
RECONCILING RACE-NEUTRAL
STRATEGIES AND RACE-CONSCIOUS
OBJECTIVES: THE POTENTIAL
RESURGENCE OF THE STRUCTURAL
INJUNCTION IN EDUCATION LITIGATION

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INTRODUCTION

“In order to get beyond racism, we must first take account of race. There is no other way.”¹

While there may be debate as to whether courts or federal legislation and its enforcement had the greatest impact on education for minority students,² closer to the truth perhaps is that the relationship is a symbiotic one—all branches responding to various socioeconomic political realities of the day. And yet, as legislative directives and executive efforts require states, school districts, and schools to pursue race-conscious objectives in remedying disparities in education achievement, federal courts have increasingly demanded race-neutral approaches in achieving them, and state courts have shown increased deference to their legislatures.

This Article examines the use and potential of the structural injunction in cases that implicate issues of education access, adequacy, and achievement in the paradoxical “post-racial” era. Originating in school desegregation cases, this powerful judicial remedy compelled public institutions to address constitutional wrongs through systematic reform. The structural injunction played an essential role in desegregation at the federal level and, albeit not typically referred to as “structural injunction” at the state level, an equally important remedial role in state school finance litigation. Yet, fears of judicial overstepping and pursuit of race-neutral remedies have greatly curtailed its use.

The enforcement of the No Child Left Behind Amendment to the Elementary and Secondary Act of 1965 (NCLB) and Title VI of the Civil Rights Act of 1964 (Title VI) may bring back the structural injunction as a viable judicial remedy in cases involving educational access and achievement.

1. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 407 (1978) (Blackmun, J., concurring).

2. See e.g., Lia Epperson, *Undercover Power: Examining the Role of the Executive Branch in Determining the Meaning and Scope of School Integration Jurisprudence*, 10 *BERKELEY J. AFR.-AM. L. & POL’Y* 146, 147 (2008) (the executive branch may hold “supreme power” in combating school desegregation and expanding educational opportunity); Vincent James Strickler, *Green-Lighting Brown: A Cumulative-Process Conception of Judicial Impact*, 43 *GA. L. REV.* 785 (2009) (evaluating and comparing the impact of the *Brown* decision on successive desegregation decisions, and 1964 Civil Rights Act Title VI impact on school desegregation); Rebecca E. Zietlow, *To Secure These Rights: Congress, Courts and the 1964 Civil Rights Act*, 57 *RUTGERS L. REV.* 945, 946 (2005) (asserting that the Civil Rights Act of 1964 was more effective than the *Brown* decision in securing civil rights).

This Article portends, through analysis of the structural injunction, that recent developments in federal education law and policy are reminiscent of the perfect storm of inter-branch cooperation that was so essential to the desegregation of public schools.

Part I introduces the role of the structural injunction in public law litigation and traces its remedial role as it addressed educational disparities in the federal and state judiciary. Beginning with its origin in the language of *Brown v. Board of Education*, the structural injunction was critical to school desegregation. Yet the structural injunction alone was not enough to shoulder the massive undertaking of reversing the firm entrenchment of segregated schools—particularly in the South. This section outlines the federal legislation and strong executive enforcement that lent potency to structural relief in school desegregation cases, it describes the impact of structural injunctions in school finance cases that implicate education clauses in state constitutions, and it concludes with a discussion of how the current stagnant state of structural injunctive relief resulted from fears of judicial activism and overreach.

Part II analyzes the central role that race plays in the NCLB and Title VI. Recently, the executive branch has endorsed the legislative recognition of the relationship between race and educational disparity in two ways. The U.S. Department of Education has acknowledged race as a priority by pledging to aggressively enforce provisions of the NCLB and Title VI to address the disparate racial impact of educational inequities, and by issuing guidance to navigate Supreme Court decisions that prohibit consideration of race in educational equity schemes.

Finally, Part III asserts that the legislative and executive forces that once empowered structural injunctive relief in school reform are again at work and should mitigate the concerns of judicial overreach that once derailed the momentum of early structural injunctive relief. Indeed, courts are now uniquely poised to complete the shift toward addressing racial disparity through educational reform.

I. THE STRUCTURAL INJUNCTION IN EDUCATION

A. The Structural Injunction as a Function of Public Litigation

In the mid-1970s, Abram Chayes introduced “public law litigation” as the label for a “new” model of litigation.³ He described the characteristics of the traditional model of the lawsuit as: between two individual interests, retrospective rather than prospective, concerning a legal right that is usually redressed through a compensatory remedy, impacting only the party litigants,

3. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1284 (1976).

and initiated and controlled by the litigants.⁴ In contrast, Professor Chayes described the features of public law litigation as: originating in a lawsuit based in equity in which the litigation extends beyond the bilateral structure to broadly impact public policy, including both a fact inquiry and remedy that are prospective and legislative rather than retrospective and compensatory, resulting in a remedy that requires judicial activism and ongoing oversight and administration of remedial compliance, and resulting in a remedy that is often flexible and negotiated rather than imposed.⁵ This ongoing judicial oversight is critical—it is one in which the court adopts a role as “policy planner and manager.”⁶

The structural injunction was a central remedial feature in Professor Chayes’s vision of public law litigation.⁷ It is a public law remedy that “remodel[s] an existing social or political institution to bring it into conformity with constitutional demands.”⁸ The plaintiffs allege a systematic deprivation of (usually constitutional) rights and the relief attempts to reform the institutional condition that served as the basis for the claim.⁹ As with other forms of equitable relief, the structural injunction can address claims and deficiencies that traditional legal damages often fail to fully resolve. Monetary damages are often an insufficient remedy for federal and state constitutional violations because they are not far reaching enough to address the broader policy issues that impact the changes that public litigation seeks to address; legal damages are also sometimes precluded by sovereign immunity.¹⁰ The structural injunction shifts social constructs to address constitutional violations, further legislative objectives, and safeguard interests that the legislature may be politically disinclined to protect. Accordingly, it is a construct of monumental significance in civil rights cases.

B. The Structural Injunction in Education Desegregation Cases

The structural injunction has been described as “the most distinctive contribution to our remedial jurisprudence drawn from the civil rights experience.”¹¹ It is a remedy generally recognized to have begun with the seminal *Brown*¹² decision in which the Supreme Court held unconstitutional

4. *Id.* at 1282-83.

5. *Id.* at 1302.

6. *Id.*

7. John C. Jeffries, Jr. & George A. Rutherglen, *Structural Reform Revisited*, 95 CAL. L. REV. 1387, 1412 (2007).

8. *Lampkin v. District of Columbia*, 886 F. Supp. 56, 62 (1995).

9. Jeffries, Jr. & Rutherglen, *supra* note 7, at 1409.

10. *Id.* at 1395.

11. Owen M. Fiss, *The Allure of Individualism*, 78 IOWA L. REV. 965, 965 (1993).

12. *Brown v. Bd. of Educ. (Brown I)*, 347 U.S. 483 (1954).

state laws that mandated segregated public schools, and specifically with the Supreme Court's demand in *Brown II* that districts move "with all deliberate speed" to eliminate segregation.¹³ Hence, the *Brown* decision is a profoundly significant one not only for its role in recognizing segregation as unconstitutional, but also its role in introducing a powerful equitable redress for social injustice.

Despite the "all deliberate speed" language of *Brown II*, the decision had no immediate effect on Southern resistance to school desegregation. Over a decade after the *Brown* decision, Virginia's New Kent School Board adopted a "freedom of choice" plan to reverse the effects of the state constitution and statutes that formerly supported segregation in Virginia's public schools.¹⁴ In reviewing the court of appeals decision to direct the district court to periodically evaluate the effectiveness of the plan, the Supreme Court considered *Brown II*'s mandate that desegregation under the *Brown I* decision occur with "all deliberate speed"¹⁵ and concluded that district courts had an affirmative duty to review proposed school desegregation plans to ensure their effectiveness.¹⁶ That the freedom of choice plan was constitutional did not affect the Court's decision to affirm busing as a structural remedy. Instead, the Court disapproved the formerly de jure segregated school system's plan because it was ineffective in remedying its constitutional violation. The Court held that because efforts to eliminate the dual school system were ineffective, it was within the purview of the district court to fashion a more effective remedy and to oversee the school board's efforts to do so.¹⁷ In so holding, *Green* affirmed that where the local authorities fail, courts have broad discretion in fashioning equitable relief.

Courts continued to expand the reach of the structural injunction and tailored its mandates to address the recalcitrant Southern response to desegregation.¹⁸ The *Swann* decision affirmed the judiciary's broad discretionary power to issue experimental structural injunctive relief in the form of busing even as the Court recognized its limitations.¹⁹ The Court reiterated *Green*'s edict that the school board had an affirmative duty to eliminate the vestiges of racial discrimination.²⁰ The opinion also affirmed the

13. *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294, 301 (1955).

14. *Green v. Cnty. Sch. Bd.*, 391 U.S. 430, 432-33 (1968).

15. *Id.* at 438.

16. *Id.* at 439.

17. *Id.* at 440-42 (rejecting the school board's plan and district appointed an expert, Dr. Finger, who submitted the Finger Plan—which in part required re-zoning (already part of the board's plan) and the busing of black students across the city).

18. Molly S. McUsic, *The Future of Brown v. Board of Education: Economic Integration of the Public Schools*, 117 HARV. L. REV. 1334, 1337 (2004).

19. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 26 (1971).

20. *Id.* at 15.

authority of the district court to correct a “condition that offends the Constitution,” asserting that when the school board failed to implement an effective desegregation plan it was within the district court’s remedial discretion to fashion relief via an equitable remedy.²¹ The *Swann* Court did, however, foreshadow the limitations of equitable relief by noting that the remedy needed to be tailored to the violation; yet in rendering broad structural relief in the form of busing, the court acknowledged that it had a duty to support, supplement, and even exceed legislative directives when the local authorities failed to appropriately remedy a constitutional violation. *Keyes v. School District No. 1* later highlighted the *Swann* requirement that in tailoring the remedy to the violation, the standard was de jure and not de facto discrimination.²²

After *Swann*, the federal courts issued structural injunctive relief that increased in scope and specificity²³ until *Milliken I*, in an opinion that noted that federal courts’ equitable powers are not “plenary,” more firmly established the limitations referenced in *Swann*.²⁴ The *Milliken I* Court held that a Detroit desegregation order requiring the consolidation of local school districts was an inter-district remedy for a district violation and that its broad scope constituted federal judicial interference with local government.²⁵ Writing for the majority, Justice Burger expressed concern about the disruptive nature of the remedy.²⁶ He observed that local control is an essential consideration of injunctive relief; he also observed that the district court could not impose a multi-district remedy when the violation occurred in one jurisdiction and the other districts were either unitary or where segregation was de facto rather than de jure.²⁷

21. *Id.* at 16.

