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AUTHOR Blumstein, James F.
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ABSTRACT

The application of constitutional principles of desegregation, derived from the context of primary and secondary education, to the postsecondary education setting, is addressed in the second of eight reports from the Postsecondary Desegregation Project at Vanderbilt University. The role of the U.S. Department of Education in enforcing the nondiscrimination provisions of Title VI of the 1964 Civil Rights Act is also examined. Attention is directed to the major Supreme Court desegregation decisions, and the controlling principles of liability in non-southern contexts are identified. A rationale to explain the Court's approach to the problem of remedying the effects of governmentally imposed segregation is developed, and postsecondary desegregation cases that have arisen in the states of Alabama, Tennessee, and Virginia are considered. While the case law with respect to desegregation of public primary and secondary schools is rather well developed, case law with respect to desegregation of postsecondary education is rather sparse. The development of the equal protection doctrine in higher education and the federal role in assuring equality of educational opportunity under Title VI and under new program authorizations are analyzed. The three most prominent desegregation cases, which came before the courts in Alabama, Tennessee, and Virginia, involved similar factual situations: the proposed construction or expansion of an identifiably white institution within the geographical zone of competition of an existing predominantly black institution. In all three cases the courts found that dual systems had not been fully dismantled. Federal affirmative action possibilities under properly constructed new legislation authorization (Board of Education v. Harris and Fullilove v. Klutznick) is also discussed. (SW)

THE POSTSECONDARY DESEGREGATION PROJECT

REPORT II

LEGAL ISSUES IN THE DESEGREGATION OF POSTSECONDARY EDUCATION

James F. Blumstein

Center for Education and Human Development Policy

Educational Policy Development Center for Desegregation

Institute for Public Policy Studies

Vanderbilt University

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THE POSTSECONDARY DESEGREGATION PROJECT

Preface

In late 1979, the Education Policy Development Center for Desegregation was asked by the Office of the Assistant Secretary for Education, U.S. Department of Health, Education, and Welfare (DHEW) to undertake comprehensive overview of the factors that might affect the federal role in the desegregation of postsecondary institutions. This study, in turn, would provide the basis for inquiry related to the efficacy of different policy options available to the federal government. This charge was renewed and further developed by the Office of the Assistant Secretary for Planning and Budget in the U.S. Department of Education when the major education activities of DHEW were given cabinet status.

This effort has resulted in a series of related studies which we call the Postsecondary Desegregation Project (PDP). The PDP, which appears to be the first attempt to address in a comprehensive way a broad range of questions affecting postsecondary education, has several components of which this report is one. These components include:

Report I: The Status of Desegregation and Minority Enrollment in Postsecondary Education—Mark A. Smylie

Report II: Legal Issues in the Desegregation of Postsecondary Education—James F. Blumstein

Report III: Federal Operating Programs Related to Desegregation of Postsecondary Education—Mark A. Smylie

Report IV: Goals for the Desegregation of Postsecondary Education and Barriers to their Attainment—Willis D. Hawley, John B. Williams, and William T. Trent

Report V: Desegregation and Traditionally Black Institutions—John B. Williams

Report VI: The Effects of Postsecondary Desegregation on Students: Findings from the National Longitudinal Study of the Class of 1972—William T. Trent

Report VII: A Preliminary Study of the Efficacy of the Adams Guideline in Promoting the Desegregation of Postsecondary Institutions—John B. Williams

Report VIII: Options for Federal Policy Related to the Desegregation of Postsecondary Education—Willis D. Hawley and John B. Williams.

Several persons have contributed to this study. The principal investigators are Willis D. Hawley, John B. Williams, William T. Trent, Mark A. Smylie, and James F. Blumstein. Anne Borders-Patterson coordinated portions of this project during its first year.

LEGAL ISSUES IN THE DESEGREGATION OF POSTSECONDARY EDUCATION

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LEGAL ISSUES IN THE DESEGREGATION OF POSTSECONDARY EDUCATION

James F. Blumstein

Introduction

Two central questions serve as the analytical focus of this paper. The first issue concerns the application of constitutional principles of desegregation, derived from the context of primary and secondary education, to the postsecondary education setting. The second inquiry examines the role of the Department of Education in enforcing the nondiscrimination provisions of Title VI of the 1964 Civil Rights Act.

In order to understand the constitutional issues of postsecondary desegregation, it is necessary to explore the constitutional principles that have emerged in the primary and secondary education cases. Accordingly, the initial section of the paper analyzes the major Supreme Court desegregation decisions, identifying the controlling principles of liability in non-southern contexts and developing a rationale to explain the Court's approach to the problem of remedying the effects of governmentally imposed segregation. The next section considers the postsecondary desegregation cases that have arisen in the states of Alabama, Tennessee, and Virginia. The concluding section of the first portion of the paper examines the federal role in the desegregation of postsecondary education under Title VI. The last portion of the paper then attempts to synthesize and apply the analysis presented in the first part.

Overview: The Evolution of Legal Doctrine in School Desegregation Cases

The landmark school desegregation decision of Brown v. Board of Education (Brown I) held invalid governmentally-imposed racial segregation in primary and secondary education (1954). Recognizing that providing public education is a most important function of state and local governments, the Court discarded the notion that equality in public education could ever be achieved in a "separate but equal" system. In public education, separate was inherently unequal and governmentally-mandated racial separation constituted a violation of the Equal Protection Clause of the Fourteenth Amendment to the United States constitution.

A.

The substantive rule of constitutional law announced in Brown I was relatively straightforward in the context of school systems expressly segregated by state statutory or constitutional provisions. In rapid succession, the Court issued a series of per curiam decisions in which, without further explanation, the nondiscrimination rule of Brown I was applied to other contexts, including higher education.[1] In 1964, the nondiscrimination principle was adopted by Congress as a norm governing disbursement of federal funds. Title VI of the Civil Rights Act of 1964 outlawed racial discrimination in any program or activity receiving federal financial assistance. The statutory provision added the power of the federal purse as a means of inducing compliance with the basic nondiscrimination priciple; if a federal beneficiary discriminated on the basis of race, it faced a cutoff of federal funds.

While the articulation, application, acceptance, and legislative adoption of the substantive nondiscrimination rule all occurred within a decade of Brown I, implementation of the constitutional mandate was much more uncertain. The Court in Brown I ordered reargument on the issue of remedy—i.e., how the decision in Brown I was to be implemented. In the 1955 Brown v. Board of Education (Brown II) decision, the Court imposed a duty on local school boards, with judicial oversight, to dismantle the governmentally-created dual school system. To suggest a bit of discretion as to timing, the Court adopted the phrase "all deliberate speed" which, as it turns out, invited delay and resistance rather than the orderliness, flexibility, and compromise it was designed to achieve.

Implementation of the Brown I mandate posed no real problem, ironically, in areas outside of public education. For example, formerly segregated public parks had to be opened up and operated on a racially neutral basis. (Evans v. Newton, (1966)). Systems of racially identifiable public restrooms and water fountains had to be eliminated (Mayor and City Council v. Dawson, 1955), and racially segregated public swimming pools were ordered operated on a nondiscriminatory basis, if operated at all. (Palmer v. Thompson, 1971). Dismantling dual systems was simply a matter of breaking down the racial barriers that had been erected by governmental action. The courts did not stop to inquire whether integration had followed from the desegregation ordered in compliance with the nondiscrimination principle of Brown I. No constitutional issue emerged if, for example, a formerly black public golf course continued to attract primarily or exclusively black players while the formerly white public golf course continued to attract a white clientele. Provided that the formal racial barriers were eliminated, the nondiscrimination mandate of Brown I was satisfied.

The remedy problem in public education was not so simple. In the immediate aftermath of Brown II the Court refrained from articulating remedial standards and interceded only where its authority was directly threatened, as in Cooper v. Aaron (1958). Over time, however, it became clear that southern school boards and political officials were resisting rather than accommodating the desegregation process. At the same time, there developed a pervasive view that integration in the classroom, per se, had a beneficial effect on black children, was not harmful educationally or socially for white children, and would help offset years of officially fostered racial isolation and stereotyping.[2] In the school context much attention came to be focused on "results," i.e., the effectiveness of desegregation decrees in dismantling dual systems although the precise meaning of "results" was only ambiguously articulated.

Concern with the effects of desegregation orders inevitably led to scrutiny of racial ratios as evidence of the impact of court-ordered desegregation. Whereas few seemed to care much about the actual impact of desegregation orders on golfing or swimming, a strong civil rights constituency worried about the ongoing racial identity of previously segregated schools. The Court in Brown II had assigned primary responsibility to local officials for dismantling the segregated school system. Desegregation advocates argued that an open admissons policy was an inadequate official response. Such a policy thrust the burden of desegregation on pupils and their parents who faced nearly insurmountable political, economic and social pressures not to disturb dual systems that were emotionally and sometimes violently defended by both public officials and private "traditionalists."

The crucial post-Brown II remedies case, Green v. County School Board, was decided by the Supreme Court in 1968. Up until that time, the Brown II

mandate that there be "a transition to a racially nondiscriminatory school system," had been taken to require only a policy of nondiscriminatory admission. In Green the Court rejected a freedom-of-choice plan on the ground that it had not been effective. When the suit was filed, a black student had never attended the one white school in the county and a white student had never attended the one black school in the county. After three years of this plan, no white attended the county's one black school and only 15% of the blacks in the system attended the white school. It was obvious that racially identifiable schools persisted, and, where they did, the policy of open admissions was insufficient to satisfy the school board's Brown II responsibility. The Court in Green held that school boards operating previously segregated systems were "clearly charged with 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" (pp. 437-438). The measure of success of a desegregation plan was its effectiveness. The board's obligation was to adopt a plan "that promises realistically to work . . . now" (p. 439). The precise standard for determining whether a plan would work, whether it was effective, was not specified in Green, but the implication of Green was that the Court would examine racial ratios as indicators of a plan's success.

The "affirmative duty" language of Green made it clear that, at least in the context of primary and secondary schools, local officials "would have to do more than simply permit black students to attend white schools and vice versa" (Columbus Board of Education v. Penick, 1979, p. 495). But Green also posed a fundamental question of principle: Had the development of remedial doctrine subtly transformed the substantive nondiscrimination principle of Brown I? If more was necessary than an open admissions policy to implement Brown I, and if

the Court would measure a plan's effectiveness by scrutinizing results (i.e., racial ratios), it is arguable that the substantive doctrine of Brown I had been subtly, but fundamentally, altered. The impact orientation of Green suggests as a substantive constitutional matter some type of affirmative duty to integrate previously segregated schools.

Green arose in a rural community that had only two schools, one black and one white. Since the county was not segregated residentially, the Court suggested a neighborhood school policy effectuated through zoning as a means of increasing actual desegregation. In Swann v. Charlotte-Mecklenburg County Board of Education (1971) the "affirmative duty" language of Green was extended to an urban context. The Court made it clear, however, that there was no substantive constitutional right to any particular level of integration. Consequently, while Swann is widely cited for its extension of Green to an urban context, it simultaneously scotched the view that Green, a Brown II remedies case, had subtly transformed the substantive principle of Brown I from nondiscrimination to integration.[3] Swann left unresolved the rationale that justified a focus on impact in the remedies phase of a case when the substantive constitutional doctrine of Brown I simply prohibited governmentally-imposed segregation but did not establish a right to integration. If Brown I only calls for the elimination of governmentally-imposed segregation, what warrants the Court's scrutiny of results as a measure of success of a desegregation decree?

Swann's endorsement of race-specific remedial orders represents, with minor exceptions, the Supreme Court's last word on southern school desegregation.[4] Despite its analytical ambiguities, Swann settled the principle that courts would look at the actual effects of a desegregation plan in order to judge its adequacy, even though not every school in a system necessarily had to

be integrated for a plan to be satisfactory. The conceptual ambiguities of Swann have become, however, major battlegrounds in subsequent non-southern school desegregation cases, in which courts must face not only Brown II implementation issues but also Brown I substantive doctrine issues. In the absence of explicit legislative or constitutional policies of segregation, a court must determine in the first instance what constitutes impermissible segregation, how it is proven, and what is the proper scope of a remedy.

B.

Supreme Court desegregation decisions from Brown II through Swann dealt with the proper scope of a remedy to undo segregation explicitly imposed by state statutory or constitutional provisions. Because a precise rationale for a result-oriented impact analysis was not fully articulated, some ambiguity about the nature of substantive doctrine remained. As the Court decided non-southern school desegregation cases, it was forced to face up to the doctrinal issues not fully articulated in the southern context.

The first non-southern case to reach the Supreme Court, Keyes v. School District No. 1 (1973), involved the Denver school system. Although the basic issue was the appropriate scope of a desegregation remedy, the Court was faced with defining what constituted a substantive violation of equal protecton. The Court clearly noted the distinction between de facto and de jure segregation. De facto (i.e., observed) segregation, which resulted from purely private choices, was not unconstitutional. Brown I barred only de jure segregation, that which is imposed by government or governmental officials and for which government is accountable (Keyes v. School District No. 1, 1973, pp. 200-201). The test for determining impermissible segregative activity was intent or purpose. Thus, the

meaning of Brown I became clearer. As stated in Swann, there was no substantive right to racial balance or integration, only a right to be free from governmentally-imposed segregation and its after effects.

The trial court in Keyes found that Denver school officials had engaged in intentional discrimination with respect to the schools in Park Hill, a predominantly black area. The finding was that officials had purposefully sought to confine blacks in Park Hill to schools built exclusively for residents of that area. Outside of Park Hill, Denver had another segregated area, but there was no finding of purposeful discrimination with respect to student assignment in those schools. The question was whether the finding of intentional segregation in Park Hill could serve as a predicate for a systemwide desegregation decree. In other words, the issue became whether purposeful segregation in a portion of the district could be deemed causally related to observed segregation elsewhere in the district.

Clearly, the problem of causation is critical. Since only intentional segregation is actionable, a desegregation remedy can follow only where a causal connection exists between a purposefully segregative act and observed racial segregation. The problem in Keyes was that plaintiffs could only present direct evidence of purposeful (de jure) segregation in Park Hill; with respect to the observed segregation elsewhere in the district, there was no showing of the requisite discriminatory governmental action. The appellate court concluded that only a remedy applicable to Park Hill was appropriate, but the Supreme Court held that the showing of purposeful discrimination in Park Hill sufficed to justify a systemwide decree. The lower court found no basis for attributing the purposefully segregative acts involving Park Hill to the de facto segregation observed in the core city. The Supreme Court, in contrast, held that the

observed segregation in the core city would be presumed either to be the effect of the segregative acts in Park Hill or caused by purposeful, albeit unproven, official actions.

Even though plaintiffs did not affirmatively demonstrate the causal link between intentional acts of segregation and the observed segregation in the core city, the Court reached its conclusion by establishing two rebuttable presumptions, one concerning effects, the other concerning intent. First, where a finding of de jure segregation is made as to a meaningful portion of a district, the Court will presume that the effects of that action will ripple through the entire district. Even if the finding of intentional segregation is limited to one area, the Court will assume that there has been a reciprocal impact districtwide. The school board has the opportunity, in rebuttal, to demonstrate that the actual impact was restricted to only portions of the district; this can be shown if there are separate, identifiable, and unrelated components of the district that were not affected by the discriminatory conduct (p. 204-205).

