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Racially Integrated Education and the Role of the Federal Government

Chinh Q. Le

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RACIALLY INTEGRATED EDUCATION AND THE ROLE OF THE FEDERAL GOVERNMENT*

CHINH Q. LE**

When it comes to racial and ethnic integration in our nation's public schools, it matters significantly whether the federal government is friend or foe. This has always been the case, but it is particularly so now. More than three decades have passed since the last major federal initiative to promote school integration. Meanwhile, courts in recent years have substantially curtailed the remedies that can be achieved through school desegregation litigation and applied increasingly narrow interpretations to laws that once allowed private litigants to supplement federal government enforcement of civil rights. As a result, American public schools have witnessed two decades of resegregation and are more segregated today than they have been in over forty years. Forty percent of Latino students and nearly that same percentage of Black students attended intensely segregated schools, where ninety to one hundred percent of the population is non-White. What is more, the relationship between race and poverty continues to run deep: forty percent of Black and Latino students also attend schools of concentrated poverty, where seventy to one hundred percent of the children are poor. By contrast, only about one in thirty White students attend such schools.

This Article takes a look back at the role that the federal government has played with regard to issues of school integration and school desegregation to see how history can inform what a new administration in Washington could do to reinvigorate the cause and advance the goal of racially integrated education. After briefly reviewing the role of the federal legislative and executive branches—in initially facilitating school desegregation and then, for

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most of the past four decades, withdrawing from the gains made—this Article offers recommendations to the Obama administration for future actions. Beyond presidential leadership, the Article focuses primarily on the promise and potential of three federal entities: the Civil Rights Division of the U.S. Department of Justice, the Office for Civil Rights in the U.S. Department of Education, and the U.S. Commission on Civil Rights. It suggests both an intentional, tailored effort to develop integration-maximizing strategies to deal with the government's existing school desegregation docket, as well as an affirmative, multi-pronged effort to advance voluntary school integration initiatives, broadly defined.

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INTRODUCTION

As with most issues implicating public policy on a grand scale, when it comes to racial and ethnic integration in our nation's public schools, it matters significantly whether the federal government is friend or foe. This has always been the case, but it is particularly so

now. More than three decades have passed since the last major federal initiative to promote school integration.¹ Meanwhile, courts in recent years have applied increasingly narrow interpretations to laws that once allowed private litigants and other entities to supplement federal government enforcement of civil rights.² Indeed, in light of *Alexander v. Sandoval*,³ private litigants may no longer bring disparate impact actions under the implementing regulations of Title VI of the Civil Rights Act of 1964,⁴ a substantial shift in the law that has thrown into question long presumed private rights of action for such claims under various other federal statutes, too.⁵

Specifically with regard to the provision of equal, integrated, quality public education, here, in a nutshell, is where the nation stands: the Federal Constitution does not guarantee a fundamental right to education,⁶ let alone an equal or desegregated education.⁷

1. GARY ORFIELD & CHUNGMEI LEE, THE CIVIL RIGHTS PROJECT/*PROYECTO DERECHOS CIVILES* (UCLA), HISTORIC REVERSALS: ACCELERATING RESEGREGATION, AND THE NEED FOR NEW INTEGRATION STRATEGIES 6 n.13 (2007) [hereinafter HISTORIC REVERSALS], available at http://www.civilrightsproject.ucla.edu/research/deseg/reversals_reseg_need.pdf (describing the Emergency School Aid Act of 1972 as “[t]he last positive legislation” on the issue).

2. See, e.g., *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950–52 (2009) (heightening the otherwise liberal pleading requirements of Rule 8 of the *Federal Rules of Civil Procedure* and the initial proof required to allege a claim of supervisory liability for intentional unconstitutional discrimination); *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 623–32 (2007) (adopting a narrow reading of the time period afforded to private litigants to enforce Title VII equal-pay rights), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-12, 123 Stat. 5 (to be codified at 42 U.S.C. § 2000e-5, 29 U.S.C. § 626(d), and other scattered sections); *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 360 (2001) (holding that the Eleventh Amendment precludes state employees from suing their employers to recover money damages for discrimination in violation of Title I of the Americans with Disabilities Act); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 66–67 (2000) (holding that the Eleventh Amendment precludes state employees from suing their employers in federal court for money damages under the Age Discrimination in Employment Act of 1967).

