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"Affirmative Action" and Equal Protection in Higher Education

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SUMMARY

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"Affirmative Action" and Equal Protection in Higher Education

When federal courts have analyzed and addressed "affirmative action" in higher education, they have done so in two distinct but related senses, both under the Fourteenth Amendment's guarantee of "equal protection."

The first has its roots in the original sense of "affirmative action:" the *mandatory* use of race by public education systems to eliminate the remnants of state-imposed racial segregation. Because state-sanctioned race segregation in public education violates the Fourteenth Amendment's Equal Protection Clause, in certain cases involving a state's formerly *de jure* segregated public university system, a state's consideration of race in its higher education policies and practices may be an *affirmative obligation.* As the U.S. Supreme Court explained in its consequential 1992 decision *United States v. Fordice*, equal protection may *require* states that formerly maintained *de jure* segregated university systems to consider race for the purpose of eliminating all vestiges of their prior "dual" systems. Drawing upon its precedent addressing racially segregated public schools in the K-12 context, the Court established a three-part legal standard in *Fordice* for evaluating the sufficiency and effectiveness of a state's efforts in "dismantl[ing]" its formerly *de jure* segregated public university system. To that remedial end, mandatory race-conscious measures—in this *de jure* context—are not limited to admissions. Instead, remedies may also address policies and practices relating to academic programs, institutional missions, funding, and other aspects of public university operations.

Outside this *de jure* context, "affirmative action" has come to refer to a different category of race-conscious policies. These involve what the Court at one time called the "benign" use of racial classifications—voluntary measures designed not to remedy past *de jure* discrimination, but to help racial minorities overcome the effects of their earlier exclusion. And for institutions of higher education, the Court has addressed one type of affirmative action policy in particular: the use of race as a factor in admissions decisions, a practice now widely observed by both public and private colleges and universities.

The federal courts have come to subject these voluntary race-conscious policies—"affirmative action" in its perhaps more familiar sense—to a particularly searching form of review known as strict scrutiny. And even though this heightened judicial scrutiny has long been regarded as strict in theory but fatal in fact, the Court's review of race-conscious admissions policies in higher education has proved a notable exception, with the Court having twice upheld universities' use of race as one of many factors considered when assembling their incoming classes. The Court has long grappled with this seeming tension—between the strictness of its scrutiny and its approval of race-conscious admissions policies—beginning with its landmark 1978 decision in *Regents of the University of California v. Bakke* through its 2016 decision in *Fisher v. University of Texas*.

Though the Equal Protection Clause generally concerns public universities and their constitutional obligations under the Fourteenth Amendment, federal statutory law also plays a role in ensuring equal protection in higher education. To that end, Title VI of the Civil Rights Act of 1964 prohibits recipients of federal funding—including private colleges and universities—from, at a minimum, discriminating against students and applicants in a manner that would violate the Equal Protection Clause. Federal agencies, including the Departments of Justice and Education, investigate and administratively enforce institutions' compliance with Title VI.

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Introduction

The last several years have seen renewed debate over the role that race plays in higher education—a debate over "affirmative action." A high-profile lawsuit challenging Harvard University's consideration of race in admitting its incoming classes,[1] and the recent withdrawal of Obama Administration-era guidance addressing similar race-conscious policies,[2] have focused the debate on "affirmative action" in perhaps its more familiar sense: the *voluntary*[3] consideration of student applicants' race as a way of increasing the participation of racial minorities in higher education.[4] Meanwhile, a recent lawsuit involving Maryland's university system has brought renewed attention to "affirmative action" in its other, original sense: the *mandatory* use of race by public higher education systems to eliminate the remnants of state-imposed racial segregation.[5] This report addresses "affirmative action" in each of these two senses and discusses how the federal courts have analyzed them under the Fourteenth Amendment's guarantee of "equal protection."[6]

The report first considers "affirmative action" in its original sense: the *mandatory* race-conscious measures that the federal courts have imposed on *de jure* segregated public university systems. The Supreme Court has made clear that a state that had a segregated system of education must eliminate all "vestiges" of that system, including through expressly race-conscious remedies.[7] In its consequential 1992 decision *United States v. Fordice*,[8] the Court charted a three-step inquiry for assessing whether a state has fulfilled that constitutional obligation, examining whether a current policy is traceable to the *de jure* segregated system, has continued discriminatory effect, and can be modified or practicably eliminated consistent with sound educational policy.[9]

Outside this *de jure* context, "affirmative action" has come to refer to a different category of race-conscious policies. These involve what the Court once called the "benign" use of racial

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[1] *See, e.g.*, Nick Anderson, "Justice Department Criticizes Harvard Admissions in Case Alleging Bias against Asian Americans," WASH. POST (Aug. 30, 2018), https://www.washingtonpost.com/education/2018/08/30/justice-dept-criticizes-harvard-affirmative-action-case.

[2] *See* Press Release, U.S. Dep't of Justice, Office of Public Affairs, "Attorney General Jeff Sessions Rescinds 24 Guidance Documents" (July 3, 2018), https://www.justice.gov/opa/pr/attorney-general-jeff-sessions-rescinds-24-guidance-documents.

[3] As used in this report, a "voluntary" race-conscious measure is one adopted by an institution apart from any legal obligation to do so.

[4] 28 C.F.R. § 42.104(b)(6)(ii) (Department of Justice regulation outlining a voluntary form of "affirmative action" permissible under Title VI of the Civil Rights Act of 1964).

[5] *See, e.g.*, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 22, 28 (1971) (stating that the remedy for state-enforced separation of the races is "to dismantle dual school systems" and approvingly discussing "affirmative action[s]" proper for achieving that end); *cf.* 28 C.F.R. § 42.104(b)(6)(i) (Department of Justice regulation providing, under Title VI of the Civil Rights Act of 1964, that "[i]n administering a program regarding which the recipient has previously discriminated against persons on the ground of race, color, or national origin, the recipient must take affirmative action to overcome the effects of prior discrimination").

[6] U.S. Const. amend. XIV, § 1 (providing that no state shall "deny to any person within its jurisdiction the equal protection of the laws"). This obligation applies with equal force, moreover, to the federal government. *See* Adarand Constructors, Inc. v. Peńa, 515 U.S. 200, 217 (1995) (noting that under Supreme Court case law "the equal protection obligations imposed by the Fifth and the Fourteenth Amendments [are] indistinguishable," so that "the standards for federal and state racial classifications [are] the same").

[7] United States v. Fordice, 505 U.S. 717, 727-28 (1992).

[8] 505 U.S. 717 (1992).

[9] *Id.* at 731.

classifications[10]—voluntary measures designed not directly to remedy past governmental discrimination, but to increase the representation of racial minorities previously excluded from various societal institutions.[11] And in the context of higher education the Court has addressed one type of policy in particular: the use of race as a factor in admissions decisions, a practice now observed by many public and private colleges and universities.

As this report explains, the federal courts have come to subject these voluntary "affirmative action" policies to a particularly searching form of review, known today as strict scrutiny. And they have so far upheld those policies under a single theory: that the educational benefits that flow from a diverse student body uniquely justify some consideration of race when deciding how to assemble an incoming class. To rely on that diversity rationale, however, the Court now requires universities to articulate in concrete and precise terms what their diversity-related goals are, and why they have chosen those goals in particular.[12] And even once those goals are established, a university must still show that its admissions policy achieves its diversity-related goals as precisely as possible, while ultimately "treat[ing] each applicant as an individual."[13]

Because both lines of cases discussed here have their roots in the Equal Protection Clause, this report focuses primarily on public universities, all of which are directly subject to constitutional requirements.[14] But those same requirements apply equally to private colleges and universities that receive federal funds pursuant to Title VI of the Civil Rights Act of 1964 (Title VI or the Act), which similarly prohibits recipients of federal dollars from discriminating on the basis of race.[15] This report concludes by discussing the role that Title VI plays in ensuring equal protection in higher education, both public and private, including several avenues for congressional action under the Act.

"Affirmative Action" as Affirmative Obligation: Dismantling *De Jure* Segregation

De Jure Segregation in Higher Ed and the Equal Protection Clause

Though government-sanctioned racial segregation in public education is commonly associated with primary and secondary schools, numerous states had also mandated or permitted racial segregation in institutions of higher education, including through the latter part of the 20th

[10] Metro Broad., Inc. v. FCC, 497 U.S. 547, 564-65 (1990) (distinguishing "benign race-conscious measures," such as voluntary affirmative action programs, from those that are "'remedial' in the sense of being designed to compensate victims of past governmental or societal discrimination").

[11] *See* 28 C.F.R. § 42.104(b)(6)(ii) (Department of Justice regulation characterizing affirmative action policies as measures designed "to overcome the effects of conditions which resulted in limiting participation by persons of a particular race").

[12] Fisher v. Univ. of Texas (*Fisher II*), 136 S. Ct. 2198, 2211 (2016).

[13] Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 318 (1978).

[14] These obligations apply with equal force, moreover, to the federal government. *See* Adarand Constructors, Inc. v. Peńa, 515 U.S. 200, 217 (1995) (noting that under Supreme Court case law "the equal protection obligations imposed by the Fifth and the Fourteenth Amendments [are] indistinguishable," so that "the standards for federal and state racial classifications [are] the same").

[15] 42 U.S.C. § 2000d (barring racial discrimination "under any program or activity receiving Federal financial assistance"); *see also* Alexander v. Sandoval, 532 U.S. 275, 281 (2001) ("tak[ing] as given" that Title VI "proscribes only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment") (quoting Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 287 (1978) (Powell, J., announcing judgment of the Court)).

century,[16] categorically excluding black students solely because of their race.[17] Though the Supreme Court held decades ago that state-sanctioned racial segregation in higher education violates the Equal Protection Clause,[18] such intentional segregation, or practices arising from formerly *de jure* segregated university systems and their discriminatory effects, may still persist.[19]

Addressing such circumstances, the Supreme Court has held the Equal Protection Clause to require states to eliminate all *vestiges* of their formerly *de jure* segregated public university systems that continue to have discriminatory effect.[20] As the Court concluded in *United States v. Fordice*, state actors "shall be adjudged in violation of the Constitution and Title VI [of the Civil Rights Act]" to the extent they have failed to satisfy this affirmative duty to dismantle a *de jure* segregated public university system.[21] A state actor therefore remains in violation of the Equal Protection Clause *today* if it maintains a policy or practice "traceable" to a formerly *de jure* segregated public university system that continues to foster racial segregation.[22] Where such a violation is shown, race-conscious measures are not only constitutionally permissible, but may be constitutionally required to remedy and eliminate such unconstitutional remnants.[23]

Segregated Colleges and Universities Before 1954

As in the K-12 context,[24] a number of states maintained racially segregated public university systems and denied black students admission to post-secondary schools—including colleges, law schools, and doctoral programs[25]—on the basis that these institutions educated white students

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[16] *See, e.g.*, *Fordice*, 505 U.S. at 722 (observing that Mississippi's segregated public university system "remained largely intact" through at least 1974).

[17] *See, e.g.*, Pearson v. Murray, 169 Md. 478, 590-91, 594 (1936) (addressing claim in which a black applicant to the state's law school met all standards for admission, but was denied admission "on the sole ground of his color" pursuant to the state's policy of segregating "the races for education"). *See also* Brown v. Board of Educ. of Topeka, Kan., 347 U.S. 483, 491-92 (1954) (explaining that in its cases preceding *Brown* concerning graduate school-level education, "inequality was found in that specific benefits enjoyed by white students were denied to Negro students of the same educational qualifications") (citing State of Missouri ex rel. Gaines v. Canada, 305 U.S. 337 (1938); Sipuel v. Bd. of Regents of Univ. of Okla., 332 U.S. 631 (1948); Sweatt v. Painter, 339 U.S. 629 (1950); and McLaurin v. Okla. State Regents for Higher Educ., 339 U.S. 637 (1950)).

[18] *Brown*, 347 U.S. at 495 (holding that racial segregation in "the field of public education" violates the Equal Protection Clause). *See also, e.g.*, *Fordice*, 505 U.S. at 727-28 (stating that if a state has not discharged its duty to dismantle a segregated public university system, "it remains in violation of the Fourteenth Amendment. *Brown v. Board of Education* and its progeny clearly mandate this observation.").

[19] For example, as of the date of this report, a case pending before the Fourth Circuit alleges that the State of Maryland continues to maintain a variety of policies and practices traceable to its formerly *de jure* segregated higher education system. *See* Coal. for Equity and Excellence in Md. Higher Educ., Inc., et al. v. Md. Higher Educ. Comm'n, No. 17-2451 (4th Cir.).

[20] United States v. Fordice, 505 U.S. 717, 727-28, 731 (1992).

[21] *Fordice*, 505 U.S. at 743.

[22] *See id*. at 731 (holding that a state has not satisfied its burden of proving that it has dismantled its prior system, if such policies are without sound educational justification and can be practicably eliminated).

[23] *See supra* section "The Affirmative Duty to Eliminate *De Jure* Segregation in Higher Education," pp. 6-11.

[24] *Compare* United States v. Montgomery Cty. Bd. Of Educ., 395 U.S. 225, 228 (1969) (discussing the intentional continuation of a racially segregated K-12 public school system in Alabama "in defiance of our repeated unanimous holdings that such a system violated the United States Constitution") *with* Knight v. Alabama, 14 F.3d 1534, 1538 (11th Cir. 1994) (discussing the state's denial of access to black persons to "college-level public higher education").

[25] *See, e.g.*, State of Missouri ex rel. Gaines v. Canada, 305 U.S. 337, 343, 349 (1938) (addressing a challenge to a state law school's refusal to admit a black student based on his race, though he was otherwise qualified for admission and there was no other law school in the state open to black students at the time; stating that "[b]y the operation of the laws of Missouri a privilege has been created for white law students which is denied to negroes by reason of their race.").

only. Prior to 1954—the year of the Supreme Court's landmark *Brown v. Board of Education* decision (*Brown I*)[26]—the Court had interpreted the Equal Protection Clause to permit state-sanctioned racially segregated public educational systems, provided that the separate schools for black students were substantially equal to those reserved for white students.[27]

For example, in its 1950 decision *Sweatt v. Painter*,[28] the Court addressed an equal protection claim raised by a black student challenging the University of Texas Law School's denial of his admission based on his race, pursuant to its white-only admissions policy.[29] At the time of the plaintiff's application in 1946, the state did not have a law school that admitted black students.[30] Denying the plaintiff's requested relief for admission, the state trial court instead granted additional time to Texas to create a law school for black students;[31] the state thereafter created a law school at the Texas State University for Negroes.[32] The Supreme Court, however, held that the law school—which, among other features, lacked accreditation[33]—did not offer an education "substantially equal" to that which the plaintiff would receive at the University of Texas Law School.[34] On that basis—the absence of a separate but equivalent legal education—the Court held that the Equal Protection Clause required the plaintiff's admission to the University of Texas Law School.[35]

A decisive turn in the Court's interpretation and application of the Equal Protection Clause, however, came by way of its 1954 decision in *Brown I*.[36] There, the Court held for the first time that race-based segregation "in the field of public education" violates the Equal Protection Clause.[37] The Court concluded that race-based segregation in public schools deprives minority students of equal educational opportunities,[38] and observed that segregation commonly denotes

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See also, e.g., McLaurin v. Okla. State Regents for Higher Educ., 339 U.S. 637, 638-40 (1950) (discussing the denial of plaintiff's admission to a doctoral program "solely because of his race," and his eventual admission to the white-only institution in the absence of a doctoral program at the black-only institutions in the state's segregated system).

[26] 347 U.S. 483, 495 (1954) (*Brown I*) (holding that racial segregation in "the field of public education" violates the Equal Protection Clause).

[27] *See, e.g.*, *Missouri*, 305 U.S. at 344 (discussing the permissibility of a state's compliance with the Equal Protection Clause by providing equal facilities to black students and white students in separate schools) (citing Plessy v. Ferguson, 163 U.S. 537, 544 (1896) and other cases). *See, e.g.*, *Plessy*, 163 U.S. at 548 (stating that "we think the enforced separation of the races, as applied to the internal commerce of the state, neither abridges the privileges or immunities of the colored man … nor denies him the equal protection of the laws").

[28] 339 U.S. 629 (1950).

[29] *Id*. at 631 (stating that the petitioner's "application was rejected solely because he is a Negro").

[30] *Id*.

[31] *Id*. at 632.

[32] *Id*. at 633 (noting that the state reported the opening of a law school at the Texas State University for Negroes after the trial in that case).

[33] *Id*. (describing the law school as "apparently on the road to full accreditation").

[34] *Id*. at 633-34.

[35] *Id*. at 635-36.

[36] 347 U.S. 483 (1954). *See also* Brown v. Board of Educ. of Topeka, Kan., 349 U.S. 294 (1955) (*Brown II*).

[37] Brown v. Board of Educ. of Topeka, Kan., 347 U.S. 483, 494-95 (1954) ("We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment."). *See also id*. (rejecting "[a]ny language in *Plessy v. Ferguson* contrary to this finding").

[38] *Id*. at 493.

inferiority of the minority group.[39] Segregated educational facilities, the Court concluded, are "inherently unequal."[40]

The Court's holding in *Brown I*[41] applies with equal force to public *higher* education—that is, to public colleges and universities[42]—as does the Court's subsequent 1955 decision in the same case ("*Brown II*"),[43] in which the Court addressed how school authorities and federal courts were to implement the mandate of *Brown I*.[44] Indeed, one of the Court's earliest applications of *Brown I* and *Brown II* was in the higher education context. In that case, *State of Fla. Ex. Rel. Hawkins v. Board of Control*,[45] the Supreme Court vacated[46] a Florida supreme court decision that declined to order the state's white-only law school to admit a black student.[47] Relying on language in *Brown II* that courts could consider practical obstacles to a school's transition to desegregation, the Florida court refused to order the plaintiff's admission.[48] The Supreme Court vacated the state court's decision, concluding that in the case of admitting a black student "to a graduate professional school, there [wa]s no reason for delay" and that he was "entitled to prompt admission under the rules and regulations applicable to other qualified candidates."[49]

The Affirmative Duty to Eliminate *De Jure* Segregation in Higher Education

Following *Brown I* and *Brown II*, the Court's equal protection jurisprudence in the public education context expanded significantly to address questions regarding the *scope* and *sufficiency* of state actions to "dismantle" racially segregated systems in public school districts across the

[39] *Id*. at 494 (discussing effect of segregation and approvingly quoting a lower court decision finding that the detrimental effect of segregation is "greater when it has the sanction of the law").

[40] *Id*. at 495.

[41] *Id*. (holding that "the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.").

[42] *See, e.g*., *Fordice*, 505 U.S. at 727-28 ("*Brown v. Board of Education* and its progeny clearly mandate" that a state has a constitutional duty to dismantle its formerly segregated system of higher education, and "remains in violation of the Fourteenth Amendment" if it has not discharged this duty).

[43] *Brown II*, 349 U.S. at 299-301 (addressing the same set of cases at issue in *Brown I*, but directing school districts and courts on the implementation of the Court's holding in *Brown I*; stating that courts should enter orders and decrees "as are necessary and proper" to admit students to public schools on a racially nondiscriminatory basis "with all deliberate speed").

[44] *Id*.

[45] 350 U.S. 413, 414 (1956).

[46] *Id*. at 413-14 (vacating the state court judgment and remanding pursuant to *Brown I* and *Brown II*).

[47] *See* State ex rel. Hawkins v. Bd. of Control, 83 So.2d 20, 21-22, 24-25 (Fla. 1955) (state court decision). *See id*. at 21 (describing its previous holding which had denied the black plaintiff's request to be admitted to the University of Florida's law school on the basis that he had "adequate opportunity for legal education at the Law School of the Florida A & M University, an institution supported by the State of Florida for the higher education of Negroes").

[48] *Hawkins*, 83 So.2d at 24-25 (concluding that *Brown II* did not require the university to admit the black plaintiff "immediately, or at any particular time in the future," but rather that "the state courts shall apply equitable principles in the determination of the precise time in any given jurisdiction"). *Cf. Brown II*, 349 U.S. at 299-301.