The second presumption concerns intent. Where plaintiffs have shown intentionally discriminatory actions as to a substantial portion of a school district and observed (de facto) racial segregation in other portions of the district, the Court will presume the observed segregation is not adventitious but rather the consequence of subtle, covert actions of the board. This transfer of intent was labeled sardonically by Justice Rehnquist in his dissent as a doctrine of "taint." The Court believed this to be a reasonable presumption—a board that acted on a discriminatory basis in a portion of a district was deemed to be responsible for observed segregation in another portion. The board could rebut the presumption in one of two ways. Either it could show that it did not act out of an impermissible motivation, or it could prove that the existing segregation

did not result from governmental actions but would have come about anyway, even without the impermissible conduct (pp. 211-213). Both showings are difficult to establish, first because finding of a negative is very difficult as a practical matter and evidence of a neighborhood school policy would not be a sufficient rebuttal, and second because proof of a demographic hypothetical is very uncertain methodologically.

The presumptions articulated in Keyes help highlight what must be the underlying rationale of Green's affirmative duty remedy. Although there may be no constitutional right to an integrated school system, there is a recognition of a personal and societal interest in integrated primary and secondary education. Blacks are thought to benefit educationally in an integrated environment. By increased contact with blacks, whites gain a greater appreciation of the rich cultural diversity of our multi-cultural, poly-ethnic society. Society gains by reducing racial and ethnic isolation and increasing inter-racial networks of communication, friendships, and business relationships. Consequently, while there may be no constitutional right to integration, plaintiffs in school segregation cases have a cognizable interest in an integrated public education.

Establishment of such an interest in school integration is insufficient, however, to understand Green and Swann. There is still a missing link in the analytical chain. That gap is closed by the indulgence of an assumption. Faced with a finding of unconstitutional racial discrimination, a court must determine the proper remedy. It is axiomatic that a remedy must correct a substantive violation of the Constitution, restoring a prevailing party to the condition that would have obtained in the absence of an unconstitutional act. The problem is to determine what the world would have looked like if the illegal, discriminatory activity had not occurred.[5]

In Keyes, the Court clearly assumed that racially discriminatory conduct in a portion of a school district had spillover effects, so that observed discrimination elsewhere in the district could be attributed to governmental action. This presumption is rebuttble, but the burden lies with the defendants to show non-impact. The Keyes formulation suggests that the "affirmative duty" remedy of Green and Swann is premised on an assumption that, absent officially-imposed segregation, the school system would be racially integrated.[6] Consequently, a school board must purge past official discrimination by "restoring" what, by assumption, would have been a voluntarily integrated system. Once that system is in fact integrated (i.e., "unitary"), or if the board can show that the system would have been segregated anyway (an almost impossible burden), then the "affirmative duty" has been satisfied.[7]

The division among the justices on the Supreme Court now largely turns on the validity of the "pro-integration" assumption that ostensibly underlies the decisions in Keyes, Swann, and Green. The issue is joined in two contexts: 1) finding of liability, and 2) determining the appropriate scope of a remedy.

First, with respect to liability under Brown I, there is disagreement about the ongoing impact of finding racially discriminatory conduct in an earlier period of time. Assuming de jure segregation by a set of acts prior to Brown I in 1954, does that finding serve as a predicate for a desegregation decree 25 years later? To prevail in a non-southern Brown I case, a plaintiff shoulders a burden of proof to show at a minimum: 1) prior intentional, official segregative conduct; 2) the absence of sufficient remedial action on the part of the defendant school board, i.e., a failure to fulfill its "affirmative duty" under Green/Swann; 3) the present existence of observable racial segregation. The apparent analytical problem is associating prior illegal segregative conduct with the current, observable segregation.

Under one approach, the Court could assume that an unremedied intentional act of segregation, even if relatively remote in time, is the cause of existing observed segregation. The burden rests with the defendant school board to show that the causal connection does not exist, and that the observable segregation would exist even in the absence of the board's impermissible conduct. Under a second approach, the responsibility would rest with plaintiff, as an affirmative part of making out his case, to demonstrate that there has been an ongoing, traceable, current segregative effect deriving from the prior illegal conduct. That view would permit a court to order a remedial decree only to the extent that a plaintiff could show a causal link between past segregative conduct and present segregative consequences.

Where the burden should fall depends, in part, on one's sense of which party can establish facts most expeditiously, what the world would look like absent official segregation (i.e., voluntarily integrated or voluntarily segregated?) and, given the uncertainties of demography and statistical proof in general, which party should bear the risk of non-persuasion. The second and third factors are the most poignant and value-laden in the school desegregation area.

In formulating a substantive standard of liability, a court must determine what probative force to give to evidence of remote segregative acts. If one assumes that, absent officially fostered segregation, the school system would be substantially integrated then the gap in the analytical chain is not especially troublesome. It would follow, by assumption, that in a neutrally administered system, segregation would not exist. Therefore, a finding of official segregative acts, even if remote, can reasonably be deemed causally related to the existing, observed segregation. It violates no basic belief to require a defendant to demonstrate, in rebuttal, that the existing, observed segregation is not the result of the past intentionally segregative acts.

On the other hand, it does make some analytical sense to impose on the plaintiff the responsibility to prove each element of his case in conformity with legal theory. This would require that plaintiffs present probative evidence linking past segregative acts with current patterns of observed segregation. Otherwise, no finding of liability could be made, given that intentional and not merely observed segregation is unconstitutional.

While it may make some sense to require a plaintiff to bear the burden of proof and the risk of non-persuasion on each link in the analytical chain, the rub comes in the uncertain nature of statistical methods that are based upon hypothetical demographic models. It is possible that, in a given set of circumstances, a plaintiff could show a statistically significant causal linkage between past segregative acts and current observed segregation; it is also possible that a defendant school board could present statistically probative evidence rebutting that causal inference. Much more likely, however, is that the results of statistical analysis will be inconclusive. By the nature of statistical methodologies, it is very likely that no hypothesis can either be proven or disproven.

Given that reality, the ultimate question is on which party should the risk of non-persuasion lie. If one reasonably assumes that in a typical case statistical evidence will be inconclusive, the problem again becomes one's vision of what the world would look like in the absence of officially fostered segregation. Placing the risk of non-persuasion on the school board is, in essence, a statement that in a governmentally neutral world people would voluntarily wind up integrated. Placing the risk of non-persuasion on plaintiffs, under the circumstances, is in essence an affirmation that there would likely be considerable voluntary segregation in the absence of impermissibly segregative

official conduct. In the real world of statistical uncertainty, it seems that one vision or the other of what a governmentally neutral world would look like must underlie the formulation of substantive doctrine. This fundamental difference in world view separates the "idealist" from the "realist" camps on the Supreme Court in school desegregation matters.

The second major context in which the causality issue arises involves the scope of the remedial decree in a Brown II type case. The unarticulated assumption in Green and Swann was that ours would be an integrated society absent governmentally-fostered segregation. The emphasis on the "effectiveness" of a desegregation decree required a focus on racial ratios, presumably in an attempt to restore an assumed status of the parties prior to the effect of official acts of segregation. The Court's decision in Pasadena City Board of Education v. Spangler (1976) made it clear that once a unitary system had been achieved, there is no continuing constitutional obligation to promote integration. The 1974 Detroit case, Milliken v. Bradley (Milliken I), made it clear that the Keyes presumptions were inapplicable where more than a single school district was involved. The subsequent Dayton case suggested, however, a fundamental rethinking of the assumptions underlying Green.

In Dayton Board of Education v. Brinkman (Dayton I), the Supreme Court held that a finding of three relatively isolated discriminatory acts could not, as "cumulative violations," suffice to justify a comprehensive, systemwide desegregation decree. In remanding, the Court held that in formulating a decree a trial court must "tailor 'the scope of the remedy' to fit 'the nature and extent of the constitutional violation'" (p. 420). Assuming a proper finding of intentional discrimination, a court

> must determine how much incremental segregative effect these violations had on the racial distribution of the Dayton school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations. The remedy must be designed to redress that difference, and only if there has been a systemwide impact may there be a systemwide remedy. (p. 420)

The standard in Dayton I appeared to undermine the "pro-integration assumption" approach of Green and even Keyes. It seemed to require that a district court make a factual determination of what the school system would look like if government had acted neutrally. Comparing the actual with what might have been, the court would be authorized only to order a remedy that achieved a projected level of integration rather than some assumed level (typically a range determined by the community's proportionate racial composition). Clearly, Dayton I imposed a greater burden on plaintiffs and courts to identify and prove what the actual racial composition within the school system would be in a nondiscriminatory society. It authorized a remedy only up to the extent to which official segregation changed the resulting racial situation.

The Court in Dayton I recognized the "difficult task" it was imposing on trial judges and plaintiffs, but there was an increased concern that the federal courts "restructure the operation" of school systems only to the extent that a constitutional violation had demonstrably altered the course of racial attendance patterns.

Dayton I appeared to respond to a growing skepticism among some justices as to the validity of the "pro-integration" assumptions of Green and Swann. There seemed to be a doubt as to whether, in a racially neutral context, there would be as much integration as the Green model intimated. Justice Rehnquist's opinion in Dayton I appeared to draw heavily from a concurrence in Austin

Independent School District v. United States (1976), in which Justice Powell argued:

> The principal cause of racial and ethnic imbalance in urban public schools across the country—North and South—is the imbalance in residential patterns. . . . For example, discrimination in housing—whether public or private—cannot be attributed to school authorities. Economic pressures and voluntary preferences are the primary determinants of residential patterns. . . . Large-scale busing is permissible only where the evidence supports a finding that the extent of integration sought to be achieved by busing would have existed had the school authorities fulfilled their constitutional obligations in the past. (pp. 994-995)

In short, Dayton I could be interpreted as telling trial courts to assume an agnostic position about what a racially neutral world would look like, that it is the plaintiff's responsibility to show what degree of integration would have occurred absent illegal government conduct and a court's responsibility to order a remedy that would achieve only that incremental degree of integration.

The causality rules implicitly underlying Keyes and ostensibly modified in Dayton I were addressed again in Columbus Board of Education v. Penick (1979). The Court in Columbus rejected the argument that Dayton I had

> implicitly overruled or limited those portions of Keyes and Swann approving, in certain circumstances, inferences of general, systemwide purpose and current, systemwide impact from evidence of discriminatory purpose that has resulted in substantial current segregation, and approving a systemwide remedy absent a showing by the defendant of what part of the current imbalance was not caused by the constitutional breach. (p. 458 at note 7)

Instead, the Court applied the Keyes presumptions and analysis to justify systemwide relief on the basis of a finding of de jure segregation in a "substantial part of the system . . . absent sufficient contrary proof by the Board . . ." (p. 458). Thus, Columbus re-established the validity of the Keyes approach for determining the appropriateness of a systemwide desegregation decree, limiting the contrary suggestion of Dayton I.

In Dayton Board of Education v. Brinkman (Dayton II), the Court dealt directly with the other major causality issue--whether remote constitutional violations can serve as a basis of current relief in the absence of a showing that past discrimination has an ongoing, current impact. On remand from Dayton I, the trial court dismissed the complaint on the ground that "plaintiffs had failed to prove that acts of intentional segregation over 20 years old had any current incremental segregative effects". (p. 532). The Sixth Circuit reversed on the ground that

> at the time of Brown I, the Dayton Board was operating a dual school system, that it was constitutionally required to disestablish that system and its effects, that it had failed to discharge this duty, and that the consequences of the dual system, together with the intentionally segregative impact of various practices since 1954, were of systemwide import and an appropriate basis for a systemwide remedy. (p. 534)

In deciding Dayton II, the Supreme Court rejected the contention that Dayton I required a plaintiff "to prove with respect to each individual act of discrimination precisely what effect it has had on current patterns of segregation" (p. 540). Rather, it was sufficient that plaintiffs demonstrated a systemwide substantive violation prior to 1954, using a Keyes-style presumption analysis. Subsequent to 1954, the board did not fulfill its affirmative duty to desegregate, the measure of which is "effectiveness, not the purpose, of the actions in decreasing or increasing the segregation caused by the dual system" (p. 538). Since the board had an "unsatisfied duty to liquidate a dual system," the Court permitted an inference that the current observed systemwide segregation could fairly be traced back to the "purposefully dual system of the 1950's . . ." (p. 541).

The analysis in Dayton II reflects a considerable retreat from that in Dayton I and a return to the expansive causality notions of Keyes, Swann, and Green. The Court assumed that a pre-1954 substantive violation, unremedied by affirmative action of the Green/Swann standard, is the cause of current observed segregation, absent rebuttal evidence. Dayton II suggests that even a remote constitutional violation, when unremedied by affirmative acts, may be presumed to be the cause of current observed segregation. Again, the assumption is consistent with Green, Swann, and Keyes and reinforces a theory that private choice, unfettered by governmental interference, will generate a racially integrated school system. Unless defendants can refute the causal inference, or have achieved a unitary system for a "Pasadena moment," the Court now seems willing to attribute existing segregation to remote official discriminatory acts, even without affirmative proof of a causal nexus. The tougher causality standard, first articulated by Justice Powell in Austin Independent School District v. United States and later for the Court by Justice Rehnquist of Dayton I, seems to have been rejected in Columbus and Dayton II. As a result, in the area of primary and secondary education, the Supreme Court appears to have adopted an assumption that a racially integrated society would exist absent discriminatory governmental action. Proof of even remote purposeful official discrimination will suffice as a predicate for overturning currently segregated systems, and evidence of impermissible discrimination in a substantial portion of a district will allow an inference of governmentally-imposed segregation in an entire system.

Having concluded this discussion of the evolution of desegregation doctrine in the area of primary and secondary education, we can turn now to the application of these broad principles to the context of higher education. In this

regard, we will first focus on the development of equal protection doctrine in the field of higher education and then turn to an analysis of the federal government's role in assuring equality of educational opportunity under Title VI and, more abstractly, under new program authorizations.

Desegregation in Postsecondary Education: The Equal Protection Cases

While the case-law with respect to desegregation of public primary and secondary schools is rather well developed, case-law with respect to desegregation of postsecondary education is rather sparse.

Interestingly, the desegregation cases that led to the landmark Brown decisions were fought out in a higher education context. During the reign of "separate-but-equal," the Court sought to guarantee that if a state chose to separate the races in its educational system, it must provide equal educational opportunities for both races. In Missouri, ex rel. Gaines v. Canada (1938), the Court held invalid a state plan for providing blacks scholarship assistance to attend out-of-state schools. Since Missouri provided white students an opportunity to attend a state-operated law school, it had a duty to provide aspiring black law students an equal facility within the State of Missouri. Public financing of a legal education for black Missourians in neighboring states did not satisfy Missouri's constitutional responsibility under the "separate-but-equal" doctrine. Missouri had to either open a law school for blacks of comparable quality to the one for whites, or else it must allow blacks to enroll at the previously all-white law school. Consequently, as early as 1938, the Supreme Court ruled that at a minimum access to the segregated system of higher education was constitutionally required, even under "separate-but-equal," where no comparable higher education programs for blacks were offered by a state.

The response of some states to the Gaines ruling was begrudging at best. For example, to avoid having to admit blacks to the University of Texas Law School, the State of Texas sought to satisfy its obligation under Gaines by establishing an alternative law school for blacks staffed by part-time faculty largely drawn from the University of Texas Law School. The physical facilities were clearly inferior and the faculty only part-time. In Sweatt v. Painter (1950), the court observed that anyone with a choice would clearly attend the University of Texas, not the alternative black law school. Perhaps most significantly, in holding the black facility unequal, the Court observed that intangibles derived from attending an integrated law school were important—black lawyers had to deal with white jurors and work with white attorneys. In the legal profession, professional contacts were important, both in obtaining and serving clients. A black whose legal education occurred in a racially isolated environment could not begin practice on an equal footing with whites. Although the Court did not say as much, the decision in the University of Texas Law School case made it virtually impossible for a state to satisfy the "separate-but-equal" mandate, at least in a law school context.

