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Gil Kujovich
Vermont Law School

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GIL KUJOVICH†

During the era of *de jure* segregated public education, discrimination against black students was not confined to elementary and secondary schools. Under the protective mantle of *Plessy v. Ferguson*,[1] the segregationist states rigidly enforced racial separation in their public institutions of higher education. The Supreme Court's earliest decisions questioning the manner in which the states afforded separate but equal public education concerned state colleges and universities. As early as 1938, the Court began to refine the constitutional mandate of equality required of states that operated racially separate colleges.[2] Within twelve years, the Court decided three additional higher education cases[3] that foreshadowed its landmark decision in *Brown* v. *Board of Education*.[4]

Despite this early focus on colleges, for nearly four decades after *Brown* the Court paid scant attention to desegregation in higher education.[5] In the absence of guidance from the Supreme

† Professor, Vermont Law School. J.D. 1975, Harvard Law School. I wish to thank Victoria Cherney for her thorough research, skilled editing, and kind support.

1. 163 U.S. 537 (1896), *overruled by* Brown v. Board of Educ., 347 U.S. 483 (1954) (*Brown I*).

2. Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938) (invalidating out-of-state scholarships as means of providing equality in graduate education).

3. McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950); Sweatt v. Painter, 339 U.S. 629 (1950); Sipuel v. Board of Regents, 332 U.S. 631 (1948).

4. 347 U.S. 483 (1954).

5. In the mid-1950s the Court issued two per curiam decisions holding that *Brown I*'s invalidation of racial segregation applied to colleges and universities, Board of Trustees v. Frasier, 350 U.S. 979 (1956) (per curiam), *summarily aff'g* 134 F. Supp. 589 (M.D.N.C. 1955), and that there was "no reason for delay" in the admission of black students to white colleges, Florida *ex rel* Hawkins v. Board of Control, 350 U.S. 413, 414 (1956). More than a decade later, the Court briefly revisited the issue by summarily affirming two lower court decisions that reached seemingly conflicting conclusions as to the permissibility of expanding white college facilities in close proximity to black institutions. Board of Visitors v. Norris, 404 U.S. 907 (1971), *summarily aff'g* Norris v. State Council of Higher Educ., 327 F.

Court, the lower federal courts struggled with the questions of whether and how constitutional remedies developed for the desegregation of elementary and secondary schools applied to segregated public colleges.[6] In 1992, the Court ended its forty years of near silence and decided a case challenging Mississippi's failure to dismantle its formerly *de jure* segregated system of public higher education. *United States v. Fordice*[7] outlined the remedial steps that Mississippi, and other states that operated racially separate colleges and universities, must take to comply with the Constitution. Addressing only the broad remedial requirements of the Fourteenth Amendment, the Court left the details of a constitutionally acceptable remedy to the consideration of the lower courts.

Subsequent to *Fordice*, federal district and appellate courts in Mississippi,[8] Alabama,[9] and Louisiana[10] have attempted to apply the *Fordice* remedial standard and to fashion specific remedies for the continuing effects of past segregation in state colleges and universities. A full understanding of the extent to which *Fordice* will succeed in achieving desegregation in public higher education must await the Court's review of cases implementing its 1992 decision and its further refinement of the remedial principles the decision established.

What is already evident, however, is that the Court crafted for higher education a desegregation remedy much more limited than

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Supp. 1368 (E.D. Va. 1971); Alabama State Teachers Ass'n v. Alabama Pub. Sch. & College Auth., 393 U.S. 400 (1969) (per curiam), *aff'g* 289 F. Supp. 784 (M.D. Ala. 1968).

6. *See, e.g.*, United States v. Louisiana, 527 F. Supp. 509 (E.D. La. 1981), 692 F. Supp. 642 (1988), 718 F. Supp. 499 (1989), 718 F. Supp. 525 (1989); United States v. Alabama, 628 F. Supp. 1137 (N.D. Ala. 1985), *rev'd*, 828 F.2d 1532 (11th Cir. 1987), *cert. denied sub nom.* Board of Trustees of Ala. State Univ. v. Auburn Univ., 487 U.S. 1210 (1988); Knight v. Alabama, 787 F. Supp. 1030 (N.D. Ala. 1991); Sanders v. Ellington, 288 F. Supp. 937 (M.D. Tenn. 1968), Geier v. Dunn, 337 F. Supp. 573 (1972), 427 F. Supp. 644 (1977), *aff'd*, Geier v. University of Tenn., 597 F.2d 1056 (6th Cir. 1979), Richardson v. Blanton, 597 F.2d 1078 (1979), *cert. denied sub nom.* University of Tenn. v. Geier, 444 U.S. 886 (1979), Geier v. Alexander, 593 F. Supp. 1263 (1984), *aff'd*, 801 F.2d 799 (6th Cir. 1986).

7. 505 U.S. 717 (1992). Justice White delivered an opinion for the Court joined by all other Justices except Justice Scalia. Concurring opinions were written by Justice O'Connor, *id.* at 743, and Justice Thomas, *id.* at 745. Justice Scalia wrote an opinion concurring in part and dissenting in part. *Id.* at 749.

8. Ayers v. Fordice, 879 F. Supp. 1419 (N.D. Miss. 1995). The district court's first opinion in the case was issued in 1987. Ayers v. Allain, 674 F. Supp. 1523 (N.D. Miss. 1987), *aff'd*, 914 F.2d 676 (5th Cir. 1990), *vacated sub nom.* United States v. Fordice, 505 U.S. 717 (1992). The 1987 judgment was reversed by a Fifth Circuit three judge panel. Ayers v. Allain, 893 F.2d 732 (5th Cir. 1990). The Fifth Circuit, rehearing en banc, affirmed the judgment of the district court and reversed itself. Ayers v. Allain, 914 F.2d 676 (5th Cir. 1990).

9. Knight v. Alabama, 14 F.3d 1534 (11th Cir. 1994), 900 F. Supp. 272 (N.D. Ala. 1995).

10. United States v. Louisiana, 9 F.3d 1159 (5th Cir. 1993), *vacating in part, rev'g in part, and remanding* 811 F. Supp. 1151 (E.D. La. 1992).

that which has evolved over the past forty years in the context of elementary and secondary schools. Most importantly for the purposes of this Article, the remedial principles announced in *Fordice* implicitly threaten the achievement of racial equality in higher education. The failure of *Fordice* to ensure that a desegregation remedy effectively serves the goal of educational equality determines the primary focus of this Article: to consider an alternative to judicially defined, constitutional remedies for segregation and discrimination in public higher education. Specifically, I consider the remedial authority delegated by Congress to the Executive Branch in Title VI of the Civil Rights Act of 1964.[11]

Using Mississippi as the primary example, Part I reviews the nature and scope of the constitutional violation resulting from the operation of racially separate systems of public higher education. As is evident from even a brief look at the history of segregated colleges and universities, the educational opportunities afforded to black citizens in the segregationist states were not only racially separate, but also unequal. Part II discusses what *Fordice* defines as the constitutionally acceptable remedy for past segregation and examines the adequacy of that remedy in eliminating the effects of long-lasting racial discrimination in public higher education.

Because *Fordice* has limited the scope of constitutionally based remedies fashioned by the federal courts, the potentially broader, administrative remedial power available under Title VI becomes a central issue in the continuing struggle for racial equality in higher education. Part III examines two perspectives on the reach of Title VI. First, it considers whether the statute's prohibition of discrimination in federally funded programs extends beyond the proscriptions of the Fourteenth Amendment's Equal Protection Clause. Second, it explores the possibility of using the Title VI enforcement process to address constitutional violations not included in the *Fordice* analysis.

While the conception of the Title VI violation is an important factor in determining the reach of Executive Branch authority to devise remedies for discrimination in higher education, it is not the only consideration. Part IV examines the additional question of the character of judicial and administrative remedial powers to suggest that administrative remedies under Title VI need not be as limited as those developed by the courts.

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11. 42 U.S.C. §§ 2000d - 2000d-7 (1988).

I. The Constitutional Violations In Separate and Unequal Higher Education

There can be no doubt that in providing publicly supported higher education to its citizens, the State of Mississippi violated the Fourteenth Amendment's requirement of equal protection. The state's unconstitutional discrimination against its black citizens took two forms. First, Mississippi operated rigidly segregated colleges and universities in violation of the Equal Protection Clause as interpreted in *Brown*. Second, during the period in which *Plessy* interpreted the Constitution to permit racially separate public facilities if equal provision were made for blacks and whites, the state consistently failed to provide equal educational opportunity to its black citizens. The vestiges of both forms of unconstitutional discrimination are evident today in Mississippi's system of public higher education and continue to adversely affect the education of the state's black citizens.

Mississippi strictly enforced racial segregation in its colleges and universities from the time it opened its first public university. During the nineteenth century the state legislature established three institutions reserved for the higher education of white students only: University of Mississippi (1848), Mississippi State University (1880), and Mississippi University for Women (1885). In that same period the state created one institution for the education of black youths: Alcorn State University (1871). Two additional white colleges were established in the early twentieth century: University of Southern Mississippi (1912) and Delta State University (1925). After the constitutionality of segregated higher education was challenged in the federal courts, Mississippi added two more black institutions to its system of higher education: Jackson State University (1940) and Mississippi Valley State University (1950).[12] Throughout the century before *Brown*, the state strictly enforced the barriers of racial separation. All eight public institutions were racially identified by their student bodies, faculties, and staffs.[13]

The state continued its policy of segregation after *Brown*.[14] It was not until 1962 that the first black student, James Meredith, was admitted to a white public college in Mississippi, and then only under court order and with the protection of federal troops.[15]

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12. *Fordice*, 505 U.S. at 721-22.

13. Ayers v. Allain, 674 F. Supp. at 1529.

14. *Fordice*, 505 U.S. at 722.

15. State officials engaged in "a carefully calculated campaign of delay, harassment, and masterly inactivity" to prevent Meredith's enrollment in the University of Mississippi. Mer-

Even after Meredith's admission, "the segregated public university system in the State remained largely intact."[16] The white institutions failed to employ any black faculty until the 1970s,[17] at which time the student bodies of all eight colleges remained "almost exclusively single-race."[18] Racial segregation remained at the time of trial in *Fordice*. In the mid-1980s, thirty years after *Brown*, the five institutions the State had created for white students remained predominantly white and the three colleges founded for black students remained predominantly black.[19]

De jure segregation was not the only equal protection violation that Mississippi inflicted on its black population. For more than eighty years after Alcorn State began educating black students, Mississippi violated *Plessy*'s constitutional command that racially separate colleges be equal. Tangible and extreme inequality in public higher education was most obvious in the number of institutions the state provided for whites and blacks. After Alcorn State opened in 1871, the state expanded its system of white colleges to include five institutions. Alcorn State, however, remained the only public college available to black citizens until 1940.[20] During that time, enrollment at Alcorn State was limited to fewer than 500 students.[21]

For nearly a century, racial discrimination in violation of *Plessy* was evident in the inadequate funding, inferior facilities, and severely restricted educational programs at the public colleges serving Mississippi's black citizens.[22] As late as 1940, the state's

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edith v. Fair, 305 F.2d 343, 344 (5th Cir. 1962), *cert. denied*, 371 U.S. 828 (1962). All three branches of the state government joined the effort to defy the Fifth Circuit's order that Meredith be admitted. Meredith v. Fair, 328 F.2d 586, 588-89 (5th Cir. 1962). Consequently, President Kennedy used U.S. Marshals and armed forces to ensure compliance with the court order. United States v. Barnett, 330 F.2d 369, 379-80 (5th Cir. 1963). After enrolling, "Meredith carried on his studies under continuous guard until his graduation." United States v. Barnett, 376 U.S. 681, 686 (1964).

16. *Fordice*, 505 U.S. at 722.

17. Ayers v. Allain, 674 F. Supp. at 1529.

18. *Fordice*, 505 U.S. at 723.

19. *Id.* at 724-25.

20. *Id.* at 721-22.

21. Ayers v. Fordice, 879 F. Supp. 1419, 1438 n.54 (N.D. Miss. 1995).

22. The scale of inequality in the early years is evident in a comparison of the funding of the state's black and white land grant colleges. Consistent with the practice of all the segregationist states, Mississippi created two land grant colleges: Alcorn State for blacks and Mississippi State for whites. *See* Gil Kujovich, *Equal Opportunity in Higher Education and the Black Public College: The Era of Separate But Equal*, 72 MINN. L. REV. 29, 40-44 (1987) (establishment of segregated land grant colleges). These two institutions received state and federal funding for the land grant functions of resident instruction, research, and extension work. *See id.* at 45-64 (review of land grant functions in racially segregated colleges).

expenditures for the higher education of the black half of its population[23] was a mere five percent of its expenditures for its white citizens.[24] The two black institutions had a full-time faculty of 43 persons while the white colleges operated with a faculty of nearly 800.[25] Students enrolled at the two black colleges could choose from only 23 programs at the undergraduate level and none at the graduate level. The state afforded its white students a choice of more than 115 undergraduate, graduate, and professional fields.[26] All five of the white public colleges were accredited. There was no fully accredited public college available to black students.[27]

Extreme racial discrimination continued in the years just prior to *Brown*. Between 1947 and 1953, average annual educational expenditures at each of Mississippi's five white public colleges were more than twice that at each of the two black public colleges.[28]

In 1928, total funding for land grant operations at Alcorn was a mere $80,676, less than one-tenth of the land grant funding provided to Mississippi State. 1 OFFICE OF EDUC., U.S. DEP'T OF INTERIOR, 1930 BULL. No. 9, SURVEY OF LAND GRANT COLLEGES AND UNIVERSITIES 101, 106-07 (1930) [hereinafter LAND GRANT SURVEY]; 2 *id.* at 856. Consistently unequal funding produced unequal facilities. The value of facilities and property at Mississippi State was more than three million dollars. 1 *id.* at 134. Alcorn was valued at just over $500,000. 2 *id.* at 869. Alcorn's science facilities were "almost entirely of secondary grade" and the institution lacked both "a properly qualified teaching staff and educational equipment for standard college work." BUREAU OF EDUC., U.S. DEP'T OF INTERIOR, 1928 BULL. No. 7, SURVEY OF NEGRO COLLEGES AND UNIVERSITIES 416, 417 (1929) [hereinafter NEGRO COLLEGE SURVEY].

Inadequate funding was matched by an inadequate educational program. More than half a century after Alcorn was founded, and when it was the only public college for black students, it was "largely a school of secondary grade . . . in which the greater part of the work [was] concentrated in industrial and manual training. Courses [were] offered in laundering, carpentry, blacksmithing, horseshoeing, wagon and carriage building, painting, shoemaking, and domestic science." *Id.* at 405. In 1928, eighty percent of Alcorn's students were below the college level. *See* 2 LAND GRANT SURVEY, *supra*, at 896-97. The college had a faculty of twelve persons, only three of whom were devoted exclusively to higher education. All but one had only a bachelor's degree. NEGRO COLLEGE SURVEY, *supra*, at 413.

23. In 1940, blacks constituted 49% of the population of Mississippi. BUREAU OF CENSUS, U.S. DEP'T OF COMMERCE, HISTORICAL STATISTICS OF THE UNITED STATES; Colonial Times to 1970 30 (Bicentennial ed. 1975).

24. In 1940, Mississippi's educational and general expenditures at its black public colleges was approximately $161,000; at the state's white public colleges the sum was more than three million dollars. 6 PRESIDENT'S COMM'N ON HIGHER EDUC., HIGHER EDUCATION FOR AMERICAN DEMOCRACY 46 (1947) (tbl. 44).

25. *Id.* at 36 (tbl. 33).

26. 2 FED. SEC. AGENCY, U.S. OFFICE OF EDUC., NATIONAL SURVEY OF THE HIGHER EDUCATION OF NEGROES: GENERAL STUDIES OF COLLEGES FOR NEGROES 10, 14-15 (1942).

27. *Id.* at 16.

28. The white institutional average was one million dollars per year; at the black colleges the institutional average was less than $400,000 annually. BOARD OF TRUSTEES, INST. OF HIGHER LEARNING, HIGHER EDUCATION IN MISSISSIPPI 335-36 (John E. Brewton, Survey Dir. 1954) [hereinafter BREWTON REPORT]. This document is the report of a committee appointed by the Board of Trustees for Mississippi's colleges and universities. *Id.* at vii. The average

Although a 1945 state study of higher education recommended improvement in the substandard and inadequate facilities at Mississippi's black public colleges,[29] racially discriminatory funding for facilities continued. From 1945 to 1953, black public colleges received only thirteen percent of state expenditures on plant and facilities.[30] Nearly a century of acute, state-imposed discrimination firmly established inequality in the facilities of the colleges attended by black students.[31]

Discrimination and inequality in the years just prior to *Brown* also involved faculty and educational programs. In 1953, the three black institutions employed a total of five persons with doctorate degrees, a mere three percent of the faculty at those colleges as compared with twenty-two percent of the much larger white college faculties.[32] In the early 1950s, Mississippi restricted its black institutions to the three educational functions that characterized separate and unequal black colleges in all the segregationist states: training of elementary and secondary teachers, agriculture and home economics, and low-grade vocational education.[33] Consequently, Alcorn State, Jackson State, and Mississippi Valley State offered their undergraduate black students educational opportunities that fell far short of those available to white students.[34]

Graduate and professional education was simply not available

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given excludes Mississippi Valley State, which became a black public college after 1950. Inclusion of that institution would increase the disparity since Mississippi Valley's total expenditures did not exceed $200,000 prior to 1953. *Id.* at 344.

29. *Id.* at 134-35 (quoting BOARD OF TRUSTEES, INST. OF HIGHER LEARNING, MISSISSIPPI STUDY OF HIGHER EDUCATION 335-36 (Joseph E. Gibson, Survey Dir. 1945)).

30. *Id.* at 251.

31. The cumulative effects of long lasting discrimination were particularly evident in the libraries of the institutions. In 1953, libraries at Mississippi's three black public colleges held less than seven percent of the volumes in all public college libraries. The black college libraries ranged from a low of 2,000 volumes to a high of 19,800; at the white institutions the libraries held from 33,000 to 184,000 volumes. *Id.* at 239, 335-36. The "separate but equal" library at Alcorn State was housed on the second floor of a classroom building, difficult to use at night because of insufficient lighting, and lacked adequate shelving. *Id.* at 232-33. Jackson State's library was inadequate for its educational program. *Id.* at 235. At Mississippi Valley, "equality" of library facilities was achieved by shelving 2,000 volumes in a classroom. *Id.* at 239. Meanwhile, two of the white institutions added million dollar library facilities to their already superior physical plants. *Id.* at 212, 223.

32. *Id.* at 293. At all faculty levels, the state discriminated in salaries. *Id.* at 148. For example, faculty at the black land grant college received approximately three-fourths the salary paid to faculty at the same level at the white land grant college. *Id.* at 292.

33. *Id.* at 144; *see generally* Kujovich, *supra* note 22, at 65-81, 104-06 (discussing curricula at segregated public colleges).

34. For Fall 1953, undergraduate education at the three black colleges totaled 321 courses; at the white institutions the total was 1,460. BREWTON REPORT, *supra* note 28, at 331-34.

to black students in Mississippi.[35] White students were more fortunate. Three of the white public colleges offered opportunities to earn graduate degrees, including a limited number of Ph.D. programs.[36] White students, but not black students, had access to Mississippi's schools of medicine, engineering, business, pharmacy, and forestry.[37] For its black population, Mississippi provided graduate and professional opportunities through a severely limited out-of-state scholarship fund,[38] a practice the Supreme Court had invalidated fifteen years earlier.[39]

As found by the district court in *Fordice*, higher education in Mississippi was both separate and unequal at the time of *Brown*.[40] The effect of long lasting discrimination on the state's black population was substantial and far-reaching. At the time of *Brown*, Mississippi's black citizens made up forty-five percent of the population but received only ten percent of the college degrees awarded by the state's colleges and universities.[41] Because segregated elementary and secondary schools depended on the black colleges for the education of their teachers, inequality in higher education ensured that the next generation of black students would also suffer the effects of discrimination. In the early 1950s, black secondary schools employed only one-third the number of teachers found in the white schools, despite the fact that the black students made up more than half of the secondary school population. Two-thirds of the black teachers had no college degree.[42]

Moreover, the legacy of racial inequality in public higher education determined the future of the colleges serving Mississippi's

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35. *Id.* at 148. Although Alcorn State offered a limited summer graduate program in agriculture, *see id.* at 112, 331, the Brewton Report described this as "little short of educational malpractice . . . with the limited resources now available." *Id.* at 112. The report cautioned that inadequacies of the black colleges "preclude any serious attempts to develop among them any programs on the graduate and professional levels." *Id.* at 157.

