(14)

Nos. 90-1205 and 90-6588

In the Supreme Court of the United States

OCTOBER TERM, 1991

UNITED STATES OF AMERICA, PETITIONER

v.

RAY MABUS, GOVERNOR OF MISSISSIPPI, ET AL.

JAKE AYERS, JR., ET AL., PETITIONERS

v.

RAY MABUS, GOVERNOR OF MISSISSIPPI, ET AL.

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

REPLY BRIEF FOR THE UNITED STATES

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TABLE OF AUTHORITIES

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The issue in this case is whether the State of Mississippi has satisfied its constitutional obligation to dismantle its racially dual system of higher education. The resolution of that issue turns on this Court's articulation of the appropriate dismantlement standard. We submitted in our opening brief that a State fulfills its obligation to dismantle a dual system of higher education only when a student applicant's choice of which college to attend is "wholly

voluntary and unfettered" by state action based on race. *Bazemore* v. *Friday*, 478 U.S. 385, 407 (1986). We further explained that simply saying that free choice exists does not necessarily make it so. *Green* v. *County School Bd.*, 391 U.S. 430 (1968). A State must not only adopt policies that are race-neutral on their face, but must also eliminate those continuing elements of its former system that perpetuate segregation by fettering free choice. This was the position of the United States in *Bazemore* v. *Friday*, *supra*, and it remains the position of the United States in this case. See U.S. Br. 31 n.30. Respondents, in sharp contrast, argue that far less is required.

1. Respondents proclaim that the record "reveals a new day in public higher education in Mississippi." Resp. Br. 70. The district court's specific factual findings present, however, a starkly different picture. Despite the nearly 40 years that have passed since this Court's decision in *Brown* v. *Board of Education*, 347 U.S. 483 (1954), more than 99% of the white students attend the five historically white schools, which have superior programs and resources, and student compositions ranging from 80% to 91% white. Pet. App. 50a-51a, 60a-61a, 68a. Meanwhile, more than 71% of the black students attend the three historically black schools, which have objectively inferior programs and resources, and student compositions ranging from 92% to 99% black. *Ibid.* See U.S. Br. 8-14. Notwithstanding respondents' self-congratulatory bravado, the objective racial characteristics of Mississippi's system of higher education have changed little since this Court's decision in *Brown*. Statistics alone do not make out a constitutional violation, but these facts strongly suggest not that a new day has dawned in Mississippi higher edu-

cation, but that the State has not succeeded in disestablishing its formerly de jure dual system.

We make that observation simply to set the record straight. At bottom, respondents' characterizations of the record are beside the point. This case is before the Court on a question of law. The issue is whether the courts below employed the correct legal standard in determining whether Mississippi has dismantled its racially dual system of higher education. If, as we believe, the lower courts employed an incorrect legal standard, then the judgment below must be vacated and the case remanded for further proceedings.

2. Once the rhetoric is stripped away, the core of respondents' legal position is plain: "Mississippi's existing system is constitutional because there is no evidence of present intentional discrimination." Resp. Br. 34. In respondents' view, once a State announces facially race-neutral policies and practices, its constitutional duty to disestablish its racially dual system of higher education comes to an end. Resp. Br. 36-47. Not so. The State must also address those remnants of its de jure system that have the effect of perpetuating segregation.

Respondents acknowledge that Mississippi is under an obligation, originating in *Brown*, to *dismantle* its racially dual university system. Resp. Br. 37. See also Pet. App. 13a. Adoption of race-neutral policies and practices is an important and indispensable first step, but it does not complete the process. The reason is obvious. A State does not dismantle a system of de jure segregation by merely taking down signs saying "Whites Only" and "Blacks Only" if it leaves in place remnants from the de jure era, that, in effect, direct whites to the formerly white facilities and blacks to the formerly black facilities. The State has

an obligation to remove such barriers and channeling practices as part of the dismantlement effort because they are remnants of the former dual system and serve no substantial purpose except to perpetuate segregation. Cf. *Hunter* v. *Underwood*, 471 U.S. 222, 233 (1985) (invalidating a state constitutional provision on the ground that "its original enactment was motivated by a desire to discriminate against blacks on account of race and the section continues to this day to have that effect"). It is no answer that the State has made some "affirmative" efforts to attract "other-race" applicants. Resp. Br. 7-10 nn.5-6. Those efforts (which respondents overstate) are of no moment if the State at the same time keeps in place practices and policies that perpetuate segregation.