A companion to the Sweatt case involved a black graduate student who had been admitted to an all-white university in order to comply with Gaines. The State, in McLaurin v. Oklahoma (1950), admitted a black student to its all-white university, but only on a segregated basis; in practice that meant that he ate lunch alone, studied at a separate table in the library, and sat alone in class. In many ways the McLaurin case is the most poignant reminder of the stigma and humiliation imposed on blacks by the system of segregation and the extraordinary pettiness of those who sought to maintain the form of a segregated society even when the substance was collapsing. Nevertheless, if one can

distance oneself from the pathos of the individual situation in McLaurin, and if one looks at the facts assuming the validity of "separate-but-equal," the analyst can hardly find a situation more nearly "equal" in terms of tangibles. The black student sat in the same classes, heard the same lectures, had access to the same professors and library resources, ate the same food, and even could interact with his fellow students outside of class (other than in the lunchroom). Nonetheless, the Court unanimously held the Oklahoma plan unconstitutional in violation of the separate-but-equal doctrine. The Court placed such overriding emphasis on intangibles that, at least in the field of higher education, a state would find it virtually impossible to justify either a separate-but-equal facilities approach or a scheme of racial separation within a single institution.

The developments from Gaines to Sweatt and McLaurin demonstrated the bankruptcy of the separate-but-equal doctrine in higher education and set the stage for Brown, in which the Court repudiated the doctrine in the context of public education. Although the Court contemplated a period of transition in desegregating public primary and secondary schools (Brown II), in Florida ex rel. Hawkins v. Board of Control (1956) it rejected any delay in implementing the nondiscrimination rule of Brown in institutions of higher education. Since 1938 some degree of desegregation in postsecondary education had been taking place as states began to meet their responsibilities under Gaines. No period of transition was therefore necessary.

The decisions in Gaines, Sweatt, McLaurin, and Hawkins demonstrate that the Constitution mandates equality of educational opportunity in institutions of higher education, however that concept may be substantively defined at any given time. The unanswered question, in light of the above cases, is what judicial duty exists to remedy the effects of previous years of de jure

segregation. The problem is complicated by the special role of historically black institutions, the noncompulsory nature of postsecondary education, the different types of postsecondary institutions and the different constituencies they serve. The courts that have faced these issues have concluded that some form of Green's affirmative duty applies to postsecondary education, but they are not in agreement about how far to push the Green attentiveness to actual integration as measured by the impact of remedial measures on racial ratios. To some extent it seems that the more closely parallel the involved system of postsecondary education is to primary and secondary education the more closely the Court will follow the affirmative duty model set forth in Green. Compare Lee v. Macon County Board of Education (1970, 1971) (involving trade schools in junior colleges) with Alabama State Teachers Association (ASTA) v. Alabama Public School and College Authority (1968, 1969) (involving 4-year, degree - granting extension of Auburn University).

A.

The postsecondary education desegregation cases that have come before the courts have arisen generally in southern states, which previously maintained segregated systems of education by law. The three most prominent cases all involved similar factual situations--the proposed construction or expansion of an identifiably white institution within the geographical zone of competition of an existing predominantly black institution.

In all three cases the courts found that dual systems had not been fully dismantled, and agreed that state-mandated segregation imposed an affirmative duty on the court to dismantle the segregated system. With respect to the scope of that duty, however, the courts were not in full accord.

In Alabama State Teachers Association v. Alabama Public School and College Authority (ASTA), the court was "reluctant . . . to go much beyond preventing discriminatory admissions" on the ground that "the scope of the duty should (not) be extended as far in higher education as it has been in the elementary and secondary public school area" (1968, p. 787). Noting that postsecondary education is "neither free nor compulsory," Judge Frank M. Johnson, Jr., observed that institutions of higher education are much less fungible than primary and secondary schools. Freedom of choice "has a long tradition and helps to perform an important function, viz., fitting the right school to the right student" (p. 790). Such choice is important because of a "full range of diversity in goals, facilities, equipment, course offerings, teacher training and salaries, and living arrangements" in postsecondary institutions (p. 788). On the assumption that the proposed new campus for Auburn University would be operated in a racially neutral manner, the court declined to require that the state act so as to maximize integration, even though Green would mandate such a remedy in primary and secondary education. In the field of higher education, ASTA held that an adequate remedy for past segregation was nondiscriminatory action with respect to admissions and faculty and staff hiring. No injunction against construction of the Auburn campus was granted and, a fortiori, no statewide desegregation action was required.

In Norris v. State Council of Higher Education (1971), a Virginia case, the Court declined to follow ASTA. It rejected the view that a state satisfied its duty to desegregate by adopting "(g)ood faith admission and employment policies administered without regard to race, coupled with freedom of choice . . ." (p. 1372). Instead, it held that Green applied to postsecondary institutions: "The means of eliminating discrimination in public schools necessarily differ from its

elimination in colleges, but the state's duty is as exacting" (p. 1373). Since a racially identifiable system of higher education persisted in Virginia despite open admissions, and since the expansion of a predominantly white 2-year school into a 4-year institution would reduce the prospects of attracting white students to an existing predominantly black institution, the Court enjoined the expansion. At the same time it refused to order a merger of the black and white institutions and, on procedural grounds, denied plaintiffs' request that a statewide desegregation plan for "all state colleges and universities" be mandated.

The most extensive relief granted in a higher education desegregation case was ordered in the Tennessee case. In Sanders v. Ellington (1968), plaintiffs sought to prevent the University of Tennessee from constructing a new facility in Nashville. The United States, as intervenor, also asked that the State be ordered to "present a plan calculated to produce meaningful desegregation of the public universities of Tennessee" (p. 939). Although there was no finding of recent segregative acton, the court found the existing dual system to be "the result of mistakes and inequities in the past" (p. 940). Accordingly, it ordered the State to develop a statewide plan for desegregation, "with particular attention to Tennessee A & I State University (TSU)," so that the dual system would be dismantled (p. 942). At the same time, however, the court refused to enjoin construction of the University of Tennessee's Nashville Center because of its exclusive emphasis on providing "educational opportunity for employed persons of all races who must seek their education at night" (p. 941). In short, the court in Sanders found no intent on the part of the University of Tennessee to turn its Nashville campus into a degree-granting day institution that would be directly competitive with the predominantly black TSU. On that basis, the court did not find "that the proposed construction and operation of the

University of Tennessee Nashville Center will necessarily perpetuate a dual system of higher education" (p. 941).

The Sanders court explicitly declined to rely on ASTA. It seemed clear that Judge Gray would not accept an open-door admissions policy if that did not effectively dismantle the dual system. There must be "genuine progress toward desegregation" or at least a "genuine prospect of progress" (p. 942). The apparent absence of direct competitiveness between TSU's daytime program and UTN's evening program seemed to be a cornerstone of Judge Gray's decision. Unlike the direct competition in Norris, there seemed to be a distinct adult constituency to which UTN would appeal.

Four years after Sanders, when TSU remained racially identifiable, Judge Gray noted in Geier v. Dunn:

> (I)n cases involving higher education, an open door policy, coupled with good faith recruiting efforts (as well, perhaps, as a provision of remedial education for the educationally under-priviledged), is sufficient as a basic requirement . . . . But this "basic requirement" is not enough in those situations where it clearly fails to accomplish the ends sought . . . . (W)hen the basic (and preferred) approach of an open door policy fails to be effective, the interest of the State in completely setting its own educational policy must give way to the interests of the public and the dictates of the Constitution. (1972, p. 580)

He ordered that a "white presence" be established at TSU, and ordered that further planning for desegregation take place (p. 581).

In 1977, with TSU still racially identifiable and with expert testimony suggesting that white adults attending evening classes were the best hope for integrating a predominantly black institution, Judge Gray ordered in Geier v. Blanton (1977) the merger of UTN, the predominantly white institution, with TSU, the predominantly black institution, because previous remedies had been

ineffective. With respect to other traditionally white state institutions, however, Judge Gray concluded that progress towards desegregation, based largely on open admissions and good faith recruitment, was satisfactory. Both facets of Judge Gray's 1977 opinion were upheld on appeal.[9]

The courts dealing with desegregation in postsecondary education have confronted the problem in states that formerly segregated by law. Under decisions such as Swann, Dayton II, and Keyes, it is quite proper for courts to remedy existing segregation in systems in which statutorily imposed segregation has not been dismantled. In effectuating a remedy, the courts have applied "the Green requirement of an affirmative duty . . . to public higher education . . ." Geier v. University of Tennessee (1979), (p. 1065). While the court in ASTA required only a policy of open admissions and good faith recruitment, the Sixth Circuit in the TSU litigation held that "(w)here an open admissions policy neither produces the required result of desegregation nor promises realistically to do so, something further is required" (p. 1067). That is, the Green effectiveness approach controls, although the "means of eliminating segregation . . . differ" in the higher education context (p. 1065).

In each of the above cases, it appears that the courts had less difficulty in encouraging the states to develop plans to integrate previously all-white institutions. The major problem in all cases was sustained segregation of traditionally black institutions. In ASTA, the plaintiffs contended that opening a new campus of Auburn, an identifiably white school, would perpetuate the dual system. The court rejected expansion of Alabama State as an alternative on the ground that it was "at least as identifiably 'black' as Auburn is identifiably 'white'. In terms of eliminating the dual school system, one label is no more preferable than the other." (p. 789). In ASTA, plaintiffs objected to the

proposed establishment of a 4-year campus of Auburn in Montgomery on the ground of competition with the existing black 4-year school of Alabama State. In the Court's view, the integrated status of Auburn was sufficient to justify its construction; if a preexisting racial identity were to preclude growth, no institution could expand.

Implicit in ASTA is the expectation that the new institution would be neither black nor white but "just a school" and that it had as good a chance to improve desegregation as expansion of a previously black institution. Lacking from the calculus in ASTA is concern for the welfare of traditionally black institutions as vehicles for promoting desegregation. For the court in ASTA, if a previously identifiable white institution would more easily attract blacks than a previously black institution would attract whites, then there was no objection to desegregating at the expense of traditionally black institutions.

In Norris the court took a different approach. In enjoining expansion of an identifiably white 2-year school into a 4-year school, the court feared overlap with an existing black institution (Virginia State); it found that expansion of the white institution would impede integration of Virginia State. Similarly, in the TSU litigation, integration of a previously black institution assumed great significance. Judge Gray ordered a "white presence," initially proposing that certain programs likely to attract whites be assigned exclusively to TSU. Eventually, the "white presence" at TSU was achieved by merging the predominantly white UTN into TSU.

Consequently, there is precedent to justify a concern with maintaining the viability of black institutions by promoting their integration. In that way, these institutions are not placed out of the mainstream of the state's higher education system; rather, their black heritage is maintained, but on a more integrated

basis.[10] Whether, absent merger as in Geier, such a strategy can be successful only time can tell. Where, as in Geier, merger is effectuated, there is a serious possibility that, over time, the continued black identity of these institutions could be imperiled. Nevertheless, the Virginia and Tennessee cases can be read to support an end to duplicative, competitive programs between predominantly white and predominantly black schools—whether by pre-emptive injunction, by merger, or some less drastic remedy such as exclusive allocation of programs.

B.

In a non-southern state, plaintiffs in higher education desegregation cases must make an initial showing of liability before being entitled to a remedy. Under doctrine established in cases such as Washington v. Davis (1976) and Keyes, it is incumbent on a challenger to prove that governmental action was intentionallly segregative in the sense that government officials must be shown to have "selected or reaffirmed a particular course of action at least in part 'because of' not merely 'in spite of,' its adverse effects on an identifiable group" (Personnel Administrator v. Feeney (1979, p. 279). Observed segregation, without proof of purposeful official action, is not unconstitutional.

Once purposeful official segregation can be demonstrated, the question becomes how broad the relief will be. The issue is how the Court, in a higher education context, would treat the twin presumptions of effect and intent announced in Keyes. In the Detroit desegregation case, Milliken I, the Court declined to apply either presumption where inter-district relief was sought. With respect to the reciprocal effect presumption, the Court implicitly held that suburban school districts were separate, identifiable, and unrelated to the Detroit district unless actual proof was demonstrated by plaintiffs that the

segregative acts in Detroit had effects in suburban areas. With respect to the transfer of intent presumption, the Court declined to infer intent to discriminate on the part of suburban boards from proof of purposeful segregation in Detroit.

How the Court would handle the scope of the remedy problem in a higher education context is conjectural. The following is a hypothetical type of problem that could arise. A postsecondary institution in Los Angeles becomes predominantly black. Evidence shows that the appropriate statewide governing board is concerned with the racial identity of that school and votes to construct a new institution in a predominantly white area of the county, explicitly designed and expected to attract white students. At the same time, it is observed that many of the postsecondary schools under the jurisdiction of this board (e.g., in San Francisco, San Diego, etc.) are racially identifiable. However, no evidence of racial motivation exists with regard to any institution except those in Los Angeles. The issue is whether, upon a finding of racial discrimination in the Los Angeles area, a presumption would arise that the board acted discriminatorily so as to create the observed segregation elsewhere.

The Milliken decison suggests a restrictive application of the Keyes reciprocal effects presumption to a single district. If the effects of segregative acts in Detroit are not presumed to penetrate into the suburbs, as Milliken holds, it seems unlikely that the segregative effects from one area would presumed to infect other portions of the state. The burden most likely would rest on a plaintiff to show the likely scope of impact of a set of official segregative acts. The remedy would then apply to undo the demonstrated effects of the unconstitutional conduct.

With respect to the Keyes transfer-of-intent presumption, there is an argument that the transfer of intent is proper because a single statewide body is

involved. Milliken is distinguishable because it was implausible to transfer the improper intent of the Detroit school board to suburban school officials. On the other hand, a court could conclude that such a borrowing from Keyes would be inappropriate in a non-southern higher education desegregation case. In a primary or secondary education context, there are significant risks of covert segregative acts that can escape detection by plaintiffs who, in essence, must find a smoking pistol. Since plaintiffs must prove purposeful discrimination, the Court in Keyes felt justified in reversing the burden of proof where plaintiffs could demonstrate racially motivated official conduct in a significant portion of the district. Covert conduct, such as gerrymandering attendance zones, manipulating feeder patterns, sizing or siting new schools, is arguably less likely to occur and more difficult to hide in a postsecondary setting. Moreover, such decisions in higher education are fewer and farther between, suggesting a much fuzzier relationship between activities in different parts of a state. Of course, if such a pattern of racist conduct can be established by a plaintiff, then relief would follow. But, the burden of going forward with such evidence and the risk of non-persuasion might well be placed on the complainant. If the Keyes transfer-of-intent presumption were not applied in the higher education context, a hypothetical plaintiff who only proved segregative intent in the Los Angeles area would not be entitled to systemwide relief, but only a desegregation remedy in the Los Angeles area.