[49] *Hawkins*, 350 U.S. at 414.

country,[50] and various challenges to district court-ordered remedies.[51] As the Court revisited these legal standards over time, it continued to describe the affirmative duty of formerly segregated public school entities as the duty to "take all steps necessary to eliminate the vestiges of the unconstitutional *de jure* system"[52] to the extent practicable.[53] Turning to the context of higher education, the Court addressed, in its 1992 decision *United States v. Fordice*,[54] how these equal protection principles and legal standards apply to a state's affirmative duty to dismantle a formerly *de jure* segregated public university system.

United States v. Fordice (1992)

Though it had "many occasions to evaluate whether a public school district has met its affirmative obligation to dismantle its prior *de jure* segregated system in elementary and secondary schools," the Court explained, *Fordice* presented the issue of "what standards to apply" in determining whether the state has met this obligation in the university context.[55]

At issue before the Court was Mississippi's prior *de jure* public university system. The Court observed that since establishing the University of Mississippi as an institution of "higher education exclusively of white persons" in 1848, Mississippi had created four more exclusively white institutions and three exclusively black institutions through 1950.[56] Thereafter, it continued to maintain its racially segregated public university system, and admitted its first black student to the University of Mississippi in 1962 "only by court order."[57] For the "next 12 years," the state's segregated university system "remained largely intact."[58] Around 1987, when the case went to trial,[59] over 99 percent of the state's white students attended the five universities that had been

[50] *See, e.g.*, Green v. Cty Sch. Bd. of New Kent Cty., Va., 391 U.S. 430, 433-34, 438-39 (1968) (holding that Virginia school district's "freedom of choice" plan allowing students to choose between attending a formerly white-only school or a formerly black-only school could "not be accepted as a sufficient step" to desegregate, in light of evidence including that in the three years under that plan, no white child had chosen to attend the formerly all-black school while some black children had chosen to attend the formerly all-white school; stating that the plan "has operated simply to burden children and their parents with the responsibility which *Brown II* placed squarely on the School Board."). *See generally*, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 18-21 (1971) (concluding that "the first remedial responsibility of school authorities is to eliminate invidious racial distinctions" with respect to matters such as faculty, the quality and maintenance of school buildings, equipment, transportation, support personnel, athletics, and extracurricular activities, and that local authorities and district courts must "see to it that future school construction and abandonment are not used and do not serve to perpetuate or re-establish the dual system.").

[51] *See, e.g.*, Missouri v. Jenkins, 515 U.S. 70, 86-94 (1995) (addressing a state's challenge to the scope of a district court's ordered desegregation remedy and discussing the Court's earlier precedent analyzing the permissible scope of a court's authority to fashion remedies for equal protection violations).

[52] Freeman v. Pitts, 503 U.S. 467, 485 (1992); *Swann*, 402 U.S. at 15 ("The objective today remains to eliminate from the public schools all vestiges of state-imposed segregation.").

[53] *See* Bd. of Educ. of Okla. City Pub. Sch., Indep. Sch. Dist. No. 89, Okla. Cty., Okla, 498 U.S. 237, 249-50 (1991) (in order to determine whether the vestiges of *de jure* segregation have been eliminated "as far as practicable," instructing the district to examine student assignments, as well as "'every facet of school operations—faculty, staff, transportation, extra-curricular activities and facilities'") (quoting *Green*, 391 U.S. at 435).

[54] 505 U.S. 717 (1992).

[55] *Fordice*, 505 U.S. at 721.

[56] *Id*. (identifying the institutions exclusively for white persons as the University of Mississippi (1848), Mississippi State University (1880), Mississippi University for Women (1885), University of Southern Mississippi (1912), and Delta State University (1925); and identifying the institutions exclusively for black persons as Alcorn State University (1871), Jackson State University (1940), and Mississippi Valley State University (1950)).

[57] *Id.* at 722.

[58] *Id*.

[59] *Id*. at 723-25.

formerly white-only, while the three formerly black-only institutions had student bodies between 92 percent to 99 percent black.[60]

Citing its precedent addressing *de jure* segregation in the K-12 context,[61] the Court stated that "[o]ur decisions establish that a [s]tate does *not* satisfy its constitutional obligations until it eradicates policies and practices traceable to its prior de jure dual system that continue to foster segregation."[62] Perhaps critically, in the context of remedying a formerly *de jure* segregated system, a state's "adoption and implementation of race-neutral policies *alone*" is not sufficient to demonstrate that it has "completely abandoned its prior dual system."[63] Aside from segregative admissions policies, the Court explained, a state's other policies may shape and determine student choice and attendance, and continue to foster segregation.[64]

Instead, to determine whether a state has satisfied its affirmative duty to dismantle its *de jure* public university system, the Court set out a three-step analysis. *First*, the analysis examines whether the challenged policy or practice maintained by the state is "traceable to its prior [*de jure*] system."[65] By way of example, the Court identified four policies[66] that, in its view, were "readily apparent" vestiges of *de jure* segregation:

- admissions standards based on a test-score range originally adopted for discriminatory reasons;[67]
- unnecessary program duplication throughout the university system (e.g., multiple institutions offering the same "nonbasic" courses);[68]
- the state's academic mission assignments to its higher education institutions (e.g., assigning the broadest academic missions to only formerly white-only

[60] *Id*. at 724-25.

[61] *Id*. at 728 (citing Freeman v. Pitts, 503 U.S. 467 (1992); Bazemore v. Friday, 478 U.S. 385, 407 (1986) (White, J., concurring); Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 434 (1976); Gilmore v. City of Montgomery, 417 U.S. 556, 566-67 (1974); Bd. of Educ. of Okla. City Pub. Sch. v. Dowell, 498 U.S. 237, 250 (1991); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 18 (1971); Green v. Cty. Sch. Bd. of New Kent Cty, 391 U.S. 430, 435-38 (1968)).

[62] *Fordice*, 505 U.S. at 728 (emphasis added).

[63] *Id*. at 729 (emphasis added). The Court agreed with the court of appeals below that there were relevant differences between the K-12 and higher education systems—namely, student choice as to which public university to attend, if one at all, in contrast to compulsory attendance for K-12, but expressly rejected the court of appeals' conclusion that because university attendance was largely a function of student choice, the state need only adopt race-neutral admissions policies to satisfy its affirmative duty. *See id*. at 727-29.

[64] *Id*.

[65] *See id*. at 731 ("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.").

[66] *Id*. at 733 (adding that it was "important to state at the outset that we make no effort to identify an exclusive list of unconstitutional remnants of Mississippi's prior *de jure* system," and that by highlighting four policies, "we by no means suggest that the Court of Appeals need not examine, in light of the proper standard, each of the other policies" that were challenged or are challenged on remand in light of the Court's articulation of the applicable standard).

[67] *See, e.g.*, *Fordice*, 505 U.S. at 734-38 (analyzing the state's admissions policy based solely on minimum test scores and concluding the current policy was traceable to the *de jure* system and that the test score minimums had been discriminatorily set to exclude black students from admission to formerly white-only institutions; also concluding that the state had failed to show that its admissions standard was "not susceptible to elimination without eroding sound educational policy").

[68] *Id*. at 738 (explaining that unnecessary program duplication "was part and parcel of the prior dual system of higher education," as "the whole notion of 'separate but equal' required duplicative programs in two sets of schools").

institutions and the narrowest academic mission to a formerly black-only institution);[69] and

- the continued operation of all public universities established in the *de jure* segregated system.[70]

With respect to traceability, the Court's analysis reflects that where a current policy functions based on distinctions or a framework created in a formerly *de jure* system, traceability can be shown. For example, when concluding that the state's designation of academic missions to its universities was traceable to *de jure* segregation, the Court cited evidence that the state's current method of assigning its universities into three academic missions levels[71] largely mirrored a three-tiered grouping of its universities in the *de jure* system.[72] In addition and more generally, an interim change or new, nondiscriminatory justification for a current policy does not necessarily sever its traceability to a *de jure* system.[73] Where the traceability of a policy or policies is shown, a party need not show discriminatory intent with respect to those challenged policies.[74]

Where traceability is *not* shown—that is, where the policies "do not have such historical antecedents" to *de jure* segregation—an equal protection challenge would then require "a showing of discriminatory purpose."[75] In those instances, the Court explained, "the question becomes whether the fact of racial separation establishes a new violation of the Fourteenth Amendment under traditional principles."[76]

Second, once traceability is shown, the analysis turns to whether those traceable policies have continued discriminatory or "segregative" effects in student choice, enrollment, or other facets of the university system.[77] At this stage, the Court noted that a court should not consider "this issue

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[69] *Id*. at 740 (concluding that the state's "institutional mission designations adopted in 1981 have as their antecedents the policies enacted to perpetuate racial separation during the *de jure* segregated regime.").

[70] *Id*. at 741-42 (observing that the continued existence of all eight of the state's universities created in the *de jure* system, instead of a lesser number of universities, "was undoubtedly occasioned by state laws forbidding the mingling of the races" and thus traceable to *de jure* segregation; also noting the district court's finding that Delta State and Mississippi Valley State were 35 miles apart, while Mississippi State and Mississippi University for Women were "only 20 miles" apart).

[71] *Id*. at 740 (identifying the current academic mission designations as "comprehensive," "regional," and "urban").

[72] *Id*. at 739-41 (concluding that current academic mission assignments were traceable to *de jure* academic mission assignments, which had assigned three formerly white-only institutions the most expansive mission and programs, the formerly white-only liberal arts and women's colleges a more limited mission and programming, and the formerly black-only institutions the most limited mission and programming of all three).

[73] *Id*. at 734 (concluding that the state's "midpassage justification for perpetuating a policy enacted originally to discriminate against black students does not make the present admissions standards any less constitutionally suspect").

[74] *Id*. at 733 n.8 (explaining that the plaintiffs "need not show such discriminatory intent to establish a constitutional violation for the perpetuation of policies traceable to the prior *de jure* segregative regime which have continuing discriminatory effects"). *See also id*. at 746 (Thomas, J., concurring) (expressing the view that "we are justified in not requiring proof of a present specific intent to discriminate" when the three elements of the legal standard adopted in *Fordice* are met, as "[i]t is safe to assume that a policy adopted during the *de jure* era, if it produces segregative effects, reflects a discriminatory intent"). *See also, e.g.*, Knight v. Alabama, 14 F.3d 1534, 1540-41 (11th Cir. 1994) (explaining that "the burden of proof lies with the charging party to show that a challenged contemporary policy is traceable to past segregation").

[75] *Fordice*, 505 U.S. at 733 n.8 (explaining that in the absence of traceability, "a claim of violation of the Fourteenth Amendment cannot be made out without a showing of discriminatory purpose").

[76] *Id*. at 731 n.6 (citing Bd. of Educ. of Okla. City Pub. Sch. v. Dowell, 498 U.S. 237, 250-51 (1991); Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977)). *See also supra* section "Racial Segregation and Discriminatory Intent," pp. 15-20.

[77] *Id. See also, e.g., id*. at 734 (after concluding that the admissions policy at issue was "traceable to the *de jure*

in isolation," but rather examine the "combined effects" of all the challenged policies together "in evaluating whether the State ha[s] met its duty to dismantle its prior *de jure* segregated system."[78] In light of this instruction, it appears the focus of the second step of the test is not on establishing causation between specific racial disparities and specific policies—by this stage, a court has already found traceability—but rather to evaluate whether a state has sufficiently dismantled its formerly *de jure* system.[79] Consistent with the state's burden of proving it has dismantled its *de jure* segregated system, the state must show the absence of segregative effects;[80] plaintiffs are not required to establish this second element.[81]

Third, because traceable policies that have discriminatory effects "run afoul of the Equal Protection Clause,"[82] such policies must accordingly "be reformed to the extent practicable and consistent with sound educational practices."[83] Thus, at the third step, a court assesses whether traceable policies can be "practicably eliminated" "consistent with sound educational practices,"[84] with the burden on the state to show that the challenged policies are "not susceptible to elimination without eroding sound educational policy."[85] Because the Court remanded the case to the lower court to address practicable elimination, its analysis in *Fordice* on this point is limited.[86] The Court suggested, however, that if a current policy lacks sound educational justification, it reasonably follows that it can be practicably eliminated in part or in whole.[87] In addition, the Court observed that in some cases, a merger or closure of institutions could be constitutionally required to eliminate vestiges, should other methods fail to eliminate their discriminatory

system," finding that "they also have present discriminatory effects").

[78] *Id*. at 738-39 (stating that the district court had "failed to consider the combined effects of unnecessary program duplication with other policies, such as differential admissions standards, in evaluating whether the State had met its duty to dismantle its prior *de jure* segregated system"; also noting that the district court's treatment of this issue was "problematic"). *See, e.g., Knight,* 14 F.3d at 1551 (instructing the lower court on remand to determine whether the traceable practice of discriminatory funding allocations, "in combination with other policies, has continuing segregative effects as required under the second part of the *Fordice* test.").

[79] *See Fordice,* 505 U.S. at 739 (describing the analysis of "combined effects" to "evaluat[e] whether the State ha[s] met its duty to dismantle its prior *de jure* segregated system.").

[80] *See id*. at 739 (stating that, as "*Brown* and its progeny" established that the burden of proof falls on the state "to establish that it has dismantled its prior *de jure* segregated system," it was erroneous for the district court to hold "that petitioners could not establish the constitutional defect of unnecessary duplication" which "improperly shifted the burden away from the State"). *See also, e.g., Knight,* 14 F.3d at 1541 (interpreting *Fordice* to require that the state prove that the challenged policy has no segregative effects to be "relieved of its duty to eliminate or modify" that policy).

[81] *Supra* note 80.

[82] *Fordice,* 505 U.S. at 731-32 ("Such policies run afoul of the Equal Protection Clause, even though the State has abolished the legal requirement that whites and blacks be educated separately and has established racially neutral policies not animated by a discriminatory purpose.").

[83] *Id*. at 729.

[84] *Id*. at 731, 741 (stating that on remand, "the court should inquire whether it would be practicable and consistent with sound educational practices to eliminate" the discriminatory effects of the state's present policy).

[85] *See, e.g., id*. at 738 (concluding that the state had thus far failed to show that its admissions standard was "not susceptible to elimination without eroding sound educational policy."). *See also id*. at 744 (O'Connor, J., concurring) (expressing the view that even "if the State shows that maintenance of certain remnants of its prior system is essential to accomplish its legitimate goals, then it still must prove that it has counteracted and minimized the segregative impact of such policies to the extent possible").

[86] *See, e.g., id*. at 741 (stating that on remand, the court "should inquire whether it would be practicable and consistent with sound educational practices to eliminate any such discriminatory effects of the State's present policy").

[87] *Id*. at 739 (stating that "implicit" in the district court's finding that program duplication was "unnecessary" was the fact that the practice lacked "any educational justification" and "that some, if not all, duplication may be practicably eliminated.").

effects.[88] Finally, the Court repeatedly stated that so long as vestiges remain, which have discriminatory effects, the state remains in violation of the Equal Protection Clause unless it can show it cannot practicably eliminate those policies or practices.[89]

In addition, Justice O'Connor, in a separate concurring opinion in *Fordice*, emphasized the "narrow" circumstances under which a state could maintain a traceable policy or practice with segregative effects.[90] In her view, courts may "infer lack of good faith" on the part of the state if it could accomplish educational objectives through less segregative means, and the state has a "'heavy burden'" to explain its preference for retaining the challenged practice.[91] Moreover, even if the state shows that retaining certain traceable policies or practices is "essential to accomplish its legitimate goals," Justice O'Connor asserted that the state must still prove it has "counteracted and minimized the segregative impact of such policies to the extent possible."[92]

Flagship Universities and Historically Black Colleges and Universities (HBCUs)

The Court in *Fordice* observed that the closure or merger of certain institutions may be constitutionally required,[93] consistent with its holding that any vestige of a *de jure* segregated system that continues to have discriminatory effect must be eliminated to the extent practicable and consistent with sound educational policy.[94] Yet that invited a new—and more difficult—set of questions: which institutions would be most subject to closure or merger, and under what circumstances would such action be required?

Significantly, the Court did not categorically identify which institutions would be most subject to such remedial action[95]—a state's flagship, formerly white-only institutions from which a *de jure* system originated, for example, or formerly black-only institutions created to preserve white-only admission at other institutions. Instead, the Court concluded that it was unable to determine—on the record presented in *Fordice*—whether closures or mergers were required in that case[96] and directed the lower court on remand to "carefully explore" several considerations.[97] This instruction to the lower court, while not part of the holding in *Fordice*, suggests that several factors are relevant for determining whether merger or closure is constitutionally required.[98] In

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[88] *Id*. at 742 (noting that "certainly closure of one or more institutions would decrease the discriminatory effects of the present system" and observing that eliminating or revising other challenged policies "may make institutional closure unnecessary," but directing that on remand, "this issue should be carefully explored").

[89] *See, e.g., id*. at 743 ("To the extent that the State has not met its affirmative obligation to dismantle its prior dual system, it shall be adjudged in violation of the Constitution and Title VI and remedial proceedings shall be conducted."). *See also, e.g., id*. at 730 ("Thus, even 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. The Equal Protection Clause is offended by 'sophisticated as well as simple-minded modes of discrimination.'").

[90] *Id*. at 744 (O'Connor, J., concurring).

[91] *Id*. (O'Connor, J., concurring).

[92] *Id*. (O'Connor, J., concurring).

[93] *Id*. at 742.

[94] *Id*. at 731, 741-42.

[95] *See id*. at 741-42.

[96] *Id*. at 742 (noting that the "[e]limination of program duplication and revision of admissions criteria may make institutional closure unnecessary").

[97] *Id*.

[98] *Id*. (instructing the lower court to consider (1) whether the retention of all institutions itself affects student choice and perpetuates segregation; (2) "whether maintenance of each of the universities is educationally justifiable"; and (3)

addition, the Court observed that maintaining all eight higher education institutions in Mississippi was "wasteful and irrational," particularly in light of the close geographic proximity between some of the universities.[99] This observation suggests that close proximity between institutions offering similar programs could be a relevant factor in assessing remedial closure or merger as well.[100]

Regarding the fate of a state's historically black institutions, Justice Thomas, in a concurring opinion, did not read *Fordice* to "forbid[]" those institutions' continued operation or "foreclose the possibility that there exists 'sound educational justification' for maintaining historically black colleges *as such*."[101] Justice Thomas emphasized that "[d]espite the shameful history of state-enforced segregation," historically black colleges and universities were and remain institutions critical to the academic flourishing and leadership development[102] of many students, and observed that "[i]t would be ironic, to say the least, if the institutions that sustained blacks during segregation were themselves destroyed in an effort to combat its vestiges."[103] In his view, though a state is not constitutionally required to maintain its historically black institutions as such, their continued operation is constitutionally permissible, so long as admission is open to all students "on a race-neutral basis, but with established traditions and programs that might disproportionately appeal to one race or another."[104]

Legal Challenges Following *Fordice*

Following *Fordice*, plaintiffs, including the United States in Title VI enforcement actions,[105] have brought suit challenging practices allegedly traceable to a state's *de jure* segregated university system. Challenged practices have included unnecessary program duplication,[106] which the Court

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whether one or more "can be practicably closed or merged with other existing institutions").

[99] *Id*. at 741-42 (noting district court findings that two institutions were "only 35 miles apart," while another two institutions were "only 20 miles" from each other).