3. 532 U.S. 275 (2001).

4. *Id.* at 293.

5. See, e.g., John Arthur Laufer, Note, *Alexander v. Sandoval and Its Implications for Disparate Impact Regimes*, 102 COLUM. L. REV. 1613, 1641–48 (2002) (raising the concern that *Sandoval* could be applied more broadly to call into question Congress’s ability under Section 5 of the Fourteenth Amendment to proscribe state action with disparate impact on protected classes). *But see*, e.g., Sam Spital, Note, *Restoring Brown’s Promise of Equality After Alexander v. Sandoval: Why We Can’t Wait*, 19 HARV. BLACKLETTER L.J. 93, 111–20 (2003) (arguing that private litigants may still be able to bring disparate impact claims under 42 U.S.C. § 1983); Bradford C. Mank, *Using Section 1983 to Enforce Title VI’s Section 602 Regulations*, 49 U. KAN. L. REV. 321, 323–24 (2001) (exploring possibility of same).

6. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973). Although there is no fundamental right to education, states may not outright exclude undocumented, non-citizen children from access to free public education. *Plyler v. Doe*,

School districts or states once subject to court-ordered desegregation may emerge from their long history of de jure acts after just a few years of reasonable compliance with formal orders, even if the compliance resulted in only nominal desegregation.⁸ And even voluntary efforts to provide some modicum of racial and ethnic integration, once encouraged by the courts, are now constitutionally suspect.⁹ In other words, at least for the time being, the courts are at best only loosely enforcing (and hardly expanding) education rights, so executive and congressional leadership is sorely needed if we as a nation are going to realize the ideals articulated in *Brown v. Board of Education*¹⁰ more than a half century ago.

And these times demand leadership. In the most recent of a series of reports by the Civil Rights Project/*Proyecto Derechos Civiles* on the subject, the organization's co-director, Gary Orfield, tells us American public schools have witnessed two consecutive decades of resegregation and are more segregated today than they have been in over forty years.¹¹ Even though public school enrollment overall is more racially and ethnically diverse than ever, this diversity has failed to translate into diverse schools. Instead, severe racial isolation remains commonplace. In the academic year spanning 2006–2007, forty percent of Latino students and nearly that same percentage of

457 U.S. 202, 210 (1982) (holding that undocumented, non-citizens are entitled to equal protection under the Fourteenth Amendment because they are “‘person[s]’ in any ordinary sense of that term”).

7. It did not take long for the federal government or the courts to arrive at this conclusion. *See, e.g.*, The Civil Rights Act of 1964, 42 U.S.C. § 2000c(b) (2006) (“‘Desegregation’ means the assignment of students to public schools and within such schools without regard to their race, color, religion, sex, or national origin, but ‘desegregation’ shall not mean the assignment of students to public schools in order to overcome racial imbalance.”); § 2000c-6(a) (authorizing the Attorney General to institute federal suits but stopping short of empowering any federal official or court from issuing “any order seeking to achieve a racial balance in any school”); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971) (finding that school districts are not required to achieve racial balance in absence of constitutional violation).

8. *See, e.g.*, *Bd. of Educ. v. Dowell*, 498 U.S. 237, 242, 249–50 (1991) (permitting the release of school districts from court supervision, regardless of continuing racially segregated enrollment patterns, upon a showing of good faith compliance with desegregation orders for a reasonable period of time and the elimination of the vestiges of segregation to the extent practicable).

9. *See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720–35, 747–48 (2007) (holding that race-conscious, voluntary school integration plans must satisfy strict scrutiny and invalidating two such plans).

10. 347 U.S. 483 (1954).

11. GARY ORFIELD, THE CIVIL RIGHTS PROJECT/*PROYECTO DERECHOS CIVILES* (UCLA), *REVIVING THE GOAL OF AN INTEGRATED SOCIETY: A 21ST CENTURY CHALLENGE* 3, 8 (2009) [hereinafter *REVIVING THE GOAL*], http://www.civilrightsproject.ucla.edu/research/deseg/reviving_the_goal_mlk_2009.pdf.

