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## ABSTRACT

This paper examines the link between the limited numbers of minority faculty in higher education and the availability of minority targeted scholarship programs. Two court cases are focused on: (1) U.S. & Ayers v. Fordice, a Mississippi higher education desegregation case, decided and remanded by the U.S. Supreme Court in 1992; and (2) Podberesky v. Kirwan, a Maryland desegregation case involving a successful challenge to a scholarship program for African Americans at the University of Maryland. After an introductory section, section 2 presents an overview of the legal and policy context in which the Fordice and Podberesky cases are embedded. Other related cases concerning affirmative action in Mississippi and Maryland are reviewed. Section 3 provides a detailed examination of the faculty "remnant" issue in Fordice, explaining how all parties in the case framed the issues and analyzed the data. The role of the Department of Education and the Government Accounting Office as related to minority targeted scholarships is directly addressed. Section 4 considers issues concerning the use of minority fellowship support programs to increase the numbers of qualified potential faculty members, whether they are mechanisms for ethnocentric separatism that segregate higher education further or are effective means for recruiting and involving talented minorities in the higher education enterprise. Section 5 addresses issues in the Fordice case as framed by the Supreme Court, the defense, and the government including fault, traceability, affirmative action, tenure, and disaggregation and desegregation. (Contains 275 reference footnotes.) (DB)

THE MISSED LINK: FACULTY 'REMNANTS' OF JIM CROW AND MINORITY FELLOWSHIP SUPPORT PROGRAMS

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Paper presented November 1995 at the Annual Meeting of the Association for the Study of Higher Education, Orlando, Florida

The author wishes to emphasize that this manuscript represents work-in-progress on a story that has evolved during the course of writing. Because the story continues to evolve, the denouement lies in the future.

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Outline In Progress of Work in Progress

THE MISSED LINK: FORDICE AND PODBERESKY, FACULTY "REMNANTS" OF  
JIM CROW AND MINORITY FELLOWSHIP SUPPORT PROGRAMS

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## ABSTRACT

### THE MISSED LINK: FORDICE AND PODBERESKY, FACULTY "REMNANTS" OF JIM CROW AND MINORITY FELLOWSHIP SUPPORT PROGRAMS

Draft Paper Presented November 1995 at the Annual Conference of the  
Association for the Study of Higher Education, Orlando, Florida

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This manuscript-in-progress describes, analyzes and critiques the developing federal jurisprudence dealing with the faculty "remnant" of formerly de jure segregated state institutions and systems of higher education, as well as federal jurisprudence and executive policy relating to race-specific scholarship programs. Its central focus is the link, which the judiciary has so far missed, between the very limited extent of faculty integration in higher education on the one hand, and, on the other, of minority targeted scholarship support programs (generically referred to in this paper as MTS, following the term used by the U.S. GAO). MTS support programs exemplify race-specific affirmative action that has and can continue to address the supply side of the problem of small numbers, in most cases token presence, of minority American faculty, especially in senior positions, at predominantly white universities.

Two cases dealing with racial integration in higher education provide the central focus of the legal component of the analysis. One is U.S. & Ayers v. Fordice, the (now) 20 + year old, comprehensive Mississippi higher education desegregation case, decided and remanded by the U.S. Supreme Court in June 1992, and reddecided by the federal district court for Northern Mississippi in March 1995. The two key faculty-related questions posed by Fordice are: What Do the Pie Charts Show? (Answer-few black faculty) and, Who Baked the Pie Charts? (Answer-doctoral granting institutions in Mississippi and around the country.)

The second case is Podberesky v. Kirwan, a Maryland desegregation case involving a successful challenge to the talent and non need-based Benjamin Banneker Fellowship Program for African Americans at the University of Maryland at College Park [hereinafter UMCP]. On May 30, 1995, seven months after the Fourth Circuit Court of Appeals declared the Banneker Scholarship Program unconstitutional, the Supreme Court declined review of the case, thus postponing a showdown in the highest court over the lawfulness of minority support programs in public higher education. For this author, if not for the Fourth Circuit, the Banneker Fellowship program survives as a metaphor for a partial answer to the question: How Can We Bake New Pie Charts?

Thus the constructive (or reconstructive) component of the paper urges the courts to reframe the legal standards used for assessing the lawfulness of "affirmative action" in educational institutions, in contrast to, say, the construction industry or widget factories.

No opinion of any judge or Justice, at any level, in either Fordice or Podberesky, however, acknowledges the strategic link between minority fellowship support programs and a long term improvement in minority representation and influence in decision-making positions in academe. UMCP's defense of its Banneker Program was cast only in terms of the negative effects of Jim Crow's lingering

presence on the recruitment and retention of African American undergraduate students. Mississippi's "we can't find any" defense of the token presence of black faculty at its historically white institutions was cast only in terms of hiring based on the existing pool of black PhDs.

Eventually I hope to expand this further into "law in action" research (to use Mark Yudof's phrase) in that it will bring to bear both normative legal theories embedded in the case law and in perspectives critical of them (e.g., Minow, Freeman, Karst, Bell, etc.) as well as what can be learned from data-based empirical studies of MTS programs (e.g., McKnight Black Doctoral Fellows Program; the Meyerhoff Scholars Program at the University of Maryland, Baltimore County) and of studies of the lives of minority (and white female) faculty at predominantly white institutions of higher education.

Several key theorists whose hypotheses have informed empirical research on these subjects are worth mentioning here. One is R. M. Kanter, who pioneered work on the dynamics of tokenism in the work place. Two others are V. Tinto and P. Terrenzini, whose theory of academic and social integration (i.e., involvement, engagement and achievement) have generated numerous studies of undergraduate student retention, including studies of MTS programs.

Much of the story this manuscript tells reflects the perspectives of the author as participant and observer in a number of roles related to racial issues in higher education: as a faculty member in two historically black institutions (one in Mississippi and one in Maryland); as a faculty member at an historically white research university--UMCP--who has directed doctoral dissertations related to MTS programs; as the lead author and researcher of a report on opportunities for black Americans at the University of Maryland; and, because of that report, as a quasi "expert witness" in Podberesky and as an expert witness on faculty issues in Fordice. Aside from relevant legal materials, legal commentary, journal articles, campus-based studies and reports, from around the country, on minority and women faculty, and news reports, the author has made use to date of quantitative and documentary data produced through discovery in both cases, survey and interview data collected for studies commissioned by UMCP in Podberesky, survey and interview data collected by students' research of MTS programs, interview data and documentary sources used in the author's case studies of minority doctoral support programs, and student and faculty data derived from national data sources (e.g., the National Research Council, ACE, EEOC, OCR, Council of Graduate Schools).

At present I envisage completion first of a major article for a journal concerned with law and policy. Beyond that, I hope to expand the manuscript into a book. For that purpose I wish to collaborate with faculty and graduate students on an impact study of Podberesky, and a field-based, interview-based study of the relationships among black and non-black faculty at Mississippi historically white institutions from 1992 to the time of the study. Because Fordice may be appealed, however, I probably will be restricted from doing so (qua expert witness in Fordice) for a year or more.



The Missed Link: Fordice and Podberesky, Faculty "Remnants" of  
Jim Crow and Minority Fellowship Support Programs

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It was not by accident that the NAACP Legal Defense Fund targeted universities and colleges first, and then public schools, to challenge the practices of racial segregation. Colleges and schools are central to the task of democracy and are vehicles for success in America; for these reasons they will continue to be settings for debating the meanings of neutrality, equality, and tolerance, and for struggling to enact those ideals.<sup>1</sup>

I. Introduction: The Missed Link

This manuscript represents work in progress on closely related and evolving topics of law and policy that engage the hearts and minds of academe in continuing debates over the meaning of neutrality, equality and tolerance in higher education, and therewith, the role of higher education in a racially pluralistic democracy. It examines the link, which the judiciary has so far missed, between the very limited extent of faculty integration in higher education on the one hand, and, on the other, of minority targeted scholarship programs (generically referred to in this paper as MTS, following the usage of the U.S. GAO)<sup>2</sup>--one example of race-specific affirmative action that has and can address the supply side of the problem of small numbers, in most cases token presence, of minority faculty, above all senior faculty members, as well as senior administrators in "historically white" institutions--that is, those once segregated by law--as well as predominantly white institutions--those never segregated by law.

Two higher education cases dealing with racial integration in higher education provide the central focus of the legal component of the analysis. One is U.S. & Ayers v. Fordice,<sup>3</sup> the (now) 20 + year old, comprehensive Mississippi higher education desegregation case, decided and remanded by the U.S. Supreme Court in June 1992. The other is Podberesky v. Kirwan,<sup>4</sup> a Maryland desegregation case involving a successful challenge to the talent and non need-based Benjamin Banneker Fellowship Program for African Americans at the University of Maryland at College Park

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<sup>1</sup> Minow, "On Neutrality, Equality, & Tolerance," Jan/Feb Change 17 (1990).

<sup>2</sup> United States General Accounting Office, Report to Congressional Requesters, Higher Education: Information on Minority-Targeted Scholarships (Jan. 1994) (GAO/HEHS-94-77). For further discussion of the GAO's findings, see p.x infra.

<sup>3</sup> 112 S. Ct. 2727 (1992).

<sup>4</sup> 762, F. Supp. 364 (D. Md. 1991); 956 F. 2d 52 (4th Cir. 1992); 838 F. Supp. 1075 (D. Md. 1993); F. 3d (4th Cir. 1994); petition for cert. filed 3/30/95; cert denied, 5/30/95.

[hereinafter UMCP].<sup>5</sup> In October 1994, the Fourth Circuit Court of Appeals, overruling the district court for the second time, invalidated the Banneker Scholarship Program. Seven months later, on May 30, 1995, the Supreme Court refused UMCP's petition for certiorari, thus declining the opportunity to consider the lawfulness of minority support programs in public higher education.<sup>6</sup> A good part of the story this paper relates reflects the position of the author as observer of and participant in both Podberesky and Fordice as it looked like they could both end up in the Supreme Court, Fordice possibly for a second time,<sup>7</sup> and Podberesky for the first time. In terms of the empirical data needed to address the standard Supreme Court decisions have required for review of race-based, voluntary, public sector affirmative action, Podberesky was "ripe" for the highest court's consideration.

In view of two June 1995 decisions in which the Court invalidated policies aimed at racial power sharing--Aderand v. Pena<sup>8</sup> (involving race-conscious contracting) and Miller v. Johnson<sup>9</sup> (involving electoral districting)--the denial of certiorari in Podberesky may, however, have postponed a national showdown that would have been devastating to programs similar to the Banneker in place around the country.<sup>10</sup> As a consequence of the Supreme Court's decision not to review Podberesky, UMCP, in compliance with the Fourth Circuit's injunction, eliminated the Banneker as a program targeted only for black Americans for the 1994-95 academic year. In Fordice the Supreme Court had taken pains to recognize the non-

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<sup>5</sup> UMCP is officially designated the "flagship" campus of the University of Maryland System. Other campuses include the University of Maryland at Baltimore (UMAB)--home to most of the graduate professional schools, and the University of Maryland, Baltimore County (UMBC), a comprehensive university, home of the Meyerhoff Scholar's Program, a competitive scholarship/support program for academically talented black students interested in math and science. For a study of the Meyerhoff Scholars program, see Sharon Fries-Britt, "A test of Tinto's Retention Theory on The Meyerhoff Scholars: A Case Study Analysis." (unpublished PhD dissertation, 1994.)

<sup>6</sup> Named after Benjamin Banneker, an african American Maryland inventor, etc. Add to this.

<sup>7</sup> As of October 1, 1995 I have not been able to find out from the Justice department whether or not the district court's March 1995 decision in Fordice will be appealed.

<sup>8</sup> 11 S. Ct. Briefly explain and note implications for federally funded fellowships

<sup>9</sup>

<sup>10</sup> It takes at least four justices to grant cert. Given the 5-4 split on affirmative action issues, the four who would probably be most favorable to the Banneker--Justices Stevens, Souter, Breyer, Ginsburg--may have feared ending up a minority on the question of the Banneker's lawfulness.

fungibility of institutions of higher education.<sup>11</sup> But in Miller and Johnson the majority conceptualizes the individuals who make up the nation's pluralistic population as a collectivity of fungible atoms, inhabiting a continent without a history and races without status-and power-based social relations.<sup>12</sup> The implications of these conceptions for diversity, including integration initiatives, will be explored later in this paper.

Last March 7, 1995 the federal district court for Northern Mississippi issued its remand decision in Fordice.<sup>13</sup> Reflecting the systemic scope of plaintiffs' challenge, Judge Neal Biggers' lengthy opinion addresses a broad range of policy questions facing Mississippi's once aggressively segregated state system of higher education. Throughout the twenty years of its litigation, the most visible and politically charged question in Fordice was the continued existence of Mississippi's historically black institutions [hereinafter HBI]. This paper, however, focuses on another important, if the far less noticed issue--the faculty "remnant" of Mississippi's state system of higher education. At the system's five historically white institutions [hereinafter HWIs], the ratios of non-black to black American faculty (above all among senior tenured faculty) are "skewed" in the extreme, to use a concept developed by Rose Moss Kanter, one of the most prominent researchers on the impact of relative numbers on the worklife of minorities--qua persons of a "different social type"--when present in different proportions.<sup>14</sup>

This manuscript also looks beyond the Mississippi litigation to consider long-term, supply side remedial possibilities of minority-targeted fellowship support

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<sup>11</sup> 112 S. Ct. at 2736.

<sup>12</sup> Kennedy, Rehnquist, Sca'la, Thomas, and O'Connor in Aderand v. Pena (June 12, 1995) (minority contracting) and Miller v. Johnson (June 29, 1995) (voting rights). Stevens, Souter, Ginsburg, and Breyer dissented. The same 5-4 lineup occurred also in the Court's June 12, 1995 decision in Missouri v. Jenkins, a decision limiting the authority of the district court to order desegregation remedies in K-12 education. The majority also held that courts may not judge whether former de jure school systems have achieved partial unitary status by comparing their students' achievement to national norms.

<sup>13</sup> 879 F. Supp. 1419 (N.D. Miss. 1995)

<sup>14</sup> See, e.g., Rosabeth Moss Kanter, "Some Effects of Proportions on Group Life: Skewed Sex Ratios and Responses to Token Women," Vol. 82 American Journal of Sociology (March 1977); Kanter, Men and Women of the Corporation, Basic Books, 1977; Kanter, "Access to Opportunity and Power: Measuring Racism/Sexism Inside Organizations," in Alvarez (ed.), Social Indicators of Institutional Discrimination: Management and Research Tools, Jossey Bass, 1978); Spangler, Gordon and Pipkin, "Token Women: An Empirical Test of Kanter's Hypothesis," Vol. 84 American Journal of Sociology, (1978); Izraeli, "Sex Effects of Structural Effects? An Empirical Test of Kanter's Theory," Vol. 62 Social Forces (1983) (etc.) Kanter's work inspired "The Tale of 'O,'" an audio-visual, role-playing training presentation for exploring the adverse consequences of "being different." It was created by Goodmeasure, Inc., 350 Broadway, Cambridge, MA 02139.

programs (generally identified as MTS by the U.S. GAO)<sup>15</sup> for the tiny presence of black faculty, above all in tenured positions of power and influence in HWIs in Mississippi and predominantly white institutions elsewhere. From a policy perspective the two cases are closely linked. It is a link which the federal judiciary, however, has so far failed to accept--indeed, even to clearly grasp. Yet, even though the Fourth Circuit's decision invalidating UMCP's Banneker program in its black-only form stands, even though the tide appears to be turning, if not moving out completely on affirmative action as, once again, affirmative action is serving as a "wedge" issue of Presidential electoral politics,<sup>16</sup> fellowship support programs for minority students have not been abandoned in Maryland or elsewhere.<sup>17</sup> A letter of September 7, 1995 from the General Counsel of the U.S. Department of Education to college and university attorneys, noting its disagreement with the result in *Podberesky*, essentially quarantined the Fourth Circuit's decision by stressing that it was "limited to ruling on the nature and weight of the University's factual evidence and the extent to which it met the 'narrowly tailored remedy' legal standard established by numerous Supreme Court precedents."<sup>18</sup> Race-targeted scholarships, "as a remedy for past discrimination or as a tool to achieve a diverse student body" are not only "legal in appropriate circumstances," general counsel concluded, they are also "vital to the education of all students."<sup>19</sup> Clearly, challenges to the legality of MTS programs will arise again from other parts of the country. A test case before the Supreme Court, however, probably will not occur until after the antimonies of campaign rhetoric quiet down.

So--the denouement of the story this manuscript tells still lies in the future. Would it not be a tragic irony if the federal judiciary finally concludes that a) even though the small number of black faculty at Mississippi's HWIs is traceable to its prior *de jure* system (ergo Mississippi is responsible), it can't be expected to do much about the absence of blacks in academic leadership positions because the limited pool of black doctorates from which to recruit minority faculty is a problem national in scope (everyone is responsible for the small number of black doctorates so no one has to take responsibility to remedy the problem), and b) that neither Mississippi's nor the universities of any other state may, much less be required to undertake to pool-expanding "educationally sound" remedies--aka affirmative action--in the form

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<sup>15</sup> GAO, Report to Congressional Requesters, Information on Minority-Targeted Scholarships, " January 1994 at 1.

<sup>16</sup> For an examination of affirmative action in campaign politics and Supreme, Court decision-making in the late 1980s, and their implications for higher education, see, e.g., Clague, M.W., "The Affirmative Action Showdown of 1986: Implications for Higher Education," The Journal of College and University Law, Fall 1987, 14, pp. 171-257

<sup>17</sup> See *infra*, p. x

<sup>18</sup> Judith A. Winston, Office of General Counsel, U.S. Dept. of Education, Sept. 7, 1995 at 2.

<sup>19</sup> *Id.*, at 3. (Emphasis in the original.)

of minority-specific fellowship support programs? The first possible outcome is reflected in Judge Biggers opinion. The second in the 4th Circuit's Podberesky decision.

The rest of this manuscript is divided into six major Sections. Section II that follows presents an overview of the legal and policy context in which the Fordice and Podberesky cases are imbedded. In view of the author's personal involvement with both cases, more and less, directly and indirectly, over a number of years the first person is used intermittently in relating the story. Section III then turns to detailed examination of the faculty "remnant" in Fordice, examining in turn the way the Supreme Court framed the issues, the way defendant Mississippi framed the issues, and the way the United States and private plaintiffs framed the issues and analyzed the data available through discovery. Arguing that Mississippi "baked the pie charts" showing few black in tenured faculty or other senior academic leadership positions in its HWIs, Section IV moves on to consider minority fellowship support programs as effective and "educationally sound" means of baking new pie charts. Are they mechanisms for ethnocentric separatism that simply segregate higher education further, and seal off black students and PhD's from the rest of academe? Are they "disuniting America"?<sup>18</sup> Or are they, quite the contrary, effective means for recruiting, welcoming and involving talented minorities in social activities and scholarly education in multi-racial settings and for expanding the reservoirs from which academic leaders can be drawn? Section V follows with an examination of the way the courts' opinions in Fordice and Podberesky (as of October 1995) relate to these issues. Section VI reviews the major arguments of defenders and opponents of MTS and critiques the reliance that some lower courts have placed, following their interpretation of Supreme Court decisions, on conceptual antinomies that will severely limit our ability to enact the ideals of "neutrality, equality, and tolerance."

## II. The Legal and Policy Context: An Overview

### II-A The Mississippi and Maryland Connection

#### 1. U.S. & Ayers v. Fordice: Affirmative Duty - Yes

In June 1992, the U.S. Supreme Court articulated, for the first time, in U.S. & Ayers v. Fordice,<sup>19</sup> what standard applies in determining whether public higher education has met its "affirmative obligation to dismantle its prior de jure segregated system." It rejected the lower court's holdings in Fordice that the state's affirmative constitutional (and Title VI) duty to integrate its state system of higher education is satisfied by "race-neutral policies and free choice."<sup>20</sup> This lower court "race neutral and free choice" standard--barely distinguishable from a mere abstention from purposeful discrimination--no more satisfies, the Supreme Court ruled, the

<sup>18</sup> A reference to concerns expressed by Arthur Schlesinger, in his recent book, The Disuniting of America, 199X.

<sup>19</sup> 112 S. Ct. 2727 (1992).

<sup>20</sup> Id. at 2736.

affirmative obligation in a public university context than it did in elementary secondary education.<sup>21</sup> Although agreeing with the Court of Appeals that "a state university system is quite different in very relevant respects from primary and secondary schools,"<sup>22</sup> and that the remedies would differ, the Court invoked its landmark 1968 decision in Green v. New Kent County School Board.<sup>23</sup> This K-12 desegregation case, which struck down a freedom-of-choice plan producing little change in school racial composition, held public school board to "the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch."<sup>24</sup> Thus the stage was set for expanded use of prospective equitable decree to operationalize the affirmative duty to dismantle prior de jure segregation; K-12 "institutional reform" litigation carried the court well beyond "victim-specific" redress.<sup>25</sup>

Fordice then, because it suggests judicial participation in the messy business of system-wide reform, is, to an extent as yet uncertain, higher education's Green. But just how far the Supreme Court is willing to carry the judiciary into institutional reform litigation is far from clear. Does the fact that the Supreme Court rejected the lower courts' equation of the state's affirmative constitutional duty to integrate with race neutral policies imply that some kind of race-conscious remedial policies may be constitutional? The Court's opinion is noticeably enigmatic on this matter. Indeed the contemporary Court has been little embarrassed in other contexts in finding, simultaneously the existence of a right, and the non-existence of an appropriate remedy.<sup>26</sup>

As a result of the Supreme Court's 1992 Fordice ruling, the continuing challenge to racial segregation in Mississippi's state system of higher education was remanded to the district court for Northern Mississippi for further proceedings consistent with the Court's newly formulated--and perplexing--standard:

"If the state perpetuates policies and practices traceable to its prior system that continue to have segregative effects . . . and such policies are without sound educational justification and can be practicably eliminated, the state has not satisfied its burden of proving that it has dismantled its prior system."<sup>27</sup>

The negating verbs eliminate and dismantle, employed in the sentence just quoted,

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<sup>21</sup> 112 S. Ct. at 2728.

<sup>22</sup> 112 S. Ct. at 2736

<sup>23</sup> 391 U.S. 430 (1968).

<sup>24</sup> 391 U.S. at 4437-438.

<sup>25</sup> McDowell, Chayes

<sup>26</sup> Double check HWC

<sup>27</sup> 112 S. Ct. at 2735.

as well as others verbs used by Justice O'Connor--"disestablish," "reform," "negate," "undo," "minimize," "counteract"<sup>28</sup>--did not clarify how race-specific remedies might be. The phrase "affirmative action" does not appear in the main body of the majority opinion in Fordice<sup>29</sup>. It does appear, however, in one question-begging footnote. In it, responding to private plaintiffs' claim that the state system violates a Title VI regulation "which requires states to 'take affirmative action'," the Court merely reminds its readers of the uncontested legal point that "that the reach of Title VI extends no further than the Fourteenth Amendment."<sup>30</sup> But does the Fourteenth Amendment countenance race-specific affirmative action remedies mandated by the courts after a finding of a constitutional violation? Does the Fourteenth Amendment ever permit voluntary and "induced" voluntary affirmative action--Banneker style? Will Fourteenth Amendment jurisprudence distinguish educational settings from other employment contexts? Are judges and Justices willing and able to make use of the insights from multiple academic disciplines as to how inequalities perpetuate themselves? These are questions that will be examined later in this manuscript.

## 2. Podberesky v. Kirwan: Affirmative Action - Yes then No

### a. Podberesky - I:

In January 1992, five months before the Supreme Court announced its Fordice decision, the Fourth Circuit Court of Appeals rejected the opinion of the district court in Podberesky v. Kirwan<sup>31</sup> (Podberesky-I). The district court's rejected opinion had upheld the University of Maryland's voluntary race-based Banneker Scholarship program for African Americans at the University of Maryland at College Park [UMCP].