[100] *Id*. *Cf*. Geier v. Univ. of Tenn., 597 F.2d 1056, 1064-71 (6th Cir. 1979). In *Geier*, a pre-*Fordice* decision, the Sixth Circuit affirmed a district court's order of a merger of two geographically proximate institutions as a remedy for the state's failure to satisfy its affirmative duty to dismantle its segregated higher education system. *Id*. at 1068-69. The approved merger was of the Nashville campus of the formerly white-only University of Tennessee (UT-N) and the formerly black-only Tennessee State University (TSU), also located in Nashville. *Id*. at 1068-70. The court of appeals noted that the "core of the problem" was that UT-N, as a four-year degree-granting institution in Nashville, created competition for white students in the Nashville area and "greatly inhibited the efforts to desegregate TSU." *Id*. at 1068. The two institutions merged in 1979 to become one institution under TSU. *See History of Avon Williams Campus*, Tenn. State Univ., http://www.tnstate.edu/library/avonwilliamslibrary/history.aspx (last visited Sept. 19, 2018).

[101] *Fordice*, 505 U.S. at 748-49 (Thomas, J., concurring) (emphasis in original).

[102] *Id*. at 748 (Thomas, J., concurring).

[103] *Id*. at 749 (Thomas, J., concurring).

[104] *Id*. (Thomas, J., concurring) (adding that a state's operation of "a diverse assortment of institutions," including historically black institutions, contributes to institutional diversity among a state's higher education institutions, and that such institutional diversity is not "even remotely akin to program *duplication*, which is designed to separate the races for the sake of separating the races").

[105] *See*, *e.g.*, Knight v. Alabama, 14 F.3d 1534, 1539 (11th Cir. 1994) (describing procedural history of case; explaining that the United States filed suit under Title VI, and was later joined by private plaintiffs). *See also* Ayers v. Fordice, 111 F.3d 1183, 1190-92 (5th Cir. 1997) (explaining history of challenge to Mississippi's public university system, including the Supreme Court's *Fordice* decision and later proceedings on remand; stating that private plaintiffs initiated the class action, and the United States intervened as plaintiff alleging violations of Title VI and the Equal Protection Clause).

[106] *See Ayers*, 111 F.3d at 1217-1221; *Knight*, 14 F.3d at 1539 (stating that plaintiffs had challenged policies such as program duplication; certain admissions standards; the underrepresentation of blacks in faculty, administration, and on governing boards; campus environments hostile to black students; the denial of adequate funding and facilities to

identified in *Fordice* as one of the "readily apparent" remnants of *de jure* segregation, as well as others such as scholarship policies,[107] funding practices,[108] and the use of curricula at formerly white-only institutions with little representation of black history and culture.[109] More recently, in 2018, a legal challenge against the State of Maryland alleged that practices relating to capital and operational funding, unnecessary program duplication, and the limited institutional missions of the state's formerly black-only institutions[110] are traceable to the state's formerly *de jure* segregated higher education system.

To date, however, only a few federal appellate courts have had occasion to analyze *Fordice*-based claims,[111] and the Supreme Court has not, since its 1992 decision, addressed claims challenging higher education policies or practices as unconstitutional vestiges of *de jure* segregation. Though development of the *Fordice* standard in federal case law is limited, the few appellate decisions applying *Fordice* provide at least some analytical examples and reflect discernible differences in approach, particularly with respect to the evidence sufficient to satisfy the third element of the *Fordice* standard—that elimination of a practice is not possible, despite being traceable and having continued discriminatory effect.

Unnecessary Program Duplication: Program Transfers to Mergers

As discussed above, the Supreme Court in *Fordice* identified "unnecessary program duplication" as a practice traceable to the prior *de jure* segregated system of higher education at issue in that case,[112] stating that "it can hardly be denied" that such duplication was a requisite feature of the

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formerly black-only institutions, and the denial of graduate and other desirable programs based on restrictive institutional missions, among others).

[107] *See, e.g. Ayers*, 111 F.3d at 1203-09 (analyzing challenge to scholarship policies).

[108] *See id.*, 111 F.3d at 1216-17 (analyzing challenge to state's allocation of land grant funding); *Knight*, 14 F.3d at 1546-52 (same).

[109] *See Knight*, 14 F.3d at 1552-53 (analyzing curriculum claim and rejecting argument that public universities' First Amendment right to academic freedom is as an absolute bar to a *Fordice* challenge to curriculm; on remand, noting it was possible that "First Amendment concerns should be considered when assessing whether relief should be granted," but declining to address "whether the curriculum claim indeed implicates First Amendment concerns and, if so, what form of legal analysis ought to be applied to take those concerns into account").

[110] *See* Coal. for Equity and Excellence in Md. Higher Educ., Inc. et al. v. Md. Higher Educ. Comm'n, 977 F. Supp. 2d 507, 523-34 (D. Md. 2013) (analyzing traceability with respect to plaintiffs' claims). As of the publication date of this report, the case is pending before the U.S. Court of Appeals for the Fourth Circuit. *See* Coal. for Equity and Excellence in Md. Higher Educ., Inc., et al. v. Md. Higher Educ. Comm'n, No. 17-2451 (4th Cir.).

[111] *See, e.g.*, United States v. Louisiana, 9 F.3d 1159, 1165-68 (5th Cir. 1993) (applying *Fordice* to analyze claims challenging unnecessary program duplication throughout the university system, a four-board governing structure, and an "open admissions" policy); Knight v. Alabama, 14 F.3d 1534, 1542-53 (11th Cir. 1994) (applying *Fordice* to analyze claims challenging academic mission assignments, allocations of federal land grants and state funding, the underrepresentation of African American thought, culture, and history in the general curriculum of formerly white-only institutions, and a continued climate of racial hostility at those institutions); Ayers v. Fordice, 111 F.3d 1183, 1197-1228 (5th Cir. 1997) (applying *Fordice* on remand to analyze remaining claims, including the admissions policy, scholarship policies, allocations of federal land grants and state funding, and the underemployment of black faculty beyond entry-level hires, among other challenged practices). *See also* Geier v. Univ. of Tenn., 597 F.2d 1056, 1064-71 (6th Cir. 1979) (pre-*Fordice* decision holding that the state has an affirmative duty to eliminate the vestiges of a dual system in the context of higher education and affirming the district court's order of a merger of two institutions as a remedy for the state's failure to satisfy its affirmative duty). The case ultimately resolved in a consent decree in 2001, with the stated objective of the agreement being to—pursuant to *Fordice*—eradicate policies traceable to the state's *de jure* segregated system that continue to foster segregation. Geier v. Sundquist, 128 F. Supp.2d 519, 521 (M.D. Tenn. 2001).

[112] *See Fordice*, 505 U.S. at 733 (emphasizing that its identification of certain remnants of Mississippi's *de jure* system was not an "exclusive list of unconstitutional remnants," and highlighting program duplication as one such remnant

prior dual system because "the whole notion of 'separate but equal' required duplicative programs in two sets of schools."[113] Drawing upon that rationale, courts that have addressed unnecessary program duplication have generally had little difficulty tracing duplicative courses and degree programs to prior *de jure* segregation.[114] On the matter of if and how program duplication might be eliminated, however, there is lesser consensus.[115] Generally, federal courts have considered several methods for eliminating program duplication, such as transferring existing programs from one institution to another, eliminating certain programs altogether, creating cooperative programs, and—perhaps most drastically—merging institutions.[116]

Challenges to Disproportionate Allocations of Federal and State Land Grants

Plaintiffs have also raised equal protection challenges to state funding practices that allocate all or most of their federal and state land grants to institutions that were formerly white-only in a *de jure* system while dedicating significantly less or no funds to formerly black-only institutions.[117] More specifically, these cases have concerned a state's allocation of federal land grants provided annually to support research on agricultural issues and the dissemination or "extension" of that research.[118]

At issue in *Knight v. Alabama*, for example, was the State of Alabama's allocation of federal funds between its two land grant universities, Auburn University, formerly white-only in the *de jure* system, and Alabama A&M University (A&M), formerly established as black-only.[119] The state allocated to Auburn the entirety of Alabama's approximately $4 million in federal aid for

made "readily apparent" from the district and appellate courts' findings of fact in that case).

[113] *Id*. at 738.

[114] *See*, *e.g.*, *Ayers*, 111 F.3d at 1220-21 (accepting finding that unnecessary program duplication between geographically proximate institutions was traceable to *de jure* segregation); United States v. Louisiana, 9 F.3d at 1165-66 (explaining that when racially segregated institutions were established under state law, "program duplication was intentional—to insure that the two sets of schools were 'separate but equal.'"). *See also Ayers*, 111 F.3d at 1218 (explaining that the district court, when analyzing program duplication in general, found that duplicative offerings between racially identifiable institutions supported a "'serious inference'" that the duplication continued to promote segregation) (quoting Ayers v. Fordice, 879 F. Supp. 1419, 1445 (N.D. Miss. 1995)).

[115] *Cf. Louisiana*, 9 F.3d at 1168-70 (holding that there were factual questions on the practicability of transferring programs to eliminate program duplication; citing evidence including that faculty would be reluctant to transfer to another university); with *Ayers*, 111 F.3d at 1220-21 (with respect to remedying unnecessary program duplication, concluding that the district court should order the Board of Trustees to study and report to a monitoring committee on program duplication between two universities, and noting that the district court had also ordered such a study of a third university in the system).

[116] *See*, *e.g.*, *Ayers*, 111 F.3d at 1221; *Louisiana*, 9 F.3d at 1169 (stating that suggested remedies before the district court had included program transfers from one institution to another, merger, cooperative programs, and the elimination of certain programs to establish new programs). *See also Geier*, 597 F.2d at 1068-1071 (approving merger of two institutions and expressing no concern over possible disruption that could result from the proposed remedy). As the 1979 *Geier* decision predates *Fordice*, the Sixth Circuit did not expressly analyze unnecessary program duplication or practicable elimination as later set forth in *Fordice*. Nonetheless, the court of appeals discussed district court findings that the continued operation of both schools impeded desegregation, *Geier*, 597 F.2d at 1059-63, 1068, and evidence supporting the workability and need for a merger. *Id*. at 1064, 1068-71.

[117] *Ayers*, 111 F.3d at 1215-17, 1221-25 (analyzing claim challenging the State of Mississippi's allocation of federal land grant aid and state funding through general legislative appropriations annually and line item appropriations); *Knight*, 14 F.3d at 1546-52 (analyzing claim challenging Alabama's allocation of federal land grant and state funding).

[118] *Ayers*, 111 F.3d at 1215-16 (discussing federal land grant aid for research pursuant to the Hatch Act, and federal land grant aid for "extension services" pursuant to the Smith-Lever Act); *Knight*, 14 F.3d at 1546-47 (same).

[119] *Knight*, 14 F.3d at 1546. *See also id*. at 1538-39, 1542 (describing the founding of the state's universities).

agricultural research, and allocated an additional $14 million to Auburn in state funds.[120] Meanwhile, the state had "for years" allocated no federal aid to A&M[121] and given state funds for agricultural research in amounts that "today still totals less than $200,000 each year."[122] The U.S. Court of Appeals for the Eleventh Circuit held that the state's current funding allocation was traceable to *de jure* segregation[123] and instructed the lower court on remand to make determinations with respect to the second and third parts of the *Fordice* test.[124] On the issue of practicable elimination, the Eleventh Circuit observed that reduced efficiency would not necessarily render a proposed modification impracticable or educationally unsound.[125]

By contrast, the Fifth Circuit affirmed a district court's ruling that permitted a state to retain its traceable funding practices.[126] There, despite finding traceability and discriminatory effects,[127] the district court had concluded, based on inefficiencies related to running more than one agricultural research program, that it was not practicable for the state to eliminate its exclusive funding allocation to its formerly white-only land grant institution.[128]

Open Questions After *Fordice*

The Supreme Court has not revisited its analysis in *Fordice*, leaving open questions about the permissible applications of its three-part legal standard to an array of fact patterns and legal theories. Similarly, as discussed above, few courts of appeals have addressed claims under *Fordice*, limiting the development and interpretation of *Fordice* in federal case law.

One such unresolved question is under what circumstances, if any, traceability can be established under *Fordice* when a state makes changes to an originally discriminatory policy such that the current policy functions differently, but there is still *some* evidence of traceability between the two, or perpetuation of similar segregative effects under the changed policy as under the original policy.[129] In addition, the Supreme Court and circuit courts have not yet expressly addressed how

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[120] *Id*. at 1547.

[121] *Id*. (explaining that federal aid to A&M changed in the late 1960s, "mostly pursuant" to a federal law that expressly designated A&M as a recipient and denied the State of Alabama discretion to reallocate the approximately $1.4 million in aid elsewhere).

[122] *Id*.

[123] *Knight*, 14 F.3d at 1551-52 (holding that, based on the district court's factual findings, traceability was established).

[124] *Id*. at 1551.

[125] *Id*. at 1551 ("In other words, even if it were true that partial reallocation of the land grant funds would result in a research and extension system somewhat less efficient than the one currently operating under Auburn's monopoly, it would not inescapably follow that such inefficiency would render the proposed modified system impracticable or educationally unsound."). *See also id.* at 1541 (concerning practicable elimination generally, discussing *Fordice* and concluding that a state can retain a traceable practice only "where, in effect, it simply is not possible" to eliminate or modify it).

[126] *Ayers*, 111 F.3d at 1217.

[127] *Id*. at 1216 (discussing district court findings).

[128] *See id*. (discussing district court findings that the creation of two separate agricultural research programs would be "inefficient," as "fewer and fewer" persons were entering the field of agriculture, and that two distinct programs would create "difficulties in communication among the participating scientists, and inefficient duplication.").

[129] Such circumstances appeared to be at issue in *Ayers*, where the Fifth Circuit analyzed a challenge to the state's general and line item legislative appropriations, and the "dearth" of black faculty and administrators at formerly white-only institutions. *See Ayers*, 111 F.3d at 1221-27. On the faculty issue, for example, the Fifth Circuit affirmed the district court's conclusion that there were no current employment or hiring practices traceable to *de jure* segregation, though the district court had also found that the racial predominance of faculty and administrators at formerly white-only institutions was "'to some extent attributable to *de jure* segregation.'" *Id*. at 1226-27.

far a district court may go in remedying an unconstitutional vestige or remnant of a prior *de jure* public university system.[130] In the K-12 context, the Supreme Court has upheld district court orders that set certain faculty and student ratios at schools in noncompliant school districts, to desegregate them pursuant to *Brown* and its progeny.[131] It remains unclear, however, whether the district courts enjoy similar authority under *Fordice* to order similarly extensive remedies. Indeed, the few cases alleging *Fordice*-type claims that did reach the federal appellate courts ultimately resolved in settlements,[132] thus leaving little judicial guidance on the scope of a court's authority to mandate specific remedies if a state fails to dismantle its formerly *de jure* segregated public university system.[133] With respect to these unresolved questions, the Supreme Court's express reliance in *Fordice* on precedent addressing *de jure* segregation in the primary and secondary school context suggests that at least some of this same precedent should inform future analyses, with adaptation to the higher education context.[134]

Racial Segregation and Discriminatory Intent

A finding of a state entity's intent to segregate students by race in the higher education context is critical to showing a violation of the Equal Protection Clause,[135] and has significant legal

[130] Settlements resolving these cases reflect agreement to take actions related to student enrollment and faculty representation. For example, the settlement resolving the *Ayers* case set a student enrollment goal at formerly black institutions of 10% other-race students (with other-race referring to persons who are not African American), though the agreement does not appear to have required a student enrollment goal for the formerly white-only institutions. *See* Ayers v. Musgrove, No. 75-9 (N.D. Miss. 2001) (Settlement Agreement, pp. 10-12). *See also, e.g.*, Geier v. Sundquist, 128 F. Supp.2d 519, 536-37 (M.D. Tenn. 2001) (directing that state funds be made available to recruit African American scholars as visiting professors).

[131] *See, e.g.*, United States v. Montgomery Cty. Bd. of Educ., 395 U.S. 225, 231-36 (1969) (reversing court of appeals' judgment striking aspects of district court remedial order requiring a ratio of black to white faculty in each school; the district court had ordered, for example, that with respect to full-time faculty, each school with fewer than 12 teachers was required to have at least one full-time teacher whose race was different from the race of the majority of the faculty). *See also Swann*, 402 U.S. at 18-19, 22 (discussing a school board's argument that it was unconstitutional for a district court to order assignment of teachers to achieve a certain degree of faculty desegregation and stating "[w]e reject that contention."; reviewing another district court order and concluding that the court "properly followed" the principles of the Supreme Court's *Montgomery* decision, as the district court's ratios were "no more than a starting point" in the remedial process "rather than an inflexible requirement," and "the very limited use made of mathematical ratios" was within the court's discretion).

[132] For example, after the Court remanded *Fordice*, that case went through further proceedings from 1992 through 2004, at which point the Fifth Circuit upheld the settlement agreement reached by the parties and challenged on appeal. *See* Ayers v. Thompson, 358 F.3d 356, 360-64, 375 (5th Cir. 2004). *See also id*. at 359 (also noting that "nearly thirty years of litigation" had transpired until a settlement agreement was reached between the plaintiffs, the federal government as intervenor in support of the private plaintiffs, and the State of Mississippi).

[133] *But see* Geier v. Univ. of Tenn., 597 F.2d 1056, 1068-69 (6th Cir. 1979) (rejecting the state's argument that the district court's order of a merger of two racially segregated universities was beyond its equitable power). *See also* United States v. Louisiana, 692 F. Supp. 642, 658 (E.D. La. 1988) (acknowledging that "drastic" changes might be required, including creating a system of junior colleges with open admission to all high school graduates and vesting state supervision to a single board.).

[134] *See, e.g*., U.S. v. *Fordice*, 505 U.S. 717, 728 (1992) (citing, among other cases, Freeman v. Pitts, 503 U.S. 467 (1992); Gilmore v. City of Montgomery, 417 U.S. 556, 566-567 (1974); Bd. of Educ. of Okla. City Pub. Sch. v. Dowell, 498 U.S. 237, 250 (1991); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 18 (1971); and Green v. Cty Sch. Bd. of New Kent County, Va., 391 U.S. 430, 435-38 (1968). *See also id*. at 730, 739.

[135] *See, e.g.*, *Swann*, 402 U.S. at 22 ("The constant theme and thrust of every holding from *Brown I* to date is that state-enforced separation of races in public schools is discrimination that violates the Equal Protection Clause. The remedy commanded was to dismantle dual school systems.").

consequences. In such cases of *de jure*—that is, intentional, state-imposed[136]—segregation, the state has an affirmative duty under the Equal Protection Clause to eliminate all vestiges of its *de jure* system by dismantling the infrastructure and other mechanisms that produced the discriminatory segregation.[137] According to the Supreme Court's 1992 *Fordice* decision, this duty commands more than just the repeal of state laws sanctioning racial segregation in higher education.[138] The state must also uproot or reform any policy or practice "traceable" to its formerly *de jure* system that continues to have discriminatory effect.[139]

In *Fordice*, the state's intent to racially segregate its higher education system was plain: with the founding of the University of Mississippi in 1848, Mississippi explicitly set out to create a public university "dedicated to the higher education exclusively of white persons," and racially segregated its public university system over the next 100 years through the creation of other "exclusively white institutions" and "solely black institutions."[140] Nor was Mississippi's system unique in this regard. "[D]ual system[s]"[141] of public higher education—one for black students, another for white—were codified in other state and local laws throughout the country.[142] Thus far,

[136] *See, e.g.*, Keyes v. Sch. Dist. No. 1, Denver, Colo., 413 U.S. 189, 205, 208 (1973) (describing *de jure* segregation as "'stated simply, a current condition of segregation resulting from intentional state action,'" and emphasizing that the "differentiating factor" between *de jure* segregation and "so-called de facto segregation" is the purpose or intent to segregate).

[137] *See id*.; *Fordice*, 505 U.S. at 728 ("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."). *See generally* Green v. County School Bd. of New Kent County, Va., 391 U.S. 430, 437-38 (1968) (stating that school boards that operated "state-compelled dual systems" have "the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch."). Though outside the scope of this report, the Supreme Court has addressed how to evaluate a state's compliance with this duty and determine whether a formerly segregated system may be found "unitary." *See, e.g.*, Freeman v. Pitts, 503 U.S. 467, 491-92 (1992) (identifying factors by which a court can evaluate whether to withdraw its supervision over the desegregation of a school system; also identifying its *Green* decision as setting forth "the elements of a unitary system" in the K-12 context).

