are allocated to minorities for salary incentives, supplementation and support. (T. 3425-26, J.A. 1681-83; T. 3947, J.A. 1832; Exh. US-946 at 115, J.A. 772-73; Exh. Bd-041 at 18, Bd-066 at 19, Bd-067 at 18, Bd-104 at 26-27) The universities prefer minority faculty in application for faculty housing. (T. 4130-31, J.A. 1844; Exh. Bd. 104 at 25)

There simply is no other recruitment procedure which the State could implement which would assure greater minority faculty representation at the predominantly white institutions.[10] (P.A. 199a; T. 3950-51, J.A.

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[10] Nor have petitioners attempted to identify any appreciably different strategies. They do suggest a faculty

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1834) Indeed, Mississippi's efforts are very similar to what institutions are doing in the recruitment of minority faculty throughout the Nation. This nationwide effort in higher education to employ minority faculty and administrators understandably significantly hampers the State's efforts. The vigorous competition of business and industry for the extremely limited supply of blacks holding terminal degrees compounds the difficulty. Moreover, the State's lower salaries particularly impede employment of black faculty who, due to high demand, enjoy substantial leverage in negotiations. The State's competitive disadvantages likewise make it difficult to retain black faculty when hired. (P.A. 136a-38a; T. 3425-26, J.A. 1681-83; T. 3940-50, J.A. 1827-34)

The imposing difficulties confronting the predominantly white universities notwithstanding, there is compelling statistical evidence of affirmative action in the hiring process. Since 1974, the percentage of blacks hired significantly exceeds the black representation in the qualified labor pool. Despite the higher turnover rate for blacks than for whites, black representation statistically comports with the relevant nationwide labor market for faculty employed since 1974.[11] (P.A. 138a, 199a; T. 4237-42, J.A. 1861-65)

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clearinghouse. Yet the State implemented one for a time and it did not work. (T. 951-53, J.A. 1445-47)

[11] While such statistical evidence does not specifically apply to administrative positions alone, private petitioners' administrative staff contentions improperly extricate administration from the State's overall affirmative nondiscriminatory employment commitments. Private petitioners also improperly

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d. *Institutional Resources.* The State disputes the relevance of institutional differences in a diverse statewide system of public higher education with genuine nondiscriminatory admissions and operational policies. The United States' comparison of resources according to predominant racial presence notwithstanding, the United States ultimately agrees that there is no legal obligation "to correct disparities between what was provided historically black schools – in terms of funding, programs, facilities, and so forth – and what was provided historically white schools." (U.S. Brief at 32) Private petitioners still insist, however, that resources must be redistributed to remedy the alleged "discrimination in resource allocation" to which blacks are subjected. Institutional differences do exist, but the record establishes such differences do not establish "discrimination." Blacks themselves are substantial beneficiaries of the educational opportunities nondiscriminatorily afforded by the comprehensive universities possessed of "superior" resources.

i. *Missions.* Definition of mission defines institutional purpose and scope in relationship to instruction of students, research and public service. There is no dispute

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emphasize the presence of substantial numbers of black faculty at the predominantly black universities. The "pull of the umbilical cord" to return to predominantly black institutions no doubt substantially contributes to such black faculty presence; many feel very strongly about the preservation of predominantly black institutions; they possess a missionary commitment to the young blacks in attendance at such institutions. (T. 3964-67) In any event this circumstance cannot be attributed to State failure to expend reasonable efforts to attract qualified black faculty to the predominantly white universities.

that distinctions in institutional mission are commonplace within public systems of higher education;[12] that the Board's assignment of differential missions is educationally reasonable; and that the distinctive mission assignments do not evidence purposeful discrimination. (P.A. 193a) Private petitioners do erroneously assert that the 1981 mission designations discriminate against blacks by preserving a less expansive program scope at the predominantly black universities.

Again, this private petitioner assertion is first an institutional contention. It ignores the fact that many blacks enjoy the educational opportunities at the comprehensive universities. It is true that the 1981 mission designations limited the predominantly black universities. It is equally true, however, that the scope of the designations "put boundaries around all institutions." (T. 3654-56, J.A. 1744-45) Moreover, the 1981 mission designations contemplated a "more comprehensive" status for predominantly black Jackson State University than for predominantly white Delta State University and Mississippi University for Women. (Exh. Bd-274, J.A. 1253) Furthermore, the Board envisions continued enhancement of Jackson State University's urban mission,[13] including

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[12] In the words of one of petitioners' key experts: "The unique character of American higher education is embodied in the concept of diversity. Diversity is the quality that differentiates among colleges and universities. It is the quality of distinctiveness. This quality says that there is no better or best kind of collegiate institution; there are only different kinds, often with different expenses." (T. 608, J.A. 1400-01; Exh. Bd-459 at 28, J.A. 1284-85)

[13] Jackson State University has also enjoyed past substantial mission enhancement. For example, during a 17-year

(Continued on following page)

meaningful graduate offerings with an urban emphasis and increased enrollments of better prepared students. (T. 938-43, J.A. 1442-43; Exh. Bd-274, J.A. 1255-56; Exh. US-683 at 8-10, J.A. 273-75)

The present missions of the State's universities are a product of historical development. Yet this circumstance is true of public institutions everywhere. There was no comprehensive black university during the *de jure* era, but the mere absence today of a major doctoral granting, predominantly black university does not indicate discriminatory mission assignments. Petitioners' own expert acknowledged that Jackson State is much more comprehensive than Delta State University and Mississippi University for Women. (T. 289, J.A. 1340) While they share the same mission designation, predominantly black Alcorn State University is more comprehensive than predominantly white Mississippi University for Women. (T. 272-73) Petitioners offered no evidence addressing the educational justification for, or the educational feasibility of, a fourth and predominantly black major doctoral granting institution or any reassignment of existing institution missions.

ii. *Funding*. State funding of basic university operations is based upon a formula appropriately tied to the

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period through 1984: student enrollment tripled; faculty size and quality materially increased; five new schools were established; the graduate school grew from a single master's degree in school administration to 35 master's degrees, 15 specialist's degrees and a doctorate in early childhood education; monumental physical expansion occurred. (P.A. 139a; T. 4381-84, J.A. 1877-79) One United States expert went so far as to state that "Jackson State has made about as much progress as any institution in the country." (Exh. Bd-463 at 108-09, J.A. 1302)

educational activities of the respective universities.[14] It is undisputed that the Board's funding process adheres to commonly applied, reasonable educational criteria. The educational expectation is that institutions with greater program breadth and research emphasis receive greater funding and thereby reflect the higher per student total revenues and expenditures. (P.A. 196a)

The Board so explained its funding practices. To further prove the absence of discrimination the Board compared Mississippi's institutions with their regional "peers." These unchallenged analyses reveal that at least for the past decade the State's comprehensive universities have been underfunded when compared to institutions of similar mission. They further revealed, however, that Jackson State University and the four regional universities, two of which are predominantly black, have been overfunded under similar comparisons.[15] (P.A. 162a; T. 3347-55, J.A. 1677-78) Thus, while funding for the three comprehensive universities is the predominant basis for petitioners' assertions, these institutions are the very ones being treated least favorably financially upon any consideration of institutional mission.

Private petitioners fare no better by comparing students rather than institutions. Their broad allegation regarding alleged less favorable financial treatment of black students than white students obviously does not

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[14] At the time of trial the academic discipline, student credit hours, and level of instruction primarily drove the formula.

[15] Further, no racial correlation whatever can be inferred from an analysis of the four institutions designated as regional universities. Petitioners' comparisons of these institutions with each other yielded in their own words a "very mixed pattern." (T. 542-43)

hold true under their own premise for the thousands of black students enrolled in the predominantly white comprehensive universities. Such an attempted direct focus upon students, while preferable to the irrelevant institutional analyses, nonetheless itself demonstrates an inherent fallacy in petitioners' resource contentions. Black students are allegedly "treated better financially" than other black students, white students better than other white students, white students better than some black students, and black students better than some white students. (P.A. 196a-97a; T. 640-41, J.A. 1406-07) This would obviously be true in any system of universities with differential missions.[16]

iii. *Programs*. Since the mid-1970's the State has subjected the quality, number and distribution of academic programs to much professional study. Doctoral programs were thoroughly reviewed from 1976 through 1979; they were again reviewed in 1985 and 1986. All programs below the doctoral level except certain professional

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[16] Petitioners declined to assess the educational justification for Board allocation of funds or the relative financial abilities of institutions to fulfill their educational missions. Further, the alleged "accumulated deficit" is not among the noncomprehensive universities. There is no correlation by race among the noncomprehensive universities in funding or with respect to areas in which funds have historically been expended. Yet, petitioners' own expert had written prior to his engagement in this case that comparisons of institutions with different missions "are largely without merit. They compare the proverbial 'apples and oranges,' for [such] universities are not similar; they are expected to do quite different things." Consequently, in studies before this litigation the expert was careful to adjust for distinctions in mission when making any comparisons across mission lines. (T. 604-18, J.A. 1398-1405; Exh. Bd-459 at 28, J.A. 1285)

programs were subject to an extensive six-year review commenced in 1980. The process involved not just substantial institutional participation but also extensive outside professional consultation. (P.A. 142a-43a; T. 3602-13, J.A. 1733-38)

The comprehensive review process resulted in the elimination of over 450 degree programs. Doctoral offerings at the predominantly white comprehensive universities have been reduced 50%. The overall offerings at all universities have been reduced by 1/3 with 69% of these terminated offerings having been at the predominantly white comprehensive universities. Only 11% of the programs eliminated were at predominantly black institutions. (T. 3608-10, J.A. 1736; Exh. Bd-263, Chap. I at 5, J.A. 1244-45) The Board concluded that the programs remaining were "of the highest quality possible with the available resources." (Exh. Bd-263 at Introd., J.A. 1237)

The question of unnecessary duplication was of "central concern" to the Board in the process. The Board was and remains highly conscious of its statutory charge to offer "the broadest possible educational opportunities . . . without inefficient and needless duplication." (Exh. Bd-263 at Introd., J.A. 1237) Following the review, the Board concluded further elimination of programs in significant numbers would both endanger institutional abilities to fulfill their missions and materially decrease access to quality academic offerings. (Exh. Bd-263 Chap. II at 5, J.A. 1245)

The United States asserts that "Mississippi's unnecessary duplication of programs at historically white and historically black schools serves no useful academic function while continuing and reinforcing Mississippi's dual system of higher education." The United States did not genuinely attempt, however, to prove such circumstances.