Although *de jure* Jim Crow died officially more than eleven years earlier in Maryland (in 1951) than it did in Mississippi (in 1962), public higher education in Maryland, as in Mississippi, had been segregated by law since the 19th century. The Banneker Program developed into one means of counteracting UMCP's Jim Crow legacy. For a decade after it was first launched with modest stipends in 1978, UMCP's Banneker Scholarship Program was not limited to African Americans; all "minority students" were eligible. In 1988, however, UMCP not only restricted eligibility to African Americans; it also greatly enhanced its monetary value.

Thus, by the late 1980s the Banneker was conceived of as one strategy--among others--to counter the "present effects" of UMCP's own prior *de jure* discrimination against black Americans. A variation on this kind of race-targeted fellowship had survived challenge, supported by the Justice Department during the Reagan

<sup>28</sup> id. at 2744. (O'Connor concurring)

<sup>29</sup> Nor in Justice O'Connor's concurring opinion, nor--not surprisingly--in Thomas' concurring opinion, nor in Scalia's opinion concurring in the judgment in part and dissenting in part.

<sup>30</sup> 112 S. Ct. at 3737-3738 note 7.

<sup>31</sup> 956 F. 2d 52 (4th Cir. 1992), reversing 764 F. Supp. 364 (D. MD. 1991).

administration, in Tennessee's higher education desegregation case, Geier v. Alexander.<sup>32</sup> "[P]referential treatment of persons solely on account of their race," argued the United States, violates the "victim-specific limitations governing court-ordered affirmative equitable relief." The Sixth Circuit disagreed, rejecting what it characterized as the Justice Department's now discredited theory of victim specificity limitation on all affirmative action remedies."<sup>33</sup>

Soon after UMCP increased funding of the Banneker and limited it to black students, it too was subject to legal challenge. Daniel Podberesky, who was precluded from consideration for a Banneker Scholarship because he was not African-American, and who was denied a merit-based, non race-targeted Francis Scott Key Scholarship, sued UMCP and its President, William Kirwan, in 1989. Despite his Polish surname, Podberesky identified himself as Hispanic<sup>34</sup> because he was born to a Costa Rican mother. He claimed that his exclusion from competition for a Banneker scholarship, indisputably "solely because of his race (he is Hispanic)"<sup>35</sup> violated his individual rights under the Equal Protection Clause of the 14th Amendment and Title VI of the Civil Rights Act of 1964. Like Allan Bakke, whose challenge to the admissions policy of the medical school of the University of California at Davis, led to the Supreme Court's divided--quotas no, race-a-plus, yes--affirmative decision of 1978, Daniel Podberesky was a high achieving student. Nevertheless he missed the cut-off for UMCP's Key Scholarship. Unlike Bakke, of course, Podberesky was not denied admission, only a scholarship.

Initially Podbersky made two claims against UMCP. The first, echoing the Justice Department's position in Geier, was based on the principle of race blindness: preclusion from consideration for a black-only Banneker Fellowship, he argued, constituted reverse discrimination, violating his rights under both the Equal Protection Clause of the 14th Amendment and Title VI of the Civil Rights Act of 1964.

Podberesky's second claim, which was in conflict with the principle grounding his first claim, was based on ethnic consciousness: the failure of UMCP to give Hispanics special consideration for the Key Scholarship, he maintained, also violated the 14th Amendment and Title VI. Some dedicated to promoting the rights of Hispanics (e.g., Michael Olivas) supported Podberesky. But the Mexican American Legal Defense and Education Fund (MALDEF), "a national civil rights organization

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<sup>32</sup> 595 F. Supp. 1263 (M.D. Tenn 1984); 801 F. 2d 799 (6th Cir. 1986). The challenged program contained in the proposed consent decree provided, for a total of five years, that 75 Black college sophomores would be selected to participate in a pre-professional preparatory program. Those who successfully completed the undergraduate program and met the minimal admissions standards of the professional were guaranteed admission.

<sup>33</sup> 801 F. 2d at 809.

<sup>34</sup> Podberesky v. Kirwan, Brief of Appellants, August 12, 1991 at 2.

<sup>35</sup> id.



dedicated to promoting the rights of Hispanics in the United States," did not.<sup>36</sup> For MALDEF the future of all minority-targeted financial aid programs, designed to counter minority underrepresentation, including Hispanic, required validation of UMCP's Banneker Program. MALDEF did consider Podberesky to be "Hispanic"--using the umbrella term employed in the 1990 Census to cover Mexican, Puerto Rican, Cuban or persons from Spain or Spanish speaking countries of Central or South America or the Dominican Republic.<sup>37</sup> But MALDEF also recognized a threat to minority groups of divide and conquer: "Mr. Podberesky's claim," it argued, "only serves to make it convenient for courts and policymakers to divide minority communities in their quest for educational attainment in a world of limited resources."<sup>38</sup> Despite the broad reach of the term Hispanic, implicitly MALDEF seemed to distinguish the circumstances of Podberesky's case from that of Hispanics who experience educational and economic deprivation linked to cultural and ethnic characteristics. MALDEF's brief does not expressly say so, but certainly Podberesky is not an "Hispano," a term the Supreme Court has used in K-12 desegregation cases to identify "Chicanos or Mexican Americans" as "an identifiable class for the purposes of the Fourteenth Amendment" in the context of school desegregation cases arising in Southwestern states. In Keyes v. School District No.1, Denver, Colo.,<sup>39</sup> as in Hernandez v. Texas<sup>40</sup> the Denver tri-ethnic school desegregation case in which MALDEF participated as amicus on behalf of minority parents, the Supreme Court refused to separate "Negroes" and "Hispanics" for the purpose of defining a "segregated" school, accepting the evidence "that in the Southwest Hispanics and Negroes have a great many thing in common"--that is, "educational inequities" and "economic and cultural deprivation."<sup>41</sup>

UMCP's Banneker Program initially survived Podberesky's "reverse discrimination" challenge. In May, 1991 the district court ruled, on a motion for summary judgment, that UMCP's reliance on OCR's findings of UMCP's history of discrimination and noncompliance with Title VI provided the "strong basis in evidence" of the "continuing effects of past discrimination," required by two Supreme Court affirmative action decisions--Wygant v. Jackson Board of Education,<sup>42</sup>

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<sup>36</sup> Brief Amicus Curiae, Mexican American Legal Defense and Educational Fund, in support of appellees at 1, Podberesky v. Kirwan,

<sup>37</sup> U.S. Bureau of the Census, 1990 Census of Population, Persons of Hispanic Origin in the United States, B-12 (1993).

<sup>38</sup> Ibid. at 6.

<sup>39</sup> 413 U.S. 189 (1973)

<sup>40</sup> 347 U.S. 475 (1954).

<sup>41</sup> 413 U.S. at 197.

<sup>42</sup> 476 U.S. 267 (1986).

and City of Richmond v. Croson,<sup>43</sup> to justify race conscious remedial action initiated by public entities under the Fourteenth Amendment.

The district court also concluded Podberesky failed to provide evidence to support the creation of an Hispanic Scholarship program at UMCP. Podberesky appealed on his "reverse discrimination" claim. He did not appeal this second, affirmative action claim.

Podberesky won his appeal on his first claim. In January 1992, the Fourth Circuit reversed the lower court's grant of summary judgement in favor of UMCP and the Banneker Program. Also relying on Wygant and, principally Croson, as the district court had, the appeals court concluded that UMCP had not itself made specific and contemporary showings of "vestiges" of its own prior discrimination. Podberesky was remanded to the district court for Maryland for a determination as to whether UMCP could make such a showing.<sup>44</sup> As we shall consider more fully later, the district court and the court of appeals held very different understandings of the distinction drawn in Wygant and Croson (reinforced in the Court's June 1995 decision in Aderand v. Pena)<sup>45</sup> between discrimination imposed by the state and discrimination emanating from society.

Thus, by mid 1992 the legal posture of Mississippi and Maryland were radically different. In Fordice, the Supreme Court held that Mississippi had neither satisfied its burden of proving that its avowedly race-neutral policies were not rooted in prior discrimination, nor shown that its claimed race neutral policies had dismantled the state's prior de jure system. In Podberesky the Fourth Circuit Court of Appeals held that Maryland had not yet met its burden of proving that its admittedly race-specific scholarship program was necessary to the dismantling of its prior discrimination. To put it differently, Mississippi had to prove that the sins of its past do not haunt the present, whereas Maryland had to prove that the sins of its past do haunt the present. If Mississippi failed its burden--if it could not gainsay traceability of facially race neutral policies to prior discrimination and their present discriminatory effects, then it must "eliminate them."<sup>46</sup> If the University of Maryland could not provide evidence robust enough to convince the courts of the continuing effects of its prior intentional discrimination, then it must eliminate its race-specific Banneker program. Two big unanswered questions remained. If Mississippi failed its burden, would it be required to take race-specific remedies? If judiciary does not mandate race-specific remedies, may Mississippi voluntarily undertake race-specific corrective action?

#### b. Podberesky - II

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<sup>43</sup> 488 U.S. 469 (1989). Croson was the first Supreme Court opinion in which a majority, not just a plurality, ruled that the "strict scrutiny" standard must be used to review the constitutionality of racial preferences benefitting minorities.

<sup>44</sup> 956 F. 2d at 55.

<sup>45</sup> Cf with Fullilove

<sup>46</sup> 112 S. Ct. at 2738.

Fordice, a challenge to the continuing effects of past discrimination, and Podberesky, a challenge to an induced voluntary remedy for the continuing effects of past discrimination (e.g., initiated by UMCP in response to pressure from OCR) are profoundly connected. As they proceeded through the judicial process one wondered if they would finally end up on a convergence, or collision course in the Supreme Court? We now know they won't. On June 2, 1995, three days after Carl Rowan gave the commencement address at UMCP, praising its President--William Kirwan--for his leadership in defense of the Banneker program. the U.S. Supreme Court denied UMCP's petition for certiorari. Editorialized the New York Times, "the Court simply stood idly by while forces hostile to affirmation action scuttled a worthy program." <sup>47</sup> (Find quote for opposite position)

Was the Supreme Court's refusal to hear out the arguments a fatal blow to minority fellowship support programs? Not yet. Many institutions have chosen to treat the Court's decision not to hear Podberesky--thus leaving the Fourth Circuit's decision in tact--as limited only to the Fourth Circuit. The public/private McKnight Black Doctoral Fellows program in Florida continues with the support of participating Florida universities. <sup>48</sup> The National Compact for Faculty Diversity, initiated by the Southern Regional Education Board [SREB], a minority doctoral support program modeled in part on Florida's McKnight program continues to develop in cooperation with SREB Southern states--Mississippi, but not Maryland, among them. And even within the Fourth Circuit, indeed within the University of Maryland System, the Myerhoff program in math and science, another support program for academically talented black undergraduate students, remains in place at the University of Maryland in Baltimore County. <sup>49</sup>

## II-B. October 1993: Tougaloo College - A Sentimental Visit

### Reflections on the Summer of 1964

On Sunday, October 31, 1993, I paid a sentimental visit to Tougaloo College, just north of Jackson, Mississippi, the State capital, and was making haste--lawfully, I believed--in a rented car down Route 49 to Hattiesburg to visit the University of Southern Mississippi the following day. I was back in Mississippi for the first time since the summer of 1964 on the second of my "official" trips to Mississippi for the purpose of visiting 6 of the 8 campuses in Mississippi's state system of higher education, in my role as a novitiate expert witness for the U.S. Department of Justice on faculty issues in Fordice. (I visited only 6 of the eight

<sup>47</sup> N.Y. Times, May 25, 1995, at A28.

<sup>48</sup> M. Clague, "Minority Doctoral Support Programs: Three Case studies," NCPGF (1989), Stamp and Tribble,

<sup>49</sup> For a study of this mixed public/private scholarship support program, see Sharon-Fries-Britt, A Test of Tinto's Retention Theory on the Meyerhoff Scholars: A Case Study Analysis, Unpublished PhD dissertation in process of publication, UMCP, 1994, and Fires-Britt, "Voices of Gifted Black Students," Paper to be presented at ASHE, Nov. 1995. I do not know as of 10/2/95 whether either the Justice Department or the private plaintiffs, or both, will appeal the district court's March 1995 Fordice decision.

campuses because I came aboard the case near the end of discovery.) Cruising south from Jackson to Hattiesburg, I thought back on the summer of 1964--almost 30 years earlier--when I, along with others in a multi-disciplinary group of fellow Harvard graduate students, taught at private, all black Tougaloo College. My courses were Constitutional Law and Elementary French. I and my fellow graduate students were greeted by Tougaloo students and administrators with extraordinary warmth; how congenial, but how undeserving simply because we were friendly white faces. I thought about the women students at Tougaloo who had combed my hair with affection that summer.

The black power movement that was to grow from Mississippi's summer of 1964 lay ahead. Its militant mood I encountered six years later, when teaching at Bowie State College--one of Maryland's HBIs--about the time National Guardsmen killed students at Mississippi's Jackson State.<sup>50</sup> I thought back, while driving to Hattiesburg in 1993, of the Bowie student who accused me of genocide because I expected him and to develop their proficiency in writing "standard English"; I was, he argued, destroying his "black English."<sup>51</sup> I recalled also another student and former marine, who instructed a large gathering of angry Bowie students on how to survive a possible guard assault by eating fellow students who might be killed, he forecasted, by the guard. Tougaloo of 1964, predated what has been called the encounter stage. Bowie State College of 197X? reflected what has been called an early encounter stage. (Must elaborate/explain re Berkeley Report)

In June 1964, not long before the arrival of our graduate student group at Tougaloo, the Chaplain of the College<sup>52</sup> had been arrested for driving without headlights--headlights the arresting officers themselves bashed after first detaining the driver. Students spoke of losing family members to the Klan, and of having to move because of Klan threats. One of my students told me she was under investigation for her affiliation with an international woman's peace group. The investigators, she believed, were from the FBI. Could it have been, instead, the Mississippi Sovereignty Commission, one of Mississippi's "defenses against the decision of the United States Supreme Court in Brown v. Board of Education"?<sup>53</sup> Charged by the Mississippi legislature in 1956 to "do and perform any and all acts and things deemed necessary and proper to protect the sovereignty of the State of Mississippi, and her sister states, from encroachment thereon by the federal government,"<sup>54</sup> it spied on "persons whose utterances or actions indicate they

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<sup>50</sup> For those of us at Bowie, the killing of students by the National Guard at Jackson State, an HBCU, was the main event, and the killing of students at predominantly white Kent State the side show.

<sup>51</sup> He declined my invitation to write his papers in "black English."

<sup>52</sup> Ed King?

<sup>53</sup> Trillin, "State Secrets," New Yorker, 54, May 29, 1995. Calvin Trillin was a reporter for the Southern bureau of the New York Times in the early 1960s.

<sup>54</sup> Id at 54.

should be watched with suspicion on future racial attitudes." <sup>55</sup> No one talked of the Commission in 1964. As of May 1995, its secret files reportedly still remain sealed, though reporters have begun to discover materials brought to light by an unresolved, eighteen year old lawsuit initiated in 1977, <sup>56</sup> as well as through documents donated by former Governor Johnson to the archives of the University of Southern Mississippi. <sup>57</sup>

In 1964, having heard the story of the police and Tougaloo's Chaplain, neither I, nor fellow white graduate students, trusted the all white Jackson police force in the summer of 1964. We deliberately parked under bright lights instead of a side street when we attended a George Wallace rally at Jackson's segregated public auditorium. Following Wallace's talk, which was somewhat less extreme than we expected, a group of young men separated from their dates and stalked us. I remember the apprehension we felt, especially about those who looked Jewish among us, and wore sandals, looked particularly suspect to the young men of Jackson. An Alabama couple and another Harvard graduate student who was visiting his girl friend saw what was going on and volunteered the protection of their respectability and escorted us to where we had parked under Jackson's bright lights. The daughter of the Mississippi state auditor, the girl friend was, we were told, the first white woman to go to college outside of Mississippi. She attended Duke. According to our landlord for the summer, his own daughter was the first black woman to go to college outside of Mississippi. I believe she went further North, to Bryn Mawr.

The Summer of 1964 we had a copy of James Silver's riveting book, Mississippi: The Closed Society <sup>58</sup> published the previous year. It documented Mississippi's incredible, consciously fostered insularity which both fed on and sustained the notion of white supremacy. The "closed society" Silver described "refused to allow freedom of inquiry or to tolerate 'error of opinion'." Its self-isolating white population which was "subject to a "never-ceasing propagation of the "true faith" [white supremacy] with a constantly reiterated demand for loyalty," <sup>59</sup> It considered "non-white Mississippians and all others as out-landers." <sup>60</sup> A long-

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<sup>55</sup> Id. at 53. Trillin concludes that the Sovereignty Commission was the source of an article in the Jackson Daily News headline that declared the "apparently endless 'freedom rides' into Mississippi and the south were planned in Havana, Cuba, last winter by officials of the Soviet Union."

<sup>56</sup>

<sup>57</sup> Trillin, at 56.

<sup>58</sup>

<sup>59</sup> Id. at 6.

<sup>60</sup> id. 154. Trillin's research reveals that, even before The Closed Society was published, the Sovereignty Commission had written the Chair of the University of Mississippi's Board of Trustees offering reasons why Silver should be terminated. L. Trillin, supra, note x at 55-56. (Note reasons given)

time professor at the University of Mississippi, Silver, it is now known, was targeted by the Sovereignty Commission before the book was published.<sup>61</sup>

Driving South on Route 49 in October 1993 I also recalled the white head of the Jackson Chamber of Commerce, who came surreptitiously to an evening talk I gave (on a constitutional law issue) in a series of discussions organized by a Tougaloo student.<sup>62</sup> This business man conveyed to us that he did not want it known to the white community beyond that he attended activities at Tougaloo. In retrospect, I wonder, could he have been building political bridges in anticipation of the Civil Rights Act of 1964, which passed Congress while we were at Tougaloo, in early July. One of my "Con Law" students the summer of 1964 was the brother of the first African American to be admitted into "Ole" Miss law school.<sup>63</sup> James Meredith, the first African American to gain admission to the University of Mississippi, and thus the first African American thereby to break Mississippi's total color barrier in both the public,<sup>64</sup> had succeeded two years earlier only by virtue of a federal court order,<sup>65</sup> under the escort of federal marshals, present to protect Meredith from rioting defenders of apartheid.<sup>66</sup> During those days of "governors at the door,"<sup>67</sup> Mississippi's Governor Ross Barnett damned the marshals as "the armed forces and oppressive power," of the United States.<sup>68</sup>

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<sup>61</sup> "[T]he director of the state Sovereignty Commission had written to the chairman of the university's board of trustees outlining what a Commission report described as 'various reasons why Dr. James Silver could be terminated from his position at the University of Mississippi without any risk of losing the University's accreditation.'" Trillin, supra note at 56.

<sup>62</sup> His name was Memphis Norman.

<sup>63</sup> The student was John Donald, brother of Cleveland Donald, the first black to attend the University of Mississippi law school.

<sup>64</sup> David G. Sansing, Making Haste Slowly: The Troubled History of Higher Education in Mississippi, University of Mississippi Press, 1990, at 195.

<sup>65</sup> Meredith v. Fair, 306 F. 2d 374 (5th Cir, 196 ), cert. denied 371 U.S. 828 (1962).

<sup>66</sup> According to Trillin, supra, note x at 54, one of the Sovereignty Commission's secrets that had been made public is that "an early black applicant to the University of Southern Mississippi, who was convicted of several crimes and thrown into prison was framed; an alternative plan was to murder him."

<sup>67</sup> A phrase used by Alvin O. Chambliss of North Mississippi Rural Legal Services, attorney for private plaintiffs. Transcript of Proceedings, Status Conference, October 22, 1992, p. 75.

<sup>68</sup> David G. Sansing, Making Haste Slowly: The Troubled History of Higher Education in Mississippi, University of Mississippi Pres, 1990, 176, 192. This page refers to first effort when Governor Barnett interposed (in the manner of George Wallace) and denied Meredith admission.

What, I had been wondering in anticipation of my official Fordice-related visits, would Mississippi be like in late 1993, with a population that was close to 36% African American, the largest percent of any of state in the union? <sup>69</sup> Would I find some models of racial progress, evidenced by significant power-sharing, from which others might learn, and which would belie the image of "Mississippi Burning"? What visual changes in Mississippi, I had wondered in advance, would strike my eye on this October 1993 visit? I had learned at my December 1992 deposition and on my trip to Delta State, Alcorn A & M, MSU and MUW earlier that month that I would not be allowed to peer much beneath the surface on these official visits. The interviews, arranged with and through university administrators, were conducted in the presence of Mississippi's attorneys with their tape recorders running. Expert witnesses for the United States were warned unmistakably by their attorneys that they could jeopardize their positions as expert witnesses if they talked independently with or received information from university employees directly. Although Mississippi's university administrators were extremely circumspect, it was obvious that there were fundamental disagreements between some Mississippi IHL institutions and the IHL governing board, above all on the issue of school closures. At the time of the visits the continued existence of HBI Mississippi Valley and HWI Mississippi University for Women were in doubt. (Note irony - footnote?)

What, on the surface, did strike my eye in 1993? Clearly, driving foreign (Japanese) in 1993 did not, as did driving foreign (French) in 1964, announce foreign (i.e., northern) non-Mississippi citizenship and the likelihood of being an "outside agitator." That was term used in 1964 to identify the thousands of "freedom riders/civil rights workers" who "invaded" the state that summer to help register black voters.

Tougaloo's campus had changed somewhat. A large mural portraying black struggle and academic achievement was now blazoned on the wall of a classroom building. The ante-bellum mansion that provided a focal point for the campus was beautifully renovated, and still surrounded with stately moss draped trees. New dorms had been added. But, the one floor, red-brick student union in which we--faculty and students--had gathered around the TV as the tale of the June 16 slayings of three civil rights workers, James Cheney, Michael Schwerner, and Andrew Goodman unfolded--looked the same, and it was still the student union. The elimination of the three young men. one black, two white, had been plotted by the White Knights of the Ku Klux Klan of Mississippi in their war of self-defense against the conspiracy of "Liberals, Comsymps, Traitors, Atheists, and Communists," especially Jewish ones, to subvert Christian American Principles. <sup>70</sup>

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<sup>69</sup> Mississippi IHL, Appendix, Mississippi, A Demographic Profile. The Mississippi University Research Center for Policy and planning projects the black population of Mississippi will be 40% by the year 2000.

<sup>70</sup> Excerpt from the a lecture of instruction by Sam Bowers, Imperial Wizard of the White Knights, to the Neshoba County and other Klan units. Quoted in the preface of Florence Mars' book, *Witness in Philadelphia*, (1977) at xvii. We were aware in 1964 of how conspicuous the Jewish Harvard graduate students among us seemed, especially the one who wore sandals.

The killings should, of course, have been called murder under Mississippi criminal law. But the State of Mississippi never brought indictments.<sup>71</sup> Instead the U.S. government indicted three Neshoba County law enforcement officers and fifteen private individuals--Klansmen--under two Reconstruction Era federal criminal civil right statutes.<sup>72</sup> The district court dismissed the charges against the private defendants as not stating a claim due to the absence of "state action." Rights protected by the Fourteenth Amendment are rights against state and local governments, not against private parties; ergo the federal civil rights statute, which enforces the Fourteenth Amendment, could not be used invoked against them. But in 1966 the United States Supreme Court reversed the district court in U.S. v. Price,<sup>73</sup> holding that if the charges were true, the "joint adventure" perpetrated by 15 private parties and law enforcement officers was--in the terminology of the Civil Rights Statutes--the taking of life "under color of law."<sup>74</sup> This decision, attributing state authority to private persons when they act in collusion with state authorities, was a landmark in its "state action" jurisprudence.<sup>75</sup> Twenty years later, however, a more conservative Supreme Court began a line of jurisprudence that undermined, without overruling them, the "joint adventurer" line of cases, and thereby sharpened the state/private or state/society distinction and made it more difficult to attribute state action to the interconnected actions of private parties. Coupled with the Court's adoption of "strict scrutiny test" in 1989<sup>76</sup> for evaluating the constitutionality of public sector affirmative action initiatives,<sup>77</sup> Equal Protection Clause jurisprudence admits of little or no mutual influence across the Supreme Court's sharply delineated categories of state and society. It was this

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<sup>71</sup> We were told, in the summer of 1964, that no white person had ever even been convicted in Mississippi with the murder of a black person. According to Florence Mars' account of the federal civil rights trial of Sheriff Price and the Klansmen no jury had returned guilty verdicts in "a long chain of widely publicized and unpunished racial killings that began after the Supreme Court 1954 decision in Brown. Witness in Philadelphia, 262.