Black students attended “intensely segregated schools,” where ninety to one hundred percent of the population is non-White.¹² These patterns of segregation, once perceived as a largely urban phenomenon—with almost two out of every three Black and Latino students in the nation’s major cities attending these intensely segregated schools—have been replicating themselves in the suburbs as well.¹³ And, the relationship between race and poverty continues to run deep¹⁴: forty percent of Black and Latino students also attend schools of concentrated poverty, where seventy to one hundred percent of the children are poor.¹⁵ By contrast, only about one in thirty White students attend such schools.¹⁶

For eight years, the civil rights community did not shy away from criticizing George W. Bush for the failure of his administration to place much if any of a priority on promoting racial integration in public schools.¹⁷ The election of Barack Obama, a former community organizer and constitutional law professor, not to mention the nation’s first biracial/African American President, has renewed hope in some that civil rights generally—and issues of educational equity and integration in particular—will receive greater attention from the top. One should be only cautiously optimistic, however. If his experience in office to date is any indication, President Obama’s attention is spread thin across many fronts, with the financial and credit crisis on the one hand, and the continuing conflicts in Iraq and Afghanistan on the other, not to mention his ambitious intentions to expand and improve health care, stimulate job growth, and “green”

12. *Id.* at 10–12.

13. See GARY ORFIELD & ERICA FRANKENBERG, THE CIVIL RIGHTS PROJECT/*PROYECTO DERECHOS CIVILES* (UCLA), THE LAST HAVE BECOME THE FIRST: RURAL AND SMALL TOWN AMERICA LEAD THE WAY ON DESEGREGATION 7 (2008), <http://www.civilrightsproject.ucla.edu/research/deseg/lasthavebecomefirst.pdf>.

14. See generally GARY ORFIELD & CHUNGMEI LEE, THE CIVIL RIGHTS PROJECT (HARVARD), WHY SEGREGATION MATTERS: POVERTY AND EDUCATIONAL INEQUITY (2005), http://www.civilrightsproject.ucla.edu/research/deseg/Why_Segreg_Matters.pdf (describing the inextricable link between race and poverty and their impact on educational opportunities).

15. REVIVING THE GOAL, *supra* note 11, at 15.

16. *Id.*

17. See generally CITIZEN’S COMM’N ON CIVIL RIGHTS, THE EROSION OF RIGHTS: DECLINING CIVIL RIGHTS ENFORCEMENT UNDER THE BUSH ADMINISTRATION (William L. Taylor et al. eds., 2007) [hereinafter THE EROSION OF RIGHTS], available at http://www.americanprogress.org/issues/2007/03/pdf/civil_rights_report.pdf (criticizing the administration’s civil rights record under President George W. Bush (“Bush II”)); LEADERSHIP CONFERENCE ON CIVIL RIGHTS EDUC. FUND, THE BUSH ADMINISTRATION TAKES AIM: CIVIL RIGHTS UNDER ATTACK (2003) [hereinafter THE BUSH ADMINISTRATION TAKES AIM], available at http://www.civilrights.org/publications/reports/taking_aim/bush_takes_aim.pdf (same).

the nation's energy infrastructure, while at the same time reducing the federal deficit. It will be incumbent upon civil rights advocates, therefore, to keep the Obama administration focused on educational equity. In any event, high expectations are often followed by great disappointment, so prudence demands tempered expectations, even in this age of hope.

With that caveat, this Article takes a look back at the role that the federal government has played with regard to issues of school integration (or, for most of the past, school desegregation) to see how history can inform what a new administration in Washington could do to reinvigorate the cause and advance the goal of racially integrated education. The school desegregation story that many of us—especially the lawyers and law students among us—know best is the one that follows the *federal courts' role* in implementing the powerful but all-too vague mandate of *Brown*.¹⁸ But there is a parallel and interwoven tale that involves the political branches of government too,¹⁹ and the purpose of revisiting that tale is threefold. First, it helps to explain where the nation currently stands and how it got there. Second, it serves as a reminder that, as important as the federal judiciary has been in shaping the opportunities for meaningful racial and ethnic integration in the nation's public schools, leadership from the President and Congress has had as much if not more of an impact on those opportunities than the court decisions. Third, it highlights the legal and policy tools available and the federal agencies that once were and may once again become allies to the cause under an administration that is willing to make integration a priority.