Instead, petitioners predicated their challenge upon a quantitative listing of programs as between the predominantly white and predominantly black universities. Petitioners did not evaluate program need, demand, cost, courses, faculty or level of difficulty of instruction. (T. 256-57, J.A. 1332-33; T. 266-67, J.A. 1336-37) Petitioners failed to investigate whether elimination of any additional program would affect access to higher education for Mississippi citizens. They scrupulously avoided any judgment as to whether any program should have been awarded, terminated, consolidated or transferred.[17] (T. 257-58, J.A. 1333)

Petitioners' definition of "duplication" had nothing to do with the educational rationale for a program's existence. Petitioners elected to define "duplication" as any instance where at least one predominantly black university and one predominantly white university offered courses in the same HEGIS discipline.[18] (T. 268, J.A. 1337) According to petitioners, "unnecessary" program duplication includes any offering by more than one institution in any discipline outside the basic core arts and

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[17] Furthermore, petitioners' institutional comparisons were not even based upon educational criteria but rather upon mere racial identifiability of institutions. Indeed, the witness "could not think" of any alleged basis but race for his group comparisons of the three predominantly black universities with the five predominantly white universities. (T. 263-64, J.A. 1335-36) He, however, "said nothing at all about the reasoning or motivation" underlying program actions. (T. 266, J.A. 1336)

[18] "HEGIS" refers merely to a classification system frequently used in higher education to identify the general subject matter of programs. It does not address the specifics of course content, instruction or other fundamentals which would reflect the actual scope of the program. (T. 73-74)

sciences.[19] Petitioners also maintained that all duplication at the master's level, regardless of discipline, is unnecessary. (T. 275-76, J.A. 1338-39) Thus, they advanced a statistically meaningless concept of common curricula within the system. Every institution duplicates other institutions.[20]

The record clearly reveals there is no pattern of duplication associated with the racial identification of institutions. There is no more duplication between the predominantly black institutions and the predominantly white institutions than one would expect to find when comparing any three institutions with any five institutions regardless of racial identification. Among the noncomprehensive universities, the three predominantly black universities are duplicated less than any other set of noncomprehensive institutions. (T. 4198-99, J.A. 1851-52; T. 4203-04)

Petitioners' distinctions in program quality or purported findings of program inequality are also solely

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[19] This wholly unrealistic definition means that petitioners considered any instance of a predominantly black and predominantly white university offering a course in, for example, business and commerce, accounting, business statistics, banking and finance, investment and securities, business management and administration, real estate, insurance, elementary education, or secondary education to be "unnecessary" program duplication. Stated differently, eight institutions could offer Russian, anthropology, or astrophysics without unnecessary duplication, but no two institutions could offer accounting, banking and finance or secondary education. (T. 275-77, J.A. 1338-39)

[20] The Board proved there are some 162 dual curricular systems in Mississippi under petitioners' definition. (T. 4197-98, J.A. 1851)

functions of institutional mission. The differences in petitioners' measures of program quality are not associated with race, but simply demonstrate the difference between comprehensive and noncomprehensive universities. There is no pattern among the noncomprehensive universities with respect to race. (T. 4206-07, J.A. 1852-53) Further, the pattern of program reduction resulting from program review has been less among the predominantly black institutions than among the predominantly white institutions. (T. 4213-14, J.A. 1853-54)

Private petitioners challenge the State's land grant programs because the predominantly white Mississippi State University possesses greater land grant resources than predominantly black Alcorn State University. Desegregation within Mississippi's land grant community is clearly not their focus. They ignore the blacks studying agriculture at MSU. They did not even attempt to address the motive, intent, good faith or educational justification underlying the State's present allocation of land grant resources. (T. 835-41, J.A. 1428-31) It was the State, and not petitioners, who pursued USDA input in this proceeding. Through the former administrative heads of the USDA's Cooperative State Research Service and Extension Service, the State proved its operation of these two fundamental programs was entirely consistent with USDA policies and practices.[21] (T. 3123-29, 3142-46, J.A.

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[21] These findings likewise rebut the United States one-sentence challenge alleging "extraordinary duplication." Under federal oversight the two universities jointly developed a single comprehensive program of agricultural research for the State. (P.A. 154a; T. 3104, J.A. 1414-15; T. 3142-46, J.A. 1664-67) The Extension Service of the USDA has insured that the two universities' extension programs are supplementary and not duplicative. (T. 3284, J.A. 1672) *See* Exh. Bd-263 at Chapter II (Board explanation for agriculture programs).

1661-67; T. 3295-99, J.A. 1673-76) The record plainly establishes that land grant resources have been nondiscriminatorily allocated consistent with legitimate educational and federal government criteria.[22] (P.A. 150a-56a, 198a)

iv. *Facilities.* Private petitioners' facilities contentions perhaps prove better than any other their refusal to acknowledge that substantial State efforts eventually satisfy the duty to disestablish, no matter how defined. The record makes clear no racial inference can be drawn from the distribution of facilities. (P.A. 163a-66a, 195a; T. 3862-98, J.A. 1806-15) Jackson State University's president attested to the "monumental physical expansion" enjoyed by the institution during his 17 year tenure. (*supra* at 20-21 n.13) Petitioners' own expert readily admitted: "There has been *equitable treatment* in recent years" of the predominantly black institutions, for "*it's clear* that physical facilities resources *in the past 30 years* in Mississippi have been allocated equitably from the viewpoint of racial characteristics of the institutions." (T. 493-94, J.A. 1379) Petitioners' assertion of the "inferior character" of the predominantly black universities' facilities is at most a function of institutional mission. They do not bother to dispute, apart from their mission challenge, the district

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[22] Petitioners' references to program offerings at off-campus centers are misleading and pointless. The Board has almost entirely curtailed predominantly white institution participation in off-campus centers. Indeed, Board actions were such that petitioners limited their "off-campus center" proof to the pre-1981 period. Despite the district court's stated expectation and United States counsel's assurance that any such petitioner contentions would be brought current, petitioners failed to do so. (T. 938-40, J.A. 1442-43; T. 3432-35, J.A. 1683-86; T. 77-79, 251-53; Exh. U.S. 757)

court's finding that these universities possessed facilities of a "character" commensurate with their mission. (P.A. 166a)

3. *The District Court's Decision.* The district court conducted a five-week bench trial and comprehensively considered the testimony of 71 witnesses and some 56,700 pages of exhibits. (P.A. 109a) The court ultimately held that the "current actions on the part of the [State] demonstrate *conclusively* that the [State is] fulfilling [its] affirmative duty to disestablish the former *de jure* segregated system of higher education." (P.A. 201a) In so holding, the court flatly stated that "the affirmative duty to dismantle a racially dual structure in the elementary and secondary levels applies also in the higher education context." (P.A. 170a-71a) Recognizing, however, the distinct attributes of higher education, the court declined to find any "level of racial mixture" to be "necessary to 'effectively' desegregate the system." (P.A. 171a) Nevertheless, the court plainly concluded that student enrollment, faculty employment, and staff hiring patterns must be examined. It simply determined that "greater emphasis should instead be placed on current state higher education policies and practices in order to insure that such policies and practices are racially neutral, developed and implemented in good faith, and do not substantially contribute to the continued racial identifiability of individual institutions." (P.A. 177a)

The court found that the State had indeed implemented "race-neutral policies and procedures" involving student admission, student recruitment, faculty employment, staff hiring, and resource allocation. Moreover, the court concluded the State "[has] also undertaken substantial affirmative efforts in the areas of other-race student and faculty-staff recruitment and funding and facility

allocation."[23] (P.A. 201a) The court noted petitioners' institutional enhancement claims sounded much like the assertion of Fourteenth Amendment rights on behalf of state political subdivisions, rights which just do not exist. (P.A. 190a-91a) Nonetheless, the court made the institutional analyses suggested by petitioners but found no disparities in resources related to the "racial identifiability" of institutions.[24]

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[23] Among its many specific factual findings substantiating its ultimate conclusions, the district court found with respect to student admission and recruitment: (i) the State's current admission policies were adopted for nondiscriminatory purposes and are "inherently reasonable and educationally sound" (P.A. 179a, 181a, 185a); (ii) "the State has used every reasonable means at its disposal in its recruitment efforts" (P.A. 187a); and (iii) the continued identifiability of institutions by student racial makeup is the "result of a free and unfettered choice on the part of individual students." (P.A. 187a) The court likewise concluded that no "additional minority faculty and staff recruitment procedures" exist which the State "could implement which would assure greater minority faculty and staff representation at the predominantly white institutions and minority staff representation with the Board of Trustees' own organization." (P.A. 199a)