36. *Id.* at 93, 97, 100, 104.

37. *Id.* at 14-23, 162-63, 178.

38. Even in out-of-state scholarships, white students received more benefits than blacks. Between 1949 and 1951, the State provided only 16 black students and 111 whites with opportunities to study out-of-state in the fields of medicine, dentistry, and veterinary medicine. *Id.* at 149. In the 1952-1954 biennium, the Mississippi legislature appropriated only $75,000 for out-of-state study by black students seeking a graduate or professional education. *Id.* at 148-49.

39. Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938). Mississippi did not begin its out-of-state scholarship program until 1948, ten years after *Gaines*. Kujovich, *supra* note 22, at 119.

40. Ayers v. Allain, 674 F. Supp. at 1528.

41. Ayers v. Fordice, 879 F. Supp. at 1438. The state's white institutions awarded degrees at the rate of one for every 131 white citizens; the black colleges provided a degree to one of every 778 blacks in the state. BREWTON REPORT, *supra* note 28, at 149-50.

42. Ayers v. Fordice, 879 F. Supp. at 1437-38.

black citizens. Just as *Brown* did not end racial segregation in Mississippi, neither did it end racially based inequality. While the state made some improvements in its black public colleges during the 1950s in an effort to forestall integration,[43] the pattern of inequality persisted. During a period of institutional development that concluded in 1970, Mississippi's white colleges received most of the funds the state invested in physical plant, faculty positions, and academic degree programs.[44] The effects of nearly a century of inequality were evident at the time of trial in *Fordice*. In the mid-1980s, the three black institutions were ranked at the bottom of the state's institutional hierarchy in program offerings, percentage of faculty with doctorate degrees, expenditures per student, library volumes, and replacement value of facilities.[45] At a time when two-thirds of the black students in the state's system of higher education were enrolled in black colleges,[46] the quality of education provided to those students showed the effects of discrimination. A review of programs below the doctoral level found that seventy-five percent of the "marginal" educational programs were located at the black institutions. At two of the colleges, approximately half of all educational programs were classified as marginal.[47]

It is clear from the historical record that Mississippi practiced two forms of unconstitutional, racial discrimination in its public colleges and universities. First, the State enforced a policy of racial separation that endured for more than a century. Continuing segregation in Mississippi's public colleges is a vestige of that policy. Second, the State denied its black citizens any measure of educational equality in its racially separate institutions. The effects of that long lasting inequality have not been eliminated. The pattern is not unique to Mississippi, but can be found in most of the segre-

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43. *Id.* at 1452.

44. *Id.*

45. Ayers v. Allain, 893 F.2d 732, 739 n.24, 741-42 (5th Cir. 1990). Of the five white institutions, the only college that shared the lower rankings with the three black colleges was Mississippi University for Women, *id.*, which the state planned to close as early as 1985. Ayers v. Fordice, 879 F. Supp. at 1489. The well-established pattern of inequality between the state's black and white land grant colleges, *see supra* note 22, continued into the 1980s and 1990s. As recently as 1993, Mississippi appropriated 31 million dollars for research and extension work at its white land grant university; the black land grant received only $372,000 in state funds for these land grant functions. Ayers v. Fordice, 879 F. Supp. at 1465.

46. Ayers v. Fordice, 879 F. Supp. at 1465.

47. 5 Joint Appendix at 1738, 1748, Ayers v. Mabus, 499 U.S. 958 (1991) (No. 90-6588); United States v. Fordice, 505 U.S. 717 (1992). The program review classified a "marginal program" as one in which "the quality . . . is so poor that changes must be made." 5 Joint Appendix at 1737. Of the five white colleges, the largest proportion of marginal programs was 16 percent, at Mississippi University for Women. *Id.* at 1748.

gationist states.[48] In *Fordice*, the Supreme Court considered the constitutional duty to remedy only the first of these constitutional violations — *de jure* segregation.

II. UNITED STATES v. FORDICE

The lower courts in *Fordice* viewed the case as requiring a determination of which of two desegregation remedial approaches should be applied in the context of higher education. In a long line of decisions, the Supreme Court has required that unconstitutionally segregated elementary and secondary school systems eliminate the racial identity of their schools. In a more recent case involving segregation in state-operated youth clubs, the Court announced an alternative, and more limited, remedial duty. In *Fordice*, the Court adopted neither alternative and fashioned a somewhat different remedy to be used in cases involving formerly segregated systems of higher education. The compromise struck by the Court, however, produced a constitutional remedy that may fall far short of what is necessary to eliminate the effects of past discrimination and ensure equality of higher educational opportunity.

A. *The* Fordice *Remedy*

In *Green v. New Kent County Board of Education*,[49] the Court imposed upon school boards, which had operated racially dual elementary and secondary schools, a constitutional "duty to take whatever steps might be necessary to convert to a unitary system" of public schools.[50] The remedial obligation under *Green* is defined largely in terms of the racial characteristics of the schools. School boards must "convert . . . to a system without a 'white' school and a 'Negro' school, but just schools."[51] Although the remedy mandated by *Green* "does not mean that every school in every community must always reflect the racial composition of the school system as a whole,"[52] the remedy obligates school authorities to "make every effort to achieve the greatest possible degree of actual desegregation."[53] With few exceptions, policies and practices that

48. *See, e.g.*, Knight v. Alabama, 787 F. Supp. 1030, 1065-147 (N.D. Ala. 1991) (history of separate and unequal colleges in Alabama), *modified*, 14 F.3d 1534 (11th Cir. 1994). *See generally*, Kujovich, *supra* note 22 (discussing history of separate and unequal colleges in 17 segregationist states).

49. 391 U.S. 430 (1968).

50. *Id.* at 437-38.

51. *Id.* at 442.

52. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 24 (1971).

53. *Id.* at 26.

impede or simply fail to achieve actual desegregation fall short of satisfying a school board's remedial duty under the Constitution.[54]

In *Bazemore v. Friday*,[55] the Court held that *Green's* affirmative duty to desegregate did not apply to the "wholly different milieu" of 4-H Clubs in which membership was not compelled by the state but was chosen voluntarily by black and white youths.[56] In *Bazemore*, the North Carolina Agricultural Extension Service had operated racially segregated clubs until 1965. Thereafter, each club was operated without discrimination and was open to all youths, regardless of race.[57] Although many of the clubs retained their racial identity, the district court concluded that the racial imbalance resulted from the "wholly voluntary and unfettered choice of private individuals."[58] Because the Service had discontinued its discriminatory practices and provided youths with a voluntary choice of clubs through a racially neutral admissions policy, the Supreme Court held that the continued existence of single-race clubs did not violate the Constitution.[59]

The lower courts in *Fordice* understandably read *Green* and *Bazemore* as defining different remedial obligations. Under *Green*, the constitutional adequacy of a school board's practices and policies is determined primarily by their results — the duty to desegregate is a duty to eliminate segregation. For state services in which participation is not compelled and in which a free choice of facility is permitted, *Bazemore* appeared to shift the remedial focus from the result of state practices to their racial neutrality. The continuing racial identifiability of the youth clubs was constitutionally irrelevant as long as the state provided youths with a voluntary choice of clubs. Finding that participation in higher education is not state-compelled and that students choose the college they attend, the lower courts in *Fordice* looked to *Bazemore* rather than *Green* to define Mississippi's remedial duty. As stated by the Fifth Circuit Court of Appeals: "Mississippi satisfies its constitutional obligation by discontinuing its prior discriminatory practices and adopting good-faith, race-neutral policies and procedures."[60]

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54. *See* Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 459 (1979) (noting that each failure to convert to unitary system continues the constitutional violation); Wright v. Council of City of Emporia, 407 U.S. 451, 460 (1972) (stating that state's actions judged according to whether they hinder or further desegregation).

55. 478 U.S. 385 (1986).

56. *Id.* at 408. (White, J., concurring). Justice White's opinion on this issue was joined by four other Justices and was adopted as the reasoning of the Court. *Id.* at 387-88, 407.

57. *Id.* at 407.

58. *Id.*

59. *Id.* at 408.

60. Ayers v. Allain, 914 F.2d 676, 687 (5th Cir. 1990).

The Supreme Court, however, analyzed the case differently and found that neither the *Green* nor *Bazemore* remedial duties could be applied without modification in the context of colleges and universities. The Court began with the assumption that "Mississippi had the constitutional duty to dismantle the dual school system that its laws once mandated" and that "[i]f the State has not discharged this duty it remains in violation of the Fourteenth Amendment."[61] Nevertheless, the Court agreed with the court of appeals that differences between higher education and elementary and secondary education called for remedies different from those crafted in *Green*:

> Unlike attendance at the lower level schools, a student's decision to seek higher education has been a matter of choice. The State historically has not assigned university students to a particular institution. Moreover, . . . Mississippi's institutions of higher learning are not fungible — they have been designated to perform certain missions. Students who qualify for admission enjoy a range of choices of which institution to attend.[62]

Although the characteristic of student choice in higher education led the Court to reject desegregation remedies such as pupil assignment and school zoning, the Court held that Mississippi did not cure its constitutional violation of a dual system simply by adopting a racially neutral admissions policy. As with its rejection of the *Green* remedies, the element of student choice was a key factor in the Court's refusal to endorse *Bazemore*'s more limited remedial duty:

> In a system based on choice student attendance is determined not simply by admissions policies, but also by many other factors . . . . [E]ven after a State dismantles its segregative *admissions* policy, there may still be state action that is traceable to the State's prior *de jure* segregation and that continues to foster segregation.[63]

Thus, the Court focused on the continuing influence of a state's past segregative policies in fashioning the remedial obligation that applies to public systems of higher education:

> If the State perpetuates policies and practices traceable to its prior system that continue to have segregative effects — whether by influencing student enrollment decisions or by fostering segregation in other facets of the university system — and such policies are without sound educational justification and can be practicably eliminated, the State has not satisfied its burden of proving that it has dismantled its prior system. Such policies run

61. United States v. Fordice, 505 U.S. 717, 727 (1992).
62. *Id.* at 729.
63. *Id.*

> 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 a discriminatory purpose.[64]

The *Fordice* remedial duty is a curious blend of *Green* and *Bazemore*. As in *Green*, the predicate for remedial action is continuing racial segregation and the remedy is directed only to state actions that foster segregation. As in *Bazemore*, however, the Court did not require that the state eliminate the racial identifiability of its institutions. A state satisfies the *Fordice* remedial duty by eliminating or modifying certain state policies and practices; it is not required to convert to a system without white colleges and black colleges: "That an institution is predominantly white or black does not in itself make out a constitutional violation."[65]

The possibility that significant segregation might remain after a state has met its constitutional obligation under *Fordice* is more than a hypothetical one. The *Fordice* remedy does not mandate the elimination of all state policies and practices that foster or perpetuate segregation. State actions with a segregative effect are subject to remedial action only if they are "traceable to" or "rooted in" the past *de jure* segregated system.[66] Absent this connection to the past, a policy that perpetuates segregation will survive unless it is shown to be intentionally discriminatory and therefore an independent violation of the Fourteenth Amendment.[67] Moreover, even those segregative policies found to be traceable to past segregation are subject to remedial modification only "to the extent practicable and consistent with sound educational practices."[68] The Court did

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64. *Id.* at 731-32.

65. *Id.* at 743. *See also id.* at 746 (Thomas, J., concurring) ("[W]e focus on the specific *policies* alleged to produce racial imbalance, rather than on the *imbalance* itself. Thus, a plaintiff cannot obtain relief merely by identifying a persistent racial imbalance . . . ."). Both *Bazemore* and *Fordice* failed to consider the influence that racial identifiability can have on choice. It seems clear that if Mississippi had not enforced racial segregation when it created its public colleges, it would not today have institutions so sharply identified by the race of their student bodies. That is, racial identifiability is a vestige of past unconstitutional action. If, as seems likely, a significant number of students choose colleges in which they will be in the racial majority, that vestige continues to influence student choice and foster segregation. *See id.* at 757 (Scalia, J., concurring in the judgment in part and dissenting in part) ("modern racial imbalance remains a 'vestige' of past segregative practices in Mississippi's universities, in that the previously mandated racial identification continues to affect where students choose to enroll — just as it surely affected which clubs students chose to join in *Bazemore*").

66. *Id.* at 729, 743.

67. *Id.* at 732 n.6.

68. *Id.* at 729. The Court's opinion includes two slightly different formulations of the "educational justification" limitation on the remedial duty. The formulation quoted above

not elaborate on what educational justifications would be sufficiently "sound" to insulate segregative policies from the remedial duty, nor did it define the limits of "practicability."[69]

As to the Mississippi system of higher education, the Court did identify four policies that appeared to have a continuing segregative effect and that are traceable to past *de jure* segregation: differential admissions standards at black and white institutions,[70] duplication of programs at black and white colleges,[71] variation in institutional mission assignments,[72] and operation of eight public

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suggests that if there are educationally sound alternatives to a suspect policy that have a lesser segregative effect, the state will not escape its remedial duty merely by establishing that its existing policy is educationally justified. The practicable and educationally sound alternative must be adopted. Elsewhere in the majority opinion, however, the Court indicated that segregative policies (traceable to prior *de jure* segregation) must be reformed if "such policies are without sound educational justification and can be practicably eliminated." *Id.* at 731. This formulation suggests that an educationally justified policy need not be changed even if there are other, less segregative and practicable alternatives.

Courts of appeals reviewing higher education desegregation decisions have reached different resolutions for this apparent inconsistency in the *Fordice* remedial duty. The Fifth Circuit has interpreted *Fordice* to require remedial action for a segregative policy traceable to the *de jure* system only when the suspect policy lacks sound educational justification. United States v. Louisiana, 9 F.3d 1159, 1164 (5th Cir. 1993). The Eleventh Circuit has held that a state is obligated to remedy even educationally justifiable policies if they are traceable to past segregation and have current segregative effects. Knight v. Alabama, 14 F.3d 1534, 1546 (11th Cir. 1994). Both courts agree that the availability of a practicable and educationally sound alternative to the suspect policy limits the scope of the state's remedial duty. *Louisiana*, 9 F.3d at 1164; *Knight*, 14 F.3d at 1546.

69. In his characteristically hyperbolic style, Justice Scalia noted the failure of the Court to elaborate on these terms:

> I am not sanguine that there will be comprehensible content to the to-be-defined-later (and, make no mistake about it, outcome-determinative) notions of "sound educational justification" and "impracticable elimination." In short, except for the results that it produces in the present case (which are what they are because the Court says so), I have not the slightest idea how to apply the Court's analysis — and I doubt whether anyone else will.

United States v. Fordice, 505 U.S. 717, 752-53 (1992) (Scalia, J., concurring in part and dissenting in part).

70. Automatic admission to Mississippi's five white institutions required an ACT score of at least 15; the minimum ACT score for automatic admission to the three black institutions was 13. Because nearly three-fourths of the white students and less than one-third of the black students achieve an ACT score of 15 or better, the differential admissions requirements had a segregative effect. *Id.* at 736-37.

71. A substantial percentage of noncore undergraduate and graduate programs were duplicated at Mississippi's black and white public colleges. *Id.* at 738. Duplicate programs can foster segregation by providing students with an institutional choice based on the racial identity of the institutions rather than on their distinct program offerings.

72. During the period of *de jure* segregation, Mississippi assigned broader academic missions to its white institutions than to its black colleges. More recent mission assignments followed, in part, the earlier racially based missions. The Court considered it "likely that the mission designations interfere with student choice and tend to perpetuate the segregated

institutions.[73] The Court held that "Mississippi must justify these policies or eliminate them."[74]

B. *Inadequacy of the* Fordice *Remedy*

Because of the characteristics that distinguish colleges and universities from elementary and secondary schools, desegregation remedies in higher education can have unintended but substantial adverse effects on the educational opportunities available to black students. While *Fordice* considered some of these distinguishing characteristics in rejecting remedial measures used to desegregate elementary and secondary school systems, the Court's analysis was incomplete. Consequently, the remedy it adopted fails to achieve either the desegregation goal of the elementary and secondary cases or the broader goal of racial equality in higher education.

The inadequacy of *Fordice* emerges from three characteristics of the remedy devised by the Court. First, the *Fordice* remedy is apparently indifferent to the effect that the modification of segregative policies can have on black educational opportunity. In an effort to change the racial profile of a state's higher education system, the remedy may permit, and even require, states to adopt policies that reduce the access of black students to colleges and universities. Second, although *Fordice* concluded that continuing racial separation is the touchstone of the remedial duty, the remedy does not demand actual desegregation. It focuses only on segregative policies, the modification of which will not necessarily yield desegregated institutions. Consequently, some or all of the state colleges may remain racially identifiable after the state has fully complied with its remedial obligation. The prospect of continuing segregation, and in particular the segregation of black students in black colleges, defines the third problematic aspect of *Fordice*. The Court imposed no independent duty on Mississippi, or the other segregationist states, to remedy the effects of their past intentionally discriminatory operation of unequal public colleges for their black citizens. Continuing inequality between black and white public colleges is insulated from remedial action absent a link between that inequality and current segregation. Thus, the

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system." *Id.* at 740-41.

73. Mississippi continues to operate the five white and three black colleges established prior to *Brown*. The Court concluded that the existence of eight institutions was a result of past segregation policies and called for an inquiry into whether retention of all eight colleges affects student choice and perpetuates segregation. *Id.* at 741-42.

74. *Id.* at 733. The Court made clear that its discussion of these four policies was not intended to foreclose examination of other policies and practices that violate the *Fordice* remedial standard. *Id.*

decision's most striking contribution to desegregation law may be its tolerance of state colleges and universities that are both racially separate and unequal.

1. *Distinguishing Characteristics of Higher Education.* Traditionally, the state has provided elementary and secondary schooling to all citizens; twelve years of education is not only available to all, it is compelled by state law. Desegregation of an elementary or secondary school system does not, therefore, result in the exclusion of any students from that educational opportunity. If a desegregation remedy displaces students from an all or predominantly black school, either by closing the school or to make room for white students, the displaced students are transferred to another school in the system. They do not lose their access to state-supported education. This is true not only for the students enrolled at the time the desegregation remedy is implemented, but for future generations of students as well. State laws providing for universal education ensure continuing access for all students, black and white.

Moreover, the elementary and secondary schools within a school district are substantially fungible. The assignment of students to different schools within a district should not result in significant differences in the education they receive. To the extent that formerly black schools are inferior, desegregation will likely generate political pressure for school equalization, since white students cannot easily choose to attend a school other than the one to which they have been assigned. Thus, in a desegregated district, the burden of any disparity of educational opportunity that remains will not fall exclusively on black students.

Public systems of higher education are distinguishable in several significant respects. The state does not offer higher education to all students who might choose to receive it. The state, as well as the students, makes choices. The state exercises its choice initially in its decision as to the character of the education each public institution will offer. As the *Fordice* Court recognized, "institutions of higher learning are not fungible — they have been designated to perform certain missions."[75] The state also chooses the number of students it will educate in its higher education system and who will receive the limited opportunities available. Budgetary decisions and enrollment limits define the number of spaces available within the system and at each institution. Institutional admissions criteria determine which students are eligible for the educational opportu-

75. *Id.* at 729.

nities at each college and which students will be denied a chance to attend any public college.

Through these and other choices, including decisions on the location of public colleges and the tuition charged to students, the state determines who will receive publicly subsidized higher education. To the extent that black and white public colleges represent different policy choices about who will be educated, desegregation remedies can alter the racial distribution of educational opportunity. If, for example, black public colleges admit students who would not be eligible for admission at white institutions, desegregation of a black college may result in fewer higher education opportunities for black students. This results because the enrollment of white students in black colleges will not necessarily be matched by the enrollment of black students in white colleges. Conversely, if black public colleges offer unequal educational opportunities, as compared to their white counterparts, the failure to achieve significant desegregation within the system can result in continuing discrimination against black students.