This Article proceeds as follows. Part I begins with a brief review of how the political branches of the federal government have dealt

18. This is, after all, what is described in the constitutional law casebooks, *see, e.g.*, WILLIAM COHEN, JONATHAN D. VARAT & VIKRAM AMAR, CONSTITUTIONAL LAW: CASES AND MATERIALS 723–49 (12th ed. 2005); KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 487–500, 552–61 (16th ed. 2007), and what makes for a good short history of the law on school desegregation. *See, e.g.*, Erwin Chemerinsky, *The Segregation and Resegregation of American Public Education*, in SCHOOL RESEGREGATION: MUST THE SOUTH TURN BACK? 29, 29–47 (John Charles Boger & Gary Orfield eds., 2005) [hereinafter SCHOOL RESEGREGATION]; Erica Frankenberg & Chinh Q. Le, *Desegregation*, in 1 BATTLEGROUND: SCHOOLS 179, 179–87 (Sandra Mathison & E. Wayne Ross eds., 2008); James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249, 260–66 (1999).

19. *See generally* 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 (2008) (discussing the influence and role of the executive branch, and particularly the Office for Civil Rights of the Department of Education, in shaping civil rights policies affecting school desegregation).

with issues of school integration and desegregation under the first nine presidential administrations after *Brown*. Part II then continues that inquiry for the past eight years under President George W. Bush. These first two Parts highlight the most relevant pieces of federal legislation relating to education and civil rights that Congress has passed over the past fifty-plus years. To inform recommendations made in the latter portions of this Article, however, these two Parts focus in particular on the creation, development, and role of three federal government entities: (1) the Civil Rights Division of the Department of Justice; (2) the Office for Civil Rights (“OCR”) in the Department of Education, and its predecessor, in the Department of Health, Education, and Welfare (“HEW”); and (3) the U.S. Commission on Civil Rights. Finally, Part III contains recommendations for the current administration. The suggestions deal both with the federal government’s existing school desegregation docket, as well as longer-term, affirmative strategies to advance voluntary school integration, broadly defined.

I. 1954 TO 2000

The story of school desegregation, as told through key Supreme Court decisions, is now familiar. *Brown v. Board of Education* declared segregated schools unconstitutional in a short, unanimous, and powerful opinion by Chief Justice Warren.²⁰ A year later, the Court issued a second decision in the same case, known as *Brown II*,²¹ famously ordering that desegregation proceed “with all deliberate speed,”²² which for nearly a decade essentially meant with little speed or urgency at all.²³ Then came *Green v. County School Board of New Kent County*,²⁴ invalidating ineffective “freedom of choice” plans and demanding that the vestiges of segregation be removed from every facet of a school system “root and branch.”²⁵ In 1969, Warren Burger succeeded Earl Warren as Chief Justice.²⁶ What followed was the controversial ruling of *Swann v. Charlotte-Mecklenburg Board of Education*,²⁷ which concluded that courts could, if need be, order

20. *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954).

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

22. *Id.* at 301.

23. See *infra* notes 48–50 and accompanying text (describing miniscule desegregation progress made in first ten years after *Brown*).

24. 391 U.S. 430 (1968).

25. *Id.* at 438, 441.

26. See JAMES T. PATTERSON, *BROWN V. BOARD OF EDUCATION: A CIVIL RIGHTS MILESTONE AND ITS TROUBLED LEGACY* 147–49 (2001).