22. *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 208 (1973) (“[W]e emphasize that the differentiating factor between de jure segregation and so-called de facto segregation to which we referred in *Swann* is purpose or intent to discriminate.”).

23. Jeffries, Jr. & Rutherglen, *supra* note 7, at 1409; Brian K. Landsberg, *Equal Educational Opportunity: The Rehnquist Court Revisits Green and Swann*, 42 EMORY L.J. 821, 826 (1993) (Professor Landsberg summarizes the constitutional standard set by the desegregation cases of the early 1970s) (“First, the tailoring doctrine requires that systematically remedied but allows more limited violations to receive more limited remedies. Second, while unexplained racial isolation in formerly dual school systems must be eliminated, racial balance is not required. Third, while all practicable means must be employed to eliminate the unexplained racial isolation, no more need be done than the practicalities allow. Fourth, the courts may not intervene where the school systems are in compliance but must intervene in case of default by the school authorities.”).

24. *Milliken v. Bradley (Milliken I)*, 418 U.S. 717, 772 (1974).

25. *Id.* at 718 (“[A] federal remedial power may be exercised ‘only on the basis of a constitutional violation’ and ‘(a)s with any equity case, the nature of the violation determines the scope of the remedy.’” (quoting *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971))); *id.* at 741 (“[N]o single tradition in public education is more deeply rooted than local control over the operation of schools.”).

26. *Id.* at 738.

27. *Id.* at 744-45.

In their dissents, Justices Douglas and Marshall cautioned that the *Milliken I* decision signaled a return to the separate but equal era of *Plessy v. Ferguson*.²⁸ Indeed, the limitations of *Milliken I* rendered busing an ineffective remedy to white flight and threatened the type of injunctive relief that resulted in genuine structural reform.²⁹ *Milliken I*'s companion decision, *Milliken II*, further narrowed the scope of the structural injunction in school desegregation cases.³⁰ In *Milliken II*, the Court focused on compensatory relief rather than desegregation as the panacea for the educational inequities that emanated from segregation.³¹ The Court sought to reconcile public and private interests by encouraging experimentation, flexibility, and resource allocation as opposed to more prescriptive edicts.³² This shift was consistent with the growing equity wave of state school finance litigation discussed *infra* in which courts increasingly issued relief that targeted funding instead of structural reform.³³

Once *Milliken I* curtailed structural injunctive relief,³⁴ plaintiff success in desegregation litigation of the 1960s and 1970s declined until it reached its end in the 1990s, most notably through the *Board of Education v. Dowell*, *Freeman v. Pitts*, and *Missouri v. Jenkins* decisions.³⁵ These cases severely restricted the scope of the district courts' remedial options and relieved local school districts both of the burden of supervision and their duty to desegregate.³⁶ Hence, even now district courts tend to defer to defendants in school desegregation lawsuits beyond that dictated by Supreme Court precedent.³⁷

In *Dowell*, the petitioner Board of Education of Oklahoma City sought dissolution of a district court decree ordering busing as a desegregation remedy.³⁸ The district court granted the dissolution after determining that demographic changes made busing not only fiscally and logistically burdensome, but that busing had been unsuccessful in achieving

28. *Id.* at 759; *Plessy v. Ferguson*, 163 U.S. 537 (1896).

29. McUsic, *supra* note 18, at 1340 ("Because most Northern and Western metropolitan areas had a school district configuration similar to Detroit's, with dozens of smaller school districts, Milliken thwarted integration plans in those areas as it had in Detroit, and schools in those regions remained highly segregated.")

30. *See generally* *Milliken v. Bradley (Milliken II)*, 433 U.S. 267 (1977).

31. *See generally id.*

32. *Id.* at 288 (quoting *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294, 300 (1955)).

33. Robert A. Garda, Jr., *Coming Full Circle: The Journey From Separate But Equal to Separate and Unequal Schools*, 2 DUKE J. CONST. L. & PUB. POL'Y 1, 21 (2007) (discussing the retreat of desegregation efforts and the return of schools to segregation).

34. Jeffries, Jr., & Rutherglen, *supra* note 7, at 1410.

35. *Missouri v. Jenkins*, 515 U.S. 70 (1995); *Freeman v. Pitts*, 503 U.S. 467 (1992); *Bd. of Educ. v. Dowell*, 498 U.S. 237 (1991).

36. McUsic, *supra* note 18, at 1340.

37. *See generally* Wendy Parker, *The Decline of Judicial Decisionmaking: School Desegregation and District Court Judges*, 81 N.C. L. REV. 1623, 1657 (2003).

38. *Dowell*, 498 U.S. at 240.

desegregation.³⁹ The district court held that the board maintained its unitary status and made good faith efforts to comply with the order to remedy the vestiges of de jure segregation.⁴⁰ The court noted that the demographic changes were not a result of discriminatory intent but of private decisions and economic factors.⁴¹ In upholding the district court's decision and rationale, the Supreme Court again recognized the flexible nature of the structural injunctive decrees by noting that the intent of such a remedy is that it be imposed only until the harm is remedied or local authorities comply for a reasonable period of time.⁴²

The same flexibility the Court initially used to validate its broad equitable powers was now being used to narrow the duration and scope of its remedial impact. In *Freeman v. Pitts*, the district court rendered ineffective a consent decree by relinquishing remedial control of all remedial categories under which the school system had achieved unitary status.⁴³ The court of appeals reversed the district court's decision, holding that the district court should maintain oversight until the school board achieved unitary status in all six categories.⁴⁴ The Supreme Court reversed the court of appeals and upheld the district court's decision to withdraw its supervision.⁴⁵ Again, the Court highlighted the fact that the school board had affirmatively (and in good faith) worked to desegregate the DeKalb County, Georgia schools, and held that where the racial imbalance was due to personal choices and not a vestige of the de jure system, the school board could not be held responsible.⁴⁶ Citing *Milliken I*, the Court reiterated that the district court's role is limited to remedying the constitutional violation and ultimately restoring "state and local authorities to the control of a school system that is operating in compliance with the Constitution."⁴⁷

When *Milliken I* thwarted efforts to combat white flight through inter-district busing, districts began to incorporate the experimental approaches the

39. *Id.* at 243.

40. *Id.* at 243-45 ("[A] school district cannot be said to have achieved 'unitary status' unless it 'has eliminated the vestiges of its prior discrimination and has been adjudicated as such through the proper judicial procedures.'" (quoting Ga. State Conference of Branches of NAACP v. Georgia, 775 F.2d 1403, 1414 n.12 (11th Cir. 1985))).

41. *Id.* at 243.

42. *Id.* at 248 (discussing the differences between traditional injunctive relief as described in *United States v. Swift*, 286 U.S. 106 (1932), and the relief in this case).

43. *Freeman v. Pitts*, 503 U.S. 467, 471 (1992).

44. See generally *id.* (noting that the six categories required in *Green v. Cnty. Sch. Bd.*, 391 U.S. 430, 435-37 (1968), to achieve unitary status are: teacher and principal assignment, resource allocation, quality education, physical facilities, transportation, and extracurricular activities).

45. *Id.* at 471 ("[A] district court is permitted to withdraw judicial supervision with respect to discrete categories in which the school district has achieved compliance with a court-ordered desegregation plan.>").

46. *Id.* at 495.

47. *Id.* at 489 (quoting *Milliken v. Bradley (Milliken II)*, 433 U.S. 267, 280-81 (1977)).

Milliken II decision encouraged. The United States District Court for the Western District of Missouri approved an ambitious attempt to integrate through desegregation by approving a magnet school plan that required the State and the Kansas City Missouri School District to jointly fund it.⁴⁸ The plan's requirements included bringing the schools up to a quality that met the highest rating awarded by the state board of education, and its annual cost of more than 200 million dollars greatly exceeded the district's budget.⁴⁹ When the State challenged the district court's remedial authority, the Supreme Court held in *Missouri v. Jenkins* that the district court exceeded its remedial powers; again, it emphasized that the judicial role is not only to remedy racial violations, but also to restore power to local authorities.⁵⁰ Justice Kennedy expressed significant federalism concerns and asserted that the district court exceeded its authority by making political decisions that belong within the purview of the executive and legislative branches.⁵¹ The decision narrowed the ability of courts to issue experimental relief via the structural injunction and significantly diminished the courts' role in promoting desegregation efforts.

Even where efforts to desegregate are initiated by local authorities rather than the courts, there are significant constitutional limitations. In *Parents Involved in Community Schools v. Seattle School District No. 1*, a plurality of Justices held that when the Seattle school district voluntarily adopted race-based student assignment plans to achieve greater diversity in the school system, the plans did not satisfy the narrowly tailoring requirement of strict scrutiny under the Equal Protection Clause.⁵² Citing *Grutter v. Bollinger*, Chief Justice Roberts pointed out that even where diversity had been recognized as a compelling state interest, the focus was not on race alone, but race as one of many factors that encompass diversity.⁵³ Furthermore, even if the school assignment plan had met the compelling interest requirement for strict scrutiny, the assignments were not narrowly tailored to that purpose.⁵⁴ After *Parents Involved*, the same equal protection considerations that yielded structural injunctive relief in the education desegregation cases seemed to signal its demise.

48. *Missouri v. Jenkins*, 495 U.S. 33, 38 (1990).

49. *Id.* at 41.

50. *Id.* at 50-52.

51. *Id.* at 67-68 (Kennedy, J., concurring).

52. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 555 U.S. 701, 709-11, 747-48 (2007).

53. *Id.* at 722-23 (citing *Grutter v. Bollinger*, 539 U.S. 306, 343-44 (2003), which upheld the affirmative action policy of the University of Michigan School of Law).

54. *Id.* at 726.