Historically, in all the segregationist states, the decision to create black public colleges embodied an implicit state policy to provide advanced education to under-prepared youths who would not have had that educational opportunity in the absence of segregated colleges. Rather than resulting from beneficence or generosity, that implicit policy was compelled by two factors. First, the Fourteenth Amendment as interpreted in *Plessy* required that each state make at least a superficial effort to give its black citizens opportunities for college education if such opportunities were made available to whites. Second, the inadequate elementary and secondary schooling afforded black youths meant that black public colleges necessarily served many students who were not prepared for higher learning.[76] The policy of providing public higher education to black students did not, however, produce equal educational opportunity. During the years that *Plessy* reigned, public higher education for blacks consisted primarily of low-level vocational education and the training of teachers for segregated elementary and secondary schools.[77] Thus, the policy decisions that produced black public colleges used public higher education as much to oppress as to elevate the black population, but provided at least some opportunity

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76. *See* Kujovich, *supra* note 22, at 69-71, 160-62.

77. *See id.* at 64-81, 104-06. Even in teacher training, the only professional education afforded in black public colleges before the 1950s, the colleges were not only the product but also the perpetuators of a separate and unequal society. "Poorly prepared students were educated in underfunded colleges, by faculty who were victims of discrimination in education, to become the teachers of the next generation of college students." *Id.* at 68.

for the advanced education of many students who would not otherwise receive it.[78]

Black public colleges today continue the tradition of educating students who would not otherwise be selected by the state for a college education. In Mississippi, the state's black public colleges enrolled many students whose low standardized test scores would not qualify them for admission to the white institutions.[79] Comparing a black public college to a nearby white institution, the district court in *Fordice* found that the black school had students with lower average ACT scores, a much larger percentage of freshmen enrolled in developmental studies, and more of its students receiving financial aid.[80] Consistent with the historical function of such institutions, the black public college had the *de facto* mission of "achieving higher education for educationally under-served blacks at the lowest possible cost."[81] Comparisons of black and white institutions by the district court in the Alabama higher education desegregation case showed the same role for that state's black public colleges.[82]

A simple mandate to desegregate does not require and would not necessarily induce white colleges to assume this and other roles that black institutions have played in the education of black Americans.[83] For that reason, the remedial power of desegregation has

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78. The observations of the district court in the Alabama higher education desegregation case apply to most of the segregationist states:

> Most whites wanted blacks educated, if at all, only to the minimum level necessary to provide semi-skilled labor. Black educational institutions were under the complete control of white officials who, for the most part, shared the paternalistic view that black subordination was a natural condition that worked for the betterment of both races . . . . For many years blacks were effectively denied the benefits of a collegiate education by the operation of two interrelated practices: the uncompromising segregation of the state's white institutions and the limited educational mission assigned to the state's black colleges. Concomitant to these two practices, there arose a host of policies and laws designed to institutionalize segregation while assuring the inferior status of black education.

Knight, 787 F. Supp. at 1046.

79. *Fordice*, 505 U.S. 717, 734-35 (1992).

80. Ayers v. Fordice, 879 F. Supp. at 1488.

81. *Id.* at 1491.

82. *Knight*, 787 F. Supp. 1321-22, 1329-30; *see also* United States v. Louisiana, 718 F. Supp. 499, 506-07 (E.D. La. 1989) (finding that whites in state colleges much better prepared than blacks).

83. In Mississippi, as in other segregationist states, black public colleges have been an important source of employment for black academics. In 1992, Mississippi's three black colleges employed over 80 percent of the black faculty in the state's system of higher education. Ayers v. Fordice, 879 F. Supp. at 1461. Black public colleges have also played an important role in the preservation of black culture and history and in the cultural and intellectual life of the black community. Alex M. Johnson Jr., *Bid Whist, Tonk, and* United

been questioned. Some black educators and lawyers have raised serious concerns that the disestablishment of racial duality in colleges would foreclose the unique contributions that black colleges have made, and continue to make, to educational opportunities for black Americans. These concerns are not new. As early as the 1950s black educators debated the role of the black public college in a system without segregation compelled by law. Then, as now, a major concern of that debate was that judicially compelled desegregation would decrease rather than increase black educational opportunity.[84]

Fordice does little to mitigate that concern. Its remedial approach calls for constitutional scrutiny, and elimination, of some of the policies that embody the state's choices in higher education. The constitutional concern, however, is the segregative effect of those policies and not their effect on broadening or narrowing black educational opportunity. The elimination or alteration of suspect state policies may satisfy the *Fordice* remedial duty while at the same time restrict educational opportunity for black students. This undesirable, but apparently not unconstitutional, result can be seen in two of the Mississippi policies that the Court concluded were constitutionally suspect: different admissions standards at black and white institutions and the continued operation of eight public colleges.

2. *Disparities in Admissions Standards.* Mississippi required that students seeking admission to public college take the standardized examination administered by the American College Testing ("ACT") Program. At the time of the trial in *Fordice*, the ACT score that qualified a student for automatic admission to the state's five white colleges was higher than that required at the three black institutions.[85] Because Mississippi first adopted a re-

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States v. Fordice: *Why Integrationism Fails African-Americans Again*, 81 CAL. L. REV. 1401, 1432 (1993); Daryll K. Jones, *An Education of Their Own: The Precarious Position of Publicly Supported Black Colleges After* United States v. Fordice, 22 J. L. & EDUC. 485, 514-15 (1993); Kujovich, *supra* note 22, at 157-58.

84. *See* Kujovich, *supra* note 22, at 33-34, 159-62; Mary Ann Connell, *The Road to* United States v. Fordice: *What Is the Duty of Public Colleges and Universities in Former De Jure States To Desegregate?*, 62 MISS. L. J. 285, 358-59 n.389 (1993) (discussing the debate among black educators on the role of historically black institutions from the 1930s to the present).

85. At the time of the first trial in *Fordice*, the white institutions would not automatically admit any students scoring below 15 on the ACT; the minimum ACT score for automatic admission at the black colleges was 13. *Fordice*, 505 U.S. 717, 736 (1992). All eight institutions permitted some exceptions to their minimum ACT scores, but the exceptions policy was broader at the black colleges than at the white schools. *See* Ayers v. Allain, 674 F. Supp. at 1534 (pointing out that the historically white universities may admit up to 5%

quirement of minimum ACT scores for admission to its white institutions in the early 1960s, when James Meredith sought admission to the University of Mississippi,[86] the Supreme Court found that the disparity in admissions criteria was traceable to *de jure* segregation.[87] The Court further concluded that the disparity had a current segregative effect because the higher minimum score at the white institutions excluded a larger proportion of black high school seniors than white seniors.[88] Consequently, significant numbers of black students who did not qualify for admission to the white institutions were channeled into the black colleges.[89] Because the admissions policies were both traceable to past segregation and had a current segregative effect, *Fordice* obligates the state to either justify the disparity in admissions standards or, if practicable, eliminate it.[90]

The *Fordice* focus on segregative effect overlooks the role that admissions criteria can play in expanding educational opportunity. Variations in admissions requirements among institutions represent policy choices by a state as to how broadly it makes educational opportunity available to its citizens. As noted by the district court in the Alabama case:

> [D]ecisions about whether to admit educationally disadvantaged students to college who do not score well on the ACT test involve value judgments that pertain to the purpose and mission of the institution. If the primary concern of an institution is to enroll students who are likely to be successful academically without extensive remedial course work, then selection criteria are necessarily reflective of that. If, on the other hand, the institution is willing and able to assist educationally disadvantaged students, then its selection criteria must necessarily reflect its mission.[91]

Although the segregationist states initially adopted the policy of providing higher education to disadvantaged black students under

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of an entering class which scores between 9 and the minimum 15 on the ACT, while the historically black universities require a minimum score of 13 on the ACT and may draw up to 10% of its entering class from students scoring between 9 and 12 on the ACT). Moreover, the white institutions failed to publicize or use admissions exceptions available to them. Ayers v. Fordice, 879 F. Supp. at 1434. Subsequent to the trial, and while the case was on appeal, Mississippi adopted new minimum ACT admission standards. The new criteria increased the minimum score gap between the black and white colleges. *See id.* at 1431.

86. Ayers v. Allain, 674 F. Supp. at 1530-31, 1555.

87. *Fordice*, 505 U.S. at 733-34.

88. *Id.* at 734-35.

89. In 1985, the ACT score minimum of 15 at the white institutions excluded over 70% of the state's black high school seniors and only 28% of the white seniors. *Id.* at 735.

90. *Id.* at 734-36.

91. Knight v. Alabama, 787 F. Supp. 1030, 1156 (N.D. Ala. 1993), *modified*, 14 F.3d 1534 (11th Cir. 1994).

the compulsion of *Plessy*, and implemented that policy in a discriminatory fashion, the policy survives today in black public colleges. One of the primary and lasting characteristics of those institutions is their willingness to assist educationally disadvantaged students, many of whom do not qualify for admission to the white institutions.[92] The district court in *Fordice* found that the state had relied on a policy of providing higher education to disadvantaged students when, in the mid-1970s, the state decided not to raise admissions requirements at its black colleges to achieve statewide uniformity in admissions standards.[93]

The intermingling of segregative effects with a policy of expanded educational opportunity for black students means that efforts to eliminate or diminish the segregative effect of admissions criteria can also eliminate or diminish educational opportunity. In Mississippi, the state could eliminate the disparity in admission standards by lowering the minimum ACT score at its white schools or by raising the minimum score at its black public colleges. The first would expand opportunities available to lower scoring black applicants; the second would deny those black applicants educational opportunities currently available to them. A third option, more effective in desegregating the colleges but also more costly, would be to transfer the mission of educating under-prepared students to the white colleges while providing the black colleges with sufficient resources to develop quality academic programs that will attract academically successful students of both races.[94]

The remedial duty fashioned in *Fordice* does not appear to require that the state, or a district court, choose a remedy that will expand rather than contract black educational opportunity. Nor is there anything in the Court's opinion that would require Mississippi's white colleges to admit and provide compensatory educa-

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92. *See supra* pp. 23-25; *see also* SOUTHERN EDUCATION FOUNDATION, PANEL ON EDUCATIONAL OPPORTUNITY AND POSTSECONDARY EDUCATION, REDEEMING THE AMERICAN PROMISE 31 (1995) (noting that black colleges provide access for inadequately prepared students). The district court in *Fordice* acknowledged the role of black public colleges in broadening access to higher education in its discussion of Mississippi Valley State University ("MVSU"):

> MVSU consistently has a high percentage of its entering class enrolled in developmental education. Because of the institution's location in one of the poorest regions in the country, MVSU has a high density of academically underprepared blacks within its service area. Because of this historic fact, MVSU has developed a strong commitment to serving students from socioeconomic backgrounds which, in the main, are vastly different from those of the clientele of the other public institutions of higher learning in the state . . . .

Ayers v. Fordice, 879 F. Supp. at 1491.

93. Ayers v. Allain, 674 F. Supp. at 1555.

94. Under this approach, there would be a disparity in admissions criteria but the effect of the disparity would be to desegregate the black and white colleges.

tion to educationally disadvantaged black students. The segregative effect of the state's admissions criteria is the constitutional concern in *Fordice*, not the educational policies embodied in those criteria.

On remand, the district court in Mississippi rejected proposals by the Justice Department and the private plaintiffs to adopt admissions requirements that would broaden the higher educational opportunities available to black students.[95] Instead, the court ordered implementation of the state's proposal for uniform admissions criteria at a level higher than those used at the black institutions.[96] Although the incorporation of high school grade point averages into the new criteria and the possibility of conditional admission for applicants who do not meet the criteria mitigate the adverse impact of the uniform standards, the predicted effect of the remedy ordered by the court will be to decrease the percentage of black students eligible for admission to Mississippi's public colleges.[97]

3. *Reduction in the Number of Public Colleges.* In *Fordice*, the Court concluded that the existence of eight institutions in Mississippi "was undoubtedly occasioned by State laws forbidding the mingling of the races."[98] The conclusion is certainly indisputable. All the segregationist states increased the number of their colleges and universities when they created black institutions to serve the policy of segregation. Both before and after *Brown*, many states added new institutions, or branch campuses of their white colleges, in close proximity to existing black schools with the effect of providing white students with a geographically accessible alternative to a black public college.[99] In Mississippi, as in the other segregationist states, the mere existence of black and white colleges promotes segregation by providing black and white students with a racially based choice of institutions. Thus, eliminating a college, or merging two institutions with different racial identities, will de-

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95. Ayers v. Fordice, 879 F. Supp. at 1481-83.

96. *Id.* at 1477-78, 1494.

97. Under the admissions criteria used at the time of the district court's decision on remand, two-thirds of black high school graduates who took the ACT were eligible for admission to some public college; only half of those black students are eligible under the uniform standards ordered by the court. *Id.* at 1479. However, the new uniform standards increase the pool of black students eligible for admission as compared to the criteria used in 1987. *Id.*

98. *Fordice*, 505 U.S. 717, 741 (1992).

99. *See, e.g.*, Ayers v. Allain, 674 F. Supp. at 1541-43; Knight v. Alabama, 787 F. Supp. 1030, 1119-36 (N.D. Ala. 1991), *modified*, 14 F.3d 1534 (11th Cir. 1994); Geier v. University of Tenn., 597 F.2d 1056, 1058, 1067 (6th Cir. 1979).

crease the segregation profile of the system. The *Fordice* Court stopped short of holding that the closure of one or more colleges is constitutionally required. Instead, it called for a determination on remand as to whether operation of all eight colleges in Mississippi perpetuates the segregated system and is educationally justified, and whether one or more of the schools could practicably be closed or merged.[100]

A *Fordice* inspired remedy addressed to the constitutionally suspect policy of operating more institutions than would have existed in the absence of segregation could have a substantial adverse effect on black students' opportunities for higher education. The effect will depend on which institutions are closed. Although the *Fordice* majority did not stipulate that black colleges should be singled out for closure or merger,[101] those institutions are the most likely candidates for extinction. In Mississippi, as in the other segregationist states, black public colleges have suffered from a century-long pattern of unequal funding, inferior facilities, and restricted educational programs.[102] Even the white branch campuses developed by many states after *Brown* usually received more funding, better facilities, and more extensive educational programs than the nearby and much older black public colleges.[103] Thus, a decision to close a black college, or to merge it into its white counterpart, can usually be justified on both educational and economic grounds.[104]

While the educational and economic costs of closing a black college will nearly always be less than the costs of closing a white college, the burden of black college extinction will disproportionately fall on the black population. To the extent that a black college provides higher education to black students who do not meet the admission standards of the state's white colleges, the closing of a black college will promote desegregation of the higher education

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100. *Fordice*, 505 U.S. at 742.

101. Justice Scalia read the Court's opinion differently: "What the Court's test is designed to achieve is the elimination of predominantly black institutions." *Id.* at 760 (Scalia, J., concurring in part and dissenting in part). In his concurring opinion, Justice Thomas contended that the Court did "not foreclose the possibility that there exists 'sound educational justification' for maintaining historically black colleges *as such*" in order to better serve black students. "I do not understand our opinion to hold that a State is *forbidden* from doing so." *Id.* at 748-49 (Thomas, J., concurring).

102. *See supra* pp. 6-12; *see also* Kujovich, *supra* note 22, at 44-113 (discussing historical inequalities in funding between black and white public colleges).

103. *See, e.g., Knight*, 14 F.3d at 1542 (noting that hundreds of millions of dollars were spent developing white branch campuses in cities where black colleges are located).

104. In addition, the greater political power of the alumni of white institutions will generally lead a state to propose the closure or merger of a black college rather than a white one.

system at the expense of black educational opportunity. Because neither state law nor the Constitution requires that the state afford higher education to all students, the state is under no legal duty to provide for the students who are most affected by institutional closure. Even if a remedy eliminating a black college includes an opportunity for students enrolled at the time of closure to transfer to other colleges in the system, future generations of black students will suffer the effects of the remedy. In addition to a likely reduction of black educational opportunity, the loss of a black college deprives the black community of other important functions performed by those institutions.[105]

While the *Fordice* Court was apparently aware of the threat institutional closure posed to black educational opportunity, it offered nothing that rises to the level of constitutional principle protecting against realization of the threat. In a footnote, the majority observed: "[i]t should be noted" that a 1973 letter from the Department of Health, Education and Welfare to Mississippi higher education officials cautioned that closure of a black institution "would create a presumption that a greater burden is being placed upon the black students and faculty in Mississippi."[106] Beyond "noting" this comment, the Court did not endorse it or indicate what role, if any, it should play in a constitutional remedy.

Absent a clear requirement that the state maintain its commitment to the education of under-prepared black students, the elimination of black public colleges is a tempting remedial alternative for states faced with constitutional challenges to racial duality in their higher education systems. Because the state's constitutional liability and remedial duty under *Fordice* depend only on current segregation, and not on a more comprehensive conception of educational inequality, the closure of black public colleges provides an expeditious and economically efficient method of satisfying the remedial duty and escaping further liability. After elimination of its black colleges, a state system of higher education would consist of institutions created for white students that enroll some small percentage of black students. No college in the system would be racially identifiable and all traces of "segregation" would disappear with the extinction of the black institutions. Indeed, each of the constitutionally suspect policies the *Fordice* Court identified in the Mississippi higher education system would be eliminated with the closure of the state's black public colleges: differential admissions standards, duplication of programs, different institutional

105. *See supra* note 83.

106. *Fordice*, 505 U.S. at 742 n.11 (1992).

mission assignments, and the continued operation of eight institutions.

The threat that a desegregation remedial duty presents to the survival of black public colleges, and the educational opportunities they offer, is not new. More than 20 years ago, the Attorney General of Virginia suggested to the Supreme Court that if Virginia were required to dismantle its formerly dual system of higher education:

> [T]he State must take steps to phase out the two racially identifiable institutions in which 81% of its Negro students are concentrated. The "root" of the formerly dual system . . . is Virginia State College, which was specifically established for Negroes in 1882 . . . and is today over 96% Negro. The "branch" of the formally dual system . . . is Norfolk State College, which was indeed a branch of Virginia State College until 1969 and is today almost 98% Negro.[107]

The threat has been renewed more recently. After the remand in *Fordice*, the state contended before the district court that the number of institutions in its higher education system "is the only remnant of the past presently having segregative effects, without sound educational justification and in need of reforming."[108] To bring itself into compliance with the Constitution, Mississippi proposed to eliminate two of its black colleges through closure or merger into white institutions.[109] Although the black colleges re-

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107. Jurisdictional Statement and Appendix for Appellants at 22, Board of Visitors of the College of William & Mary v. Norris, 404 U.S. 907 (1971) (No. 71-170). The dissenter in the lower court in *Norris* succinctly described the effects of using institutional closure as a desegregation remedy in higher education:

> It would be a relatively simple procedure to completely dismantle the dual system of higher education in Virginia by "phasing out" Virginia State College . . . and Norfolk State College . . . , each predominantly black and absorbing 81% of all black students attending state-supported colleges and universities in Virginia. The tragedy of such action would seriously affect the opportunities of worthy black students to secure a college education. It could be argued that the thirteen (13) predominantly white state-supported colleges or universities would be appropriate to "phase out," but this would result in even greater disruption . . . .

Norris v. State Council of Higher Educ., 327 F. Supp. 1368, 1375 (E.D. Va. 1971) (Hoffman, J., dissenting).

108. Ayers v. Fordice, 879 F. Supp. at 1445-46.

109. The state proposed to close Mississippi Valley State University and merge Mississippi Valley State and Delta State University into a new institution, Delta Valley University, which would be located at the old Delta State University campus. *Id.* at 1487. Although the district court described this proposal as a merger, it involved abandonment of the black college campus and an uncertain future for the educational programs, faculty, and administrators of that institution. *Id.* As initially framed, the state's remedial proposal also sought to give the white land grant university ("Mississippi State") control over the black land grant ("Alcorn State"). Robert N. Davis, *The Quest for Equal Education in Mississippi:*

ceived a temporary reprieve,[110] the district court left the door open to the future elimination of at least one black institution if the state could support its view that closure was the only educationally sound means of achieving desegregation.[111]

The uncertain future that desegregation remedies present for black public colleges is not limited to Mississippi. In a bizarre twist of fate, federal courts considering desegregation of the Alabama system of higher education have looked to the closure of black public colleges as a "remedy" for the state's long history of unequal treatment of those institutions. In an opinion issued prior to the Supreme Court's decision in *Fordice*, the district court in Alabama found that the condition of the physical facilities at the state's black colleges was a "vestige of segregation which must be eliminated by the state if its actions are to comport with the Constitution."[112] The court offered the state the remedial alternatives of spending more than twenty million dollars to improve the black college facilities or closing the institutions.[113] According to the district court, the Constitution did not preclude the state from choosing the alternative — closing black colleges — that would have the maximum, adverse impact on black educational opportunity.[114]

In an opinion issued after *Fordice*, the Court of Appeals for the Eleventh Circuit considered the Alabama plaintiffs' claim that the district court erred in failing to order a remedy for past discrimination in the assignment of missions and academic programs to Alabama's black public colleges, and for the state's discriminatory allocation of funding between its black and white land grant

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The Implications of United States v. Fordice, 62 MISS. L.J. 405, 456 (1993); Lorne Fienberg, Note, United States v. Fordice *and the Desegregation of Public Higher Education: Groping for Root and Branch*, 34 B.C. L. REV. 803, 805 (1993). The state further offered to merge two white institutions: Mississippi University for Women and Mississippi State University. Ayers v. Fordice, 879 F. Supp. at 1488. The court rejected this last proposal as having "little or no desegregative impact." *Id.* at 1490.