27. 402 U.S. 1 (1971).

busing to achieve desegregated schools.²⁸ *Keyes v. School District No. 1, Denver, Colorado*,²⁹ ordered desegregation in the West,³⁰ where findings of de jure segregation were harder to come by than in the South; it was also the first notable Supreme Court case involving the desegregation of Latinos.³¹

It turned out that *Swann* was the high water mark and *Keyes* arguably the turning point for the Burger Court. From there, it issued *Milliken v. Bradley*,³² which held that courts lacked the authority to order interdistrict remedies in the absence of a finding of an interdistrict constitutional violation.³³ After *Milliken*, the Supreme Court dealt with issues of relatively lesser moment over roughly the next decade and a half,³⁴ not the least of which was the question of what to afford plaintiff children for whom a desegregative remedy, of the sort sought in *Milliken*, was unavailable.³⁵ In the early 1990s, a divided Rehnquist Court issued three decisions that, taken together, explained that school desegregation litigation must come to an end and described—in rough terms—how school districts could achieve that finality, also known as “unitary status.”³⁶ (A school system attains “unitary status” when a court determines that it has satisfied its constitutional obligations and dissolves all desegregation orders

28. *Id.* at 30.

29. 413 U.S. 189 (1973).

30. *Id.* at 213–14.

31. Kristi L. Bowman, Note, *The New Face of School Desegregation*, 50 DUKE L.J. 1751, 1777–79 (2001).

32. 418 U.S. 717 (1974).

33. *Id.* at 745.

34. See, e.g., *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 452–55 (1979) (finding that evidence that a school board’s purposeful and effective maintenance of all-Black schools gave rise to a prima facie case of intentional discrimination justifying a systemwide remedy); *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 419–20 (1977) (holding that if there was no finding of systemwide liability, a judicial remedy had to be tailored to address only those schools that had been affected adversely by specific prior de jure acts); *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 434–35 (1976) (finding that a district court exceeded its remedial authority when it required a school district to make annual readjustments of attendance zones to maintain desegregated facilities).

35. For instance, three years after *Milliken*, the Supreme Court granted certiorari again in the same case, this time to address the questions of whether a district court may, as part of a desegregation decree, order compensatory or remedial educational programs for schoolchildren subjected to past acts of de jure segregation and whether it can require state officials responsible for constitutional violations to bear part of the costs of those programs. *Milliken v. Bradley (Milliken II)*, 433 U.S. 267, 279 (1977) (affirming district court’s order, on remand from *Milliken*, of remedial and compensatory programs).

36. See *Missouri v. Jenkins*, 515 U.S. 70, 100–02 (1995); *Freeman v. Pitts*, 503 U.S. 467, 490–91 (1992); *Bd. of Educ. of Okla. City Pub. Sch. v. Dowell*, 498 U.S. 237, 247–50 (1991).

related to that system.)³⁷ Lastly, we come to the 2007 decision of *Parents Involved in Community Schools v. Seattle School District No. 1*,³⁸ which dealt with school desegregation's cousin, sometimes dubbed "voluntary integration."³⁹ It held that, in the absence of a court order, race-conscious student assignment plans to increase integration or reduce racial isolation that school districts adopt by choice are subject to strict scrutiny and must comply with various difficult (but ultimately vague) legal requirements.⁴⁰

With that story in the background, let us turn to the impact that the other two branches of the federal government have had on school desegregation and integration. With little help from the federal government, *Brown* (and *Brown II*) had almost no immediate effect on the racial composition of America's schools.⁴¹ In 1956, 101 Southern congressmen and senators signed a "Southern Manifesto," decrying the Supreme Court's decision and pledging "to use all lawful means to bring about [its] reversal."⁴² President Eisenhower himself failed to express support for school desegregation, and it was rumored that he "deplored *Brown*'s holding and felt that integration should move more slowly."⁴³ Nevertheless, in the face of strong opposition, Eisenhower proposed, and Congress managed to pass, the Civil Rights Act of 1957,⁴⁴ the first piece of civil rights legislation since Reconstruction. The 1957 Act was primarily designed to ensure that African Americans could exercise their right to vote.⁴⁵ But it also

37. See *Dowell*, 498 U.S. at 246, 249–50 (stating that a court can release a school system from its desegregation obligations upon a finding that it complied "in good faith" with prior court orders and that the vestiges of the prior discrimination have been eliminated "to the extent practicable").

38. 551 U.S. 701 (2007).