<sup>72</sup> 18 U.S.C. § 241 and 18 U.S.C. § 242.

<sup>73</sup> 383 U.S. 787 (1966).

<sup>74</sup> 383 U.S. at . The Court relied in part on the test for state action used in Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961). Though Burton has been undermined by subsequent decision (e.g., Rendall-Baker v. Kohn, 457 U.S. 830 (1982)), it has not been overruled.

<sup>75</sup> In 1967, seven of the fifteen private parties were convicted in the federal district court of Meridian, Mississippi by an all white jury.

<sup>76</sup> In Croson, 488 U.S. 469.

<sup>77</sup> Aderand v. Pena (1995) now holds the federal as well as state and local governments to the strict scrutiny standard: that is, public sector race-based affirmative action must be "narrowly tailored" to serve a "compelling government interest."



dichotomy which the district court challenged in its 1992 decision upholding UMCP's Banneker Fellowship Program in Podberesky. And it was this rigid dichotomy between governmental and society discrimination that the Fourth Circuit invoked in rejecting the district court's appeal for recognition of the societal damage "done by our shameful legacy of involuntary segregated education." <sup>78</sup> (Need transition and cross reference to future discussion here.)

These were some of the things I thought about in October 1993 as I drove at 68 mph, careful to stay within what seems to be the de facto 70 mph speed limit in Maryland, when the combination of police siren and flashing lights signaled for me to pull over. Glancing out my rear view mirror as the trooper approached from behind, I chuckled silently to myself. Here, walking to my car, was some evidence of power sharing. The trooper seemed close to 30 years of age and he resembled a youthful Sidney Poitier. I learned from him that in Mississippi, unlike Maryland, de jure 55 mph limit is also the de facto, ticketable limit. I also learned from him that the Mississippi state police force was no longer all white. "How many black state troopers are there in Mississippi?" I asked the officer, as he started to write. "About a 100," he said. I told him I had taught in Mississippi almost 30 year ago, and . . . "Yeah, I guess there weren't any black troopers then," he interjected, before I could say it myself. Whereupon he then gave me my first speeding ticket ever. I plan to frame it.

## II - C The Mississippi Troopers' Decision: Affirmative Action Mandate

I did not realize when I got my ticket in October 1993 that Mississippi's highway patrol had been desegregated starting in the late 1970s by means of court-ordered "affirmative hiring relief." <sup>79</sup> In 1970 when black plaintiffs filed their discrimination complaint, the Mississippi Highway Patrol had "never in its history employed a member of the Negro race as a sworn officer." <sup>80</sup> Mississippi had claimed, as it would in response to the faculty remnant of Fordice with regard to black that it couldn't find any--that "qualified blacks [were] not in fact applying for positions." <sup>81</sup> Initially, the Fifth Circuit accepted the district court's limited remedy, which, while enjoining discriminatory practices, did not order state officials to increase the presence of black officers via hiring preferences. By 1974, however, (on a second appeal?) with evidence of only "token" numbers of black troopers hired (6 of 591), the Fifth Circuit changed direction. Rejecting Mississippi's good faith argument, it concluded that "[t]hese figures alone negate the State's argument that its present practices are nondiscriminatory, and give no support whatsoever to any argument that the decree appealed from is sufficient to eliminate the effects of past

<sup>78</sup> 838 F. Supp. at 1098.

<sup>79</sup> Morrow v. Crisler, 479 F. 2d 960 (5th Cir. 1973); 491 F.2d 1053, 1056 (5th Cir. 1974) (en banc); cert. denied 419 U.S. 895 (1974); 412 F. Supp. 494 (S.D. Miss. 1976) sub nom Morrow v. Dillard; 580 F. 2d 1284 (1978).

<sup>80</sup> 479 F.2d 960, 962.

<sup>81</sup> Find cite

racial discrimination." <sup>82</sup> In 1978, the Fifth Circuit affirmed race-based hiring relief. The patrol's Jim Crow reputation, far from being an excuse, was evidence of the present effects of its past discrimination:

The reputation of the patrol in the black community as a discriminatory employer has posed a formidable obstacle to achievement of a patrol which has eradicated all the effects of past discriminatory practices. <sup>83</sup>

Thus, in the Mississippi's troopers case, the courts recognized that reputation in the black community is as an important indicator of the continuing effects of the Highway Patrol's past discrimination. In defending the Banneker program in 1993-1994, UMCP, too, attempted to measure continuing effects of past discrimination by the poor reputation of the campus in the "African American community, particularly among parents and high school counselors who influence students' college choices." <sup>84</sup> The district court relied on the reputational data as one of four present effects. <sup>85</sup> The Fourth Circuit rejected it: "[m]ere knowledge of historical fact [past discrimination by UMCP] is not the kind of present effect that can justify a race-exclusive remedy." <sup>86</sup>

If, indeed, there were 100 black state troopers in Mississippi in 1993 they represented 22-25% of these forces of law and order in the state, Mississippi appears to have met the court-mandated quota. <sup>87</sup> The affirmative relief approved by the Fifth Circuit in 1978 consisted of a "hard," albeit temporary, quota system. The State was required to hire and permanently employ one qualified black state trooper for each white so hired until the state troopers were 25% black. Thanks to my speeding ticket, I thus learned of some progress toward significant power sharing.

With the 1978 Mississippi troopers decision, the Fifth Circuit Court of Appeals mandated what Mississippi must do to undo de jure race discrimination. Mississippi's state police force underwent judicially-ordered "reconstruction." As of 1993, however, Mississippi's state system of higher education had not. Judicial mandates--"must do's"--based on the Constitution, had not been of much consequence anywhere in the desegregation of higher education. To be sure, challenges to legally imposed racial segregation in higher education had preceded and laid the groundwork for the

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<sup>82</sup> 491 F. 2d 1053, 1055 (en banc) (1974).

<sup>83</sup> Check cite

<sup>84</sup> UMCP, Decision and Report, April 1993. The Report drew, inter alia, upon interviews conducted by two of its expert witnesses--Walter Allen of UCLA and Joe Feagin, a race relations consultant--as well white and black university administrators.

<sup>85</sup> 838 F. Supp at 1095.

<sup>86</sup> F. 3d (4th Cir. 1994), Slip opinion, p. 8.

<sup>87</sup> Source: Stephen Jiampetti, Ny State Trooper, 1994

1954 holding in Brown I<sup>88</sup> that racially segregated elementary/secondary schools are "inherently unequal" and in violation of the equal protection clause of the 14th Amendment. Two years later, in two per curiam decision without opinion, the Court applied Brown-I's "inherently unequal" ruling to segregated state systems of higher education.<sup>89</sup> Six days after the May decision in Brown-I, the Trustees of the University of North Carolina had issued a resolution adamantly opposing the admission of blacks to the undergraduate school. In 1966, the Supreme Court, in turn, affirmed the lower court injunction ordering the Board of Trustees to cease denying admission to blacks who met the admissions requirements solely because of their race. Equitable relief went no further than to enjoin exclusion of blacks who met the admissions criteria solely because of their race. There wasn't the slightest hint in the Florida and North Carolina cases that the Court was prepared--other than to condemn such overt, unsubtle discrimination--to question the neutrality of institutions of higher education,

Withall, post Brown-I jurisprudence mandating an "affirmative [constitutional] duty to integrate" elementary/secondary education did not result in a similar Supreme Court ruling covering public higher education for over a quarter of a century--that is, not until the Court's 1992 Fordice decision.<sup>90</sup>

## II - D The Maryland Troopers' Decision: The Limits of Affirmative Action

Although I did not know yet, in late October 1993, when I got my speeding ticket, that Mississippi's highway patrol had been integrated by court order, I was aware that a May 1993 decision of the Fourth Circuit in Maryland Troopers Assn, Inc. v. Evans<sup>91</sup> had struck down a consent decree providing for the hiring and promotion of black troopers at each state trooper rank in the state of Maryland. Six years earlier the U.S. Supreme Court had equated consent decrees with voluntary state action in a case involving firefighters.<sup>92</sup> And in 1989, in Croson, a Supreme Court majority, not just a plurality as in Wygant, held for the first time, that state and local governments that initiate voluntary (and induced voluntary) programs that benefit racial minorities, are subject to the same "strict scrutiny" standard of review used to challenge state imposed hostile discrimination against racial minorities. This fault-based standard requires that state and local governments identify their own

<sup>88</sup> 347 U.S. 483 (1954).

<sup>89</sup> Board of Trustees of Univ. of N.C. v. Frasier, 380 U.S. 079 (1956), aff'g per curiam, 134 F. Supp. 589 (M.D. N.C. 1955), Florida ex rel Hawkins v. Bd. of Control, 350 U.S. 413 (1956). (Double check if both per curiam.

<sup>90</sup> See, e.g., M.W. Clague, "Legal Aspects of Minority Participation in Higher Education," Vol 21 (3) Education and Urban Society, (May 1989), 260, 262-262.

<sup>91</sup>

<sup>92</sup> International Assn of Firefighters v. Cleveland, 578 U.S. 501 (1986). The case involved both Title VII (dealing with employment discrimination) and Fourteenth Amendment claims.

past or continuing discrimination "with some degree of specificity before they may use race-conscious relief." <sup>93</sup> Following Croson, and because of Croson, the Maryland Department of Transportation commissioned a study of the contract set-aside plan of the state's Minority Business Enterprise Program. <sup>94</sup> Anchoring its judgment on the commissioned report, the state concluded in 1990 that present effects of past discrimination against blacks and women justified continuation of the plan. <sup>95</sup> In 1990, in the Maryland Troopers case, Maryland also proffered statistical disparities between the overall percentage of black troopers and the percentage of black Maryland residents who met the basic hiring criteria. But the disparities were not gross enough to convince the appeals court that Maryland had satisfied its burden of proof. <sup>96</sup> The Mississippi Troopers decision of 1978 exemplified a judicial mandate as to what a state must do, whereas the Maryland troopers decision of 1993 exemplified a judicial limit on what a state may do voluntarily--that is, without a court order--in the name of affirmative remedies for its past de jure discrimination. <sup>97</sup>

The 1993 Maryland Troopers' decision, I learned in 1994 from a Maryland Assistant Attorney General, signaled trouble ahead in the Fourth Circuit for the University of Maryland and the state of Maryland, in their defense of the University's Banneker Fellowship Program for academically talented African Americans. Still, it was not absolutely clear that Croson, upon which the Fourth Circuit relied in its Troopers' decision, would apply to all forms of race conscious affirmative action in educational settings.

#### II-E The University of Maryland: Byrd to Banneker

Like Mississippi and other Southern states, Maryland's policy toward African Americans before Brown was "characterized by the reluctant establishment of institutions of higher education for blacks that were segregated, vastly underfunded and consistently neglected." <sup>98</sup> Slaves had been used before the Civil War to build the physical plant of UMCP's small predecessor agricultural College. <sup>99</sup> Curly

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<sup>93</sup> U.S. at

<sup>94</sup> It was conducted by Coopers & Lybrand. "Md. Minority Set-Aside Pain Gets Go Ahead," Wash. Post, March 17, 1990.

<sup>95</sup> Note to MWC- Check the bill to reenact the MBE.

<sup>96</sup> Id. at 1076-1077, citing Richmond v. Croson, 488 U.S. 469, 109 (1989), quoting in turn, Wygant v. Jackson Board of Education, 476 U.S. 267, at 277 (1986) (plurality opinion)

<sup>97</sup> For the use of these terms see, Clague, "Legal Aspects of Minority Participation in Higher Education," Education and Urban Society

<sup>98</sup> Judge Motz, in Podberesky v. Kirwan, 838 F. Supp. 1075, 1078 (D. Md. 1993).

<sup>99</sup> George Callcott, A History of the University of Maryland, Maryland Historical Society, 1966 at 158.

institutions of higher education for blacks that were segregated, vastly underfunded and consistently neglected." <sup>99</sup> Slaves had been used before the Civil War to build the physical plant of UMCP's small predecessor agricultural College. <sup>100</sup> Curly Byrd, President of the rapidly growing campus from 1935-1953, whose name identifies UMCP's stadium to the present, vehemently opposed the admission of blacks to graduate and professional schools because, he wrote, "it would destroy the very segregation [sic] idea for the undergraduate school." <sup>100</sup> Like the Janus faced border state in which it is located, however, UMCP, unlike the University of Mississippi, did not respond to Brown with a policy of "massive resistance." <sup>101</sup> In June 1954, in response to Brown, the Maryland Regents voted for the admission of "all residents of Maryland without regard to race" at all its campuses. A few months later UMCP became "the first state university in the South to accept Negro undergraduates." Two entered UMCP "without incident" reports UMCP's historian. <sup>102</sup> Yet, to paraphrase the metaphors of Justice Steven's dissent in the Supreme Court's 1995 affirmative action decision in Adarand, the "No Trespassing" signs may have come down, but UMCP's official posture of facial "neutrality" did not offer a "welcoming mat." <sup>103</sup>

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<sup>99</sup> Judge Motz, in Podberesky v. Kirwan, 838 F. Supp. 1075, 1078 (D. Md. 1993).

<sup>100</sup> George Callcott, A History of the University of Maryland, Maryland Historical Society, 1966 at 158.

<sup>100</sup> As quoted in Podberesky v. Kirwan, 838 F. Supp. at 1078. Byrd was right, of course. To paraphrase a saying, with so much handwriting on the de jure wall, the legal, if not social wall separating whites and black undergraduates was about to fall down. Byrd also worried publicly, in 1937, that unless funding for the all-black, and only black, campus in the state (Princess Anne) "we're going to have to accept Negroes at College Park, where our girls are." Def. Ex. 70 at 147, quoted at 853 F. Supp 1077 n. 6.

<sup>101</sup> The first black graduate student was admitted over the opposition of UMCP's President Byrd in 1951, soon after the Supreme Court's 1950 decisions, which, while remaining (barely) within the framework of the doctrine of "separate but equal" doctrine, required the admission of black students to the Texas and Oklahoma law schools. Sweatt v. Painter, 339 U.S. 629 (1950); McLaurin v. Oklahoma State Board of Regents, 339 U.S. 637 (1950).

<sup>102</sup> Callcott, at 353. Check to find out how long the two remained at UMCP.

<sup>103</sup> Adarand v. Pena, 115 S. Ct. 2097, 2120 (1995). See Judge Motz opinion, citing defendant's exhibits in Podberesky, 638 F. Supp. at 1078.

**II - F. Title VI, the Adams' Litigation and Higher Education's  
"Administrative-Judicial Era"<sup>104</sup>**

In 1969 black student enrollment at UMCP was less than 1%.<sup>105</sup> That was the year I completed my doctorate and began employment as a member of the Political Science faculty at Bowie State College, another Maryland public institution.<sup>106</sup> One of the four Maryland HBCUs, Bowie State's undergraduate student body well over a 90% black undergraduate student population in 1969. The College was located only 15 miles east of UMCP near the town of Bowie, Maryland (sometimes also called Belair), the then nearly all white Levitt Town suburb of Washington, D.C. Like many HBCUs, then as now, Bowie State was sometimes called "black by day, white by night," although the night-time Masters program was racially mixed.

I had first learned of Bowie in 1968 when, on orders from then Maryland Governor Spiro Agnew, the National Guard broke up a student take-over of the College administration building (a take-over tacitly supported by the campus administration) in protest of Bowie's woeful underfunding and neglect on the part of the State of Maryland. Residents of nearby Bowie, including some white undergraduates who participated in the student take over (referred to during my employment at Bowie as the "Belair housewives") sheltered a number of the black student protesters whom the National Guard had chased into the ex-urban woods in a mission of absurd overreaction.<sup>107</sup>

Sometime in late 1969 or early 1970, a man named Peter Holmes visited the rustic quarters of Bowie State's Political Science Department and asked us a number of questions about campus facilities. We were aware that Holmes was there as a representative of the U.S. Government (during the Nixon administration). But we had no idea at the time that Holmes' visit signalled the beginning of what would

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<sup>104</sup> See YKL

<sup>105</sup> 838 F. Supp. at 1079, citing def. exhibit 70 at 161.

<sup>106</sup> I could not even think of applying for a faculty position at UMCP at that time because I was married to a UMCP faculty member. The University's nepotism rule precluded employment of the spouse of another faculty. (Check - or spouse of any employee?) From the perspective of disparate impact analysis it was clear who the rule was neutral against. The nepotism ended at UMCP after the U.S. Office for Civil Rights issued the Higher Education Guidelines for Executive Order 11246 (U.S. Department of HEW, Office for Civil Rights, October 1972), which interpreted for academic contractors the more general employment prohibitions and affirmative obligations first set out in President Johnson's 1965 Executive Order 11246. 3 C.F.R. 339 (1965), as amended by Executive Order 11375, 3 C.F.R. 339 (1965).

<sup>107</sup> The siege mood - Several of my undergraduate students at Bowie who had transferred from UMCP to Bowie, expressed feelings of deep anger at their experiences at UMCP. The President of Bowie had been stopped by state police for driving with his wife--a lighter skinned African American. (work on tying these comments together thematically.)

become known as the 20 year old "Adams" litigation--titled Adams v. Richardson in the first complaint. <sup>108</sup> Initially, the private black Adams' plaintiffs sued HEW, the predecessor agency to the Department of Education, to cease its "conscious policy of non-enforcement of Title VI" against ten state systems of higher education. <sup>109</sup> Maryland and Mississippi were among the ten. They were both admonished by the Office for Civil Rights [hereinafter OCR], <sup>110</sup> that they had an "affirmative duty to adopt measures necessary to overcome the effect of past segregation"--a position the U.S. Supreme Court did not take until its 1992 Fordice decision.

In deciding to enlist the authority of the federal courts to order the federal government to enforce Title VI--rather than to proceed against individual academic institutions or state systems directly, the NAACP/LDF sought to have the federal courts "oversee the overseer," as the appeals court later put it two decades later in dismissing the case. <sup>111</sup> For twenty years the wholesale strategy represented by Adams (and other civil rights) litigation, appeared to be a singular exception to the principle that administrative "inaction or stasis" is unreviewable. <sup>112</sup> Because the Adams' plaintiffs <sup>113</sup> were suing the United States, they put one federal trial court--the district court for the District of Columbia--in the role of a "nationwide overseer or pacer of procedures government agencies use to enforce civil rights prescriptions controlling educational institutions that receive federal funds." <sup>114</sup>

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<sup>108</sup> After Elliot Richardson, then Secretary of HEW representing the defendants. The name of defendant changed numerous times as the Adams case stretched out over succeeding Secretaries of HEW and later of Education--Weinberger, Bell, Califano, Bennett, and finally, Cavazos.

<sup>109</sup> Adams v. Richardson, 356 F. Supp. 92 (D.D.C. 1973); 480 F. 2d 1159 (D.C. Cir. 1973 (en banc) Adams v. Weinberger, 391 F. Supp. 269 (D.D.C. 1975); Adams v. Bell, 711 F.2d 161 (D.C. Cir. 1983) (en banc), cert. denied, 465 U.S. 1021 (1984); 709 F. 2d 1531?, Adams v. Bennett, 675 F. Supp 668 (D.D.C. 1987); Weal v. Cavazos, 879 F. 2d 880 (D.C. Cir. 1989); Weal v. Cavazos, 906 F. 2d 742 (D.C. Cir. 1990) The Adams case went through the many changes in the names of defendants as the Secretaries of HEW and subsequently Secretary of Education succeeded each other as defendants and as the case. Changes in the names of plaintiffs occurred as the original complaint "expanded to colossal proportions," (906 F. 2d at 744), encompassing the enforcement of four civil rights provisions against all fifty states.

<sup>110</sup> I 1969 part of the former HEW.

<sup>111</sup> Women's Equity Action League v. Cavazos, 906 F. 2d 742 (D.C. Cir. 1990).

<sup>112</sup> Salvador v. Bennett, 800 F. 2d 97 (7th Cir. 1986), 99.

<sup>113</sup> (and emulator Title IX and 504 plaintiffs) Salvador v. Bennett, 800 F. 2d 97 (7th Cir. 1986) (Title IX) Marlow v. United States Dept. of Education, 820 F. 2d 581 (2nd Cir. 1987) (Section 504). Check these. What district court?

<sup>114</sup> 906 F. 2d 742, 7xx (Opinion of Ruth Bader Ginsburg)

By 1987, the same district court, in the voice of the same judge, concluded in effect, and remarkably, that Title VI desegregation policy had been an exercise in futility: "[t]he injury of which plaintiffs complain, particularly in the case of state institutions of higher learning, is not remediable by the relief which plaintiffs seek."<sup>115</sup>

More troubling still, the court also suggested that the executive branch's Title VI policy may have been an exercise in fraud. Pointing to the failure of ten states to meet "their commitments to reduce racial discrimination in their colleges and universities," Judge Pratt cited a 1987 study by the House Committee on Government Operations entitled Report on Failure and Fraud in Civil Rights Enforcement.<sup>116</sup>

In any event, during the 20 years of the Adams litigation, when OCR actually did try to play overseer pursuant to its Adams mandate, the racial composition of the faculties of Maryland's white and black institutions, as well as of their student bodies, were treated as indicia that the State's dual system "had not been disestablished."<sup>117</sup>

## II - G. Origins of Adams' Mississippi Maryland Derivatives

### 1. Mississippi: From Resistance to Resistance (1970-1987)

According to the Supreme Court's opinion in Fordice, from 1969-75, Mississippi offered up desegregation plans found unacceptable by OCR.<sup>118</sup> As it had done with Maryland, HEW-OCR concluded that Mississippi had not done enough, inter alia, in the areas of student recruitment and enrollment and faculty hiring.<sup>119</sup> By early 1975 OCR either concluded that negotiations with Mississippi were unavailing (as the Supreme Court depicts it) or saw referral of the Mississippi component of the Adams litigation to the U.S. Justice Department as a way of xxx. Justice in turn filed its complaint-in-intervention in Ayers v. Allain,<sup>120</sup> in April 1975. The suit, which would end up in 1992 as U.S. & Ayers v. Fordice in the Supreme Court, had been initiated a few months earlier by private black plaintiffs against the Governor, the Board of Trustees of Mississippi's Institutions of Higher Learning [hereinafter IHLs], the Commissioner of Higher Education and Presidents and Chancellors of Mississippi's five HWIs. As district court Judge Biggers specified in his 1987 opinion, in September 1975 the private plaintiff class would be certified and defined as "all black citizens residing in the State of Mississippi, whether students, former students, parents, or taxpayers who have been, are or will be discriminated against on account of race in receiving equal educational opportunity

<sup>115</sup> Adams v. Bennett, 675 F. Supp. 668 (D.D.C. 1987).

<sup>116</sup> 675 F. Supp. at 675, n. 26. (Follow up this note on the Report)

<sup>117</sup> Brief of Amicus Curiae, U.S. Department of Education, Podberesky v. Kirwan, p. 6. 1973, 1974, 1975, 1978. Check UMCP's 85-89 plan re faculty.

<sup>118</sup> 112 S.C. at 2733.

<sup>119</sup> id. at 2733.

<sup>120</sup> Now more commonly referred to as Fordice after the name of the current governor of Mississippi.



and/or equal employment opportunity in the universities operated by said Board of Trustees." <sup>121</sup> Their challenge was to the inequality of educational opportunity, as well as to the continuing segregation that perpetuates it, in Mississippi's state system of higher education. <sup>122</sup> By comparison, the challenge of the United States as intervenor focused more on maintenance and perpetuation of Mississippi's unlawful dual system of higher education. Thus began the still unresolved 20+ year old class action suit against the state of Mississippi for failure to satisfy the state's obligation under the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964. <sup>123</sup> Years more of fruitless negotiations ensued before the case finally went to trial in 1987. By the end of 1987 the federal district court, relying on the Supreme Court decision decision in Bazemore v. Friday <sup>124</sup> (discussed at greater length below) sided with Mississippi. It concluded that the State's facially neutral policies brought it in compliance with the Constitution.