This Court's school desegregation decisions reflect the principle we advocate. They recognize that neutrality is not enough. In addition, the vestiges or remnants of past discrimination must be eliminated to the extent practicable. *Board of Education* v. *Dowell*, 111 S. Ct. 630, 638 (1991). The Court's decision in *Bazemore* refines that concept by recognizing that where attendance is a matter of informed choice, the dismantlement effort must concentrate on those elements of the dual system that fetter choice. Thus, *Bazemore* focuses the inquiry, but it does not change the basic legal standard. A State remains under an obligation to eliminate those remnants of prior de jure discrimination that restrict an individual's free choice on the basis of race.

Respondents contend (Br. 44) that the United States "necessarily misconstrues" *Bazemore*. Respondents, however, are unable to point to any inconsistency between our submission here and this Court's decision in that case. This Court has never

said that a State automatically satisfies its dismantlement obligation by the mere adoption of race-neutral policies and practices. Indeed, the United States, which was the prevailing party in *Bazemore*, specifically emphasized the principle that we assert here in its brief to the Court in that case:

> This is not to say that a voluntary attendance system is unitary with respect to admissions because the state entity simply announces that it will henceforth conduct admissions without regard to race. Rather, such a formerly segregated government program is unitary only if the state has, in fact, established an admissions "system in which racial discrimination [is] eliminated root and branch." *Green*, 391 U.S. at 438. Thus, the relevant program must be free from all practices that either indicate that the program is not genuinely open to all free from subtle discrimination or that otherwise create further racial separation.

U.S. Br. at 43, in *Bazemore* v. *Friday*, Nos. 85-93 and 85-428 (O.T. 1985). That problem was merely theoretical in *Bazemore*, because neither the United States nor the private petitioners contended that the state authorities had "engaged in any action that had a segregative effect." *Id.* at 44. See *Bazemore*, 478 U.S. at 407-408. Hence, there was no occasion for the Court specifically to address that matter. This case, by contrast, presents that problem in concrete form. We have argued throughout this litigation that while Mississippi has announced a race-neutral admissions policy, it has retained elements of its prior system that perpetuate racial segregation.

The legal standard that the lower courts applied and respondents defend fails to take account of that problem. Under respondents' theory, a State may

retain elements of its past dual system that effectively promote segregation, provided that there is no "evidence of present intentional discrimination." Resp. Br. 34, 38. The defect in that approach is apparent: The State engaged in unconstitutional intentional discrimination when it established its racially dual system, and the dismantlement standard must be directed to correcting *that* constitutional violation. Under respondents' theory, the State need not discontinue the past segregative practices that were cultivated under the de jure dual system. Instead, the State need only disavow a present racial intent. Respondents' standard shifts the focus away from the question whether the State has effectively dismantled its racially dual system, and concentrates attention on the search for current racial animus. Under their approach, the State's dismantlement obligation would become a matter of form, rather than substance.

We submit that the proper objective in the State's dismantlement efforts must be to secure real freedom of choice for all college applicants. Mere proclamations do not suffice. As Judge Higginbotham explained:

> When a system of higher education presents every person with a truly equal and free choice among schools, that system will be constitutional. Well and good, but the long years of separatism have worn deep traces—so deep that declarations of freedom of choice draped over them are not so easily translated to real choice.

Pet. App. 41a. Thus, the court must look beyond such declarations to the actual functioning of the admissions process—including to whether the State has retained elements of its former system that fetter

free choice on the basis of race and thereby perpetuate segregation.

In the end, respondents are unable to offer *any* reason why a State should be entitled to retain elements of its formerly de jure system that, regardless of the State's intent, serve only to segregate. Indeed, they ultimately concede that "[t]here may be a case in which it would be appropriate to prohibit a state from, in fact, continuing to fetter choice by race." Resp. Br. 44. They simply assert that "[t]his is not such a case." *Ibid.* That assertion, however, can be tested only through actual *application* of the correct legal standard—it does not excuse the district court's failure to consider the United States' evidence under the appropriate legal test.

3. The court of appeals' decision must be set aside for the straightforward reason that it affirmed the district court's use of an incorrect legal standard in evaluating the evidence adduced at trial. The United States is entitled to have its evidence evaluated under the correct legal criteria. Hence, the case should be remanded for further proceedings consistent with this Court's articulation of the governing law. See, *e.g.*, *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986); *United States Postal Service Board of Governors* v. *Aikens*, 460 U.S. 711, 717 (1983).