39. See, e.g., ANURIMA BHARGAVA, ERICA FRANKENBERG & CHINH Q. LE, NAACP LEGAL DEF. AND EDUC. FUND, INC. & THE CIVIL RIGHTS PROJECT/*PROYECTO DERECHOS CIVILES* (UCLA), STILL LOOKING TO THE FUTURE: VOLUNTARY K–12 SCHOOL INTEGRATION, MANUAL FOR PARENTS, TEACHERS, AND ADVOCATES 5 (2008), http://www.civilrightsproject.ucla.edu/research/deseg/Still_Looking_to_the%20Future_Integration_Manual.pdf.

40. See *Parents Involved*, 551 U.S. at 788–90 (Kennedy, J., concurring). Justice Kennedy provided the fifth vote, and his opinion therefore controls the reach of the Court's holding.

41. See *infra* notes 49–50 and accompanying text.

42. 102 CONG. REC. 4459–60 (1956).

43. Stephen Plass, *Exploring the Limits of Executive Civil Rights Policymaking*, 61 OKLA. L. REV. 155, 158 & n.10 (2008).

44. Pub. L. No. 85-315, 71 Stat. 634.

45. See RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* 754 (Vintage Books 1977) (1975) (describing the voting provisions as the "most important" aspects of the 1957 Civil Rights Act).

created a national U.S. Commission on Civil Rights (“Civil Rights Commission” or “Commission”), assigning it investigatory and advisory functions (and, importantly, subpoena powers), and provided for an additional Assistant Attorney General in the U.S. Department of Justice (“DOJ”), appointed by the President, who could focus exclusively on civil rights issues.⁴⁶ Later that year, the Attorney General signed an order formally creating a Civil Rights Division within DOJ, headed by an Assistant Attorney General for Civil Rights.⁴⁷

Despite the existence of that Civil Rights Division, however, DOJ generally refrained from school desegregation litigation in the first ten years after *Brown*, leaving that work to private parties—mostly lawyers from the NAACP Legal Defense and Educational Fund, Inc. (“LDF”) and their network of cooperating attorneys across the South.⁴⁸ Without help from the federal government, and with the courts refusing to define “all deliberate speed,” *Brown*’s tenth anniversary was hardly an occasion to celebrate: there had been some token desegregation in the South, but the main story to date was one of massive resistance and minimal pressure from the federal government’s three branches.⁴⁹ By 1964, a tiny fraction of Southern Blacks—in the range of 1.2 to 2.3%, depending whom you asked and how you counted it—were attending schools with White students.⁵⁰

46. §§ 101–105, 71 Stat. at 634–36 (setting up the Commission); § 111, 71 Stat. at 637 (creating the Assistant Attorney General position). President Truman laid the foundation for the Commission’s creation when he created a fifteen-member Committee on Civil Rights in 1946. See Jocelyn C. Frye et al., *The Rise and Fall of the United States Commission on Civil Rights*, 22 HARV. C.R.-C.L. L. REV. 449, 452–53 (1987).

47. Exec. Order No. 155-57, 22 Fed. Reg. 10,310 (Dec. 20, 1957); David L. Norman, *The Strange Career of the Civil Rights Division’s Commitment to Brown*, 93 YALE L.J. 983, 983 n.2 (1984) (citing the order).

48. Norman, *supra* note 47, at 984.

49. J. HARVIE WILKINSON III, *FROM BROWN TO BAKKE, THE SUPREME COURT AND SCHOOL INTEGRATION: 1954–1978*, at 78–102 (1979).

50. Compare STEPHAN THERNSTROM & ABIGAIL THERNSTROM, *AMERICA IN BLACK AND WHITE* 105 (1997) (“[I]n the eleven ex-Confederate states . . . , a mere 1.2% of black public school students attended schools that had *any* white pupils at all.”), LEADERSHIP CONFERENCE ON CIVIL RIGHTS EDUC. FUND, *LONG ROAD TO JUSTICE: THE CIVIL RIGHTS DIVISION AT 50*, at 13 (2007) [hereinafter *LONG ROAD TO JUSTICE*], <http://www.civilrights.org/publications/reports/long-road/long-road-to-justice.pdf> (stating that 1.2% of Southern Blacks attended schools with Whites), and James R. Dunn, *Title VI, the Guidelines, and School Desegregation in the South*, 53 VA. L. REV. 42, 42 & n.3 (1967) (citing 1.17% of Black students in schools with Whites, with an explanation in the footnote of how even this percentage is deceptively high), with WILKINSON, *supra* note 49, at 102 (stating that 2.3% of Southern Blacks attended schools with Whites), and Comment, *The Courts, HEW, and Southern School Desegregation*, 77 YALE L.J. 321, 322 (1967) (stating that 2.3% of Southern Blacks were attending desegregated schools).