[24] For example, the court's factual findings included: (i) "the current mission designations are rationally based on sound educational policies" (P.A. 193a); (ii) petitioners failed to prove any placement of academic programs associated with race or that any program reallocation "would be feasible, educationally reasonable, or would offer any hope of substantial impact on student choice" (P.A. 194a); (iii) no racial pattern exists with respect to the provision or condition of physical facilities (P.A. 195a); (iv) "while differences in level of funding obviously exist, these differences are not accountable in terms of race, but rather are explained by legitimate educational distinctions among institutions" (P.A. 196a); and (v) the differentiations made in land grant programs are "educationally sound and are not motivated by discriminatory motive." (P.A. 198a)

4. *The Court of Appeals' Decision.* The court of appeals plainly stated at the outset of its opinion the ultimate basis for its affirmance: "Finding that the *record makes clear* that Mississippi has adopted and implemented race neutral policies for operating its colleges and universities and that *all students have real freedom of choice* to attend the college or university they wish, we affirm." (P.A. 2a) (emphasis added). Like the district court, the court of appeals acknowledged that "Mississippi was . . . constitutionally required to eliminate invidious racial distinctions and dismantle its dual system." (P.A. 13a) Similar to the district court, the appellate court emphasized, however, that "universities are not simply institutions for advanced education. They differ in character fundamentally from primary and secondary schools." (P.A. 23a) The court concluded that delineation of the duty to disestablish must necessarily honor the distinctive attributes of higher education, particularly freedom of choice and institutional diversity. (P.A. 23a-26a) The appellate court read *Bazemore*,[25] in conjunction with *ASTA*,[26] to be the proper assessment of this " 'wholly different milieu' of a voluntary association." (P.A. 25a) Because Mississippi, in thought, word and deed, discontinued "prior discriminatory practices" *and* adopted *and* implemented "good-faith, race-neutral policies and procedures," the court of appeals held that the State had satisfied its affirmative duty to disestablish. (P.A. 26a)

It cannot be overlooked that the court of appeals did not stop with definition of the legal duty to disestablish;

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[25] *Bazemore v. Friday*, 478 U.S. 385 (1986).

[26] *Alabama State Teachers Ass'n v. Alabama Public School and College Auth.*, 289 F. Supp. 784 (M.D. Ala. 1968), *aff'd per curiam*, 393 U.S. 400 (1969).

it scrutinized the record to assure the presence of, and the use and encouragement of, genuine good-faith, race-neutral policies which afford "real freedom of choice." The court saw two components of the system as bearing most directly on the presence of "true" student choice: institutional mission designation and student admissions policies. The court of appeals found "the record amply supports the findings of the district court that the [institutional mission] designations are commonly used, educationally sound, and not motivated by discriminatory intent." (P.A. 31a) The court held "the district court gave full consideration to all aspects of the admissions process"; and it concluded district court findings that the "current admissions policies and procedures in effect in Mississippi universities were adopted and developed in good faith and for nondiscriminatory purposes" were not clearly erroneous. (P.A. 34a-35a)

The en banc court also found statistical parity in respondents' faculty employment, noted the genuine commitment to increase black employment at the predominantly white universities, and acknowledged the substantial difficulties inherent in minority faculty recruitment. (P.A. 35a-36a) The court of appeals had "nothing to add" to district court findings concerning alleged "disparities between the historically black and historically white institutions regarding program offerings and duplication among universities and branch centers, faculty, funding, library volumes, facilities, and land grant programs," with only one exception. (P.A. 36a) The court of appeals did find institutional "disparities" today to be "reminiscent" of the segregated system, but only in the sense that present institutional mission designations cannot be totally extricated from an institution's past. The court stated that such institutional distinctions do not

"den[y] equal educational opportunity or equal protection of law," for respondents "have adopted good-faith, race-neutral policies and procedures and have fulfilled or *exceeded* their duty to open Mississippi universities to all citizens regardless of race." (P.A. 37a) (emphasis added). The en banc court rejected outright the private petitioner suggestion that such institutional differences require resource allocations to universities according to race to make the predominantly black universities "equal" to the predominantly white comprehensive universities. (P.A. 37a)

## SUMMARY OF ARGUMENT

The legal principles which govern this controversy are not best analyzed in the abstract. They are inextricably tied to the facts in Mississippi. Just as Mississippi once promoted an unconstitutional system of higher education with schools of higher learning reserved solely for whites or solely for blacks, the State now affords real freedom of choice extending to all students and to all schools. Today's system, in policy and in fact, provides open, unimpeded access for all with no barrier on account of race. More than mere race neutral policy prevails; for most of two decades there has been admirable State encouragement directed to desegregation. It may be that Mississippi was not required to go beyond adoption and implementation of race neutral policies so as to promote and encourage the exercise of choice in favor of an "other-race" institution. But it did. Thus, the State does not have the burden of arguing a legal standard applicable to less persuasive facts.

The duty imposed on Mississippi to dismantle or disestablish its former system of de jure segregation has

been fulfilled. Mississippi's existing system is constitutional because there is no evidence of present intentional discrimination. Continuing racial identifiability of institutions resulting from individual student choice does not equate to unconstitutionality because the constitutional vice of state-imposed segregation has been eliminated. There exists unfettered, individual choice in Mississippi. The trial record reflects a commitment to the operation of a statewide system dedicated to the enhancement of integrated higher education opportunities coupled with the goal of quality education.

*Bazemore* best speaks to the fulfillment of the State's duty to disestablish in a setting, *i.e.*, public higher education, where individual choice traditionally plays a significant role and, indeed, is consistent with laudable educational objectives. *Bazemore* heeds *McLaurin*. *Bazemore* honors *Brown*. *Bazemore* appropriately distinguishes *Green*. Equal protection is a fact where equal opportunities afforded by the State are genuinely available to all on equal terms. Neither the Constitution nor Title VI require more than the fact of equal protection.

The United States challenges the standards for admission to the respective universities but in doing so, necessarily ignores the record. Present-day admissions standards exist for reasons unrelated to the "Meredith era." Even so, they are distressingly modest. The evidence is that virtually all black applicants to predominantly white universities are accepted. There is no evidence that black students are forced to apply to a predominantly black university. Admission standards are no more unconstitutional "vestiges" or "remnants" of past de jure segregation than class attendance and class examination requirements.

The United States contends, again in the teeth of the findings below, that there are so-called "duplicative" programs in place which arguably impede further desegregation. Stripped of rhetoric, the contention is that it is unconstitutional for a single predominantly black and a single predominantly white university to both offer a course in business or education. A choice among institutions which offer business and education is no more an unconstitutional "vestige" or "remnant" than a choice between institutions which offer English, history, mathematics, social studies and science.

The private petitioners alone continue to press for more than free choice among all institutions including the comprehensive universities. The United States does not join in the suggestion of the private petitioners that black students have a constitutional right not only to choose a predominantly black institution but also a constitutional right upon enrollment to find buildings, grounds, programs and accoutrements equal to the comprehensive university the students could have chosen in the first place. Putting aside questions of educational policy and educational reasonableness or financial capability, the assertion that the Court must compel the State to provide at least equal resources to schools with a predominantly black population as a matter of constitutional or statutory necessity deserves short shrift.

## ARGUMENT

### I. Mississippi has fulfilled its duty under the Fourteenth Amendment to disestablish state-imposed segregation in higher education through the adoption and years of implementation of good-faith, genuinely nondiscriminatory policies which do not contribute to institutional racial identifiability.

#### A. The constitutional duty to disestablish state-imposed segregation in higher education may be satisfied by discontinuing prior discriminatory practices and implementing good-faith, race-neutral policies and procedures.

Definition of a state's duty to disestablish de jure racially separate systems of higher education must focus upon the constitutional vice of state-imposed segregation. The crux of the inquiry is what is required of a state to assure genuine equality of treatment of similarly situated citizens. A state must of course admit black applicants to public institutions of higher education "under the rules and regulations applicable to other qualified candidates." *Florida ex rel. Hawkins v. Board of Control*, 350 U.S. 413, 413-14 (1956); *Sweatt v. Painter*, 339 U.S. 629 (1950); *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938). This Court has not suggested, however, any duty of "disestablishment" for statewide higher education beyond good-faith nondiscriminatory policies and practices. Instead, the Court has expressly recognized "a vast difference – a Constitutional difference – between" state-imposed racial bars and racial identifiability continuing on account of individual choice. *McLaurin v. Oklahoma State Regents*, 339 U.S. 637, 641 (1950).

The assertion that the Constitution requires no more than equal treatment is not to beg the determinative question of how the duty to disestablish is to be defined.

Mississippi acknowledges a duty to dismantle its dual system derived from *Brown v. Board of Education*, 347 U.S. 483 (1954). The emphasis on nondiscriminatory policies is to say, however, that *Brown* itself went no further. *Brown* identified the constitutional right as the "availability on equal terms" of the educational opportunities afforded by the State. *Id.* at 493. The constitutional vice *Brown* condemned was state-imposed separation of the races. The judicial charge was "to effectuate a transition to a racially nondiscriminatory school system," one which recognized that "at stake [was] the personal interest of [black students] in admission to public schools as soon as practicable on a nondiscriminatory basis." *Brown II*, 349 U.S. at 300-01. This Court's decisions mandating nondiscriminatory maintenance of public parks and facilities are to the same specific effect. *E.g., Watson v. City of Memphis*, 373 U.S. 526, 529-30 (1963).

To be sure, *Green v. County School Board of New Kent County*, 391 U.S. 430 (1968), and its progeny in public primary and secondary education, rest on *Brown;* but neither *Green's* rejection of a freedom of choice plan that showed a lack of good faith, *Swann's* rejection of race-neutral policies imposed on a "loaded game board," nor any other grade school decision of this Court require state actions intended to manipulate racial presence in the altogether different arena of public higher education. Indeed, this Court long ago recognized that higher education cannot be analyzed, tested or remedied precisely as elementary education. You have specifically grouped parks *and state universities* to distinguish them from elementary and secondary schools because desegregation of parks and state universities "do not present the same kinds of cognizable difficulties inhering in elimination of racial classifications in schools, at which attendance is *compulsory*, the adequacy of teachers and facilities crucial,

and questions of geographic *assignment* often of major significance." *Watson*, 373 U.S. at 532 n.4.