The Federal Role in the Desegregation of Postsecondary Education: Title VI

Section 601 of Title VI of the 1964 Civil Rights Act applies to any program receiving federal financial assistance that discriminates on the basis of race, color, or national origin:

> 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. (42 U.S.C. Section 2000d)

The provisions of Title VI are a major tool available for the federal enforcement of the principle of racial equality in both public and private educational institutions. Whereas the constitutional provisions of the Fourteenth Amendment only apply to public institutions — that is where state action exists —the non-discrimination provisions of Title VI are applicable to all recipients of federal funds, thereby including both public and private institutions.

At the outset, several important limitations of Title VI must be noted. First, and perhaps most important, the provisions do not apply to employment practices. (42 U.S.C. Section 2000d-3). Presumably, all employment discrimination claims under the Act are to be litigated under Title VII. The federal fund cut-off remedy is unavailable to combat employment discrimination under the Civil Rights Act, although it may be possible under Executive Order 11,246.[12]

Second, if a local school district is in compliance with a court desegregation order, the statute mandates that the district "shall be deemed to be (in) compliance" with Title VI. (42 U.S.C. Section 2000d-5). This provision suggests that the federal government cannot require, under Title VI, a beneficiary of federal funding to go beyond compliance with its constitutional obligations.

Third, the fund cut-off sanction of Title VI contains a pinpoint provision, restricting the termination power to specific programs guilty of non-compliance.[13] In its regulations, the Department of Education (DEd) has sought broader application of the fund cut-off authority, placing the burden on

recipients to demonstrate to DEd's satisfaction that the cut-off provision should not apply to an entire institution (Federal Regulations, 45 C.F.R., Section 80.4(d)(2)). Whether DEd's expansive reading of Title VI comports with the statute apparently has not been definitively resolved.

Title VI and the Equal Protection Clause of the Fourteenth Amendment

One of the major unresolved issues of civil rights law is whether the non-discrimination provisions of Section 601 incorporate the same standards as the equal protection clause of the Fourteenth Amendment. Compare Lora v. Board of Education (1980, p. 250) and Castaneda v. Pickard (1981) with Guadalupe Organization, Inc., v. Tempe Elementary School Dist. No. 13 (1978, p. 1029, note 6). The issue arose in Regents of the University of California v. Bakke (1978), which dealt with the affirmative action admissions program at the University of California-Davis Medical School. Four justices--Stevens, Burger, Rehnquist, and Stewart--concluded that Section 601 adopted a strictly color blind approach to barring discrimination. They declined to limit Title VI to situations in which a racial stigma is imposed. Implicitly, these four justices refused to hold that Title VI and the equal protection clause were identical in all circumstances. Since Title VI adopted a color blind standard, it was stricter than the equal protection clause in the context of an affirmative action program. Beyond that conclusion, there remained some ambiguity as to the position of the Stevens group with respect to the application of Title VI in the context of affirmative action and wider challenges to reverse discrimination under the Fourteenth Amendment.

Justice Brennan, joined by Justices Marshall, White, and Blackmun, concluded that Title VI adopted the equal protection standard, including the

evolution of interpretation of that constitutional norm. In his concurrence, Justice Powell agreed with the Brennan group that Title VI adopted the constitutional standard. Consequently, in Bakke, a majority of five justices adopted the view that Title VI and the Constitution were co-extensive. In Board of Education v. Harris (1979), which upheld HEW regulations for the implementation of the Emergency School Aid Act (ESAA), the majority suggested that Title VI was co-extensive with constitutional standards. Justices Powell and Rehnquist, who joined Justice Stewart in dissent, indicated that they accepted this view.

The reason that the relationship between Title VI and the equal protection clause is important is that adoption of the constitutional test would mean that a finding of purposeful discrimination might be required before the federal government could invoke its authority to cut off funds. In a recent comprehensive discussion of this issue, Judge Sofaer of the Southern District of New York concluded in Bryan v. Koch (1980) that Bakke and Harris "strongly indicated that . . . a majority of the Justices would hold that . . . the standard of discrimination in Title VI is the same standard the Court establishes for discrimination under the Fifth and Fourteenth Amendments."

In Harris, the Court upheld the disporportionate racial effect or impact standard used by HEW in implementing ESAA. (The dissent would have required a showing of discriminatory purpose.) In Bryan, involving New York City's threatened shut-down of a hospital in Harlem, HEW maintained that the test of invalidity under Section 601 of Title VI was also racially disproportionate impact, a position that Judge Sofaer rejected. HEW's implementing regulations under Title VI include at least two provisions that focus on racial impact rather than on discriminatory purpose. If Judge Sofaer is correct, as the second and fifth

circuits have now held, these provisions could well be improper regulations in conflict with the terms of the statute. See Guardians Ass'n v. Civil Service Comm'n (1980); Castaneda v. Pickard (1981).

(1)

Although Section 601 of the statute certainly is susceptible to the reading that a majority of the Supreme Court apparently gives to it, and the reference in Title VI to compliance with court desegregation orders reinforces this reading, the conclusion contradicts other language in the statute and an earlier Title VI case that sustained a disproportionate impact analysis under Title VI (Lau v. Nichols, 1974).

Section 2000d-6(a) of Title VI states that federal policy guidelines under Title VI should deal uniformly with conditions of racial segregation "whether de jure or de facto . . . whatever the origin or cause of such segregation." Similarly, Section 703(b) of ESAA reiterates that provision. On their face, those provisions certainly suggest that Title VI addresses the problem of de facto as well as de jure segregation. That would indicate that federal guidelines focusing on racially disproportionate impact would validly be related to an objective of Title VI. Under those circumstances, no finding of discriminatory intent would be necessary.

However, Section 2000d-6(b) defines uniformity so that all de facto and all de jure segregation wherever found must be treated alike. This section was apparently left intact by the subsequent enactment of Section 703(b) of ESAA (see Board of Education v. Harris, 1979, p. 372, note 10). Consequently, it would seem that Title VI requires parity among regions as to each separate type of segregation. Section 2000d-6(b) could therefore be read as effectively nullifying

the linkage of de jure and de facto segregation in Section 2000d-6(a). In essence, de facto segregation under Section 2000d-6(b) would be uniformly ignored by Title VI. If the statute deals only with purposeful discrimination, then its terms would not cover de facto segregation and, as a result, de facto segregation, wherever found, would be treated uniformly by the statute—by being unaffected.

It would seem that both the majority and dissenting opinions in Harris (1979) implicitly accept that somewhat strained line of argument, although the dissent questioned whether Section 703(b) of ESAA was intended to leave intact Section 2000d-6(b) of Title VI. If, however, the majority's view on that issue were valid, the dissenters seemed prepared to accept the majority's interpretation of the relationship of Sections 2000d-6(a) & (b) of Title VI. Thus, while ESAA applied to de facto segregation and justified adoption of a racially disproportionate impact standard, Title VI applied only to de jure segregation, necessitating a finding of discriminatory intent.

(2)

In Lau v. Nichols (1974), the Court held invalid under Title VI the failure of the San Francisco school system to provide English language instruction to approximately 1,800 non-English speaking students of Chinese ancestry. The Court concluded that the Chinese students were denied a "meaningful opportunity to participate" in public educational programs in violation of Section 601 of Title VI (p. 568). Although the precise mode of analysis is somewhat obscure, it seems that the Court held under Section 601 that "(d)iscrimination is barred which has that effect even though no purposeful design is present . . ." (p. 568). The Court supported its conclusion by reference to HEW's implementing

regulation, which bars recipients of federal funds from administering their programs so that there is a discriminatory effect on participants.

(a)

It is conceivable that the reasoning of Lau has been undermined by the subsequent decisions in Bakke and Harris. This is essentially the view adopted by Judge Sofaer in Bryan v. Koch and subsequently by the second and fifth circuits. Several legal commentators have also taken this view.[14] In Harris, Justice Stewart, joined by Justices Powell and Rehnquist, concluded that after Bakke "Title VI prohibits only purposeful discrimination," (p. 379), a position that Justice Blackmun for the majority apparently accepted (p. 372, note 10). Finally, in Bakke itself the Brennan Four noted the shakiness of the reasoning in Lau:

> We recognize that Lau, especially when read in light of our subsequent decision in Washington v. Davis, 426 U.S. 229 (1976), which rejected the general proposition that governmental action is unconstitutional solely because it has a racially disproportionate impact, may be read as being predicated upon the view that, at least under some circumstances, Title VI proscribes conduct which might not be prohibited by the Constitution. Since we are now of the opinion . . . that Title VI's standard, applicable alike to public and private recipients of federal funds, is no broader than the Constitution's, we have serious doubts concerning the correctness of what appears to be the premise of that decision. (p. 352)

In light of the rulings in Bakke and Harris, therefore, one view is that the effects standard of Lau is overruled.

(b)

Another possibility is that Lau could be re-cast along the lines suggested by Justice Stewart's concurrence. For Justice Stewart, the issue in Lau was the

validity of HEW's regulations promulgated under Section 602 of Title VI. Justice Stewart, joined by Justice Blackmun and Chief Justice Burger, noted the absence of any claim of intentional discrimination on the part of the school officials, "only that they have failed to act in the face of changing social and linguistic patterns" (pp. 569-570). Because of a lack of purposeful discrimination, Justice Stewart was skeptical whether the non-discrimination language of Section 601, "standing alone, would render illegal the expenditure of federal funds on these schools" (p. 570). Rather, Justice Stewart focused on HEW guidelines that required a school district to "take affirmative steps to rectify the language deficiency" in order to open up educational programs to students unable to speak or understand the English language. From this perspective, "(t)he critical question (was), therefore, whether the regulations and guidelines promulgated by HEW go beyond the authority of Section 601" (p. 571).

The Justice Department argued that the guidelines were issued by HEW pursuant to Section 602, which authorizes an appropriate federal agency "to effectuate the provisions of (Section 601) . . . by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute . . ." (pp. 571-572, note 3). The test of the validity of the regulation was whether it was "resonably related to the purposes of the enabling legislation" (p. 571, quoting Thorpe v. Housing Authority, 1969, pp. 280-281). The guidelines satisfied that standard, although Justice Stewart did not explain the grounds on which he reached that conclusion.

The approach of Justice Stewart's concurrence in Lau suggests that Section 601, standing alone, would require a demonstration of purposeful discrimination. This would equate Section 601 with the equal protection clause of Section 1 of the Fourteenth Amendment. At the same time, however, the Stewart

concurrence suggests that a federal agency would have authority under Section 602 to issue regulations and guidelines that would be more stringent than the provisions of secton 601 on their own. Presumably, where a federal agency saw a risk that a group, because of its national origin, would be effectively "excluded from participation in" or "be denied the benefits of" a "program or activity receiving federal financial assistance," it could act to impose some affirmative obligation on a recipient of federal funds to ensure meaningful participaton. As Justice Blackmun emphasized in his separate concurrence, the 1,800 children affected represented "a very substantial group that is being deprived of any meaningful schooling because the children cannot understand the language of the classroom." For him "numbers (were) at the heart of this case . . ." (p. 572).

If federal regulatory power under Section 602 extends beyond the authority of Section 601, the result in Lau seems justifiable even if it is assumed that Section 601 incorporates a purposeful discrimination standard. The risk of exclusion of non-English-speaking students from meaningful participation in the educational process was realistic and the concern was not incompatible with the overall equality provisions of Section 601. Moreover, the decision in Lau must be understood in light of the state's compulsory attendance law, its command that English be the language of instruction in the classroom, and its policy that English be mastered by all pupils in school. Furthermore, as Justice Powell observed in Bakke:

> (The affirmative duty imposed in Lau) did not result in the denial of the relevant benefit—"meaningful opportunity to participate in the educational program"—to anyone else. No other student was deprived by that preference of the ability to participate in San Francisco's school system, and the applicable regulations required similar assistance for all students who suffered linguistic deficiencies. (p. 304)

Consequently, no conflict with the non-discrimination language of Section 601 existed, and the guidelines promulgated pursuant to Section 602 could be deemed reasonable and valid.

This suggested interpretation of Lau is compatible with the subsequent decisions in Bakke and Harris. It would also allow added flexibility for federal enforcement of Title VI by issuance of guidelines under Section 602 that, in some circumstances, went beyond the strictures of Section 601, provided that the guidelines were not incompatible with or in conflict with the terms and objectives of Section 601. This interpretation, then, would analogize Section 601 of Title VI to the equal protection clause of Section 1 of the Fourteenth Amendment and Section 602 of Title VI to the Section 5 enforcement provision of the Fourteenth Amendment.

Since 1966, the Court has construed congressional power under Section 5 of the Fourteenth Amendment to extend beyond the contours of the equal protection guarantees of Section 1. In Katzenbach v. Morgan (1966), the Court interpreted Section 5 as "a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment" (p. 651). There, the Court upheld a provision of the Voting Rights Act of 1965 which prohibited application of state English-language literacy requirements to otherwise qualified voters who had completed the sixth grade in an accredited American school in which the predominant medium of instruction was a language other than English. The Court earlier had held in Lassiter v. Northampton Election Board (1959) that state literacy tests were not invalid under the equal protecton clause. The Court in Katzenbach found it unnecessary, as a prerequisite to upholding the federal voting statute, to hold the state literacy provision

unconstitutional. Lassiter was not overruled. "It was enough that the Court could perceive a basis upon which Congress could reasonably predicate a judgment that application of literacy qualifications . . . would discriminate in terms of access to the ballot and consequently in terms of access to the provision or administration of governmental programs" Fullilove v. Klutznick (1980, p. 4987).

In Fullilove v. Klutznick, the Court upheld the validity of a federal spending program that mandated that 10% of the federal funds granted for local public works projects be used by recipients to procure supplies or services from businesses owned and controlled by members of statutorily identified minority groups. Although the equal protection clause, standing alone, would not have mandated the 10% set aside provision, the central opinion in Fullilove, authored by Chief Justice Burger, upheld the statute on the ground that Congress could reasonably infer that the disparity in the percentage of public contracts awarded to minority business enterprises resulted "from the existence and maintenance of barriers to competitive access, which had their roots in racial and ethnic discrimination, and which continue today, even absent any intentional discrimination or other unlawful conduct" (p. 4987). Thus, Congress could enact remedial legislation under Section 5 of the Fourteenth Amendment on the basis of its view that "traditional procurement practices, when applied to minority businesses, could perpetuate the effects of prior discrimination" (p. 4987). The legislation was valid even without a finding of current illegal procurement practices.

In Fullilove, the Chief Justice cited Lau v. Nichols as an instance where the Court upheld an impact standard included in regulatons adopted under a federal spending program. Despite the absence of improper discriminatory

purpose in Lau, the regulations were valid. On the assumption that Section 601 of Title VI requires a finding of purposeful discrimination, the favorable mention of Lau in the Chief Justice's opinion in Fullilove strongly suggests that federal authority under Section 602 goes beyond the self-executing terms of Section 601. Thus, the decision in Fullilove, relying on Section 5 of the Fourteenth Amendment and citing Lau in that context, supports the reading of Lau suggested here. This would allow the decision in Lau to survive despite the decisions in Bakke and Harris and would suggest a certain administrative flexibility on the part of federal agencies to require more under the implementaton authority of Section 602 than would be mandated under the nondiscrimination provisions of Section 601 standing alone.

Federal Enforcement of Title VI in Postsecondary Education

For the past ten years, the specific responsibilities of HEW (and now the U.S. Department of Education) for the enforcement of Title VI have been the subject of litigation. In 1969-1970, HEW found that ten states (Louisiana, Mississippi, Oklahoma, North Carolina, Florida, Arkansas, Pennsylvania, Georgia, Maryland, and Virginia) "were operating segregated systems of higher education in violation of Title VI."[15] Five of those states totally ignored orders to submit desegregation plans, and the plans submitted by the other five states were apparently unsatisfactory to HEW. Although the plans were deemed unacceptable, however, HEW did not formally comment on them for two or three years.