Respondents contend that the judgment should be salvaged on the theory that the district court said that Mississippi allowed "free and unfettered choice" and that finding is sustainable under the "clearly erroneous" standard set forth in Rule 52(a) of the Federal Rules of Civil Procedure. Resp. Br. 48-63. We disagree. "Rule 52(a) does not inhibit an appellate court's power to correct errors of law, including those that may infect a so-called mixed finding of law and fact, or a finding of fact that is predicated on

a misunderstanding of the governing rule of law." *Bose Corp.* v. *Consumers Union, Inc.*, 466 U.S. 485, 501 (1984). See also *Pullman-Standard* v. *Swint*, 456 U.S. 273, 287, 292 (1982). Accordingly, "if the trial court bases its findings upon a mistaken impression of applicable legal principles, the reviewing court is not bound by the clearly erroneous standard." *Inwood Laboratories Inc.* v. *Ives Laboratories, Inc.*, 456 U.S. 844, 855 n.15 (1982). See also *United States* v. *Singer Mfg. Co.*, 374 U.S. 174, 194 n.9 (1963); *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 394 (1948). The reason is self-evident. If the trial court misapprehends the applicable legal standard, it is unlikely to evaluate correctly the significance of the facts at issue or the relevance of the evidence offered in their support. See, *e.g.*, *Aikens*, 460 U.S. at 717. That is what occurred here.

We have set forth the appropriate legal standard for dismantlement of a segregated system of higher education—a State must end intentional discrimination, adopt and implement race-neutral policies, *and* eliminate those continuing elements of its former dual system that have the effect of fettering choice. The district court concluded, however, that the State "was only obliged to adopt and implement good-faith, race-neutral polices and procedures." Pet. App. 5. In other words, the district court equated "wholly voluntary and unfettered choice," *Bazemore*, 478 U.S. at 407, with the elimination of intentional discrimination. Thus, the district court's legal analysis eliminated from consideration the United States' evidence as to effects of remnants on the exercise of free choice.

The district court's opinion manifests that defect. As we explained in our opening brief, the United States introduced evidence showing that remnants of

the State's dual system continue to affect student choice. That evidence focused specifically on the State's reliance on ACT test scores alone to determine automatic admission to particular schools and on the State's perpetuation of the dual system by pointlessly duplicative programs at the historically white and historically black colleges. The district court applied its legal standard in a manner that simply ignores the significance of that evidence.

In the instance of admissions standards, the United States' evidence showed that: (1) Mississippi adopted the practice of using ACT scores alone to determine automatic admissions specifically to prevent the admission of black students to Mississippi's historically white institutions; (2) that admissions policy continues to deter black students from the historically white universities, which maintain higher ACT score requirements; (3) there is no educational justification for relying on ACT scores alone because —as the ACT's designers stress and the studies in Mississippi demonstrate—the use of high school grades in conjunction with ACT scores provides a *more* accurate prediction of college performance; and (4) there is no practicable impediment to considering grades in the admissions process. U.S. Br. 35-37. The district court rejected the United States' argument that the State should consider high school grades in the admissions process by simply observing that respondents were "concerned about grade inflation" and that use of the ACT scores alone is "a valid indicator." Pet. App. 180a. Plainly, the district court did not evaluate the United States' evidence under the legal standard that we have set forth.

Respondents' feeble response to our evidence, Resp. Br. 50-55, simply underscores the need for reevaluation on remand:

(1) Respondents contend that the use of ACT scores alone to determine automatic admissions should not be considered a remnant of the past system—despite the fact that the practice was adopted to *preserve* that system—because the practice is now maintained 'for altogether different reasons." Resp. Br. 50. The only reason offered, however, is "grade inflation," Pet. App. 180a, and that reason is insufficient in light of the fact that the ACT, in combination with grades, provides a more accurate predictor of future academic performance.

(2) Respondents next contend that the use of grades in the admissions process would not change the "racial identifiability" of the Mississippi's colleges because it would affect only a limited number of black applicants. Resp. Br. 51-52. The ultimate issue here, however, is unfettered choice—not racial identifiability. Mississippi cannot retain an irrational admissions barrier on the ground that it unjustifiably fetters the choice of only a portion of the black applicant pool.