Consequently, it is this Court's explicit sanction in *Bazemore* of nondiscriminatory policies where individual choice determined participation that delineates the duty to disestablish in higher education. *Bazemore* plainly identifies the duty to disestablish state-imposed segregation in noncompulsory state-sponsored educational programs. Prior to 1965 the North Carolina Agricultural Extension Service *assigned* students according to race for participation in 4-H or homemaker clubs. Thereafter "in response to the Civil Rights Act of 1964 the Service discontinued its segregated club policy and opened [the clubs] to any otherwise eligible person regardless of race." 478 U.S. at 407. Nevertheless, "a great many all-white and all-black clubs" remained.

The Court's holding based on these facts could not be clearer: "[T]his case 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." 478 U.S. at 408. In so holding the Court focused not on the alleged continuance of "discriminatory effects" of state-imposed segregation but on the absence of evidence of present discrimination. The Court did not remotely require any comparative examination of program duplication[27] or the relative attractiveness of any club activity to blacks and whites. The Court neither undertook nor suggested any determination whether all "practicable" efforts had been

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[27] Petitioners claim *Bazemore* rests on the absence of differences among clubs. If the clubs were identical, North Carolina was guilty of "program duplication" far more pervasive than that which allegedly exists in Mississippi.

expended to alter the racial makeup of clubs. Instead, the Court unhesitantly rejected application of *Green* to the "wholly different milieu" of noncompulsory educational programs. The Court emphasized that your "cases requiring parks and the like to be desegregated lend no support for requiring more than [discontinuation of prior discriminatory practices and adoption of a wholly neutral admissions policy.]" 478 U.S. at 408.

In what was admittedly a summary affirmance, this Court also recognized material distinctions between compulsory lower education and noncompulsory higher education in *Alabama State Teacher's Association v. Alabama Public School and College Authority*, 289 F. Supp. 784 (M.D. Ala. 1968), *aff'd per curiam*, 393 U.S. 400 (1969) (*ASTA*). On the heels of *Green*, the three-judge court in *ASTA* concluded that the duty to disestablish or "dismantle" a dual higher education system is necessarily fulfilled by the adoption and implementation of good-faith nondiscriminatory practices. Justice Douglas' specific dissent from this Court's summary affirmance is instructive; he dissented from limiting the duty imposed upon higher education and from failing to apply the full duty imposed upon elementary and secondary education.[28]

Further, the well-reasoned rationale of *ASTA* to which the *en banc* court of appeals adhered is all the more compelling in light of your subsequent decision in *Bazemore*. Student choice in higher education necessarily requires that the student "face the full range of diversity

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[28] The court of appeals correctly observed that the Court's summary affirmance of *Norris v. State Council of Higher Education for Virginia*, 327 F.Supp. 1368 (E.D. Va.), *aff'd*, 404 U.S. 907 (1971), is not inconsistent with *ASTA*. Unlike *ASTA*, the lower court in *Norris* found that state action had both a discriminatory *"purpose* and effect." (P.A. 18a)

in goals, facilities, equipment, course offerings, teacher training and salaries, and living arrangements" which historically have marked higher education throughout the Nation. *ASTA*, 289 F. Supp. at 788. Such a role for student choice obviously stands in even starker contrast to the student choice rejected in *Green* than did the element of choice honored in *Bazemore*. Elementary and secondary education is unique among public benefits. Unlike a college education, it is universally available. It is mandatory. It is rigidly controlled. Uniformity, rather than diversity, is a fundamental goal. Due to this uniformity, as well as the geographically insular nature of school districts, courts view faculty, students and staff as fungible. This unique characteristic means that in many cases racial populations themselves can be readily manipulated.

Consequently, "the Court properly identified the freedom-of-choice program in *Green* as a subterfuge." *Keyes v. School District No. 1, Denver, Colorado*, 413 U.S. 189, 221 (1973) (Powell, J. concurring and dissenting). If school board officials have the ready capability to alter racial composition of elementary or secondary schools, by manipulation of faculty and student assignment, *and nonetheless* maintain identifiable "black" and "white" schools, such schools stand as persuasive evidence that the school board actually intends to maintain segregation. It was such continuous, obvious and intentional efforts to maintain segregation that prompted *Green*. The Court showed impatience with a recalcitrant school board which refused to implement feasible and educationally sound measures to end state-imposed segregation in a two-school system. *Green* remains a classic example of

utilizing available and practical means to insure immediate integration of schools within an insular school district. It does not forbid any unlawful conduct other than intentional discrimination.

Indeed, Justice Scalia so explained *Green* and demonstrated *Bazemore's* plain applicability to noncompulsory, nonfree public higher education. Justice Scalia observed:

> Our analysis in *Basemore v. Friday* . . . reflected our unwillingness to conclude, *outside the context of school assignment,* that the continuing effects of prior discrimination can be equated with state maintenance of a discriminatory system. There we found both that the government's adoption of "wholly neutral admissions" policies for 4-H and Homemaker clubs sufficed to remedy its prior constitutional violation of maintaining segregated admissions, and that there were no further obligations to use racial reassignments to eliminate continuing effects – that is, any remaining all-black and all-white clubs. . . . "[H]owever sound *Green* may have been in the context of the public schools," we said "it has no application to this wholly different milieu."

*City of Richmond v. J. A. Croson Company,* 488 U.S. 469, 525 (1989) (Scalia, J. concurring) (emphasis added).

The foregoing demonstrates that private petitioners miss the mark when they deny "principled bases" exist on which to distinguish disestablishment of state-imposed segregation in higher education from elementary education.[29] They misconstrue the "restoration" of

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[29] The court of appeals properly observed that heeding the distinctions is not merely a matter of identifying the proper " 'means' of eliminating discrimination." (P.A. 23a-24a)

rights to which blacks today are entitled as the result of discriminatory practices of another era. Blacks have no constitutional right to choose predominantly black universities with resources comparable to predominantly white universities in order to be free of discrimination.[30] The position to which blacks are entitled is one of freely choosing which institution to attend and freely competing for admission without consideration of their race. Whites today enjoy no greater rights.

Petitioners further erroneously equate continued "racial identifiability" of universities at which genuine nondiscriminatory policies prevail to the "continuation" of the de jure system. There is no constitutional right to any particular racial mix or constitutional obligation to redress racial identifiability resulting from individual choice. *Pasadena City Board of Education v. Spangler,* 427 U.S. 424, 434, 436 (1976). Racial identity alone is not unconstitutional even in elementary education. *Id.; Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 24-26 (1971). *Bazemore* precludes private petitioners' ironclad presumption that past discrimination alone causes an unlawful present racial configuration.

Moreover, private petitioners' belated attempt at the end of their brief to distinguish *Bazemore* is unavailing. Their advancement here of purported "remedial possibilities" while none were allegedly urged in *Bazemore*

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[30] The court of appeals' opinion includes a devastating rejection of the notion of alleged institutional rights inherent in petitioners' resource contentions. (P.A. 28a, 37a) The district court's similar observations are equally poignant. (P.A. 190a-91a) The United States itself appropriately concedes there is no constitutional duty to correct institutional disparities or to expend efforts toward making the predominantly black universities "equal." (U.S. Brief at 32-33) Little else need be said.

skirts the threshold *liability* determination of whether a constitutional violation exists. The issue in *Bazemore* was clearly whether the implementation of nondiscriminatory policies was sufficient, not whether reasonable additional actions could be implemented to alter racial identifiability. Nor can *Bazemore* be avoided by asserting higher education is more important than extension clubs. *Bazemore* makes no constitutional differentiation according to perceived value of the state-sponsored activity and no other decision of this Court suggests such a sliding scale.[31] Petitioners' third purported basis for distinguishing *Bazemore* concedes applicability of the *Bazemore* legal standard and merely raises factual questions rejected by both lower courts.

The United States apparently feels obliged to differ with the court of appeals on the scope of Mississippi's duty. Unable to disavow *Bazemore* and aware of the inapplicability of *Green*, the United States disingenuously articulates its suggested hybrid standard: remove "remnants" which "fetter free choice by race." There is no factual basis whereby the United States can self-servingly ignore the court of appeals and district court findings that "real freedom of choice" exists. Genuine nondiscriminatory policies by their very definition do not impermissibly fetter choice by race.

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[31] The court of appeals properly identified this relativistic contention "as an improper 'hierarchy of values,' " and aptly described "such a hierarchy [as] purely subjective, impossible to apply, and not founded on the Constitution." (P.A. 23a)

There may be a case in which it would be appropriate to prohibit a state from, in fact, continuing to fetter choice by race. This is not such a case.[32]

To the extent the United States poses a different legal standard than the court of appeals, the Government necessarily misconstrues both *Bazemore* and *Green*. In the teeth of its own acknowledgment that the *Bazemore* standard centering upon the discontinuation of prior discrimination and adoption of race-neutral policies applies (U.S. Brief at 29), the United States asserts that something more is nonetheless required here to assure choice is not fettered by race. The Government draws on *Green* to impose an obligation beyond *Bazemore* to assure choice is "real" even though it acknowledges *Bazemore* specifically refused to so extend *Green* to a traditionally noncompulsory arena. Despite *Bazemore's* obvious preoccupation with nondiscriminatory admissions in a traditional "choice setting," the United States argues for a "collective" interpretation of *Bazemore* and *Green* based upon *Green's* understandable insistence that an atypical "freedom of choice" plan "merely begins the inquiry."[33] Such

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[32] Again, the district court examined the evidence on this basis: "While student enrollment and faculty and staff hiring patterns are to be examined, greater emphasis should instead be placed on current state higher education policies and practices in order to insure that such policies and practices are racially neutral, developed and implemented in good faith, and *do not substantially contribute to the continued racial identifiability of individual institutions.*" (P.A. 177a) (emphasis added).