In a series of litigation begun as Adams v. Richardson (Adams I), plaintiffs challenged HEW's enforcement of Title VI in the ten specified states (1972). Judge Pratt stated in Adams I that "(t)he basic issue . . . (was) whether (HEW's) exercise of discretion in relying largely on voluntary compliance to accomplish

the progress achieved and to obtain compliance in the areas still unresolved meets their full responsibilities under the mandate of Title VI" (p. 640). The court held that "(w)here a substantial period of time has elapsed, during which perjodic attempts toward voluntary compliance have been either not attempted or have been unsuccessful or have been rejected, (HEW's) limited discretion is ended and they have the duty to effectuate the provisions of (Section 601 of Title VI) by either administrative determination . . . . that funds should be terminated, or by any other means authorized by law . . ." (p. 641). In short, where HEW had found non-compliance and voluntary negotiations had not been successful, it had a duty to implement remedies made available by Title VI for enforcing its substantive provisions. HEW had "no discretion to negate the purpose and intent" of Title VI "by a policy . . . of 'benign neglect' but, on the contrary, (has) the duty, on a case by case basis, to employ the means set forth in (Section 602) to achieve compliance" (p. 642).

In Adams II (1973a), the court ordered HEW to commence enforcement proceedings against the ten non-complying states within a specified period of time. On appeal, the District of Columbia Circuit court, sitting en banc, held in Adams III (1973b) that a "consistent failure" on the part of HEW to institute compliance proceedings "is a dereliction of duty reviewable in the courts" (p. 1163). The appeals court upheld the district court's order, but modified the timetable allowing the ten non-complying states time to submit new desegregation plans. The court of appeals noted that "desegregation problems in colleges and universities differ widely from those in elementary and secondary schools," and that HEW had not formulated guidelines for desegregating statewide systems of higher education (p. 1164). The court observed that "(t)he problem of integrating higher education must be dealt with on a statewide rather

than a school-by-school basis" and that statewide desegregation plans must take into account "the special problems of minority students and of black colleges... (which) currently fulfill a crucial need and will continue to play an important role in Black higher education" (pp. 1164, 1165).

The court in Adams IV recognized the need to provide for "minority access to quality post-graduate programs" by focusing on the needs of black students and also on the needs of black institutions (p. 1165). Presumably, integration of white institutions could not result in neglect of the welfare of traditionally black institutions. The court, albeit in dicta, clearly signaled that HEW's guidelines should include consideration of the role of black institutions within a unitary system.

Subsequent to Adams III, HEW referred the states of Louisiana and Mississippi to the Justice Department for enforcement proceedings.[16] In June 1974, HEW found acceptable the postsecondary desegregation plans submitted by all the Adams states except Maryland and Pennsylvania although the department had not at that time issued desegregation guidelines under Title VI for postsecondary education. In Adams v. Califano (Adams IV) the district court found that six of the state plans "did not meet important desegregation requirements and . . . failed to achieve significant progress toward higher education desegregation" (1977, p. 119). The basis of the court's holding suggests a politicized intra-departmental dispute and a new departmental approach following the inaugration of the Carter administration in January 1977.

Apparently, despite the absence of official regulations, communications in 1973-1974 from HEW to the Adams states "identified the critical requirements of an acceptable desegregation plan" (Adams IV, 1977, p. 119). The plans actually submitted by the states, and eventually officially accepted by HEW,

"failed to meet the requirements earlier specified" in the individual communications (p. 119). The plaintiffs vigorously objected to the state plans because of alleged inadequacies concerning "desegregation of student bodies, of faculties, the enhancement of Black institutions long disadvantaged by discriminatory treatment, and desegregation of the governance of higher education systems" (p. 120). The director of the Office of Civil Rights (OCR) agreed with plaintiffs' position and so testified. He must have lost out in the intra-departmental bureaucratic maneuvering because HEW ultimately found the state plans acceptable even though inconsistent with the criteria privately communicated to the states by some HEW officials. Since no official guidelines had been promulgated, it may be assumed that in the final analysis HEW actually applied less rigorous standards when approving the state plans than were articulated during the negotiation process by OCR. The official acceptance of the submitted plans was a tacit departmental decision to adopt less stringent standards of affirmative integration efforts under Title VI than initially suggested by OCR in the process of negotiation.

In Adams IV Judge Pratt drew on the dicta in Adams III to order HEW to develop desegregation criteria for higher education that "will take into account the unique importance of Black colleges and at the same time comply with the congressional mandate" (p. 120). Judge Pratt stated that "(t)he process of desegregation must not place a greater burden on Black institutions or Black students' opportunity to receive a quality public higher education" (p. 120).

It is possible, therefore, to interpret the decisions in Adams III and Adams IV in two quite different ways. First, they may stand for the proposition that the state plans were wrongly accepted because they did not conform to the criteria articulated by certain HEW officials in informal communications with the states.

Since no other criteria were explicitly articulated, HEW would be held accountable to application of the sole standards found to be in existence. Such a decision would not implicate the court in mandating HEW to devise a particular set of criteria but only require that HEW live up to the informal criteria announced when reviewing state plans for compliance. The decisions would turn on an improper application of HEW's own informal criteria, not on the substantive merits of the standards themselves. Under this interpretation, HEW could have adopted less stringent standards, and then applied them. What HEW could not do is announce one set of criteria and tacitly employ a different normative benchmark.

An alternative, broader reading would be that Judge Pratt imposed certain substantive standards on HEW when the department formulated its guidelines. Specifically, Judge Pratt's decision can be interpreted to require that the dicta from Adams III on the role of black institutions be mandated for inclusion in HEW's guidelines. Such factors as the placement and duplication of new programs and the enhancement of black institutions might well be deemed necessary components of HEW's guidelines under this reading of Adams IV.

With the change of administration, it became clear the HEW read Adams IV broadly, and the guidelines eventually submitted to the court reflected this broad view (Federal Register, 1978). The Department noted that the six Adams IV states all had a history of de jure segregation and were therefore under an affirmative duty to desegregate.[17] The test of a desegregation plan was its effectiveness; it must "address the problem of 'systemwide racial imbalance'" (p. 6659). In order to achieve effectiveness, HEW followed what it perceived to be the direction of Adams III and Adams IV, a statewide approach. Most significantly, the Department's guidelines set forth specific numerical goals and timetables that must be satisfied by a state's plan:

> (T)he goals are established as indices by which to measure progress toward the objective of eliminating the effects of unconstitutional de-jure racial segregation and of providing equal educational opportunity for all citizens of these states. They are benchmarks and provide the states the clear and specific guidance called for by the Court. (p. 6659)

After HEW's promulgation of the Adams guidelines, all of the non-complying states but North Carolina submitted satisfactory desegregation plans. North Carolina is undergoing enforcement proceedings. A district court has barred HEW from deferring funding pending the outcome of the proceedings and court review. Interestingly, in contrast to HEW's interpretation of Adams III and Adams IV under the Carter Administration, the district court in State of North Carolina v. Department of Health, Education and Welfare (1979) narrowly construed the decisions in the Adams litigation. Judge Dupree quoted from the court of appeals decision in Adams III to demonstrate that the Adams case was not intended "to resolve particular questions of compliance or noncompliance. It was, rather, to assure that the agency properly construes its statutory obligations, and that the policies it adopts and implements are consistent with those duties and not a negation of them" (pp. 1163-1164). The court of appeals in Adams III further noted that "the order merely requires initiation of a process which, excepting contemptuous conduct, will then pass beyond the District Court's continuing control and supervision" (p. 1163, note 5).

Relying on the court of appeals' statements in Adams III, Judge Dupree concluded that Adams IV "did not stray beyond the essential jurisdictional confines" of Adams III (p. 932). The state plans were rejected in Adams IV, according to this view, "not because the state systems themselves had been found in violation of Title VI, but because their proposals failed to meet the requirements which had been previously specified by the Secretary concerning

enhancement of black institutions, and desegregation of faculties, student bodies and governing councils" (p. 932). Thus, Judge Dupreee in State of North Carolina interpreted Adams IV narrowly, as an attempt to remedy "HEW's failure to enforce its own Title VI compliance guidelines," but not specifying or approving the content or reach of those criteria (p. 932 and p. 932, note 1).

If the narrow view of the Adams litigation suggested by State of North Carolina is correct, then the federal agency has considerable discretion in formulating desegregation guidelines for higher education. In any event, the Adams criteria are only applicable by their terms to states having a history of de-jure segregation. In a situation such as that involving North Carolina, the specific substantive scope of Adams III and Adams IV must be determined. If, as State of North Carolina suggests, those decisions were essentially procedural and not substantive in nature, then the Department of Education would be free to formulate guidelines that satisfy the affirmative duty to desegregate as that concept has developed more flexibility in the constitutional cases discussed earlier. If the Adams decisions impose some substantive obligations in formulating desegregation criteria, the question remains whether those criteria comport or conflict with the underlying nondiscrimination principle of Section 601 of Title VI. If Adams III and Adams IV purport to mandate substantive enforcement criteria, then the underlying validity of those orders must be reassessed in light of the evolving understanding of Section 601 after Bakke and Harris.

Taking Stock

To this point, we have considered the following: 1) general overview of constitutional developments in the desegregation of primary and secondary education, emphasizing both the substantive liability issues (for non-southern states) and the remedies problems, 2) the application of desegregation principles derived from the context of primary and secondary education to the postsecondary setting, and 3) the federal government's equal opportunity enforcement responsibilities under the statutory provisions of Title VI of the 1964 Civil Rights Act. We now turn to a synthesis of these developments to ascertain their significance for the formulation of a federal policy on desegregation of higher education.

Current Legal and Constitutional Duties Imposed on the Department of Education

At a minimum, the Adams litigation imposes a duty on the department to enforce the nondiscrimination provisions of Title VI. Where voluntary compliance procedures have not succeeded, the department is under an obligation to commence enforcement proceedings, as now under way against the State of North Carolina.

Adams orders the formulation of desegregation criteria to be used in implementing Title VI. HEW responded to the court's orders by establishing "Revised Criteria Specifying the Ingredients of Acceptable Plans to Desegregate State Systems of Public Higher Education" (Federal Register, 1978). At least three problems remain with these criteria. First, it is unclear whether the President has specifically approved them. Under Section 602 of Title VI, "(n)o such rule, regulation or order shall become effective unless and until approved by the President." Nothing in the Federal Register suggests that the President has specifically approved the cirteria. This omission, apparently overlooked by

Judge Pratt in Adams IV, could pose a technical problem for the department if pending litigation with North Carolina returns to Judge Dupree's court.

Second, the revised criteria apply only to states "which formerly operated a dual system of public education . . ." (p. 6659). If the Department is under an obligation to enforce Title VI, it would seem that it must also develop guidelines for implementing the statute throughout all states. This would necessitate the formulation of rules to govern situations in which official acts of segregation occur, although no statutory dual system ever existed. The uniformity provision of Title VI requires evenhanded treatment of de jure segregation "wherever found," and since Keyes, it is clear that de jure segregation can exist by intentional acts of official segregation even where no statutory dual system existed.

Third, the revised guidelines apply only to public institutions of higher education. Yet, as stated in the opinion of Justices Brennan, White, Marshall and Blackmun in Bakke, "Title VI's standard (is) applicable alike to public and private recipients of federal funds . . ." (p. 352). If Adams requires that the federal government enforce the provisions of Title VI, it would seem incumbent upon the appropriate agency to specify enforcement criteria for private as well as public institutions. After all, under Section 602, the relevant federal department or agency is "directed to effectuate" Title VI "by issuing rules, regulations, or orders of general applicability . . . ."

To be sure, the substantive issues involved with regard to private institutions that were once segregated are complex. It may be that different criteria of causation might be appropriately applied (e.g., remote segregation might not be sufficient to trigger a Title VI sanction), or the scope of an acceptable remedy might differ (e.g., an open-door policy, following ASTA,

might be sufficient). But whatever the substance of the guidelines, it is especially important that they be formulated because private universities are not typically subject to constitutional contraints of equal protection. Consequently, a Title VI remedy may be the only one available for an aggrieved party in a private institutional setting. Moreover, guidelines to combat sex discrimination have been issued under Title IX of the Higher Education Act. Failure to act under Title VI gives the appearance that sex discrimination is treated more seriously, and with a higher priority, than race discrimination by the Department.

As a substantive matter, the minimum that would be required in enforcement of Title VI would be a standard of racial neutrality—i.e., non-discrimination.[18] To the extent that a recipient of federal funds engages in intentional discrimination in student admissions, financial aid, or any other activity (with the exception of an "employment practice" as specified in Section 604), it seems clear that the provisions of Section 601 are violated (see Adams III, p. 1164, note 10). Discrimination in employment would be subject to case-by-case litigation under Title VII, or potential action under the terms of Executive Order No. 11,246.

The decree filed in Adams IV imposes on the department a duty to promulgate "final guidelines or criteria specifying the ingredients of an acceptable higher education desegregation plan" (p. 121). It does not specify substantive criteria that must be satisfied, although the opinion itself does mention some factors that should be considered. In light of the Order in Adams IV, the language of Adams III, and Judge Dupree's reading of Adams in State of North Carolina, it seems reasonable to conclude that no specific criteria have been imposed by the courts. Moreover, the uncertainty in the higher education

desegregation cases makes it unclear just how far the Department must go in remedying the effects of past de jure segregation. It is at least arguable that implementing regulations could be limited to contemporaneous and prospective enforcement of Section 601's nondiscrimination principle. The affirmative duty to dismantle segregated systems, applied as a remedy in Fourteenth Amendment litigation, does not necessarily become a part of enforcement efforts under Sections 601 and 602. Even if the equal protection principle of nondiscrimination is congruent with the terms of Section 601, that does not automatically impose a parallel remedy on enforcement efforts under Title VI. The Adams litigation creates no such affirmative mandate.

Restrictions on Discretion in Enforcing Title VI

Before enforcement proceedings can commence under Title VI, efforts at voluntary compliance must be undertaken and exhausted.[19] Of course, once voluntary compliance efforts fail, Adams requires that enforcement efforts commence.

If a public system of higher education (e.g., Tennessee, Virginia, or Alabama) has been found by a federal court to be in compliance with constitutional commands, or if it is in compliance with a federal court desegregation order, then there is deemed to be compliance under Title VI. Under Adams II and Adams III the Department is required to monitor actual compliance with court desegregation orders. If the Department finds evidence of non-compliance with a court order, it may not commence enforcement proceedings but must "bring (its) finding to the attention of the court concerned. The responsibility for compliance . . . under court order rests upon the court issuing said order" (Adams III, p. 99).

In administering Title VI, the Department must apply its criteria for de jure desegregation uniformly to all regions. Desegregation remedies mandated by the Department must be causally related to findings of noncompliance. This follows from the general equitable principle that a remedy cannot go beyond curing the substantive violation at issue.