C. State Courts, School Finance Reform, and the Structural Injunction

Public litigation is not limited to federal constitutional issues, and as with desegregation cases, the structural injunction has been a major factor in school finance reform. Indeed, Professors Charles Sabel and William Simon cite school desegregation and school finance litigation cases as examples of public litigation.⁵⁵ While they do not explicitly refer to the remedial overhaul of school finance systems as structural injunctive relief, they do note public law cases in which the judiciary responded to what they call the ‘new accountability’ movement in educational reform.⁵⁶

School finance reform litigation is such a movement. It is a movement in which plaintiffs use public law litigation to achieve equal access to quality education through the redistribution of economic resources. Because school finance litigation is aimed to help all poor students rather than only minority students, it is a particularly attractive alternative for those who seek a colorblind solution to issues of equitable access to educational resources.⁵⁷ And yet, while the school finance reform litigation movement is examined primarily in terms of equity and adequacy of educational resources, race is integral to school funding issues.

While not always the impetus of school finance litigation, school funding has historically been used both to preserve and challenge segregation. From the time free blacks were educated in the United States, the schools they attended were funded at levels inferior to those of white schools.⁵⁸ Prior to judicial and legislative efforts to dismantle de jure segregation, many Southern states attempted to create funding equalization programs between white and black schools as an attempt to use “separate but equal” to preserve segregation.⁵⁹ These systematic efforts to preserve segregation ceased as civil rights laws and judicial mandates to desegregate began to dismantle de jure segregation.⁶⁰

The legal and practical failures of desegregation efforts resulted in the birth of modern school finance litigation—a movement generally recognized to have

55. Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015, 1025 (2004).

56. *Id.* at 1026 (citing *Edgewood Indep. Sch. Dist. v. Meno*, 917 S.W.2d 717, 758 (Tex. 1995), in which the Texas Supreme Court held that the state’s school system was out of compliance with the state constitution’s education clause and then accepted a 1995 statutory scheme).

57. James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249, 252 (1999) (discussing ways to move beyond race and achieve equity and adequacy for all disadvantaged students and generally discussing the inextricable nature of desegregation and school finance in the analysis of education law and policy).

58. See Kamina A. Pinder & Evan R. Hanson, *360 Degrees of Segregation: A Historical Perspective of Segregation-Era School Equalization Programs in the Southern United States*, AMSTERDAM L. FORUM, no. 3, 2009-2010, at 63-68.

59. *See id.* at 57.

60. *Id.* at 62.

three historic waves.⁶¹ The first wave was based on cases that relied on the federal Equal Protection Clause to support efforts to achieve equality in education.⁶² By the 1970s, substantial disparities existed in school funding, and it was estimated that the government spent an average of 15 to 20 percent more on each white student's education than on each black student's education.⁶³ The California Supreme Court determined that California's funding scheme violated the state Equal Protection Clause through its disparate funding of education.⁶⁴ It did so even though this first wave had ended four years earlier when, in *San Antonio Independent School District v. Rodriguez*, the Supreme Court held that the Equal Protection Clause did not support equal education as a fundamental right.⁶⁵

As desegregation cases continued to decline in impact and number, plaintiffs who sought equal educational access experienced more success by challenging funding expenditures.⁶⁶ The second wave of school finance litigation began in the early seventies and was based on challenges to inequitable state spending on schools.⁶⁷ Plaintiffs succeeded in seven of twenty-one state high court decisions, and more than twenty states modified their school finance systems as a result.⁶⁸ The initial success of these claims resulted in significant state reform in education spending and prioritized education policy as a national issue.⁶⁹ Later, the wave ebbed as plaintiffs failed to establish a connection between levels of funding and improved educational

61. See generally JANE FOWLER MORSE, *A LEVEL PLAYING FIELD: SCHOOL FINANCE IN THE NORTHEAST* (2007) (describing the three waves of school finance litigation); Garda, *supra* note 33, at 18-19 (discussing the rise of school finance reform litigation as a response to the failures of desegregation litigation).

62. See Campaign for Fiscal Equity v. State, 719 N.Y.S.2d 475, 480 (Sup. Ct. 2001).

63. Erwin Chemerinsky, *The Segregation and Resegregation of American Public Education: The Courts' Role*, 81 N.C. L. REV. 1597, 1610 (2003).

64. Serrano v. Priest, 569 P.2d 1303 (Cal. 1977).

65. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 54-58 (1973); Chemerinsky, *supra* note 63, at 1611-12.

66. Garda, *supra* note 33, at 27 (discussing the retreat of desegregation efforts and the return of schools to segregation).

67. The second wave of school finance reform is widely recognized to have begun with *Robinson v. Cahill*, 303 A.2d 273 (N.J. 1973), in which the New Jersey Supreme Court held that New Jersey's school funding scheme violated the state constitution.

68. Larry J. Obhof, *Rethinking Judicial Activism and Restraint in State School Finance Litigation*, 27 HARV. J.L. & PUB. POL'Y 569 (2004) (describing the states' response to the mixed success of the second wave of school finance litigation); Deborah A. Verstegen, *Towards A Theory of Adequacy: The Continuing Saga of Equal Educational Opportunity in the Context of State Constitutional Challenges to School Finance Systems*, 23 ST. LOUIS U. PUB. L. REV. 499, 505 (2004) (describing the second wave's success).

69. Michael Heise, *Judicial Decision Making, Social Science Evidence, and Equal Educational Opportunity: Uneasy Relations and Uncertain Futures*, 31 SEATTLE U. L. REV. 863, 872 (2008) (discussing school finance litigation as a basis for the significant increase of state spending on schools in the seventies).

quality.⁷⁰ Moreover, plaintiff successes often resulted in lower per-pupil expenditures.⁷¹ Consequently, state courts began to apply a rational basis test under which local authorities merely had to provide legal justification for upholding the disparate allocation of education funding.⁷²

The third and current wave began in 1989 and includes claims based on schools failing to meet minimum levels of adequacy as required under education clauses in state constitutions and statutes.⁷³ As with public law litigation that results in structural reform on the federal level, these cases arise from a constitution, albeit state rather than federal. Because all fifty states have education clauses in their constitutions, courts can use the constitutional language as a basis for issuing a remedy that requires districts to meet the adequacy standard.⁷⁴ Adequacy presents plaintiffs and defendants a lower legal threshold than equity law; instead of having to distribute finances evenly, adequacy allows districts to merely finance economically disadvantaged districts to the extent necessary to provide an “adequate” education, however adequate is defined.⁷⁵

Courts were less likely to determine that adequacy cases were non-justiciable than equity cases.⁷⁶ While equity cases required courts to reallocate resources, in adequacy cases the courts were more deferential to the state legislature with regard to decisions about how to improve school performance.⁷⁷ Plaintiffs in adequacy suits experienced a success rate of over 75% between the years of 1989 and 2005; however, the successive years resulted in a judicial unwillingness to involve themselves in issues of school funding.⁷⁸

70. Matt Brooker, Comment, *Riding the Third Wave of School Finance Litigation: Navigating Troubled Waters*, 75 UMKC L. REV. 183, 187 (2006).

71. *Id.*

72. Garda, *supra* note 33, at 25 (discussing the retreat of desegregation efforts and the return of schools to segregation).

73. The third wave is generally recognized to have begun with *Rose v. Council for Better Education, Inc.*, 790 S.W.2d 186 (Ky. 1989) (holding that the state violated the Kentucky state constitutional provision that Kentucky children had a fundamental right to education and an efficient system of schools).

74. See Robert M. Jensen, *Advancing Education Through Education Clauses of State Constitutions*, 1997 BYU EDUC. & L.J. 1 (describing the various uses of educational clauses in state constitutions).

75. Garda, *supra* note 33, at 26-27 (discussing the retreat of desegregation efforts and the return of schools to segregation).

76. Aaron J. Saiger, *The Last Wave: The Rise of the Contingent School District*, 84 N.C. L. REV. 857, 913-15 (2006); see also Aaron Y. Tang, *Broken Systems, Broken Duties: A New Theory for School Finance Litigation*, 94 MARQ. L. REV. 1195, 1208 (2011) (noting that only eight of the thirty-two states to consider cases on adequacy grounds have refused to consider the merits of the claim on the basis of nonjusticiability).

77. Saiger, *supra* note 76, at 915.

78. See Julia A. Simon-Kerr & Robynn K. Sturm, *Justiciability and the Role of Courts in Adequacy Litigation: Preserving the Constitutional Right to Education*, 6 STAN. J. C.R. &

The costs associated with raising school quality once again raise the separation of powers concerns that thwarted structural injunctive relief in desegregation cases.⁷⁹ Courts are often reluctant to issue relief that prescribes how much the state has to provide in order to bring education up to the constitutional level of adequate; requiring a cost-benefit study to determine that level is often perceived to be a task best left within the purview of the state legislature.⁸⁰ When courts are willing to venture into the fiscal realm, many courts are not convinced that money (and certainly not money alone) is enough to bring education up to an adequate level.⁸¹

D. The Judicial Retreat from Structural Injunctive Relief

Even where judicial intervention stemming from public law litigation is effective, critics, and even some supporters, have been wary of overreach.⁸² Additionally, courts are sensitive to the financial burden their remedies may impose on districts and municipalities.⁸³ In their reluctance to be labeled judicial activists, courts have erected self-imposed barriers to structural injunctions,⁸⁴ commonly citing deference to local control and political questions best left to legislatures as the basis for their unwillingness to issue sweeping structural relief.⁸⁵

Many courts decline to address educational inadequacies on the basis of non-justiciability and are reluctant to impose remedies that attempt to resolve a complex array of issues with which even the most knowledgeable experts continue to grapple.⁸⁶ And though analysis of structural injunctive relief is

C.L. 83, 85 (2010) (discussing the increasing judicial unwillingness to address the complex issues school finance cases involve); Tang, *supra* note 76, at 1210 (stating that plaintiffs have lost six of eleven school finance cases since 2009).

79. Tang, *supra* note 76, at 1208 (noting that opponents of adequacy claims assert that the accountability of legislatures make them the body most appropriate to address the issue of adequacy).

80. Simon-Kerr & Sturm, *supra* note 78, at 107-09.

81. *See id.* at 104.

82. Sabel & Simon, *supra* note 55, at 1017-18 (“[F]ederal courts could not superintend the restructuring of state and local agencies without compromising principles of federalism and local autonomy.”).

83. Simon-Kerr & Sturm, *supra* note 78, at 117.

84. Myriam Gilles, *An Autopsy of the Structural Reform Injunction: Oops . . . It's Still Moving!*, 58 U. MIAMI L. REV. 143, 146 (2003) (citing standing requirements as one example of such obstacles to injunctive relief).