[138] *See Fordice*, 505 U.S. at 731-32 ("Such policies run afoul of the Equal Protection Clause, even though the State has abolished the legal requirement that whites and blacks be educated separately and has established racially neutral policies not animated by a discriminatory purpose.").

[139] *Id*. at 731.

[140] *Id*. at 721-22. In addition, the Court observed that the state's racially segregated system of higher education "remained largely intact" at least two decades after the Court's 1954 *Brown v. Board of Education* decision. *Id*. at 722.

[141] *Id*. at 727 (reflecting that Mississippi's laws had once mandated a "dual school system"). *See* Bd. of Educ. of Okla. City Public Sch. v. Dowell, 498 U.S. 237, 246 (1991) (explaining that "[c]ourts have used the terms 'dual' to denote a school system which has engaged in intentional segregation of students by race").

[142] *See, e.g.*, Knight v. Alabama, 14 F.3d 1534, 1538-39 (11th Cir. 1994) (discussing *de jure* segregation of Alabama's public higher education system through state law from 1819 onward, which *inter alia* criminalized education of enslaved black persons and later excluded blacks from universities attended by white students following the abolition of slavery); Geier v. Univ. of Tenn., 597 F.2d 1056, 1058 (6th Cir. 1979) (explaining that public higher education in Tennessee had been segregated by law); United States v. Louisiana, 9 F.3d 1159, 1162 (5th Cir. 1993) (indicating that racial segregation had been codified in school segregation laws, and which plaintiffs argued continued in the state's system of higher education after those laws were officially repealed). More recently, as of the publication date of this report, a case pending before the Fourth Circuit raises a *Fordice* challenge to practices that the plaintiffs contend are traceable to the State of Maryland's formerly *de jure* segregated public university system. *See* Coal. for Equity and Excellence in Md. Higher Educ., Inc., et al. v. Md. Higher Educ. Comm'n, No. 17-2451 (4th Cir.); Coal. for Equity and Excellence in Md. Higher Educ., Inc. et al. v. Md. Higher Educ. Comm'n, 977 F. Supp. 2d 507, 512-13 (D. Md. 2013) (describing Maryland's dual system of public education as having operated under statute, with no public higher education offerings available to black students before 1920).

federal courts that have addressed *de jure* segregation in higher education have done so in the context of such codified segregation,[143] as in *Fordice*.[144]

The absence of a codified dual system of higher education, however, may not mean that a university system was not or is not intentionally segregated. As reflected in the Supreme Court decision *Keyes v. School District No. 1, Denver, Colorado*,[145] even when state authorities have not segregated their public schools by statute, they may still have engaged in unconstitutional racial segregation.[146] Thus, in the K-12 context, federal courts have found *de jure* segregation based on evidence reflecting a state actor's impermissible segregative intent.[147] This line of cases would appear to apply in the context of higher education as well. As the Court noted in *Fordice*, where a plaintiff is unable to show that a policy or practice is a vestige of prior *de jure* segregation, she may nonetheless prove a "new" constitutional violation with evidence of a present-day intent to racially segregate students "under traditional principles" governing discriminatory intent.[148] This would be consistent with the Court's application of *Brown* and its progeny broadly across "the field of public education,"[149] including higher education, as reflected in *Fordice*.[150]

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[143] *See supra* note 142.

[144] *Fordice*, 505 U.S. at 727 (noting that the State of Mississippi's laws had mandated a "dual school system").

[145] 413 U.S. 189 (1973).

[146] *See Keyes*, 413 U.S. at 198-201 (explaining that though a statutory dual system never existed in Denver, Colorado, a finding of *de jure* segregation may be established by evidence that school authorities carried out a "program of segregation affecting a substantial portion of the students, schools, teachers, and facilities within the school system"; stating that petitioners had proved that "for almost a decade after 1960 respondent School Board had engaged in an unconstitutional policy of deliberate racial segregation in the Park Hill schools."). Evidence of segregative intent can be used to show contemporaneous or new acts of state-imposed segregation, as opposed to historical *de jure* segregation only. *See, e.g.*, Diaz v. San Jose Unified Sch. Dist., 733 F.2d 660, 661-64, 675 (9th Cir. 1984) (en banc) (in a case where plaintiffs, the parents of Spanish-surnamed children, alleged that the school district intentionally segregated schools by race, holding that evidence was sufficient to show the school board's segregative intent).

[147] *See, e.g.*, *Keyes*, 413 U.S. at 199-209 (discussing evidence and allegations of segregative intent and establishing a burden-shifting test by which a state entity is presumed to have acted with segregative intent system-wide, once a finding has been made that a state entity acted with segregative intent as to a meaningful portion of a given school system). *See also infra* note 158. *See generally*, Spurlock v. Fox, 716 F.3d 383, 396 (6th Cir. 2013) (stating that to prove *de jure* segregation, a plaintiff must show "'1) action or inaction by public officials 2) with a segregative purpose 3) which actually results in increased or continued segregation in the public schools'") (quoting NAACP v. Lansing Bd. of Educ., 559 F.2d 1042, 1046 (6th Cir. 1977)).

[148] *Fordice*, 505 U.S. at 732 n.6 (citing Bd. of Educ. v. Dowell, 498 U.S. 237, 250-251 (1991) and Arlington Heights v. Metro. Housing Development Corp., 429 U.S. 252 (1977)). Applying such "traditional principles," it appears that a party could also offer nonstatutory evidence to prove a state actor's past segregative intent, in order to show the existence of a prior *de jure* segregated system and the state's present-day failure to eliminate vestiges of that prior system. *See, e.g.*, Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526, 534-37 (1979) (discussing and upholding court of appeals' finding of *de jure* segregation based on evidence of segregative intent, where plaintiffs alleged the existence of a prior *de jure* segregated system before and in 1954—the year of the Supreme Court's *Brown I* decision—and the continued maintenance of that segregated system through the 1970s).

[149] *See, e.g.*, *Fordice*, 505 U.S. at 721 (describing *Brown I* and *Brown II* as holding that "the concept of 'separate but equal' has no place in the field of public education" and ordering "an end to segregated public education 'with all deliberate speed'") (quoting *Brown I*, 347 U.S. at 495 and *Brown II*, 349 U.S. 294, 301 (1955); Swann, 402 U.S. at 22 ("The constant theme and thrust of every holding from *Brown I* to date is that state-enforced separation of races in public schools is discrimination that violates the Equal Protection Clause."); *Brown I*, 347 U.S. at 491-92 (discussing its precedent involving segregation "in the field of public education," and including in that discussion four cases at the public graduate school level).

[150] *See Fordice*, 505 U.S. at 728-29 (citing and discussing its Equal Protection Clause jurisprudence addressing racial segregation in the K-12 context; acknowledging that though there are operational differences between a state university system and primary and secondary schools, rejecting the view that the adoption of a race-neutral admissions policy alone is sufficient to satisfy a state's affirmative obligation to dismantle a prior *de jure* segregated university system).

Because the Supreme Court has yet to address segregative intent in higher education, it is unclear what intent evidence would be sufficient to establish a *de jure* segregated public university or institution, apart from a law codifying such segregation.[151] As a general matter, though, a court's determination of discriminatory intent is a fact-intensive, "sensitive inquiry."[152] And the Supreme Court has observed that this is even more so in cases alleging *de jure* segregation in public education.[153] Where the evidence indicates, for example, that a state actor undertook a policy or practice knowing that doing so would have the "foreseeable" effect of segregating students by race, that evidence may support an inference of *de jure* segregation.[154] In addition, at least in the K-12 context, a finding of a state entity's segregative intent in one part of a school system creates a rebuttable presumption that segregation found in other parts of the same system was also intentional.[155] *De jure* segregation proved by such nonstatutory evidence generally triggers the same affirmative obligation on the state to eliminate the vestiges of its state-imposed segregation, as when *de jure* segregation is shown through state or local laws.[156]

Though segregative intent analyses at the K-12 level may be instructive, the guidance these decisions provide may be limited by the nature of the evidence at issue in those particular cases:[157] the method of student assignment to elementary or secondary schools, for example, or the drawing of attendance zones to create racially segregated schools.[158] It appears unlikely that

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[151] The question of whether racial segregation was *de jure* was not at issue in *Fordice*. *See Fordice*, 505 U.S. at 721-22. In addition, there do not appear to be any cases in the federal appellate courts involving *de jure* segregation in a public university or public university system based on evidence other than its codification in state law. *See supra* note 142.

[152] *See generally Arlington Heights*, 429 U.S. at 266 (stating that the determination as to whether discrimination was a motivating factor in state action "demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available").

[153] *See* Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 414 (1977) (observing, in a case alleging *de jure* segregation in a K-12 system, "that the task of factfinding in a case such as this is a good deal more difficult than is typically the case," while also noting that the question of whether "racial concentration occur[s] from purely neutral public actions or were instead the intended result of actions which appeared neutral on their face but were in fact invidiously discriminatory is not an easy one to resolve.").

[154] Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 464-65 (1979) (explaining that evidence of a state entity's adherence to a policy or practice, with knowledge that adherence to that policy would have the foreseeable effect of racially segregating schools, is one type of evidence from which an inference of segregative intent may be drawn; describing the district court's analysis of such foreseeability evidence as "well within the requirements of *Washington v. Davis* and *Arlington Heights*"); Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526, 536, n. 9 (1979) (stating that the Court has never held that the foreseeability of segregative consequences establishes a prima facie case of segregative intent, but acknowledging that "as we hold in Columbus today, 443 U.S., at 464–465, proof of foreseeable consequences is one type of quite relevant evidence of racially discriminatory purpose").

[155] *See Keyes*, 413 U.S. at 208 (holding that a finding of intentionally segregative state action "in a meaningful portion of a school system" establishes a prima facie case of "unlawful segregative design" with respect to segregation existing in other parts of the system as well; discussing the "high probability" that where school authorities intended to racially segregate a meaningful part of the school system, "similarly impermissible considerations" also motivated their actions in other parts of the same system). *See also Columbus*, 443 U.S. at 467 (describing *Keyes* as holding that "purposeful discrimination in a substantial part of a school system furnishes a sufficient basis for an inferential finding of a systemwide discriminatory intent unless otherwise rebutted").

[156] *See, e.g.*, *Keyes*, 413 U.S. at 203 (explaining that in cases where a finding of state-imposed segregation has been made based on nonstatutory evidence, such a finding, "as in cases involving statutory dual systems," triggers an affirmative duty on the part of the state to desegregate).

[157] *See, e.g.*, *Keyes*, 413 U.S. at 198-202 (in a district where racial segregation in public schools was never codified in law, discussing other evidence that may be indicative of "segregative intent" on the part of the school board, such as the assignment of faculty and staff on racially identifiable bases, gerrymandering attendance zones and designating feeder schools on the basis of race, and the specific site selection for new school construction).

[158] *See, e.g.*, United States v. Yonkers, 197 F.3d 41, 47 (2d Cir. 1999) (summarizing district court findings of segregative intent, including evidence that the city had pursued a discriminatory housing policy in part motivated by an

such evidence would be at issue or directly applicable in cases alleging segregative intent at the collegiate or graduate level. Nonetheless, these decisions generally suggest that categorical distinctions—between evidence indicative of *de jure* segregation and evidence of existing segregation insufficiently linked to state intent—are difficult to draw.[159] Indeed, given the difficulties that can arise in a court's analysis of "segregative intent," over the years a number of Justices have called into question the rationale and basis for the distinction between *de jure* and so-called *de facto* segregation,[160] though the majority of the Court has recognized and continues to recognize this distinction.[161]

Whatever the open questions may be regarding the evidence sufficient to show segregative intent, particularly in the higher education context, *Fordice* instructs that a plaintiff need not provide evidence of *new* discriminatory intent when alleging that a state has failed to eliminate vestiges of a prior *de jure* segregated system.[162] And with respect to remedying intentional racial segregation,

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intent to maintain racially identifiable schools); United States v. Sch. Dist. of City of Ferndale, Mich., 616 F.2d 895, 897-99, 902-04 (6th Cir. 1980) (rejecting contention that attendance boundaries for an elementary school were race-neutral applications of the district's neighborhood school policies; holding that creation of school "was intentionally segregative in purpose and effect" based on evidence including that the school's attendance zone was precisely mapped to the only residential area that had not excluded black occupancy through restrictive housing covenants). *Cf., e.g., Spurlock*, 716 F.3d at 396-402 (analyzing evidence of segregative intent and affirming district court finding that the evidence was insufficient to establish that a school rezoning plan was undertaken with segregative purpose).

[159] Federal court decisions analyzing allegations of *de jure* segregation in the K-12 context have involved highly fact-intensive determinations regarding the interrelationship between schools' racial compositions and evidence regarding student assignment policies, the drawing of school attendance zones, site selection for school construction and closures, and racially segregated residential patterns (which, in some cases, had resulted from subdivision covenants that restricted occupancy in certain neighborhoods to white-only residents or from allegedly discriminatory state action with respect to housing). *See generally Swann*, 402 U.S. at 21-22 (discussing influence and impact of school location on patterns of residential development and neighborhood composition, and observing that a state authority's decisions relating to student assignment, school construction, and school closures "have been used as a potent weapon for creating or maintaining a state-segregated school system). *See also supra* note 158.

[160] *See, e.g.*, Parents Involved in Community Sch. v. Seattle Sch. Dist. No.1, 551 U.S. 701, 820-22 (2007) (Breyer, J., dissenting) (questioning the basis for the legal distinction between *de jure* and *de facto* school segregation; also contending that the crucial difference between the two cannot be the fact of a court's *de jure* finding, given that numerous school districts had been segregated by law but desegregated without court order); *Keyes*, 413 U.S. at 215 (Douglas, J., concurring) (expressing that there should be "no constitutional difference between de jure and de facto segregation"; asserting that though certain state actions are "quite distinct from the classical de jure type of school segregation," it "is a misnomer" to categorize such actions—like a school board decision to close schools in certain areas and build new schools in "black areas and in distant white areas"—as *de facto*, "as they are only more subtle types of state action that create or maintain a wholly or partially segregated school system."). *See also id*. at 224 (Powell, J., concurring in part and dissenting in part) (stating that the *de jure*/*de facto* distinction cannot be "justified on a principled basis," and characterizing as "tortuous" the burden of identifying and proving segregative intent). In *Keyes*, Justice Powell would instead have held that where racial segregation exists to a substantial degree in a school system, there is a prima facie case that the school board or other public authorities "are sufficiently responsible to warrant imposing upon them a nationally applicable burden to demonstrate they nevertheless are operating a genuinely integrated school system." *Id*.

[161] *See, e.g.*, *Parents Involved*, 551 U.S. at 736 (stating that the distinction between *de jure* and *de facto* discrimination "has been central to our jurisprudence in this area for generations") (citing Milliken v. Bradley, 433 U.S. 267, 280, n. 14 (1977); Freeman v. Pitts, 503 U.S. 467, 495-96 (1992)).

[162] *See* United States v. Fordice, 505 U.S. 717, 733 n.8 (1992) (explaining that plaintiffs "need not show such discriminatory intent to establish a constitutional violation for the perpetuation of policies traceable to the prior *de jure* segregative regime which have continuing discriminatory effects"). *See also id*. at 746 (Thomas, J., concurring) (expressing the view that "we are justified in not requiring proof of a present specific intent to discriminate" when the three elements of the legal standard adopted in *Fordice* are met, as "[i]t is safe to assume that a policy adopted during the *de jure* era, if it produces segregative effects, reflects a discriminatory intent"). *See also Knight*, 14 F.3d at 1540-41 (explaining that "the burden of proof lies with the charging party to show that a challenged contemporary policy is traceable to past segregation").

the Court has repeatedly held that a state not only *may* use a broad array of explicit race-conscious policies and practices to remedy its constitutional violation, but often *must* do so.[163] By themselves, race-neutral measures simply may not be enough, the Court has explained, to provide equitable, make-whole relief for intentionally segregative acts.[164]

This affirmative obligation to consider race arises, however, only in the context of *de jure* segregation. Outside that *de jure* context, institutions of higher education subject to the Equal Protection Clause[165] have no such duty to remedy racial segregation.[166] Nor may they—or the federal courts, for that matter—use the same broad array of race-conscious measures available for remedying *de jure* segregation.[167]

De jure segregation, however, is not the only context in which race-conscious measures in higher education may be used. For over forty years colleges and universities have considered race as a way of increasing the racial diversity of their student bodies, independent from a legal basis relating to *de jure* segregation. Thus far, however, the Supreme Court has addressed only one type of discretionary race-conscious measure in the higher education context: admissions policies. And when evaluating these discretionary policies, the Court reviews them under a notably different analytical lens, looking to their precision in achieving certain concretely defined and "compelling" educational interests, as explained more fully below.[168]

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[163] *See, e.g.*, *Fordice*, 505 U.S. at 729 (explaining that the adoption and implementation of race-neutral policies alone does not suffice to demonstrate that a state has eliminated its prior dual system; concluding that a race-neutral admissions policy does not cure the constitutional violation of a segregated university system given other policies that may continue to foster segregation); *Swann*, 402 U.S. at 27-28 (affirming the district court's remedial order assigning students to schools on a racial basis as an interim corrective measure so as to desegregate all-white and all-black schools in a formerly *de jure* segregated system; stating that race-neutral plans "may fail to counteract the continuing effects" of a state's intentional separation of students by race). *See also, e.g.*, *Parents Involved*, 551 U.S. at 737 (stating that "no one questions that the obligation to disestablish a school system segregated by law can include race-conscious remedies—whether or not a court had issued an order to that effect").

[164] *See supra* note 163. In addition, the Court in *Fordice* observed that a state's current policies that are *traceable* to *de jure* segregation "may be race neutral on their face" but nevertheless foster racial segregation by "contribut[ing] to the racial identifiability" of a state's public universities. *See Fordice*, 505 U.S. at 733 (instructing that in such instances, the state "must justify these policies or eliminate them").

[165] Though the Equal Protection Clause applies only to state actors, Title VI of the Civil Rights Act similarly prohibits private recipients of federal funding from discriminating based on race. *See* 42 U.S.C. § 2000d. Moreover, the Supreme Court has read Title VI to proscribe the same conduct prohibited by the Equal Protection Clause. *See* Alexander v. Sandoval, 532 U.S. 275, 281 (2001) ("tak[ing] as given" that Title VI "proscribes only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment") (quoting Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 287 (1978) (Powell, J., announcing judgment of the Court)).

[166] *See, e.g.*, *Fordice*, 505 U.S. at 727-28 (describing a state's affirmative obligation as arising from a showing that racial segregation is attributable to the state); *Keyes*, 413 U.S. at 200 (stating that in cases involving *de jure* segregation, the state "automatically assumes an affirmative duty" to eliminate from public schools within its system '"all vestiges of state-imposed segregation.'") (quoting Swann, 402 U.S. at 15).

[167] *See, e.g.*, *Parents Involved*, 551 U.S. at 709-10, 736-37, 745-46 (holding unconstitutional voluntary race-conscious programs of student assignments in two public school systems, because one school district had never been segregated by law and the other district had been found to have eliminated the vestiges of its prior dual system). *See also Dayton*, 433 U.S. at 419-20 (stating that "[t]he power of the federal courts to restructure the operation of local and state governmental entities" may be exercised only on the basis of a constitutional violation); *Swann*, 402 U.S. at 15 ("If school authorities fail in their affirmative obligations under these holdings, judicial authority may be invoked. Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.").