Section 602 of Title VI specifies that any fund cut-off "shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been found . . . ." In the leading case on this pinpoint provision, Board of Public Instruction of Taylor County v. Finch (1969), the court held that a termination of funds under Title VI "must be made on a program by program basis . . ." (p. 1078).[20] In Taylor County, Judge Goldberg noted for the court that sometimes specific programs are "insulated from otherwise unlawful activities." Such programs should not

> suffer for the sins of others . . . . HEW was denied the right to condemn programs by association. The statute prescribes a policy of disassociation of programs in the fact finding process. Each must be considered on its own merits to determine whether or not it is in compliance with the Act. In this way the Act is shielded from a vindictive application. Schools and programs are not condemned en masse or in gross, with the good and the bad condemned together, but the termination power reaches only those programs which would utilize federal money for unconstitutional ends. Under this procedure each program receives its own "day in court." (p. 1078)

The court found in Taylor County that responsibility lay with the federal agency seeking to cut off federal funds to make findings of fact to support its actions:

> The administrative agency seeking to cut off federal funds must make findings of fact indicating either that a particular program is itself administered in a discriminatory manner, or is so affected by discriminatory practices elsewhere in the school system that it thereby becomes discriminatory. (p. 1079)

The federal government argued that the statute imposed no such affirmative duty on the federal agency. Rather, it contended that the statute created an affirmative defense for recipients "in the event that some programs are untainted . . ." (p. 1076). The court explicitly rejected the federal government's view, instead construing Title VI to place the "burden of limiting the effects of termination on the administrative agency responsible for the order . . ." (p. 1077).

In light of Taylor County and Mandel v. United States Department of Health, Education, and Welfare (1976), the federal enforcement agency has the burden of finding discrimination in any program subject to fund cut-off.[21] This raises some question of the validity of several of the provisions of the existing regulations implementing Title VI. Specifically, 45 C.F.R. Section 80.4(d)(2) creates a presumption that an institution of postsecondary eduction's assurances as to admission practices apply to the entire institution, not just to the department receiving funds. A recipient can rebut the presumption only by showing "that the institution's practices in designated parts or programs of the institution will in no way affect its practices in the program of the institution for which Federal financial assistance is sought. . ." (p. 1977). This approach suggests that "a graduate school research grant could be terminated upon a finding of discrimination in undergraduate admissions" (Edwards and Nordin, 1979, p. 533). The validity of this regulation is subject to question in light of Taylor County and Mandel.

Areas of Administrative Discretion in Enforcing Title VI

Desegregation remedies in public primary and secondary education are based on a premise of what the racial composition of a school system would be in the absence of governmentally-sponsored segregation. The division within the

Supreme Court on this issue stems in large part from differing perceptions of first principles, differing weltanschauungs. The prevailing group assumes that racially neutral governmental policies would produce a racially integrated school system. Any deviation from that norm is, by assumption, the result of governmentally fostered segregation. If in a particular circumstance that perception is not accurate, the responsibility rests with a defendant to show that integration is not the norm.

The other group looks at urban living patterns and concludes that private choices account for a good deal of racial separation. Implicitly, this group is willing to accept that state of affairs pragmatically as a given. Further, these justices deny judicial responsibility for altering that initial position. This group would thrust on a desegregation plaintiff the burden of showing the degree of incremental segregation that results from impermissible official conduct. A prevailing plaintiff would then be entitled only to that remedy which would restore the system to its original position. If that would include considerable racial separation, then so be it, according to this group. The Constitution confers no substantive right to integration, and a remedy should be confined to undoing the effect of a constitutional violation.

The prevailing view, reflected in such cases as Green and Swann, leads to an emphasis on racial ratios in the remedies stage. The ostensible justification is that the effectiveness of a remedy can be measured by integrative results. Even though no affirmative right to integration exists, the rationale seems to be that a court can legitimately focus on numbers since, by assumption, the norm consists of racial attendance patterns roughly proportionate to total population. In the higher education context, HEW has apparently vacillated between heavy reliance on numerical data and emphasis on procedural and structural

remedies.[22] The latter approach cannot be so easily measured for success and is not sufficiently result-oriented to satisfy those who insist that indicia of success be statistically demonstrable, leading to increased levels of actual integration (see Mandel, pp. 547-553).

In formulating implementation guidelines for Title VI, the analyst must determine what assumptions to make about the racial composition that would exist in a racially neutral system of higher education or in a particular institution of public or private higher education. Is the full integration model of Green and Swann appropriate in the higher education context? How does that approach comport with the concern articulated in Adams for the welfare of historically black institutions? It would seem that the wholesale adoption of the Green affirmative duty remedy to the higher education context—perhaps through some form of central admissions process, which could destroy differences among institutions and bar student selectivity—would simultaneously "extinguish the traditional values of the black colleges as curators of Afro-American culture" (Note, 1970, p. 680).

Apparently, the existing Adams criteria attempt to promote integration of historically white institutions and also strengthen historically black institutions by both encouraging white institutions to admit and recruit more blacks and encouraging black institutions to reach out to attract white students. In order to "guard against the diminution of higher educational opportunities for black students (and) to take into account the unique importance of traditionally black colleges," Section II of the Adams guidelines requires that states specify numerical goals and timetables for increasing the total enrollment of black students in the postsecondary education system (Federal Register, 1978, vol. 43, p. 6662). Section I. B. of the guidelines requires Adams states to make specific

commitments to "strengthen the role of traditionally black institutions in the state system" (p. 6661).

Only after there is increased overall black enrollment in the postsecondary system, and after steps are taken to strengthen black institutions, can a state establish "numerical goals for the enrollment of white students in traditionally black institutions" (p. 6662). Thus, affirmative steps to increase white participation at traditionally black institutions is required under the guidelines, but only after more blacks are admitted to the system at large and traditionally black institutions are upgraded. The assumption appears to be that those prior steps will increase the likelihood that traditionally black institutions will retain their identity and "continue to play an important role" in public system of postsecondary education (Adams III, p. 1165). The Adams criteria seem devised to meet the challenge of Judge Pratt, who declined to suggest an "answer" to the problem of desegregation with accommodation of black institutions but rather charged HEW with the responsibility to develop desegregation criteria that "take into account the unique importance of Black colleges and at the same time comply with the Congressional mandate" (Adams IV, p. 120).[23]

The approach adopted in the Adams guidelines is similar to that suggested in a Note appearing in the 1970 Yale Law Journal. The author argued that the "ultimate goal" of desegregation in higher education should be to "eradicate the lingering effects of past de jure segregation which inhibit free student choice among institutions of higher education" (p. 682). He urged a dual thrust, toward integration and toward improvement of historically black institutions, and much that he proposed—e.g., approximate equality of per pupil expenditures at similar types of schools, fair recruiting, faculty desegregation, use of program expansion and new construction to enhance integration—is incorporated in the Adams

criteria. Importantly, given the dual objectives espoused for desegregation of postsecondary education—i.e., to promote integration and "to preserve the psychological/cultural and remedial functions of the Negro Colleges" (p. 683)—, he argued that the Green affirmative duty standard should be defined "in terms of practices rather than results" (p. 683). Otherwise, full adoption of the racial balance perspective of Green in a postsecondary education context would not only trench on other distinct values of a system of postsecondary education but also gravely threaten the identity and viability of historically black institutions. Consequently, it would seem that Adams suggests a broader view of the duty under Title VI to desegregate in postsecondary education, one that accommodates the needs for diversity within the system and the distinctive roles of black institutions with the need to dismantle the dual system.

Previously segregated systems. In states with previously segregated systems of postsecondary education, cases such as Dayton II, Sanders v. Ellington, and Geier v. University of Tennessee permit the implementation of a remedy without the necessity of a particularized finding of a nexus between past segregative conduct and existing observed segregation. This imposition of a remedial responsibility on such previously segregated states is clearly justified under constitutional case law and implicitly approved by the courts in the Adams litigation. Such remedial action, however, is probably not mandated under the terms of either Section 601 or Section 602.

If a policy decision is made, as suggested by the existing Adams guidelines, to require remedial action, Sanders and Adams III would justify a statewide approach where the segregation was imposed by law on a statewide basis. The scope of the remedy will depend on whether the ASTA approach is followed or whether Norris and Geier are deemed controlling. Under ASTA, states would be

permitted greater flexibility to structure their postsecondary systems provided that affirmative steps are taken to assure that opportunities are available for blacks to attend white schools and vice versa. Under Norris and Geier, more attention would be focused on the welfare of black institutions during the desegregation process. Consistent with Adams, there would be a duality in objectives—to promote an end to racial isolation but also to strengthen historically black institutions. The welfare of black educators and the contribution of black institutions as part of the heritage of black communities would be preserved. Existing Adams criteria legitimately follow the paths suggested by Norris and Geier but can be faulted for disingenuously disregarding the ASTA decision in setting forth the controlling legal principles (Federal Register, vol. 43, p. 6659). More administrative flexibility exists than the Department's rationale for the guidelines suggests.

The desegregation implementation cases in primary and secondary education permit an examination of racial ratios. The assumption is that the court order is designed to restore the school system to its initial status prior to official discrimination, which, by assumption, would be integrated. Direct application of this assumption to the area to higher education is subject to question because of 1) the desirability of retaining and strengthening historically black institutions, 2) the essential lack of fungibility of different institutions of higher education, 3) the lack of compulsory attendance, 4) the essential function of freedom of choice for students where their choice is limited only on the basis of individual merit, and 5) possibly different choice patterns among different students based on (a) geography (b) desire to attend public vs. private institutions of higher education, (c) desire to attend in-state vs. out-of-state institutions of higher education, (d) different perceptions of the return to an investment in

higher education, (e) different family responsibilities and opportunities, (f) different economic circumstances, and (g) varying career objectives and aspirations. These differences, recognized by all the courts that have decided higher education desegregation cases, undermine to some degree the "universalist assumption" of Green as applied to postsecondary education. However, they do not compromise the affirmative duty to desegregate systems and institutions of postsecondary educaton. Rather these differences suggest an orientation that places less emphasis on numerical indices. In order to overcome the concern that de-emphasis on numerical ratios leaves open the risk that states would shirk their duty to desegregate, it would be incumbent on the Department of Education to devise standards, other than racial ratios, that are relatively easily ascertainable. Certain provisions of the existing Adams criteria adopt this approach.

1. The Department can require that states, as part of a desegregation plan, provide resources to historically black institutions "which are at least comparable to those at traditionally white institutions having similar missions" (Federal Register, vol. 43, 1978, p. 6661). Where provision of unequal and inadequate resources to a historically black institution is a vestige of a state-imposed dual system, there is certainly jusitfication for requiring basic equalization during the period of transition to a unitary system. As the preamble to the Adams criteria specifies, however, the ultimate goal must be the development of a "unitary system free of the vestiges of state imposed racial segregation" (p. 6660). Otherwise, the financial equalization remedy could exacerbate or perpetuate the dual system, which would be constitutionally suspect under the decisions in Sweatt and McLaurin.

Both Sweatt and McLaurin stressed the importance of intangibles in postsecondary education, noting the problems that arise from racial isolation. Accordingly, it would seem impermissible to promote equality in resource allocation to black institutions as a long-term solution absent concomitant measures such as aggressive recruitment and nondiscriminatory admissions to increase the white presence at previously black institutions (see Geier v. Dunn, 1972, pp. 580-581). The Adams criteria recognize that traditionally black institutions are not "exempt from the Constitution or the requirements of Title VI" (p. 6660). The eventual goal must be a unitary system, not the perpetuation of racially separate and identifiable systems. In the transition, however, Adams IV specified that "(t)he process of desegregation must not place a greater burden on Black institutions or Black students' opportunity to receive a quality public higher education" (p. 120). On an interim basis, therefore, and accompanied by other desegregation measures, a rule of comparable resource allocation is permissible and has the virtue of being easily measurable.

2. Under Geier v. Dunn, the Department can require the creation of cooperative programs among desegregating institutions. If these programs are ineffective in eliminating competition for the same students, the Department can require the exclusive allocation of programs to one institution or another in order to increase the racial integration of the particular campus (p. 581). Where, over a period of time, cooperative programs or exclusive assignment of programs do not substantially alter the racial composition of the units within a system, "more radical remedies" may be required. When the constitutional violation is of a "severe and egregious nature," then the merger of institutions might even be justified (p. 581).[24]

The key message on this point in the Tennessee and Virginia litigation is that duplication of programs must be eliminated where identifiably black and white institutions are in competition. The exclusive program allocation approach is designed to assure that the educational environment for students in those programs will be integrated. In the TSU litigation, for example, there were nursing programs at traditionally black TSU and at the competitive and predominantly white UTN. Initially, the court was persuaded that UTN and TSU were not in competition because TSU offered a traditionally daytime program whereas UTN offered an evening program aimed at working adults. Once persuaded that the programs were in fact competitive, the judge ordered an exclusive program assignment to TSU and ultimately merger.

A critical issue not precisely addressed by the courts in the TSU litigation is the nature of the objectives in eliminating duplicative programs. At a minimum, Geier holds that competitive programs at traditionally white and black schools impede desegregation by attracting a segregated rather than a racially mixed learning environment. Given the importance courts assign to an integrated learning experience in postsecondary education, Geier mandates that a satisfactory desegregation plan must eliminate such forms of program duplication.

Geier leaves more ambiguous the nature of and rationale for the "white presence" mandated at TSU. Judge Gray stated the "white sutdents would not be attracted to (TSU) in any substantial numbers until there is what might be termed a 'white presence' on the campus" (p. 581). The question is whether white students could not be successfully recruited into a particular program until some whites were already participating, or, whether there was a separate institutional concern that, in the aggregate, more whites be enrolled in courses at TSU. The

first concern is fully compatible with early cases such as Sweatt and McLaurin, with Brown, and with remedies cases such as Green and Swann. Indeed, one of the major justifications for the affirmative duty concept of Green was the notion that a desegregation plaintiff had a cognizable interest in, if not a substantive right to, an integrated education.

The rationale for the second concern is somewhat less clear. That is, what, consistent with the theory of desegregation, supports a concern with overall numbers of blacks and whites at an institution if they are in fact enrolled in separate programs? There are several possible reponses to this question. First, even if black and white students are not enrolled in the same programs and do not attend class together, they may participate together in campus extra-curricular activities, meet and exchange ideas in the informal intellectual climate of a postsecondary campus, and otherwise develop social, housing and friendship networks that contribute toward reducing racial stereotyping and promote improved communication by diminishing racial isolation. Second, a generalized white presence on campus might make recruitment of whites for other programs easier. This rationale views institutional change as an incremental, dynamic process; a white presence now in program X may facilitate attracting more whites in program Y in 3 years. Third, location of a predominantly white program at a historically black school will enhance affirmative efforts at integrating that program.

These justifications for a concern with an institutional white presence at historically black postsecondary institutions—as distinct from a white presence within specific programs—all rely on prospects for integration. Some components of the TSU litigation suggest, however, that desegregation goals are furthered by the existence at TSU of identifiably white programs, not as a means

of eventually promoting integrated learning experiences but as a satisfactory ultimate goal. As an end, rather than as a means, such an approach poses serious conceptual difficulties because of the rather tenuous link between the advantages of integrated education and the existence of a few white program units at a predominantly black institution. As a long-term objective, such a confederation of racially identifiable units, albeit under a single campus administration, smacks very much of the discredited separate but equal doctrine. The goal of strengthening black institutions cannot be achieved by a return to a different form of racial separatism, cosmetically concealed by aggregated rather than disaggregated data. Therefore, except as institutional integration can be used as a means of promoting integration within one or more programs, greater emphasis should be placed on strategies that attract whites to specific programs at black institutions and, conversely, that attract blacks to particular programs at historically white institutions.