(3) Respondents' only answer to the fact that using the ACT alone underestimates the academic potential of black applicants is to say that "mere prediction" of academic performance "is not the total educational picture." Resp. Br. 53-54. The State of Mississippi, however, determines automatic admissions based *solely* on ACT scores, which—like high school grades—function as a predictor of academic performance. Respondents fail to explain how including grades or other information, in addition to ACT scores, would present a *less* complete "picture."

> (4) Finally, as to the practical impediments to using grades, respondents simply assert that the fact that other States are able to use grades in their admissions process does not mean that Mississippi would be capable of doing so. Resp. Br. 55. Yet respondents give no reason why Mississippi is incapable of doing what other States readily do.

The district court also failed to evaluate properly the United States' evidence concerning program duplication. That evidence showed that: (1) Mississippi instituted program duplication at separate white and black institutions with the express aim to establish a "separate but equal" educational system; (2) the maintenance of unnecessarily duplicative programs at historically white and historically black institutions perpetuates segregation by effectively endorsing a racially dual system; (3) there is no educational justification for unnecessary program duplication; and (4) program duplication can be practically eliminated by the cost-effective technique of modifying and consolidating programs that persist despite their inefficiencies and wastefulness. U.S. Br. 37-41. As we explained in our opening brief, the district court specifically found that unnecessary program duplication existed, but concluded that such duplication was irrelevant because "this case * * * is about the charge of racial discrimination" and whether the State's policies "are racially motivated." Pet. App. 146a, 200a. See U.S. Br. 37, 40. In this instance as well, the district court did not evaluate the United States' evidence under the legal standard that we have set forth.

Respondents, again, have no satisfactory reply to our evidence:

(1) Respondents assert that program duplication is not a remnant of its past de jure system because program duplication exists among the historically white universities. Resp. Br. 60-61. But the fact that program duplication may arise for reasons other than to maintain a racially dual system does not diminish the State's obligation to eliminate program duplication that originates from the dual system and that perpetuates segregation.

(2) Respondents next argue that the maintenance of pointlessly duplicative programs does not send a "racial message." Resp. Br. 61. That argument is inconsistent with the premise of *Brown*, the entire history of racial segregation, and the testimony in this case that Delta State and nearby Mississippi Valley—which needlessly duplicate programs—operate, respectively, as the "University of the Delta" for white students and the "University of the Delta" for black students. See U.S. Br. 20-21; J.A. 761.

(3) Respondents contend that most of the "alleged" unnecessary program duplication exists in the disciplines of business and education and that it is "patently unreasonable to suggest that universities in the 1990's must wholly abandon such disciplines." Resp. Br. 61. We suggest, of course, nothing of the sort. Our point is this: There is no reason why two colleges, one historically white and one historically black, should continue to offer the same curriculum when they are only 35 miles apart. U.S. Br. 40. As the district court stated, the unnecessary program duplication at those schools "cannot be justified economically or in terms of providing quality education." Pet. App. 145a-146a. Respondents offer no concrete justification for the duplication, which not only perpetuates state channeling of

students to institutions on the basis of race, but also—as in the case of the university centers—operates to prevent new or enhanced programs from being placed at the historically black institutions. U.S. Br. 5 n.5, 38 & n.6.

(4) Finally, respondents assert that elimination of program duplication will not affect "racial identifiability." Resp. Br. 63. As we have explained, however, the ultimate issue here is not racial identifiability, but rather whether the State has retained elements of its racially dual system that continue to fetter choice. Respondents offer no explanation why the State cannot take the economically rational step of eliminating what the district court found to be needless duplication.

In sum, it is clear that the district court did not properly consider the significance of the United States' evidence. The district court's simple declaration, contained in its conclusions of law, that Mississippi has provided "free and unfettered choice" is not a substitute for a reasoned analysis under the appropriate legal standard. Indeed, the district court's failure to make the inquiries relevant to that analysis underscores the need for concrete guidance. We submit that the four factors we have identified—whether the challenged practice was a part of the dual system, whether it perpetuates racial separation, whether it nonetheless serves legitimate educational objectives, and whether it can be practicably eliminated—provide appropriate direction and should be employed on remand.

4. The specific undertakings necessary to dismantle a racially dual system of higher education will depend on both the State's history of segregative practices and the current conditions at its universi-

ties. In this case, we have pointed specifically to Mississippi's use of ACT scores and its program duplication as remnants of its prior segregated system that fetter choice and should be eliminated. In doing so, we recognize that, in other cases, different state practices may constitute remnants that improperly interfere with choice.