[168] *Compare Fordice*, 505 U.S. at 728, 733-43 (stating that a court must examine "[t]he full range of policies and practices" when evaluating the sufficiency of a state's efforts to dismantle its formerly *de jure* segregated public university system) *with* Fisher v. Univ. of Tex., 136 S.Ct. 2198, 2207-08 (2016) (setting forth "three controlling principles relevant to assessing the constitutionality of a public university's affirmative-action program" under strict

Beyond *De Jure*: Judicial Scrutiny of Racial Classifications

"Affirmative action" in its original sense grew out of the states' affirmative obligation under the Equal Protection Clause to rid their public institutions of the lingering vestiges of *de jure* segregation. But "affirmative action" has also come to refer to race-conscious policies developed outside this *de jure* context. These are policies *voluntarily* adopted by institutions to help racial minorities overcome the effects of their earlier exclusion.[169] And unlike the measures ordered by the courts to right the wrongs of *de jure* segregation, these policies are strictly voluntary,[170] with their legality consequently turning on constitutional considerations unlike those involved in the *de jure* context.

"Affirmative action" in this more familiar, voluntary sense has also been among the most contentious subjects in constitutional law.[171] In the forty years since *Regents of the University of California v. Bakke*,[172] when the Court first addressed those programs' constitutionality, the Justices have divided sharply over when or whether such programs can survive constitutional scrutiny. And a major point of disagreement among the Justices—lingering to this day[173]—is how strictly to review those policies and what the government or other state entity must do to justify its use of "benign" racial classifications. In recent decisions, the Court has reviewed such classifications under a seemingly "elastic" regime of strict scrutiny,[174] accepting those classifications only where they have been narrowly tailored to serve compelling government interests.

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scrutiny).

[169] *See* 28 C.F.R. § 42.104 (Department of Justice regulation characterizing affirmative action policies as measures designed "to overcome the effects of conditions which resulted in limiting participation by persons of a particular race"); *see also Metro Broadcasting*, 497 U.S. at 564-65 (distinguishing "benign race-conscious measures" from those meant "to compensate victims of past governmental ... discrimination").

[170] Not only are these voluntary race-conscious measures discretionary, but the Court has also held that states may forbid their use. *See* Schuette v. Coal. to Def. Affirmative Action, 134 S. Ct. 1623, 1638 (2014) (concluding that Michigan had the right to outlaw the use of "racial preferences" in the state).

[171] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 764 (5th ed. 2015) ("No topic in constitutional law is more controversial than affirmative action.").

[172] 438 U.S. 265 (1978).

[173] *See, e.g.*, Gratz v. Bollinger, 539 U.S. 244, 298 (2003) (Ginsburg, J., dissenting) (criticizing the Court for "once again maintain[ing] that the same standard of review controls judicial inspection of all official race classifications"); Grutter v. Bollinger, 539 U.S. 306, 346 (2003) (suggesting that in a different case the Court might revisit "whether all governmental classifications by race, whether designed to benefit or to burden a historically disadvantaged group, should be subject to the same standard of judicial review"); Fisher v. Univ. of Tex. (*Fisher I*), 570 U.S. 297, 337 (2013) (Ginsburg, J., dissenting) (suggesting the same); *see also* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 800-01 (2007) (Stevens, J., dissenting) (arguing that "a rigid adherence to tiers of scrutiny obscures *Brown [v. Board of Education*]'s clear message").

[174] Adarand Constructors, Inc. v. Peńa, 515 U.S. 200, 268 (1995) (Stevens, J., dissenting) (observing that "the Court's very recognition [in that case] that strict scrutiny can be compatible with the survival of a classification so reviewed demonstrates that our concepts of equal protection enjoy a greater elasticity than the standard categories might suggest").

Equal Protection and Racial Classifications

The constitutional guarantee of equal protection broadly prohibits the government from employing "arbitrary classification[s]."[175] And the use of racial classifications in particular has long been of special concern for the courts. Indeed, this "heightened judicial solicitude"[176] for racial categorizing has roots nearly as old as the Fourteenth Amendment itself. As the Supreme Court explained in an early decision under the Amendment, the "spirit and meaning" of the Equal Protection Clause was "that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, ... that no discrimination shall be made against them by law because of their color."[177] In the decades since, the Court has only made clearer that it regards the government's use of racial classifications as "inherently suspect" and therefore subject to more demanding scrutiny than other classifications,[178] which are typically reviewed only for basic rationality.[179]

There has been significant disagreement, however, over just how rigidly the courts should scrutinize a racial classification, especially when the point of the classification is to benefit racial minorities, as in the case of affirmative action.[180] That issue came before the Court for the first time in *Bakke*,[181] involving a challenge to an affirmative action admissions program begun at the then newly created medical school at the University of California at Davis (the Medical School).

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[175] *See* Engquist v. Ore. Dep't of Agric., 553 U.S. 591, 597 (2008) (noting the Court's "traditional view of the core concern of the Equal Protection Clause as a shield against arbitrary classifications"). *See also* Willowbrook v. Olech, 528 U.S. 562, 564 (2000) ("Our cases have recognized successful equal protection claims brought by a 'class of one,' where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment.").

[176] Graham v. Richardson, 403 U.S. 365, 372 (1971) (observing that "heightened judicial solicitude is appropriate" for classifications affecting "a 'discrete and insular minority'") (citing United States v. Carolene Products, 304 U.S. 144, 152-53 n.4 (1938)).

[177] Strauder v. West Virginia, 100 U.S. 303, 307 (1879).

[178] Graham v. Richardson, 403 U.S. 365, 371-72 (1971) (noting that "the Court's decisions have established that classifications based on ... race are inherently suspect and subject to close judicial scrutiny"); *Adarand*, 515 U.S. at 216 (internal quotation marks and citations omitted).

[179] Typically, but not always, some classifications not subject to strict scrutiny instead receive a milder but still heightened form of scrutiny, sometimes referred to as "intermediate." *Compare* Hodel v. Indiana, 452 U.S. 314, 331-32 (1981) ("Social and economic legislation ... that does not employ suspect classifications or impinge on fundamental rights must be upheld against equal protection attack.") *with* Clark v. Jeter, 486 U.S. 456 (1988) ("Between th[e] extremes of rational basis review and strict scrutiny lies a level of intermediate scrutiny, which generally has been applied to discriminatory classifications based on sex or illegitimacy.")

[180] *See, e.g.*, Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2327-28 (2016) (Thomas, J., dissenting) (criticizing the Court's "tiers of scrutiny," especially as applied to affirmative action, as so many "labels [that] now mean little"); Williams-Yulee v. Fla. Bar, 135 S. Ct. 1656, 1673 (2015) (Breyer, J., concurring) (observing that, in his view, the "Court's doctrine referring to tiers of scrutiny [are] guidelines informing [its] approach to the case at hand, not tests to be mechanically applied"); Gratz v. Bollinger, 539 U.S. 244, 298-99 (2003) (Ginsburg, J., dissenting) (criticizing the Court for "once again maintain[ing] that the same standard of review controls judicial inspection of all official race classifications").

[181] In an earlier case—DeFunis v. Odegaard, 416 U.S. 312 (1974)—the Court declined to reach the merits of a similar challenge to an affirmation action admissions policy at the University of Washington's law school. *Bakke* was therefore the first case involving an affirmative action policy that the Court reviewed on its merits. *See* CHEMERINKSY, *supra* note 171, at 765 (noting the same).

And the Court's fractured decision there prefigured the central disagreements that the Justices still face in reviewing so-called "benign" racial classifications.[182]

1. *Bakke*'s Splintered Levels of Scrutiny

In the early 1970s, not long after the Medical School opened, it adopted a race-conscious admissions policy to increase its enrollment of certain "disadvantaged" students.[183] Under that policy, the school each year would set aside 16 seats in its entering class of 100 specifically for members of this "disadvantaged" group, to be admitted by a "special admissions" committee.[184] Although many white students sought admission under this "special" policy, the committee considered only students of specifically identified racial minorities.[185] After Allan Bakke, a white male, twice sought—and was denied—admission to the school, he brought suit challenging the set-aside under the Equal Protection Clause as well as Title VI,[186] which prohibits institutional recipients of federal funds—like the Medical School—from discriminating on the basis of race.[187]

Bakke's case eventually found its way to the Supreme Court and into the hands of a divided bench. The Justices found themselves particularly at odds over the case's threshold question—what level of scrutiny the Court should apply in reviewing Bakke's challenge. Justice Stevens, writing for a quartet of Justices, concluded that the program violated Title VI, sidestepping the constitutional question.[188] Another four Justices would have reached the equal protection challenge,[189] and in doing so would have required the Medical School to point to "important governmental objectives" that justified its admissions policy's use of "remedial" racial classifications, along with evidence that their use was "substantially related to" achieving those important objectives.[190] Under that standard—a form of *intermediate scrutiny*[191]—these Justices would have upheld the policy.[192]

Justice Powell, announcing the Court's judgment but writing for himself, insisted that all "racial and ethnic distinctions" drawn by the government must be regarded as "inherently suspect," calling for "the most exacting judicial examination."[193] What that meant in *Bakke*, according to

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[182] Metro Broad., Inc. v. FCC, 497 U.S. 547, 564-65 (1990) (distinguishing "benign race-conscious measures," such as voluntary affirmative action programs, from those that are "'remedial,' or designed to compensate victims of past governmental or societal discrimination").

[183] The Medical School apparently did not define what that category encompassed besides certain racial minorities. *See* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 274-75 (1978) (describing the operation of the "special admissions program"). Unless otherwise indicated, citations of *Bakke* are of Justice Powell's opinion announcing the Court's judgment.

[184] *Id.*

[185] Those included students who identified themselves as Asian, Black, "Chicano," or "American Indian." *Id.*

[186] The Act provides that "[n]o 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." 42 U.S.C § 2000d.

[187] *Bakke*, 438 U.S. at 276-79.

[188] This group included Chief Justice Burger along with Justices Rehnquist, Stevens, and Stewart. *See id*. at 418 (Stevens, J., concurring in the judgment in part and dissenting in part).

[189] That group included Justices Brennan, Blackmun, Marshall, and White. *See id.* at 324.

[190] *Id.* at 359 (Brennan, J., concurring in the judgment in part and dissenting in part).

[191] *See* CHEMERINSKY, *supra* note 171, at 765 (characterizing this level of review as intermediate).

[192] *Bakke*, 438 U.S. at 325-26 (Brennan, J., concurring in the judgment in part and dissenting in part).

[193] *Id.* at 291.

Justice Powell, was that the Medical School would need to prove that its use of the "special admissions" carve-out was "precisely tailored to serve a compelling governmental interest"—the standard of review now known simply as *strict scrutiny*.[194] And because, in his view, the school could come forward with no such proof,[195] Justice Powell concluded that its affirmative-action policy could not survive the Court's scrutiny, whether under the Fourteenth Amendment or the overlapping standards of Title VI.[196]

2. Settling on Strict Scrutiny

Because *Bakke* yielded no majority opinion, it could only hint at how the Court might treat other "benign" race-conscious policies that did not involve the sort of apparent quota[197] invalidated in that case or cases outside the unique context of higher education. That uncertainty would last another decade, as the Court, in another series of splintered decisions, weighed constitutional challenges to differently structured affirmative action policies in other contexts, each time without resolving the appropriate standard of review.[198]

That uncertainty appeared to abate with the Court's 1989 decision in *Richmond v. J.A. Croson, Co.*[199] There, for the first time,[200] five Justices clearly signaled that they would apply strict scrutiny to affirmative action plans implemented at the state and local levels, including the program they invalidated in that case, involving the City of Richmond's set-aside of public work funds for minority-owned businesses.[201] But the next year, in *Metro Broadcasting, Inc. v. FCC*,[202] the Court, in another 5-4 ruling, suggested that it would review *federal* affirmative action plans differently. In the Court's view there, "benign race-conscious measures mandated by *Congress*" need only "serve important governmental objectives" and be "substantially related to the achievement of those objectives"—satisfying an intermediate level of scrutiny.[203]

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[194] *Id.* at 299.

[195] For a fuller discussion of Justice Powell's analysis of the Medical School's plan, *see infra* notes 144-148 and accompanying text.

[196] *Bakke*, 438 U.S. at 299. Justice Powell agreed with the four dissenting Justices that "Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment." *Id.* at 287; *see also id.* at 352 (Brennan, J., concurring in part and dissenting in part) (explaining the dissenters' view that "Title VI's definition of racial discrimination is absolutely coextensive with the Constitution's").

[197] *See Bakke*, 438 U.S. at 288 n.26 (noting that the lower courts there "found—and [the] petitioner d[id] not deny—that white applicants could not compete for the 16 places reserved solely for the special admissions program," leading the courts to "characterize[] this as a 'quota' system").

[198] *See* Fullilove v. Klutznick, 448 U.S. 448 (1980) (upholding a federal law that mandated 10 percent of federal funds granted for public work projects to be awarded to minority-owned and -controlled businesses, but expressly declining to adopt any of the analyses presented in *Bakke*); Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986) (invalidating under the Fourteenth Amendment a collective bargaining agreement provision that protected minority public school teachers from layoff at the expense of more senior white faculty, again without reaching any consensus as to the standard of review); *see generally* CHEMERINSKY, *supra* note 171, at 766-68 (discussing the development of these cases in greater detail).

[199] 488 U.S. 469 (1989).

[200] *Id.* at 551 (Marshall, J., dissenting) ("Today, for the first time, a majority of the Court has adopted strict scrutiny as its standard of Equal Protection Clause review of race-conscious remedial measures.").

[201] *See id.* at 499 (concluding that, "[w]hile there [was] no doubt that the sorry history of both private and public discrimination in this country ha[d] contributed to a lack of opportunities for black entrepreneurs, this observation, standing alone, cannot justify a rigid racial quota in the awarding of public contracts in Richmond, Virginia").

[202] 497 U.S. 547 (1990).

[203] *Id.* at 564-65 (emphasis added).

Just a few years later, however, in *Adarand Constructors, Inc. v. Peńa*,[204] the Supreme Court reversed course. There, in a federal contracting case, the Court drew a different lesson from its pre-*Metro* line of race-classification cases: in the view of the *Adarand* majority, "any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny."[205] That simple rule therefore precluded the divided regime upheld in *Metro Broadcasting*, subjecting the states' use of racial classifications to strict scrutiny, while relaxing the review of comparable classifications enacted by Congress. Instead, the *Adarand* Court held, "[f]ederal racial classifications, like those of a State, must serve a compelling governmental interest, and must be narrowly tailored to further that interest."[206] And to the extent that *Metro Broadcasting* was "inconsistent" with that uniform rule, it was accordingly overruled.[207]

After *Adarand* strict scrutiny therefore became the test of any classification that subjected individuals to unequal treatment based on their race, no matter which state actor was doing the classifying.[208] And the Court expressly extended that holding to the context of higher education.[209] As the Court reaffirmed in *Fisher v. University of Texas*, "because racial characteristics so seldom provide a relevant basis for disparate treatment," "[r]ace may not be considered [by a university] unless [its] admissions process can withstand strict scrutiny."[210]

It therefore appears that a classification that subjects individuals to unequal treatment because of their race, even if for a "benign" purpose, will have to satisfy strict scrutiny.[211] In its canonical formulation, that test calls for measuring such classifications along the two dimensions Justice Powell identified in *Bakke*: (1) the classification must serve a *compelling governmental interest* and (2) the use of that classification must also be *narrowly tailored* to achieving that interest.[212] The government has the burden of proving both,[213] and neither is easy to do.[214] Indeed, in the

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[204] 515 U.S. 200 (1995).

[205] *Id.* at 224.

[206] *Id.* at 227.

[207] *Id.*

[208] *See, e.g.*, Johnson v. California, 543 U.S. 499, 505 (2005) ("We have held [in *Adarand*] that 'all racial classifications [imposed by government] ... must be analyzed by a reviewing court under strict scrutiny.'"). In several cases since *Adarand* the Court has suggested, as in *Johnson*, that the use of *any* racial classification by the government would be presumptively impermissible. A number of federal appeals courts, noticing some ambiguity in *Adarand*'s holding, have concluded that an express racial classifications need not, in every instance, draw strict scrutiny. *See* MD/DC/DE Broads. Ass'n v. FCC, 236 F.3d 13, 20 (D.C. Cir. 2001) ("assum[ing] ... that *Adarand* requires strict scrutiny only of governmental actions that lead to people being treated unequally on the basis of their race"); *see also* Safeco Ins. Co. of Am. v. City of White House, 191 F.3d 675, 692 (6th Cir. 1999) ("Outreach efforts may or may not require strict scrutiny.") Whether this distinction survives the Court's more recent rulings in Grutter v. Bollinger, 539 U.S. 306 (2003) and Fisher v. Univ. of Tex. (*Fisher I*), 570 U.S. 297, 309-10 (2013) remains to be seen.

[209] *See* Fisher v. Univ. of Tex. (*Fisher I*), 570 U.S. 297, 309-10 (2013) (citing Gratz v. Bollinger, 539 U.S. 244 (2003) and Grutter v. Bollinger, 539 U.S. 306 (2003) for the proposition that "[r]ace may not be considered [by a university] unless the admissions process can withstand strict scrutiny").

[210] Fisher v. Univ. of Tex. (*Fisher II*), 136 S. Ct. 2198, 2208 (2016).

[211] *See id.* ("Race may not be considered [by a university] unless [its] admissions process can withstand strict scrutiny."); *see also* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 720 (2007) ("It is well established that when the government distributes burdens or benefits on the basis of individual racial classifications, that action is reviewed under strict scrutiny.")

[212] Johnson v. California, 543 U.S. 499, 505 (2005) (citing Adarand Constructors, Inc. v. Peńa, 515 U.S. 200, 227 (1995)).

[213] *Id.*

[214] One study found, for example, that of all governmental actions reviewed by the federal courts under strict scrutiny

sixty years that separated the Court's now-repudiated decision in *Korematsu v. United States*[215] from *Grutter v. Bollinger*,[216] when the Court first upheld an affirmative action policy at a public university, the only other "racial classifications upheld under strict scrutiny [have been] race-based remedies for prior racial discrimination by the government."[217] To many commentators "strict scrutiny" has thus come to seem rather more "strict in theory, but fatal in fact"[218]—a point sometimes echoed by the Justices themselves.[219]

Voluntary "Affirmative Action" in Higher Education: Scrutinizing Admissions

Strict scrutiny may typically be fatal in fact, but affirmative action policies in higher education have been a notable exception.[220] Partly this has to do with the Equal Protection Clause itself, and the often crucial difference that a particular context makes in deciding cases under that "broad provision[]."[221] And for several Justices the context of affirmative action, involving the arguably "benign" use of race, has seemed particularly distinctive.[222] Yet, despite this contextual difference, the Court has made it clear that its scrutiny of race-conscious admission policies is still every bit as strict. Or, as Justice Kennedy put the point in the first *Fisher* case, even though "[s]trict scrutiny must not be 'strict in theory, but fatal in fact,'" it must also "not be strict in theory but feeble in fact."[223]

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to that point, only some 30% ended up surviving, including only 27% of challenged policies reviewed specifically for "suspect class discrimination." Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 815 (2006).

[215] 323 U.S. 214 (1944); *see* Trump v. Hawaii, 585 U. S. __, __ (2018) (slip op. at 38) (announcing that "*Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear—'has no place in law under the Constitution'").

[216] 539 U.S. 306 (2003).

[217] Suzanna Sherry, *Foundational Facts and Doctrinal Change*, 2011 U. ILL. L. REV. 145, 156, 156 n.27 (2011) (citing, as the only exceptions, United States v. Paradise, 480 U.S. 149 (1987) and Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421, 480 (1986)).

[218] Gerald Gunther, *In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

[219] *See, e.g.*, Fullilove v. Klutznick, 448 U.S. 448, 507 (1980) (Powell, J., concurring) (acknowledging that "the failure of legislative action to survive strict scrutiny has led some to wonder whether our review of racial classifications has been strict in theory, but fatal in fact"); *Adarand*, 515 U.S. at 237 ("[W]e wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.'"); Grutter v. Bollinger, 539 U.S. 306, 326 (2003) (explaining that "[s]trict scrutiny is not 'strict in theory, but fatal in fact.'); Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 832-33 (2007) (Breyer, J., dissenting) (explaining that strict scrutiny "is *not* in all circumstances 'strict in theory, but fatal in fact'").