110. The state abandoned its proposed merger of the two land grant institutions. As to the elimination of Mississippi Valley State, the district court found a lack empirical support for the educational and fiscal soundness of the proposal. Ayers v. Fordice, 879 F. Supp. at 1492, 1495.

111. *Id.* at 1495.

112. Knight v. Alabama, 787 F. Supp. 1030, 1370 (N.D. Ala. 1991), *modified*, 14 F.3d 1534 (11th Cir. 1994).

113. *Id.* at 1283, 1370-71. The court presented an additional option of transferring facilities to the black colleges from other institutions. *Id.* at 1371.

114. The Alabama district court acknowledged that "the State of Alabama has no federal constitutional obligation to maintain any institution of higher education. It does, however, have the obligation to eliminate vestiges of segregation in those institutions it establishes and operates." *Id.* at 1371 n.163. Consequently, it concluded that the "state may choose any option which will satisfy its obligation to eliminate the vestiges of segregation." *Id.* at 1371.

institutions.[115] In remanding these issues for further consideration under the *Fordice* standard, the appellate court specifically instructed the district court judge to consider closure of institutions, as well as plaintiffs' proposed enhancement of the black colleges, as a remedy for the continuing segregative effects of past discrimination.[116] As in *Fordice*, the Eleventh Circuit did not expressly state that black colleges should be eliminated. However, the court of appeals read *Fordice* to obligate the state "to adopt, from among the full range of practicable and educationally sound alternatives . . . , the one that would achieve the greatest possible reduction in the identified segregative effects."[117] The substantial racial identifiability of black public colleges[118] and the uncertain desegregative effect of black college enhancement[119] suggests that closing the institutions, rather than enhancing them or closing white colleges, would achieve the greatest possible reduction in segregation. Moreover, the effects of a long history of discrimination against black colleges and the cost of remedying those effects support a finding that closure of a black college would be the more practicable and educationally sound remedial alternative.

The possibility that the remedy for long-lasting discrimination will be the elimination of colleges that continue to play a key role in the higher education of black students is directly traceable to *Fordice*'s remedial focus on the racial distribution of students rather than on the racial distribution of higher education opportunity. The *Fordice* remedy turns on the presence and elimination of segregative policies; the effect of desegregation remedies on black educational opportunity is apparently not a factor in the remedial calculus under the Constitution.

Despite the implications of the Court's reasoning, the elimination of black colleges is not a certainty under *Fordice*. Faced with the prospect of such a major restructuring of a state's higher education system, lower federal courts may conclude that the closure remedy is not practicable or educationally sound.[120] The mere sur-

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115. Knight v. Alabama, 14 F.3d 1534, 1542-43, 1546-48 (11th Cir. 1994).

116. *Id.* at 1546, 1551.

117. *Id.* at 1541.

118. In 1994, Alabama's black land grant college had a 94% black undergraduate enrollment; enrollment at the state's second black institution was more than 97% black. *Knight*, 900 F. Supp. at 296, 304.

119. *See* Ayers v. Fordice, 879 F. Supp. at 1491 (explaining that the court was not persuaded that adding programs and increasing budgets will desegregate a black college).

120. *See Knight*, 900 F. Supp. at 314 ("[A]t this point, . . . it is not educationally sound, and most likely not practicable, to close" Alabama's black public colleges.); Ayers v. Fordice, 879 F. Supp. at 1492 (submitting that desegregative effect of "less drastic measures" should be considered before black colleges closed).

vival of the institutions, however, will not ensure racial equality in public higher education. The vestiges of a century of discrimination remain at black public colleges in the form of restricted missions and educational programs, unequal facilities, and under-developed faculties. The narrow conception of constitutional equality in *Fordice* is inadequate to protect black students from the discriminatory effects of these vestiges.

4. *Perpetuation of Separate and Unequal Education.* In devising the constitutional remedy for higher education, the *Fordice* Court focused exclusively on the harm of racial separation and failed to recognize the distinct constitutional violation resulting from the unequal educational opportunity provided to black students in racially separate colleges. Because *Fordice* recognized only part of the harm, it fashioned an incomplete remedial duty: the remedy addresses segregation but not educational inequality. Moreover, satisfaction of the limited remedial duty under *Fordice* does not mandate the elimination of segregation. The state is not required to convert its black and white colleges to "just colleges;" it is not even compelled to modify all policies that foster segregation. After a narrowly defined class of suspect policies are eliminated or altered to the extent practicable, the continuing racial identity of an institution does not violate the Constitution. Thus, the *Fordice* remedy appears to embrace the worst of both worlds — it permits an outcome which is both racially separate and unequal. This ironic result is evident in the district court's implementation of the *Fordice* remedy.

a. *Segregation and Student Choice.* After the remand in *Fordice*, the district court found that Mississippi's eight public colleges had substantially retained the racial identity that characterized them during the era of *de jure* segregation. The three black institutions employed more than 80% of the black faculty in the system and each college had undergraduate enrollments that were at least 92% black.[121] Although the white institutions had made some progress in enrolling black undergraduates, the court found a sizeable underrepresentation of black students at most of the white schools[122] and a continuing racial identifiability in the administrative and tenured faculty ranks of those institutions.[123] Moreover,

121. Ayers v. Fordice, 879 F. Supp. at 1461, 1470 n.252.

122. *Id.* at 1469. In 1990, four of the five white institutions had more than 81% white undergraduate students; the exception was Delta State which had an undergraduate enrollment that was 78% white. *Id.* at 1470 n.252.

123. *Id.* at 1462. In 1992, black faculty comprised 17% of the faculty in the eight-col-

the court expressly recognized that fulfillment of the *Fordice* remedial duty would not necessarily eradicate the racial identifiability of public colleges.[124] Because *Fordice* provides a state with a variety of ways to escape or limit even the narrow constitutional obligation to modify policies that perpetuate segregation, continuing racial separation is not only constitutional but also likely.

In discussing students' decisions as to which public institution they will attend, the district court noted that students make segregative choices of college because of several factors that are not subject to modification under *Fordice*. For example, the court found that the racial composition of an institution's faculty can perpetuate segregation by its influence on student choice.[125] Despite this acknowledged segregative effect resulting from racial imbalance in the faculties of Mississippi's colleges, the court concluded that *Fordice* required no adjustment of that imbalance because the state's current employment policies and practices are not traceable to *de jure* segregation.[126] Similarly, the court noted that the historic racial identity of the white colleges, and the current underrepresentation of minority students at those institutions, dissuade black students from enrolling in them.[127] Under *Fordice*, however, the mere racial identifiability of an institution is not a sufficient basis for remedial action.[128] The court also found that black students' hesitancy to select a white public college in Mississippi is a result, in part, of the reputation those institutions have within the black community. That reputation, in turn, is influenced by the historical roots of the institutions, their past discriminatory actions, and "continued links to the past in terms of the symbols with which some universities and/or their alumni choose to identify."[129] Concluding that there were no current policies or practices traceable to *de jure* segregation that foster a racially inhospitable climate at the white institutions, the district court ordered no re-

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lege system, but accounted for just over 4% of the faculty at the five white institutions, *id.* at 1461, and an even smaller percentage of the upper faculty ranks in those schools. *Id.* at 1460 & n.196. In 1992, administrators at the white institutions were 98% white and only 2% black. *Id.* at 1460.

124. *Id.* at 1474.

125. *Id.* at 1463, 1471.

126. *Id.* at 1463, 1477.

127. *Id.* at 1470.

128. *Fordice*, 505 U.S. at 743.

129. Ayers v. Fordice, 879 F. Supp. at 1471. The "symbols" with links to the past appear to include the now abandoned practice at the University of Mississippi of using the Confederate flag as a "pep symbol at athletic events" and that institution's continuing practice of playing "Dixie" at university functions. *Id.* at 1467. To accommodate those who perceive "Dixie" as a racist song, the school also plays "Battle Hymn of the Republic" at public functions. *Id.*

medial action specifically designed to alter the black community's perception of the white schools.[130]

Despite the district court's rejection of remedial action designed to impact student choice "in and of itself,"[131] the limited remedies the court ordered may produce some increase in the percentage of black students enrolled in the white institutions. A gradual shift of black students to white schools, however, holds little promise for changing the racial identity of the black colleges. In Mississippi, as in other states subject to the *Fordice* remedy, the public colleges established exclusively for blacks have overwhelmingly black undergraduate enrollments.[132] Analyzing the institutional preferences of Mississippi's college-bound students between 1990 and 1993, the district court found that of more than 15,000 white students indicating a preference for a public college in the state, fewer than 100 registered a preference for a black public college. Only 15 of 15,000 white students selected a black public college in Mississippi as their first choice.[133]

The remedies ordered by the court are unlikely to have any significant effect on white student enrollment decisions, and, therefore, on the racial characteristics of undergraduate enrollments at the black colleges. The court found that the predominant characteristic of the few white students preferring a black public college was their lack of academic qualifications in terms of high school grades, college preparatory courses, and ACT scores.[134] Thus, the most far-reaching remedy ordered by the court — elimination of the disparity in admissions standards[135] — will reduce the already very small number of white students selecting black colleges. White students who might have enrolled in a black institution because of its lower admissions requirements will no longer have that option. Moreover, the court left substantially intact a distribution

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130. *Id.* at 1477.

131. *Id.* at 1471.

132. In 1990, Mississippi's three black colleges had the following black undergraduate enrollments: 92% at Jackson State, 94% at Alcorn State, and 99.5% at Mississippi Valley State. *Id.* at 1471 n.252. In 1994, undergraduate black enrollment at Alabama's two black institutions were 97% and 94% respectively. Knight v. Alabama, 900 F. Supp. at 296, 304. The same pattern was evident in Louisiana. *See* United States v. Louisiana, 718 F.Supp. 499, 504 (E.D. La. 1989) (citing black enrollments of 95.8%, 92.7%, and 83.9% at the black colleges in 1988).

133. *Id.* at 1470-71 & n.258. The student preferences considered by the court were made in response to a questionnaire answered by white high school students who took the ACT test and indicated a preference for a public institution in Mississippi. The district court noted that the evidence suggests that this highly skewed pattern of preference is a national phenomenon. *Id.* at 1471 n.258.

134. *Id.* at 1471.

135. *Id.* at 1477-83.

of undergraduate programs in which more than three-fourths of the programs offered by one or more of the black institutions is duplicated by one or more of the white colleges.[136] In pursuing their educational goals, most white students will continue to have a choice of colleges based upon the racial identity of the institutions rather than the programs offered. If white students continue to enroll in colleges in which they are the racial majority, the black colleges will remain substantially one-race schools.

In addition to being racially identifiable, the black colleges also remain the primary source of publicly supported undergraduate education for black students. Mississippi's three black institutions enroll two-thirds of the black undergraduates in the state's public system of higher education.[137] While the *Fordice* remedies may make white colleges somewhat more accessible to black students and thus gradually decrease the percentage of black students in black colleges, it seems likely that the black schools will educate a substantial percentage of black undergraduates for many years to come. The continuing concentration of black students in the colleges to which they were once confined by law raises the issue of the quality of education the state provides those students.

b. *Continuing Inequality in Educational Opportunity.* During the *Plessy* era, the Constitution required — at least in theory — that the segregationist states provide their black citizens with equal institutions of higher education. Under *Fordice*, however, the Constitution does not require equalization of institutions, even if they remain racially identifiable. Responding to the private plaintiffs' contention that Mississippi must enhance its black public colleges, the Supreme Court created a much more limited remedial duty for the state:

> If we understand private petitioners to press us to order the upgrading of Jackson State, Alcorn State, and Mississippi Valley State *solely* so that they may be publicly financed, exclusively black enclaves by private choice, we reject that request. The State provides these facilities for *all* its citizens and it has not met its burden under *Brown* to take affirmative steps to dismantle its prior *de jure* system when it perpetuates a separate, but "more equal" one. Whether such an increase in funding is necessary to achieve a full dismantlement under the standards we have outlined, however, is a different question, and one that should be addressed on remand.[138]

It seems clear that a state does not satisfy its constitutional

136. *Id.* at 1442, 1486.
137. *Id.* at 1469-70.
138. *Fordice*, 505 U.S. at 743 (emphasis added).

duty by perpetuating a racially separate and more equal system of higher education. However, in its conception of petitioners' request, the Court answered the wrong question. Because *Fordice* finds racial separation to be constitutionally acceptable after the state has fulfilled its limited remedial duty, the more relevant question is whether a state may maintain a system of higher education that is both racially separate and unequal. It appears that *Fordice* requires the upgrading of black public colleges only if it will decrease segregation — "full dismantlement under the standards we have outlined" — and not to ensure equal educational opportunity for those students who remain in segregated institutions after the state implements the limited, *Fordice* desegregation remedies. The district court on remand relied on that narrow conception of the remedial duty.

After finding that during the period of *de jure* segregation Mississippi had maintained inferior and unequal public colleges for its black citizens, the district court considered the relationship between that discriminatory past and the current status of the black institutions. In evaluating institutional missions, the court found that the current limited missions of the black colleges were remnants of the past and that the state's actions, before and after *Brown*, perpetuated an inferior position for the black colleges in relation to the state's white institutions.[139] Examining the two land grant institutions, the court found that the continuing and near total exclusion of the state's black college from state-supported land grant activities was traceable to the era of *de jure* segregation and past decisions to allocate resources on the basis of race.[140] More generally, the court found that in the past, Mississippi had invested most of its resources in the institutions reserved for white students and that the state's current actions perpetuate this historical funding disparity.[141] Similarly, the court found that now, as during the era of *de jure* segregation, the black public colleges suffer deficiencies, as compared with the white institutions, in equipment and library facilities.[142]

Although this past pattern of institutional inequality continued to determine the inferior position of Mississippi's black colleges, the district court refused to adopt remedial measures that would significantly upgrade the quality of the black institutions. The court concluded that broad scale enhancement of the black institutions was not required under *Fordice* because such measures

139. Ayers v. Fordice, 879 F. Supp. at 1438-39, 1445.
140. *Id.* at 1463, 1466, 1484.
141. *Id.* at 1452-53, 1477.
142. *Id.* at 1456-57, 1477.

would not have a significant desegregative effect[143] or because enhancement of the black colleges was not educationally sound or practicable.[144] The limited enhancement measures that the court did adopt were designed to attract white students to the black colleges rather than to ensure equality of educational opportunity for the black students who would dominate the undergraduate enrollments of those schools for years to come. For example, nearly all of the program enhancement measures included in the court's remedy involved the addition of graduate programs[145] which might attract white graduate students, but which would have a limited effect on undergraduate programs with predominantly black enrollments.[146]

c. *Separate and Unequal.* The district court recognized that its *Fordice* remedy could result in racially separate and tangibly unequal colleges, but concluded that it raised no constitutional issue. Although it found that the more limited missions of Mississippi's black colleges had the "effect of maintaining the status quo" established during the period of *de jure* segregation, the court viewed this remnant of the past as constitutionally insignificant in an educational system based on voluntary choice:

> [I]t is perhaps easy to fall into the perspective that views fewer comparable offerings at a HBI [historically black institution] as indicia of discrimination against black students who are enrolled or who might later choose to enroll in the HBIs but, when viewed from the perspective of the Constitution, citizens are not deprived of equal protection of the law where an equal opportunity exists to attend either the more comprehensive HWIs [historically white institutions] or the less comprehensive HBIs and that opportu-

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143. *Id.* at 1452-53, 1457-58 (funding and facilities). The court also found that some forms of inequality remaining at the black colleges were not a significant deterrent to white student enrollment. *Id.* at 1458, 1484 (facilities and land grant functions).

144. *See id.* at 1453, 1465-66, 1484-85 (funding, land grant functions, and missions).

145. The court's remedial decree requires that graduate programs in social work, urban planning and business be developed at Jackson State ("JSU") and that the Board of Trustees conduct a study to determine whether other programs should be added to JSU. *Id.* at 1494-95. The court also directed that an MBA program be offered by Alcorn State ("ASU") at an off-campus center run by that institution. *Id.* at 1495. In addition, the decree provided that endowment trusts, in the amount of five million dollars each, be created for JSU and ASU, "with the income therefrom to be used to provide funds for continuing educational enhancement and racial diversity, including recruitment of white students and scholarships for white applicants . . . ." *Id.* Earlier in its opinion the Court found that the five white colleges had amassed endowments averaging 23 million dollars while the three black college endowments averaged less than two million dollars. *Id.* at 1451.

146. *See* Kenyon D. Bunch & Grant B. Mindle, *Testing the Limits of Precedent: The Application of* Green *to the Desegregation of Higher Education*, 2 SETON HALL CONST. L.J. 541, 587 (1992) (finding that most white students attending black colleges are enrolled in evening classes at off-campus settings or in graduate and professional school programs).

nity is truly unfettered by vestiges of the past . . . .[147]

Similarly, the court dismissed the comparatively lower funding of the black colleges as irrelevant to the issue of unconstitutional discrimination as long as students have an "unfettered choice" of institution.[148]

The difficulty with the court's analysis is that the "unfettered choice" of black students is more theoretical than real. While the court eliminated some of the factors influencing student choice, such as differential admissions standards, the *Fordice* remedy left intact other influences that direct black students to black colleges. The district court concluded that the vestiges of racially identifiable faculties, administrators, and student bodies, as well as the reputation that the white institutions have in the black community, foster segregative enrollment decisions but are beyond the scope of the *Fordice* remedy.[149] Consequently, what the court termed "ghosts of the past"[150] continue to channel black students into black institutions in which the "ghosts of the past" remain in the form of limited missions, restricted program offerings, and unequal funding.

The possibility that *Fordice* will yield an outcome of separate and unequal educational opportunity appears to have been realized in the district court's treatment of Mississippi Valley State University ("MVSU"), one of Mississippi's three black public colleges. The state opened MVSU in 1950[151] at a location which was only 35 miles from Delta State University, an undergraduate college that was reserved for white students.[152] MVSU remained an exclusively black college until it enrolled its first white student in 1970.[153] In 1990, the college's undergraduate enrollment was 99.5% black.[154]

As was true of black public colleges generally during the era of *de jure* segregation,[155] MVSU has the primary function of serving educationally and economically disadvantaged black students. Its entering freshmen have low ACT scores and more than half of them are enrolled in developmental studies. All of its students re-

147. Ayers v. Fordice, 879 F. Supp. at 1439.

148. *Id.* at 1452.

149. *See supra* pp. 40-41.

150. Ayers v. Fordice, 879 F. Supp. at 1471.

151. *Id.* at 1440. The school was established as Mississippi Vocational College. Its name was changed to Mississippi Valley State College in 1964; ten years later the legislature designated the institution a "university." *Id.* at 1440-41.