Despite President Kennedy's reportedly reluctant commitment to civil rights,⁵¹ his leadership paved the way for the most comprehensive civil rights legislation the nation had seen in nearly a century.⁵² A year after Kennedy sent it to Congress, the Civil Rights Act of 1964 ("1964 Act")⁵³ became law, although sadly, it was left to his successor, President Lyndon B. Johnson, to be signed.⁵⁴ Remarkable in both design and scope, the 1964 Act irreversibly enmeshed the federal government in the law and politics of school desegregation.

Three provisions of the 1964 Act are particularly relevant in this regard. First, Title IV authorized the Attorney General to initiate desegregation litigation against school districts and states upon receipt of a written complaint by aggrieved individuals who could not pursue the claim on their own for reasons of cost, safety, employment, or other such concerns.⁵⁵ Second, Title VI prohibited discrimination on the basis of race, color, and national origin in federally assisted programs.⁵⁶ As applied to public schools, the vast majority of which received some amount of federal funds,⁵⁷ it made discrimination not just illegal but practically and economically difficult by withholding federal funds from schools that did not comply. Finally, Title XI authorized the Attorney General to intervene in existing civil rights lawsuits brought by private parties under the Equal Protection Clause of the Fourteenth Amendment by certifying that the case is of general public importance.⁵⁸ Several commentators have described the law as taking a "carrot and stick" approach to civil rights enforcement, with

51. See HUGH DAVIS GRAHAM, *THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY 1960-1972*, at 65-67 (1990); CHARLES WHALEN & BARBARA WHALEN, *THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT* 16 (1985).

52. See KLUGER, *supra* note 45, at 758-59.

53. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C.).

54. See KLUGER, *supra* note 45, at 759.

55. § 407, 78 Stat. at 248 (codified as amended at 42 U.S.C. § 2000c-6 (2006)). Title IV also established federal grants to state and local agencies to assist them in eliminating school segregation. § 405, 78 Stat. at 247-48 (codified as amended at 42 U.S.C. § 2000c-4 (2006)).

56. §§ 601-605, 78 Stat. at 252-53 (codified at 42 U.S.C. §§ 2000d-2000d-4 (2006)); see also Dunn, *supra* note 50, at 45-50 (describing the legal framework and background of Title VI).

57. It was especially true that the majority of public schools received federal funds after Congress passed the Elementary and Secondary Education Act of 1965 the following year, which infused more federal dollars into local school systems serving low-income families and students with special needs. Pub. L. No. 89-10, 79 Stat. 27 (codified as amended at 20 U.S.C. §§ 6301-6578 (2006)).

58. § 902, 78 Stat. at 266 (codified at 42 U.S.C. § 2000h-2 (2006)).

the offer of funding for compliant school districts as the carrot, and litigation against noncompliant ones as the stick.⁵⁹

Enforcement of Title VI's ban on the use of federal funds for discriminatory behavior was entrusted to the U.S. Department of Health, Education, and Welfare ("HEW") in the first instance.⁶⁰ HEW was authorized to investigate complaints, conduct compliance reviews, and initiate enforcement proceedings against school districts with the possibility of terminating federal funding.⁶¹ In exercising these duties, HEW played a key role in developing legal standards governing school desegregation. In 1965, it issued implementing regulations and desegregation guidelines under Title VI.⁶² Because these initial guidelines "primarily relied on freedom-of-choice plans and the good faith efforts of local officials"⁶³ and did not require any specific desegregation results, they were not terribly controversial in the South.⁶⁴ The following year, however, HEW released more aggressive revised guidelines that reflected a recognition that freedom of choice plans were ineffective and demanded actual results.⁶⁵ Although the second set of guidelines elicited substantial opposition from Southern leaders, the Supreme Court ultimately gave the guidelines implicit approval when it invalidated the freedom of choice plan in *Green*, and HEW gained legitimacy as a desegregation enforcement agency that the courts were willing to back.⁶⁶

59. ROSEMARY C. SALOMONE, *EQUAL EDUCATION UNDER LAW: LEGAL RIGHTS AND FEDERAL POLICY IN THE POST-BROWN ERA* 4 (1986); see also GARY ORFIELD, *THE RECONSTRUCTION OF SOUTHERN EDUCATION: THE SCHOOLS AND THE 1964 CIVIL RIGHTS ACT* 46, 77 (1969) (describing the role of federal funding post-*Brown*).