85. Simon-Kerr & Sturm, *supra* note 78, at 83 (discussing the shift from plaintiff's victories in school finance litigation, most notably between the years of 2005-2008). *But see* Jeffries & Rutherglen, *supra* note 7, at 1411-12 (suggesting that the move toward increased flexibility that Professors Sabel and Simon describe has made the structural injunction a more acceptable remedy).

86. Obhof, *supra* note 68, at 594.

largely limited to federal courts responding to federal constitutional violations, it is equally applicable where state courts have retreated from issuing broad injunctive relief for state constitutional violations. Indeed, school finance reform raises even more separation of powers issues than desegregation. School finance litigation centers around the allocation of state resources, decisions that rest almost exclusively in the purview of the legislature. School finance schemes are complex and must maintain their flexibility in the wake of the challenges of economic downturns, public needs, and political pressure.⁸⁷ Consequently, when courts are confronted with challenges to the state constitutional requirements of educational adequacy, they are reluctant to issue relief that would restrict the ability of legislatures to allocate state resources.⁸⁸ Yet, the programs enacted by state legislatures often fail in light of economic and sociopolitical realities, leaving a hole in education reform that no branch seems willing to address.

Professors Sabel and Simon see the move toward judicial restraint as a part of a positive evolution toward flexibility and responsiveness in remedial reform. They describe the evolution of structural remedies in federal courts as moving from what they characterize as “command and control injunctive regulation” which results in a very specific, inflexible remedial decree imposed by a directive court, toward the current “experimentalist regulation” which allows for more flexibility with regard to stakeholder participation and discretion in achieving the goal of the litigation.⁸⁹

Sabel and Simon describe this modern approach to structural reform in public law litigation as both more and less invasive in reforming public institutions than those of which Chayes wrote in the 1970s.⁹⁰ The courts “are more involved because experimentalist remedies contemplate a permanent process of ramifying, participatory self-revision rather than a one-time readjustment to fixed criteria.”⁹¹ But the courts are less involved because those most affected by the terms of compliance are the ones who set them.⁹² Consequently, the courts engage the participants in a collaborative process that avoids separation of powers issues and ameliorates the burden of extensive judicial oversight.⁹³ Sabel and Simon describe the experimentalist tendency as more responsive to the constraints on structural injunctions imposed by the Supreme Court and more connected to the causal link between the condition and the constitutional violation.⁹⁴ The remedy is more likely to be tailored to

87. McUsic, *supra* note 18, at 1349-50.

88. *Id.* at 1347-48.

89. Sabel & Simon, *supra* note 55, at 1019-22.

90. *Id.* at 1019-20.

91. *Id.* at 1020.

92. *Id.*

93. *Id.* at 1016, 1019-20.

94. *Id.* at 1020.

specific objectives, to incorporate data collection, monitoring, reporting, and performance measures as methods by which to assess the degree of effectiveness.⁹⁵

Not everyone shares Professors Sabel and Simon's characterization of the narrowed reach of the courts as positive growth. Just as there are complaints of judicial activism in the more prescriptive, sweeping injunctive relief, there are also critics who charge judicial abdication where judges have significantly narrowed it. Professor Obhof has identified two ends of a continuum with regard to the remedial treatment of school finance cases—judicial activism and judicial abdication.⁹⁶ Professor Thro asserts that when a court ignores the complexities of an appropriate remedy and focuses solely on financial contributors to educational inequities, it effectively abdicates its responsibilities.⁹⁷ That abdication can occur both where courts hold that questions of educational quality are non-justiciable and where courts set low standards of education adequacy.⁹⁸

So what, then, is the appropriate role of the courts when legislatures and local authorities fail to meet the obligation to educate their children? While there may not be a definitive answer, public litigation appears to demand a more activist judicial response. One of the purposes of equitable relief in public law litigation is to address injuries that are not compensable solely through legal damages.⁹⁹ The structural injunction allows courts to use their broad equitable powers to remedy inequities in educational access. While courts are not competent to create their own educational standards, they are capable of applying a standard set by the legislative and executive branches.¹⁰⁰

During the current wave of school finance reform, many plaintiffs have looked to state constitutional education provisions for that standard, although many courts never reach the merits of the claim. Of the twenty-six highest state courts to address adequacy challenges, almost a third dismissed them on the basis of separation of powers, and the other two-thirds varied tremendously in their willingness to issue structural relief.¹⁰¹ Where courts have issued equitable relief, those remedies have included: merely identifying a violation and allowing the legislature to address it; identifying a violation and offering

95. *Id.* at 1028.

96. Obhof, *supra* note 68, at 593-98.

97. William E. Thro, *A New Approach to State Constitutional Analysis in School Finance Litigation*, 14 J.L. & POL. 525, 552 (1998).

98. *Id.* at 546-47 (accepting bare minimum standards of accreditation as a measure for quality of education). For an extensive analysis of judicial review of constitutional adequacy in school finance cases see Scott R. Bauries, *Is There An Elephant in the Room?: Judicial Review of Educational Adequacy and the Separation of Powers in State Constitutions*, 61 ALA. L. REV. 701 (2010).

99. Chayes, *supra* note 3, at 1292-93.

100. Thro, *supra* note 97, at 547.

101. Bauries, *supra* note 98, at 746.

guidance, but prescribing no mandates with regard to a remedy; and issuing a specific remedy that must be implemented in order to cure the constitutional violation.¹⁰² Yet, separation of powers principles in the education clauses of state constitutions, whether explicit or silent, seem to have no causal or even correlative relationship to education finance litigation outcomes.¹⁰³

Ultimately, whether the objective of litigation is desegregation or school finance reform, courts are unlikely to engage in structural reform without a strong legislative basis to legitimize and facilitate their involvement. The combined effect of the accountability measures in NCLB and Title VI, and the recent efforts of the executive branch to effectuate them, may be that catalyst.

II. NCLB AND TITLE VI INVITE A RETURN TO THE STRUCTURAL INJUNCTION AS A VIABLE REMEDY.

The legislative and executive branches have opened the door to the resurgence of the structural injunction through the enactment and combined enforcement of NCLB and Title VI of the Civil Rights Act. By so doing, they have once again made race central to analysis of education reform. NCLB sets a race-conscious objective of closing the achievement gap between traditionally educationally advantaged and disadvantaged groups.¹⁰⁴ One of the ways in which the statute attempts to meet this objective is through a requirement that districts report test results disaggregated by various student demographic subgroups. The statute ties federal funding, in part, to those results. The NCLB requirements ushered in an unprecedented federal role in accountability in academic achievement and catapulted education to the forefront of the domestic agenda.¹⁰⁵ While imperfect in its implementation and impact, the statute is laudable in its objectives and groundbreaking in terms of its potential, which still has not been fully realized.

The key to enforcing NCLB's efforts to close the racial achievement gap might be through the impact, or effect, provisions of section 602 of Title VI.¹⁰⁶ Enacted pursuant to Congress's spending powers, relevant Title VI regulations allow federally funded institutions to take remedial measures to address race discrimination, even when the discrimination is limited to discriminatory

102. *Id.* at 746-49.

103. *Id.* at 744-45.

104. Daniel J. Losen, *Challenging Racial Disparities: The Promise and Pitfalls of the No Child Left Behind Act's Race-Conscious Accountability*, 47 *How. L.J.* 243, 245 (2004); L. Darnell Weeden, *Income Integration as a Race-Neutral Pursuit of Equality and Diversity in Education After The Parents Involved in Community Schools Decision*, 21 *U. FLA. J.L. & PUB. POL'Y* 365, 379-80 (2010).

105. Shannon K. McGovern, Note, *A New Model for States as Laboratories for Reform: How Federalism Informs Education Policy*, 86 *N.Y.U. L. REV.* 1519-21 (2011).

106. Civil Rights Act of 1964, Pub. L. No. 88-352, § 602, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000d *et seq.* (2006)).

impact. In conjunction with NCLB, Title VI could be as central to educational reform today as it was in the 1960s and 1970s, when it played a pivotal role in desegregation litigation and in legitimization of structural injunctive relief.

A. Title VI

1. A Tale of Three Branches

Historically, inter-branch cooperation has been necessary to implement the sweeping change that structural injunctive relief actuates. It took the cooperative efforts of all three branches of government to achieve the force necessary to overcome the deeply entrenched resolve of the South. *Brown* rendered segregation unconstitutional and introduced the structural injunction, yet prior to the enactment of the Civil Rights Act of 1964, the decision had very little practical effect on desegregation.¹⁰⁷ The *Brown* decision illustrates how the judicial powers of equity are limited in the absence of legislative support and diluted by remedies so broad that they invite noncompliance. In the wake of *Brown*, President Eisenhower made a vow to Southern leaders that he would “make haste slowly,” a promise that directly violated the *Brown II* mandate.¹⁰⁸ True to his word, he did not recommend desegregation legislation for four years and in fact opposed tying anti-discrimination legislation to federal funding.¹⁰⁹ Consequently, even a decade after the *Brown* decision, approximately ninety-eight percent of black students in Southern states continued to attend segregated schools.¹¹⁰

It took legislative force to move the *Brown* tenet into action. Congress responded to the rapidly growing Civil Rights movement and the *Brown* decision by introducing several civil rights bills that had been proposed as early as the late 1940s and continued to be proposed through the early 1960s.¹¹¹ The first civil rights bill of the twentieth century was a voting rights bill, and despite its enactment, ongoing opposition to integration from many congressional constituents resulted in the failure of subsequent civil rights bills to garner

107. Jeffries, Jr., *supra* note 23, at 1408 (explaining that Title VI gave force to the *Brown* decision by authorizing the Attorney General to bring desegregation actions and cut off federal funds to non-complying school districts); Zietlow, *supra* note 2, at 995 (noting that in the three years after the *Brown* decision, Southern legislatures enacted at least 136 pro-segregation laws and constitutional amendments).

108. Epperson, *supra* note 2, at 153.

109. *Id.*

110. *Id.* (citing GARY ORFIELD & CHUNGMEI LEE, RACIAL TRANSFORMATION AND THE CHANGING NATURE OF SEGREGATION 13 (2006), available at <http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/racial-transformation-and-the-changing-nature-of-segregation/orfield-racial-transformation-2006.pdf>).