[220] *See, e.g.*, Brett M. Kavanaugh, *Keynote Address: Two Challenges for the Judge as Umpire: Statutory Ambiguity and Constitutional Exceptions*, 92 NOTRE DAME L. REV. 1907, 1917 (2017) ("The Court has recognized a basic equal protection right not to be treated differently by the government on account of your race. But there is a longstanding exception for affirmative action, at least in the realm of higher education.").

[221] *Grutter*, 539 U.S. at 327 ("Context matters when reviewing race-based governmental action under the Equal Protection Clause.") (quoting Gomillion v. Lightfoot, 364 U.S. 339, 343-44 (1960)).

[222] *See, e.g.*, Richmond v. J. A. Croson Co., 488 U.S. 469, 551-52 (1989) (Marshall, J., dissenting) ("A profound difference separates governmental actions that themselves are racist, and governmental actions that seek to remedy the effects of prior racism or to prevent neutral governmental activity from perpetuating the effects of such racism.").

[223] Fisher v. Univ. of Tex. (*Fisher I*), 570 U.S. 297, 314 (2013).

This seeming tension—between the strictness of the Court's scrutiny and its approval of race-conscious admissions policies—has led the Court to adjust its framework for scrutinizing similar policies over the years. And since *Bakke* that framework appears to have shifted in two significant respects, corresponding to each of the two prongs of strict scrutiny. First, the Court now requires public universities that adopt affirmative action admissions policies to explain in increasingly "concrete and precise" terms[224] what diversity-related educational goals those policies serve and why the university has chosen to pursue them.[225] Anything less, the Court has held, would fail to present an interest sufficiently compelling under strict scrutiny.[226] Second, the Court also now expects universities to prove that their policies achieve those "concrete and precise goals" in an appropriately "flexible" way, as most clearly exemplified by the Harvard plan that Justice Powell singled out in *Bakke*.[227] That model has yielded "five hallmarks" of an appropriately tailored affirmative action policy, criteria that have since guided lower courts in assessing other affirmative action plans.[228]

From "Student Body Diversity" to Concrete and Particular Diversity-Related Goals

For a university's affirmative action policy to survive strict scrutiny, a university must first "demonstrate with clarity that its 'purpose or interest is both constitutionally permissible and substantial."[229] The Court has recognized only a single interest that meets that standard: "the attainment of a diverse student body."[230] What exactly that interest amounts to—and how, consequently, a university should ensure it has appropriately tailored its policy to achieve that interest—has been a point of uncertainty since *Bakke*.[231] With its two decisions in *Fisher v. University of Texas*, however, the Court appears now to require a more "concrete and precise" articulation of the diversity-related educational goals a university hopes to achieve through its affirmative action admissions policy. In addition, the Court also now appears to expect a university to provide a reasoned and principled explanation of why the school believes it important to achieve those goals.

[224] Fisher v. Univ. of Tex. (*Fisher II*), 136 S.Ct. 2198, 2211 (2016) (requiring the university to articulate "concrete and precise goals" to state a constitutionally compelling interest).

[225] *Fisher I*, 570 U.S. at 310 (requiring the university to provide "a reasoned, principled explanation for the academic decision" "to pursue 'the educational benefits that flow from student body diversity'").

[226] *Fisher II*, 136 S.Ct. at 2211 (requiring a university to state "goals" that are "sufficiently measurable to permit judicial scrutiny of the policies adopted to reach them").

[227] *Grutter*, 539 U.S. at 334 (noting that "Justice Powell made clear in *Bakke* [that] truly individualized consideration demands that race be used in a flexible, nonmechanical way").

[228] *See, e.g.*, Smith v. Univ. of Wash., 392 F.3d 367, 373 (9th Cir. 2004) (applying *Grutter*'s "five hallmarks" to uphold the University of Washington Law School's affirmative action policy).

[229] *Fisher II*, 136 S.Ct. at 2208 (quoting *Fisher I*, 570 U.S. at 298).

[230] *Bakke*, 438 U.S. at 311-12.

[231] This appears to reflect more general uncertainty about the Court's use of strict scrutiny, a result of its having "largely ignored parallel questions involving the generality with which governmental interests should be specified." Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. Rev. 1267, 1271 (2007).

1. *Bakke* and the Diversity Interest

The diversity rationale emerged with the Court's first encounter with a voluntary affirmative-action policy, in *Bakke*.[232] There—in an opinion for the Court joined by no other Justice—Justice Powell explained what interests clearly would *not* count as compelling enough to satisfy strict scrutiny. Those included the Medical School's alleged interest in having "some specified percentage" of certain racial or ethnic groups in a student body and its interest in "remedying ... the effects of societal discrimination," as well as the school's particular interest in "the delivery of health-care services to communities currently underserved." None of these interests, Justice Powell concluded, provided a reason substantial enough to justify turning to race-conscious measures.[233] Nor has the Court said otherwise since.

But Justice Powell was also clear about what interest he believed *would* satisfy strict scrutiny: "student body diversity."[234] And just as importantly, he also explained why: colleges and universities, he suggested, had a uniquely academic interest in promoting an "atmosphere of speculation, experiment, and creation"—an interest, more simply, in "academic freedom."[235] That interest, Justice Powell observed, was not only "essential to the quality of higher education," but had also long "been viewed as a special concern of the First Amendment."[236] Thus the "right to select those students who will contribute the most to the robust exchange of ideas" not only allowed a university "to achieve a goal that is of paramount importance in the fulfillment of its mission,"[237] it also represented a "countervailing *constitutional* interest" that, in Justice Powell's view, called for the Court's respect.[238]

In *Bakke*, Justice Powell set out the basic theory for why diversity could justify an affirmative action policy, at least "in the context of a university's admissions program.[239] But he gave few details about what that interest encompassed.[240] As he saw it, that interest must have its limits: pursuing diversity would not allow a university to resort to racial quotas,[241] for example, nor could the school disregard other "constitutional limitations protecting individual rights."[242] But Justice Powell declined to indicate where those other limitations fell or how they circumscribed the goals a university could permissibly seek in the name of a diverse student body. And because the *Bakke* Court fractured as it did, with no one opinion commanding a majority of the Justices'

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[232] *Bakke*, 438 U.S. at 306-12.

[233] *Id.*

[234] *See Grutter*, 539 U.S. at 325 (endorsing "Justice Powell's view that student body diversity is a compelling state interest that can justify the use of race in university admissions"). No other Justice in *Bakke* joined Justice Powell's opinion or his explanation of the diversity rationale. Indeed, the term "diversity" does not even appear in any other Justice's opinion there.

[235] *Bakke*, 438 U.S. at 312-13 (internal quotation marks omitted).

[236] *Id.* (emphasis added).

[237] *Id.* (internal quotation marks omitted).

[238] *Id.* (emphasis added).

[239] *Id.* at 314.

[240] In *Fisher II*, Justice Kennedy would make this concern explicit: "A university's goals cannot be elusory or amorphous—they must be sufficiently measurable to permit judicial scrutiny of the policies adopted to reach them." *Fisher II*, 136 S.Ct. 2198, 2211 (2016).

[241] *Bakke*, 438 U.S. at 307 ("If [the Medical School's] purpose is to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin, such a preferential purpose must be rejected not as insubstantial but as facially invalid.").

[242] *Id.* at 314.

votes, the lessons of that case have been hard to discern, especially after the Court appeared to decline a similar diversity rationale in later cases outside higher education.[243] Perhaps unsurprisingly, the lower courts soon came to reflect this uncertain division of opinion in later cases involving affirmative action programs at other public universities.[244]

2. "Critical Mass" and Diversity

Some clarity over *Bakke*'s diversity theory came in 2003, with a pair of decisions reviewing affirmative action policies of the University of Michigan: *Grutter v. Bollinger*,[245] challenging the university's law school admission program, and *Gratz v. Bollinger*,[246] challenging the policy used by the university's undergraduate program. *Grutter*, especially, helped clarify what an interest in diversity involved, and how a university could rely on that interest to defend a race-conscious admissions policy.

Under the admissions policy of the University of Michigan Law School (the Law School) challenged in *Grutter*, applicants to incoming classes were admitted under a policy that weighed a composite of the applicant's LSAT score and undergraduate GPA along with several more individualized factors, including the applicant's race.[247] The Law School set out to create classes with what it called a "critical mass of underrepresented minority students,"[248] to ensure that those students felt "encourage[d] ... to participate in the classroom and not feel isolated."[249] The school, however, never explicitly assigned a numerical target for any particular racial group, though it did track, on an ongoing basis, "the racial composition of the developing class."[250] A rejected white applicant claimed the Law School's admission policy discriminated against her based on her race, in violation of the Equal Protection Clause and Title VI.[251] And her challenge eventually reached the Supreme Court, alongside its companion case, *Gratz*,[252] challenging the university's admissions policy for its undergraduate program.

Given the uncertainties surrounding *Bakke*'s bottom line,[253] the first major question in *Grutter* centered on the basic goal of the Law School's policy: Is achieving student diversity an interest compelling enough to justify a school's use of race at all in its admissions decisions? And for the

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[243] *See* Hopwood v. Tex., 78 F.3d 932, 944-45 (5th Cir. 1996), *cert. denied* 518 U.S. 1033 (1996) (striking down the University of Texas law school's affirmative action policy partly because "recent Supreme Court precedent"—including *Adarand*, *Metro Broadcasting*, and *Croson*—appeared to suggest that the "diversity interest will not satisfy strict scrutiny").

[244] *Compare Hopwood* 78 F.3d at 944 (concluding that the diversity interest was not compelling enough to survive strict scrutiny), *with* Smith v. Univ. of Wash. Law Sch., 233 F.3d 1188, 1200-01 (9th Cir. 2000) (concluding, based on Justice Powell's opinion in *Bakke*, that "educational diversity is a compelling governmental interest that meets the demands of strict scrutiny of race-conscious measures").

[245] 539 U.S. 306 (2003).

[246] 539 U.S. 244 (2003).

[247] *Grutter*, 539 U.S. at 315.

[248] *Id.* at 319.

[249] *Id.* at 318

[250] *Id.*

[251] *Id.* at 316-17.

[252] 539 U.S. 244 (2003).

[253] *Grutter*, 539 U.S. at 325 (noting that "[i]n the wake of [the Court's] fractured decision in *Bakke*, [lower] courts have struggled to discern whether Justice Powell's diversity rationale, set forth in part of the opinion joined by no other Justice, [was] nonetheless binding precedent").

first time the Supreme Court held that it was. Writing for a clear majority, Justice O'Connor adopted the view Justice Powell set out in *Bakke*: "student body diversity is a compelling state interest that can justify the use of race in university admissions."[254]

More than that, the Court made clear that it was willing to defer to the Law School's understanding of that interest,[255] and its goal of "enroll[ing] a 'critical mass' of minority students.'"[256] As Justice O'Connor explained for the Court, by enrolling a "critical mass" of students, the Law School was trying to achieve the "substantial" "educational benefits that diversity is designed to produce"—benefits such as "promot[ing] cross-racial understanding," "break[ing] down racial stereotypes," "promot[ing] learning outcomes," and "better prepar[ing students] as professionals."[257] Achieving a "critical mass" of underrepresented students, the Court agreed, was simply one way that the Law School could try to vindicate those diversity-related educational benefits. And because this interest was deemed compelling enough to satisfy strict scrutiny, the Court was therefore willing to treat the school's use of the "critical mass" target as a permissible proxy for achieving those benefits.[258]

Not all the Justices agreed, however, that the university's invocation of "critical mass" made the diversity interest more concrete[259] or compelling.[260] In dissent, Justice Kennedy sided with Chief Justice Rehnquist's view that "the concept of critical mass [was] a delusion used by the Law School to mask its attempt to make race an automatic factor in most instances and to achieve numerical goals indistinguishable from quotas."[261] That "delusion," according to Justice Kennedy, did not just make the school's appeal to "critical mass" "inconsistent with [the] individual consideration" of applicants.[262] It also, in his view, turned the school's admissions policy into a veiled form of racial balancing.[263] And all four dissenting Justices found that result incompatible with the Equal Protection Clause.[264]

3. From "Critical Mass" to "Concrete and Precise Goals"

Grutter appeared to settle the major question left open by the fractured decision in *Bakke*: whether achieving student diversity was a compelling enough interest for a public university to

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[254] *Id.* at 325.

[255] *Id.* at 328 ("The Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer.").

[256] *Id.* at 329-30.

[257] *Id.*

[258] *Id.* at 333.

[259] *See id.*at 347 (Scalia, J., dissenting) (rejecting the "mystical 'critical mass' justification'" as "challeng[ing] even the most gullible mind").

[260] All four dissenting Justices—Chief Justice Rehnquist and Justices Kennedy, Scalia, and Thomas—wrote opinions, but only Justices Scalia and Thomas directly questioned whether the Law School had stated a sufficiently compelling interest. *See id.* at 357 (Thomas, J., dissenting) ("Justice Powell's opinion in *Bakke* and the Court's decision today rest on the fundamentally flawed proposition that racial discrimination can be contextualized so that a goal, such as classroom aesthetics, can be compelling in one context but not in another."); *id.* at 347 (Scalia, J., dissenting) (finding "particularly unanswerable" Justice Thomas's criticism of the "allegedly 'compelling interest'" advanced by the Law School).

[261] *Grutter*, 539 U.S. at 389 (Kennedy, J., dissenting).

[262] *Id.*

[263] *Id.*

[264] *See id.* at 387 (Rehnquist, C.J., dissenting).

justify its consideration of race in its admissions policies. *Grutter* confirmed not only that the Court still viewed student diversity as a compelling interest, but also that a school could vindicate that interest by seeking to enroll a "critical mass" of underrepresented minorities in its incoming classes.[265]

The ruling also effectively swept aside contrary lower court decisions that struck down other state universities' affirmative action policies, including in Texas.[266] In the wake of *Grutter*, the University of Texas (UT Austin) decided to revisit its applicant review process, eventually choosing to introduce race as one of the factors considered in its admissions policy. Under the revised policy, UT Austin would continue to admit all Texas high school students who graduated in the top ten percent of their class,[267] and fill in the rest of its incoming undergraduate classes[268] using an index score incorporating two assessments: (1) an "Academic Index" (AI) that weighed the applicant's SAT score and academic record; and (2) a "Personal Achievement Index" (PAI) that included a more holistic appraisal of the student's character and, following post-*Grutter* revisions, also factored in the applicant's race.[269] Abigail Fisher, a white Texas student whose application to UT Austin was rejected under this process,[270] challenged the AI-PAI system.[271] That system, she argued, had discriminated against her as a white applicant by allegedly allowing race to figure in the decision to reject her application, in violation of the Equal Protection Clause.[272] Her challenge eventually made its way to the Supreme Court as *Fisher v. University of Texas*,[273] where the Supreme Court remanded the challenge to the lower court to review UT Austin's policy under strict scrutiny (*Fisher I*),[274] and then upon appeal upheld the school's admission policy (*Fisher II*).[275]

In her suit, Fisher did not challenge *Grutter*'s basic holding—that the university had a compelling interest in student diversity, or even that the school could pursue that interest in diversity by enrolling a "critical mass" of underrepresented minorities.[276] But when the Court finally took up her challenge on the merits in *Fisher II*, Justice Kennedy also took the occasion to revisit *Grutter*'s analysis, offering several "controlling principles"[277] on behalf of the four-Justice majority[278] that would guide its review of UT Austin's race-conscious admissions policy.

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[265] *Id.* at 335-36.

[266] *See Fisher II*, 136 S.Ct. 2198, 2205 (2016) ("In upholding this nuanced use of race, *Grutter* implicitly overruled *Hopwood*'s categorical prohibition.").

[267] *Id.*

[268] *Id.*

[269] This included essays submitted by the applicant, as well as other factors such as "leadership and work experience, extracurricular activities, community service, and other 'special characteristics.'" *Id.*

[270] Because Fisher did not graduate in the top ten percent of her high school class, her only chance for admission was through holistic review under the AI-PAI system. *Id.* at 2207.

[271] *Id.*

[272] *Id.*

[273] *Fisher I*, 570 U.S. 297 (2013).

[274] The Court held that the Fifth Circuit appellate panel in that case had misapplied the strict scrutiny standard by erroneously "deferring to the University's good faith in its use of racial classifications and affirming the grant of summary judgment on that basis." *Id.* at 314.

[275] *Fisher II*, 136 S.Ct. at 2215.

[276] *Fisher I*, 570 U.S. at 311 (noting that "the parties [did] not ask the Court to revisit that aspect of *Grutter*'s holding").

[277] *Fisher II*, 136 S.Ct. at 2207.

[278] Justice Kagan took no part in the case, and Justice Scalia had passed away before the case was decided, leaving only

In *Fisher II*, as in *Fisher I*, Justice Kennedy confirmed that *Grutter*'s bottom line remained good law: "obtaining 'the educational benefits that flow from student body diversity,'" he confirmed, was still an interest compelling enough to satisfy strict scrutiny.[279] But perhaps mindful of his dissent in *Grutter*, Justice Kennedy also clarified that "asserting an interest in the educational benefits of diversity writ large" would not suffice.[280] That, he explained, would make the "university's goals" too "elusory or amorphous" "to permit judicial scrutiny of the policies adopted to reach them."[281]

The Court thus cut two new benchmarks for reviewing a university's asserted interest in resorting to race as a factor in its admissions policy. First, the university had to articulate "precise and concrete goals" that its race-conscious policy served, goals "sufficiently measurable" under "judicial scrutiny."[282] And, second, the university had to provide a "'reasoned, principled explanation' for its decision to pursue those goals"—a sound academic rationale, in other words, for wanting to achieve whatever diversity-related goals it set for itself.[283] In the majority's view, UT Austin's use of race in its admissions decisions measured up to both benchmarks.[284]

According to the Court, the first benchmark was straightforwardly met: the goals UT Austin articulated, Justice Kennedy pointed out, effectively "mirror[ed] the 'compelling interest' th[e] Court ha[d] approved in its prior cases."[285] And under *Grutter*, the majority concluded, those benefits passed constitutional muster.[286]

Notably, however, achieving critical mass was not among those Justice Kennedy listed. Nor did Justice Kennedy return to the question he raised in *Grutter*:[287] whether the "critical mass" concept even has a place among the "concrete and precise goals" that *could* survive strict scrutiny.[288] But that question was also arguably beside the point in *Fisher II*. As Justice Kennedy emphasized for the Court, the goals that UT Austin articulated were clearly constitutionally adequate, having come nearly verbatim from the Court's case law. And the university's officials had all offered "the same, consistent 'reasoned, principled explanation'" for pursuing them—meeting the Court's

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the seven Justices to consider Fisher's second appeal.

[279] *Id.* at 2210 (quoting *Fisher I*, 570 U.S. at 309).

[280] *Id.* at 2211.

[281] *Id.*

[282] *Id.*

[283] *Id.* at 2211 (quoting *Fisher I*, 570 U.S. at 310).

[284] *Id.*

[285] *Id.* at 2210 (reaffirming that "enrolling a diverse student body 'promotes cross-racial understanding, helps to break down racial stereotypes, and enables students to better understand persons of different races'").

[286] *Id.* at 2211 (rejecting the "contention that the University's goal was insufficiently concrete" based on its stated interest in obtaining the educational benefits approved in *Grutter*).

[287] *See Grutter*, 539 U.S. at 389 (Kennedy, J., dissenting) (describing the concept of "critical mass" as "a delusion used by the Law School to mask its attempt to make race an automatic factor in most instances and to achieve numerical goals indistinguishable from quotas").