## 2. Maryland: From Resistance to Counter-Attack to Affirmative Action (1970-1989)

From 1970-1975 Maryland, like Mississippi, offered up desegregation plans found unacceptable to OCR. It proposed its first desegregation plan in 1970. HEW's Office for Civil Rights (OCR) rejected it in 1973 as "ineffectual." Maryland adopted a second plan in 1974. OCR initially accepted it, but enforcement was deemed so inadequate that OCR notified Maryland that it planned to commence administrative enforcement proceedings, with the ultimate sanction--in theory--of a federal funds withdrawal if Maryland were to be found in non-compliance with Title VI. Among the inadequacies of the plan was the failure to establish or recruit other race faculty and chairs. (During my employment at Bowie from 1969-1974 there white faculty chairs and other line administrators, whereas UMCP had no black faculty chairs or other line administrators.)

By early 1976, about nine months after the United States (qua Justice Department) joined the Ayers plaintiffs suing the state of Mississippi, the state of Maryland sued the United States (qua HEW/OCR)--successfully--to enjoin OCR from commencing administrative enforcement proceedings until the federal agency specifically "pinpointed" what programs and activities were not in compliance with Title VI. Siding with Maryland in its 1976 decision in Mandel v. HEW, <sup>125</sup> the district court held that by questioning all federally funded programs indiscriminantly, and failing to identify specifically allegedly discriminatory

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<sup>121</sup> Ayers v. Alain, 674 F. Supp. 1523, 1526 (N. D. Miss. 1987), quoting the order of the presiding judge of a three-judge court convened to preside over the cause.

<sup>122</sup> Private plaintiffs invoked the Fifth, Ninth, Thirteenth Amendment, as well as the Fourteenth Amendment, and its enforcement statutes. Check what happened to 5th, 9th and 13th claims.

<sup>123</sup> Fifth and Ninth Amendment claims dropped from the litigation?

<sup>124</sup> 478 U.S. 385 (1986).

<sup>125</sup> Mandel v. HEW, 411 F. Supp. 542 (D. MD. 1976)

programs, OCR/HEW had not negotiated voluntary compliance in good faith. Its decision, prohibiting OCR from enforcement proceeding until it "pinpointed" what programs,<sup>126</sup> cast serious doubts on a system-wide approach to desegregation<sup>127</sup> using Title VI's administrative enforcement mechanism. Nevertheless, the State and OCR continued to negotiate--without agreement--for nine more years. Implementation of Maryland plan number three, adopted in 1978, failed to satisfy OCR. That same year, pursuant to an order in Adams,<sup>128</sup> HEW published its "Revised Criteria Specifying the Ingredients of Acceptable Plans to Desegregate State Systems of Public Higher Education"--better known perhaps as the "Califano Guidelines"<sup>129</sup>. Designed "to guide de jure states in preparing acceptable desegregation plans. . . ,"<sup>130</sup> they included "affirmative recruitment plans" for faculty as well as students. But Maryland plan number four, adopted in 1980, still failed to convince OCR that the state was "honest" about compliance with Title VI guidelines. Inter alia, there was too little progress in faculty as well as student desegregation.<sup>131</sup> Rejected plan four included for the first time a very limited undergraduate Benjamin Banneker scholarship program, but it was minimally funded and not restricted to African Americans.

Finally, in 1985, came Maryland's desegregation plan number five, OCR acceptance of it for the life of the plan, and therewith agreement on dismissal of Mandel case. It was this five year Plan to Insure Equal Postsecondary Educational Opportunity, 1985-89 that included enhanced funding for UMCP's Benjamin Banneker Scholarship Program and limited it to "academically talented Black students" that led in 1989 to Daniel Podberesky's private action against UMCP. Ironically, one year later (1990) and twenty years after it originated, the whole Adams model collapsed; the case was dismissed by the Court of Appeals (in the voice of Judge Ruth Bader Ginsburg) for lack of jurisdiction on grounds there was no private right of action under Title VI against federal enforcement agencies.<sup>132</sup>

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<sup>126</sup> Mandel was dismissed by stipulation when OCR accepted the 1985-89 plan for its duration. For an excellent summary of the complex procedural history of the Adams and related litigation, including the Mandel case see, Kaplin & Lee, at 841-844.

<sup>127</sup> Because one judge died before the Fourth Circuit issued its initial decision to allow the HEW/OCR to take a system-wide approach if it first created system-wide guidelines (562 F. 2d 914 (4th Cir. 1977)), the appeals court ended up affirming the district court. (571 F. 2d 1273 (4th Cir. 1978).)

<sup>128</sup> Which Adams?

<sup>129</sup> 43 Fed. Reg. 6658-6664.

<sup>130</sup> Brief, Supra note x, at 12.

<sup>131</sup> Supra, Brief at 13.

<sup>132</sup> Women's Equity Action League v. Cavazos, 906 F. 2d 742 (D.C. Cir. 1990).

### III. Podberesky v. Kirwan - II

#### A. In Defense of Banneker: Maryland's Mea Culpa

As indicated above (p. 6), Daniel Podberesky first lost his challenge to UMCP's Banneker Program in federal district court in 1991 on a summary judgment in favor of the University.<sup>133</sup> The district court relied on OCR's findings and continued monitoring of UMCP's desegregation efforts, the court's post-Croson opinion concluded that "[i]f ever there was an administrative record demonstrating past discrimination, this is it . . ." <sup>134</sup> But, for the Fourth Circuit, this was not it. In 1993, on appeal to the Fourth Circuit, Daniel Podberesky won a reversal and remand for rehearing. Reliance on OCR findings, the appeals court ruled, did not satisfy the evidentiary demands of Croson. To justify a "voluntary race-based affirmative program," on remedial grounds, Croson requires the University itself to make specific findings that provide the "strong basis in evidence" of the present effects of past discrimination.<sup>135</sup> On May 11, 1994, a Washington Post headline read: "U-Md. Attacks Itself to Defend Its Blacks-Only Scholarship."<sup>136</sup> The nature of that self-attack, in which I played a part, is discussed at greater length at x below.

In 1975, the year the United States sued Mississippi, a year before Maryland sued the United States, I began my faculty career at UMCP. It led ultimately to my involvement in both Podberesky and Fordice. From 1990-92 (by then a securely tenured full professor) at UMCP, I served as a member, and later co-chair, of a multi-racial committee appointed by UMCP's President, William Kirwan--the named defendant in Podberesky. Designating it the "Committee on Excellence Through Diversity: Opportunities for Black Americans at College Park," [hereinafter the ETD Committee], President Kirwan established a three-part charge: 1) to assess the effectiveness of present programs aimed at achieving the full participation of black Americans in all aspects of campus life; 2) to recommend changes in programs that are determined to be deficient; and 3) to suggest new strategies that are needed in order for the campus to achieve the objectives on black American participation identified in the campus' five year Enhancement Plan of 1989.<sup>137</sup>

By 1990, not long after the Committee came into existence, the increased financial support anticipated in UMCP's Enhancement Plan during "the "magical days" of Spring 1989, "quickly evanesced into major disenchantment."<sup>138</sup> Budget

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<sup>133</sup> 764 F. Supp. 364 (D. Md. 1991)

<sup>134</sup> 764 F. Supp. at

<sup>135</sup> 956 F. 2d at 56-57

<sup>136</sup> Washington Post, Maya 11, 1994 at x.

<sup>137</sup> See, Basic Report of the Committee on Excellence Through Diversity: Providing Opportunities for Black Americans at College Park, Chap. I, "The Charge, the Context and the Challenge," July 30, 1995.

<sup>138</sup> Id. at 5.

cuts did not, however, result in cuts in the Banneker program. The ETD Committee proceeded to conduct surveys and interviews with faculty, students and staff with the assistance of the Survey Research Center and financial support of the President's office. A few months before the Committee issued its Report on July 30, 1992, UMCP had decided, unknown to committee members, to fight for the Banneker program in the aftermath of the Fourth Circuit's second remand to the district court. Noting the irony of the situation, given the Committee's charge, the Committee recommended enhanced financial support for underrepresented minority undergraduates, and, at the graduate level, a new initiative to establish an endowed extended graduate fellowship program modeled on the McKnight Black Doctoral Fellowship program in Florida.<sup>139</sup> Though bearing similarities to the Banneker in terms of both financial and psycho-social support to black students, McKnight's funding, unlike the Banneker, is both public and private. The express purpose of this supply side "joint venture" between the public and private sector was and is to increase the number of black faculty in Florida's institutions of higher education.<sup>140</sup> Thus, the link between minority fellowship programs and programs and ultimately increased racial diversity on higher education faculties, to which the Fourth Circuit's decision in *Podberesky* was oblivious, is McKnight's *raison d'etre*. Its high retention and graduation rates have not been lost on non judicial policy makers. By 1992 the McKnight program was already serving as a model--with modifications--for the Southern Regional Education Board's initiative (in collaboration with the Western Interstate Commission for Higher Education and the New England Board for Higher Education) for a "National Compact for Faculty Diversity."

**The Maryland Attorney General's Office - October 3, 1992:** On October 3, 1992, a couple of months after the ETD Report was dated, and little more than a year before my October 1993 visit to Tougaloo, USM and Alcorn A & M, I found myself in Baltimore, at the Offices of the Maryland Attorney General, together with staff from the office of the UMCP President and expert witnesses hired by Maryland and drawn from around the country.<sup>141</sup> What developed was in essence an extraordinary multi-disciplinary, multi-racial "seminar" conducted by the African American assistant attorney general<sup>142</sup> in charge of Maryland's defense of UMCP's Banneker Program.

My presence at the AG's office on October 3, I learned upon arrival, was related to my work on the Report of the Committee on "Excellence Through Diversity," especially because of the survey our committee had conducted in 1991 of undergraduate black and non-black students at UMCP. The results provided evidence of a negative climate at UMCP from the perspective of undergraduate

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<sup>139</sup> *Id.* at 151.

<sup>140</sup> M. Clague, "Minority Doctoral Support Programs: Three Case Studies," National Center for Postsecondary Governance and Finance, 1989.

<sup>141</sup> Walter Allen, William Trent, Jacqueline Flemming, Joe Fegin, William Sedlacek

<sup>142</sup> Evelyn O. Cannon

African Americans.<sup>143</sup> Yet, I was a bit mystified (and still am.) The last and rare contact I had with President Kirwan was in the Spring of 1992, before the Rodney King riots, when he met with members of ETD Committee and, to the dismay of most of us, made it clear he was perturbed with a number of less-than upbeat conclusions included in the draft material of our report-in-progress. The faculty chapters of the Report, for which I was largely responsible, was particularly disheartening to the President. Although the chapter noted that overall figures showed UMCP near the top, nationally, in the number and percent of black Americans employed at predominantly white research universities, it also concluded that overall figures masked, as had an earlier campus report,<sup>144</sup> the existence of a rapidly revolving door. Survey and interview data also documented painful feelings of isolation and loneliness, particularly among nontenured and departed black faculty.

Although I left the April 1992 meeting with the President feeling more like an inside agitator than an established faculty member, neither he nor his office put any pressure on me or, to my knowledge, the African American committee members with whom I worked.<sup>145</sup> Indeed the President's office provided the committee with highly competent staff support to facilitate and expedite production of the final July 30, 1992 product. At the time we interpreted the assignment to our task of the particular staff member, ironically, but incidentally, an Hispanic, as a signal of the importance the President attached to the expeditious completion of our work.

A couple of months following release of the ETD Report I accepted the invitation to join the Banneker defense. My contribution consisted of an affidavit swearing to various findings in the ETD Report. It was this involvement in the Podberesky case that led almost a year later to my engagement as an expert witness for the Justice Department on faculty issues in Fordice. The faculty chapters in the ETD Report, caught the attention of amicus NAACP LDF. Meanwhile the expert witnesses who were retained by the University of Maryland proceeded with studies to document multiple aspects of the contemporary "vestiges" (the pre-Fordice term) of University's Jim Crow past: enrollment, retention and graduation patterns of undergraduates by race, the economic status of African Americans in Maryland; the reputation of UMCP within the surrounding African American Community, and, finally, campus climate. As in the Mississippi Trooper's decision, reputation was treated as a critical variable in documenting the present effects of past discrimination.

In April 1993, the results of this unprecedented institutional self-examination were made public in the name of UMCP's President Kirwan. The summary to the sixty page Decision and Report of the University of Maryland at College Park Regarding

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<sup>143</sup> The ETD Report had also endorsed the Banneker Scholarship Program.

<sup>144</sup> The earlier report, Access is Not Enough, released to the campus in October 1989, was written by Ray Gillian, and assistant to President Kirwan. The ETD committee was charged by the UMCP campus senate with the task of following up this report with "significant recommendations" for further action.

<sup>145</sup> Two white full professors on the committee, however, declined "to endorse the report in its present format." ETD Basic Report at iv. Quote Piper?

The Benjamin Banneker Scholarship Program encapsulated the Report's findings and conclusions as follows:

The University of Maryland at College Park, through its President, William E. Kirwan, concludes that effects of past discrimination against African Americans in Maryland still exist in the form of an adverse reputation among members of the African American community; perceptions of a hostile campus climate; and in low enrollment, retention and graduation rates for African American students at the University.<sup>146</sup>

Another half year later, on November 19, 1993--less than three weeks after my October visit to Tougaloo and the University of Southern Mississippi--Judge Motz, of the federal district court for Maryland, reaffirmed, on the Podberesky remand,<sup>147</sup> the lawfulness of UMCP's Banneker scholarship program for Black Americans. The outcome was clearly foretold in the opening sentence:

The question posed in this case is whether a public university, racially segregated by law for almost a century and actively resistant to integration for at least twenty years thereafter, may--after confronting the injustices of its past--voluntarily seek to remedy the resulting problems of its present, by spending one percent of its financial aid budget to provide scholarships to approximately thirty high-achieving African American students each year.

Through the data reported in its Decision and Report, the University of Maryland, had, the Judge concluded, successfully shown "a strong basis in evidence" of four present effects of past discrimination at UMCP: first, a "poor reputation in the African American community" (an effect that recalls the Fifth Circuit's 1978 decision in the Mississippi Trooper decision); second, "underrepresentation of African Americans in UMCP's student body; third, the disproportionately high attrition rate of African-Americans; and fourth and finally, a climate on campus adverse or hostile to African Americans. Thus, UMCP justified the Banneker Scholarship program as one strategy among others for countering the effects of past de jure discrimination. The judge's extraordinary opinion, befit the unique character of this litigation:

It is worthy of note that the University is (to put it mildly) in a somewhat unusual situation. It is not often that a litigant is required to engage in extended self-criticism in order to justify its pursuit of a goal that it deemed worthy. All other matters aside, UMCP administrators are

<sup>146</sup> Decision and Report, April 26, 1993, p. 1.

<sup>147</sup> Podberesky v. Kirwan, 764 F. Supp. 364 (D. Md. 1991); 956 F. 2d 52 (4th Cir. 1992); Podberesky v. Kirwan, 838 F. Supp. 1075 (D. Md. 1993); Podberesky v. Kirwan, F. 3d (4th Cir. 1994).

to be commended for the moral courage that they have demonstrated in undertaking this self-examination with an admirable degree of candor.<sup>148</sup>

Later in November 1993, at a celebratory reception hosted by UMCP's President Kirwan for many who had been involved in defending the Banneker Program, Judge Motz was toasted, in absentia, in return. The multi-racial group of celebrants were committed to the kind of affirmative action the Banneker Program represented.<sup>149</sup> But the celebrants knew they could not yet claim victory. The district court was, of course, only the court of original jurisdiction. Podberesky, of course, was expected to appeal to the Fourth Circuit, the court that decided the Maryland Troopers case only six months earlier.

#### Education is Different:

Judge Motz's opinion concluded that UMCP, as an initiator of race-based affirmative action, had satisfied the requirements of the strict scrutiny standard imposed by Wygant, Croson and the Fourth Circuit's Maryland Trooper's decision; the University had presented "a strong basis for finding the present effects of past discrimination exist" on campus. Add re compelling and narrowly tailored. But this is not what made Judge Motz's opinion extraordinary. He felt "compelled to add a few words."<sup>150</sup> It was these added words--dicta--that made his opinion so extraordinary.

Application of this Wygant-Croson standard to the education contexts created too rigid an analytic framework. Developed in cases involving challenges to affirmative action in employment, it "provides imperfect analogies for determining the constitutionality of an affirmative action program in an educational context":<sup>151</sup>

the various restrictions that the Court has applied to affirmative action programs in the employment context--particularly the prohibitions against remedying the effects of 'societal discrimination,' or discrimination that was done by another 'governmental unit'--appears inappropriate in the education context where the effects of past discrimination are obviously societal in scope.<sup>152</sup>

This rejection of the rigid antinomy between state and society evokes silently the spirit of race-related state action jurisprudence of the 1960s, of Burton and Price and their more supple notions of symbiosis, mutual benefit, and joint ventures

<sup>148</sup> 838 F. Supp. at 1082, n. 47.

<sup>149</sup> Still to do-Relate to Berkeley Report.

<sup>150</sup> 838 F. Supp. at 1097

<sup>151</sup> Id.

<sup>152</sup> Id. at 1097-1098.

between state and private actors. Educational institutions are not fire departments, whose employment practices have limited impact on the larger society. Educational institutions are society's matrix; their "ripple effect necessarily affects every aspect of our economy and society."<sup>153</sup> Public education is not a widget factory; public education plays "a vital role . . . in forming and transmitting values . . . ." Educational opportunities are the foundation that enable society's members to compete for employment opportunities. Judge Motz' rejection of the rigid antinomy between state and society also evoked explicitly the spirit of Brown-I (if not the rigid de jure, de facto distinction of its remedial progeny). Of all forms of discrimination, discrimination in education is the "most odious."<sup>154</sup> And it is because education is central to our democratic society that the Supreme Court "has created aggressive affirmative duties in the area of primary and secondary school desegregation."

In taking on the second rigidity of the constraints nested in affirmative action employment cases--the "government unit" restriction--Judge Motz invokes a higher education case--U.S. & Ayers v. Fordice--for its willingness to take a system-wide rather than a single school approach to remedies. And systems are verticle as well as horizontal.

Even if it was held that the "governmental unit" restriction is applicable in the education context, it would be nonsensical to hold that institutions of higher education may not attempt to remedy past discrimination by primary or secondary schools. Systems are just that--systems.' The schools within them are inextricably linked to one another.<sup>155</sup>

There is no supporting reference for this important observation--a mere footnote within dicta. There can be no supporting legal reference because the Supreme Court has not vertically integrated K-12 and post-secondary education in its desegregation frameworks. At least one might cite, at least, Hodgkinson's "All One System" and "Guess Who's Coming to College".<sup>156</sup>

The rigid distinction drawn between state imposed discrimination and societal discrimination prohibits public institutions of higher education from taking responsibility, through affirmative action, for combatting "the culture of bigotry" to which it contributed; the artificial segmentation of the public educational system by the "governmental unit" limitation, prohibits public institutions of higher education from taking responsibility, through race conscious affirmative policies, to counter "the damage . . . done by our shameful legacy of involuntary segregated

<sup>153</sup> 838 F. Supp. at 1098.

<sup>154</sup> 833 F. Supp. at 1097.

<sup>155</sup> 838 F. Supp. at 1098, n. 61.

<sup>156</sup> Harold L. Hodgkinson, All One System: Demographics of Education, Kindergarten Through Graduate School, (Washington D.C., Institute for Education Leadership, 1985)



education" in pre-collegiate education that inevitably carries over to post-secondary education and upon which post-secondary education builds.<sup>157</sup>

Additionally, and finally, the district court critiqued the Wygant-Croson standard for its narrow focus solely on past discrimination inflicted by the defendant state educational agents or agencies.

let us assume for the purpose of argument that each generation is, in fact, born cloaked in innocence and pure of soul. If effects of racism nevertheless appear on our university campuses, would it not be a paradox, the height of irony, that our educational institutions could not attempt to cure them because it is we, not our parents or grandparents who are their source?<sup>158</sup>

Would the district court persuade the Fourth Circuit, the Maryland Trooper's decision notwithstanding? Not by a long shot. This is the 1990s. The Fourth Circuit's Reagan-Bush judges,<sup>159</sup> in the post-Rendall-Baker, post-Croson era, is not favorable to supple lines between state and society, or to a single system perspective. Indeed, it treated the district court's "alternate analysis"--its dicta--as a tacit acknowledgment by the district court that the Banneker Program could not withstand strict scrutiny analysis.<sup>160</sup>

Manifestly displeased with the district court's "restlessness" with the strict scrutiny standard of review, the Fourth Circuit ruled that the district court erred in concluding the standard had been met. UMCP's poor reputation in the African-American community and black perceptions of a hostile climate on campus was not evidence of present effects of past discrimination needed to justify the Banneker program. A poor reputation in the African American community only bespeaks African American awareness of the historic fact of past discrimination. Racial hostility, as plaintiff had argued, is not unique to UMCP; northern universities that did not discriminate in the past experience the same problem. Evidence based on the results of focus groups interviews and the student survey in our ETD simply could not be connected to UMCP's past discrimination. They only show exiting societal attitudes. UMCP's arguments from under-representation and low graduation rates among African Americans fared no better. All the trial court has done was to point to "societal discrimination, which cannot be used as a basis for supporting a race-conscious remedy."<sup>161</sup>

In enjoining UMCP from "enforcing that part of the qualifications for entry into the Banneker Program which requires that the applicant be of the African-American

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<sup>157</sup> Id.

<sup>158</sup> Id.

<sup>159</sup> Check re Widener, Wilkins, Hamilton

<sup>160</sup> 38 F. 3d at 147.

<sup>161</sup> Id. at 161.

race [sic],"<sup>162</sup> the Fourth Circuit made only a glancing reference to the Supreme Court's Fordice opinion. It noted only that to justify the Banneker program, Fordice requires "a connection between the past discrimination and the [continuing] effect."<sup>163</sup>

Would the Supreme Court grant UMCP's petition for certiorari in Podberesky and thus seize the opportunity to consider Judge Motz' alternate analysis for educational contexts? Would it seize the opportunity to clarify whether the burden of establishing "a connection between past discrimination and the effect," was as heavy as the Fourth Circuit's interpretation of Croson presumed? As noted above, again the Supreme Court answered in the negative when it denied certiorari in Podberesky in June 1995.

By fall 1995 the Banneker program for African Americans was dissolved. In response to the Fourth Circuit's decision, UMCP combined the Banneker and Key Programs. The new selection process for this Banneker/Key scholarship program is now similar to the Harvard undergraduate admissions model accepted by Justice Powell in Bakke. Qualities considered include diversity, special talents/skills, extracurricular involvement, essay, and recommendations, in addition to high school performance and test scores. Compared with Banneker recipients of 1994, the representation of African American men among Banneker/Key recipients of 1995 dropped drastically, from 15 to 3, while representation of African American females fell from 2 to 15.

#### B. MTS, The GAO and the Department of Education

In July 1992, during the Clinton administration and a few weeks after the Supreme Court handed down its Fordice opinion, the U.S. Department of Education [DOE] entered the lists as one of numerous amicus curiae in district court in support of the constitutionality of the Banneker Fellowship Program.<sup>164</sup> On February 23, 1994, three months following Judge Motz' opinion in Podberesky - II, DOE issued its Notice of Final Policy Guidance on Title VI of the Civil Rights Act of 1964, and its implementing regulations.<sup>165</sup> Its purpose was "to help clarify how colleges can use financial aid to promote campus diversity and access of minority students to postsecondary education without violating Federal anti-discrimination laws."

This need for clarification was engendered by contradictory positions taken over two decades by the executive branch on the lawfulness of MTS, as administrations changed. Under the Reagan administration, the Justice Department took positions consistent with the Individual Rights Plank of the 1984 Republican

<sup>162</sup> Source: Memo from Clement, Gill, Scott and Thomas-Walton to Robert Hampton, August 30, 1995.

<sup>163</sup> 38 F. 3d at 154, citing 112 S.Ct. 2727 n.4.

<sup>165</sup> 45 Fed. Reg. 8756 (Feb. 23, 1994) They were to take effect on May 24, 1994.