[33] The district court's joint reading of *Green* and *Bazemore* far better explains their relative applicability: "The court perceives no inconsistency with respect to the Supreme Court decisions *Green* and *Bazemore* and the *ASTA* decision. These decisions stand in harmony for the proposition that the scope

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posturing by the Government over the significance of alleged "discriminatory effects" is not just inconsistent with Justice Scalia's authoritative interpretation of *Bazemore*. It is ultimately at odds with the Court's plain recognition that *Bazemore* holds the "mere existence of single-race clubs in [the] absence of *evidence of exclusion by race* cannot create a duty to integrate." *City of Richmond*, 488 U.S. at 503.

Similarly, the United States' concluding assertion that "the mandate of the Equal Protection Clause is met once [there is] no discriminatory *prompting* from the State" is wholly unsatisfactory. The Constitution, and *Bazemore*, of course say nothing about discriminatory "prompting." It is discrimination which is prohibited. If "prompting" is anything other than present intentional discrimination, any attempted judicial identification of it is particularly unwarranted in higher education. As emphasized by the court of appeals, "universities are not simply institutions for advanced education." (P.A. 23a) A purported identification of "prompting" invites judicial invasion into the whole array of "educational policy decisions in which courts should not become involved." *ASTA*, 289 F. Supp. at 788. *See Board of Curators of the University of Missouri v. Horowitz*, 435 U.S. 78, 92 (1978) (courts being "particularly ill equipped to evaluate academic [decisions] warn[s] against judicial intrusion"). Particularly is this true when the uncontradicted record demonstrates some 15 years of

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of the affirmative duty to disestablish a former de jure segregated system of education is to be defined in accordance with the degree of choice individuals enjoy as to whether they wish to attend college at all and, if so, which one." (P.A. 175a)

genuine nondiscriminatory policies coupled with affirmative good-faith efforts to increase other-race presence.[34] The deference due even local elementary school boards requires courts not involve themselves in a wide range of higher education policy decisions absent compelling circumstances. *See, e.g., Board of Education v. Dowell*, 111 S.Ct.

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[34] The State has acknowledged a duty to disestablish state-imposed segregation; it has not disputed that the duty initially arose without the necessity of petitioner proof of discriminatory purpose as the result of State maintenance of the de jure system. But even if *Bazemore* as construed by the State does not control, all actions throughout the 1970's and 1980's by altogether different boards and university officials do not bear a presumed discriminatory taint as the result of discriminatory acts of the 1950's and early 1960's. Such acts, or even failures to act, should not be evaluated absent consideration of evidence of purposeful discrimination. Certainly at some point in time after years of good-faith nondiscriminatory policies the causal nexus between state-imposed separation of the races and racial identifiability evaporates or becomes so attenuated as to require proof of present intentional discrimination. Otherwise, purported constitutional "remedies that are ageless in their reach into the past, and timeless in their ability to affect the future" improperly result. *Wygant v. Jackson Board of Education*, 476 U.S. 267, 276 (1986). *See Columbus Board of Education v. Penick*, 443 U.S. 449, 470-71 (1979) (Stewart, J., concurring and dissenting) (passage of time militates against shifting of normal burden of proof). Cf. *Dowell*, 111 S.Ct. at 637-38 (evaluation of good faith of school board over time). Such considerations make the United States' call for the elimination of discriminatory "prompting" all the more unsatisfactory and private petitioners' demand for the total restructuring of the system because of institutional differences even more intolerable.

630, 637-38 (1991); *Dayton Board of Education v. Brinkman*, 433 U.S. 406, 410 (1977).[35]

Stripped of all pretense, the United States' own assertion must be construed to acknowledge that the duty to disestablish is fulfilled by the cessation of prior discrimination and implementation of nondiscriminatory policies.[36] The record here overwhelmingly establishes State fulfillment of this legal duty.[37]

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[35] Similarly, First Amendment considerations are not irrelevant. Assuming of course the existence of nondiscriminatory polices, universities are to remain free "to determine on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1956) (Frankfurter, J., concurring). *See Regents of the University of California v. Bakke*, 438 U.S. 265, 311-12 (1978) (academic freedom "long a special concern" of First Amendment). Nor should the Court wholly ignore First Amendment rights to freedom of association.

[36] Indeed, the United States was the major advocate of the position adopted by the Court in *Bazemore*. The United States urged rejection of *Green* because of the absence of state-dictated attendance. *Bazemore*, 478 U.S. at 416. Not surprisingly, shortly after *Bazemore* the United States is similarly on record in systemwide higher education desegregation litigation that "higher education is a voluntary activity [and] a state satisfies the Constitution by putting an end to discriminatory practices, and has no obligation to eliminate the vestiges of past discrimination." The United States specifically maintained "the state [has] no compelling interest in embarking on additional remedial action after it [has] established 'neutral admissions standards.' " *Geier v. Alexander*, 801 F.2d 799, 804 (6th Cir. 1986).

[37] The United States references Judge Higginbotham's special concurrence and dissent at the end of its brief. (U.S. Brief at 41) The Government alleges that if the lower courts had "answered the right question" they would have discovered "discriminatory remnants." Yet when the United States itself

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### B. The district court's finding that the continued racial identifiability of Mississippi universities persists today as the result of free and unfettered choice of students and personnel is not clearly erroneous.

The district court scrutinized the substantial evidence of Mississippi's genuine nondiscriminatory polices accompanied by good-faith affirmative efforts to encourage integration. It found that such policies have been administered by a governing board which is 25% black and on which blacks have assumed leadership roles. (P.A. 166a-68a) It unhesitantly concluded that the State has implemented race-neutral polices and substantial affirmative efforts with respect to student admission and recruitment, faculty employment, and resource allocation. (P.A. 201a) The district court specifically found Mississippi students possessed a "free and unfettered choice" of a public university. (P.A. 187a) The *en banc* court of appeals

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writes the "question" it only purports to identify two alleged "remnants," neither of which can be properly characterized as vestiges as explained below.

Moreover, with all due respect Judge Higginbotham's reading of *Bazemore* is hollow. (P.A. 40a) It ignores the basis upon which this Court found genuine choice to exist despite widespread racial identifiability. *Bazemore* held the State had "discharged its duty to undo its wrong" by discontinuing prior discrimination and adopting race-neutral polices. Judge Higginbotham improperly suggests a timeless continuum of judicial evaluation of the "effects" of state action on continued racial identifiability not contemplated by *Bazemore*. (P.A. 42a) Judge Higginbotham also unjustly accuses the lower courts of "denying any notion of perpetuation." (P.A. 43a) Both lower courts found Mississippi's genuine nondiscriminatory policies do not contribute to any continued racial identifiability.

also weighed the record carefully in its affirmation of the district court. The appellate court likewise concluded "all students have real freedom of choice." (P.A. 2a, 27a) The United States does not challenge a single district court student enrollment or personnel employment factual finding concerning the genuineness and substantiality of State race-neutral and affirmative action policies apart from admission standards. Private petitioners likewise say nothing about student recruitment practices apart from their admission standards contentions.[38]

**1. The nondiscriminatory, educationally reasonable current admission standards are not the cause of any continued racial identifiability of universities.**

"The current admission policies and procedures, including the particular use to which the ACT assessment is put, were not adopted for racially discriminatory purposes and are reasonable, educationally sound, and racially neutral. . . . Although the various institutions continue to be identifiable by the racial makeup of the

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[38] Private petitioners do include within their shotgun attack, however, assertions concerning employment at the predominantly white universities and treatment of blacks at the University of Mississippi. Such contentions have received the attention of two courts. The compelling statistical evidence of affirmative action in the faculty hiring process and overall parity in the labor force together with abundant evidence of genuine substantial affirmative employment recruitment efforts are simply insurmountable. (*supra* at 16-18) The selected individual and for the most part unwarranted complaints at the University of Mississippi do not rise to any semblance of "official" action, particularly in light of the substantial evidence of university policy and efforts to the contrary. (*supra* at 10, n.6)

student populations, this is not a substantial result of current admission practices and procedures but is instead the result of a free and unfettered choice on the part of individual students." (P.A. 187a) These determinative district court factual findings are unassailable. The United States erroneously asserts, however, the Board's mid-1970's actions "only formalized" a 1961 discriminatory standard. Despite having been twice rejected, private petitioners still specifically allege intentional discrimination. Private petitioners' depiction of lower court evaluation of the State's 1976 and subsequent admission actions as "totally arbitrary" is, however, itself completely unfounded. The contention that just because the State's original use of the ACT long ago may have been rooted in discrimination mandates a finding that today's admission standards implemented under totally different circumstances are intentionally discriminatory is clearly wrong. Both lower courts satisfied *Hunter v. Underwood*, 471 U.S. 222 (1985), to the letter. (P.A. 32a-33a, 178a-85a)

Nor may the United States presumptuously depict the State's present use of the ACT as a "remnant" or "vestige" of the de jure system. The record and lower court findings belie any assumption that the ACT is used today because it was utilized in 1961. Indeed, the proof obliterated any causal nexus between present admission policies and those of the "Meredith era." Altogether different boards have confronted altogether different circumstances and acted for altogether different reasons. (T. 3550-75, J.A. 1717-29; P.A. 8a-9a, 179a; *supra* at 13-16) Whatever the definition of a "vestige" may be, where all substantive links are destroyed a present condition cannot be termed an impermissible "effect" of the distant unconstitutional past.