[288] Justice Kennedy, writing for the majority, considered, but rejected, Fisher's argument that UT Austin allegedly "ha[d] no need to consider race because it had already 'achieved critical mass' by 2003 using the Top Ten Percent Plan and race-neutral holistic review." *Fisher II*, 126 S.Ct. at 2211. He did so, however, only because he concluded that UT Austin had carried its "heavy burden in showing that it had ... obtained the educational benefits of diversity before it turned to a race-conscious plan." *Id.* at 2211-12. He did not explain how—or whether—"achieving critical mass" mattered to that conclusion.

second benchmark.[289] That was apparently enough for the Court to conclude that a compelling interest justified the university's diluted use of race in its holistic review of applications.[290]

The Harvard Plan and the Five Hallmarks of Narrow Tailoring

With *Fisher I* and *II*, the Court reiterated that the educational benefits that come with a racially diverse student body count among the few interests compelling enough to survive strict scrutiny.[291] But *Fisher I* and *II* also narrowed that interest: seeking student body diversity had to involve objectives more specific than the simple desire for "diversity writ large."[292] Rather, under the *Fisher* formulation, the university must articulate the "concrete and precise goals" it expects its affirmative action policy to accomplish, along with a "reasoned, principled explanation" of why it has chosen to pursue them.[293] So long as a university does that, it will likely have a strong case, under *Fisher I* and *II*,[294] that a compelling interest supports its use of a race-conscious admissions policy.

That, however, is only the first of two tests that a policy has to pass under strict scrutiny. The second—probing whether the university has narrowly tailored its policy to achieve those diversity-related benefits—has proved equally critical in the Court's review of affirmative action policies. And once again owing to Justice Powell's opinion in *Bakke*, the Court appears to have embraced a model of what a narrowly tailored policy looks like: Harvard College's admissions program endorsed in *Bakke*,[295] now more commonly known as the "Harvard plan."[296] The Harvard plan has also provided the Court with a basis for developing more specific criteria for evaluating other affirmative action policies—what one court has described as the "five hallmarks of a narrowly tailored affirmative action plan."[297]

A Narrowly Tailored Affirmative Action Policy: *Bakke*'s Harvard Plan

The first affirmative action program to come before the Court—the policy challenged in *Bakke* at U.C. Davis's Medical School—was also the first to falter under the Court's scrutiny. But because the Justices were unable to cobble together a majority there, they also settled on no single

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[289] *Id.*

[290] *Id.* at 2211. As Justice Kennedy emphasized in his opinion for the Court, "there [was] no dispute that race is but a 'factor of a factor of a factor' in the holistic-review calculus." *Id.* at 2207.

[291] *Id.* at 2210.

[292] *Id.* at 2211.

[293] *Id.*

[294] The three dissenting Justices in *Fisher II*—Chief Justice Roberts along with Justices Alito and Thomas—voiced significant reservations about how compelling this interest was, or whether Justice Kennedy's new formulation of that interest, requiring "concrete and precise goals," really did anything to make it more concrete. As Justice Alito argued in the principal dissent, however "laudable" the university's goals may have been, they still were "not concrete or precise, and they offer[ed] no limiting principle for the use of racial preferences." *Fisher II*, 136 S.Ct. at 2233 (Alito, J., dissenting). That meant, in his view, that the Court could not "ensure than an admissions process is narrowly tailored," because it cannot "pin down the goals that the process is designed to achieve." *Id.* Justice Thomas, meanwhile, wrote to "reaffirm" his view "that 'a State's use of race in higher education admissions decisions is categorically prohibited by the Equal Protection Clause.'" *Id.* at 2215 (Thomas, J., dissenting) (quoting *Fisher I*, 570 U.S. at 315 (Thomas, J., concurring)).

[295] *See Bakke*, 438 U.S. at 316 (discussing the plan then in place at Harvard).

[296] Gratz v. Bollinger, 539 U.S. 244, 274 n.21 (2003) (analyzing "the individualized review ... discussed by Justice Powell and described by the Harvard plan in *Bakke*").

[297] Smith v. Univ. of Wash., 392 F.3d 367, 373 (9th Cir. 2004).

rationale for why the Medical School's policy could not survive the Court's scrutiny. This uncertainty left the lower courts without clear guidance on the permissibility of race-conscious admissions policies structured differently than the one struck down in *Bakke*.[298]

In announcing the judgment in *Bakke*, however, Justice Powell offered a clear reason why, in his view, the Medical School's policy could not survive a challenge under the Equal Protection Clause. The school's 16-seat set-aside for minority students was not "the only effective means of serving [the school's] interest in diversity"[299]—in constitutional parlance, the set-aside was not narrowly tailored. And to explain why not, Justice Powell pointed to the Harvard plan as an example of an appropriately tailored affirmative action policy.[300]

That plan, according to Justice Powell, had several significant features that distinguished it—favorably—from the set-aside struck down in *Bakke*:

> In [Harvard's] admissions program, race or ethnic background [is] deemed a "plus" in a particular applicant's file, yet it does not insulate the individual from comparison with all other candidates for the available seats. The file of a particular black applicant may be examined for his potential contribution to diversity without the factor of race being decisive when compared, for example, with that of an applicant identified as an Italian-American if the latter is thought to exhibit qualities more likely to promote beneficial educational pluralism. Such qualities could include exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, ability to communicate with the poor, or other qualifications deemed important ... [And] the weight attributed to a particular quality may vary from year to year depending upon the 'mix' both of the student body and the applicants for the incoming class.[301]

Unlike this "flexible" system of review, the Medical School policy at issue in *Bakke* was rigid: reserving a predetermined number of seats for a "selected ethnic group." In Justice Powell's view, that technique effectively precluded a more holistic review, that "treats each applicant as an individual."[302] "[R]ace or ethnic origin," as he saw it, did not serve as "a single though important element" of an applicant's file in the Medical School's policy; it had instead become a factor that "foreclosed" other applicants "from all consideration for [certain] seat[s] simply because [they were] not the right color or had the wrong surname."[303] A program like that, Justice Powell concluded, could not be narrowly tailored—precisely because another more individualized and "holistic" model, like Harvard's, could serve instead.[304]

Ratifying the Harvard Model

Even if *Bakke* suggested that the Court's scrutiny of a race-conscious admissions policy would be every bit as strict as for other racial classifications, later cases have made clear that such scrutiny need not always be fatal. The companion cases of *Grutter v. Bollinger* and *Gratz v. Bollinger*

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[298] Grutter v. Bollinger, 539 U.S. 306, 325 (2003) (noting the "courts ha[d] struggled to discern" what in Justice Powell's opinion was "binding precedent").

[299] Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 315 (1978).

[300] *See Bakke*, 438 U.S. at 316.

[301] *Id.* at 317-18.

[302] *Id.*

[303] *Id.*

[304] *See Grutter*, 539 U.S. at 337 (likening the University of Michigan Law School's "individualized, holistic review of each applicant's file" to "the Harvard plan Justice Powell referenced in *Bakke*").

offer clear examples: each involved affirmative action admissions policies at the University of Michigan, and each yielded a different bottom line, with the Court upholding the Law School's policy in *Grutter* while striking down the university's undergraduate admissions policy in *Gratz*.[305] But those diverging results appeared to proceed from a common starting point: how closely the challenged admissions policy resembled the Harvard plan.[306]

In the case of the Law School's admissions policy, the Court found the resemblance quite close. As Justice O'Connor explained for the Court in *Grutter*, "the Law School engages in a highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment."[307] It therefore did not award "mechanical, predetermined diversity 'bonuses' based on race or ethnicity."[308] And "[l]ike the Harvard Plan, the Law School's admissions policy" accorded each applicant the same sort of flexible consideration that Justice Powell had called for in *Bakke*.[309]

That "policy st[ood] in sharp contrast,"[310] however, with the way the Court viewed the university's undergraduate admissions policy in *Gratz*. Under the undergraduate policy, admissions officers automatically awarded "20 points, or one-fifth of the points needed to guarantee admission, to every single 'underrepresented minority' applicant solely because of race."[311] As Chief Justice Rehnquist explained for the Court, that policy therefore violated a basic feature of "[t]he admission program Justice Powell described" in *Bakke*—a program that "did not contemplate that any single characteristic automatically ensured a specific and identifiable contribution to a university's diversity."[312] The result was a policy that did not "offer applicants the individualized selection process described in Harvard's example," and that could consequently not pass strict scrutiny.[313]

On that point Justice O'Connor also agreed. As she explained in supplying her decisive fifth vote, the undergraduate policy simply did not "enable[] admissions officers to make nuanced judgments with respect to the contributions each applicant is likely to make to the diversity of the incoming class," unlike the Law School's more holistic policy.[314] This was true even though the undergraduate policy "assign[ed] 20 points to some 'soft' variables other than race," such as "leadership and service, personal achievement, and geographic diversity."[315] None of that, in Justice O'Connor's view, could counteract the more problematic effect of those factors' being "capped at much lower levels," so that "even the most outstanding national high school leader could never receive more than five points for his or her accomplishments—a mere quarter of the

[305] *Grutter*, 539 U.S. at 343-44; Gratz v. Bollinger, 539 U.S. 244, 275-76 (2003).

[306] *See Gratz*, 539 U.S. at 269, 271 (disagreeing with the university's contention that its "program 'hews closely' to both the admissions program described by Justice Powell and the Harvard College admissions program that he endorsed," while describing the Harvard plan as "instructive" in the Court's consideration of the undergraduate program); *Grutter*, 539 U.S. at 337 (concluding that the Law School's admissions policy conformed to "the Harvard Plan" that Justice Powell described in *Bakke*).

[307] *Grutter*, 539 U.S. at 337.

[308] *Id.*

[309] *Id.*

[310] *Gratz*, 539 U.S. at 279 (O'Connor, J., concurring).

[311] *Id.* at 270.

[312] *Id.* at 271.

[313] *Id.* at 273.

[314] *Id.* at 279.

[315] *Id.*

points automatically assigned to an underrepresented minority solely based on the fact of his or her race."[316] That weighting, though not problematic in all cases,[317] had all but ensured there "that the diversity contributions of applicants [could not] be individually assessed."[318] A thumb pressed that heavily on the racial scale, Justice O'Connor concluded, came too close to the "nonindividualized, mechanical" balancing condemned by *Bakke* to survive strict scrutiny.[319]

Five Hallmarks of a Narrowly Tailored Admissions Policy

Despite their contrasting results, *Gratz* and *Grutter* gestured at several basic criteria by which to assess a university's race-conscious admissions policy. Those criteria, as the U.S. Court of Appeals for the Ninth Circuit later described them, could be summed up in "five hallmarks of a narrowly tailored affirmative action plan."[320] And all five can be traced in one way or another to Justice Powell's analysis of the Harvard plan.

1. No Quotas.

Perhaps the clearest violation of the requirement that a policy be narrowly tailored is the use of racial quotas. As Justice O'Connor explained in *Grutter*, a "'quota' is a program in which a certain fixed number or proportion of opportunities are reserved exclusively for certain minority groups," consequently "insulat[ing] the individual [applicant] from comparison with all other candidates for the available seats."[321] And as Justice Powell emphasized in *Bakke*,[322] and as has been consistently reaffirmed by the Court since, "[t]o be narrowly tailored, a race-conscious admissions program cannot use a quota system."[323] This ban on quotas therefore precludes the use of a rigid set-aside like the one challenged in *Bakke*.[324] And it likewise rules out the sort of "mechanical," automatic points system that was once in place at the University of Michigan's undergraduate college and was later invalidated in *Gratz*.[325]

2. Individualized Consideration.

The flip side of the Court's refusal to accept racial quotas has been its insistence on individualizing the consideration of applicants. As Justice Kennedy reaffirmed in *Fisher I*, echoing Justice Powell's description of the Harvard plan in *Bakke*,[326] an appropriately tailored program "must 'remain flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her

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[316] *Id.*

[317] *Id.* (contrasting the undergraduate policy's "automatic, predetermined point allocations" with the law school's admissions policy that "enable[d] admissions officers to make nuanced judgments").

[318] *Id.*

[319] *Id.* at 280.

[320] Smith v. Univ. of Wash., 392 F.3d 367, 373 (9th Cir. 2004).

[321] Grutter v. Bollinger, 539 U.S. 306, 335 (2003 (internal quotation marks and citations omitted).

[322] *See* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 316 (1978) (quoting from a description of the Harvard College admissions plan that describes it as having "not set target-quotas for the number of blacks" or any other group).

[323] *Fisher I*, 570 U.S. at 309 (quoting *Grutter*, 539 U.S. at 334); *see also Smith*, 392 F.3d at 374 (discussing *Grutter*).

[324] *See Fisher II*, 136 S.Ct. at 2208 (quoting *Fisher I*, 570 U.S. at 311) ("A university cannot impose a fixed quota or otherwise 'define diversity as "some specified percentage of a particular group merely because of its race or ethnic origin."').

[325] *See Gratz*, 539 U.S. at 280 (O'Connor, J., concurring).

[326] *See Bakke*, 438 U.S. at 316 (describing the Harvard plan as one that "treats each applicant as an individual").

application.'"[327] And as the Court suggested in *Gratz* and *Grutter*, an acceptable plan will therefore engage in a "highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment."[328] Such review allows "the use of race as one of many 'plus factors' in an admissions program,"[329] like in the University of Michigan Law School's policy upheld in *Grutter*.[330] It also appears to bar a school from "automatically award[ing] points to applicants from certain racial minorities" as an effectively decisive factor, as it became under the university's undergraduate policy.[331]

3. Serious, Good-Faith Consideration of Race-Neutral or More Flexible Alternatives.

Neither of these two criteria, however, implies that a university must exhaust "every conceivable race-neutral alternative" before turning to a race-conscious policy.[332] Instead, a university need only provide evidence that it undertook "serious, good faith consideration of workable race-neutral alternatives" before resorting to its choice of a race-conscious plan,[333] but that those alternatives either did not suffice to meet its approved educational goals[334] or would have required some sacrifice of its "reputation for academic excellence."[335] The same holds true, moreover, of more flexible race-conscious alternatives. Thus Justice Powell explained in *Bakke* that the Medical School's program was not narrowly tailored when the school could have adopted the more individualized, holistic program then in use at Harvard, an option the Medical School apparently did not consider.[336]

4. No Undue Harm.

Even though the Court has allowed the use of race-conscious admissions policies under the exacting standard of strict scrutiny, it has also long "acknowledge[d] that 'there are serious problems of justice connected with the idea of preference itself.'"[337] In *Grutter*, Justice O'Connor drew another corollary from that apparent discomfort with racial preferences. "[A] race-conscious admissions program," she explained, must "not unduly harm members of any racial group."[338] What this corollary means more specifically remains unclear; so far it has received only passing attention from the Court. At the least, Justice O'Connor suggested, a race-conscious admissions policy must not "unduly burden individuals who are not members of the favored racial and ethnic groups."[339] And in *Grutter*, Justice O'Connor put more flesh on that analysis: an affirmative action policy that closely resembled the Harvard plan, she suggested, would *not* "unduly harm"

[327] *Fisher I*, 570 U.S. at 309.

[328] *Grutter*, 539 U.S. at 337; *see also Smith*, 392 F.3d at 374 (quoting *Grutter* for the same).

[329] *Fisher I*, 570 U.S. at 305.

[330] *Id.* (citing *Grutter*).

[331] *Id.* (citing *Gratz*).

[332] *Grutter*, 539 U.S. at 339.

[333] *Id.*

[334] *Fisher I*, 570 U.S. at 312.

[335] Fisher v. Univ. of Tex. (Fisher II), 136 S.Ct. 2198, 2213 (2016) (citing *Grutter*, 539 U.S. at 339).

[336] *See* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 318-20 (1978) (concluding that the Medical School had not shown that "the challenged classification [was] necessary to promote a substantial state interest" given its departures from the Harvard plan).

[337] *Grutter*, 539 U.S. at 341 (quoting *Bakke*, 438 U.S. at 298).

[338] *Id.*

[339] *Id.* (internal quotation marks and citation omitted).

other applicants.[340] It remains to be seen, however, whether this principle might take on new life in the Court's review of other plans.[341]

5. Ongoing Review.

In *Grutter*, Justice O'Connor also drew a fifth and final corollary from the basic premise that the Fourteenth Amendment was meant "to do away with all governmentally imposed discrimination based on race."[342] "[R]ace-conscious admissions policies," she concluded, "must be limited in time."[343] This requirement, Justice O'Connor explained for the Court, reflected a consideration apparently unique to racial classifications: "however compelling their goals, [they] are potentially so dangerous that they may be employed no more broadly than the interest demands."[344] Doctrinally, this meant there could be no "permanent justification" for race-conscious admissions policies in higher education; sooner or later they had to end, as the university conceded in its briefing.[345] Practically, this "logical end point" could come in one of several ways. It could take the form of an explicit "durational limit," such as a sunset provision.[346] Or it could arrive as a result of "periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity."[347] But, however a university chooses to pursue that end, it has an "ongoing obligation to engage in constant deliberation and continued reflection regarding its admissions policies" and the role race plays in them, or whether it should continue to play one at all.[348]

For several Justices this ongoing obligation of review also pointed to something more definite—an expiration date, when "the use of racial preferences will no longer be necessary to further [the

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[340] *Id.* (concluding that "so long as a race-conscious admissions program uses race as a 'plus' factor in the context of individualized consideration, a rejected applicant" will have had her "qualifications ... weighed fairly and competitively," as required by the Equal Protection Clause); *see also Smith*, 392 F.3d at 374 (discussing this corollary).

[341] Justice Alito, dissenting in *Fisher II*, stressed just this concern about UT Austin's AI-PAI system, arguing that "the UT plan discriminates *against* Asian-American students," and contending that it "undeniably harms Asian-Americans" by effectively treating "the classroom contributions of Asian-American students as less valuable than those of Hispanic students" in deciding which group to give special consideration to during holistic review. *Fisher II*, 136 S.Ct. at 2227 (Alito, J., dissenting). Apparently as a result, the AI-PAI system was also "poorly tailored" under strict scrutiny. *Id.* This analysis may well have opened the door to the argument recently advanced by the U.S. Department of Justice (DOJ) in its intervention in the litigation involving Harvard's undergraduate admissions policy. Among the reasons that the policy should flunk strict scrutiny, DOJ has argued there, is that the policy has "work[ed] just such undue harm on Asian Americans," allegedly violating *Grutter*'s no-undue-harm principle. Statement of Interest in Opposition to Defendant's Motion for Summary Judgment at 12, Students for Fair Admissions, Inc. v. Harvard Corp., No. 1:14-cv-14176-ADB (D. Mass. Aug. 30, 2018) (quoting *Grutter*).

[342] *Grutter*, 539 U.S. at 341-42.

[343] *Id.* (internal quotation marks and citation omitted). In *Fisher I*, the Court acknowledged the durational limit as a part of *Grutter*'s holding. *See* Fisher v. Univ. of Tex. (Fisher I), 570 U.S. 297, 313 (2013) ("In *Grutter*, the Court approved the plan at issue upon concluding that it was not a quota, was sufficiently flexible, *was limited in time*, and followed 'serious, good faith consideration of workable race-neutral alternatives.'"). As the Court also expressly declined to "consider the correctness of that determination," with neither party having challenged it in *Fisher I* or *II*, a durational limit of some kind appears to remain good law. *Id.*

[344] *Id.* at 342.

[345] *Id.*

[346] *Id.*

[347] *Id.*; *see also Smith*, 392 F.3d at 375 (noting that, under *Grutter*, "race-conscious admissions programs must be limited in time, such as by sunset provisions or periodic reviews to determine whether the preferences remain necessary.").

[348] *Fisher II*, 136 S.Ct. at 2215.

school's] interest" in student body diversity.[349] Looking back over the quarter-century since *Bakke*, Justice O'Connor "expect[ed]" that day to come twenty-five years after casting her deciding votes in *Gratz* and *Grutter*—ten years from this writing.[350] What exactly this meant, as either a practical or doctrinal matter, also remains unclear. Indeed, even then several of her fellow Justices seemed less sure, or simply unsure, what to make of that unusually specific constitutional deadline.[351] But with six Justices having since departed the Court,[352] Justices O'Connor and Kennedy included, it remains to be seen whether in the next ten years race-conscious admissions policies will reach this foreordained "logical end point."