With respect to the Department's Adams criteria, this analysis would suggest cautious application of the requirement that a desegregation plan "give priority consideration to placing any new undergraduate, graduate, or professional degree program, courses of study etc., which may be proposed, at traditionally black institutions, consistent with their missions" (p. 6661). Sensitively applied, as a means toward an end, and sensibly applied, in recognition of generally applicable equitable principles, the "priority consideration" provision is probably justifiable under Geier, provided that, for good reason shown, a state would be able to pursue its own educational policy objectives in other ways compatible with its affirmative duty to desegregate. While warranted as a matter of policy discretion in a proper set of circumstances if sufficiently flexibly administered, the "priority consideration" rule cannot

reasonably be deemed mandated by existing cases such as Geier or Richardson v. Blanton (1979).[25]

3. Under Milliken II, the Department could legitimately require a state desegregation plan to include compensatory instruction, counseling and career guidance, and faculty and staff development programs. In that case, the Supreme Court upheld a court order that mandated provision of remedial education programs as part of a school desegregation decree. The Court declined to restrict the desegregation remedy to school assignment policies because discriminatory student assignment policies can "breed other inequalities . . . into a dual system founded on racial discrimination" (p. 283). In remedying current effects of past discriminatory conduct, "(f)ederal courts need not, and cannot, close their eyes to inequalities, shown by the record, which flow from a longstanding segregated system" (p. 283).

Section II. H. of the Adams criteria enumerates Milliken-style remedial measures, and where proper foundation is established, these measures can be imposed as a reasonable means of effectuating a state's affirmative duty to desegregate (p. 6662). The Adams criteria also suggest the imposition of financial aid as a part of a state desegregation plan. Although Milliken II does not expressly deal with financial aid, since it arose in a primary and secondary education context, imposition of such a program is not a significant extension of the principle announced there. By analogy, courts in primary and secondary education desegregation cases have ordered the transportation of students at considerable cost; in Milliken II the remedial educational programs were costly (p. 292). In a postsecondary context, it would appear eminently reasonable to mandate, as part of a desegregation program, an appropriately designed and tailored financial aid plan to facilitate the desegregation process. Presumably,

by analogy to the magnet school concept in primary and secondary education, a state could target its financial assistance to achieve desired integrative outcomes. Moreover, even though existing criteria do not mention this, the Department could encourage states to adopt financial inducements for white faculty to move to black institutions or black faculty to move to white institutions.

4. The use of numerical goals and targets for complying with the Green duty to desegregate has been accepted in primary and secondary education cases such as Swann. The court in the TSU litigation also evaluated the success of its intermediate desegregative efforts by an examination of statistical measures. Although it did not impose any numerical goals on the state, the court was clearly concerned with the results of integration efforts throughout the university system, both at TSU, the historically black institution, and at the remaining historically white institutions. It would seem reasonable to permit the Department to require a state to develop particularized goals, provided that (a) states have the flexibility to establish the goals consistent with reasonable projections of enrollments in a racially neutral system, and (b) the "interests of state . . . authorities in managing their own affairs," are given due deference within an overall balancing process (Milliken II, 1977, p. 281).[26] As Swann carefully noted, these goals are not matters of substantive entitlement; they therefore must be remedial in nature and appropriately related to the "nature and scope of the constitutional violation" (Milliken II, p. 280). A rigid quota would probably go beyond the remedial characterization. The state must have some flexibility in defining its targets and establishing modes of achieving them. On the other hand, the Department can and should require that a state justify the methodology, assumptions and projections used in formulating a plan.

5. Another problem with a rigid quota approach is the risk of undermining institutional prerogatives with respect to racially-neutral admissions criteria. A rigid quota would eliminate such autonomy. Short of a rigid quota, however, one could envision a policy of affirmative action admissions, wherein institutions of a state system of postsecondary education would be required to apply differential criteria of admissions for minority applicants so as to improve the racial balance within the system. The Adams criteria do not go that far, and, since merit selection is atypical in the public primary and secondary school area, there are no convincing analogies.

Whether or not a federal program could be developed that ties federal funds to such standards will be considered subsequently in light of Fullilove v. Klutznick, Board of Education v. Harris, and Regents of the University of California v. Bakke. Under Title VI, it is very questionable that a state could be affirmatively mandated to alter non-discriminatory admissions standards in order to comply with an affirmative duty to desegregate. The Adams criteria implicitly reflect this by permitting states to define the missions of state institutions on a basis other than race (p. 6661). Also, the Sixth Circuit in Geier indicated that "Assignment . . . of students to a particular institution" in a postsecondary context was "undesirable" because it intruded on the important interest in freedom of choice in postsecondary education (p. 1069).[27] In light of the value assigned to states' management of their own educational affairs, Milliken II, and the uncertain relationship between such a remedy and the substantive violation, it is far from clear that such an extensive and intrusive requirement would be warranted or permitted as a federally imposed remedy under Title VI.

6. While a federally mandated differential admissions policy might be (a) excessively intrusive on state interests in educational management, and (b) insufficiently closely related to the substantive violation (viz., previous statutory segregation) to outweigh that state interest, a state-initiated affirmative action program would pose quite different questions. In a once-segregated state system, the validity of such a state program would be analyzed as a remedy for a pre-existing constitutional violation. For that reason, cases such as Bakke, which arose in a setting in which there was no finding of past discrimination, are not directly applicable. Greater leeway in utilizing affirmative action programs exists where a state is seeking to overcome the effects of previous purposeful discrimination.[28]

In a remedial setting, it would seem perfectly legal for a state desegregation plan to pledge that an institution adopt certain race-conscious policies as part of an affirmative action admissions program. For example, an institution could consider race as a positive factor, along with other factors such as geographic diversity or indicia of disadvantage, in making admissions decisions. If it chose, an institution could also modify admissions criteria for minorities. This could be justified because traditional criteria were deemed inadequate measures of expected performance, because of the educational value of a racially integrated learning environment, or because necessary, in light of past discriminatory practices, to open doors of opportunity during a transitional period until the effects of past discrimination are eliminated.

Although the determinative opinion of Justice Powell in Bakke ruled that a rigid racial quota system was invalid, the Bakke case arose in a context in which no finding of past discrimination could be made. It is distinctly possible that a racial quota could be sustained where the state could make the following

showings: (a) that the quota was adopted as a remedy to overcome the effects of past purposeful race discrimination; (b) that other techniques of overcoming past discrimination are likely to be less effective; (c) that there is a rational nexus between the quota as a remedy and the nature and scope of the substantive violation; (d) that the impact on non-minority students has been considered and that the state has acted affirmatively to offset to the greatest extent possible the detrimental impact on innocent third parties; (e) that the quota is imposed as an interim, transitional measure for a designated period of time. Under those circumstances, even a quota system, if state-initiated, could well be a legitimate component of a statewide higher education desegregation plan.

Systems not previously segregated by statute. Three basic issues arise in the enforcement of Title VI in states where no statutory segregation existed. First, what standard is applicable to determine whether a violation of Section 601 has been committed? Second, what flexibility exists under Section 602 for the Department, by regulation, to impose requirements on recipients of federal funds that go beyond the self-executing requirements of Section 601? Third, what authority do states retain, after Bakke, in using race-conscious voluntary affirmative action programs in the absence of past purposeful discrimination?

1. As the earlier discussion indicates, a majority of the justices of the Supeme Court has concluded that the terms of Section 601 of Title VI are co-extensive with the provisions of the equal protection clause. A plaintiff alleging race discrimination must prove purposeful discrimination, not merely that certain acts had the effect, even if foreseeable, of having a disproportionate racial impact.[29] Although no Supreme Court decision has actually held that the Washington/Arlington Heights purposeful discrimination standard controls in Section 601 cases, and at least one pre-Wasington Supreme Court decision, Lau

v. Nichols, is apparently contra, it nevertheless seems likely that courts will take their cue from the express observation of the Brennan four in Bakke that Lau's premise is now undermined. The announced position of five justices in Bakke and the implications of both majority and dissenting opinions in Harris (upholding an effects standard under ESAA) indicate that the purposeful discrimination approach of Washington/Arlington Heights will control in Section 601 cases. Despite HEW's forceful opposition, that view was adopted by Judge Sofaer in his extensive and thoughtful opinion in Bryan v. Koch, applying the purposeful discrimination standard to Section 601 and rejecting the disproportionate impact analysis. It would appear that, until the Supreme Court rules otherwise, Judge Sofaer's interpretation of the state of existing law will prevail. See Guardians Ass'n v. Civil Service Comm'n (1980); Castaneda v. Pickard (1981).

2. The scope of the Department's authority to regulate under Section 602 is uncertain. If Section 602 confers no additional administrative discretion, then the validity of at least two portions of existing Title VI regulations are subject to question. One section bars a recipient of federal funds from using "criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race . . ." (emphasis supplied). 45 C.F.R. §80.3(b)(2). Another section, governing site selection for new facilities, prohibits choices that have "the effect of excluding individuals from, denying them the benefits of, or subjecting them to discrimination . . . on the ground of race . . ." (emphasis supplied). 45 C.F.R. § 80.3 (b)(3). These criteria specify impact-oriented standards for determining when discrimination in violation of Title VI has occurred. Unless Section 602 can be construed to permit the Department to adopt regulations beyond the self-executing provisions of Section 601, these regulations are likely invalid (see Bryan v. Koch, 1980).

Relying on Justice Stewart's concurrence in Lau v. Nichols, one can construct an argument that federal administrative authority under Section 602 permits the adoption of regulations that would bar actions not in themselves prohibited by the provisions of Section 601. In Lau, Justice Stewart, joined by the Chief Justice and Justice Blackmun, was skeptical whether the San Francisco school board's failure to provide language assistance to non-English speaking Chinese students violated Section 601 because there was no showing of intentional discrimination, only a "laissez-faire attitude on the part of the school administrators" (p. 570). Nevertheless, he voted to sustain the HEW guidelines that mandated affirmative remedial efforts to assist linguistically deprived children.

Perhaps Lau can be construed in such a way as to maintain its vitality despite the subsequent erosion in Bakke and Harris of the majority's premise that "(d)iscrimination is barred which has (a discriminatory) effect even though no purposeful design is present" (p. 568). By parsing the language of Section 601, it may be possible to develop a rationale that would permit greater administrative flexibility under Section 602 provided that the regulation does not "go beyond the authority of § 601" and is reasonably related to its purposes (p. 571).

Section 601 contains three distinct prohibitions. It provides that "(n)o person . . . shall, on the ground of race, color, or national origin, (1) be excluded from participation in (2) be denied the benefits of, or (3) be subjected to discrimination under any program or activity receiving Federal financial assistance." The decisions in Washington and Arlington Heights hold that a racial classification can only be shown where a government official intentionally selected a particular course of conduct because of its adverse effects on a racially identifiable group. Transferring those constitutional holdings to a Title

VI context would necessitate a construction of the word "discrimination" in Section 601 that accords with this intent language of Washington and Arlington Heights. Thus, any notion of enforcing Section 601's principle of nondiscrimination must utilize a purposeful discrimination criterion.

Under the Constitution, government must not intentionally act so as to stigmatize or otherwise disadvantage a racial minority, but the ultimate consequences of racially neutral official conduct are not a source of constitutional concern. Section 601, however, specifies a concern with exclusion from participation in federally funded programs. Arguably, the exclusion from participation and denial of benefits clauses in Section 601 can be interpreted to allow administrative enforcement without a finding of intentional exclusion. That would not directly conflict with Washington and Arlington Heights and would reconcile Lau with the subsequent rulings in Bakke and Harris.

Under this reading of Section 601, a federal enforcement agency would be authorized to adopt regulations under Section 602 to combat the effective exclusion of an identifiable group of persons from participation in a federally financed program. Even in the absence of intentional discrimination, it is possible that a racially or ethnically identifiable group could be effectively excluded from participation in a program not because of a disadvantage imposed by action of government but by a condition that reasonably flows from racial or ethnic status. The Constitution's nondiscrimination provision does not impose an affirmative duty on government to provide a person with "the financial resources" to obtain the "full range of protected choices" (Harris v. McRae, 1980, p. 4946). The reason is that while government cannot intentionally "place obstacles in the path" of access to opportunity on prohibited grounds such as race or national origin, "it need not remove those not its own creation" (p. 4946).

In a constitutional sense, then, the principle of governmental nondiscrimination does not entail an affirmative obligation to overcome obstacles to opportunity not caused by improper governmental conduct, even if those obstacles are related to one's protected status. As Justice Stewart has explained, the reason is that "(t)he calculus of effects, the manner in which a particular law reverberates in a society, is a legislative and not a judicial responsibility" (Personnel Administration v. Feeney, 1979, p. 272). In Section 601, however, there is an explicit legislative concern with barriers to access to federally funded programs. Consistent with Justice Stewart's concurrence in Lau, it is not an overly strained reading of Sections 601 and 602 to allow implementing regulations to combat exclusion from participation in federal programs where the barrier to participation, albeit not governmentally caused, is reasonably attributable to one's status as a member of a legally protected group. The inability of the non-English-speaking Chinese students in Lau to effectively participate in the public school program is arguably the type of foreclosure of opportunity that the federal government should be allowed to prevent even absent official discriminatory conduct. This is especially true since no denial of a program benefit to innocent third parties was required and no conflict existed with the non-discrimination language of Section 601 (see Bakke, p. 304) (opinion of Justice Powell).

This construction of Title VI would permit federal regulations under Section 602 to require certain affirmative integrative steps on the part of recipients of federal funds, provided that the regulations were compatible with the intentional discrimination concept of Section 601 (as per Lau) and reasonably related to the other provisions of that section. Thus, for example, the Department may be able to justify the mandatory imposition of procedural

affirmative action admissions programs by requiring such activities as recruitment at minority institutions or in minority communities, guidance and career counseling, and so forth, to publicize and make federally funded programs more easily accessible to members of minority groups. Many of the non-voluntary activities suggested in 45 C.F.R. Section 80.5(j) could well be mandated on this reading of Sections 601 and 602, Lau, Bakke, and Harris.

3. The prevailing opinion of Justice Powell in Bakke prohibits the use of rigid quotas and the use of race as the sole criterion in admissions by a state university which has never intentionally discriminated by race. Justice Powell rejected the claim that state universities can use racial criteria in admissions under such circumstances to combat the effect of societal discrimination or to increase the number of minority professionals. The sole justification for use of racial criteria was a state's interest in establishing a racially heterogeneous learning environment for students in its institutions of higher education. Even so, racial characteristics can only be used as a factor, not the sole factor, in admissions decisions. The system must be sufficiently flexible so that all students effectively compete against each other, and none are foreclosed from access to opportunity on the basis of race.

The Office of Civil Rights of HEW, under David S. Tatel, issued a policy interpretation of the Bakke decision that seems to be substantially in accord with the prevailing opinion of Justice Powell. Some caution is necessary, however, since the Powell view prevailed only because all eight other justices disagreed, lining up in two different camps of four. The Brennan group would have permitted the setting aside of a fixed number of seats for qualified black applicants whereas the Stevens group would have construed Section 601 as a mandate for total race neutrality. Importantly, the decisions in Harris (ESAA)

and Fullilove v. Klutznick suggest a broader array of federal affirmative action options under a new statutory authorization.

Federal Affirmative Action Possibilities Under Properly Construed New Legislative Authorization

This subsection is not designed to map out the full array of programmatic possibilities for federal affirmative action legislation in the area of higher education. Instead, it is intended briefly to sketch out the parameters outlined by recent Supreme Court decisions in Board of Education v. Harris, and Fullilove v. Klutznick.