Party Platform, which had repudiated "quota systems and preferential treatment." <sup>166</sup> Invoking, instead, however, the Supreme Court's 1986 decision in Bazemore v. Friday, <sup>167</sup> a case that strongly suggested public institutions of higher education would not be held to the same affirmative duty to integrate as had K-12 education, Justice entered a Memorandum in Opposition to the consent decree designed to settle Geier v. Alexander, <sup>168</sup> Tennessee's higher education desegregation case. What the Justice Department opposed, based on its "victim-specific" theory of remedies, was a five year MTS program designed to prepare black college students for professional schools, and to enhance their prospects for admission. Favoring people, the Memo argued, who have not personally been the victims of unlawful discrimination offends a "first reader principle of equity jurisprudence." <sup>169</sup> Rejecting the federal government's contention that Bazemore implied that, unlike K-12 education, public higher education is under no affirmative duty to integrate, the Sixth Circuit approved of Tennessee's non victim-specific, race-specific MTS program. <sup>170</sup>

Four years later, in fall 1990, during the Bush administration, came the Arizona Fiesta Bowl. Arizona was the state that had taken a position against a holiday in honor of Martin Luther King, Jr. When Fiesta Bowl organizers, reportedly feeling the heat for the choice of state, proposed to contribute \$100,000 to the University of Alabama and the University of Louisville, the two institutions represented in the Fiesta Bowl, to establish a Martin Luther King, Jr. scholarship fund, the Department of Education's Assistant Secretary for Civil Rights, Michael Williams, wrote the organizers, cautioning them that the participating universities might be acting in violation of Title VI if they accepted the money. <sup>171</sup> "Colleges Face Loss of U.S. Aid If Race is Criterion," was the spin a New York Times headline put on Williams' letter. <sup>172</sup>

It was because of DOE's admittedly inconsistent position on the issue of race and financial aid for over a decade, Williams was quoted as saying, that "[w]e owe colleges and universities a good-faith and legally honest review of the law." <sup>173</sup>

<sup>166</sup> N.Y. Times, Aug. 22, 1984, at A10, col. 2.

<sup>167</sup> 478 U.S. 385 (1986). For further discussion of Bazemore and its relationship to Fordice, see *infra* pp. 35-38.

<sup>168</sup> Geier v. Alexander, 593 F. Supp. 1263 (M.D. Tenn, 1984).

<sup>169</sup> Id. Memorandum of the United States in Opposition to entry of Proposed Stipulation of Settlement, Geier v. Alexander, 593 F. Supp. 1263 at 11-12. To be elaborated.

<sup>170</sup> 801 F. 2d 799 (6th Cir. 1986). See, e.g., M. Clague, "Legal Aspects of Minority Participation in Higher Education," 21 Education and Urban Society, May 1989.

<sup>171</sup> Letter of 12/04/90 to John Dunker, Executive Director of the Fiesta Bowl.

<sup>172</sup> N.Y. Times, 1990, A1.

<sup>173</sup> New York Times, Dec. x, 1990, at B 14, col. 3. Check date.

Yet even Williams' letter seemed to endorse the notion that federally funded institutions could adopt MTS programs as voluntary remedies for past discrimination. "OCR interprets [its Title VI regulations] as generally prohibiting race-exclusive scholarships," he wrote. "However, a recipient may adopt or participate in a race-exclusive financial aid program when mandated to do so by a court or administrative order, corrective action plan, or settlement agreement."<sup>174</sup> A year later the Department of Education published a notice of proposed policy guidance and request for public comment, the initiative that led to the May 1994, final policy guidance, during the Clinton administration.

Principle 3, one of the 5 principles upon which the Department of Education rested its revised policy guidance of May 1994 spoke directly to the Banneker type programs at issue in Podberesky.

Principal 3 - "Financial Aid to Remedy Past Discrimination" has been amended to permit a college to award financial aid based on race or national origin as part of affirmative action to remedy the effects of past discrimination without waiting for a finding to be made by the Office for Civil Rights (OCR), a court, or a legislative body, if the college has a strong basis in evidence of discrimination justifying the use of race-targeted scholarships.<sup>175</sup>

Like Motz' opinion, and the Fourth Circuit's opinion vacating Motz' opinion, the Education Department's legal analysis in support of Principle 3 rested, perforce, on Bakke, Wygant, Croson, K-12 desegregation cases, and the Supreme Court's Fordice opinion. In Fordice and K-12 desegregation cases, the Department emphasized, the Court has sanctioned the use of race-conscious remedies to serve the "compelling interest," repeatedly affirmed, in "the elimination of discrimination on the basis of race or national origin."

Standing alone, the Education Department's Principle 3 did not address the value MTS programs in practice. However, the Department also relied, in part, on a recent and favorable study completed by the General Accounting Office (GAO) (January 1994) at the request of four Democratic Senators and four Democratic Congresspersons.<sup>176</sup> Based on the results of GAO surveys sent to a random sample of 300 four year undergraduate and graduate schools, as well as to 349 professional

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<sup>175</sup> Principle 4 --"Financial Aid to Create Diversity" picked up on the First Amendment prong of Justice Powell's Bakke opinion. It would permit the award of financial-aid on the basis of race or national origin, if aid is a necessary and narrowly tailored means of accomplishing the goal of a diverse student body that will enrich its academic environment. Because the diversity rationale is not a remedial one, no showing of prior discrimination is required.

<sup>176</sup> Check further with William Gray

schools, and site-based case studies at six institutions, <sup>177</sup> the GAO had concluded that although MTS make up a small proportion of all scholarships, as well as a small proportion of scholarship dollars, college and university officials described them as:

valuable tools for recruiting and retaining racial or ethnic minority students. These scholarships, officials said, help schools to overcome the traditional difficulties they face in enrolling and graduating minority students, such as financial hardships and a perception of cultural isolation. Moreover, according to some officials, the use of MTS helps recruit and retain minority students who do not receive these scholarships, because they help build a critical mass of minority enrollment and send a message that the school sincerely wants to attract such students. <sup>178</sup>

(Must Check-Did what may have caused Williams to back off was, however, the implications for his position for scholarships based on gender, etc., scholarships that favor white males. <sup>179</sup>)

"It would indeed be ironic," Education's amicus brief in Podberesky commented, "if the validity of the [Maryland] Plan accepted by OCR was somehow diminished because it was achieved through voluntary compliance," after the Fourth Circuit, in Mandel, "enjoined OCR from proceeding formally and required it to negotiate in good faith." <sup>180</sup>

Ironic, as we know, it would become. Voluntary initiatives, or more accurately induced voluntary initiatives, to comply with Title VI--through affirmative action for African Americans--occurred in Maryland. But the Banneker program, one of the fruits of the "induced" voluntary, negotiated, settlement, would be found unconstitutional. Induced voluntary compliance and negotiated compliance failed in Mississippi. Thus Mississippi must, the Supreme Court ruled in Fordice, counteract and minimize the segregative impact of "remnants" of its prior system. State Maryland still awaits (as of March 1996?) an OCR determination as to whether or not the state has finally complied with Title VI.

After first losing in the Fourth Circuit in 1992, on grounds that it had not

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<sup>177</sup> U.S. GAO, Survey of Financial Aid Directos Regarding Minority Scholarships/Grants.

<sup>178</sup> Id. at 11.

<sup>179</sup> (Need to check this further. Add re interview of March 15, 1996 with former Representative William Gray, now of UNCF.

<sup>180</sup> Brief of Amicus Curiae, U.S. Department of Education, at 10, n. 8.

produced contemporary findings of the present effects of past discrimination,<sup>181</sup> required to justify the race-exclusive Banneker Program, UMCP had several alternatives: it could have simply discontinued the Banneker Program--a position consistent with Mississippi's race-neutral posture; it could, invoking Justice's Powell's Bakke opinion,<sup>182</sup> have created a new multi-racial scholarship program in the name of diversity and the First Amendment, using race as a "plus factor"; or, possibly, it could have created a new program in the name of diversity though still restricted it to African Americans.<sup>183</sup> Instead, UMCP and the State of Maryland, unique among the Adams' states, chose to meet the burdens of Croson's "strict scrutiny" test of proving a "compelling government interest" in remedying the effects of its past official discrimination.<sup>184</sup> Thus, UMCP funded studies, conducted by mostly by external consultants and academics (expert witnesses in legal parlance), who were given unobstructed access to employees and students so they might more convincingly document the ways in which UMCP's racially exclusionary past haunts its present.<sup>185</sup> In defending the Banneker against Daniel Podberesky's challenge, Maryland also drew on some of the findings of the report of the campus-based Committee on Excellence on Diversity (ETD) (especially the results of surveys of black and non-black students.) The ETD Committee, which had pursued its tasks in ignorance of deliberations by campus and state officials over defense strategy, had been given access to UMCP institutional research data,

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<sup>181</sup> 956 F. 2d 52, 55-56 (4th Cir. 1992). The Circuit Court reversed the district court's grant of summary judgement in favor of UMCP, holding that reliance on OCR administrative findings did not satisfy UMCP's burden of producing the "strong basis in evidence" of the present effects of past discrimination required by Croson's application of the strict scrutiny test to affirmative action programs.

<sup>182</sup> 438 U.S. 265 (1978), which represented only the judgement, not the majority opinion of the divided Court.

<sup>183</sup> These alternatives are laid out in a paper entitled "Defense of Minority scholarship programs: Podberesky v. Kirwan," presented in February 1994 by Richard Weitzner, a Maryland assistant Attorney General, and Richard Anderson, chief of the Educational affairs division of the Maryland Attorney General's office at the 15th Annual National Conference on Law & Higher Education.

<sup>184</sup> Prior to the Croson, Tennessee, which was sued directly under the 14th Amendment and was no longer part of the Adams case when the latter was dismissed in 1987 (double check), did agree to a consent decree in 1986, which stated that one of its purposes is the "maximization of educational opportunities for black citizens." 801 F. 2d 799 (6th Cir. 1986). Under the Tennessee plan the state agreed to establish a preprofessional preparatory/support program for black college students--which included counseling, curriculum planning, and special summer programs. The plan also reserved places in four professional schools for those black students who completed the program successfully and met their minimum graduate admissions requirements. See, M. Clague, "Legal Aspects of Minority Participation in Higher Education," 21 Education and Urban Society 260, 269-270 (1989) (or M. Clague, Supra, p. x note x. Explain importance of consent decree

<sup>185</sup> Walter Allen of UCLA, Jacqueline Flemming of TC/Columbia (?) Joe Fagin, William Trent of the University of Illinois, historian, economist

was supported financially to work with the Survey Research Center in the development and conduct of surveys, and to hire a graduate student to assist with interviews with faculty (present and former). It behaved, in short, according to my idea of how academic institution should, despite the risks entailed in letting a Committee of tenured faculty, graduate and undergraduate students, and representatives of classified employees follow their own lead on race-related issues that could perhaps have made UMCP vulnerable to further litigation. Although the administration expressed distress with a preliminary draft, it placed no restrictions on our access to staff, faculty or students, and asked for no modifications.<sup>186</sup>

As the African American Assistant Attorney General in charge of Maryland's defense of the Banneker Program put it, UMCP not only acknowledged, but it had to prove that everything is not "hunky-dory."<sup>187</sup> Judging by comments made by African American students and colleagues at UMCP in 1995, the symbolic value of this choice served UMCP's official aspiration to be recognized by many African Americans, but vocally not all, for its commitment to racial diversity.

Maryland's choice in 1993 was not Mississippi's. From 1975 up to the Supreme Court's Fordice decision in 1992, Mississippi defended itself with a "hunky dory" defense: that is, having eliminated overtly discriminatory policies with regard to "student admissions, faculty hiring and operations," the State argued, it had achieved a unitary system of higher education and was in compliance with Title VI and the Constitution. In ruling for Mississippi, the district court had placed the burden of identifying remnants on plaintiffs. Once subject to the Supreme Court's Fordice standard, the burden shifted to Mississippi to prove that it had dismantled its prior system or justify "surviving aspects" of its segregated system that "contribute to the racial identifiability of the eight institutions." Yet, following the Supreme Court's Fordice decision, the Mississippi defendants maintained the position that their liability had not even been established and could not be established because the State had already "completely dismantled the prior de jure system to the extent educationally sound and practicable."<sup>188</sup> This put a burden on plaintiffs, private and U.S., to identify "remnants," a burden closer to the burden placed on UMCP and Maryland in Podberesky. As Maryland had to document the continuing effects of its prior de jure system, the task of the Ayers plaintiffs and the United States, on remand, was to identify "remnants" of Mississippi's de jure system. Several that plaintiffs had already identified, were, the Supreme Court agreed, "problematic": the use of ACT scores for admission; program duplication; institutional mission classification; and the maintenance and operation of eight postsecondary institutions. But these were not an exhaustive list. "The full range of policies and practices," were to be examined on remand.<sup>189</sup>

<sup>186</sup> Two members of the Committee were unwilling to sign the final document, in large part because they did not think it reflected on UMCP positively enough.

<sup>187</sup> From personal notes made at the meeting of October 3, 1993.

<sup>188</sup> Ayers and U.S. v. Fordice, at 5. March 1995.

<sup>189</sup> 112 S.C. at 2743.

What an interesting position I found myself in late 1993--early 1994--situated between two divergent Adams' spinoffs--one a "reverse discrimination" litigation against the University of Maryland, the other the anti-discrimination litigation against Mississippi's state system of higher education. UMCP, whose 1990 Mission Statement declares that "[w]ithin the next decade, the University seeks to be recognized for its commitment to cultural and racial diversity,"<sup>190</sup> had, with the Banneker Program, put out a visible welcome mat to academically achieving African Americans. To justify this Program, as an affirmative action defendant bound by the "strict scrutiny" standard, UMCP hired experts, and drew on the student survey in our ETD Report, to document Jim Crow's "present effects"--"remnants"--in the language of Fordice, of UMCP's own past discrimination.

Compare the position of defendant Mississippi in Fordice with the University of Maryland. It was plaintiffs burden to identify Jim Crow remnants whose existence Mississippi denied. To that end, would plaintiffs' expert witnesses be able to conduct the same kind of in-interviewing and surveys at Mississippi's post-secondary institutions as had been used to defend Maryland's Banneker program? The class of private plaintiffs in Fordice were black citizen and taxpayers of Mississippi. Black faculty at Mississippi's HWIs are citizens and taxpayers. Ergo, should not black faculty be included in the plaintiff class? And as members of the plaintiff class, shouldn't the plaintiffs' expert witnesses be able to listen to what black faculty at Mississippi's HWI might have to say? The idea of conducting interviews and surveys was posed directly to Mississippi's senior defense attorney at my deposition in December 1993. His unmistakable response was that no, I would not be permitted to use such qualitative data gathering methods.<sup>191</sup>

How strange this seemed, from my researcher's point of view, with an interest in gathering the best data possible to answer relevant research questions. But strange also, I thought, within the logic of the legal framework in Fordice. The faculty were treated as if they were part of defendant corporation Mississippi. I asked a Justice Department attorney, "aren't Mississippi's black American faculty, qua black citizens and taxpayers, members of the private plaintiffs' class?" That, he replied, was a "gray area."<sup>192</sup> After eighteen years of the Fordice litigation, this was a gray area?

There was another logic, however. Perhaps Mississippi was afraid, it dawned on me later, that interviews with black faculty might allow plaintiffs to uncover "new violation[s] of the 14th Amendment"--that is, intentional discrimination "not rooted

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<sup>190</sup> The UMCP Mission Statement was approved by the Maryland Higher Education Commission in February 1990.

<sup>191</sup> See, transcript of Clague deposition, by William F. Goodman, December 13, 1993. Mr. Goodman was the attorney who successfully defended Jackson, Mississippi after the city closed its swimming pools in the 1960s to avoid integration, in the case of Palmer v. Thompson, 403 U.S. 217 (1971). The Supreme Court ruled that the city constitutional obligation to provide public pools.

<sup>192</sup> Note to author. Check with KW about this issue in Ala.



in the prior dual system," a possibility the Supreme Court noted in Fordice.<sup>193</sup> Mississippi could be vulnerable to findings of new violations if plaintiffs witnesses were permitted to interview and survey Mississippi's black faculty on their own. By comparison, UMCP's support of interview and survey-based research to document the present effects of its Jim Crow past did not make Maryland vulnerable to findings of current violations.<sup>194</sup> It was Maryland's task to report finding of present effects, but it was careful, of course, to disavow any present violations. And Daniel Podberesky, the plaintiff in Maryland's reverse discrimination suit, unlike plaintiffs in Fordice, had no interest in identifying UMCP's past or present violations of the Fourteenth Amendment; the success of his claimed hinged on UMCP not being able to show any.

#### IV. K-12, Higher Education and The "Race Neutral" Defense

##### A. From Brown I & II to Bazemore

By ruling in Fordice that the adoption and implementation of what the state depicted as "good-faith, non-discriminatory, race-neutral policies and practices"<sup>195</sup> did not discharge the affirmative obligation to dismantle Mississippi's racially dual system of higher education, the Supreme Court aligned postsecondary education jurisprudence more closely with K-12 desegregation cases. To be sure, the remedies for Jim Crow in higher education would differ from those common to elementary/secondary school desegregation cases (e.g., pupil assignment, busing, attendance quotas, and zoning).<sup>196</sup> But, the fact that the decision to pursue postsecondary education is a matter of choice, unlike attendance in elementary/secondary education, does not mean, the Supreme Court held, that in higher education, "the adoption and implementation of race neutral policies alone suffice to demonstrate that the State has completely abandoned its prior dual system."<sup>197</sup>

Such policies run afoul of the Equal Protection Clause, even though the State has abolished the legal requirement that whites and blacks be educated separately and has established racially neutral policies not animated by discriminatory purpose.<sup>198</sup>

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<sup>193</sup> The majority wrote: "Of course, if challenged policies are not rooted in the prior dual system, the question becomes whether the fact of racial separation establishes a new violation of the Fourteenth Amendment under traditional principles." 112 S. Ct. at 2733 n. 6.

<sup>194</sup> Briefs, Report, etc.

<sup>195</sup> 112 S. Ct. at 2734.

<sup>196</sup> 112 S. Ct. at 2736.

<sup>197</sup> 112 S. Ct. at 2736.

<sup>198</sup> 112 S. Ct. at 2737.

This rejection of Mississippi's claimed "good-faith, race-neutral" defense had certainly not been a foregone conclusion. As noted above, challenges to Jim Crow in higher education preceded and lay the groundwork for Brown-I. But in 1955 and 1956, in cases involving the University of North Carolina <sup>199</sup> and the University of Florida <sup>200</sup> (?) the Supreme Court extended Brown (I & II?) to post-secondary education to the extent only of enjoining legally enforced exclusion, on the basis of race, of "qualified" black applicants. But when Brown-II's, promise of a radically new, policy-formulating "sociological equity" <sup>201</sup> reached its apotheosis in the Court's 1968 decision in Green v. County School Board of New Kent County <sup>202</sup> and progeny, by mandating an "affirmative [constitutional] duty to integrate" elementary and secondary education, no higher education counterpart followed. Two lower courts took contradictory positions as to whether higher education was under an "affirmative duty" to undo racial segregation. The Supreme Court affirmed them both. <sup>203</sup>

It was not until its 1986 decision in Bazemore v. Friday, <sup>204</sup> that the Supreme Court squarely addressed the import of K-12's affirmative duty for higher education. In a per curiam opinion--endorsing the concurring opinion of Justice White--the Court held that the financing and operational support provided by North Carolina State University's Agricultural Extension Service to racially segregated 4-H and Homemakers Youth Clubs did not violate the Equal Protection Clause. Prior discriminatory practices had been abandoned. Admissions policies were now race neutral; participation in the 4-H Club of one's choice was the result of "wholly voluntary and unfettered choice of

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<sup>199</sup> Board of Trustees of Univ. of N.C. v. Frasier, 380 U.S. 079 (1956), aff'g per curiam, 134 F. Supp. 589 (M.D. N.C. 1955).

<sup>200</sup> Florida ex rel Hawkins v. Board of Control, 350 U.S. 413 (1956)

<sup>201</sup> G. McDowell, Equity and the Constitution: The Supreme Court, Equitable Relief, and Public Policy, University of Chicago Press, (1982)

<sup>202</sup> 391 U.S. 430 (1968)

<sup>203</sup> Alabama State Teacher's Association v. Alabama Public School and College Authority, 289 F. Supp. 784 (D. Ala. 1968), which expressly rejected the argument that higher education has an affirmative duty to dismantle segregated systems was affirmed by the Supreme Court without a majority opinion, 393 U.S. 400 (1969). But, two years later, Norris v. State Council of Higher Education, 327 F. Supp. 1368 (E.D. Va), which looked the other way, was also affirmed by the Supreme Court, 404 U.S. 907 (1971), this time without any opinion.

<sup>204</sup> 478 U.S. 385 (1986)

private individuals." <sup>205</sup> By establishing a non discriminatory admissions system, the state university's extension service has taken affirmative action enough "to overcome the effects of prior discrimination." Thus, it appeared, a majority (? double check) in Bazemore <sup>206</sup> agreed that the whole quarter century of jurisprudence engendered by Court's pathbreaking 1968 remedial decision in Green <sup>207</sup> on the affirmative constitutional duty of elementary/secondary education "to take whatever steps might be necessary to covert to a unitary system in which the discrimination would be eliminated root and branch," <sup>208</sup> was declared inapposite to "this wholly different milieu." <sup>209</sup> It was this Supreme Court decision which the Department of Justice invoked during the Reagan administration, to challenge--albeit unsuccessfully--the fellowship support program for black college students in Geier v. Alexander.

So--what, according to the cryptic, minimally explained opinion in Bazemore made the milieu of segregated 4-H clubs "wholly" different from the elementary/secondary milieu? Voluntariness. Voluntariness in the sense that K-12 kids are compelled to go to public schools; they don't have to join 4-H or Homemakers Clubs. "[T]here is no statutory or regulatory authority to deny a young person the right to join any Club he or she wishes to join." <sup>210</sup> The only hint that influences traceable to the former de jure system, more subtle than statute or regulation, might influence choice on racial lines received no elaboration.

#### B. From Bazemore to Fordice

It was not surprising, therefore, that some, albeit not all lower courts, <sup>211</sup> the District Court and the Circuit of Appeals in Fordice among them, <sup>212</sup> interpreted Bazemore as scouting out for public higher education an alternative and far more laissez-faire track than Green did for elementary/secondary education progeny. Kids are compelled by law to go to K-12 schools; older students are under no legal obligation to go to college or

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<sup>205</sup> 478 U.S. 407. This quotes from Justice White's concurring opinion which the Court's per curiam opinion endorsed.

<sup>206</sup> Three justices joined Justice White's opinion on this point, an opinion concurring in the Court's per curiam opinion.

<sup>207</sup> 391 U.S.

<sup>208</sup> Id.

<sup>209</sup> 478 U.S. at 408

<sup>210</sup> Id.

<sup>211</sup> In Geier v. Alexander, the Sixth Circuit

<sup>212</sup> 676 F. Supp. at 1553, F 2d

university. Thus, according to the lower courts in Fordice, the "must do" stemming from the acknowledged constitutional duty to integrate in higher education seemed barely distinguishable from abstention from active discrimination.<sup>213</sup>

Surprisingly, as it turned out, however, the Supreme Court ruled in Fordice, through an opinion authored again by Justice White, that the lower courts erred in applying the Bazemore standard to the milieu of higher education. Green and progeny were back in;<sup>214</sup> Bazemore was out. Only Justice Scalia (who was not a member of the Bazemore Court) considered the dispute in Bazemore "parallel in all relevant respects"<sup>215</sup> to the dispute in the Mississippi's higher education desegregation case. While agreeing with the Court that Mississippi's use of the American College Testing Program (ACT) for admissions should be further reviewed to determine whether it was intentionally adopted to exclude blacks from Mississippi's historically white institutions, that was the extent to which he countenanced judicial involvement in institutional reform of higher education. "The Bazemore standard for dismantling a dual system" of higher education, he asserted, "ought to control here."<sup>216</sup> Green, and its requirement of compliance with Brown-I, should not.<sup>217</sup>

But for the eight other justices "Bazemore plainly [did] not excuse inquiry into whether Mississippi has left in place certain aspects of its prior dual system that perpetuate the racially segregated higher education system."<sup>218</sup> Brown, Green and other K-12 affirmative duty progeny<sup>219</sup>

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<sup>213</sup> The district court and 5th Circuit in Ayers v. Allain Geier v. Alexander. See Clague, "Legal Aspects of Minority Participation in Higher Education," 21 Education and Urban Society, 260, 261-264 (1989).