111. Zietlow, *supra* note 2, at 960-61.

sufficient congressional support.¹¹²

The language of Title VI of the Civil Rights Act of 1964 first appeared in 1947 as one of a number of proposed legislative bills aimed to end segregation through the exercise of congressional spending power.¹¹³ In homage to the legacy of President Kennedy, and largely due to the efforts of President Johnson, Congress finally passed the Civil Rights Act of 1964 to use the force of congressional funding to supplement the Brown decision.¹¹⁴ The legislation had almost an immediate and widespread impact on desegregation efforts.¹¹⁵ Between 1954 and the passage of the Civil Rights Act in 1964, “only 1.2 percent of black children in [the Deep South] attended school with white children.”¹¹⁶ After passage of the Civil Rights Act, “[b]etween 1964 and 1972, that number rose to 91.3 percent.”¹¹⁷

Title VI authorizes the federal government to appropriate federal funds to desegregated school districts and to withdraw those funds where there is evidence of racial discrimination.¹¹⁸ Importantly, a year after enacting the Civil Rights Act, Congress enacted the Elementary and Secondary Act of 1965 (ESEA), which provided federal funds to states proportionate to their number of poor children.¹¹⁹ The executive ability to enforce Title VI anti-discrimination provisions by withholding ESEA funds from school districts that resisted desegregation was powerful. The impact was greatest in the Deep South, which was one of the poorest regions in the country, and the region in which resistance to desegregation efforts was strongest.¹²⁰

The executive played a role as essential as the other two branches in effectuating Title VI to combat desegregation.¹²¹ And within the executive

112. *Id.*

113. *Id.* at 958-59, 998; Charles F. Abernathy, *Legal Realism and the Failure of the “Effects” Test for Discrimination*, 94 GEO. L.J. 267, 274-75 (2006) (discussing the historic background and application of the “effects” test under Title VI).

114. See Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000d *et seq.* (2006)); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 329 (1978) (discussing the legislative history of Title VI); Zietlow, *supra* note 2, at 997 (discussing the relationship between the Act and the Brown decision).

115. Zietlow, *supra* note 2, at 997 (“[I]n the area of public accommodations and education, the rapid pace of the acceptance of the validity of the 1964 Act was truly amazing compared to the decade of strife and noncompliance that followed the Court’s ruling in Brown.”).

116. *Id.* at 998.

117. *Id.*

118. 42 U.S.C. §§ 2000d *et seq.* (2006).

119. The Elementary and Secondary Education Act, Pub. L. 89-10, 79 Stat. 27 (1965) (codified as amended at 20 U.S.C. ch. 70 (2006)).

120. Epperson, *supra* note 2, at 155.

121. Zietlow, *supra* note 2, at 998 (“Then Solicitor General Archibold Cox later emphasized the importance of the involvement of all three branches. Speaking of the success of the 1964 Act, he argued that wiping out segregation in places of public

branch, it is the U.S. Department of Education's Office for Civil Rights (OCR) that is primarily responsible for the enforcement of its provisions.¹²² OCR enforces Title VI through "complaint investigations, compliance reviews, education and policy development, complainant appeals hearings, litigation referrals, and informal conciliations."¹²³ If a recipient of federal education funds is in non-compliance with Title VI, the agency can initiate proceedings to delay or terminate funds, or it can refer the issue to the Department of Justice.¹²⁴ The OCR aggressively initiated and pursued enforcement proceedings from the mid-1960s until the Nixon presidency.¹²⁵ President Nixon used an anti-desegregation platform to appeal to Southern voters, and once he was in office, Nixon eliminated the executive enforcement of desegregation orders.¹²⁶ OCR enforcement of Title VI virtually ceased under Nixon and never regained the momentum of the sixties, yet it is still the primary means by which the Title VI disparate impact provisions are enforced.¹²⁷

2. Impact and Effect

After the enactment of the Civil Rights Act, every Cabinet department—and an estimated forty federal agencies—adopted regulations under Title VI to prohibit federal grantees from carrying out activities or programs with discriminatory effects; many of these federal agencies continue to promulgate these regulations.¹²⁸ Importantly, Title VI authorizes the government to address the discriminatory effects or impact of program activities. The U.S. Department of Education (ED) promulgated regulations to implement sections 601 and 602 of Title VI indicate in relevant part.

First, a school district may not exclude students from participation, deny them benefits, or otherwise subject them to discrimination on the basis of race, color, or national origin with regard to any aspect of its program.¹²⁹

accommodation was too much of a burden for the Supreme Court alone.”)

122. Epperson, *supra* note 2, at 146-47 (identifying OCR in its executive role as the potential centerpiece of coordinated efforts among the three branches of government in combating racial isolation and inequity in education).

123. Note, *After Sandoval: Judicial Challenges and Administrative Possibilities in Title VI Enforcement*, 116 HARV. L. REV. 1774, 1777 (2003) [hereinafter *After Sandoval*].

124. 42 U.S.C. §2000d *et seq.* (2006). *But see*, *After Sandoval*, *supra* note 123, at 1776 (noting that OCR rarely delays or terminates funds because termination requires Congressional authorization).

125. Epperson, *supra* note 2, at 155-57 (noting that between the years of 1964 and 1970, “OCR initiated approximately 600 administrative proceedings against school districts that failed to comply with Title VI”).

126. *Id.* at 157-58.

127. *Id.* at 157-61; Losen, *supra* note 104, at 287 (identifying OCR as the most important enforcement agency with regard to Title VI disparate impact complaint review).

128. *After Sandoval*, *supra* note 123, at 1776.

129. 34 C.F.R. § 100.3(a) (2012).

Second, districts may not, on the basis of race, color or national origin, provide individuals with any service or benefit that is different or is provided in a different manner from that provided to others, may not subject individuals to separate treatment, and may not restrict individuals in any way in the enjoyment of any advantage or privilege enjoyed by others.¹³⁰

Finally, a recipient may not utilize criteria or methods of administration that have the effect of subjecting individuals to discrimination on the basis of race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives the program with respect to individuals of a particular race, color, or national origin.¹³¹

The Supreme Court first addressed the application of sections 601 and 602 of Title VI in the 1974 *Lau v. Nichols* case.¹³² The Court concluded that Title VI prohibited disparate impact discrimination by a school district that failed to provide English language instruction to students of Chinese ancestry.¹³³ It relied on 601 for its decision and assumed that 602's disparate impact regulations simply insured that recipients of federal aid acted consistently with 601 requirements.¹³⁴

After analysis of Title VI that included a review of its legislative history, the *Bakke* Court suggested that proof of intentional discrimination was necessary to establish a violation under the statute.¹³⁵ In a concurring opinion that provided the decisive fifth vote in the case, Justice Powell stated that section 601's anti-discrimination language "proscribe[s] only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment."¹³⁶ Justice Brennan, joined in his plurality opinion by Justices White, Marshall and Blackmun, agreed that the Title VI only prohibits acts proscribed by the Equal Protection clause, but also stated that 602 regulations "are entitled to considerable deference in construing Title VI"¹³⁷ and that the regulations "require[d] affirmative measures" to help minorities who had been subject to discrimination and "authorize[d]" voluntary affirmative action programs "by federally funded institutions that ha[d] not been guilty of prior discrimination."¹³⁸

In *Guardians Association v. Civil Service Commission of City of New York*, the Supreme Court decisively held that section 601 requires proof of intentional discrimination, but its position on section 602 was less clear, with five of the

130. 34 C.F.R. § 100.3(b)(1)(ii)-(iv) (2012).

131. 34 C.F.R. § 100.3(b)(2) (2012).

132. *Lau v. Nichols*, 414 U.S. 563, 566 (1974).

133. *Id.* at 566-68.

134. *Id.*

135. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 352-53 (1978).

136. *Id.* at 287.

137. *Id.* at 342 (Brennan, J., concurring).

138. *Id.* at 343 (Brennan, J., concurring).

Justices indicating that the disparate impact provisions permitted claims that included proof of discriminatory effect.¹³⁹ When the Court later addressed the disparate impact provisions in its 2001 decision in *Sandoval*, it did not evaluate their validity, but instead held that the regulations did not support a private right of action.¹⁴⁰

While Congress has not ratified the disparate impact regulations, it continues to validate their existence by requiring their adoption by several agencies.¹⁴¹ Yet, the reach of the Title VI effect test has not been fully tested. Both the statute's legislative drafters and the Executive (including the administrative agencies) avoided addressing the effects test and its application as intended under the law.¹⁴² While some may argue the appropriate application of Title VI, Professor Abernathy has noted that in the twenty-seven years between the *Lau* and *Sandoval* decisions, there has not been an appellate decision that has relied solely on the effects test to issue a remedy, and few decisions even implicate it.¹⁴³

B. No Child Left Behind

1. Origins

Prior to the enactment of the No Child Left Behind Act, the federal government was hands off with regard to issues of educational achievement—largely deferring to the state with regard to decisions about how best to educate children. Federal involvement in academic achievement took a decided turn after the standards reform movement—a period during late 1980s and the 1990s in which states adopted educational standards that described what children should learn and know.¹⁴⁴ As states developed their own standards,

139. *Guardians Ass'n v. Civil Serv. Comm'n of New York*, 463 U.S. 582, 584 n.2 (1983). Those five justices were: Justices Brennan, Marshall, Blackmun, Stevens, and White.

140. *Alexander v. Sandoval*, 532 U.S. 275, 275 (2001) (rejecting a disparate impact challenge to a state driver's test exam).

141. Bradford C. Mank, *Are Title VI's Disparate Impact Regulations Valid?*, 71 U. CIN. L. REV. 517, 532 (2002).

142. Abernathy, *supra* note 113, at 277 (noting that contrary to anti-desegregation jurisprudence, the evolved effects test come "almost wholly without meaningful public discussion or justification by the authorities who adopted it"). *But see* BENJAMIN MICHAEL SUPERFINE, *THE COURTS AND STANDARDS-BASED EDUCATION REFORM* 62 (2008) (citing regulations implementing Title VI, Title IX, Section 504, and Title II as the legal basis on which have plaintiffs have sued to invalidate or enjoin high-stakes testing).