152. Ayers v. Allain, 674 F. Supp. at 1528; Ayers v. Fordice, 879 F. Supp. at 1486.

153. Ayers v. Allain, 674 F. Supp. at 1529.

154. Ayers v. Fordice, 879 F. Supp. at 1470 n.252.

155. *See* Kujovich, *supra* note 22, at 69-71, 160-62.

quire some form of financial aid.[156] The district court recognized the traditional and racially based mission of MVSU in finding that the college is an efficient institution if "efficiency is measured in terms of achieving higher education for educationally under-served blacks at the lowest possible cost."[157]

Racial identifiability and the function of serving under-prepared black students are not the only vestiges of the past evident at MVSU. The inequality that characterized the separate but equal era continues to affect the institution and the students it serves. Initially the school offered only precollegiate vocational training. It gradually evolved into an undergraduate college for the training of black teachers,[158] but was not accredited until 1968.[159] Eighteen years later, the "ghosts" of past discrimination remained. The institution ranked last among Mississippi's eight colleges in the number of bachelor programs, number of bachelor's fields offered, percentage of faculty holding a doctorate degree, number of volumes in its library, and the replacement value of its facility.[160]

Although the impact of the limited facilities and educational programs at this least developed of Mississippi's public colleges falls nearly exclusively on black students, the district court rejected remedial measures that would significantly improve the institution. In declining to order a remedy that would enhance MVSU, the court considered only the desegregative effect of enhancement and not the effect it would have on the educational opportunity provided to black students:

> [T]he court cannot find that institutional enhancement of MVSU will eliminate the vestiges of segregation that have contributed to MVSU's status as essentially a one-race institution. Evidence does not persuade the court that merely adding programs and increasing budgets will desegregate a HBI. . . . The court cannot find that institutional or programmatic enhancement of MVSU is justified as educationally sound for desegregation purposes . . . .[161]

The court's refusal to order any significant remedy for the continuing unequal educational opportunity provided to black students at MVSU exemplifies the inadequacy of the *Fordice* remedy. The remedial focus is on the vestige of racial separation and not on the vestiges of tangible inequality. At the same time, *Fordice* re-

156. Ayers v. Fordice, 879 F. Supp. at 1488 & n.342.

157. *Id.* at 1491.

158. *Id.* at 1440.

159. *Id.* at 1441.

160. Ayers v. Allain, 893 F.2d at 739 n.24, 742.

161. Ayers v. Fordice, 879 F. Supp. at 1491.

jects a remedial goal of fully desegregated colleges and universities. Thus, full compliance with the constitutionally required remedy may leave significant numbers of black students in racially separate and unequal institutions.

Although apparently permitted by *Fordice*, this ironic and undesirable result may not be inevitable.[162] However, even the possibility of such a result suggests the need for an alternative remedial approach. Executive Branch enforcement of Title VI of the Civil Rights Act of 1964 offers that alternative.

III. The Scope of the Violation Under Title VI of the Civil Rights Act of 1964

Section 601 of Title VI provides in relevant part:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.[163]

Under section 602 of the Act, each federal department and agency dispensing federal funds "is authorized and directed to effectuate the provisions of section [601]" by issuing regulations which become effective only upon approval by the President.[164] Section 602 further provides that compliance with "any requirement adopted pursuant to this section" may be secured by the termination of federal funds or "by any other means authorized by law."[165] The statute does not define "discrimination" and thus leaves undetermined the reach of section 601's broad prohibition. Nor does the Act elaborate on the remedial power implicit in its requirement that federal agencies effectuate the general prohibition against discrimination.

This Part discusses the extent to which Title VI authorizes the Executive Branch to prohibit forms of racial discrimination not

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162. In an opinion issued before *Fordice*, the district court in Alabama included in its remedial order a requirement of increased funding for Alabama's black public colleges and actions by the state to eliminate the vestiges of past discrimination evident in the physical facilities of those institutions. Knight v. Alabama, 787 F. Supp. at 1378-79. The court noted that its findings concerning physical facilities "are *not* based on an institutional enhancement theory but rather on the realization that the adequacy of facilities has a direct and immediate impact on individual students as they consider which institution to attend." *Id.* at 1283. In an appeal filed before but decided after *Fordice*, the defendants did not challenge these remedial measures. *Knight*, 14 F.3d at 1538-39.

163. 42 U.S.C. § 2000d (1988).

164. 42 U.S.C. § 2000d-1.

165. *Id.*

considered in *Fordice*, and therefore to require remedial actions in addition to those mandated by the *Fordice* Court. Section A examines the relationship between the statutory and constitutional standards of violation. The Supreme Court's cases addressing this issue suggest that Title VI empowers administrative agencies to adopt regulations prohibiting, as a condition of federal funding, forms of discrimination that would not violate the Equal Protection Clause. Section B assumes that Title VI prohibits only racial discrimination which also violates the Constitution. After examining elements of the constitutional violation not considered by the *Fordice* Court, Section B concludes that Title VI authorizes Executive action beyond the *Fordice* mandate, even if the statute and the Constitution are coextensive.

A. *Statutory and Constitutional Standards of Violation*

Opinions in several cases decided by the Supreme Court have offered confusing and seemingly inconsistent pronouncements on the scope of the violation created by section 601 of Title VI, and on the reach of administrative authority delegated by section 602 of the statute. In 1974, the Court held that governmental actions that were not undertaken with a discriminatory purpose nevertheless violated Title VI regulations prohibiting actions with a discriminatory effect. Subsequently, the Court decided that discriminatory purpose is an essential element of an equal protection violation under the Fourteenth Amendment. Taken together, these two cases suggested that the Title VI standard of violation is different from, and more extensive than, the constitutional standard. Nevertheless, the Court later appeared to decide that the Title VI and constitutional standards are coextensive. As if to make the confusion complete, the Court subsequently held that Title VI regulations may prohibit actions with a discriminatory effect even if those actions do not violate the Constitution. A determination of the relationship between the Title VI and constitutional standards of prohibited discrimination requires a deciphering of these cases. Although the matter is not free of ambiguity, a majority of the Court appears to have adopted the view that federal agencies have the authority to prohibit, through regulations implementing Title VI, state actions that do not violate the Equal Protection Clause of the Constitution.

In *Lau v. Nichols*,[166] students of Chinese ancestry who did not speak English claimed that the San Francisco public school district denied them equal educational opportunity in violation of Title VI

166. 414 U.S. 563 (1974).

and the Constitution. The students' claims were not based upon intentional discrimination but on the discriminatory impact resulting from the district's use of English as the language of instruction in its schools.[167] Concluding that the students had failed to show a violation of either the Equal Protection Clause or Title VI, the Ninth Circuit affirmed the district court's denial of relief.[168] The Supreme Court reversed, relying on Title VI and without reaching the constitutional claim.[169]

Writing for the majority, Justice Douglas found that Title VI regulations issued by the Department of Health, Education, and Welfare ("HEW") prohibited actions having a discriminatory effect, "even though no purposeful design is present."[170] Finding that the effect of the school district's policy of instruction in English had "all the earmarks of discrimination banned by the regulations,"[171] the Court reversed and remanded the case for a determination of an appropriate remedy.[172]

At the time it was issued, the *Lau* decision appeared to be unexceptional. Under section 602 of Title VI, HEW was authorized to promulgate regulations implementing the congressional policy prohibiting discrimination in federally funded programs.[173] In carrying out that delegated power, HEW had determined that providing education in the English language to students who did not speak that language constituted "discrimination" in violation of section 601, even in the absence of a discriminatory purpose. While the majority opinion did not expressly state that regulations prohibiting actions with a discriminatory effect were within the scope of authority delegated to HEW, its decision necessarily carries that implication.[174]

Concurring in the *Lau* result, Justice Stewart expressly addressed what the majority had decided by implication: "whether the regulations and guidelines promulgated by HEW go beyond the authority of § 601."[175] In concluding that HEW had acted within the scope of its statutory authority, Justice Stewart invoked

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167. *Id.* at 569-70 (Stewart, J., concurring).

168. Lau v. Nichols, 483 F.2d 791 (9th Cir. 1973), *rev'd*, 414 U.S. 563 (1974).

169. *Lau*, 414 U.S. at 566.

170. *Id.* at 568.

171. *Id.*

172. *Id.* at 569.

173. *Id.* at 566-67.

174. *See id.* at 569 ("[T]he Federal Government has the power to fix the terms on which its money allotments to the States shall be disbursed. . . . Whatever may be the limits of that power . . . , they have not been reached here." (citations omitted)).

175. *Id.* at 571. (Stewart, J., concurring). Chief Justice Burger and Justice Blackmun joined Justice Stewart's opinion. *Id.* at 569.

two established principles of administrative law. First, regulations promulgated under a general statutory authorization are valid if they are reasonably related to the purposes of the authorizing statute. Second, in determining the purposes of a remedial statute, a court should accord great weight to a consistent construction of a statute by the administrative agency empowered to implement it.[176] Applying these principles in *Lau*, Justice Stewart found that HEW had reasonably and consistently interpreted section 601 to require affirmative assistance to non-English speaking students.[177]

Justice Stewart's opinion included an additional observation that foreshadowed the confusion arising after *Lau*. Although he agreed with the majority that the HEW regulations prohibited certain discriminatory impacts, Justice Stewart thought it "not entirely clear that § 601 . . . standing alone, would render illegal the expenditure of federal funds" in the absence of intentional discrimination.[178] While this observation might be read as suggesting a divergence between the scope of Title VI and the scope of Title VI regulations, it embodies a much less controversial notion. When Congress delegates to an executive agency the power to implement a general statutory policy, elaboration and implementation of the legislative policy depend on the judgment of the agency to which power has been delegated. In the absence of an agency determination that a particular practice is inconsistent with the statutory policy, that practice is not necessarily unlawful. As Justice Frankfurter observed many years ago in *SEC v. Chenery*:

> [B]efore transactions otherwise legal can be outlawed. . . they must fall under the ban of some standards of conduct prescribed by an agency of government authorized to prescribe such standards — either the courts or Congress or an agency to which Congress has delegated its authority.[179]

Relying on what has become an established principle of administrative law, Justice Frankfurter in *Chenery* further recognized that when an agency has not outlawed a particular practice as inconsistent with a general statutory policy, a court should not exercise the authority delegated to the agency. When the question turns on "a determination of policy or judgment which the agency alone is authorized to make and which it has not made, a judicial judgment cannot be made to do service for an administrative judgment."[180]

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176. *Id.* at 571.

177. *Id.*

178. *Id.*

179. 318 U.S. 80, 92-93 (1943).

180. *Id.* at 88. The fact that a court has declined to find that a practice is inconsistent with statutory policy (and therefore illegal) does not prevent the agency from outlawing the

Thus, as Justice Stewart observed in *Lau*, courts applying a general statutory prohibition "standing alone" should not necessarily invalidate actions that an agency's implementing regulations could prohibit.

Although Justice Stewart recognized the authority of administrative agencies to refine and elaborate the general policy against discrimination found in Title VI, neither he nor the *Lau* majority considered the relationship between unlawful discrimination under the statute and unconstitutional discrimination under the Fourteenth Amendment. Two years after *Lau*, the Supreme Court held that unconstitutional discrimination under the Equal Protection Clause does not include what *Lau* recognized as a violation of Title VI. In *Washington v. Davis*,[181] applicants for positions as police officers claimed that a requirement of satisfactory performance on a written test was unconstitutional because it had a disproportionate, adverse impact on black applicants. The Court rejected that claim and held that the Fourteenth Amendment prohibits only purposeful discrimination; mere discriminatory effect is insufficient to establish a constitutional violation.[182] After *Washington v. Davis*, it appeared that *Lau* stood for the proposition that Title VI — or more precisely, regulations promulgated under the statute — prohibits racial discrimination that does not violate the Constitution. That proposition was called into question by *Regents of the University of California v. Bakke*.[183]

Allan Bakke contended that racially based, affirmative action admissions decisions by a public university violated both the Fourteenth Amendment and Title VI. Two of the opinions in *Bakke*, commanding a majority of five Justices, expressly addressed the question of the relationship between the Title VI and constitutional standards of violation.[184] Broad statements in both opinions suggest that a majority of the Court concluded generally that the Title VI standard of violation is coextensive with that of the Constitution. Justice Powell found in the statute's legislative history

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practice at a later time. After the Court's first *Chenery* decision, the Securities and Exchange Commission exercised its delegated authority and outlawed precisely the practice that the Court had previously found to be lawful in the absence of agency action. SEC v. Chenery Corp., 332 U.S. 194 (1947).

181. 426 U.S. 229 (1976).

182. *Id.*

183. 438 U.S. 265 (1978).

184. *Id.* at 284-87 (Powell, J., announcing the judgment of the Court); *id.* at 328-55 (Brennan, White, Marshall, & Blackmun, JJ., concurring in part and dissenting in part). Justice Stevens, joined by the Chief Justice and Justices Stewart and Rehnquist, did not decide the question of the relationship between the Title VI and constitutional standards of prohibited discrimination. *Id.* at 417 (Stevens, J., concurring in part and dissenting in part).

"evidence of the incorporation of a constitutional standard into Title VI."[185] The joint opinion of Justices Brennan, White, Marshall, and Blackmun expressed the view that "Title VI's definition of racial discrimination is absolutely coextensive with the Constitution's."[186]

These broad statements appear to constitute an implicit overruling of *Lau*.[187] There are, however, several reasons for reading *Bakke* more narrowly. First, *Bakke* presented only the specific issue of whether Title VI prohibits race-based affirmative action when such action is permitted by the Constitution.[188] The case did not require a decision on the general congruence between Title VI and the Constitution. Less sweeping language in both of the relevant opinions supports a reading of *Bakke* as limited to the narrower issue. Justice Powell concluded that "Title VI must be held to proscribe only those *racial classifications* that would violate [the Constitution]."[189] Similarly, the joint opinion of four Justices agreed that "Title VI goes no further in prohibiting *the use of race* than the Equal Protection Clause."[190] If *Bakke* decided only that Title VI and the Constitution impose the same limitations on the use of race-conscious affirmative action, then it did not reject *Lau*'s implication that the statute can reach other forms of discrimination not prohibited by the Constitution. As Justice White observed in a later case: "Although some of the language in *Bakke* has a broader sweep, the holdings in *Bakke* and *Lau* are entirely consistent."[191]

Second, despite the apparent inconsistency between *Lau* and the broad statements in *Bakke*, the Court did not overrule *Lau*. The joint opinion of Justices Brennan, White, Marshall, and Blackmun is particularly noteworthy on this point. While expressing "serious doubts" that *Lau* could survive a determination that the constitutional and statutory definitions of "discrimination" are coextensive, the joint opinion went on to explain that *Lau*'s recognition of an impact violation would support, not detract from, *Bakke*'s conclusion that Title VI permits race-conscious affirmative

185. *Id.* at 286.

186. *Id.* at 352.

187. *See id.* (expressing "serious doubts" about *Lau*'s implication that discriminatory impact alone violates Title VI).

188. As framed by Justice Powell, the Court considered "the proposition that § 601 enacted a purely color-blind scheme, without regard to the reach of the Equal Protection Clause." *Id.* at 284-85.

189. *Id.* at 287 (emphasis added).

190. *Id.* at 325 (emphasis added).

191. Guardians Ass'n. v. Civil Serv. Comm'n, 463 U.S. 582, 590 (1983).

action.[192]

Finally, in concluding that Title VI did not prohibit affirmative action in university admissions, the joint opinion of the four *Bakke* Justices relied on the principle of administrative law applied by Justice Stewart in *Lau*. Citing *Lau*, the joint *Bakke* opinion noted that HEW regulations implementing Title VI and permitting affirmative action "are entitled to considerable deference in construing Title VI."[193] It is not at all clear why this principle of judicial deference would apply if Title VI incorporated a constitutional standard of violation. Rather, it appears that the Justices who authored the joint opinion were deferring to HEW's implementation of a separate, statutory standard.

Bakke's pronouncements on the relationship between the constitutional and Title VI standards of unlawful discrimination remain somewhat enigmatic. On the one hand, five Justices in *Bakke* suggested that the statute and the Constitution impose the same prohibitions against racial discrimination. On the other hand, the narrowness of the issue necessary to the judgment in *Bakke*, the Court's failure to overrule *Lau*, and the willingness of four Justices to defer to an administrative interpretation of Title VI combine to suggest that *Bakke* should be read more narrowly and that *Lau* survived the *Bakke* decision.

Perhaps the most satisfactory way to reconcile the two cases is to read the broad language in the *Bakke* opinions as a decision on the reach of the statutory violation when Title VI is — to borrow Justice Stewart's phrase in *Lau* — "standing alone." Under this reading, *Bakke* would not overrule *Lau*'s conclusion that the Executive Branch has a substantial measure of discretion to elaborate upon and implement the statute through regulations that effectuate the provisions of section 601. This is the reading of *Bakke* adopted by a majority of the Court when it revisited the question of a Title VI discriminatory impact violation five years later.

In *Guardians Association v. Civil Service Commission*,[194] minority police officers claimed that police department examinations having a discriminatory effect on minority applicants violated Title VI. While the Court was widely fragmented on each of the four related issues raised by the case,[195] two propositions clearly com-

192. *Bakke*, 438 U.S. at 351-53.

193. *Id.* at 342. The joint opinion discussed HEW regulations permitting affirmative action under some circumstances. *Id.* at 344-45.

194. 463 U.S. 582 (1983).

195. *Guardians* is the most confusing of the Court's Title VI decisions. The Justices disagreed on each of the four issues addressed in the case. In addition to deciding whether Title VI and Title VI regulations prohibit actions with a discriminatory effect, the Court

manded a majority. Seven Justices in *Guardians* agreed that *Bakke* had decided that the standard for a violation of Title VI tracked that of the Constitution and therefore a violation of the statute, absent implementing regulations, requires proof of intentional discrimination.[196] A different majority of five Justices further held that an impact violation could be created by administrative regulations promulgated under section 602.[197] The matter thus seems to have been resolved in the manner that Justice Stewart outlined nearly a decade earlier in *Lau* — Title VI standing alone prohibits only intentional discrimination that would violate the Constitution, but agencies charged with enforcement of the statute may, through regulations under section 602, extend the scope of unlawful discrimination.

In 1985, two years after *Guardians*, the Court agreed on this interpretation of the statute. Writing for a unanimous Court in *Alexander v. Choate*,[198] Justice Marshall characterized the *Guardians* decision as follows: "First, the Court held that Title VI itself directly reached only instances of intentional discrimination. Second, the Court held that actions having an unjustifiable disparate impact on minorities could be redressed through agency regulations designed to implement the purposes of Title VI."[199]

After its reaffirmation by the unanimous Court in *Choate*, the *Guardians* decision on the reach of Title VI appears to have sur-

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decided whether Title VI is enforceable in a private action and whether compensatory relief may be afforded in a private action under Title VI. A majority of six Justices agreed that a private action could be brought to enforce Title VI. *Id.* at 593-95 (Opinion of White, J., joined by Rehnquist, J.); *id.* at 624-26 (Marshall, J., dissenting); *id.* at 635-36 (Stevens, J., joined by Brennan, J. and Blackmun, J., dissenting). Of these, only four concluded that compensatory relief is available in a private action. *Id.* at 624-34 (Marshall, J., dissenting); *id.* at 636-39 (Stevens, J., joined by Brennan, J. and Blackmun, J., dissenting).

Five Justices agreed to constitute the judgment of the Court that the plaintiff police officers were not entitled to the relief they sought under Title VI. *Id.* at 584 (Opinion of White, J.). There was not, however, a majority of the Court for any of the three different bases upon which the judgment rested.

196. *Id.* at 610-11 (Powell, J., joined by Burger, C.J., and Rehnquist, J., concurring in the judgment); *id.* at 612-15 (O'Connor, J., concurring in the judgment); *id.* at 639-42 (Stevens, J., joined by Brennan, J. and Blackmun, J., dissenting).

197. *Id.* at 591-93 (Opinion of White, J.); *id.* at 623 n.15 (Marhall, J., dissenting); *id.* at 642-45 (Stevens, J., joined by Brennan, J. and Blackmun, J., dissenting).

198. 469 U.S. 287 (1985). *Choate* involved the question of an impact violation under § 504 of the Rehabilitation Act of 1973, which, in language substantially the same as that used in Title VI, prohibits discrimination against handicapped persons in federally funded programs. *See id.* at 290.