<sup>214</sup> The K-12 progeny cited were Swann v. Charlotte-Mecklenburg, Pasadena v. Spangler, Freeman v. Pitts.

<sup>215</sup> 112 S. Ct. at 2750.

<sup>216</sup> 112 S. Ct. at 2750. For Justice Scalia the only claimed "race neutral" policy that is challengeable is a pseudo-neutral policy animated by intentional discrimination having continuing discriminatory effects. He conceded that under his approach only Mississippi's reliance on the ACT test for admissions should have been considered on remand.

<sup>217</sup> 112 S. Ct. at 2751.

<sup>218</sup> 112 S. Ct. at 2727.

## V. FORDICE AND FACULTY "REMNANTS"

### A. The Supreme Court Frames—And, Confuses the Issues

#### Fulfilling the Affirmative Duty: Fordice's Multi-Step Inquiry

Having chosen for public higher education Green's affirmative duty to dismantle prior de jure segregation over Bazemore's acceptance of "race neutrality," the Fordice majority proceeded to outline the following multi-step inquiry process to guide the lower courts in determining whether Mississippi had met its affirmative duty:

1. Traceability and Fault: "If the State perpetuates policies and practices traceable to its prior system that continue to have segregative effects--whether by influencing student enrollment decision or by fostering segregation in other facets of the university system" then there are "remnants" of de jure segregation. The burden of establishing traceability of a contemporary policy having segregative effects, per Fordice, falls to plaintiffs-petitioners. This first step in the analysis, by limiting what black citizens and taxpayers and the U.S. might challenge to policies and practices traceable to the de jure "regime" fell just shy of a full-fledged fault-based, discriminatory intent prerequisite for a state's liability under the equal protection clause. In other words, plaintiffs were mercifully not required to prove that a discriminatory intent animated the policies of the de jure era. The first step in the Fordice inquiry also frames the problem to be addressed as a problem of continuing segregation by institutions, and not necessarily, of inequality of educational opportunity.

2. No Contemporary Segregative Effects: Given the identification of a traceable policy, the state must then must show that the policy has no contemporary segregative effects. If it can do so it is relieved of its affirmative duty to eliminate or modify the policies.

3. Traceability, Liability and Remedies: If, however, the state fails to show that traceable policies have no contemporary segregative effects, then it must reform them to the extent "practicable and consistent with sound educational practices." Or, to put it in alternative words, Mississippi must "justify these policies or eliminate them."<sup>223</sup>

Does this Fordice framework correspond with the standard of Green? The Justices were not in agreement about this. Justice Thomas, who concurred in Justice White's Fordice opinion, also wrote separately "to emphasize" that "this standard is far different from the one adopted to govern the grade-school context in Green and its progeny."<sup>224</sup> This defender of the color-blind Constitution

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<sup>223</sup> 112 S. Ct. at 2738. Note to MWC. Dig into the implications of these burdens later. See Scalia. The court distanced itself from private petitioners insofar as they urged the court to address present discriminatory effects, regardless of whether they flow from policies "rooted in the prior system." 112 S. Ct. at 2738, n. 8.

<sup>224</sup> 112 S. Ct. at 2744.

invoked W. E. DuBois defense of black institutions. Green's emphasis on racial balance, Thomas worried, could be construed to destroy the HBIs. Hence Thomas' understanding of the majority opinion in Fordice was that it "does not compel the destruction of historically black colleges." But for Justice Scalia, who also worried about the radical implications of applying Green to higher education, and who, with Justice Thomas, opposes remedies directed at achieving racial balance, the Fordice standard does correspond with Green. Mocking the majority's "something-for-all, guidance-to-none opinion,"<sup>225</sup> he asserts that "one must conclude that the Court is essentially applying to universities the amorphous standard adopted for primary and secondary schools in Green . . . ." <sup>226</sup> To disprove that existing racial identifiability is attributable to the state--"the ordinarily unsustainable burden of proving a negative"--Justice Scalia predicted that Mississippi must inexorably resort to racial proportionality in IHL institutions.

Fordice introduces the term "remnants" of segregation. Green and progeny used the term "vestiges." Is this difference in wording significant? Possibly. Green spoke of "taking whatever steps necessary" to eliminate the vestiges "roots and branch." In Fordice, by contrast, the Court does not ask "impracticable elimination" of traceable and segregative policies that are based on an "educationally sound justification"--two "to-be defined-later. . . notions. . . ." Justice Scalia remarked.

Not only was the Court's Fordice "standard" ill-defined--possibly purposefully so given how unchartered the intersection of law and higher education desegregation policy?--its remand instructions to the district court were exceptionally open-ended. Specifically "highlighted" as "constitutionally problematic" were four "surviving aspects of Mississippi's prior dual system": (1) admissions policies, (2) unnecessary program duplication between black and white institutions, (3) institutional mission designations, (4) and the maintenance of all eight IHL institutions. Although faculty and administrator employment were not among the those highlighted, the four highlighted issues, the four were not intended as exhaustive. "[E]ach of the other policies now governing the State's university system that have been challenged or that are challenged on remand" were also to be examined under the standard the Court announced.<sup>227</sup> Policies and practices related to faculty were among those that had been challenged and that would be challenged on remand.<sup>228</sup>

#### B. K-12 Precedents: Faculty and Staff "Factors"

In Green, K-12's affirmative duty decision, the Court identified faculty and staff as two of the "six factors" to be used to measure compliance with Brown-II--

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<sup>225</sup> 112 S. Ct. at 2753.

<sup>226</sup> 112 S. Ct. at 2748.

<sup>227</sup> 112 S. Ct. at 2738.

<sup>228</sup> 112 S. Ct. at 2734.

i.e., the achievement of a "racially nondiscriminatory school system."<sup>229</sup> Over the decades of K-12 desegregation litigation, the faculty and staff factors were examined in turn in terms of four variables: hiring, retention, promotion and balance among schools within the school system. They were not viewed in isolation from other Green "factors." As the Supreme Court reiterated in a case decided only two three months before Fordice, "two or more Green factors may be intertwined or synergistic in their relation, so that a constitutional violation in one area cannot be eliminated unless the judicial remedy addresses other matters as well."<sup>230</sup> Specifically, the courts have treated student segregation and faculty segregation as "related problems," as "inextricably tied" to each other, as "interdependent."<sup>231</sup>

In Fordice, the Supreme Court commented only on Mississippi's claimed good faith race-neutral faculty hiring, without reference to other employment policies and practices. The Court's opinion, however, referred more generally to "faculty and staff," without limiting faculty policies and practices to be scrutinized on remand to hiring only. Though the Court did not mention promotion and retention, its opinion did not preclude them from examination either. What was to be examined was defined by what had or would be challenged by the plaintiffs. As noted earlier, the Court agreed with the defense that "institutions of higher learning" are "not fungible,"<sup>232</sup> and that the Green remedies are therefore not appropriate in the higher education context. Thus, the Court did not frame the faculty issue, as it has in K-12 education, as a question of central system assignment of black and non-black faculty to HBI and HWI institutions in order to achieve a racially balanced faculty--balance being defined in terms of the systemwide ratio of black to non black faculty.

As noted at the outset, during the two and one half years that followed the Supreme Court's Fordice ruling, the "policies and practices" that most gripped public and press attention, as well as most commentary, was the continued existence of all three "historically" black institutions--Alcorn A & M, Jackson State, and Mississippi Valley State University.<sup>233</sup> The Supreme Court's

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<sup>229</sup> 391 U.S. at 435. The other four were the composition of student bodies, transportation, extracurricular activities, and facilities. The six Green factors did not preclude identification of others. See, e.g., Freeman v. Pitts, 112 S. Ct. 1430, (1992)

<sup>230</sup> Freeman v. Pitts, 112 S. Ct. 1430, 1449 (1992).

<sup>231</sup> In Freeman, the Court cited Dayton Bd of Educ. v. Brinkman, 443 U.S. 526, 536 (1979) (Brinkman II); Bradley v. Richmond School Bd., 382 U.S. 103, 105 (1965) (*per curiam*); Vaughns v. Board of Education of Prince George's County, 742 F. Supp. 1275, 1291 (D. MD 1990).

<sup>232</sup> 112 S. Ct. at 2736. And n. 4.

<sup>233</sup> "[M]ost of the testimony and the vast majority of documentary evidence have pertained to the eight universities in the higher education system . . . ." 879 F. Supp. 1419, (D.N. Miss. 1995); See e.g., Smothers, "Mississippi's University System Going On Trial, N. Y. Times, May 9, 1994, at A10, col. 1;

language clearly positioned a general cloud over the continued maintenance of all eight IHL institutions--"wasteful and irrational" and "undoubtedly occasioned by State law forbidding the mingling of the races." <sup>234</sup> On remand, defendant Mississippi acknowledged that "the maintenance of eight universities . . . is "a present policy or practice traceable to de jure segregation which continues to have segregative effects"; <sup>235</sup> indeed, this was the only such present policy or practice Mississippi ever acknowledged. Two Mississippi plans, responding to the Supreme Court's Fordice opinion and plaintiffs list of remnants, placed a cloud specifically over the continued existence of MVSU and Alcorn A & M. <sup>236</sup> In the proposed merger of HWI Delta State and HBI Mississippi Valley State into a new unit of the University of Mississippi the operation and maintenance of "Valley" at Ita Bena was to be "totally eliminated" while Delta State's campus at Cleveland was to serve as the base for the "new" Delta Valley University.

Little wonder that for so many, private plaintiffs especially, the fate of the black colleges became a litmus test of victory or defeat. Fearing replication of the history of K-12 desegregation, with black schools, students, faculty, and administrators bearing the heaviest burden, Mississippi's merger/closure proposals suggested a hostile HWI takeover. Indeed, the meaning of desegregation--is it a means or an end?--is what differentiated the position of the private plaintiffs from the United States. The former feared that the United States' focus on the desegregation of Mississippi's post-secondary institutions would not address their fundamental complaint--the system of white supremacy upon which the public higher education system was based, and therefore all policies and practices that discriminate against black students whether they foster institutional segregation or not. <sup>237</sup>

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Chronicle, For law review commentary, See e.g., Leading Cases: Equal Protection--Desegregation of Public Systems of Higher Education," 106 Harvard Law Rev. (Nov. 1992) at 230. For a study of the politics of desegregation of Mississippi's post-secondary institutions, see, Paul Green, United States v. Fordice: The Politics of desegregation in Historically Black Colleges and Universities in The State of Mississippi, (unpublished PhD dissertation, University of Virginia, 1996). ETC.

<sup>234</sup> 112 S. Ct. at 2742.

<sup>235</sup> Pretrial Order at 7(c) as quoted by the district court in March 1995 at p. 163.

<sup>236</sup> On October 22, 1992, following the Supreme Court's ruling Mississippi first proposed a model according to which HWI Delta State and HBI MVSU would be merged and become administrative units of the University of Mississippi and Alcorn would become an administrative Unit of MSU. As if to appear racially evenhanded, the Governing Board also put into question the survival of MUW. Under the October 1992 plan to be subsumed by USM, and under a updated plan of April 7, 1994, to be subsumed by MSU in Starkesville--ten miles to the West of MUW. Quote women's college comments

<sup>237</sup> Briefs, etc., and 879 F. Supp. at 1428-1429 & n. 4.



Nevertheless, the Mississippi case was not just about the fate of Alcorn, Valley and MUW.<sup>238</sup> Following failure (in November 1992) to reach a joint stipulation of remnants to which Mississippi and plaintiffs could agree, the United States and private plaintiffs submitted a joint list of their own for the purpose of instituting discovery. Their list covered a wide range of system policies and practices other than the maintenance of the eight institutions.<sup>239</sup> Employment-related ones were among them.<sup>240</sup>

By 1994, five of the United States' revised list of forty-six remnants pinpointed employment-related policies and practices. Private plaintiffs also again identified, as they had in 1987, employment-related policies and practices traceable to segregation.

What if, on remand, the trial court were to conclude that faculty remnants were indeed "traceable" to the prior de jure system, what kind of policies would disestablish, dismantle, negate, eliminate, undo, or counteract them? How racially non-neutral might corrective policies be? How much race-specific affirmative action might be required (or permitted) in fulfillment of Mississippi's affirmative obligation to "ameliorate" the racial identifiability of the institutions in its university system,<sup>241</sup> or to "reform" policies traceable to the de jure system which continue to have segregative effects? The Supreme Court was not generous with guidance and, as pointed out above, the phrase "affirmative action" is noticeably absent from the main body of the Fordice opinion. Considering the profound differences on affirmative action that split the Justices this silence may have been deliberate.<sup>242</sup>

#### V - B. The Defense Frames the Issues: The Affirmative Action Employment Model

##### Ayers & U.S. v. Allain (1987) and Ayers & U.S. Fordice (1994)

When Fordice first went to trial in 1987 (then Ayers v. Allain) both the private plaintiffs and the United States argued, that among the policies and

<sup>238</sup> Elaborate on proposal re MUW

<sup>239</sup> Indeed, on that subject, the plaintiffs jointly stated that they recognized that "the issue of the number of institutions of higher education (senior and community colleges) to be operated is before the court. Plaintiffs' Unified List of Policies and/or Practices, November 18, 1992. (Ask Keith/Douglas/ Younger /Pressman) United States' Remand Findings of Fact and Conclusions of Law, in Ayers & U.S. v. Fordice, October 1994. Get private plaintiffs list of remnants.

<sup>240</sup> Plaintiffs Unified List, D. at 7.

<sup>241</sup> 112 S. Ct. at 2736 and n. 4.

<sup>242</sup> Rehnquist, Kennedy, Scalia, Thomas, joined with qualifications by O'Connor have x. Blackmun left the Court after Fordice. Souter and Stevens have since been joined by Ginsburg and Breyer in rejecting across-the-board color blind approach.

practices through which state officials maintained and perpetuated Mississippi's racially dual system of higher education were those governing the employment of faculty and staff. Although the United States did not develop much of a case to support its position at this first trial, private plaintiffs did. At both the 1987 trial and the trial on remand in 1994, faculty integration at the HBIs was not at issue, for the district court acknowledged in effect that the faculties of the HBIs were in the eyes of the law racially integrated: "[t]he statistical presence of other-race faculty at the historically black institutions is substantial and unchallenged."<sup>243</sup> Thus, with the exception of proportions of faculty by race at HWIs and HBIs, and salary differences between faculty at HWIs and HBIs, attention focused primarily on the presence and status of black faculty at the HWIs.

### 1. The Affirmative Action Employment Model And The "We Can't Find Any" Defense

In 1987, and again in 1994, Mississippi's defense strategy was to conceptualize the issue strictly as a hiring problem--as if Fordice were a Title VII employment discrimination case, which, of course it was not.<sup>244</sup> Thus the State focused on the number and percent of black faculty at HWI institutions in comparison with the limited availability of blacks with the threshold qualification--a doctorate--for most [albeit clearly not all] tenure track and tenured positions in Mississippi IHL institutions. The defense's witness also noted that because of the nationwide decline in the number of black doctorates produced during the 1980s, Mississippi institutions of higher education were in an even more difficult competitive position in 1987 than in 1980. This point could be made again in 1994 as the number of black doctorates continued to decline.

The defendant historically white universities, which claimed to recruit on a nationwide basis, faced keen competition in attempting to hire from the low and declining pool of African Americans earning doctorates; they faced competition for "the same limited supply" of black Phds not only from colleges and universities nationwide, but also from business and industry as consumers of PhDs as well. Poor Mississippi, the state with the lowest per capital income in the nation, a state which had cut funding for higher education, a state which offered the lowest average salaries of the Southern Regional Education Board institutions, couldn't find many black faculty. Moreover, the defense's expert

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<sup>243</sup> 674 F. Supp. at 1537. 32% of Alcorn, 33% of Jackson State and 26% of Mississippi Valley were white.

<sup>244</sup> In K-12 desegregation cases a finding of segregated faculties within individual schools, or discrimination in the hiring of minorities teachers are treated as among the "important indicia of a segregated system." See, e.g., Swann v. Charlotte-Mecklenburg Bd. Of Educ., 401 U.S. 1, 18 (1971). For the author's analysis of employment related remedies in school desegregation suits, see Clague, "Beyond the Title VII Framework: Racial Quotas and Teacher Employment Policies in School Desegregation Litigation," School Law Update, Ch. 13, (1983).

witness argued,<sup>245</sup> it was difficult to attract black faculty to Ole Miss because Oxford, its town, lacked a cadre of black professionals and because Mississippi had an "image problem"--the image, referred to repeatedly at the 1994 trial, of "Mississippi Burning." And yet, amazingly enough, despite the stiff demand side competition for the limited supply of black Phds, the defense claimed the number of blacks hired in "faculty positions" since 1974 "exceeded the black representation in the qualified labor pool."<sup>246</sup> What exactly was the nature of the faculty positions these black candidates filled is examined below.

In Judge Biggers December 1987 ruling in Ayers & U.S. v. Allain, one is presented with a portrait of valient Mississippi, doing as best it could, given a PhD supply problem that was nationwide in scope. Thus, the "we can't find any" argument won the day.

The evidence shows . . . that the defendants have adopted racially neutral hiring policies with respect to faculty and staff at each of the institutions of higher education. . . . The Court is not aware of any additional minority faculty and staff recruitment procedures the defendants could implement which would assure greater minority faculty and staff representation at the predominately white institutions . . .<sup>247</sup>

As will be argued at greater length in the future, framing the faculty piece of the integration mosaic in terms of affirmative action hiring goals, given the small existing pool of eligible African Americans with doctorates, is a sadly myopic way of considering the presence and status of African American faculty. Thus the role of Mississippi's HWI institutions, above all its doctoral granting ones (which have had a virtual monopoly on doctoral production in Mississippi) in contributing to the size of the pool of black doctorates, from which they seek to hire fell outside the defense's framework: a fortiori the idea that minority targeted fellowship support programs might offer a long-term, "educationally sound" production-side strategy for expanding the pool of black doctorates did too.

If Mississippi's "we can't find any" argument had a certain plausibility within its limiting framework, two other arguments the defense offered to explain the small number of African American faculty at HWI institutions seemed to amount to a concession that HWI institutions experience continuing effects of past discrimination.

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<sup>245</sup> The defense's expert witness on faculty employment was Victor Feisel, former Provost of Memphis State University.

<sup>246</sup> 647 F. Supp at 1538.

<sup>247</sup> 674 F. Supp. at 1563.

2. Tenured-In In 1987, though I do not believe in 1994 (must check), Mississippi included an argument that implied that even if the HWIs could find some eligible blacks, it couldn't hire them to tenure track positions because the HWIs were "tenured in."<sup>248</sup>

This is a defense? Surely being tenured in with non-black faculty is a legacy of tenuring in white faculty when zero or few black faculty were eligible--because of segregation and discrimination in education and employment--for employment and/or promotion to tenured positions. (Possibly because HWI institutions may not be tenured-in in the mid to late 90s, if older faculty at Mississippi institutions, like others around the nation, move into retirement, the defense dropped the tenured-in argument at the 1994 trial.)

3. "Mississippi Burning" If Mississippi's "tenured-in" argument seemed more an argument for traceability rather than evidence of no contemporary segregative effects, a third defense argument, that Mississippi's negative image among African Americans makes it difficult for HWI institutions to recruit African American faculty, seemed to me to give the case away. The negative image of the University of Maryland in the black community was a key argument made by UMCP, consistent with the Mississippi Trooper's decision, to show the present effects of its former de jure system and thus to defend its affirmative action scholarship program for black Americans. Would not the image of "Mississippi Burning" amount to a mea culpa illustrating how the HWI institutions are haunted by their Jim Crow past? Amazingly, no. Mississippi invoked the image as an exonerating defense of the small numbers of black faculty at its HWI institutions.

### C. Remand: Failed Settlement

Did Judge Biggers' 1987 decision leave open a revisit of faculty and staff employment? In October, 1992, in the aftermath of the Supreme Court's Fordice decision, Judge Biggers held a status conference with counsel for parties to the case to determine if there was agreement enough to reach a settlement on remedial issues. There was not. One of the areas as to which remnants of the prior de jure system still exist was that of faculty and staff employment. Defense counsel contended that because the Court of Appeals and the Supreme Court left Judge Biggers' 1987 findings on faculty and staff employment undisturbed, faculty and staff issues should be treated as res judicata.<sup>249</sup> As the United States characterized Mississippi's position on faculty, defendants "say faculty is fine. Go away and don't bother us on faculty."<sup>250</sup> Although private plaintiffs and the United States had their own disagreements, they concurred that faculty was not fine. Following failed efforts to reach a stipulation of remnants upon which all

<sup>248</sup> 1987 testimony of Dr. Victor Feisel, at 68.

<sup>249</sup> William Goodman speaking at Oral Presentation, Status Conference, October 22, 1992, Transcript of Proceeding Before Judge Neal B. Biggers, p. 24, 52-53.

<sup>250</sup> Nathaniel Douglas, for the U.S. Dept. of Justice, Transcript, October 22, 1992, p.74.

parties could agree,<sup>251</sup> private plaintiffs and the United States submitted a "Unified List of Policies and/or Practices"--i.e., remnants--on November 18, 1992. They identified, *inter alia*, three employment-related remnants: (1) The policy and practices of the governing board of ratifying employment recommendations of individual universities which perpetuate the racial identifiability of those universities as well as the as the recommendations themselves; (2) The HWIs practices of granting full professorship and tenure status to few African-American persons; and (3) The policy and practice of paying lower salaries to the faculty at the HBIs than to the faculty at the HWIs.<sup>252</sup>

In response to these employment items of the plaintiffs' Unified List (cum interrogatories), Mississippi simply denied that they were "properly in issue before the court" or that they served "to identify a remnant of the *de jure* system."<sup>253</sup> Almost a year later, private plaintiffs' "Revised List of Remnants" added a fourth employment remnant: "the small number of black faculty at HWIs," a remnant "traceable in part to the *de jure* system," in that defendants offered few graduate programs at HBIs in the *de jure* period to the present.<sup>254</sup>

#### D. Discovery and its Limits

Ayers & U.S. v. Fordice began in 1975. By late 1993, eighteen years later, extensive documentation had been supplied by defendants, at the behest of discovery demands by private plaintiffs and the United States. The mass of data on faculty and administrators would help make some sense of numbers.

Identification of faculty by race and rank at least made it possible to know, which perusal of catalogs alone could not, who the black faculty were and the positions they held. But such data was not enough to more fully understand questions relating to the dynamics of tokenism, inter-group relations, feelings of support and welcome ("climate"), the extent of the "revolving door syndrome," the power and influence of black faculty--questions critical to understanding, if not of successful integration strategies, then at least the limited promise of the

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<sup>251</sup> A meeting of all parties on November 12, 1992 failed to produce an agreement on a stipulation.

<sup>252</sup> Plaintiffs' Unified List, Nov. 18, 1992, reprinted in "The Ayers Decision," Vol. II, Board of Trustees of State Institutions of Higher Learning, p. 7.

<sup>253</sup> Defendants' Response to United States' First Set of Interrogatories Following Remand, June 30, 1993 at 6. Defendants also denied that interrogatories related to governance, admissions and student access, and the ability of HBIs to attract diverse student populations were properly in issue before the court or identified remnants of the *de jure* system.

<sup>254</sup> Private Plaintiffs Revised List of Remnants, October 15, 1993, at 10.

successful integration strategies, then at least the limited promise of the defense's approach to faculty integration.<sup>255</sup>

However, as explained above, Mississippi was not prepared to let the Justice Department's expert witness direct access to black faculty. This meant a severe limits on discovery and therewith a narrow framing of this issues to what might be made of the numbers. On the occasion of official trips to Mississippi Justice Department expert witnesses were not permitted to talk directly with employees of Mississippi's IHLs.faculty. They were limited to pre-arranged interviews with university administrators, designated by the defendants, conducted in the presence of defense counsel and their tape recorders.<sup>256</sup>

#### V. E. Countering Mississippi's Defense

##### 1. Within The Limits of What was Discovered: Disaggregation and Desegregation

Given the limits placed on discovery the task of exploring faculty and administrator employment remnants and their traceability to the de jure era at Mississippi's five HWIs was thus limited to documentation supplied by the defendants, and limited-use interviews with Mississippi administrators in the presence of defense counsel and their tape recorders.