The United States' challenges of the present admission standards beyond its incorrect vestige characterization are equally erroneous. The record flatly contradicts any assumption that the presently lower admission standards at the predominantly black universities are responsible for their "racial identifiability." More white students receive ACT scores between 9 and 14 than black students. (*supra* at 15-16) Further, before taking the ACT, students indicate their college preferences or "choices"; black students do not on any statistically significant basis first choose to attend a predominantly white university and subsequently switch to a predominantly black university after scoring below 15. (T. 4225-32, J.A. 1857-61) Moreover, virtually all black applicants to the predominantly white universities are admitted.[39] (*supra* at 15)

*Dothard v. Rawlinson* does not dilute the significance of such proof. The "automatic admission" challenge is a very narrow one. It just applies to students scoring 13 or 14, for "automatic admission" results at the predominantly black universities only for students scoring 13 or above. (Exh. Bd-183A, J.A. 1188-95) The record precludes any inference that "self-recognized inability" to meet the automatic admission criteria, as contrasted with the

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[39] Private petitioners' allegations of inadequate publication of the exceptions policies are inconsequential. The three comprehensive universities set forth the exceptions policies in their university catalogs. (Exh. US-818 at 4, US-821 at 44, US-920 at 21) Delta State University, while omitting the "high risk" exception in its bulletin, affirmatively contacts each student scoring below 15 who expressed an interest in the university before taking the ACT. (Exh. US-967 at 66-69, J.A. 800-02) Private petitioners' assertion of course ignores the thousands of students admitted since 1977 with scores below 15. (Exh. Bd-173, Bd-174)

overall admission standards, contributed to alleged disproportionate failure of blacks to apply to the predominantly white universities. Thousands of students have been admitted to all eight universities over the years under exceptions to "automatic" admission polices. Private petitioners similarly attribute the failure to apply to students taking the ACT more than once. To the extent such speculation is even entertained, students obviously take the ACT again to achieve a higher score, and there is no basis to infer that the level of the first score, particularly the 13 or 14, discourages application to a predominantly white university.[40]

Petitioner criticism of the exceptions to the threshold admissions requirements as "limited" is also misplaced.

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[40] No inference of discrimination can be drawn from the present existence of different test score requirements at the predominantly black and predominantly white universities. Apart from the proof that score requirements are not responsible for racial identifiability, petitioners ignore where predominantly black universities once stood and the dramatic progress made to date. The Board elected at the time of initial implementation in 1976 not to require the otherwise patently reasonable 15 because it posed a substantial risk of catastrophic decimation of *then existing* student enrollment at the predominantly black universities. At the same time, however, the Board and universities immediately moved toward the necessary increase in admission standards. Alcorn State University moved in steps from the 9 to a 13 and though not yet achieved once projected a 15. The Board's 1981 mission statement specifically emphasizes the necessity that Jackson State University decrease participation by "marginal students"; Jackson State University has gradually moved from the 9 to a 13 with projections of moving still higher. Mississippi Valley State University has moved from the 9 to a 13. (P.A. 123a-25a; T. 3564-66; Exh. Bd-179, Bd-274; Exh. US-849, US-851, US-852, US-960 at 102-10, 113-114, US-961 at 89-90)

First, the United States bases its contention upon its erroneous "remnant" characterization of the present admission policies. Second, the attack advocates admission of substantially greater numbers of students scoring below the indisputably modest 15. Yet this assertion runs directly contrary to the recognized justification for the 1976 adoption of the 15 in the first place. An adoption of the 15 did not alleviate university problems with poorly prepared students. Universities should be permitted to be universities. Courts should not nullify the modest "certification of credentials" represented by the 15.[41] (*supra* at 11-16)

The misleading contentions that a standard for automatic admissions incorporating both high school grades and the ACT would better serve the State's interests are also incorrect. The mere prediction of a probability that students with low ACT scores may obtain a passing grade is not the total educational picture.[42] Mere passage in college does not insure quality graduates or productive citizens. The level of university instruction being afforded has been a constant issue. Utilizing present

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[41] Amazingly, private petitioners even challenge the State's use of an ACT score of 9. The State does not argue that students at such a low level of academic development may not one day be highly productive citizens. Yet it should go without saying that students at such low levels are not presently prepared for university level instruction.

[42] It also should be recognized that there is no assertion that the ACT is "racially biased." Petitioners' own expert acknowledged it is "well known" the ACT predicts as accurately for blacks as for whites; ACT's comprehensive research is to the same effect. (T. 1931; Exh. Bd-189) It is undisputed that the ACT is a reasonable measure of the test taker's, whether black or white, present level of academic development.

student performance in college as the only basis for evaluating admission standards would be a circuitous exercise precluding any student quality improvement. The Board and Mississippi citizens have a substantial, legitimate educational interest in continually striving toward raising educational expectations at every stage of the process as mandated by the Department of Education's *Nation at Risk: The Imperative for Educational Reform.*[43] (*supra* at 16)

Moreover, the "success" of ill-prepared students reflects the universities' efforts – and expenditure of resources – to retain every student who enrolls. Low achieving students are carefully selected based upon multiple cognitive and noncognitive criteria. They then receive inordinate attention through costly remedial and developmental programs. Even though the record indicates such actual enrollment would not occur, admission of any appreciable number of students with ACT scores below 15 would necessitate substantial remedial education. Again, it plainly is not educationally feasible or desirable for universities, particularly the major doctoral universities, to maintain such expensive programs on a widespread basis.[44] (P.A. 124a; *supra* at 14)

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[43] Further, the State's data correlating ACT scores and freshman grade point averages indicates that ACT scores greater than 15 are needed at the comprehensive universities for there to be a genuine probability of obtaining the modest 2.0 grade average. (Exh. Bd-275; Exh. US-900a, 900d, 900l, 900m, 900n)

[44] This reality is of course also true for the predominantly black universities. As previously recognized, the commitment there is to raise the ACT standards. The problem should not be compounded by a lowering at the predominantly white universities.

Nor is petitioners' suggestion that a less discriminatory, more effective admission standard can be feasibly implemented supported by petitioners' own proof. The global assertion that other states use grades is certainly not sufficient.[45] Petitioners' testing expert declined to enter the real world of actual admissions policies preferring instead to criticize unreasonably any use of a "cut score." He never broached the ultimate issue of educational reasonableness of the admissions standards. Such consideration by his own admission "gets into a lot of other things." (T. 1921-28)[46]

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[45] States that use grades no doubt generally combine relatively high grades with such modest scores as a 15, if such low achieving students are automatically admitted at all. (T. 328-31) Mississippi should not be penalized for having no grade average requirement. Indeed, petitioners' own witness Dr. Elias Blake, president of the predominantly black Clark College and an active spokesman in higher education desegregation litigation, testified to utilization of the SAT equivalent of a 15 *and* a 2.0 grade average to define the "automatic" admission pool at his institution. (T. 2053-54, J.A. 1551-52) *See* College Entrance Examination Board, *The College Handbook 1991*, 28th Ed. (*e.g.*, historically black Florida Agricultural and Mechanical, 19 ACT (or 900 SAT) *and* 2.5 high school GPA; Florida State University, 23 ACT (or SAT of 1040)).

[46] The United States' hypothetical suggestion is in any event of no practical significance in Mississippi. As discussed above, students scoring as low as 9 are already eligible for admission. Grades and other criteria are already being used. Any emphasis upon "automatic" as opposed to exceptional admission is illusory. Nor should petitioners be heard to argue

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Ultimately it must be recognized that blacks disproportionately qualify for admission to universities because they disproportionately appear at lower levels of academic development upon graduation from high school. This regrettable circumstance cannot be laid, however, at the doorstep of public higher education. The socio-economic causes are multifaceted. Attempting to remedy these causes here would erroneously far exceed the scope of the alleged constitutional violation of respondents in this proceeding. *E.g., Milliken v. Bradley*, 433 U.S. 267, 282 (1977). A higher education system is under no legal obligation to "compensate" for infirmities at the elementary and secondary school levels or for other circumstances beyond its reasonable control. *United States v. LULAC*, 793 F.2d 636, 649 (5th Cir. 1986).[47]

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that use of a lower ACT would not constitute a lowering of standards. The developmental education probabilities have been noted. Petitioners themselves relied upon the ACT scores of students enrolled as a major criterion of institutional quality. (T. 131, J.A. 1321) Students, parents, educators, employers and the public at large unquestionably view them no differently.

[47] It is not insignificant, however, that the State does provide additional educational opportunities for the high school graduate not yet academically prepared for a university experience. More students attend the junior colleges than the universities. As many students transfer from the junior colleges to predominantly white University of Southern Mississippi as enroll as first time freshmen and Delta State University's junior class is substantially larger than its freshman class due to transfers, including significant numbers of students from a predominantly black junior college. The other universities recruit the junior colleges as well. (*supra* at 12) The district court understandably found that the transfer procedure is "not unreasonable or unduly burdensome." (P.A. 133a)

**2. The educationally reasonable assignment of missions and allocation of resources are not the cause of any continued racial identifiability of the universities.**

The importance and prevalence of diversity in higher education are undisputed. The educational reasonableness of the present missions of Mississippi's eight universities is not contested. Jackson State University's status as the State's only urban university possessed of a more comprehensive mission than either Delta State University or Mississippi University for Women is conceded. Private petitioners cannot dispute the absence of any racial correlation in resources among Alcorn State University, Delta State University, Mississippi University for Women, and Mississippi Valley State University, the State's four regional universities. (*supra* at 20-21, 27) The relative underfunding of the State's three comprehensive, predominantly white universities, when compared to other states' comprehensive universities, is uncontroverted. The relative overfunding of the States's noncomprehensive universities, three of which are predominantly black, on a peer basis is likewise unchallenged. (*supra* at 22)

Nonetheless, petitioners still maintain an unlawful correlation exists between racial identifiability and resources. The State disputes altogether the relevance of institutional differences in a statewide system of public higher education which maintains genuine nondiscriminatory admissions and operational policies. (*supra* at 41-42) But if relevant, this controversy does not focus upon whether students in some measure select a university based upon anticipated program of study or even according to physical facilities. Rather, the threshold question is whether the State's allocation of institutional resources *causes* present institutional racial identifiability. Even a *Green* approach

to higher education would require some showing that the addition or reallocation of resources offers a realistic and meaningful prospect of altering racial identifiability. No such showing exists on this record.