Furthermore, the duty to take affirmative steps to ensure that choice is truly unfettered also exists with respect to the desegregation of faculty and administration. Just as announcing that a college is desegregated does not make it so, so too the mere announcement that a college's faculty is desegregated is not enough. A State that adopted segregative practices with respect to faculty and administration must take affirmative steps to ensure that black educators know that they are welcome at historically white schools and that white educators know that they are welcome at the historically black schools. Those steps will entail, at a minimum, new policies of affirmative and nondiscriminatory advertising and recruitment for faculty and administrative positions. Those steps are required not only to vindicate the equal protection rights of teachers, but also for the equal protection of students. The district court did not reach the question whether sufficient affirmative steps were taken in this regard, because it applied the wrong legal standard.

Finally, Amicus Board of Trustees of the University of Alabama blatantly misstates our position as being that "economic enhancement of historically black institutions is undesirable." Amicus Br. 3. That is in no sense our view. To the contrary, the United States has firmly supported the policy of enhancing historically black colleges and universities, which "have contributed significantly to the effort to

attain equal opportunity through post-secondary education for Black, low-income, and educationally disadvantaged Americans." 20 U.S.C. 1060. It has recognized that those institutions "represent a vital component of American higher education, enriching a great tradition of educational choice and diversity in this country." 25 Weekly Comp. Pres. Doc. 633 (April 28, 1989). The United States therefore has taken affirmative steps "to strengthen the capacity of historically Black colleges and universities to provide quality education." Exec. Order No. 12,677, 3 C.F.R. 222 (1989); See also Exec. Order No. 12,320, 3 C.F.R. 176 (1981). Nothing in our opening brief should be read to draw that vital commitment into question.

In contrast to the Amicus' unfounded characterizations, we argued in our brief that " 'improved' *duplication*" was undesirable, U.S. Br. 32 (emphasis added). It is, after all, *unnecessary duplication* that is the tell-tale remnant of the prior de jure system. That duplication operates within Mississippi to prevent enhancement of historically black institutions. As we have pointed out, *id.* at 38 n.36, Mississippi's construction of degree-granting centers, most vividly illustrated by the University Center in Jackson, either duplicated programs at historically black institutions or prevented new or enhanced programs from being located at historically black universities. If Mississippi had been fulfilling its solemn obligations under the Equal Protection Clause, those funds and facilities would have gone to Jackson State.

More broadly, it is incumbent on the State of Mississippi to eradicate discrimination from its system of higher education. Over the years, that discrimination manifested itself in a deprivation of equitable

and fair funding to historically black institutions, which sought faithfully, and under difficult circumstances, to serve the interests of black students in Mississippi. Those students were deprived of the unfettered choice demanded by the Equal Protection Clause. Indeed, those historic disparities operated to deprive prospective students of all races of the full range of choices that would have been theirs to enjoy but for the State's discriminatory practices. The time has now come to eliminate those disparities and thereby unfetter the choice of persons who can hereafter choose freely among the State's institutions of higher learning.*

Not only does the Amicus mischaracterize our earlier position, but it has long been the position of the United States that state educational policy choices to improve funding at institutions that have suffered inadequate funding in the past are desirable; what is undesirable—indeed, what is a remnant of the prior dual system that must be eliminated—are state decisions to duplicate program offerings without economic or educational justification in a manner that perpetuates the formerly de jure dual system. *Id.* at 37-41.

The cessation of unnecessary duplication may result in the reallocation of funds among historically white and historically black institutions. We believe that the dismantlement effort must take into account the important role of historically black institutions. While unwarranted duplication must be eliminated, the reallocation or cessation of programs and courses must be done in a way that does not place the burden

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* Suggestions to the contrary in our opening brief, U.S. Br. 32-34, 41 n.39, no longer reflect the position of the United States.

of desegregation discriminatorily on black students, teachers, and administrators. See, *e.g.*, *Valley* v. *Rapides Parish School Bd.*, 702 F.2d 1221, 1228 (5th Cir.), cert. denied, 464 U.S. 914 (1983). The courts should "seek out, within practical limitations, an equitable allocation of the burden of desegregation." *Ibid.* For now, it is sufficient for the Court to hold that Mississippi has not met its obligations under the Equal Protection Clause in the area of higher education.

The judgment of the court of appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted.

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OCTOBER 1991

☆ U. S. GOVERNMENT PRINTING OFFICE: 1991 282061 45107