As noted earlier, Judge Biggers concluded in his 1987 decision that "the statistical presence of other-race faculty at [Mississippi's] historically black institutions is substantial and unchallenged."<sup>257</sup> In other words, the faculty at the HBIs were integrated enough to exempt them from further scrutiny. Thus, the plaintiffs' case focused primarily on the presence and status of faculty and administrators at Mississippi's historically five white institutions: Delta State University, Mississippi State University, the University of Mississippi, the University of Southern Mississippi, and the Mississippi University for Women.<sup>258</sup>

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<sup>255</sup> As noted supra, in my work at UMCP on faculty-related issues in 1991-1992, for the Committee on ETD: Opportunities for Black Americans at College Park, I had developed, with the financial and staff support of the campus administration, surveys of black and non-black faculty and, with the assistance of a graduate student, conducted interviews with 35 former and present UMCP African American faculty. I assumed this approach to faculty issues at UMCP is what led to my involvement in Fordice.

<sup>256</sup> MWC - Check with KW on Alabama

<sup>257</sup> 674 F. Supp. at 1537.

<sup>258</sup> Data did not permit accurate identification of faculty at the University of Mississippi Medical Center. Hence they were not considered in the tallies.

In examining the data made available through discovery the essential first question was: who counts as black faculty? In neither the district court's 1987 decision, nor the Supreme Court's Fordice were any definitions offered. Believing meaningful integration means significant power-sharing between blacks and non-blacks at HWIs, I decided the concept of faculty had to be disaggregated. Rank and tenure comparisons between blacks and non-blacks were therefore of great importance. Generally speaking, non-tenured, tenure track faculty, regardless of race, lack power and influence because they are probationers. Non-tenure track personnel--e.g., instructors, adjuncts, part-time temporary instructors, teaching assistants, and 4-H Club teachers--have only a very tangential relationship to universities. They are poorly paid; they lack job security; they enjoy none of the prerogatives of academic citizenship; they have little or no opportunity for upward mobility in faculty ranks, much less to influential administrative positions. Thus, for the 1994 trial, this witness decided to include only tenure track and tenured African American faculty: i.e., Assistant, Associate and Full Professors.<sup>259</sup>

Besides, the data supplied by the HWIs in response to interrogatories really left no choice. The institutions did not adopt a common definition of faculty. Only one of them listed only Assistant, Associate and Full Professors. A second also included instructors. A third, the University of Mississippi, also included all kinds of part-time adjuncts, graduate assistants and temporary instructors--those at, or indeed, outside the margins of faculty security, power and influence. Thus, the only common denominator for all the HWIs, then, was tenure track and tenured faculty.

The Governing Board of Mississippi's IHLs identified 91 black faculty at HWI institutions in 1992. In December 1993 another IHL chart, identified as request G, listed 94 black tenure and tenure track faculty. This data was not credible to me. After cross checking various documents,<sup>260</sup> eliminating one deceased African American, several names who were counted more than once, and blacks who were most likely were not African Americans,<sup>261</sup> I was able to identify, at most, 55-60 black American tenure and tenure track faculty. The defense never challenged any of my calculations.

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<sup>259</sup> Mississippi HWIs tenure track (Assistant Professor) and tenured faculty ranks (Associate & Full Professors) are by and large comparable to those at most other universities across the country. Although there remain a few tenured instructors at the HWIs, the HWIs no longer grant tenure to instructors.

<sup>260</sup> Responses to Interrogatories # 46, # 47, Request G, Catalogs, and switch-board calls.

<sup>261</sup> One faculty member listed as black had an undergraduate degree from an Egyptian University and a graduate degree from an English University.

## 2. What the Pie Charts Show

### a. Faculty By Race: HWIs and HBIs:

The first of the employment "remnants" upon which the Ayers plaintiffs and the United States agreed in submitting their "Unified List of Policies and/or Practices" to the district court in November 1992 was "the policy and practice of the governing board of ratifying employment recommendations of individual universities which perpetuate the racial identifiability of those universities as well as the recommendations themselves."<sup>262</sup> Thus, even though the district court agreed in 1987 that the presence of "other-race" (non-black) faculty at Mississippi's HBIs was "substantial and unchallenged,"<sup>263</sup> plaintiffs argued that the disproportionate employment of blacks at HBIs and whites at HBIs, overall, perpetuates the segregated system.

Chart # 1, below, which is based on numbers supplied by the IHL (Request G)--data more favorable to the defense than what I calculated--illustrates the claimed racial proportions of the tenure track and tenured faculty in FY 1992. 63 black tenure track and tenured faculty represent 3% of the faculty at Mississippi HWIs; 315 black tenure track and tenured faculty represent 67% of the faculty at Mississippi HBIs. Putting aside for now what, if any remedy for such a disparity there should be, the conclusion is inescapable that these patterns show the continuing effects of de jure segregation. Judging by responses to interrogatories that permitted corroboration of African American faculty by name, the absolute number of tenure track and tenured black faculty at HWIs in Spring of 1993 was probably at most 53 or 54, thus considerably less than the 63 identified by Mississippi's numbers for FY 1992.

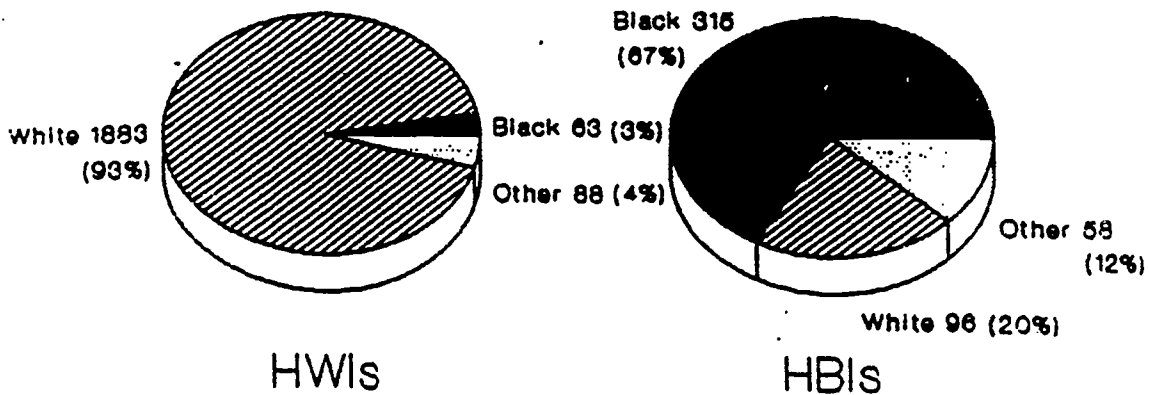
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<sup>262</sup> Plaintiff's [sic] Response to 10-22-92 Order, p. 7.

<sup>263</sup> Ayers v. Allain, 674 F. Supp. at 1537.



## Faculty By Race Tenured and Tenure Track Mississippi IHLs FY 1992



Source: U.S. Discovery Doc - Request G

# 1  
M. Clague

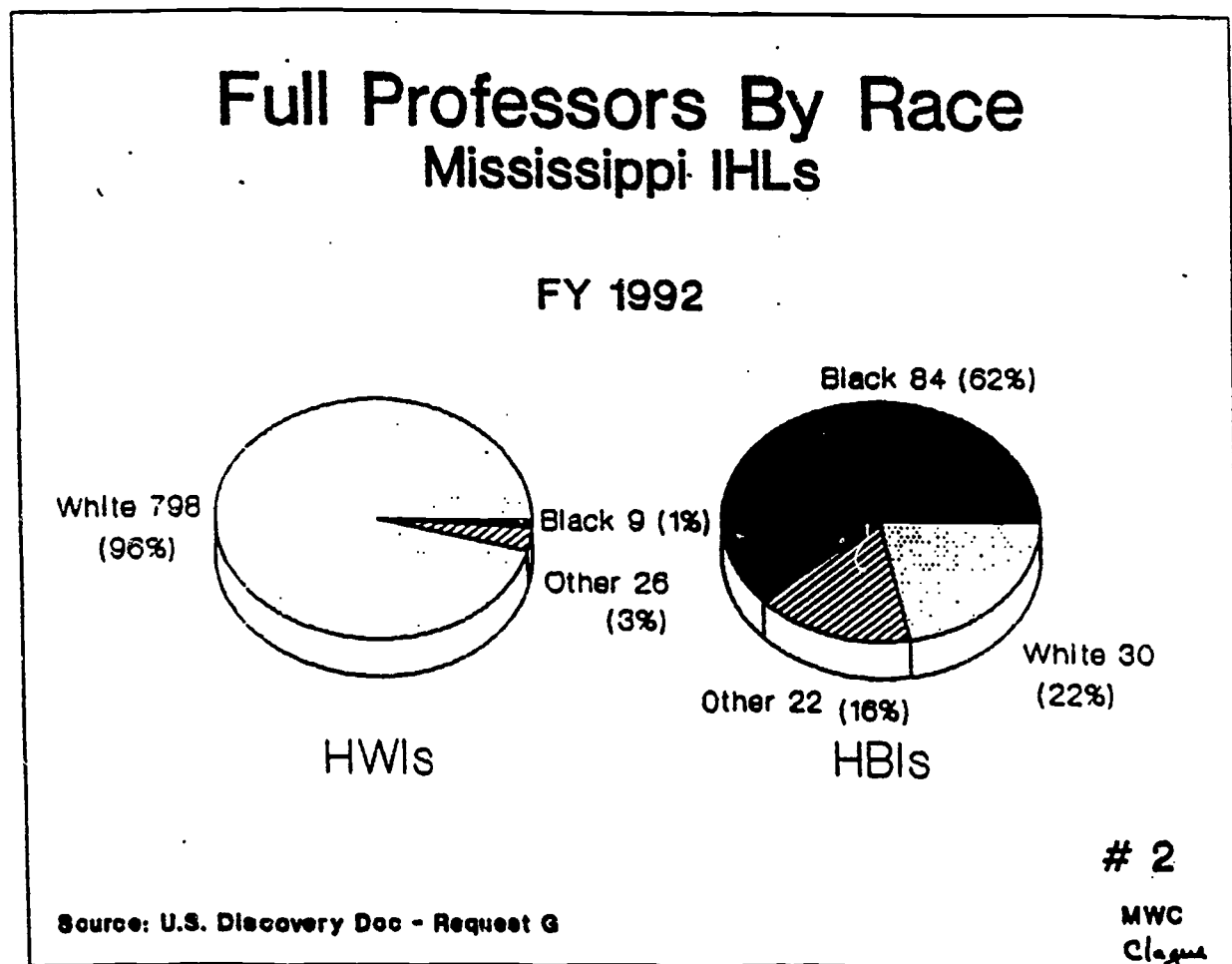
### b. Black Full Professors: Systemwide

Even accepting Mississippi's limited and limiting affirmative action employment model framework, it seemed clear that the presence of African American faculty with terminal degrees in tenure track and tenured positions is notably low at the University of Mississippi, the Mississippi University for Women and the University of Southern Mississippi. The number of tenure track and tenured African American faculty at MSU is closer to availability.

If the judiciary takes seriously the idea that a successfully integrated or integrating institution requires a critical mass of minorities in roles that carry status and job security, and therewith, some power and influence, consideration of faculty rank is of critical importance. The presence of a significant number of tenured full professors at Mississippi's HWIs, as at other HWIs, is key to transforming attitudes and effectuating institutional change in a multi-racial

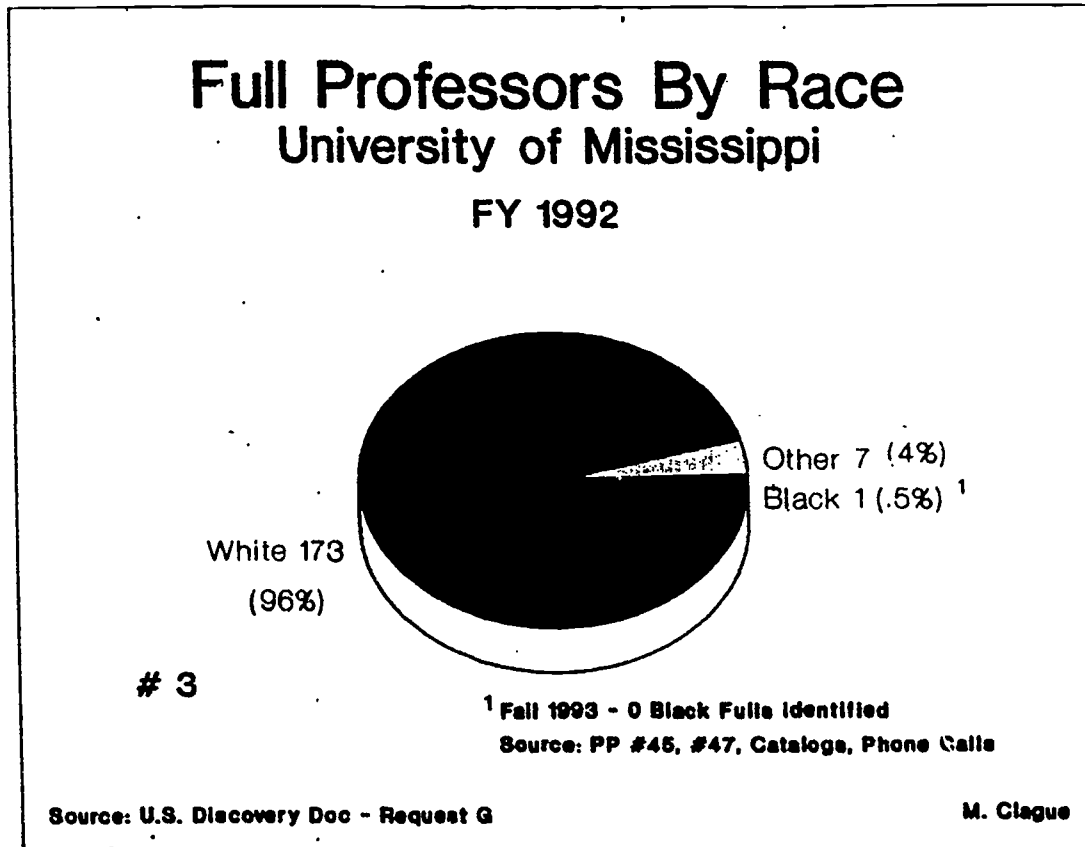
direction. Moreover, if tenured black faculty have risen from within, they have acquired the most insider understanding of the HWI institutions.

Chart # 2, below, shows the number of black full professors at Mississippi's HWIs and HBIs in FY 1992. Again, using data most favorable to the defense (Request G), only 9 of 788 faculty at the four HWIs, a mere 1% of full professors were African Americans. By comparison 84, or 62% of full professors at the HBIs were black.



c. Black Full Professors: Individual HWIs

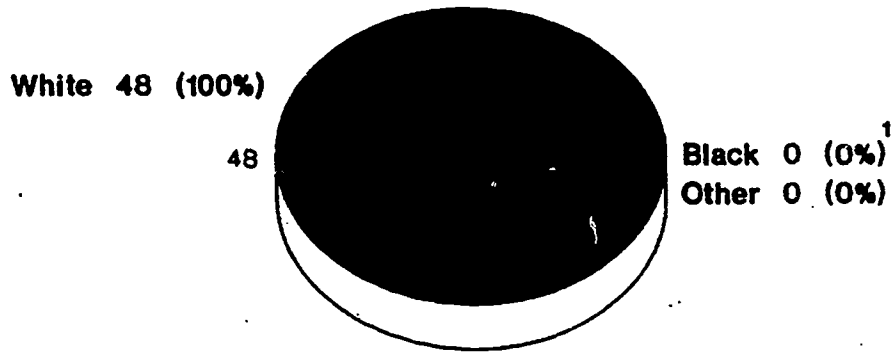
As chart # 3 below illustrates, in 1992 there was only one black full professor at the University of Mississippi. In 1993 there were none. In other terms, to borrow the phrase used by Justice O'Connor's in her concurring opinion in a Title VII affirmative action case, Johnson v. Santa Clara Transportation Co.,<sup>264</sup> black full professors represented an "inexorable zero."<sup>265</sup>



<sup>264</sup> 480 U.S. 616 (1987). The quoted words from Johnson repeat a phrase used a decade earlier in Teamsters v. United States, 431 U.S. 324 (1977), 432, n. 23. "[T]he company's inability to rebut the inference of discrimination came not from a misuse of statistics but from 'the inexorable zero'." In Johnson, a gender-based Title VII affirmative action employment case, a majority of the Supreme Court held that under Title VII, in contrast to Equal Protection Clause jurisprudence, a public employer, like private employers, "need not point to its own prior discriminatory practices" to justify a hiring preferences. It suffices if a statistical imbalance of women (and minority men) in a "traditionally segregated job category" results from "strong social pressures [that] weight against their participation." The author must explore more fully the tension between Johnson Equal Protection Clause affirmative action case law (Croson and more recently Aderand) used in Podberesky and Fordice.

<sup>265</sup> 480 U.S. at 657 (1987). (Not to author--elaborate later and note implications for Fordice.)

# Full Professors By Race Mississippi University for Women FY 1992



# 4

<sup>1</sup>Fall 1993 - 0 U.S. Blacks Identified  
Sources: PP Discovery Docs #46, #47  
Catalog, Interviews

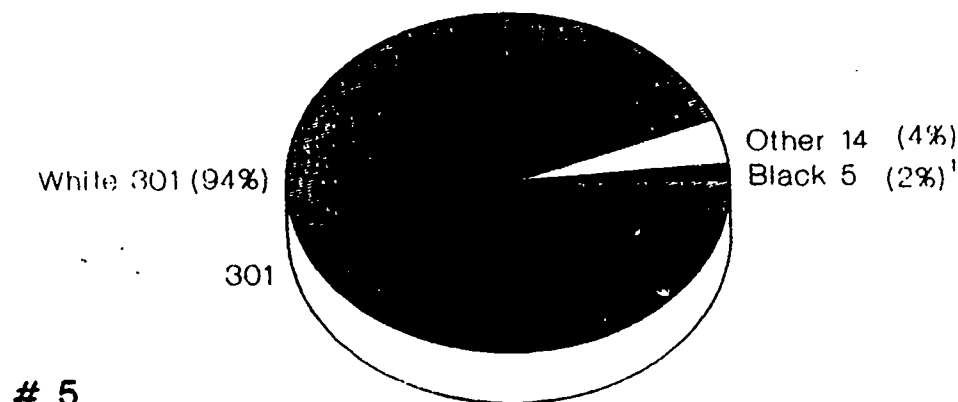
Source: U.S. Discovery Doc - Request G

M. Clague

As of FY 1992 there appear to be 4-5 black full professors at Mississippi State University (Chart # 5), <sup>246</sup> 2 at the University of Southern Mississippi (Chart # 6), <sup>247</sup> and 1 full professor at Delta State (Chart # 7). <sup>248</sup>

## Full Professors By Race Mississippi State University

FY 1992



<sup>1</sup> Fall 1993 - 3 Black Fulls Identified  
Sources: PP #46, #47  
Catalogs, Phone & Site Interviews

Source: U.S. Discovery Doc - Request G

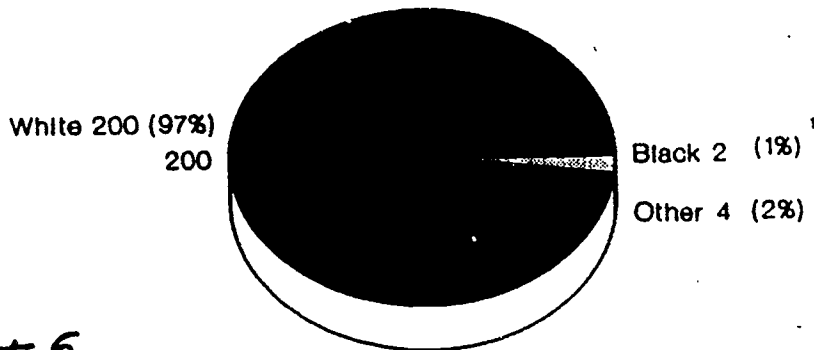
M. Clague

<sup>246</sup> This fell to 3 in Fall 1993.

<sup>247</sup> This increased to 5 black full professors in Fall 1993.

<sup>248</sup> This increased to 2 in Fall 1993.

# Full Professors By Race University of Southern Mississippi FY 1992



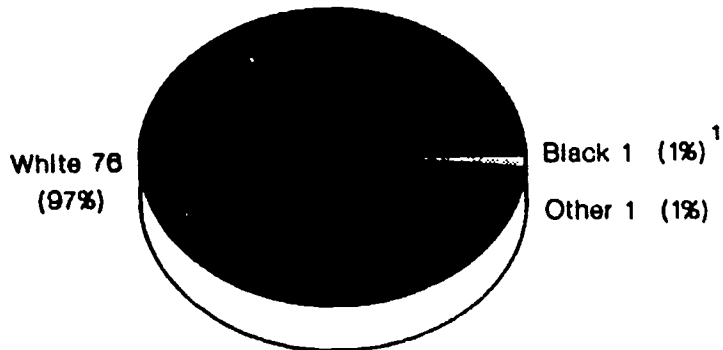
# 6

<sup>1</sup> Fall 1993 - 5 U.S. Black Full Professors Identified  
PP Discovery Documents # 46, #47  
& Phone & Site Interviews

Source: U.S. Discovery Doc - Request G

m. Clague

# Full Professors By Race Delta State University FY 1992



# 7

<sup>1</sup> Fall 1993 - 2 Blacks Identified  
Sources: PP # 46, #47, Catalog

Source: U.S. Discovery Doc - Request G

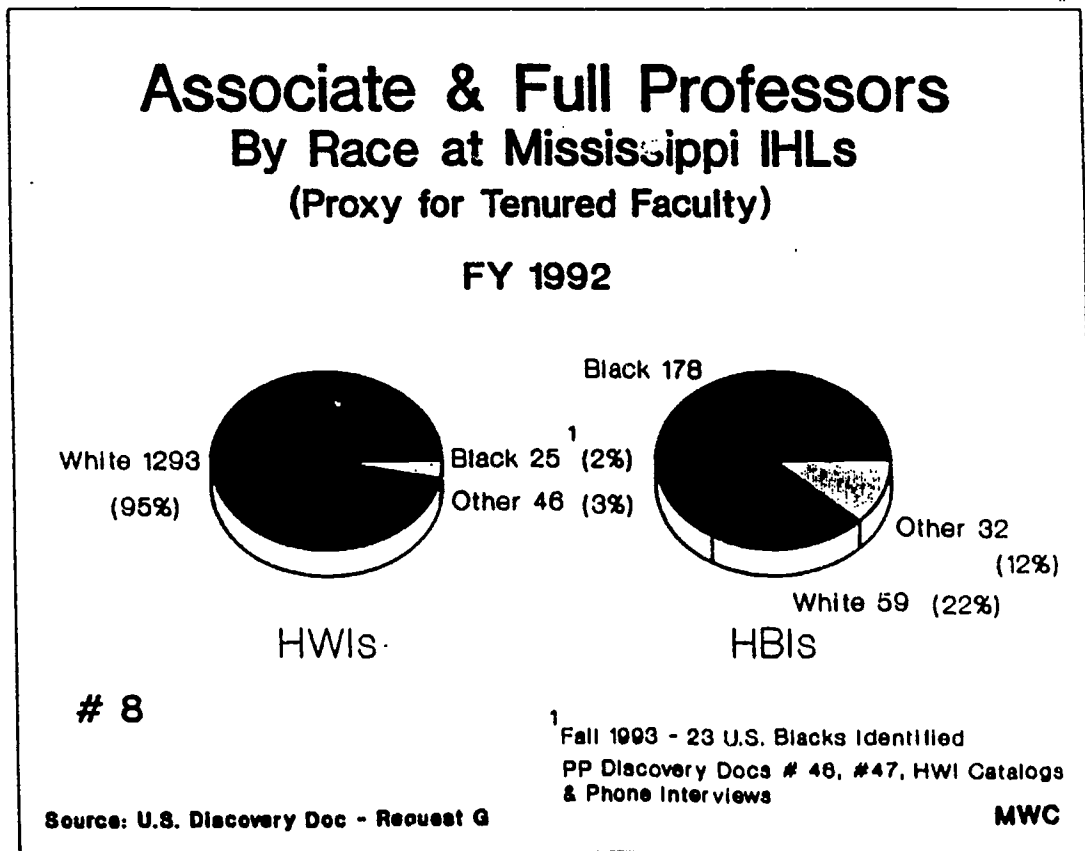
m. Clague

**d. Associate and Full Professors: Proxy for Tenured Black Faculty:**

Tenure is not a sufficient condition of faculty influence and power in the governance of academic institutions. But the substantial presence of tenured black faculty is surely essential to a long term process of transforming HWI institutions from mono-racial to multi-racial, multi-cultural institutions. Tenure is also essential for senior academic administrative positions: i.e., chairs and above. To put it another way, a critical mass of African American tenured faculty, secure enough to exert leadership in faculty and administrative roles, is key to progressive integration in many aspects of university life. In their absence, who is there to challenge the inevitable blind spots of Mississippi's non-black faculty in dealing with racial issues? In their absence, or with their mere token and marginal presence, who is there to engage non-blacks in the educational process that progressive, successful integration requires?