Private petitioners, but not the United States, purport to rationalize their challenge of resource allocations to the predominantly black universities with two hypotheses: (i) the alleged deficient resources inhibit desegregation; and (ii) the alleged inadequate resources deprive blacks at these institutions of equal educational opportunities. The first assertion is essentially that the predominantly black universities are predominantly black today because of resources. The supposition is that substantial institutional enhancement would materially alter the present racial identifiability of the predominantly black universities. Yet there is no demonstrable relationship in this record between resources and racial presence. There is no basis to infer that institutional resources affect blacks' choices any differently than they do whites' choices or vice-versa.[48]

Private petitioners' allegations of denial of "equal educational opportunity" arise from fundamental misapprehensions of the term's meaning in the context of public higher education. Petitioners define equal educational opportunity not just in the context of uniformly available alternatives but rather according to perceived benefits derived *after* the exercise of choice. Petitioners approach equal educational opportunity not simply in the context

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[48] Louisiana's experience likewise irrefutably demonstrates the total fallacy in the assertion that enhancement of the predominantly black institutions offers any hope of a material change in racial composition. (Brief Amici Curiae Charles E. "Buddy" Roemer, III, et al. at 20-24)

of participation in the statewide system but according to privileges available at the particular institutions selected. "Differences" in institutional resources may result in a "different" educational experience just as a host of non-resource factors may affect the educational experience. The experience at a smaller university may be better or worse than at a larger university. (*See* Exh. Bd-459, J.A. 1284-85) It is incongruous indeed for plaintiffs to even suggest that after a student makes his or her choice the student may constitutionally expect "the same" programs and facilities available at another university which would have been received had he or she first elected to attend the other institution. Petitioners are obviously asserting a nonexistent constitutional right.

Further, petitioners' "equality of opportunity" argument, when even modestly extended, yields absurd results. For example, the students at predominantly white Delta State University and Mississippi University for Women under such an approach are subjected to "unequal educational opportunities" as contrasted with those students not just at the predominantly white comprehensive universities but also at predominantly black Jackson State University. Students at predominantly black Jackson State University are simultaneously "preferentially treated" vis-a-vis predominantly white Delta State University and Mississippi University for Women but "discriminated against" when compared to the predominantly white comprehensive universities. Substantial numbers of blacks of course attend the "resource superior" predominantly white comprehensive universities and benefit from the same alleged institutional favoritism which allegedly "discriminates against" other black students who attend the predominantly black universities.

What petitioners obviously have done is stand the salutary principle of diversity in higher education on its head.

The United States' challenge of the allocation of resources focuses solely upon allegations of "unnecessary program duplication." It again invokes its own four-part "remnant" analysis in contending allegedly unnecessary program duplication impermissibly perpetuates segregation. The mere suggestion that the elimination of "unnecessary program duplication" will materially alter racial identifiability is meritless. The present program structure in Mississippi does not impermissibly fetter choice by race, and the United States' purported analysis is deficient in every respect.

The United States again makes an unwarranted assumption concerning what constitutes a vestige of state-imposed segregation in higher education. It advances the beguiling notion that program "duplication" was a central element in the de jure system to then argue continued duplication is a remnant of the past. This assertion distorts the threshold constitutional violation. It was not the "equality" of universities, to the extent it even arguably existed, that *Brown* struck down. Rather, it was of course the state-imposed separation of the races that *Brown* condemned. The blanket inference that program duplication today is a "vestige," or "remnant," is no more appropriate than depicting the universities themselves as vestiges for elimination.

Particularly is this true on this record. It is undisputed that no pattern of "unnecessary program duplication," even as illogically defined by petitioners, exists premised upon the racial identifiability of universities. Indeed, the three predominantly black universities are actually duplicated less than any other group of three noncomprehensive universities. (*supra* at 26) Where the

program duplication among predominantly white universities is similar to, or even greater than, that between predominantly white and predominantly black universities, no substantive link to the former dual system can be inferred.

Likewise, the United States' assertion that State tolerance of duplicative programs sends a message affecting choice by race is unfounded. The availability of duplicative program choices among comprehensive and noncomprehensive universities situated throughout the State, regardless of racial characteristics, sends no racial message. Moreover, there is no credible proof of even the alleged extent to which unnecessary program duplication supposedly impedes desegregation. The United States does not challenge program duplication in the core arts and sciences. The import of the United States' utterly unrealistic definition of "unnecessary" program duplication also must be recognized: virtually all of the alleged unnecessary program duplication between the predominantly black and predominantly white universities is in the areas of business and education. (Exh. US-482, Tables 2 & 4, J.A. 221-39; T. 274-77, J.A. 1338-39) It is patently unreasonable to suggest that universities in the 1990's must wholly abandon such disciplines, *i.e.*, not offer a *single* business or education course, to avoid "unnecessary" duplication.[49] *See* Exh. Bd-263 Chapter II at 4-5, 8-9

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[49] The United States' assertion that program duplication at off-campus centers maintains racial identifiability is wrong. The State long ago mooted allegations that it perpetuated such "duality," so much so that the United States selectively limited its off-campus proof to the pre-1981 period. (P.A. 146a-50a; *supra* at 28, n.22) Yet the comprehensive universities' virtual abandonment of the challenged degree-granting centers has not yielded an appreciable increase in white enrollment at Jackson State University or Alcorn State University.

(explaining educational reasons for business and education "duplication" in Mississippi).

The United States misconstrues the district court's findings concerning unnecessary program duplication. The district court did state at one point that "unnecessary program duplication by Delta State and Mississippi Valley State . . . cannot be justified economically or in terms of providing quality education," (P.A. 146a) but such language does not warrant the United States' characterization of the judicial finding as "program duplication serves no useful educational purpose." (U.S.Brief at 40) The bases for the district court's findings of unnecessary program duplication must be heeded. "In assessing the amount of unnecessary program duplication," the district court first carefully stated its findings "disregard[ed] institutional mission and demand for programs." (P.A. 144a) The district court thereby acknowledged that program existence may be fundamental to institutional integrity even though it duplicates programs elsewhere.[50] Thus, the district court's comments reflect a more general concern regarding the number of universities, predominantly white and predominately black, competing for scarce resources. (P.A. 200a)[51] Indeed, the

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[50] This critical finding is obviously not clearly erroneous as the United States made no pretense of approaching the issue from this essential educational perspective. (*supra* at 25-26) The State, however, did offer such proof confirming efforts to reduce all educational unnecessary program duplication to the extent educationally feasible. (*supra* at 23-24)

[51] Of course no party seeks and the Constitution does not require closure of any institution. As already emphasized, however, such a complicated educational and *political* issue does manifest the necessity of full applicability of *Bazemore* to public higher education. It strongly counsels against judicial

(Continued on following page)

district court otherwise specifically concluded with respect to program duplication that "there is no proof that the elimination of unnecessary program duplication would be justifiable from an educational standpoint or that its elimination would have a substantial effect on student choice." The district court further similarly found "there is no showing in this case that the elimination of unnecessary programs within the system of higher education in Mississippi would be feasible, educationally reasonable, or would offer any hope of substantial impact on student choice." (P.A. 194a)

Finally, it is amazing that the United States, not even having attempted to prove it, suggests that elimination of "unnecessary program duplication" in Mississippi would have an effect on the alleged racial identifiability of universities. Educational opportunities, public and *private*, are simply too diverse to entertain the fiction that elimination or merger of the relatively few arguably "nonessential" programs will have any material desegregative result. The district court correctly observed that "the experience of other courts assessing the relative impact of the elimination of unnecessary programs between historically white and historically black institutions indicates that elimination of such programs would have little impact."[52] (P.A. 194a)

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involvement in those questions which should be debated in the public domain outside the jurisdiction of "ill-equipped" courts. (*supra* at 45-47)

[52] *See Artis v. Board of Regents*, No. CV 479-251 at 9 (S.D. Ga. Feb. 2, 1981) (racially identifiable institutions in same city but over 80% of affected students still went elsewhere); *Report on Success of Merger of University of Tennessee at Nashville and Tennessee State University* (Brief Amici Curiae Charles E. "Buddy" Roemer, III, et al. at 27a-34a) (merger ordered, due to failure of joint, cooperative, and exclusive program planning, itself unsuccessful; *see Geier v. Blanton*, 427 F. Supp. 644, 654-56 (M.D. Tenn. 1977)).

## II. The duty to disestablish state-imposed segregation in higher education is no greater under Title VI than under the Constitution. In any event the State of Mississippi has fulfilled any alleged greater duty under Title VI through the adoption and years of implementation of genuine nondiscriminatory policies coupled with substantial affirmative efforts to promote desegregation.