199. *Id.* at 293. *See also* Consolidated Rail Corp. v. Darrone, 465 U.S. 624, 630 n.9 (1984) ("A majority of the [*Guardians*] Court agreed that retroactive relief is available to private plaintiffs for all discrimination, whether intentional or unintentional, that is actionable under Title VI.").

vived the Court's subsequent and brief consideration of the issue. However, *Fordice* itself may revive the confusion that existed before *Guardians.* In *Bazemore v. Friday*,[200] a case that was pivotal in the *Fordice* litigation,[201] private plaintiffs seeking desegregation of 4-H and Extension Homemaker Clubs relied on the Fourteenth Amendment and on Department of Agriculture regulations requiring State Extension Services to take affirmative action to overcome the effects of past discrimination.[202] In an opinion commanding a majority of the Court on this issue,[203] Justice White treated the claim under the Title VI regulations as separate from the constitutional claim, but deferred to the Agriculture Department's representation that there had been full compliance with its regulations.[204]

In *Fordice*, the Court of Appeals found it "unnecessary . . . to discuss the scope of Mississippi's duty" under a virtually identical regulation issued by the Department of Education, because "the duty outlined by the Supreme Court in *Bazemore* controls in Title VI cases."[205] Writing for the majority of the Supreme Court in *Fordice*, Justice White included a footnote in his opinion concluding that the "Court of Appeals . . . misanalyzed the Title VI claim":[206]

> It will be recalled . . . that the relevant agency and the courts had specifically found no violation of the regulation in *Bazemore.* Insofar as it failed to perform the same factual inquiry and application as the courts in *Bazemore* had made, therefore, the Court of Appeals' reliance on *Bazemore* to *avoid* conducting a similar analysis in this case was inappropriate.[207]

While this treatment of the Court of Appeals' opinion appears to recognize and preserve the distinction between a constitutional violation and unlawful discrimination under Title VI regulations, Justice White's footnote went on to dispose of the Title VI claim:

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200. 478 U.S. 385 (1986).

201. *See supra* pp. 11-15.

202. *Bazemore*, 478 U.S. at 408 (White, J., concurring).

203. *Id.* at 387-88.

204. *Id.* at 408-09. Justice White's cursory treatment of the issue did not discuss or cite *Lau, Bakke,* or *Guardians. Id.* In a dissenting opinion, Justice Brennan strongly disagreed with the Court's conclusion that continuing segregation of the clubs was consistent with the regulation's requirement of eliminating the effects of past discrimination. *Id.* at 411-14 (Brennan, J., dissenting). Justice Brennan's opinion also appeared to assume, without mentioning the relevant cases, that the Title VI issue was distinct from the constitutional claim. *Id.*

205. Ayers v. Allian, 914 F.2d at 687 n.11.

206. United States v. Fordice, 505 U.S. at 732 n.7.

207. *Id.* (citations omitted).

> Private petitioners reiterate in this Court their assertion that the state system also violates Title VI, citing a regulation to that statute which requires states to "take affirmative action to overcome the effects of prior discrimination." Our cases make clear, and the parties do not disagree, that the reach of Title VI's protection extends no further than the Fourteenth Amendment. We thus treat the issues in this case as they are implicated under the Constitution.[208]

It is true that the Court's prior cases establish that the protections of Title VI, in the absence of implementing regulations, extend no further than the Constitution. However, those cases also "make clear" that agencies dispensing federal funds have the power to effectuate the statute's protection by adopting regulations which prohibit forms of racial discrimination that do not violate the Constitution. Although the precise meaning of *Fordice*'s casual pronouncements on the reach of Title VI is not immediately evident,[209] it seems unlikely that the Court used ambiguous language in a footnote implicitly to overrule *Lau* and *Guardians* and to reject the clear statement of *Choate*.[210]

Moreover, the *Guardians* resolution of the Title VI issue incorporates an appropriate division of Title VI authority between courts and administrative agencies. Congress intended that section 601's prohibition against racial discrimination would be administratively implemented and enforced. Section 602 delegates to each federal agency with funding responsibilities a general rulemaking authority to effectuate the provisions of section 601. It further requires that implementing regulations "be consistent with achievement of the objectives of the statute authorizing the financial assis-

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208. *Id.* (citations omitted).

209. Perhaps the Court implicitly interpreted the Education Department's regulation to require no more than the Constitution and thus the Title VI claim was essentially based on the statute standing alone. If that was the Court's conclusion, however, it is not clear why it would be "inappropriate" for the Court of Appeals to avoid a separate analysis of the Title VI claim.

210. It seems particularly unlikely that Justice White would announce such a sweeping change in the law without comment on prior, inconsistent opinions which he had authored. Justice White was one of the four Justices who issued the joint opinion in *Bakke*. United States v. Bakke, 438 U.S. 265, 324 (1978). In his *Guardians* opinion, Justice White read *Bakke*'s decision on Title VI to be limited to the narrow issue of race-based affirmative action and "plainly not determinative of whether Title VI proscribes unintentional discrimination in addition to the intentional discrimination that the Constitution forbids." Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 590 (1988). He further noted that *Bakke* left undisturbed the conclusion of three concurring Justices in *Lau* that agencies "charged with enforcing Title VI had sufficient discretion to enforce the statute by forbidding unintentional as will as intentional discrimination." *Id.* at 592. Justice White also wrote the opinion adopted by a majority of the *Bazemore* Court that treated a claim under Title VI regulations as distinct from a constitutional claim. Bazemore v. Friday, 478 U.S. 385, 409 (1986).

tance."[211] It seems clear that the powers conferred by section 602 call for the exercise of administrative discretion in implementing Title VI across the full range of federally funded programs.

While there may be some common ground among those programs as to what measures will effectively protect against racial discrimination, the particular regulatory requirements necessary to effectuate section 601 may well depend on the context of the program receiving federal funding. In some instances, a simple ban of intentionally discriminatory acts might suffice. In others, a prophylactic prohibition against actions with a discriminatory effect may be necessary because a determination of intent is difficult, costly, or inconsistent with achievement of the objectives of the funding statute.[212] In programs with a history of discrimination, federal agencies might find it necessary to prohibit what would otherwise be lawful actions to ensure that the effects of past discrimination are not perpetuated.[213]

Under the scheme of administrative enforcement established by Title VI, the decision as to what is necessary to effectuate the provisions of the Act is made by the departments and agencies that fund the programs subject to the statute's protections. As set forth in section 603, the primary role of the courts is to exercise the power of judicial review that usually applies to the actions of administrative agencies.[214] Thus, in the usual case, a court is required to determine only whether an agency's regulations, and its application of them, are within the authority delegated and are a reasonable elaboration of the delegating statute.[215]

The courts, however, have been willing to entertain the unusual case. *Lau*, *Bakke*, and *Guardians* each involved private actions brought directly against the recipients of federal funds, rather than appeals from administrative determinations under Ti-

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211. 42 U.S.C. § 2000d-1 (1988).

212. *See* South Carolina v. Katzenbach, 383 U.S. 301, 328 (1966) (stating that inordinate costs of litigation justify voting rights remedies that do not require prior judicial finding of violation).

213. *See* City of Rome v. United States, 446 U.S. 156, 176-77 (1980) (upholding voting rights remedies addressed to actions that perpetuate the effects of past discrimination); Gaston County v. United States, 395 U.S. 285 (1969).

214. 42 U.S.C. § 2000d-2 (1988).

215. Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 842-45 (1984). The "substantial deference" accorded to an agency's interpretation of a statute it is charged with administering also applies when the agency alters its prior interpretation. Rust v. Sullivan, 500 U.S. 173, 184-85 (1991). The deference normally shown to an agency by a reviewing court should be particularly applicable in the context of Title VI regulations which enjoy the special stature conferred by presidential approval. 42 U.S.C. § 2000d-1 (1988).

tle VI.[216] In a direct private action, a court may be asked to determine the reach of the statutory prohibition, without the benefit of an administrative elaboration of the statutory policy. If a court attempts to make "a judicial judgment . . . do service for an administrative judgment,"[217] it intrudes upon the authority delegated to administrative agencies under section 602.[218] The *Guardians* majorities resolved this problem in a manner consistent with the appropriate roles of courts and agencies. In the absence of administrative guidance, a court makes only a judicial judgment — whether the challenged actions violate the constitutional standard of racial discrimination. A decision on the meaning of Title VI standing alone would not preclude an administrative judgment as to what other forms of discrimination should be prohibited in order to effectuate the provisions of the Act.

Exercising the authority granted under Title VI, federal departments and agencies could prohibit, as a condition of federal funding, state actions that would not violate the constitutional standard announced in *Fordice*. In segregated systems of public higher education, the regulatory prohibition could, for example, encompass policies and practices that have a current discriminatory effect, even if they are not traceable to past *de jure* segregation. Moreover, the reach of Title VI regulations need not be limited to actions producing or preserving the segregation of students, but could extend to state policies resulting in other forms of discrimination. For example, policies that restrict the funding and educational programs of public colleges serving a predominantly black student population would be encompassed within the Title VI regulatory authority if those actions perpetuate inequality in the educational opportunities afforded to black students. More generally, the authority delegated under Title VI permits federal departments and agencies to develop a statutory prohibition of discrimination broader than the constitutional standard announced in *Fordice*.

With effective Title VI regulations, the Executive Branch could supplement, rather than simply follow, the judiciary's conception of racial equality in higher education. Administrative ac-

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216. Although each of these cases included private enforcement claims under Title VI, the Court did not decide that such actions were permissible until *Guardians Ass'n*, 463 U.S. at 582.

217. SEC v. Chenery, 318 U.S. 80, 88 (1943).

218. *See* Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193, 1206-07 (1982) (Judicial creation of private rights of action "may usurp the agency's responsibility for regulatory implementation . . . and force courts to determine in the first instance the meaning of a regulatory statute.").

tion in pursuit of a broader conception of equality, however, does not depend upon a divergence between the constitutional and statutory standards of violation. *Fordice* considered only part of the constitutional violation inherent in segregated public colleges. A more complete view of the constitutional violation provides the Executive Branch with an alternative source of remedial power.

B. *The Constitutional Standard of Violation*

As discussed in Part I, public higher education for blacks in the segregationist states was not only racially separate but also unequal, and the effects of that inequality perpetuate discrimination against black students.[219] A complete conception of the constitutional standard of equality, and of the constitutional violations created by separate and unequal schools, provides an alternative basis for Executive Branch remedial action. Even if the Title VI prohibition of discrimination is limited to unconstitutional discrimination, the statute is a source of administrative authority to remedy not only segregation, but also inequality in education.

Fordice embraced a view of the equal protection violation that is limited to the racial separation that characterized "separate but equal" colleges. Even where the continuing vestiges of Mississippi's past discrimination were most obviously the product of state-imposed inequality, the *Fordice* Court viewed the violation only in terms of segregation. For example, the majority recognized that historically Mississippi restricted the funding and academic missions of its black public colleges,[220] a practice common to all the segregationist states.[221] Nevertheless, when considering the current, restricted academic missions of Mississippi's black colleges, the Court concluded that the "mission designations . . . have as their antecedents the policies enacted to perpetuate racial separation."[222] Inequality, however, is not an inevitable concomitant of segregation. Restricted funding and academic missions were designed not to segregate black students, but to discriminate against them after they had been isolated in black colleges. Thus, the harm of *de jure* segregation, as it was practiced in Mississippi and other states, was not simply the intangible effects of racial separation; it included the tangible inequality of the black public colleges and the education they provided their students. The antecedents of the inequalities evident in Mississippi's black public

219. *See supra* pp. 4-13.

220. *Fordice*, 505 U.S. at 739-41.

221. *See* Kujovich, *supra* note 22, at 45-81, 100-06.

222. *Fordice*, 505 U.S. at 740.

colleges today are not policies of racial separation, but policies designed to limit the quality and quantity of education available to blacks.[223]

The Court's incomplete view of the violation led to its narrow conception of the remedial obligation. As conceived by the majority:

> [T]he "primary issue" in this case is whether the State has met its affirmative duty to dismantle its prior dual university system.
>
> Our decisions establish that a State does not discharge its constitutional obligations until it eradicates policies and practices traceable to its prior *de jure* dual system that continue to foster segregation.[224]

Fordice shows no apparent constitutional concern for continuing inequality in the education afforded to black students who remain in racially identifiable public colleges after the state has satisfied its remedial duty.[225] Both the violation and the remedy focus on state-compelled segregation and ignore the constitutional evil of tangibly unequal public colleges.

This restricted judicial conception of the constitutional violation and the remedial duty is the direct result of the Court's decisions in *Brown v. Board of Education*.[226] In *Brown I*, the Court proceeded on the assumption "that the Negro and white schools involved have been equalized, or are being equalized, with respect to buildings, curricula, qualifications and salaries of teachers, and other 'tangible' factors."[227] The assumed tangible equality of the schools led the Court to conclude that racial separation is inherently unequal.[228] The Court thus foreclosed the need for individualized findings of tangible inequality between black and white schools in each separate and unequal school district. Segregated school districts could be found in violation of the Constitution without a case-by-case evaluation of their facilities and educational

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223. Justice Scalia's opinion in *Fordice* also ignores the tangible inequality that characterized segregated public education. In his view: "The constitutional evil of the 'separate but equal' regime that we confronted in *Brown I* was that blacks were told to go to one set of schools, whites to another." *Id.* at 754 (Scalia, J., concurring in part and dissenting in part). Later in his opinion, Justice Scalia exhibited a seemingly willful blindness to the historical record by asserting that the requirement of equal funding of black and white colleges " 'was part and parcel of the prior dual system.' " *Id.* at 759. Whatever the characteristics of Mississippi's racially dual system of higher education, equal funding was not one of them.

224. *Id.* at 728.

225. *See id.* at 741 ("We do not suggest that absent discriminatory purpose the assignment of different missions to various institutions . . . would raise an equal protection issue where one or more of the institutions become or remain predominantly black or white.").

226. 347 U.S. 483 (1954) (*Brown I*); 349 U.S. 294 (1955) (*Brown II*).

227. *Brown I*, 347 U.S. at 492.

228. *Id.* at 495.

programs. While this approach broadened the application of the *Brown* decision, it also diminished the scope of the constitutional harm considered by the Court.

Brown I's benign, but incomplete conception of the constitutional violation determined the scope of the constitutional remedy. In *Brown II*, the Court adopted a remedial goal designed "to achieve a system of determining admission to the public schools on a nonracial basis."[229] More than a decade later, in *Green v. County School Board*,[230] the Court interpreted that remedial goal to require "the dismantling of well-entrenched dual systems."[231] Subsequently, in *Swann v. Charlotte-Mecklenburg Board of Education*,[232] the Court reaffirmed its focus on the constitutional harm of racial separation and the remedial duty to desegregate:

> The objective today remains to eliminate from the public schools all vestiges of state-imposed segregation. Segregation was the evil struck down by *Brown I* as contrary to the equal protection guarantees of the Constitution. That was the violation sought to be corrected by the remedial measures of *Brown II*. That was the basis for the holding in *Green*. . . .[233]

Cases after *Swann* preserved the Court's narrow focus on the racial separation element of the violation, even as they expanded the scope of the desegregation remedy.[234]

Developments in the remedial law applicable to elementary and secondary education mitigated the consequences of failing to consider both elements of the constitutional violation.[235] The de-

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229. *Brown II*, 349 U.S. at 300-01.

230. 391 U.S. 430 (1968).

231. *Id.* at 437.

232. 402 U.S. 1 (1971).

233. *Id.* at 15.

234. In Milliken v. Bradley, 433 U.S. 267 (1977), the Court preserved its narrow focus on segregation as a constitutional violation but endorsed the remedy of compensatory education, which would appear to be a remedy for educational inequality. The *Milliken* majority offered a somewhat unconvincing explanation of why the need for compensatory education resulted from the mere separation of black and white students:

> Children who have thus been educationally and culturally set apart from the larger community will inevitably acquire habits of speech, conduct, and attitudes reflecting their cultural isolation. They are likely to acquire speech habits, for example, which vary from the environment in which they must ultimately function and compete, if they are to enter and be part of that community. This is not peculiar to race; in this setting, it can affect any children who, as a group, are isolated by force of law from the mainstream.

Id. at 287. Justice Powell was apparently unconvinced and suggested in his concurring opinion that a constitutional remedy should not include educational programs unless a court found past discrimination and inequality in the operation of those programs. *Id.* at 295, 298 & n.4 (Powell, J., concurring).

235. The continuing discrimination that resulted from *Brown*'s failure to take account

mand of the post-*Brown* cases that school districts eliminate the racial identifiability of their schools through a general redistribution of students[236] meant that any continuing disparities between formerly black and formerly white schools would not be racially targeted. Moreover, the elementary and secondary remedial cases ultimately came to consider the inequalities of black schools as indicia of the segregation aspect of the constitutional violation. As formulated in *Swann*, "corrective action must be taken with regard to the maintenance of buildings and the distribution of equipment" because "[i]n these areas, normal administrative practice should produce schools of like quality, facilities, and staffs."[237] *Swann* and related cases may also have recognized the need to remedy educational inequalities since the desegregation remedy did not necessarily require a completely proportional distribution of black and white students in each school.[238] In the absence of school equalization, a school that remained black could be both racially separate and unequal — a result the elementary and secondary remedial cases did not tolerate.

The safeguards against continuing and racially targeted inequality that emerged in the elementary and secondary cases are absent from the remedy the Court has formulated for higher education. *Fordice* does not require the elimination of racial identifiability or the greatest possible degree of actual desegregation. As summarized by Justice Thomas in his concurring opinion, "we focus on the specific *policies* alleged to produce racial imbalance, rather than on the *imbalance* itself."[239] Moreover, segregative policies are not subject to remedial modification unless they are "traceable to the *de jure* system" and unless their reformation is both "practicable and consistent with sound educational prac-

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of the tangible inequality that characterized black elementary and secondary schools should not be understated. No remedy was provided to the black students who received their education in inferior schools after 1954 and before the Court interpreted *Brown II* to require actual desegregation of public school systems. Nor did these students benefit from the later decision in *Milliken* to include compensatory education as part of the desegregation remedy. *See supra* note 234.

236. *See Green*, 391 U.S. at 442 (school districts obligated to convert "to a system without a 'white' school and a 'Negro' school, but just schools"); *Swann*, 402 U.S. at 26 (constitutional duty requires "every effort to achieve the greatest possible degree of actual desegregation").

237. *Swann*, 402 U.S. at 18-19. *See also* Freeman v. Pitts, 503 U.S. 467, 507-08 (1992) (Souter, J., concurring) (noting that quality of physical plant and per pupil expenditures are indicators of racial identifiability); Wright v. Council of Emporia, 407 U.S. 451, 465 (1972) (stating that inequality of black and white schools indicates perpetuation of segregation).

238. *Swann*, 402 U.S. at 24.

239. *Fordice*, 505 U.S. 717, 746 (1992) (Thomas, J., concurring) (second emphasis added).

tices."[240] Finally, because *Fordice* does not adopt *Swann*'s requirement that a remedy eliminate the indicia of segregation, whether it be racial identifiability or institutional inequality, it imposes no direct duty on the state to remedy the continuing effects of past discriminatory treatment of the colleges created for black students. The enhancement of black colleges is required, if at all, only to the extent that it serves *Fordice*'s more limited desegregation mandate.[241]

Although the *Fordice* Court did not expressly address the matter, continuing institutional inequality might be justified by the presence of voluntary student choice in higher education.[242] Nearly all state systems of public higher education include institutions that are unequal in their levels of funding, program offerings, facilities, and qualification of faculty. In a system without a history of racially based inequality, students who elect to attend or are admitted to only the less adequate colleges are not subjected to unconstitutional discrimination. Absent a discriminatory purpose, institutional differences would not violate the Constitution even if student choices produced a predominantly black student body at one of the lesser colleges in the system.[243] Under these circumstances, institutional inequality is not an effect of either past or present racial discrimination.

Even in a system with a history of racial discrimination, the present effects of past inequality might become constitutionally insignificant in the face of truly voluntary student choice. If students have an unrestrained choice of colleges, the effect of any continuing inequality might be characterized as a result of student selection and not the actions of the state. The district court on remand offered this justification for refusing to remedy the vestiges of inequality between Mississippi's black and white colleges. As previously noted, however, the standard of voluntary choice under *Fordice* is a compromise between the constitutional rights of black

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240. *Id.* at 729.

241. *See supra* pp. 43-46.

242. The *Fordice* Court did not discuss the distinct violation of inequality in separate and unequal colleges, but its concern with continuing segregation was expressed in terms of policies that "substantially restrict a person's choice of which institution to enter" thereby contributing to racial identifiability. *Fordice*, 505 U.S. at 733. *See also id.* at 734-35 (admission policies restrict student choices in a way that perpetuates segregation); *id.* at 741 (mission designations interfere with student choice and perpetuate segregation; *id.* 742 (number of institutions makes for different choices).

243. *See id.* at 741 ("We do not suggest that absent discriminatory purpose the assignment of different missions to various institutions in a State's higher education system would raise an equal protection issue where one or more of the institutions become or remain predominantly black or white.").

students and the perceived needs of the state's system of higher education.[244] The result of that compromise does not depend on any objective evaluation of the freedom students actually enjoy in selecting a college.