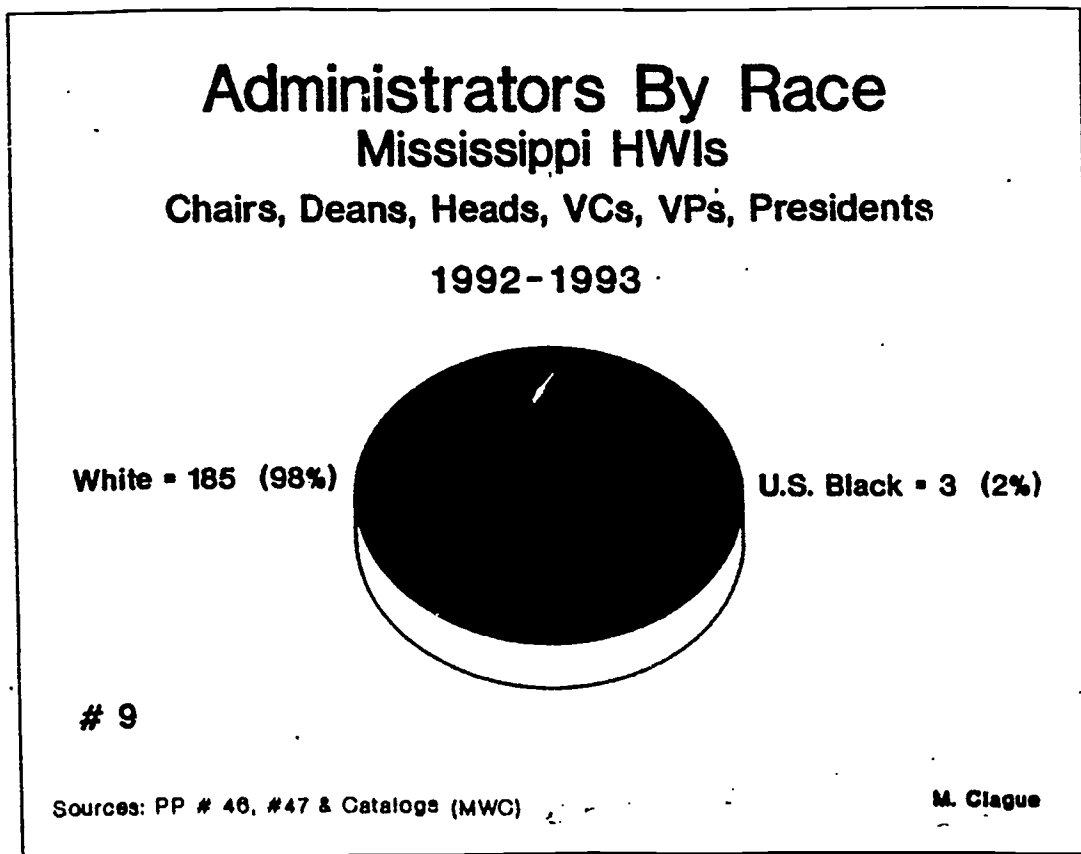
The best way to estimate the number of tenured faculty, given the data available via discovery, was to count Associate & Full Professors. Interviewees with whom I talked during site-based interviews confirmed my assumption that Associate and Full Professorships carry tenure. Although there are a few Assistant Professors with tenure at the HWIs, the practice of tenuring Assistant Professors appears to have ended in Mississippi's HWIs. In any case, adding tenured Assistant Professors might well have shown an even smaller percentage of tenured U.S. Blacks.

Chart # 8 below, illustrates, once again, the very small % of African American faculty with tenure at Mississippi's HWI institutions.



e. Black Line Administrators at Mississippi's HWIs:

If the pie charts show few black faculty in tenured ranks at Mississippi's HWIs, what of line administrators? One would expect very few, insofar as line administrators, especially those in the academic area, normally come from the ranks of tenured faculty. Not surprisingly therefore, the data shows only 2-3 African American academic administrators at all five HWIs combined as of FY 1992.<sup>269</sup> I was able to identify only 2-3 U.S. black line administrators at the 5 HWIs. In addition, and not surprising either, the Assistant Vice President-Center for Cultural Diversity at MSU was African American. As shown on Chart # 9 below, these few people represent approximately 2% of line administrators at the level of Chair and above: i.e., Chairs, Deans, Associate Deans, Vice Chancellors, Associate Vice Chancellors, Vice Presidents, Associate Vice Presidents, Presidents and Chancellor.



<sup>269</sup> They were the Dean of the Division of Continuing Education at DSU; the Chair of Dept. of Marketing at USM; and the Interim Associate Dean of the Graduate School at MSU. I heard the new Dean of the Law School is Black. True? Ask Bruce Williams.



### 3. Traceability: Who Baked the Pie Charts

#### a. Reframing the Faculty Issues: Beyond the Affirmative Action Employment Model

The small number of African American tenured and tenure track faculty and senior administrators at HWI institutions is a self-perpetuating effect of de jure segregation and of the pervasive racism it reflected and fostered. Yet this obvious "remnant" is grossly discounted when one relies solely or primarily on an affirmative action recruitment and employment model for assessing the contemporary status of African American faculty in HWI institutions. If the faculty piece of the integration mosaic is framed in terms of affirmative action hiring goals, given the existing pool of eligible African American doctorates, the law will accomplish little more than a ratification of Mississippi's "We can't find any" defense.

Primary or exclusive reliance on affirmative action, availability pool analysis is inadequate to address the woefully small number of African American faculty at HWI IHL institutions, for four reasons:

First, by focusing only on the current supply of black doctorates nationally, it utterly ignores historic and systemic reasons for the scarcity of African Americans with terminal degrees--the long history of segregated and unequal education in Mississippi--and elsewhere--that accounts in part for the small size number of African Americans with terminal degrees--the eligible pool.

Second, it completely ignores the fact that Mississippi HWI institutions have followed a practice of "growing" a large number of their own white faculty and administrators over the years. Mississippi HWI institutions now recruits faculty nationwide. But the legacy of the in-bred "closed society" was manifest in a tally of non-black faculty: Using 1992-1994 catalogs from Mississippi's HWIs, I counted approximately 400 non-black tenure track and tenured faculty (Assistant, Associate and Full professors) with highest degree or study from an HWI Mississippi institution.<sup>270</sup> By comparison only 20 U.S. black tenure track and tenured faculty at the five HWIs had earned their highest degree from a Mississippi institution. Thus, tenure and tenure track non-black (mostly white) faculty with their highest degrees from Mississippi institutions outnumbered U.S. blacks with their highest degrees from Mississippi institutions by twenty times.

Another striking indicator of the present consequences of a history of discrimination against blacks by Mississippi doctorate granting institutions is that there appears to be only one U.S. black full professor at an HWI--MSU--who earned a doctorate from a Mississippi HWI. And of black Associate professors only 6-7 had earned their highest degree from an HWI institution. Thus, only 7-8 tenured black faculty earned their highest degree from UM, MSU, or USM.

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<sup>270</sup> This tally was made possible by the fact that discovery documents identified the black faculty. Thus, it was possible to identify non-blacks by using the catalogs. UM 1993 Undergraduate catalog; MS 1993-94 Graduate Catalog; 1992-93 USM undergraduate catalog. (This includes Gulf Coast Research Lab faculty. It does not include UM-Medical Center.) Because I have the names of black faculty, I am able to distinguish black and non-black faculty listed in catalogs.

Third, primary or exclusive reliance on affirmative action, availability pool analysis also fails to address the marked status differences, as discussed above, between black and non-black HWI faculty in terms of rank and tenure.

Fourth, affirmative action employment/availability pool analysis is limiting because it is strictly mechanistic: It does not address such critical "beyond access" issues as "climate," loneliness, isolation, junior faculty development and support, overuse of token African American faculty, mentoring, promotion, tenure, power, status, influence, reasons for the revolving door phenomenon, etc. As noted I was severely limited in my ability to talk with, much less survey or interview African American faculty. Yet these quality-of-professional life issues, the terrain of sociological inquiry, are critical to understanding the barriers to and process of successful faculty and student integration.

Finally, affirmative action employment, availability pool analysis fails to consider the role African Americans faculty play qua teaching professors in an educational setting, as contrasted with public employees in other employment settings. It ignores the importance of the faculty-student connection, the critical importance of African American leadership and participation in black-white dialogues that will shape the universities of the late 20th and 21st centuries. Affirmative action availability pool analysis underplays the role African American faculty and administrators can play in changing damaging self-reproducing racial stereotypes about African Americans. In sum, without a significant African American presence in positions of power and influence, Mississippi's HWIs cannot transcend the image of "Mississippi Burning."

One could make a number of recommendations for improving the status of black faculty in the short run and of "multi-culturalists"—faculty of all races who welcome the challenge of bringing about successful faculty and student racial integration. However, a significant and long term solution to the paucity of African American faculty at Mississippi's HWI institutions requires a remedial framework that transcends beyond affirmative action employment analysis. It requires a framework that makes the connection between the present small number of African American faculty in HWI institutions and the role of HWI doctoral granting institutions and Jackson State in the production of black scholars. It requires, in other words, attention to the "production" and not just the "demand" or "consumption" side of the faculty problem. I also suggest remedies that take this approach below.

An indicated on p. 48 above, in 1987 the district court, buying and boxed into the way the defense framed the faculty issues, in effect threw up its hands in despair of any remedies: "The Court is not aware of any additional minority faculty and staff recruitment procedures the defendants could implement . . . ." <sup>271</sup> And Mississippi, following the Supreme Court's remand, was quite content with the district court's 1987 decision. It simply denied the existence of a faculty remnant. As a consequence it offered no remedial suggestions.

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<sup>271</sup> 674 F. Supp. at 1563.

### **b. Mergers and Minority Faculty**

What Mississippi did proffer, however, were two plans for consolidating the number of IHL institutions. What were their implications for faculty? In its plan of October 1992, IHLs BOT proposed the barebones outline of the idea of subsuming HBI Alcorn State into an administrative unit of HWI Mississippi State University; HWI and predominantly female Mississippi University for Women into an administrative unit of HWI University of Southern Mississippi;<sup>272</sup> and the merger of HBI Mississippi Valley State University and HWI Delta State University and their absorption into an administrative unit of the HWI University of Mississippi. In April 1994, a subsequent plan proposed that MUW be incorporated into MSU.

Under both of Mississippi's two plans, prospects for existing black faculty looked dismal, as did the prospects for increased black presence at the HWIs. The State's October 1992 plan spoke vaguely, in the conditional and subjective tenses, about incentive plans to encourage faculty and staff "to transfer along with any programs that might be relocated programs."<sup>273</sup> But with no projected program reallocation from Alcorn or MVSU to Mississippi's three white comprehensive institutions--USM, UM, and MSU--there was nothing for black faculty at MVSU and Alcorn to transfer to them with. Mississippi's subsequent Supplemental Response of April 7, 1994 was not much clearer. Tenured faculty would be offered positions in light of need and educational soundness. There were no provisions for non-tenured faculty. And whether MUW was incorporated into USM, as suggested in the October 1992 plan, or into MSU, as suggested in the April 1994 plan, MUW's demise would do nothing for faculty integration. There were no tenured black faculty at MUW to whom to offer positions at MSU.

One did not have to be an outsider on the side of plaintiffs to see this more a hostile takeover by the 3 comprehensive HWI universities than a plan to engage Mississippians in a long-term strategy to improve racial integration (not to mention gender integration) in a spirit of mutual respect and enhancement.

### **c. Mississippi Doctorates Awarded By Race**

The pie charts show very few black faculty in tenured positions of influence and power at Mississippi's HWI institutions. Mississippi did not contest the data. It argued instead that nationally the pie chart of doctorates by race show a small and declining proportion of African American doctorates. It never suggested a supply side remedy for a demand side problem: that was precluded by the affirmative action employment model.

**But who baked the pie charts?** Mississippi for one, if not the only one. Of the non-black faculty at Mississippi's doctoral granting HWI institutions--UM, MSU, and USM--400--approximately a third of their tenure track and tenured faculty earned their doctoral degrees from the same three doctoral granting institutions. This is roughly 20 times the number of black faculty at these institutions who earned

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<sup>272</sup> Note to MWC - Later comment n the implicit norming on a white male norm.

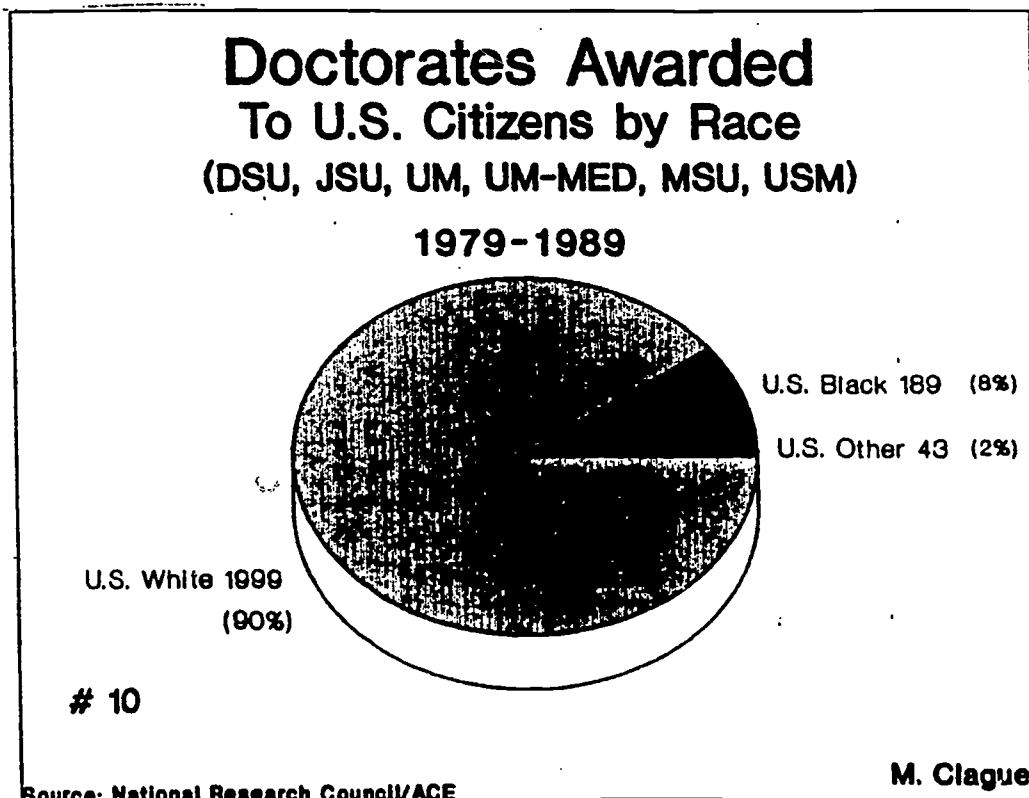
<sup>273</sup> at 5.

their doctorates at these three institutions. Black faculty, with the power and influence that goes with tenure, can be counted on two hands.

Without doubt these striking racial imbalances do not reflect the results of "wholly voluntary and unfettered choice of private individuals."<sup>274</sup> The long path from kindergarten to doctorate for black Mississippians was blocked by Jim Crow and its devastating educational consequences. But, of course, also, the structure of desegregation litigation does not allow for the law to consider K-12 through graduate school as "all one system." In *Fordice*, as in all other higher education cases, the responsibility of the public system of higher education is considered in isolation from the whole pre-collegiate system on which it builds. Thus, one more restrictive frame adds to the restricting frame of fault-based, state action liability.

Yet—even with the frame restrictions—is it not possible to meet *Fordice*'s requirement that plaintiffs show the traceability of faculty remnants to policies and practices rooted in the *de jure* system? Mississippi grew and hired a high proportion of its own when blacks had zero or limited access to graduate education.

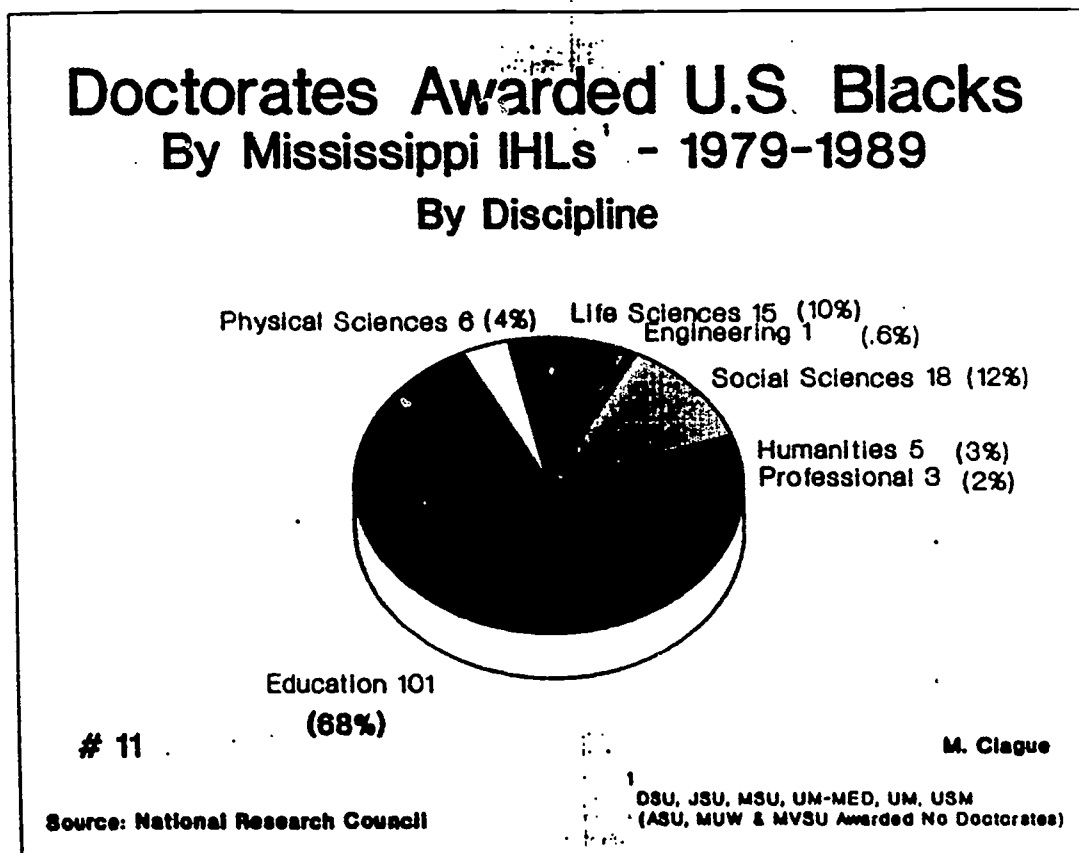
Taking a the decade 1979-89, a time period far more favorable to Mississippi than one that reaches to prior decades, we find that 8% of all doctorates awarded by IHL institutions were to blacks, and 90% to whites. (# 10) To be sure, by comparison with the percentage of doctorates awarded to blacks by white doctoral granting institutions around the country during the same time period, Mississippi's 8% was among the best.



<sup>274</sup> 112 S. Ct. at 2737, paraphrasing the Supreme Court's conclusion in *Bazemore*

d. Black Doctorates by Discipline: 1979-89

To say that Mississippi's black doctoral production was among the best during the decade 1979-1989, is to use a norm that is not an encouraging one. The number of doctoral degrees awarded to black Americans nationally fell during that decade. Furthermore, to better understand the implications for desegregation, the global figures on black doctorates must be disaggregated. Chart # 11 shows the break down of Mississippi's black doctorates by discipline.



Nationally, during the decade 1979-89, 52% of doctorates awarded to U.S. blacks were in education related fields. The proportion of doctorates in education awarded to U.S. blacks in Mississippi's HWI institutions during the same decade was considerably higher: 102 of the 150—68%—of doctorates awarded to U.S. blacks were in education. The high proportion of doctorates earned by African Americans in the broad field of education translates into proportionately far fewer African American doctoral recipients who pursue academic careers, compared with whites who earn terminal degrees in a much broader variety of fields. This is because the number of faculty positions in education are limited and because a very high percentage of education doctorates are oriented to employment outside of higher education.

**VI. BAKING NEW PIE CHARTS: MINORITY FELLOWSHIP SUPPORT PROGRAMS:  
LONG TERM "EDUCATIONALLY SOUND" REMEDIES FOR FACULTY  
"REMNANTS"**

There are ways of increasing the employment and influence of African American faculty given the existing limited pool of doctorates. But a significant and long term solution to the paucity of African American faculty, requires the courts to transcend affirmative action employment, availability pool analysis and to reject the Fourth Circuit's blind's eye, color blind rejection, in Podberesky, of MTS fellowship programs. For Mississippi it would require a framework that makes the connection between the present small number of African American faculty in HWI institutions and the role of HWI doctoral granting institutions and Jackson State in the production of blacks with doctorates and other terminal degrees. Additionally, as argued above, it requires attention to the discipline concentration of African American doctorates.

A number of minority doctoral support programs, as well as foundation layig MTS undergraduate programs, exist around the country. Perhaps the most successful is the McKnight Black Doctoral Fellows Program [BDF], a program component of the Florida Education Fund for Higher Education [FEF]. Originated in 1984, this public-private fellowship program was created for the express purpose of increasing the presence of blacks on the faculties and in the administrations of Florida's public and private institutions of higher education.<sup>275</sup> With that purpose in mind the McKnight Black Doctoral Fellows Program also expressly emphasizes disciplines other than education, with the exception of math and science education. limits the award of fellowships to graduate students

Under the leadership of the Southern Regional Education Board in Atlanta and the Florida Endowment Fund President, plans are underway to replicate key features of the McKnight program across the nation. According to sources outside the state of Mississippi, representatives of the IHL governing board have expressed an interest in replicating some key features of the McKnight Black Doctoral Fellows program in Florida. Yet no one I spoke to 1993 at MSU, USM, MUW, Jackson, Alcorn, Delta State or the Board of Trustees mentioned this.

**ASHE READERS - I AM FOLLOWING UP ON MANY LEGAL AND POLICY DEVELOPMENTS, INCLUDING THE NATIONAL COMPACT AND MISSISSIPPI'S ROLE IN IT, RELEVANT DEVELOPMENTS IN THE ALABAMA DESEGREGATION LITIGATION, RESPONSES TO PODBERESKY AND THE BACKLASH AGAINST AFFIRMATIVE ACTION IN GENERAL WITH REGARD TO MINORITY FELLOWSHIP PROGRAMS. FORDICE HAS BEEN APPEALED SINCE THE ASHE CONFERENCE IN NOVEMBER 1995.**

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<sup>275</sup> See, e.g., M. Clague, Minority Doctoral Support Programs: Three Case Studies, at 51. Tribble & Stamp, J. White, etc.