Board of Education v. Harris. In Harris, New York City was ruled ineligible for federal financial assistance under the Emergency School Assistance Act (ESAA). ESAA was enacted to provide federal financial assistance to eliminate segregation and to encourage "the voluntary elimination, reduction, or prevention of minority group isolation" in public schools and to aid school children "in overcoming the educational disadvantages of minority group isolation." 20 U.S.C. §1601 (b). Section 706(d)(1) made an educational agency ineligible if any practice it employed "results in the disproportionate demotion or dismissal of instructional . . . personnel from minority groups in conjunction with desegregation . . . ." Further, the statute made ineligible any agency that "otherwise engaged in discrimination based on race . . . in the . . . assignment of employees . . . ."

New York City was declared ineligible for funds on the ground that it employed a pattern of teacher assignment that had the effect of identifying schools on a racial basis "solely because of the (racial) composition of the facilities" (p. 366). The issue in Harris was whether ESAA authorized the withholding of funds "when an applicant's faculty assignments, although not

shown to amount to purposeful racial discrimination . . ., are not justified by educational needs" (p. 369).

Justice Blackmun for the majority held that a racial impact standard was what Congress intended with respect to teacher assignment policies. ESAA was designed to overcome de facto as well as de jure segregation; it was concerned with the effects of racial isolation irrespective of the cause of that circumstance. Consequently, according to the Court, federal financial assistance was aimed only at achieving diminution of existing racial separation. The Court therefore upheld HEW's ruling that New York City was ineligible for federal ESAA funds.

The Court in Harris was primarily concerned with congressional intent. Having concluded that Congress intended to promote integration, the court held that HEW's racial impact criterion was appropriate:

> (I)t would make no sense to allow a grant to a school district that, although not violating the Constitution, was maintaining a de facto segregated system. To treat as ineligible only an applicant with a past or a conscious present intent to perpetuate racial isolation would defeat the stated objective of ending de facto as well as de jure segregation. (p. 370)

Harris never questioned the constitutionality of ESAA as so construed. It clearly assumed that Congress could, if it chose, adopt a pro-integration policy as a basis of its distribution of federal funds. The constitutional issues were never addressed and, implicitly, must not have been deemed substantial, even though the racial impact standard of HEW's implementation of ESAA required de facto districts to make race-conscious decisions to offset observed segregation. Although such race-conscious behavior might raise constitutional sensitivities, the Court did not explain why the issue was so insubstantial. The subsequent decision in Fullilove, although no opinion spoke for the Court, did address these issues.

Fullilove v. Klutznick. The Fullilove case involved the minority business enterprise (MBE) provision of the Public Works Employment Act of 1977. Section 103 (f)(2) of the Act required that 10% of each grant be set aside and expended for MBE's, which were defined as businesses at least 50% of which were owned by minority group members.[30] Two groups of three justices voted to uphold the MBE provision.

Justices Marshall, Brennan and Blackmun held to their Bakke position that if race-conscious classifications do not stigmatize they are valid if they "serve important governmental objectives and are substantially related to achievement of those objectives" (p. 4998). The Marshall group found that Congress had a "sound basis for concluding that minority-owned construction enterprises, though capable, qualified, and ready and willing to work, have received a disproportionately small amount of public contracting business because of continuing effects of past discrimination" (p. 4998). Remedying these ongoing effects was a "sufficiently important governmental interest to justify the use of racial classifications" (p. 4998). Also, the Marshall group found the "set aside" provision substantially related to the achievement of the remedial purpose (p. 4999).

The Marshall opinion would allow for considerable latitude in federal race-conscious programs for remedying the present effects of prior discrimination in higher education. However, since the Marshall group dropped a member (Justice White) from its Bakke consensus, one must conclude that a program that only satisfies the Marshall position will not necessarily pass constitutional muster. Accordingly, the other opinon, authored by Chief Justice Burger and joined by Justices White and Powell, probably reflects the prevailing position in Fullilove.

The Chief Justice analyzed the power of Congress under the commerce clause and the enforcement provisions of the Fourteenth Amendment. Under the commerce clause, the Chief Justice found that Congress had a rational basis "to conclude that the subcontracting practices of prime contractors could perpetuate the prevailing impaired access by minority businesses to public contracting opportunities, and that this inequity has an effect on interstate commerce" (p. 4986). Congress need not wait for a violation of an anti-discrimination law since it can act to overcome the current effects of prior discrimination which was not unlawful. With respect to private institutions of higher education, the commerce clause rationale would probably serve as an adequate source of federal authority under Fullilove to justify a race-conscious program to overcome the effects of past discrimination, even if not unlawful.

With respect to procurement practices of state and local government, Chief Justice Burger focused on the Section 5 enforcement provision of the Fourteenth Amendment. Under Katzenbach v. Morgan, it is enough that the Court can "perceive a basis" upon which Congress could "reasonably predicate a judgment" that the provisions of a state statute "would discriminate in terms of access . . . to the provisions or administration of governmental programs" (p. 4987). In short, Congress can "reasonably determine that its legislation (is) an appropriate method of attacking the perpetuation of prior purposeful discrimination" even if the specific practices outlawed "might have discriminatory effects only" (p. 4987). The MBE was a legitimate exercise of power under Section 5 because Congress could rationally conclude "that traditional procurement practices, when applied to minority businesses, could perpetuate the effects of prior discrimination" (p. 4987).

The Section 5 analysis in Fullilove supports the reading of Section 602 of Title VI suggested earlier. Moreover, with respect to any new programmatic initiative, Fullilove clearly authorizes federal legislation that ties federal funds for public institutions of higher education to the achievement of integrative results, provided that a basis exists to conclude that it is aimed at eliminating the current effects and future perpetuation of past discriminatory conduct.

If Congress has a legitimate source of authority to enact the MBE provisions under either the commerce clause or Section 5 of the Fourteenth Amendment, the question remains whether the means adopted violate any limitation on federal power contained in the Constitution.

"As a threshold matter," the Chief Justice rejected the view that "in the remedial context" Congress can only act "in a wholly 'color-blind' fashion" (p. 4988). Courts have used racial criteria in the remedies context and have approved state legislation that uses racial criteria if that is "reasonably necesary to assure compliance" with federal law (p. 4988).[31] Moreover, Congress has special remedial authority to enforce equal protection guarantees:

> (It) not only may induce voluntary action to assure compliance with existing federal statutory or constitutional antidiscrimination provisions, but also, where Congress has authority to declare certain conduct unlawful, it may, as here, authorize and induce state action to avoid such conduct. (p. 4989)

The fact that some non-minority firms, which are innocent of any prior discrimination, may be foreclosed from contracting opportunities is not a bar to congressional remedial legislation: "When effectuating a limited and properly tailored remedy to cure the defects of prior discrimination, such a 'sharing of the burden' by innocent parties is not impermissible" (p. 4989).

The Chief Justice also rejected a claim that the MBE set aside was underinclusive in that it defined previous disadvantage by specifying particular racial and ethnic groups for legal protection even though other such groups may have been disadvantaged or discriminated against. Congress was not trying to "give select minority groups a preferred standing in the construction industry, but has embarked on a remedial program to place them on a more equitable footing with respect to public contracting opportunities" (p. 4989). Also, there was no convincing evidence that equally worthy groups have been omitted from the Act's MBE protection.

Finally, the prevailing opinion rejected a claim that the MBE provision was overinclusive because "it bestows a benefit on businesses identified by racial or ethnic criteria which cannot be justified on the basis of competitive criteria or as a remedy for the present effects of identified prior discrimination" (p. 4989). Although the Chief Justice ultimately rejected the claim, he was "alert . . . to the deleterious effects of even benign racial or ethnic classifications when they stray from narrow remedial justifications" (p. 4989). Such a provision is not valid unless it (a) "provides a reasonable assurance that application of racial or ethnic criteria will be limited to accomplishing the remedial objectives of Congress," and (b) "misapplications of the program will be promptly and adequately remedied administratively" (pp. 4989-4990). The Chief Justice emphasized the flexible administriative provisions that permitted exemption and waiver, and relied on that flexibility to assure that the program will be limited to achieving the remedial goals of Congress and that "misapplications of the racial and ethnic criteria can be remedied" (p. 4990). He also stressed that the MBE program was a "pilot project, appropriately limited in extent and duration, and subject to reassessment and reevaluation by the Congress prior to any extension or reenactment" (p. 4990).

The analysis in the Chief Justice's opinion in Fullilove suggests that Congress has considerable latitude in attaching conditions to its spending programs that would eliminate the current effects and the future perpetuation of past discrimination, even absent a finding that earlier discrimination was unlawful. Although Washington and Arlington Heights require a showing of purposeful discrimination under equal protection, Fullilove and Katzenbach v. Morgan allow Congress to act to stop current practices that only have a discriminatory effect. That is, under Section 5 Congress can do more than prohibit purposeful discrimination; it can discourage or bar "state action that has discriminatory impact pertetuating the effects of past discrimination" (p. 4987).

There are limits to congressional authority, however, even under Fullilove. For example, it is noteworthy that only the allocation of a relatively small amount of federal funds was at stake. The total foreclosure of opportunity for innocent third parties was, in the context of the total national market, de minimis. The provision was of short duration and part of a public works program explicitly designed to put to work the un-and under-employed, a large segment of whom are members of minority groups. The threat to other core values was minimized because of the administrative flexibility.

Nevertheless, the decision does permit the Department, if it should choose to pursue a policy of race-conscious remedies designed to offset the effects of past discrimination, to formulate for congressional approval a program of explicitly race-based criteria aimed at promoting integration. Arguably, even the quota provisions struck down in the Bakke case could be imposed by a clear legislative statement from Congress in its Section 5 enforcement role. Apparently, several members of the Court are willing to give greater difference to Congress' judgment in enacting race-conscious remedial legislation than to

decisions by a state agency: "(W)e are bound to approach our task with appropriate deference to the Congress, a coequal branch charged by the Constitution with the power to 'provide for the general Welfare . . .' and 'to enforce by appropriate legislation' the equal protection guarantees of the Fourteenth Amendment" (p. 4986; see also p. 4990). Yet, despite this deference, the prevailing opinion recognizes that the Court must give "close examination" to a "program that employs racial or ethnic criteria, even in a remedial context" (p. 4986). That opinion continues:

> Congress must proceed only with programs narrowly tailored to achieve its objectives, subject to continuing evaluation and reassessment; administration of the programs must be vigilant and flexible; and, when such a program comes under judicial review, courts must be satisfied that the legislative objectives and projected administration give reasonable assurance that the program will function within constitutional limitations. (p.4990)

Fullilove certainly seems to provide considerable flexibility for race-conscious remedial group programs, yet the continued lack of consensus makes definite predictions problematic.[32] Attention to the Burger approach will probably be most useful in devising a race-conscious program, if, on policy grounds, the Department should choose to use federal funds as an inducement for increased integration or as a vehicle for enhancing the stature of identifiably black institutions that suffer an ongoing harm from prior race discrimination.

NOTES

[1]For example, see New Orleans City Park Improvement Association v. Detiege (1958), Gayle v. Browder (1956), Holmes v. City of Atlanta (1955), and Florida ex rel. Hawkins v. Board of Control (1956). See also Wechsler (1959).

[2]See for example, Coleman, Campbell, Hobson, McPartland, Mood, Weinfeld, and York (1966).

[3]See Milliken v. Bradley (1977): "Thus the Court has consistently held that the Constitution is not violated by racial imbalance in the schools .... An order contemplating the 'substantive constitutional right (to a) particular degree of racial balance or mixing' is therefore infirm as a matter of law." (p. 280, note 14)

[4]See Estes v. Metropolitan Branches of Dallas NAACP (1980).

[5]See Yudof (1973) discussing a "universalist principle" that a just society must be an integrated society. See also Fiss (1965) and Goodman (1972).

[6]In the teacher employment context, this assumption is clearly expressed as a factor in Title VII litigation (see Hazelwood School District v. United States (1977). The Supreme Court in Hazelwood, quoting from International Brotherhood of Teamsters v. United States (1977, p. 340, note 20), stated:

> (A)bsent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired. Evidence of longlasting and gross disparity between the composition of a work force and that of the general population thus may be significant even though Section 703(j) makes clear that Title VII imposes no requirement that a work force mirror the general population (p. 307).

[7]See Pasadena City Board of Education v. Spangler (1976).

[8]Compare Lee v. Macon County Board of Education (1970), involving trade schools and junior colleges, with Alabama State Teachers Association v. Alabama Public School and College Authority (1968), involving 4-year, degree granting extension of Auburn University.

[9]See Geier v. University of Tennessee (1979) with respect to the merger of TSU and UTN and Richardson v. Blanton (1979) noting satisfactory progress toward desegregation at Tennessee's institutions of postsecondary education, exclusive of TSU.

[10]See Note, Yale Law Journal (1970).

[11]Allocation of programs was suggested as a possible remedy by the court in Geier, but was resisted by UTN.

[12]See Note, Vanderbilt Law Review (1980).

[13]See Board of Public Instruction of Taylor County v. Finch (1969).

[14]See, for example, Maltz: ". . . (S)ince the equal protection clause only prohibits intentional discrimination, . . . Lau is apparently overruled on this point" (1980, p. 345). See also Lesnick (1979).

[15]Findings are cited in Adams v. Richardson (1972).

[16]Maryland pursued independent litigation (Mandel v. United States Department of Health, Education and Welfare, 1976), and HEW entered into negotiations with Pennsylvania (Adams v. Califano, 1977).

[17]While HEW cited Norris and Geier in further support of its position it did not mention the ASEA ruling.

[18]The issue of affirmative action after Bakke will be considered separately.

[19]See Mandel (1976).

[20]Accord, see Mandel (1976, pp. 556-561).

[21]In the postsecondary context, it is arguable that Adams held that statewide systems of postsecondary education constitute a single "program." However, the Court did not purport to address that issue directly.

[22]The evasiveness of HEW's desegregation requirements may be explained by departmental hesistancy to risk failure of its specific mandates. In a memorandum of November, 1969, from Martin Gerry to the then-director of OCR, Gerry stated: "(I)t would seem prudent to place the burden for developing a plan on the State. If we make specific suggestions we are as a practical matter stuck with them, whether they 'work' or not" (Mandel, p. 551, note 21).

[23]See generally, Note, Yale Law Journal (1970, pp. 673-678).

[24]See Geier v. University of Tennessee (1979, pp. 1068-1071).

[25]This decision upheld Tennessee's overall statewide postsecondary education desegregation plan without any such "priority consideration" provision.

[26]See Geier v. University of Tennessee (1979, p. 1068).

[27]Accord, see ASTA (p. 790).

[28]See Title VI Policy Interpretation (Federal Register, vol. 44, 1979, p. 58510).

[29]See Village of Arlington Heights v. Metropolitan Housing Development Corporation (1977), Washington v. Davis (1976), and Personnel Administrator v. Feeney (1979, p. 279).

[30]Minority group members are described as "citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts" (p. 4981).

[31]See Swann (pp. 18-21) and United Jewish Organizations v. Carey (1977, pp. 147-165, 180-187).

[32]The concurring opinion of Justice Powell and the dissenting opinion of Justice Stevens are also worthy of attention because they reflect a flexibility and an openness. Their decisions in these kinds of cases are likely to turn on specific circumstances.

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