The *Fordice* standard of voluntary choice is a far weaker standard than the Court has adopted in other contexts. In *Teamsters v. United States*,[245] for example, the Court recognized that the racial composition of an employer's work force can unlawfully deter minority employment applicants.[246] Under *Fordice*, however, the racial composition of a public college is not considered to be a relevant factor in evaluating the voluntariness of student choices.[247] In the context of elementary and secondary school desegregation, the lower federal courts embraced a more complete conception of equality under a voluntary choice regime than is evident in *Fordice*. In *United States v. Jefferson County Board of Education*,[248] for example, the Fifth Circuit fashioned a broadly applicable, voluntary choice remedial decree that required equalization of the facilities and educational programs in black and white schools.[249] The school equalization provision of the *Jefferson* decree both encouraged desegregation through a more voluntary choice and protected black students against separate and unequal education in schools that remained predominantly black.[250]

Fordice apparently concluded that after its limited version of voluntary choice is available to students in the formerly *de jure* segregated higher education system, then the system is desegregated for constitutional purposes. If Title VI incorporates the constitutional standard, and no more, then *Fordice* would appear to

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244. *See supra* pp. 18-19.

245. 431 U.S. 324 (1977).

246. *Id.* at 365; *see also* NLRB v. Southern Bell T&T Co., 319 U.S. 50, 57 (1943) (discussing how employer-created union restricts employee's free choice of bargaining unit after employer domination has ceased).

247. *See supra* note 65.

248. 372 F.2d 836 (5th Cir. 1966), *aff'd*, 380 F.2d 385 (5th Cir. 1967) (en banc).

249. 372 F.2d at 899-900.

250. *Bazemore v. Friday* provides further support for the view that voluntary choice does not obviate the need to remedy continuing inequality in facilities selected by black students. In *Bazemore*, the Court refused to order the desegregation of racially identifiable youth clubs relying, in part, on a factual finding that the racial imbalance resulted from voluntary choice. 478 U.S. at 407 (White, J., concurring). Unlike the black public colleges in *Fordice*, however, the black youth clubs in *Bazemore* did not retain the continuing effects of past inequality; services were provided to the clubs "equally regardless of their racial makeup," Bazemore v. Friday, 751 F.2d 662, 667 (4th Cir. 1984), and all other vestiges of past discrimination had been eliminated. *Id.* at 697 n.15 (Phillips, J., concurring in part and dissenting in part). Thus, the continuing concentration of black youths in racially separate clubs did not perpetuate past unequal treatment.

prohibit an administrative remedy incorporating a more demanding version of desegregation by voluntary choice. *Fordice* should not, however, be read as foreclosing a Title VI remedy for the effects of unconstitutional denials of tangible equality. If, after the *Fordice* standard of desegregation is met, black students are concentrated in colleges that remain not only racially separate but also unequal, then continuing inequality in the education offered by those colleges perpetuates a constitutional harm distinct from that of racial segregation. Administrative enforcement of Title VI can, and should, address the current discrimination resulting from the vestiges of inequality.

Fordice did not address the inequality element of the violations resulting from separate and unequal public colleges. The majority's only allusion to the issue can be found in its rejection of what it considered to be the private plaintiffs' claim for racially separate but more equal colleges.[251] Providing a remedy for the inequality element of the constitutional violation, however, is not a reversion to the doctrine of separate but equal. A requirement that the vestiges of past, racially based inequality be eliminated neither compels nor condones a continuing state of racial segregation. It does, however, demand that if black students remain concentrated in colleges that were separate and unequal during the era of *de jure* segregation, then the state must implement remedial measures sufficient to ensure that the effects of past discrimination are not perpetuated. Administrative action under Title VI to remedy the effects of inequality would not compel separate but equal, but would prohibit separate and unequal.

Moreover, unlike the constitutional doctrine under *Plessy*, the higher education remedy justified by the inequality aspect of the constitutional violation would not require conversion of black pub-

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251. *Fordice*, 505 U.S. at 743. Justice Scalia rejected any remedy for tangible inequality between black and white institutions because "it is students and not colleges that are guaranteed equal protection of the laws." *Id.* at 759 (Scalia, J., concurring in part and dissenting in part). Justice Scalia's observation is true, but irrelevant. A remedy for inequality is not based on an institutional claim of equal protection. The funding, facilities, faculty, educational programs, and other activities of a college determine the quality of education that is afforded to its students. It is the effect of inequality on students that justifies the remedy. Thus, the remedy is necessary only to the extent that a formerly *de jure* segregated institution's student body remains predominantly black. If a college is no longer racially identifiable, then the effects of inequality are not racially targeted on black students. Justice Scalia's statement also ignores a long line of elementary and secondary cases requiring that a remedy address the condition of school facilities. *See, e.g.*, Freeman v. Pitts, 503 U.S. 467, 486 (1992); Board of Educ. v. Dowell, 498 U.S. 237, 249 (1991); Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 460 (1979); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 18 (1971). A higher education remedy for the inequality of racially identifiable schools no more confers rights on institutions than did *Swann* and the cases that followed it.

lic colleges into identical duplicates of their predominantly white counterparts. Such actions would encourage racially based student choices and conflict with the goals of a judicially ordered desegregation remedy.[252] Title VI does not compel what the Constitution prohibits. The Title VI remedy for the continuing effects of tangible inequality should be designed to ensure that racially identifiable black colleges are diverse in their educational programs so that student enrollment choices can be based on institutional characteristics other than race.[253] Fashioned in this way, a Title VI remedy will not only prevent continuing discrimination against black students enrolled in black colleges, but also encourage desegregation through the enrollment of white students. By adopting a more complete conception of the constitutional violation, administrative enforcement of Title VI could thus support and supplement the *Fordice* remedy.

IV. Judicial and Administrative Remedies

In the final analysis, whether Title VI embodies a conception of racial discrimination that is coextensive with or broader than that of the Equal Protection Clause may not be the determinative issue. Mississippi and the other segregationist states engaged in extensive and long-lasting constitutional and statutory violations by restricting the higher educational opportunities of their black citizens to public colleges that were both racially separate and tangibly unequal. To the extent that the effects of those violations remain, the primary issue in a higher education desegregation case is the determination of an appropriate remedy. The nature and scope of the remedial authority of administrative agencies acting under Title VI, and its relationship to judicial remedial power under the Constitution, present issues distinct from those concerning the constitutional and statutory standards of violation. Because resolution of those issues turns, in part, on the institutional characteris-

252. *Fordice* identified unnecessary program duplication among black and white colleges as a vestige of past segregation. The Court remanded for further inquiry into the segregative effect of such duplication and the feasibility of eliminating it. *Fordice*, 505 U.S. at 738-39.

253. For institutional characteristics other than educational program offerings, the remedy for continuing inequality will be less complex. For example, each of the segregationist states created a racially separate and unequal black land grant college in response to federal land grant legislation. *See* Kujovich, *supra* note 22, at 40-43. One of the prominent features of discrimination during the separate but equal era was the refusal to allocate to the black land grants any state or federal funding for extension activities. *Id.* at 54-60. To the extent that inequality in extension funding continues, it can easily be remedied by assigning black and white land grant colleges full extension responsibilities for different areas of the state and dividing the funding accordingly.

tics of the body ordering the remedy, judicially and administratively prescribed remedies may differ. Thus, administrative remedies under the statute need not coincide with judicial remedies under the Constitution.

When the Court in *Brown II* remanded the first desegregation cases for the development of remedial decrees, it briefly outlined the characteristics of the equitable remedial power that is the source of judicial authority to engage in the reform of public institutions found to be in violation of the Constitution:

> In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs.[254]

Practical flexibility and the reconciliation of the public interest and private needs seemed essential if the judiciary was to undertake the extraordinary remedial task of restructuring systems of public education. Intrusion of federal courts into the operation of public school systems required something more — and something less — than a simple, immediate, and absolute vindication of constitutional rights.

The attributes of equity and of the desegregation task make the remedial decision a complex and indeterminate one, the resolution of which is not determined by constitutional principle. The remedial decree is not the result of "some predetermined route from right to remedy like railroad tracks from Bombay to Simla,"[255] but involves compromises among competing interests, not all of which enjoy constitutional protection. The interests balanced against the "private needs" of the plaintiffs in a desegregation case include not only the public interest in the control of its schools and educational policy,[256] but also a wide range of private interests. Even the relatively circumscribed decision concerning the busing of elementary and secondary students requires that a trial judge consider not only the success of different busing plans in achieving desegregation, but also the effect that different plans may have on the educational process, the resources required to implement the plans, and the likely community response to the plan adopted. The judge's selection of a busing plan implicitly determines who will be bused and how far, who will attend neighbor-

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254. Brown v. Board of Educ., 349 U.S. 294, 300 (1955).

255. Robert D. Goldstein, *A* Swann *Song for Remedies: Equitable Relief in the Burger Court*, 13 HARV. C.R.-C.L. L. REV. 1, 56 (1978).

256. *See, e.g.*, Freeman v. Pitts, 503 U.S. 467, 489 (1992); Milliken v. Bradley, 433 U.S. 267, 280-81 (1977).

hood schools, who will be educated in fully desegregated schools, and who will remain in schools with some measure of racial identifiability.

A remedial decree in higher education also involves an implicit balancing of interests in deciding how to reform policies that are traceable to the *de jure* past and that foster continuing segregation. Modification of admissions standards, for example, not only affects the racial profile of different institutions but also determines which students, black and white, will receive the benefits of a state's investment in public higher education. The decision to close a college, or to merge it into another institution, affects the interests of students who attend the discontinued institution, the faculty and administrators who are employed there, its past graduates, and the larger community it serves. The selection of which institution to close or merge allocates the burdens and benefits of the remedy among different members of the plaintiff class and among third parties who are not represented when a court fashions the decree. Constitutional principle does not dictate how a district court should balance these interests and does not require a particular outcome of the balancing process.

Exercise of the judicial equity power to order desegregation remedies also involves the courts in a variety of educational policy decisions. This is particularly true in higher education cases. *Fordice* requires that constitutionally suspect policies and practices "be reformed to the extent practicable and consistent with sound educational practices."[257] The question of what is practicable or educationally sound is not answered by the application of constitutional standards. Nor is there any single answer for the various policies and practices of a higher education system. The modification of admissions standards requires a determination as to what criteria best predict student success in higher education and a judgment as to the purpose of higher education or of particular institutions within a system of colleges and universities. To the extent that a desegregation decree modifies the missions of black and white institutions,[258] a district court's remedial decision will involve it in the most fundamental and far-reaching aspects of higher education policy. Mission classification is a means for state-

257. *Fordice*, 505 U.S. at 729.

258. *Fordice* found that the current mission designation of Mississippi's black and white colleges "have as their antecedents the policies enacted to perpetuate racial separation during the *de jure* segregated regime" and directed the district court to inquire on remand "whether it would be practicable and consistent with sound educational practices" to modify the mission assignments so as to eliminate any continuing segregative effects. *Id.* at 740-41.

wide planning in higher education. By determining the role and scope of each institution in a higher education system, mission designations involve decisions about the distribution of educational programs, facilities, and faculty resources, as well as the allocation of limited public funds.[259] These determinations are quintessentially ones of educational policy and politics.[260] Constitutional principle requires that some remedy be afforded, but does not determine the particular remedial choices.

In resolving the complex issues attendant upon an equitable decree, a trial court enjoys a substantial measure of discretion.[261] Because there is not a constitutionally compelled resolution of the remedial issues, the trial judge devises the remedy based on a balancing of the public and private interests involved and consideration of the educational policy issues presented. In exercising their discretion, district judges must assume the roles of "constitutional exegetes, political power brokers, and educational experts."[262] The remedial decision is "constructed not through principled elaboration but in the exercise of prudence and policy."[263]

The nature of an equitable remedy in a higher education desegregation case suggests that the judiciary is not the best source of remedial authority and should not be the exclusive source. The courts' acknowledged lack of expertise in matters of educational

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259. *See* Ayers v Allain, 674 F. Supp. at 1539.

260. The character of the decisions that must be made by judges in fashioning a higher education desegregation remedy is evident in the ruling of the Mississippi district court on the allocation of resources between the black and white land grant institutions in Mississippi. The court found that the state had engaged in a consistent and continuing pattern of denying funds to the black land grant college, Ayers v. Fordice, 879 F. Supp. at 1463-64, thereby making it "impossible for it to develop into a full-fledged land grant institution," *id.* at 1464. The court refused, however, to order a redistribution of land grant funds for research and extension work based, in part, on its judgment that it would be inefficient and educationally unsound to fund those activities at two different colleges. *Id.* at 1465-66.

261. *See, e.g., Freeman*, 503 U.S. at 487 (reaffirming discretion of district courts under traditional equitable principles in desegregation cases). Appellate review of a desegregation remedy normally functions to determine whether there has been an abuse of discretion, not to enforce a uniform and predetermined remedial approach. Wright v. Council of City of Emporia, 407 U.S. 451, 470-71 (1972); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 28 (1971). *See* Lemon v. Kurtzman, 411 U.S. 192, 200 (1973) ("In shaping equity decrees, the trial court is vested with broad discretionary power; appellate review is correspondingly narrow."). In *Fordice*, Justice Scalia was sharply critical of what he perceived to be the "virtually standardless discretion conferred upon district judges" which would "permit them to do pretty much what they please." *Fordice*, 505 U.S. at 762. (Scalia, J., concurring in part and dissenting in part).

262. David L. Kirp, *Legalism & Politics in School Desegregation*, 1981 WISC. L. REV. 924, 933.

263. PETER H. SCHUCK, SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS 28 (1983).

policy and judicial concern about political accountability in educational decisions[264] encourages remedial restraint and deference to the policy decisions of the defendants — state educational authorities. While that restraint and deference may be a necessary concomitant to the judicial remedial power, it can also impede achievement of a complete and effective remedy. Faced with conflicting opinions from expert witnesses, a federal judge may hesitate to reject the educational policy judgments made through a state's political and administrative processes. Similarly, a judge may conclude that a remedial measure, although effective in eliminating the vestiges of discrimination, is not practicable in the context of the judicial equity power.[265]

To the extent that a court does venture into the realm of educational policy, its remedial decrees will more closely resemble administrative orders than traditional judicial remedies.[266] Yet courts lack the institutional capabilities of administrative agencies. A court is dependent upon parties in an adversarial relationship, the context of a particular case, and the limitations of the rules of evidence to develop the factual basis for a remedy. The judicial process functions best for the determination of historical, adjudicative facts and not for the general or legislative fact-finding that forms

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264. *Freeman*, 503 U.S. at 489-90; *Bakke*, 438 U.S. at 265, 404 (Opinion of Blackmun, J.); San Antonio Sch. Dist. v. Rodriguez, 411 U.S. 1, 42-43 (1973); Milliken v Bradley, 418 U.S. 717, 743-44 (1974); Epperson v. Arkansas, 393 U.S. 97, 104 (1968).

265. A court may accept an incomplete remedy for the constitutional violation because of its hesitation to intrude on competing values and interests or its inability to undertake the structural reform necessary for a complete remedy. "The more narrowly the court defines successful implementation [of a desegregation remedy], the more possible is its achievement: thus, the temptation to convert implementation of a systemic policy change into a matter of compliance with a narrow judicial role." Kirp, *supra* note 262, at 935. In *Fordice*, the Court seems to have given into that temptation. By rejecting *Green*'s remedial goal of "a system without a 'white' school and a 'Negro' school, but just schools," Green v. County Sch. Bd., 391 U.S. 430, 442 (1968), the Court avoided the complex remedial task of desegregating colleges and universities and substituted the more modest requirement of modifying some of the state's policies that foster continuing segregation. *Fordice*, 505 U.S. at 728. In the view of some commentators, courts should more candidly acknowledge the limits of the judicial remedial power and leave full vindication of the underlying right to remedial action by the other branches of government. Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 606 (1983); Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1221, 1227 (1978). Administrative enforcement of Title VI provides just such an opportunity for a more effective higher education remedy than can be afforded by a court.

266. The administrative characteristics of complex judicial remedies are not confined to higher education desegregation but appear in a variety of contexts involving institutional remedies or public law injunctions. *See* Schuck, *supra* note 263, at 151-53; William A. Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635, 644 (1982); Abram Chayes, *The Supreme Court, 1981 Term—Forward: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 56 (1982).

the basis for educational and other policy decisions that are incident to the formulation of an equitable remedy.[267] Moreover, because the parties do not represent all constituencies affected by a remedy, the remedial options presented by the parties may neglect legitimate, but not constitutionally protected, interests.[268] The court's insulation from interest groups and other political forces further encourages simplification of the remedial issues and creates a "danger of fostering reductionist solutions."[269]

An administrative agency developing remedies for discrimination under Title VI is not restricted by the institutional limitations of the judiciary.[270] Administrative processes are characterized by a flexibility lacking in judicial decisionmaking. Because it has the authority to engage in Title VI rulemaking, as well as adjudication, an agency's remedial inquiry is not limited by the case-specific adversarial process. A rulemaking proceeding permits broader participation in the development of remedial principles and the remedial options presented to the agency are not limited to those offered by plaintiffs, defendants, or their witnesses. Unlike judges, who, for the most part, are generalists rather than specialists in a particular policy area,[271] an administrative agency employs a specialized staff which preserves the agency's institutional experience and expertise.

An agency also enjoys capabilities for information gathering that are superior to those of the judiciary. It can consult sources of information beyond the parties and the experts they offer. In a rulemaking proceeding, an agency can draw upon the experience and knowledge of educators, academic administrators, and others without regard to the restrictions of the rules of evidence or other constraints of the judicial process. The agency can conduct its own studies, employ independent consultants, and receive information from other public and private organizations.[272] Administrative fact-finding processes are thus better adapted to the exploration of general, legislative facts and to a full examination of all facets of the complex policy issues raised by desegregation remedies in higher education.

Because its Title VI enforcement powers are national in scope,

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267. DONALD L. HOROWITZ, THE COURTS AND SOCIAL POLICY 45-51 (1977).

268. Gewirtz, *supra* note 265, at 604; Fletcher, *supra* note 266, at 658.

269. HOROWITZ, *supra* note 267, at 23.

270. *See* Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 188 (1941) (attainment of national policy through expert administration not confined within narrow judicial canons for equitable relief).

271. HOROWITZ, *supra* note 267, at 25-26, 30-31.

272. Mark G. Yudof, *Equal Educational Opportunity and the Courts*, 51 TEX. L. REV. 411, 413 (1973).

a federal agency can develop more comprehensive and consistent solutions to the problems raised by higher education desegregation remedies. In a single rulemaking proceeding, or in a less formal context, an agency can bring together higher education officials from the formerly *de jure* segregated states for an exchange of views on the successes and failures of past desegregation efforts. Such consultations can assist an agency in determining which remedial techniques have little likelihood of success and which are worthy of duplication in more than one state. In generally applicable regulations incorporating remedial requirements, an agency could ensure consistency in the remedial obligations imposed on different state systems of higher education while at the same time retain the flexibility to take account of each system's unique characteristics.

In addition, an agency, unlike a district court, can better inform itself about, and develop remedial solutions to, impediments to desegregation that cross state lines and that influence more than one system of higher education. For example, the severe national shortage of black academics with advanced degrees[273] prevents faculty desegregation at white public colleges which, in turn, impedes student desegregation at those institutions.[274] The district court in *Fordice* found that "Mississippi, together with all prior *de jure* segregated states, has to some degree affected the qualified pool of black applicants for faculty positions,"[275] but nevertheless concluded that the state's white institutions could not be held responsible for the general shortage of black faculty.[276] Consequently, the court adopted no remedial measures directed to faculty desegregation. A federal agency with a broader enforcement jurisdiction than that of a district court might adopt comprehensive solutions to the problem of faculty desegregation. It could, for example, develop techniques for interstate cooperation in countering the effects that past discrimination has on the pool of black academics. This might include multi-state agreements that expand existing programs in which white public colleges provide funding for the advanced education of black students in exchange for a commitment to teach at the funding institution upon graduation.[277] Such agreements could influence the career choices of black students by providing them with a broader range of institutional

273. *See* SOUTHERN EDUCATION FOUNDATION, *supra* note 92, at 39-41; Ayers v. Fordice, 879 F. Supp. at 1461.

274. *See* Ayers v. Fordice, 879 F. Supp. at 1462-63, 1471.

275. *Id.* at 1462 (emphasis omitted).

276. *Id.* at 1463.