143. Abernathy, *supra* note 113, at 270 (examining the promise versus reality of Title VI enforcement).

144. U.S. DEP'T OF EDUC., NAT'L COMM'N ON EXCELLENCE IN EDUC., *A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM* (1983), available at http://datacenter.spps.org/uploads/SOTW_A_Nation_at_Risk_1983.pdf; James S. Liebman & Charles F. Sabel, *A Public Laboratory Dewey Barely Imagined: The Emerging Model of*

they sought consistency and guidance; consequently, they issued a call for leadership from the federal government in setting national education standards.¹⁴⁵ Though wary of expanding the federal role in education, President George H. W. Bush responded to this call of action by organizing a national education summit at which he set six national goals in what was called the America 2000 plan.¹⁴⁶ President Clinton incorporated these goals into his own initiative, Goals 2000, as part of the Improving America's School Amendment (IASA) to the ESEA.¹⁴⁷ Signed into law in 1994, The Improving America's Schools Amendment required states receiving ESEA Title I funds to adopt educational standards and then create, align, and implement assessment standards that demonstrated student progress toward achieving the standards.¹⁴⁸

The NCLB Amendment was the sixth amendment to the Elementary and Secondary Education Act, and was signed in law in 2001. NCLB gave the federal government an unprecedented role in addressing race and academic achievement in elementary and secondary education. NCLB strengthened the accountability provisions of the previous versions of the ESEA statute and by doing so encouraged the U.S. Department of Education to more vigorously enforce it.

2. NCLB, Accountability, and Race

At the core of NCLB statute are its efforts to address racial disparities in academic performance. Notably, both former President George W. Bush¹⁴⁹ and

School Governance and Legal Reform, 28 N.Y.U. REV. L. & SOC. CHANGE 183, 208 (2003) (“Within a few years of *A Nation at Risk*, nearly all fifty states had adopted some version of comprehensive standards.”).

145. William S. Koski & Rob Reich, *When “Adequate” Isn’t: The Retreat from Equity in Educational Law and Policy and Why It Matters*, 56 EMORY L.J. 545, 577 (2006).

146. LAMAR ALEXANDER, *AMERICA 2000: AN EDUCATION STRATEGY: SOURCEBOOK 18-19* (1991) (detailing the six educational goals as follows: first, to ensure that every child begins school ready to learn; second, to raise the high school graduation rate to ninety percent; third, to ensure that every child leaving the fourth, eighth, and twelfth grades can demonstrate competence in core subjects; fourth, to make American students first in the world in math and science; fifth, to ensure adult literacy and to ensure that every adult has the “skills necessary to compete in a global economy and exercise the rights and responsibilities of citizenship”; and sixth, to liberate schools from violence and drugs); PAUL MANNA, *CONDUCTOR, SCHOOLMARM, OR STRUGGLING SUBSTITUTE TEACHER? EXPLAINING THE CHANGING FEDERAL ROLE IN K-12 EDUCATION* (2006), available at <http://pmanna.people.wm.edu/research/Manna2006PolicyHistoryConference.pdf> (recounting the history of the federal role in education).

147. Improving America's Schools Act of 1994, Pub. L. No. 103-382, 108 Stat. 3518 (codified as amended in scattered sections of 20 U.S.C.).

148. See U.S. DEP'T. OF EDUC., *GOALS 2000: REFORMING EDUCATION TO IMPROVE STUDENT ACHIEVEMENT* (1998), available at <http://www2.ed.gov/PDFDocs/g2kfinal.pdf>.

149. President George W. Bush, Acceptance Speech at the Republican National Convention (Sept. 2, 2004); see also President George W. Bush, Remarks to the National

current President Obama have identified closing the racial achievement gap as a priority of the statutory amendment; and, indeed, the NCLB accountability provisions tie test achievement results—disaggregated by race among other characteristics—to funding.¹⁵⁰ NCLB's role in addressing racial disparities in academic achievement is not ancillary; indeed, the statute's measures passed at least in part as a deliberate attempt to address race.¹⁵¹ This is not to say that the drafters of NCLB sought to promote integration. In fact, conservatives drafted the Act in part to avoid "affirmative integration," seeking instead to address educational inequities by improving school and student performance through its accountability measures, and by generating competition among school districts for students.¹⁵² In other words, consistent with constitutional jurisprudence, school systems could remain segregated so long as the segregation was not the result of intentional discrimination and so long as the school authorities had made good faith efforts to provide resources to educationally disadvantaged districts and the students within them.

In furtherance of its focus on improving educational outcomes, NCLB kept the standards and aligned assessments of its predecessor IASA and also required that states: create for schools receiving Title I funds at least three levels of student competencies; annually test students in schools three to eight; and test students at least once in grades ten to twelve.¹⁵³ The level at which states set annual goals for proficiency and for the percentage of students who must meet it is called Adequate Yearly Progress (AYP).¹⁵⁴ AYP is a concept central to NCLB accountability, particularly in its use of disaggregated data.¹⁵⁵ Under NCLB, schools receiving Title I funds must test at a minimum ninety-five percent of their total student population, and ninety-five percent of students within non-aggregated subgroups that include race, disability, and English

Urban League Conference (July 28, 2003), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2003/07/20030728-3.html> ("Equal education is one of the most pressing civil rights of our day.").

150. See Elementary and Secondary Education Act, 20 U.S.C. 6301 *et seq.*, amended by No Child Left Behind Act of 2001, Pub. L. No. 107-110; Fredrick M. Hess, *Our Achievement Gap*, NAT'L AFF., Fall 2011, at 114, 121-23 (discussing the presidential objectives to close the achievement gap); *Achievement Gap*, EDUC. WK. (July 7, 2011), <http://www.edweek.org/ew/issues/achievement-gap/>.

151. Losen, *supra* note 104, at 246-49 (quoting President Bush's description of the Act's objective to "end the soft bigotry of low expectations").

152. Dan J. Nichols, *Brown v. Board of Education and the No Child left Behind Act: Competing Ideologies*, 2005 BYU EDUC. & L.J. 155, 172, 178-79 (2005).

153. 20 U.S.C. § 6311(b)(1)(D)(ii)(II)-(III) (2006) (describing the three levels of competency); 20 U.S.C. § 6311(b)(3)(C)(vii) (explaining states must test students annually in grades three through eight); 20 U.S.C. § 6311(b)(3)(C)(v)(I)(cc) (requiring states to test once from grades ten through twelve).

154. 20 U.S.C. § 6311(b)(2)(B).

155. See generally Losen, *supra* note 104, at 245, 258.

Language Learner status.¹⁵⁶ The failure of any subgroup to meet AYP results in overall failure for a school and can result in corrective action and sanctions for the school.¹⁵⁷ The statute is specific in its deadline, requiring all children to be proficient in reading and math by 2014.¹⁵⁸

The actual value of the sanctions and positive or negative impact on education is the subject of ongoing debate. However, AYP requirements to disaggregate performance data by race pressure states to not only examine performance from a race-based perspective, but to generate potential solutions.¹⁵⁹ Employing tests to assess and compare student performance serves a valuable information-gathering function, even if the punitive measures of NCLB do not. In fact, NCLB's requirements to disaggregate scores could play a critical role in determining how to close the racial achievement gap.

C. Dual Enforcement of Title VI and NCLB

Where NCLB race-specific remedies and Title VI have by themselves been ineffective, together the two federal statutes may be key to fulfilling *Brown's* promise of equal educational opportunity.¹⁶⁰ NCLB aims to close the racial achievement gap, but its language and interventions are race neutral. Title VI can more extensively address racial disparities because unlike NCLB, its interventions are not based solely on academic outcomes. Consequently, Title VI may provide the more viable judicial basis for issuing structural relief that addresses racial disparities in academic achievement.¹⁶¹

For the first time, the United States Department of Education Office for Civil Rights (OCR) is addressing unintentional discrimination, and the Obama administration has vowed to aggressively address educational disparities to an unprecedented degree.¹⁶² The Department of Education is using the disparate impact provision of Title VI to examine possible violations of NCLB.¹⁶³ Now,

156. 20 U.S.C. § 6311(b)(2)(C)(v)(II)(aa)-(dd); 20 U.S.C. § 6311(b)(2)(I)(ii).

157. NCLB sanctions come in three forms: school improvement, 20 U.S.C. § 6316(b)(1)(A) (2006), corrective action, 20 U.S.C. § 6316(b)(7)(A)-(C), and restructuring, 20 U.S.C. § 6316(b)(8).

158. 20 U.S.C. § 6311(b)(2)(G)(iv) (requiring that all children reach the state standard for proficient in Adequate Yearly Progress by 2013-14).

159. Losen, *supra* note 104, at 263.

160. *Id.* at 243-248 (discussing the historical limitations of No Child Left Behind and Title VI in addressing racial disparities in education while also acknowledging their potential).

161. *Id.* at 283.

162. Ed Finkel, *Department of Education Revives Civil Rights Office: Los Angeles and 31 other districts undergo federal compliance reviews*, DISTRICT ADMIN. (May 1, 2010), <http://www.districtadministration.com/article/department-education-revives-civil-rights-office>.

163. 42 U.S.C. §2000d, *et seq.* (2006); Finkel, *supra* note 162.

as the Department uses Title VI to enforce NCLB accountability provisions, it opens the door to structural injunctive relief in education litigation that supports rather than usurps the authority of the other branches, and may again give courts a central role in achieving structural reform in the realm of education.

In March 2010, on the forty-fifth anniversary of the “Bloody Sunday” civil rights march, U.S. Secretary Arne Duncan stood on the Edmund Pettus Bridge in Selma and pledged that the U.S. Department of Education would work to aggressively fight discrimination in public schools.¹⁶⁴ OCR conducted the first of over thirty compliance reviews in the Los Angeles Unified School District (LAUSD).¹⁶⁵ The review of the District included an examination of its English Learner (EL) students, and an appraisal of resources and opportunities in schools with predominately black student enrollment as compared to those with predominately white student enrollment.¹⁶⁶

OCR investigated nine schools and examined resources and policies in the areas of program resources and facilities, instructional programs, effective teachers, school administration and organization, parent involvement, and discipline.¹⁶⁷ Assessment results indicated that EL students were not meeting NCLB state or district goals and that the parent communication about the impact of the EL program was insufficient.¹⁶⁸ The agency also examined large disparities between white and black students on student test results to determine whether disparities are a result of “unequal access to educational opportunities,” thereby triggering Title VI.¹⁶⁹

The investigation revealed that fewer black children than white children were referred to gifted programs, but that black children were disciplined and referred for discipline, including suspensions and expulsions, at a higher rate than white children.¹⁷⁰ It also uncovered fewer library and technological resources in predominately black schools.¹⁷¹ LAUSD acknowledged a need to study teacher effectiveness and access to effective teachers in predominately

164. Lesli A. Maxwell, *Civil Rights Office Expands Its Reach Into Schools: Agency Expands Scope and Number of Reviews*, EDUC. WK., Dec. 13, 2011, available at http://www.edweek.org/ew/articles/2011/12/14/14ocr_ep.h31.html; *The First March From Selma*, LIBR. OF CONGRESS, http://www.americaslibrary.gov/jb/modern/jb_modern_selma_1.html (detailing the Selma march).