What seems clear for now, however, is that the Harvard plan described in *Bakke* remains the Court's working model of a constitutionally satisfactory race-conscious admissions policy. And that, as the Court has consistently said since,[353] is a policy capable of achieving the diversity "essential" to the life of a modern university, while still "treat[ing] each applicant as an individual."[354]

Title VI and Higher Education

Race has come to play two major doctrinal roles in higher education today, mirroring the two senses of "affirmative action" discussed in this report: the *mandatory* role, rooted in the affirmative obligation states have to eliminate the vestiges of *de jure* segregation, and the *voluntary* role, particularly in admissions decisions at selective colleges and universities. In the context of higher education, the Court has so far considered these two forms of "affirmative action" only in relation to public universities, and then primarily as a matter of constitutional law, under the Fourteenth Amendment's Equal Protection Clause. But many of those cases have also involved claims brought under Title VI of the Civil Rights Act of 1964 (Title VI or the Act).[355] And while the Court has read Title VI's protections to overlap with the Equal Protection Clause,[356] Congress still has a significant say over the substantive scope of Title VI as well as its enforcement.

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[349] *Grutter*, 539 U.S. at 343.

[350] *Id.*

[351] *See id*. at 346 (Ginsburg, J., concurring) ("From today's vantage point, one may hope, but not firmly forecast, that over the next generation's span, progress toward nondiscrimination and genuinely equal opportunity will make it safe to sunset affirmative action"); *id.* at 394 (Kennedy, J., dissenting) ("It is difficult to assess the Court's pronouncement that race-conscious admission programs will be unnecessary 25 years from now."); *but see id.* at 351 (Thomas, J., dissenting) (agreeing "with the Court's holding that racial discrimination in higher education admissions will be illegal in 25 years"); *id.* at 375-76 (Scalia, J., dissenting) (agreeing "that in 25 years the practices of the Law School will be illegal, [because] they are ... illegal now").

[352] This includes Chief Justice Rehnquist along with Justices O'Connor, Souter, Stevens, Scalia, and Kennedy. They have been replaced by, respectively, Chief Justice Roberts and Justices Alito, Sotomayor, Kagan, Gorsuch, and Kavanaugh.

[353] *See supra* section, "The Harvard Plan and the Five Hallmarks of Narrow Tailoring," pp.33-36.

[354] Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 312, 318 (1978).

[355] 42 U.S.C. § 2000d.

[356] Alexander v. Sandoval, 532 U.S. 275, 281 (2001) ("tak[ing] as given" that Title VI "proscribes only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment") (quoting Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 287 (1978) (Powell, J., announcing judgment of the Court)).

Agency Interpretation and Enforcement of Title VI

Title VI generally protects participants in federally funded "program[s] or activit[ies]" from discrimination based on their "race, color, or national origin."[357] To ensure that statutory right, the Act grants all federal funding agencies the authority to issue implementing regulations,[358] and the power to enforce the regulations they issue.[359] In practice, much of the interpretive authority falls to the U.S. Department of Justice (DOJ),[360] and for educational programs, the U.S. Department of Education (ED). Both DOJ and ED have also established their own processes for receiving and investigating complaints of suspected Title VI violations.[361] ED, meanwhile, has also issued its own set of rules to govern the federal education dollars it disburses each year, reaching some 4,700 colleges and universities.[362]

Every agency that awards federal funds—ED included—has the authority not just to issue implementing regulations but to enforce those rules against noncompliant recipients, including through an investigation that may, upon a finding of noncompliance, result in the termination, suspension, or refusal to grant federal funds.[363] Thus, for example, where ED finds a school in violation of Title VI or its implementing regulations the department may seek to cut off federal funding through an "administrative fund termination proceeding," as it has in at least some

[357] 42 U.S.C. § 2000d ("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."). *See also id*. § 2000d-4a (defining program or activity).

[358] 42 U.S.C. § 2000d-1. Executive Order 12250 delegated functions that the statute had originally vested in the President to the Attorney General relating to the approval of rules, regulations, and orders of executive branch agencies that extend federal financial assistance. *See* Exec. Order No. 12250, 28 C.F.R. Part 41, Appendix A to Part 41 (Nov. 2, 1980).

[359] *See* 42 U.S.C. § 2000d-1.

[360] The Attorney General, pursuant to executive order, has been given broad authority to coordinate Title VI implementation and enforcement across executive branch agencies. *See* Exec. Order No. 12250 § 1-201(a), 28 C.F.R. Part 41, Appendix A to Part 41 (Nov. 2, 1980). DOJ has accordingly produced a comprehensive manual of Title VI guidance in addition to its own set of regulations under the Act. *See* U.S Dep't of Justice, Civ. Rights Div., *Title VI Legal Manual*, https://www.justice.gov/crt/case-document/file/934826/download; 28 CFR §§42.101-42.112 (DOJ regulations implementing Title VI).

[361] *See How to File a Complaint*, U.S. Dep't of Justice, https://www.justice.gov/crt/how-file-complaint#three (describing methods of reporting complaints to DOJ's Educational Opportunities Section); *Education and Title VI*, U.S. Dep't of Educ., Office for Civ. Rights, https://www2.ed.gov/about/offices/list/ocr/docs/hq43e4.html (explaining ED's enforcement of Title VI through its Office for Civil Rights, and describing the complaint procedure for reporting acts of discrimination based on "race, color or national origin, against any person or group, in a program or activity that receives ED financial assistance").

[362] *See Education and Title VI*, U.S. Dep't of Educ., Office for Civil Rights, https://www2.ed.gov/about/offices/list/ocr/docs/hq43e4.html (identifying as DOE funding recipients: "50 state education agencies, their subrecipients, and vocational rehabilitation agencies; the education and vocational rehabilitation agencies of the District of Columbia and of the territories and possessions of the United States; 17,000 local education systems; 4,700 colleges and universities; 10,000 proprietary institutions; and other institutions, such as libraries and museums").

[363] 42 U.S.C. § 2000d-1 (stating that compliance "may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made and, shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law").

cases.[364] And since the passage of the Civil Rights Restoration Act of 1987,[365] the courts have read the scope of liability under Title VI broadly.[366] With respect to the termination of funds, a Title VI violation in one program at a college or university could therefore jeopardize funding for the institution as a whole.[367]

Withdrawing funds may be the ultimate means of enforcing Title VI, but it is far from exclusive.[368] DOJ, for its part, has also sought to achieve compliance through the federal courts, intervening in some private suits alleging Title VI violations[369] and otherwise representing executive branch agencies, such as ED, in lawsuits seeking enforcement of Title VI.[370] DOJ has participated in cases challenging practices of formerly *de jure* segregated public university systems as well as in settlements resolving such *Fordice*-related claims.[371] DOJ has also taken a position in cases challenging affirmative action admissions policies, most recently in the ongoing litigation surrounding Harvard College's admissions policies.[372] ED has ventured into this area as well, having recently opened investigations into the admissions decisions at several prominent private universities.[373]

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[364] *See, e.g.*, Coal. for Equity & Excellence in Md. Higher Educ. v. Md. Higher Educ. Comm'n, 977 F. Supp. 2d 507, 516-17 (D. Md. 2013) (describing ED's earlier efforts to terminate funding for Maryland's higher education system); *see also Education and Title VI*, U.S. Dep't of Educ., Office for Civ. Rights, https://www2.ed.gov/about/offices/list/ocr/docs/hq43e4.html ("If it cannot obtain voluntary compliance, OCR will initiate enforcement action, either by referring the case to the Department of Justice for court action, or by initiating proceedings, before an administrative law judge, to terminate Federal funding to the recipient's program or activity in which the prohibited discrimination occurred."). ED does not appear to have readily available data on how often it has initiated fund termination proceedings, or in how many cases such proceedings have resulted in the termination of funds.

[365] Pub. L. No. 100-259 § 2 (finding that "legislative action [wa]s necessary to restore the prior consistent and long-standing executive branch interpretation and broad, institution-wide application of those laws as previously administered"). *See also* 42 U.S.C. § 2000d–4a.

[366] *See, e.g.*, Sharer v. Oregon, 581 F.3d 1176, 1178 (9th Cir. 2009) ("To honor Congress' intent, we 'interpret[] 'program or activity' broadly.'") (quoting Haybarger v. Lawrence County Adult Prob. & Parole, 551 F.3d 193, 200 (3d Cir. 2008)); *see also DOJ Title VI Legal Manual*, *supra* note 360, at 22-24, 27-28.

[367] *See* Ayers v. Allen, 893 F.2d 732, 754 (5th Cir. 1990) (noting that the Civil Rights Restoration Act of 1987 made it "possible to establish institution-wide discrimination under Title VI when there is federal financing that is program specific").

[368] *See* Nat'l Black Police Ass'n, Inc. v. Velde, 712 F.2d 569, 575 (D.C. Cir. 1983) (explaining that "fund termination was envisioned as the primary means of enforcement under Title VI," but that "Title VI clearly tolerates other enforcement schemes" including the "referral of cases to the Attorney General, who may bring an action against the recipient").

[369] *See generally* Alexander v. Sandoval, 532 U.S. 275, 279-80 (2001) (discussing the ability of private individuals to sue under Section 601 of Title VI).

[370] *See* U.S. Dep't of Justice, Educ. Opportunities Section, https://www.justice.gov/crt/educational-opportunities-section (last visited Sept. 19, 2018).

[371] *See, e.g*, Geier v. Univ. of Tenn., 597 F.2d 1056, 1057-59 (6th Cir. 1979) (describing the procedural history of litigation and the intervention of the United States in the lawsuit alleging a violation of the Fourteenth Amendment). *See also* Geier v. Sundquist, 128 F.Supp.2d 519, 521 (M.D. Tenn. 2001) (settlement agreement).

[372] *See* Statement of Interest in Opposition to Defendant's Motion for Summary Judgment, Students for Fair Admissions, Inc. v. Harvard Corp., No. 1:14-cv-14176-ADB (D. Mass. Aug. 30, 2018).

[373] *See, e.g.*, Benjamin Wermund, "Trump administration probes complaint that Yale discriminates against Asian-Americans," POLITICO (Sept. 26, 2018), https://www.politico.com/story/2018/09/26/trump-administration-probes-yale-discrimination-complaint-843581.

Congress and Title VI

Congress continues to have considerable say over how Title VI works—at least within the parameters of the Supreme Court's equal protection jurisprudence. Perhaps the most direct way of doing so is by amendment. As a general matter, Congress could revise Title VI in one of two directions, to make the statute either (1) *more restrictive* than the Court's current Equal Protection jurisprudence or (2) *expressly permissive* of race-conscious measures that the Court has upheld or has thus far not addressed.

In the more restrictive direction, Congress could prohibit recipients of federal funds from using voluntary race-conscious measures at all—a result that four Justices in *Bakke* argued Title VI already requires, but which the Court has so far not embraced.[374] A statutory revision of that kind would also implicitly reject the Harvard Plan discussed in *Bakke*, by excluding race as a permissible factor in admissions decisions at the many universities subject to Title VI, including the many private universities that receive federal funds. And, consequently, an amendment along these lines would make unlawful the type of admissions policies that the Court has approved under the Equal Protection Clause, like those at issue in *Grutter* and *Fisher II*.

On the other hand, Congress could expressly open other avenues for effectuating Title VI's antidiscrimination mandate. This could include incorporating a private right of action to bring suit under Title VI, which, at present, is an implied right with no statutorily defined remedies.[375] More consequentially, Congress could also amend Title VI to provide for disparate impact liability—that is, a Title VI violation based on a funding recipient's use of certain policies or practices that disproportionately and negatively impact members of a protected class, as already exists under Title VII of the same Act.[376] A provision addressing disparate impact liability—either its availability or foreclosure under Title VI—would resolve a significant and ongoing debate on the issue.[377] Such an addition would also be one way of clarifying whether Congress does in fact intend for Title VI to be read coextensively with the Equal Protection Clause.[378]

Beyond legislative amendments, Congress also exercises oversight over the agencies charged with carrying out Title VI's antidiscrimination mandate.[379] As discussed earlier, DOJ and ED are primarily responsible for enforcing Title VI in educational programs. For its part, ED investigates

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[374] *See* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 414-15 (1978) (Stevens, J., concurring in the judgment in part and dissenting in part) (concluding from the legislative record that "under Title VI it is not 'permissible to say 'yes' to one person; but to say 'no' to another person, only because of the color of his skin").

[375] *See, e.g.*, Barnes v. Gorman, 536 U.S. 181, 185 (2002) ("Although Title VI does not mention a private right of action, our prior decisions have found an *implied* right of action."). *See also id*. at 187-90 (observing that "Title VI mentions no remedies—indeed, it fails to mention even a private right of action" and applying contract doctrine to conclude that remedies under Title VI include compensatory damages and injunctive relief, but not punitive damages).

[376] *See* 42 U.S.C. § 2000(k) (outlining the burden of proof in disparate impact cases under Title VII of the Civil Rights Act of 1964).

[377] During the Obama Administration, for example, the Office of Civil Rights issued a series of guidance premised on a disparate-impact theory under Title VI, to evaluate whether school districts were inappropriately disciplining minority students. The Trump Administration has proposed rescinding that guidance, however, arguing in a recent report that the guidance's disparate-impact theory rested on a "dubious" reading of Title VI, "at best." *See* Fed. Comm'n on School Safety, *Final Report* at 67-72 (Dec. 18, 2018) (discussing the earlier disparate-impact guidance and the Commission's reasons for urging their withdrawal).

[378] Because the Court has understood Equal Protection to forbid only acts of intentional discrimination, and not those solely with a "racially disproportionate impact," Washington v. Davis, 426 U.S. 229, 239 (1976), a statutory disparate-impact standard would necessarily broaden Title VI's protections beyond that constitutional minimum.

[379] For an overview of the oversight tools at Congress's disposal, see CRS Report R45442, *Congress's Authority to Influence and Control Executive Branch Agencies*, by Todd Garvey and Daniel J. Sheffner, at 30-36 (Dec. 19, 2018).

and seeks compliance through its Office for Civil Rights,[380] while the Educational Opportunities Section of the Department of Justice's (DOJ's) Civil Rights Division typically enforces Title VI in educational programs for the department.[381] Both offices maintain public archives documenting their past and current investigations,[382] as well as wider-ranging reports detailing their enforcement priorities and investigatory procedures.[383] And because Title VI applies to a wide variety of entities that receive federal financial assistance, not just colleges and universities, DOJ also publishes news and updates on Title VI enforcement activity in other programmatic areas, from agencies across the federal government.[384]

Conclusion

Race has come to play two major doctrinal roles in higher education today, reflecting the two senses of "affirmative action" discussed in this report. "Affirmative action" in its original sense grew out of the affirmative obligation imposed on the states by the Equal Protection Clause to eliminate the vestiges of *de jure* segregation from their public schools. And in that sense, "affirmative action" involves the *mandatory* use of race-conscious measures in higher education to right the enduring wrongs of state-sanctioned segregation. But "affirmative action" has also come to refer to race-conscious policies outside this *de jure* context—policies *voluntarily* adopted by institutions to help racial minorities overcome the effects of their earlier exclusion. In higher education, none has been more salient—or stirred more debate—than the race-conscious admissions policies that colleges and universities across the country have used to diversify their student bodies.

Thus far, remedial measures addressing *de jure* segregation, and voluntary measures designed to promote student-body diversity, have been the only race-conscious measures that the Court has approved under the Equal Protection Clause. And both remain areas of active litigation and administrative enforcement. Over the years, however, the Court has made it clear that it will subject *voluntary* "affirmative action" policies to especially close scrutiny, approving them only when they can be shown to be narrowly tailored to serve compelling educational goals. It has approved such polices twice already, most recently in 2016. Still, several Justices have suggested that the rationales supporting these voluntary race-conscious measures will one day run out. But for the time being, at least, these two lines of authority nevertheless provide a place for affirmative action in higher education today.

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[380] The Office for Civil Rights has also published a detailed manual prescribing its procedures for handling complaints under Title VI, among other statutes with its purview. *See generally* U.S. Dep't of Educ., Office for Civ. Rights, *Case Processing Manual*, https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf.

[381] More recently, it has been reported that the Educational Opportunities Section is no longer exclusively handling certain enforcement matters in this area. *See* Charlie Savage, *Justice Dept. to Take On Affirmative Action in College Admissions*, N.Y. TIMES (Aug. 1, 2017), https://www.nytimes.com/2017/08/01/us/politics/trump-affirmative-action-universities.html.

[382] *See* U.S. Dep't of Justice, *Department of Justice Updates*, https://www.justice.gov/crt/fcs/DOJ-updates; U.S. Dep't of Educ., Office for Civ. Rights, *Pending Cases Currently Under Investigation at Elementary-Secondary and Post-Secondary Schools*, https://www2.ed.gov/about/offices/list/ocr/docs/investigations/open-investigations/index.html.

[383] *See* U.S. Dep't of Justice, *Title VI Legal Manual*, https://www.justice.gov/crt/fcs/T6manual; U.S. Dep't of Educ., Office for Civ. Rights, *Case Processing Manual* (Nov. 19, 2018), https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf.

[384] *See, e.g.*, U.S. Dep't of Justice, *Title VI Enforcement and Updates by Agency*, https://www.justice.gov/crt/fcs/Enforcement-updates-byagency.

This authority, however, leaves questions as of yet unexplored. It appears to be an open question,[385] for example, whether a public institution[386] of higher education can cite its own history of intentional exclusion,[387] or else its "past discrimination,"[388] as a basis for adopting a race-conscious admissions policy, among other measures. Whether—and how—the courts might assess such untested arguments would likely turn on a range of factors, including the further development of the two lines of authority addressed in this report. Regardless of those and other possible developments, however, Congress still has a significant say in in this area, through its authority not just to revise Title VI but to oversee the Act's enforcement.

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[385] To date, there appears to be no federal court decision addressing an Equal Protection claim in which a litigant has challenged a public university's race-conscious admissions policy (or other race-conscious measure), and the institution has defended those race-conscious practices as necessary to correct or eliminate a vestige of prior *de jure* segregation, as *Fordice* mandates under the Equal Protection Clause. *Cf. Parents Involved*, 551 U.S. at 737 (stating that "no one questions that the obligation to disestablish a school system segregated by law can include race-conscious remedies—whether or not a court had issued an order to that effect").

[386] While intentional segregation is most commonly analyzed in terms of a public school *system* or district, it is less clear how a federal court might analyze segregation or segregative practices by a particular public *institution* as the basis for finding *de jure* segregation that triggers an affirmative duty. *Cf.* Keyes v. Sch. Dist. No. 1, Denver, Colo., 413 U.S. 189, 192-93, 198-205 (1973) (addressing claims alleging *de jure* segregation in one area ("Park Hill") within the Denver public school district, as well as *de jure* segregation with respect to the rest of the school district, "particularly heavily segregated schools in the core city area"); United States v. Sch. Dist. of City of Ferndale, Mich., 616 F.2d 895, 896 (6th Cir. 1980) (holding that there was *de jure* segregation as to *one* public school in the district). *See also* Wessman v. Gittens, 160 F.3d 790, 795 (1st Cir. 1998) ("Of course, we know that [the government's use of a racial classification] is acceptable upon a showing, *inter alia*, that it is needed to undo the continuing legacy of an *institution*'s past discrimination.") (emphasis added).

[387] *See generally Fordice*, 505 U.S. at 728 ("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.").

[388] *See, e.g.*, *Wessman*, 160 F.3d at 800-807 (in a case challenging a race-conscious admissions policy at a selective K-12 public "examination" school in Boston, applying an analysis "guided primarily by the [Supreme] Court's particularized analysis in [*City of Richmond v.*] *Croson*" that requires state actors to "muster a 'strong basis in evidence'" of "past discrimination" to justify race-conscious measures, where such measures must be narrowly tailored to remedy the specific harm at issue; noting there was no contention in the case that "any municipal actor ha[d] attempted intentionally to subvert the demographic composition" of the school); Podbersky v. Kirwan, 38 F.3d 147, 152-153 (4th Cir. 1994) (applying the "strong basis in evidence" test to a public university's scholarship program for African American students).

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