277. *See id.* at 1462.

choices in pursuing advanced degrees and opportunities in more than one state for employment at a white public college after graduation. A regulatory regime of Title VI remedies that recognizes not only the desegregative effect that results from the hiring of a black faculty member at a white public college, but also the contributions of the states providing the funding and the educational opportunity could induce more progress toward reducing the black faculty shortage than the current state-by-state approach. A federal agency could encourage similar interstate cooperation in the exchange of faculty between black and white public colleges.

The statutory framework for Title VI enforcement establishes an additional distinction between the judiciary's equitable remedial power and administrative remedial power under the statute. Section 602 requires presidential approval of regulations issued to enforce section 601's prohibition against discrimination. Moreover, agency decisions to terminate federal funding, made after an opportunity for an administrative hearing, do not become effective until the agency has filed a written report on the grounds for its action with the relevant committees of the House and Senate.[278] Consequently, administrative creation and enforcement of remedies for desegregation in higher education have an element of political accountability and embody a political consensus that are absent from the remedial orders of a federal district judge. While the insulation from political accountability that characterizes the federal judiciary is an important element of judicial legitimacy in the elaboration of constitutional rights, it is much less of an asset when a court formulates an equitable remedy for the reform of social institutions.[279] The decision, for example, of which higher education remedial measures are practicable or educationally sound, does not call for the principled elaboration of legal standards, but for determinations of politics and policy — determinations more suitable for an administrative agency than a court.[280]

Because of the political accountability and broad participation in rulemaking that characterize the Title VI regulatory process, an agency is more likely than a court to consider and take account of the wide variety of interests that are not constitutionally pro-

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278. 42 U.S.C. § 2000d-1 (1988). The committees to which the required report must be submitted are those "having legislative jurisdiction over the program or activity involved." *Id.*

279. *See* SCHUCK, *supra* note 263, at 178 ("What a court can legitimately and effectively do in reforming social structure is limited by the same functional attributes of the judicial process that legitimate the judicial derivation of substantive rights.").

280. *See* Chevron U.S.A. v. National Resources Defense Council, 467 U.S. 837, 865-66 (1984) (stating that policy judgments are to be made by administrative agencies, not courts).

tected, but that are nevertheless affected by a higher education remedy. Consequently, an agency may strike a different balance among the affected interests and make policy choices different from those of a court acting within the confines of the equitable remedial power, the judicial process, and an appreciation for the limits of judicial power. Where a district court might give substantial weight to a policy favoring selective admissions standards, an administrative agency may weigh more heavily a policy protecting the educational opportunities of black students. Neither policy choice is constitutionally compelled; both involve an exercise of remedial discretion in balancing the affected interests. For the broad range of remedial choices that are not determined by constitutional or other legal principles, the choices made by an administrative agency are as legitimate as those made by a district court.[281]

Moreover, a federal agency developing desegregation remedies has the flexibility to include in its remedial calculus other policies adopted by Congress and the Executive Branch that bear on the choice of remedy even if they do not compel a particular desegregation remedy. For example, Congress has found that "Black colleges and universities have contributed significantly to the effort to attain equal opportunity through postsecondary education for Black, low-income, and educationally disadvantaged Americans."[282] Thus, it has adopted the policy of enhancing those institutions[283] "to ensure their continuation and participation in fulfilling the Federal mission of equality of educational opportunity."[284] Similarly, Presidents of both political parties have issued Executive Orders calling for the strengthening of black colleges through increased awards of federal funds.[285] These legislative and executive policies are directly relevant to the question of whether institutional closure should be adopted as a desegregation remedy and, if so, whether black colleges should be selected for extinction.

The agreement of the political branches of the federal govern-

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281. *See* Kirp, *supra* note 262, at 957 ("There exists no single right answer to questions of educational policy. Choosing a 'best' solution is largely a matter of strategy, and there is no particular reason to think that the courts have some special competence in this realm."); *see also* Cannon v. University of Chicago, 441 U.S. 677, 747-49 (1979) (Powell, J., dissenting) (favoring administrative, rather than judicial, intrusion into college admissions standards).

282. 20 U.S.C. § 1060(1) (1988).

283. 20 U.S.C. §§ 1060(3) - 1060(4).

284. 20 U.S.C. § 1060(3).

285. Exec. Order No. 12,232, 3. C.F.R. 274 (1980) (President Carter); Exec. Order No. 12,320, 3 C.F.R. 176 (1981), *reprinted in* 20 U.S.C. § 1051 (Supp. V 1976) (President Reagan); Exec. Order No. 12,677, 3 C.F.R. 22 (1989), *reprinted in* 20 U.S.C. § 1060 (Supp. II 1990) (President Bush); Exec. Order No. 12,876, 3 C.F.R. 671 (1993), *reprinted in* 20 U.S.C. § 1060 (Supp. V 1988) (President Clinton).

ment that black colleges should be preserved and strengthened because of their contribution to equal educational opportunity, in combination with the distinctive characteristics of the administrative process, would influence other remedial choices made by a federal administrative agency. The district court in *Fordice*, for example, declined to order enhancement of Mississippi Valley State University because the evidence in the case did "not persuade the court that merely adding programs and increasing budgets [would] desegregate" a black institution.[286] With its broader information-gathering powers and its consideration of desegregation remedies in more than one state, an administrative agency might reach a different conclusion about the desegregative potential of enhancing black colleges. Moreover, in light of federal policies recognizing the role of black colleges and favoring their preservation, an agency's judgment concerning the use of institutional enhancement would be informed not only by the likelihood of success, but also the consequences of failure. The remedial choice made by the district court in *Fordice* leaves black students in an institution that continues to suffer the effects of past discrimination. An administrative decision to use the remedial technique of black college enhancement could produce some measure of desegregation and at the same time ensure that black students are not left to the fate of a separate and unequal education.

The more flexible administrative process is also better suited to the monitoring of desegregation remedies over the extended period during which progress must be measured. An administrative agency can initiate investigations, conduct periodic on-site inspections, and evaluate the consequences of its remedial decisions. Based on an agency's monitoring of all states over which it has enforcement jurisdiction, the agency can modify its remedial approach in response to changed circumstances or new information on the impact of its desegregation remedies. Because it has the power to initiate action, an agency's monitoring and continuing enforcement activities do not depend upon the resources or litigation strategy of the parties to a lawsuit.

Finally, administrative remedies under Title VI are, in one important respect, less intrusive than judicial orders. The administrative enforcement authority of Title VI depends upon the receipt of federal funding by a state system of higher education.[287] State educational authorities thus have a measure of choice in their compli-

286. Ayers v. Fordice, 879 F. Supp. at 1491.

287. Section 601 of Title VI prohibits discrimination only in a "program or activity" receiving federal funding. 42 U.S.C. § 2000d (1988). Under section 606, the term "program or activity" includes a public system of higher education. 42 U.S.C. § 2000d-4a(2)(A) (1988).

ance with Title VI remedies that is not available for judicially compelled, constitutional remedies. A state system can avoid the future application of conditions imposed under Title VI by refusing federal funding.[288] If a state higher education system withdraws from federal funding of its programs, its remedial obligation is limited to that imposed by a court under the Constitution.

Because the institutional characteristics that limit the judiciary in developing complex remedies for pervasive discrimination do not apply to administrative agencies, the administrative remedial power should not be confined to that exercised by the courts. While *Fordice* may determine the limited reach of the judiciary's equitable remedial power under the Constitution, it does not define the scope of administrative remedial authority under Title VI. The statute itself supports an administrative remedial authority distinct from the judicial remedial power. Congress vested primary authority to enforce the statute in federal agencies, and not in the courts. Thus, section 602 directs federal agencies to issue regulations that will effectuate the discrimination prohibition of section 601.[289] It further authorizes those agencies to secure compliance with any requirement adopted pursuant to section 602.[290] In the Title VI enforcement scheme, agencies have been given broad discretionary authority while the courts have been assigned the primary role of reviewing administrative actions. A substantial measure of deference normally applies to judicial review of actions by administrative agencies, and nothing in Title VI suggests a deviation from this standard practice.[291]

Moreover, the judicial deference shown to decisions of administrative agencies is "particularly important when a court is asked to review an agency's fashioning of discretionary relief. In this area, agency determinations frequently rest upon a complex and hard-to-review mix of considerations."[292] Where, as in Title VI, Congress has vested in an agency the authority to select the means of achieving statutory policy, judicial review is conducted in accord with the "fundamental principle" that " 'the relation of remedy to policy is peculiarly a matter for administrative competence.' "[293]

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288. *See* Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 596-99 (1983).

289. 42 U.S.C. § 2000d-1 (1988).

290. *Id.*

291. Section 603 provides for judicial review of agency action under Title VI "as may otherwise be provided by law for similar action taken by such department or agency on other grounds." 42 U.S.C. § 2000d-2 (1988). The statute's only exception to the normal procedures for judicial review is its express provision for review of fund termination decisions, even if such decisions would not be reviewable under the Administrative Procedure Act. *Id.*

292. Consolo v. Federal Maritime Comm'n, 383 U.S. 607, 620-21 (1966).

293. Butz v. Glover Livestock Comm'n Co., 411 U.S. 182, 185 (1973) (quoting American

Thus, in reviewing administrative remedies, a court "must guard against the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy."[294] The agency "has wide latitude for judgment and the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist."[295]

V. CONCLUSION

Forty years after *Brown*, the persistence of segregation and inequality in public higher education presents a continuing challenge to this Nation's promise of racial equality. Fulfillment of that promise is not, and should not be, within the exclusive domain of the Judicial Branch. Confronted with the formidable task of purging the effects of institutionalized discrimination from public systems of higher education, the *Fordice* Court defined a modest role for the judiciary. Rather than reforming the institutions that embody and perpetuate the harms of the past, the Supreme Court elected to remedy only a carefully circumscribed set of policies and practices. In place of a systemic conception of desegregation, *Fordice* substituted a remedial goal that accepts a continuing state of racial duality in colleges and universities. As much as any case decided in recent years, *Fordice* exemplifies the limits of the judicial power in affording a complete and effective remedy for more than a century of the most extreme forms of racial discrimination.

The limits of the judicial power, however, do not determine the limits of national power. In Title VI of the Civil Rights Act of 1964, Congress exercised its full authority under the Spending Clause to ensure that the revenues collected from all the people are not used to the disadvantage of some of the people. Through a broad and unqualified prohibition against racial discrimination in federally-funded programs, Congress provided an added measure of protection against the perpetuation of the legacy of inequality. And in delegating to federal agencies the power to effectuate the national policy expressed in Title VI, Congress enlisted the power of the Executive Branch to ensure that judicial remedies would not be the only remedies for racial discrimination.

Power & Light Co. v. SEC, 329 U.S. 90, 112 (1946)).

294. Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 194 (1941).

295. Jacob Siegel Co. v. FTC, 327 U.S. 608, 613 (1946). The principle of judicial deference applies as much, if not more, in the context of rulemaking. *See* Rust v. Sullivan, 500 U.S. 173, 184-91 (1991) (Department of Health and Human Services regulations); Chevron U.S.A. v. National Resources Defense Council, 467 U.S. 837, 842-45 (1984) (Environmental Protection Agency regulations); Mourning v. Family Publications Serv., Inc., 411 U.S. 356, 371-72 (1973) (Federal Reserve Board regulation).

The existence of two partially overlapping sources of remedial power in two different branches of the federal government presents the issue of how the two powers can be reconciled in practice. The issue is not a novel one and there is precedent for its resolution. In elementary and secondary school cases, the lower courts recognized that desegregation remedies implicated a variety of policy and administrative questions that were better resolved by the agencies of the Executive Branch than the judiciary.[296] While retaining the ultimate authority to determine what constituted an effective remedy for constitutional violations,[297] they adopted the practice of requiring substantial reliance on Title VI desegregation guidelines issued by the Department of Health, Education and Welfare.[298] Subsequently, and to comply with *Green*'s mandate for prompt action,[299] cooperation between the Judicial and Executive Branches was furthered by court orders that school districts first submit their desegregation plans to HEW for advice, recommendations, and review — a practice found acceptable by the Supreme Court.[300]

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296. *See, e.g.*, United States v. Jefferson County Bd. of Educ., 372 F.2d 836, 852-61 (5th Cir. 1966); Price v. Dennison Indep. Sch. Dist. Bd. of Educ., 348 F.2d 1010, 1013-14 (5th Cir. 1965); Whittenberg v. Greenville County Sch. Dist., 298 F. Supp. 784, 790 (D.S.C. 1969).

297. *E.g.*, Singleton v. Jackson Mun. Separate Sch. Dist., 355 F.2d 865, 869 (5th Cir. 1966); Kemp v. Beasley, 352 F.2d 14, 19 (8th Cir. 1965).

298. *Jefferson County Bd. of Educ.*, 372 F.2d at 861 (discussing the policy of "encouraging the maximum legally permissible correlation between judicial standards for school desegregation and HEW Guidelines."); Singleton Mun. Separate Sch. Dist. v. Jackson Sch. Dist., 348 F.2d 729 (5th Cir. 1965) (noting the "great weight" attached to administrative standards); *Kemp*, 352 F.2d at 18 (agreeing that administrative standards "must be heavily relied upon to determine what desegregation plans effectively eliminate discrimination"). HEW has also issued guidelines for desegregation in higher education. Revised Criteria Specifying the Ingredients of Acceptable Plans to Desegregate State Systems of Public Higher Education, 43 Fed. Reg. 6658 (1978) [hereinafter Revised Criteria]. The Department of Education, successor to HEW's enforcement responsibilities with regard to education, recently reaffirmed the policies contained in the Revised Criteria. Notice of Application of Supreme Court Decision, 59 Fed. Reg. 4271, 4272 (1994). The federal courts, however, have not looked to the Revised Criteria as the benchmark of an effective remedy. In the *Louisiana* case, the federal district court concluded that the Revised Criteria were intended to apply only to voluntary compliance and not to litigation. United States v. Louisiana, 718 F. Supp. 525, 529 (E.D. La. 1989). The first district judge to consider the *Alabama* case ordered the defendants to submit a remedial plan based on the Revised Criteria, United States v. Alabama, 628 F. Supp. 1137, 1173 (N.D. Ala. 1985), but the court's finding of liability was later reversed and remanded, 828 F.2d 1532 (11th Cir. 1987). The district judge who was subsequently assigned to the case did not rely on the Revised Criteria in developing a remedy. Knight v. Alabama, 787 F. Supp. 1030, 1377-82 (N.D. Ala. 1991).

299. Green v. County Sch. Bd., 391 U.S. 430, 439 (1967).

300. Alexander v. Board of Educ., 396 U.S. 19, 21 (1969); Davis v. Board of Sch. Commn'rs, 414 F.2d 609, 610-11 (5th Cir. 1969); United States v. Choctaw County Bd. of Educ., 417 F.2d 838, 842-43 (5th Cir. 1969); Conley v. Lake Charles Sch. Bd., 303 F. Supp.

The Court has developed a similar approach to reconciling the potentially conflicting administrative and judicial roles in voting rights cases. Under section five of the Voting Rights Act of 1965, certain changes in voting procedures, including reapportionments, are not effective until submitted to the United States Attorney General for an administrative determination that the change does not violate the Act.[301] In cases in which a federal court has found an existing apportionment to be unconstitutional, the requirement of administrative "preclearance" of a reapportionment plan could conflict with a district court's power to adopt a remedy for the constitutional violation. The Supreme Court resolved this potential conflict by stipulating the sequence of administrative and judicial determinations: voting changes must be submitted to the Attorney General before a judicial determination on the constitutionality of the change.[302] While the voting rights context differs from that of Title VI,[303] the same sequence of administrative and judicial action could be effected by a court in the exercise of its remedial discretion.[304]

394, 399 (W.D. La. 1969), *aff'd in part and rev'd in part*, 434 F.2d 35 (5th Cir. 1970); *Whittenberg*, 298 F. Supp at 790-91.

301. 42 U.S.C. § 1973c (1988). The Act also provides for a declaratory judgment action to secure judicial approval of a voting change, as an alternative to submission to the Attorney General. *Id.* The preclearance requirement of section five applies to reapportionments. Georgia v. United States, 411 U.S. 526, 533-35 (1973).

302. McDaniel v. Sanchez, 452 U.S. 130 (1981). *McDaniel* drew a distinction between reapportionment plans submitted for a court's approval after a judicial determination that the existing apportionment was unconstitutional and plans actually fashioned by a court. *See id.* at 146-53. The Court held that Congress did not intend that the latter be submitted to the Attorney General for § 5 preclearance. *Id.* at 148-49. Thus, a voting change devised by a court is essentially deemed to be compliance with § 5. Congress has imposed a similar limitation on administrative enforcement of Title VI by stipulating that compliance with a desegregation order of a federal court "shall be deemed compliance with [Title VI], insofar as the matters covered in the order or judgment are concerned." 42 U.S.C. § 2000d-5 (1988). This provision, however, is limited to desegregation by a "local education agency" and does not cover state systems of higher education or other state and local governmental units. *See id.; see also* 42 U.S.C. § 2000d-4a(2) (1988) (distinguishing "local education agency" and "public system of higher education").

303. The most important distinction is that Title VI does not require an administrative determination of compliance with the statute prior to a judicial decision on the constitutionality of a desegregation plan. Thus, referral for administrative action on a plan that is before a court would depend on the exercise of the court's discretion, as was done in many of the elementary and secondary cases.

304. The proper sequence of administrative and judicial action is particularly important in the absence of Title VI regulations defining the scope of the statutory violation. When the statutory and constitutional standards of violation are coextensive, administrative ordering of a remedy after a court has fashioned a constitutional remedy would, in effect, constitute impermissible agency review of judicial action. *See* Lee v. Macon County Bd. of Educ., 270 F. Supp. 859, 866 (M.D. Ala. 1967) ("There can be no administrative supervision

An effective relationship between courts and executive agencies in achieving the constitutional and statutory goal of racial equality in educational opportunity depends upon the sensitivity of each Branch to the powers and institutional capabilities of the other. It also requires that federal agencies not abdicate their responsibility to shape and enforce the national policy prohibiting discrimination in federally funded programs, a responsibility too frequently neglected in the past.[305] The time has come for the Executive Branch to exercise the full measure of its enforcement powers under Title VI. This requires a regulatory regime, approved by the President, that defines the scope and nature of unlawful discrimination in segregated systems of higher education and that establishes the remedial steps such systems must undertake to maintain their eligibility for federal funding. As *Fordice* makes all too clear, there is no viable alternative.

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or review of a judicial decree."). If the Title VI violation has been extended by regulations, then agency enforcement action after a court has ordered a constitutional remedy should not be barred, at least to the extent that the administrative remedy supplements the judicial remedy rather than displacing or conflicting with it. *See* Harper v. Levi, 520 F.2d 53, 69-73 (D.C. Cir. 1975) (stating that Attorney General's objection to voting change previously held constitutional by a court does not necessarily conflict with judicial decision in light of difference between Voting Rights Act and constitutional standards of violation).

305. In 1973, a federal district court found that the Department of Health, Education and Welfare had neglected its responsibility to enforce Title VI. *See* Adams v. Richardson, 351 F. Supp. 636 (D.D.C. 1973). Over the next two decades, the district court issued a variety of orders designed to ensure that HEW and the Department of Education carried out the policies established in Title VI and related statutes. For a history of this lengthy litigation, see Women's Equity Action League v. Cavazos, 879 F.2d 880, 881-84 (D.C. Cir. 1989), *aff'd*, 906 F.2d 742 (D.C. Cir. 1990); *see also* Adams v. Bell, 711 F.2d 161, 163-64 (D.C. Cir. 1983). Acting under the constraints of the orders issued in the *Adams* cases, HEW and the Department of Education found that several state systems of higher education were not in compliance with Title VI. However, most of these cases were settled under desegregation plans that either did not meet the administrative remedial guidelines or that were not fully implemented. *See, e.g.*, Adams v. Bell, 711 F.2d 161, 204-09 (D.C. Cir. 1983) (Wright, J., dissenting) (North Carolina plan did not comply with remedial guidelines); Adams v. Bennett, 675 F. Supp. 668, 674 (D.D.C. 1987) (ordering Department of Education to require that additional plans be submitted from four defaulting states). After the decision in *Fordice*, the Department of Education reaffirmed its Title VI enforcement authority, but adopted a passive posture by promising to "take appropriate action" if it received information indicating that a state has not complied with the Department's higher education desegregation policies. Notice of Application of Supreme Court Decision, 59 Fed. Reg. 4271, 4272 (1994).