165. Letter from Arthur Zeidman, Director, U.S. Dep’t of Educ., Office for Civil Rights, to Dr. John Deasy, Superintendent, L.A Unified Sch. Dist. (Oct. 11, 2011), available at <http://www2.ed.gov/about/offices/list/ocr/docs/investigations/09105001-a.html>.

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. Letter from Arthur Zeidman, Director, U.S. Dep’t of Educ., Office for Civil Rights, to Dr. John Deasy, Superintendent, L.A Unified Sch. Dist. (Oct. 11, 2011), available at <http://www2.ed.gov/about/offices/list/ocr/docs/investigations/09105001-a.html>.

171. *Id.*

black schools, and the district committed to engage in strategies to address disparities in equalizing educational opportunities for EL and black students.¹⁷² Through its recent and ongoing investigatory and enforcement actions, the U.S. Department of Education has made a powerful statement about the need to enforce the letter and spirit of NCLB. This enforcement unquestionably permits race-based solutions and, where appropriate, the courts should endorse this position through their remedial powers.

III: THE REVIVAL OF STRUCTURAL INJUNCTIVE REFORM IN EDUCATION

A. “Post-Racial” is Anathema To Education Reform

Underlying the judicial move towards race neutrality is the notion of post-racialism—a concept based on the notion that society has progressed to a point at which it is beyond considering race.¹⁷³ Efforts to minimize racial disparity under the guise of colorblindness are not new. Since the end of the Civil War, the concept of ignoring race has been used to make racial subordination more politically and ethically palatable.¹⁷⁴ This thinking effectively precludes any activism, resistance, or remedies with race at its core.¹⁷⁵ Instead, post-racialism views even the allegation of racial inequality as inherently suspect.¹⁷⁶ It is a perspective more consistent with anti-classification theory under the Equal Protection Clause, in which the Court rejects differentiation based on race, than an anti-subordination view, in which the Court prohibits actions that perpetuate hierarchical views of race.¹⁷⁷

Addressing educational disparities through the lens of funding rather than race is an appealing notion to those who adhere to post-racial theory. However, it is difficult to deny the correlation between race and poverty, and between

172. *Id.*

173. See Sumi Cho, *Post-Racialism*, 94 IOWA L. REV. 1589, 1595 (2009) (analyzing post-racialism as an ideology that reflects a retreat from discussing and addressing issues of race); Helen Norton, *The Supreme Court’s Post-Racial Turn Towards A Zero-Sum Understanding of Equality*, 52 WM. & MARY L. REV. 197, 201-02 (2010).

174. Professor Cho traces the history of colorblindness as a political tactic to the end of the Civil War, when whites used it to separate and subordinate blacks; he also describes race-neutral tactics as a means of preserving Jim Crow and defying the *Brown* decision. Cho, *supra* note 173, at 1644-45; see also Kimberle W. Crenshaw, *Twenty Years of Critical Race Theory: Looking Back To Move Forward*, 43 CONN. L. REV. 1253, 1329-30 (2011) (describing how post-racialism is used to silence racial justice advocacy).

175. See Cho, *supra* note 173, at 1595 (analyzing post-racialism as an ideology that reflects a retreat from discussing and addressing issues of race).

176. See Norton, *supra* note 173, at 201-02 (discussing the difficulties in reconciling the disparate impact language of Title VII with the judicial post-racial stance).

177. See generally Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278 (2011) (detailing the evolution of the Supreme Court’s anti-classification and anti-subordination approaches).

poverty and achievement.¹⁷⁸ Professor Heise notes that one-third of all African-Americans live in neighborhoods he describes as hyper-segregated, and he observes that Hispanics experience similar patterns.¹⁷⁹ He identifies zip codes as the primary predictors of academic success by describing the current correlation between poverty and “the racial and ethnic isolation of minorities,” and the correlation between higher percentages of white students and lower percentages of poor students.¹⁸⁰

Approximately two-thirds of black students attend schools in high-poverty, low performing school districts, while white families, even those who live in high-performing, wealthier public school districts, are more likely to send their children to private schools.¹⁸¹ Consequently, “minorities are concentrated in poorly performing, high poverty schools that experience lower achievement scores, graduation, and college matriculation rates and higher dropout rates than their suburban counterparts.”¹⁸² Notably, NCLB’s race-conscious provisions have the unintended effect of serving as potential disincentives to integrate because of the threat of invoking its punitive measures when racial subgroups fail to meet its standards for adequate performance. Accordingly, more diverse schools and school districts are more likely to be sanctioned under the AYP provisions.¹⁸³

Economic isolation has an impact similar to race on academic performance, and since racial isolation and socioeconomic isolation often go together, it is black and Hispanic children who most often feel its impact. The *Milliken* decision severely limited desegregation efforts around the country,¹⁸⁴ and school finance reform further thwarted desegregation efforts by promoting

178. Michael Heise, *Litigated Learning and the Limits of Law*, 57 VAND. L. REV. 2417, 2423 (2004) (“Low-poverty schools almost always outperform high-poverty urban schools. Students attending low-poverty schools typically score 50 to 75 percent higher on reading and math tests than do students in high-poverty schools.”).

179. *Id.* at 2432-33.

180. *Id.* at 2420-21, 2427-28 (“Less than 10 percent of schools whose enrollments are between 10 percent and 20 percent minority are predominately poor. Exactly half of the schools that are 50 percent to 60 percent minority are predominately poor. And nearly 90 percent of schools that are 90 percent to 100 percent minority are predominately poor.”).

181. James E. Ryan, *The Influence of Race in School Finance Reform*, 98 MICH. L. REV. 432, 435 (1999) (describing the high percentage of black students in poor, low performing schools); see also Heise, *supra* note 178, at 2429 (highlighting the higher likelihood that wealthy white parents will send their children to private schools).

182. Garda, Jr., *supra* note 33, at 52 (attributing disparities in academic achievement primarily to socioeconomic factors rather than racial segregation).

183. Losen, *supra* note 104, at 246 (comparing No Child Left Behind’s accountability measures to the enforcement (or lack thereof) of the disparate enforcement provisions of Title VI); see also *id.* at 285 (“However, to the extent that children of color are over-represented in inadequately funded schools, there is a concomitant hard bigotry of inadequate funding that contributes in critical ways to racial disparities in achievement that could actually be exacerbated by NCLB.”).

184. Chemerinsky, *supra* note 63, at 1607.

the notion that schools could achieve qualitative parity through funding rather than integration.¹⁸⁵ Yet, the failures of segregated schools and the failures of school finance reform repeatedly illustrate that the results are anything but equal. State and local governments provide over ninety percent of the funding for educational expenditures, and it is the poor districts and those who teach in them that are allocated the fewest resources.¹⁸⁶ Complicating matters, the resources allocated to poor districts are often distributed inefficiently.¹⁸⁷ Those districts have more difficulty attracting high-quality teachers even though the need for them is more pronounced. Moreover, appointments of administrators are often based on political motivation rather than merit, and lower parent socioeconomic status can make teachers and administrators less accountable.¹⁸⁸

Professor Ryan argues that racial segregation actually hinders school finance reform.¹⁸⁹ He contends that racial and socioeconomic integration are critical to improving educational access for disadvantaged groups, and there is evidence that desegregation leads to higher academic achievement for black students.¹⁹⁰ Yet, instead of seeking to improve schools through integration, there seems to be general acceptance that poor and predominately minority schools will remain isolated. Consequently, the focus is not on desegregation, but on providing segregated disadvantaged populations with adequate resources.¹⁹¹ The current adequacy wave of school finance reform litigation fails to address racial disparities in achievement—in fact, there is no evidence that the movement increases resources to predominately minority schools.¹⁹² Indeed, Professor Ryan notes that plaintiff districts with a higher number of minorities experience less success in school finance litigation cases than predominately white districts.¹⁹³ Even where school finance litigation plaintiffs are successful, the remedies have resulted neither in equalized funding to schools nor a significant overhaul of the school finance system.¹⁹⁴ More significantly, the increased resources still fail to improve academic

185. Garda, Jr., *supra* note 33, at 19.

186. Daniel S. Greenspahn, *A Constitutional Right To Learn: The Uncertain Allure of Making a Federal Case Out of Education*, 59 S.C. L. REV. 755, 759 (2008).

187. *Id.*

188. Ryan, *supra* note 57, at 294 (discussing important social effect and improved academic achievement for minorities as a result of desegregation and suggesting that school finance cases should seek both racial and socioeconomic integration).

189. *Id.* at 296-97.

190. *Id.*; McUsic, *supra* note 18, at 1355-56 (discussing higher academic achievement of black students in integrated schools).

191. Ryan, *supra* note 57, at 256.

192. *Id.*

193. Professor Ryan acknowledges the complexities involved in school finance litigation and, in pointing out this statistic, he is careful to note that he only asserts correlation and not causation. Ryan, *supra* note 181, at 442-43, 455 (exploring the statistical disparities between predominantly white and predominantly minority school districts).

194. Heise, *supra* note 178, at 2438.

performance.¹⁹⁵

B. Revisiting the Appropriate Judicial Role in Structural Reform

Courts may be in the best position to facilitate cooperation among the three branches to achieve education reform.¹⁹⁶ This is not to say the role of the court is to usurp the interest of the other branches. Courts have rarely been able to solve the problems identified by structural reform litigation without the combined efforts of the political branches of government. During the apex of school desegregation, it took the cooperative efforts of all three governmental branches to overhaul the racial composition of schools.¹⁹⁷

However, the judicial ability to impose a remedy that addresses both compensable and non-compensable interests is vital to the fundamental shift so desperately needed in public education.¹⁹⁸

Professor Chayes asserts that the judiciary is in a uniquely advantageous position to address issues raised in public litigation, primarily because judges are insulated from political pressure.¹⁹⁹ This is particularly important when minority interests are at stake. The kind of political influence necessary to combat racial and economic isolation in schools is unlikely to come from those who most acutely feel its effects, as they are the constituents most often disenfranchised by the political process.²⁰⁰ Naturally, legislators are reluctant to take on issues that are politically unpopular, and likewise, the executive enforcement of regulations fluctuates according to the priorities of the administration in office.²⁰¹

Because judges are insulated from political pressure in a way that governors and state legislators are not, judges are free to engage in significant

195. *Id.* at 2446 (“[S]chools with a majority of poor students rarely, if ever, perform as well as their middle-class counterparts. This holds true even when substantial resources are provided to these schools.”).