It is undisputed that Title VI of the Civil Rights Act of 1964 "proscribes only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment."[53] *University of California Regents v. Bakke*, 438 U.S. 265, 287 (1978). *See Alexander v. Choate*, 469 U.S. 287, 292-93 (1985). Consequently, "proof of invidious purpose is a necessary component of a valid Title VI claim." *Guardians Association v. Civil Service Commission of City of New York*, 463 U.S. 582, 642 (1983) (Stevens, J. dissenting). This same standard applies to petitioners' assertions of the Department of Education Title VI regulation, 34 C.F.R. § 100.3(b)(6)(i).[54] An administrative agency may not promulgate regulations that "go *beyond* the purpose" of the enabling statute. *Guardians*, 463 U.S. at 613 (O'Connor, J. concurring). As already explained, any evaluation of the alleged presence of "effects of prior discrimination" must

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[53] The United States specifically states "Mississippi's obligation to dismantle its racially dual system of higher education is the same under both Title VI and the Equal Protection Clause." (U.S. Brief at 42) Apart from contending the asserted regulation was "promulgated pursuant to 42 U.S.C. § 2000d-1," private petitioners never cite the statute.

[54] The United States argues that this same Constitutional standard requires "affirmative steps to remove remnants." Private petitioners maintain that this regulation requires not just admission policy changes but substantial institutional enhancement of the predominantly black universities.

consider first whether evidence exists of present maintenance of a discriminatory system.[55]

The court of appeals correctly concluded *Bazemore* controls the Title VI inquiry. (P.A. 26a) Despite the continued existence of single-race clubs, the State's efforts in *Bazemore* satisfied affirmative action demands of regulations. 478 U.S. at 408-09. The "affirmative action" regulation considered in *Bazemore* is identical to the one cited by petitioners:

> In administering a program in which the recipient has previously discriminated against persons on the ground of race, color, or national origin, the recipient must take affirmative action to overcome the effects of prior discrimination.

*Compare* 7 C.F.R. § 15.3(b)(6)(i), quoted in *Bazemore*, 478 U.S. at 412, with 34 C.F.R. § 100.3(b)(6)(i), cited in petitioners' briefs. The Court specifically held that the State's "affirmative action to change its policy and to establish what is concededly a nondiscriminatory admissions system" satisfied the regulation. 478 U.S. at 409. Stated differently, the Court held the State met its regulatory duty

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[55] Justice O'Connor's specific view in *Guardians* that the Title VI regulations, like the statutes, "proscribe only purposeful discrimination" was admittedly not the opinion of a majority of the Court. Justice O'Connor's opinion was shared, however, by then Chief Justice Burger, Justice Powell, and Chief Justice Rehnquist. More importantly, *Guardians* did not address the particular regulation or issue before this Court. A regulation requiring a particular degree of racial mixing would be inconsistent with the Constitution and beyond regulatory bounds. The imposition of an affirmative duty to act according to race absent a showing of present intentional discrimination, or even present state actions which materially contribute to racial separation, cannot be said to "reasonably further the purposes" of the statute "proscribing only intentional discrimination."

by implementing good-faith, race-neutral policies and procedures which both lower courts here have found prevail in Mississippi. Clearly, the Court concluded the regulation imposed no burden upon the State to change choice or actively promote integration beyond the implementation of genuine nondiscriminatory policies.

The United States necessarily agrees. After all, it was the Government's position of "full regulatory compliance" that the Court adopted in *Bazemore*. Nonetheless, the United States reargues its "remnant" contentions. It contends that "while the adoption of a nondiscriminatory admission policy is sufficient to 'overcome the effects of prior discrimination' in the context of 4-H Clubs, more may be required" here in public higher education. The United States specifically identifies no unlawful continuing "effects." Presumably it is the State's present admission standards and alleged unnecessarily duplicative programs which allegedly constitute "effects of prior discrimination."

Yet this United States position requires no exploration of the scope of "affirmative action" required under the regulation. As already explained, neither the present admission standards nor the alleged unnecessary program duplication are *"effects of* prior discrimination." The "prior discrimination" in issue in this proceeding is the segregated de jure system of higher education. The record will not permit a conclusion that the State's present use of the ACT or tolerance of duplicative programs is an "effect" of the separatist policies of that distant era.

Nor is any continued racial identifiability of universities an "effect" requiring the State to do more than it has done. The record establishes that the admission policies do not contribute to institutional racial identifiability. (*supra* at 14-16) There is no proof of any educationally

justified program termination, consolidation or transfer which would materially alter racial identifiability. (P.A. 193a-94a) The United States concedes that the institutional enhancement of predominantly black universities will contribute nothing to, and may indeed detract from, any alteration of racial identifiability. (U.S. Brief at 32-33) The district court's factual findings that the State has "undertaken substantial affirmative efforts in the areas of other-race student and faculty-staff recruitment and funding and facility allocation" are not clearly erroneous. The same issue of racial identifiability as an "effect of prior discrimination" existed in *Bazemore*. Since the relatively nominal efforts in *Bazemore* complied with this regulation, Mississippi's multi-million dollar affirmative action programs plainly cannot be assailed.[56]

Private petitioners argue for a far broader reading of the regulation than does the United States. Thus, they again seek relief precluded by *Bazemore*. *Bazemore* does not even suggest that the regulations require, or even permit, the manipulation of resources with no educational justification and little likelihood of changed racial mixes. *Bazemore's* finding of no discrimination in services does not remotely imply that distinctions in resources among universities constitutes "discrimination" or a remediable "effect." Private petitioners' procrustean

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[56] The United States' reference to the "Revised Criteria" is meaningless. They are by the United States' own admission not binding. Moreover, they are not informative; they materially conflict with much of the United States' present position; they are even of questionable origin. *See* Brief Amici Curiae of Charles E. "Buddy" Roemer, III, et al. at 24-30. Furthermore, even now the United States does not attempt to explain what it is the Criteria allegedly require beyond genuine non-discriminatory policies.

"results oriented" approach is clearly not contemplated. Likewise as in *Bazemore*, the interpretation of the United States, though itself erroneous, nonetheless precludes private petitioners' unduly expansive reading.[57]

Furthermore, nothing in *Bazemore* suggests "affirmative efforts" were undertaken there to the extent they have been here. The district court's analysis of the evidence went far beyond the mere confirmation of State

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[57] While disputing *Bazemore's* general applicability private petitioners do not specifically argue that *Bazemore's* delineation of the regulatory duty is inapplicable here. Recognizing, however, the conclusive effect of *Bazemore*, Amici Curiae NAACP Legal Defense and Educational Fund, Inc., et al. attempt to distinguish *Bazemore* on the facts. While the factual situations obviously differ, *Bazemore* cannot be "factually distinguished."

In their flight from *Bazemore*, Amici NAACP grossly distort the purported distinctions. It is only 20% of black students (those with ACT scores below 9) that are automatically denied access to a university, both predominantly black and predominantly white. It is frivolous to suggest that *Bazemore* addressed something other than widespread "racial identifiability"; "when judgment was entered there were a *great many* all-white and all-black clubs." 478 U.S. at 407. Actually in Mississippi the State is "statistically" approaching at least four racially mixed institutions, albeit majority white. Like *Bazemore*, the district court here found "no evidence of discrimination." While a laudable social objective shared by the State, "participation rates" are ultimately of no relevance in a nondiscriminatory system. Higher education is not just noncompulsory; it is not free, the students' level of academic development is critical, and a wide variety of other factors beyond the control of higher education affect whether a student will attend a university. The suggestion of additional remedial measures here is itself unfounded. In any event *Bazemore* did not suggest that nothing else could arguably be done to attempt to alter racial identifiability; the Court held nothing further was required. *Bazemore* in no way implied any improper floating standard dependent upon the relative importance of the State activity.

adherence to the *Bazemore* standard through discontinuation of prior discriminatory admission practices and the adoption of a "wholly neutral admissions policy." It made extensive factual findings addressing motive, effect, and the availability of educationally reasonable alternatives concerning student admissions and recruitment, faculty and staff employment efforts, and resource allocation practices. *Bazemore* cites no "affirmative action" findings that approach those existing here.[58]

Thus, the court of appeals' comments regarding fulfillment of any expanded duty are instructive. The court stated: "Under the present record we are not prepared to say the defendants have failed to meet the duties outlined in the regulations." (P.A. 26a) "[W]e would be reluctant to say the defendants have not met their duty even under *Green*." (P.A. 34a) Indeed, what this record reveals as portrayed by the evidence, and confirmed by the district court's extensive findings, is that the State of Mississippi

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[58] The district court's now familiar findings could not be more explicit. The State has used "every reasonable means" in student recruitment (P.A. 187a); there are no additional faculty and staff recruitment procedures available for State implementation which offer any meaningful prospect of greater minority presence (P.A. 199a); there is no feasible, educationally reasonable means of further reducing program duplication which "would offer any hope of substantial impact on student choice" (P.A. 194a); physical facilities appropriations disproportionately favor the predominantly black universities over the past 15 years and no racial institutional pattern exists concerning either the amount or condition of facility space (P.A. 195a); institutional funding differences are educationally based and unrelated to race except to the significant extent the predominantly black institutions have actually been favored (P.A. 161a-62a, 196a); and the continued racial identifiability of the universities is "the result of a free and unfettered choice on the part of individual students." (P.A. 187a)

has fulfilled its duty to disestablish under *Bazemore, Brown, Green,* Title VI, and the Title VI regulation.

## CONCLUSION

This controversy concerns the extent to which the judiciary should inject itself into the wide range of higher educational policy decisions in order to dictate further integration with little prospect that institutional racial identifiability will be materially altered. This case comes to the Court almost 30 years after the admission of the first black student to a formerly all white university. It comes over 15 years after its filing in the district court. It comes under factual circumstances dramatically different from those existing in the era which spawned the litigation. The record reveals a new day in public higher education in Mississippi. The distant unconstitutional past does not justify judicial usurpation of the inherently sensitive, profoundly important realm of higher educational policy.

The judgment below should be affirmed.

Respectfully submitted,

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