196. Michael A. Rebell, *Poverty, “Meaningful” Education Opportunity, and the Necessary Role of the Courts*, 85 N.C. L. Rev. 1467, 1538 (2007).

197. Garda, Jr., *supra* note 33, at 14 (discussing the retreat of desegregation efforts and the return of schools to segregation).

198. *See* Thro, *supra* note 97, at 551-52.

199. Chayes, *supra* note 3, at 1307-08.

200. *See* Chemerisky, *supra* note 63, at 1600 (asserting that African Americans and Latinos do not have sufficient political power to achieve desegregation through the political process); *cf.* Victor Suthammanont, *Rebalancing the Scales: Restoring the Availability of Disparate Impact Causes of Action in Title VI Cases*, 54 N.Y.L. SCH. L. REV. 27, 37-38 (2009) (asserting that although the Court rarely uses its power to protect minorities, that power wields tremendous weight in legitimizing the interest at issue).

201. *See* Losen, *supra* note 104, at 288 (referring specifically to “enforcement of disparate impact regulations, pursuant to Title VI, [as being] highly vulnerable to administrative priorities”).

reform.²⁰² Further, although Congress sometimes restricts judicial remedies, Congress also relies on them to help shape legislative reform.²⁰³ Indeed, leaving a gap can sometimes be a part of a political maneuver by the legislature in which the legislature promotes minority interests that may be politically unpopular by leaving the courts to craft remedies that address the need.²⁰⁴ Professor Chayes describes this gap as legislative abdication; Congress sets general policy objectives then leaves open the opportunity for the court to use its discretionary powers to shape specific policies.²⁰⁵ He suggests that in cases of public litigation, where a case is brought under a statute rather than the Constitution, the court's remedial action is legitimized because it is "engaged in carrying out the legislative will."²⁰⁶

The structural injunction is distinguishable as an equitable remedy because courts can reshape a public social structure by tailoring remedies specific enough to address the situation, yet flexible enough to be modified if needed.²⁰⁷ While jurisprudence dictates that courts must respect local authority as they tailor relief, local interests must be balanced against the public interests of addressing educational disparities and desegregating schools.²⁰⁸

C. New Possibilities for Structural Relief

For courts to engage in structural reform, the challenged practice must be both broad and profound in its impact.²⁰⁹ The marked disparities in public education demand such relief, and Title VI and NCLB in particular offer opportunities for courts to exercise their equitable powers to remedy

202. See *Obhof*, *supra* note 68, at 574-75 (discussing the restraints of both governors and legislators in concentrating too much of a state's resources on a single budget issue such as education); *Rebell*, *supra* note 196, at 1538 (asserting that the judicial branch is shielded from the pressures that cause legislators "to create education finance systems that strongly disfavor poor urban and rural school systems").

203. See *Jeffries*, *supra* note 7, at 1416.

204. See, e.g., *id.* (citing authorization by the Violent Crime and Law Enforcement Act of 1994 for the Attorney General to sue for an injunction against police misconduct).

205. See *Chayes*, *supra* note 3, at 1314.

206. *Id.*

207. See *id.* at 1308-09. Chayes also asserts that the judicial process allows for relatively broad participation by those most likely to be affected by the decision and the adversarial litigation process allows for extensive fact-finding from various perspectives from the parties. *Id.*

208. See *Bd. of Educ. v. Dowell*, 498 U.S. 237, 267 (1991) (Marshall, J., dissenting) (noting the danger of elevating local control and school board autonomy over the constitutional rights of black schoolchildren).

209. See *Gilles*, *supra* note 84, at 147-48 (identifying two necessary conditions for judicially mandated structural reform—breadth and depth). Breadth requires broad socio-political consensus that an institutionalized practice has "systematically depriv[ed] individuals of constitutional rights" and depth stems from violations that are profoundly intolerable. *Id.*

educational disparities.

NCLB is widely recognized as a strategy for combating the racial achievement gap, yet the statute falls short of encouraging race-conscious implementation.²¹⁰ In December 2011, the U.S. Department of Education released for the first time guidance that districts can use to navigate the *Parents Involved*, *Grutter*, and *Gratz* decisions as they attempt to desegregate schools.²¹¹ The guidance encourages districts to first seek race-neutral approaches to desegregation, but specifically acknowledges that race-neutral strategies are not always “workable” in desegregation efforts.²¹² Importantly, it recognizes avoiding racial isolation as a compelling interest and indicates that when the race-neutral strategies are ineffective, districts may use narrowly tailored race-based strategies to combat racial isolation.²¹³ The guidance affirms Supreme Court doctrine in that it does not allow districts to target individual students on the basis of race, but instead encourages generalized approaches that apply to categories of students.²¹⁴ Relying on Justice Kennedy’s examples in the *Parents Involved* opinion,²¹⁵ the guidance suggests race-based strategies such as changing school location, adjusting school feeder patterns, redrawing attendance zones, creating magnet programs, and altering admission strategies for competitive schools.²¹⁶

Professor Dyson has suggested that the kind of strategies the Department offers are sufficiently specific and nuanced to implement race-conscious remedies under NCLB that will pass Equal Protection scrutiny.²¹⁷ Alternatively, he suggests that if the race-conscious strategies do not survive constitutional scrutiny, then race-neutral objectives that center on closing the gap between the highest and lowest achievers with a focus on “race-conscious targeted interventions and remedies” may be more judicially palatable (and require a lower standard of Equal Protection deference).²¹⁸ To pass the narrow tailoring requirements of strict scrutiny, NCLB’s sanctions, remedies, and race-

210. Joseph O. Oluwole & Preston C. Green, III, *No Child Left Behind Act, Race, and Parents Involved*, 5 HASTINGS RACE & POVERTY L.J. 271, 271-72 (2008).

211. See U.S. DEP’T OF EDUC. & U.S. DEP’T OF JUSTICE, GUIDANCE ON THE VOLUNTARY USE OF RACE TO ACHIEVE DIVERSITY AND AVOID RACIAL ISOLATION IN ELEMENTARY AND SECONDARY SCHOOLS (2011), available at <http://www2.ed.gov/about/offices/list/ocr/docs/guidance-ese-201111.pdf>.

212. *Id.* at 6.

213. *Id.* at 6-7.

214. *Id.*

215. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 789 (2007) (Kennedy, J., concurring in part and concurring in the judgment).

216. U.S. DEP’T OF EDUC. & U.S. DEP’T OF JUSTICE, *supra* note 211, at 6, 9-10, 12.

217. Maurice R. Dyson, *De Facto Segregation & Group Blindness: Proposals for Narrow Tailoring Under a New Viable State Interest in PICS v. Seattle School District*, 77 UMKC L. REV. 697 (2009).

218. *Id.* at 712.

conscious funding under the Act must incorporate a logical end.²¹⁹ Certainly, the NCLB requirements that states meet accountability provisions by 2014 offer such an end. Yet at the time of this writing twenty-four states requested and were granted waivers of NCLB academic accountability provisions, eleven states are waiting for waivers, and more waivers are inevitably on the way.²²⁰ Despite the recent waivers, the disaggregation requirements and the requirements to meet or exceed academic standards by 2014 could pressure states to address the racial disparities in achievement in a targeted way.²²¹

As OCR enforces Title VI disparate impact regulations and districts apply the recent Department guidance, the courts are likely to display a great deal of deference. Consistent with *Chevron*, courts have afforded deference to the agency's interpretation of Title VI so long as that interpretation is reasonable, and the agency has tailored its enforcement to the specific activities in which disparity is likely to result.²²² There is evidence that NCLB's accountability measures have already led courts to issue relief beyond legal damages.²²³ One example is in their approach to defining adequacy. While many courts have looked to state content standards to determine whether a state has provided its children with a constitutionally adequate level of education, most courts have carved out their own definitions of adequacy by comparing the low performing districts with those that are academically successful.²²⁴

It is beyond the scope of this article to specifically detail the ways in which courts can use their equitable powers to support the legislative call for educational reform. At the very least, however, the recent efforts of the other branches should lend potency to the structural injunction as a means for courts to promote the experimentation and reform so important to achieving equitable access to educational quality.

CONCLUSION

In rendering the decision that actualized the structural injunction, Justice Warren identified education as "perhaps the most important function of state

219. Oluwole & Green, *supra* note 210, at 301.

220. *ESEA Flexibility Requests and Related Documents*, U.S. DEP'T OF EDUC., <http://www.ed.gov/esea/flexibility/requests> (last visited Feb. 18, 2013).

221. Oluwole & Green, *supra* note 210, at 272.

222. *See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984) (setting forth a standard for deference to a government agency's interpretation of the statute it administers).

223. *See Simon-Kerr & Sturm, supra* note 78, at 111-13 (citing Abbeville County Sch. Dist. v. State, No. 93-CP-31-0169, slip op. at 158-59 (S.C. Ct. Com. Pl. Dec. 29, 2005) (requiring the state of South Carolina to provide preschool in the plaintiff districts) and Moore v. State, No. 3AN-04-9756, slip op. at 179 (Alaska Super. Ct. 2007) (requiring that the Alaska legislature increase accountability and oversight of the local school districts).

224. Tang, *supra* note 76, at 1215-16.

and local governments.”²²⁵ It would be dangerous to posit that the judicial branch is the branch most appropriately assigned the massive undertaking of educational structural reform; issues as nuanced as school desegregation and school finance reform require the profound attention that legislatures are most appropriately designated to address.²²⁶ Yet while some rightly cite the importance of the political accountability legislative bodies bring to educational reform, those arguments were equally convincing when southern states used federalism and states’ rights as the theoretical basis for resisting desegregation efforts.²²⁷

Schools are still separate and unequal, and whether the segregation is de jure or de facto the disparities profoundly affect educational achievement. Consequently, equitable access to high-quality education is a goal to which all three branches of government should aspire. Title VI, No Child Left Behind, and their accompanying regulations and enforcement are the manifestations of that aspiration. These recent developments have brought us to a precipice of judicial involvement in education the likes of which has not been seen in forty years. It may be that judicial involvement is the missing piece required to accomplish authentic educational equity.

225. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

226. *See Zietlow*, *supra* note 2, at 1002-03 (asserting that courts are not as politically isolated as many theorists suggest, and that where court opinions are not politicized, the reaction to them can be).

227. *See Epperson*, *supra* note 2, at 152-53.