60. 29 Fed. Reg. 16,298 (Dec. 4, 1964); General Statement of Policies Under Title VI of the Civil Rights Act of 1964, 45 C.F.R. pt. 181 (1966); see SALOMONE, *supra* note 59, at 63; *The Courts, HEW, and Southern School Desegregation*, *supra* note 50, at 322. For a more thorough discussion of OCR over the past four decades, see Epperson, *supra* note 19, at 154-73.

61. See 45 C.F.R. pt. 181 (1966). For a thorough history of the development of the HEW guidelines, see ORFIELD, *supra* note 59, at 57-101.

62. See SALOMONE, *supra* note 59, at 63; Epperson, *supra* note 19, at 154-55.

63. SALOMONE, *supra* note 59, at 64.

64. See Dunn, *supra* note 50, at 44.

65. See *id.* (citing U.S. OFFICE OF EDUC., DEP'T OF HEALTH, EDUC. & WELFARE, *REVISED STATEMENT OF POLICIES FOR SCHOOL DESEGREGATION PLANS UNDER TITLE VI OF THE CIVIL RIGHTS ACT OF 1964* (Mar. 1966)).

66. See WILKINSON, *supra* note 49, at 102-08. HEW's guidelines were also incorporated into federal court orders, giving them additional credence and weight. *Id.* at 107, 111-14 (citing and discussing various decisions of the U.S. Court of Appeals for the Fifth Circuit in which the court deferred or referred to the guidelines, including *United States v. Jefferson County Bd. of Educ.*, 380 F.2d 385 (5th Cir. 1967) (per curiam)); Dunn, *supra* note 50, at 53-87.

In just a few short years, primarily under the leadership of the Johnson administration, the combined enforcement efforts of HEW and the Civil Rights Division of DOJ transformed public education in the South. Between 1965 and 1970, HEW, initially independently, and later through its Office for Civil Rights ("OCR"), which was created in 1967,

brought some 600 administrative proceedings against noncomplying school districts. In the first year, the Department's enforcement efforts resulted in movement toward desegregation in every rural school district. In 1966, the agency focused on faculty desegregation and made its first moves beyond token desegregation of students. In 1968, rural southern schools were put on notice that they must complete the desegregation process by the fall of 1969. By the end of 1968, more than 200 fund terminations had been ordered under Title VI, all of these against southern school districts.⁶⁷

The Civil Rights Division found itself equally busy during these years. Together with HEW, it "developed a joint strategy combining administrative enforcement of Title VI [by HEW] . . . with Justice Department litigation against large numbers of school systems."⁶⁸ In 1966 alone, the government initiated fifty-six school desegregation cases,⁶⁹ and through the sixties, the number of suits against school districts exceeded 500.⁷⁰ Lawyers at DOJ also developed the concept of the statewide desegregation suit, which allowed quicker access to broad relief by attacking issues of racial segregation and discrimination at the state (rather than individual district) level.⁷¹

What a difference it made to have so much of the federal government's resources brought to bear on school desegregation, even if only for those few years. Whereas just a fraction of Southern Black students attended schools with White students in 1964, just six years later, the South boasted the most integrated schools in the

67. SALOMONE, *supra* note 59, at 65.

68. Brian K. Landsberg, *The Federal Government and the Promise of Brown*, in *BROWN V. BOARD OF EDUCATION: THE CHALLENGE FOR TODAY'S SCHOOLS* 27, 30 (Ellen Condliffe Lagemann & Lamar P. Miller eds., 1996).

69. LONG ROAD TO JUSTICE, *supra* note 50, at 14.

70. KLUGER, *supra* note 45, at 759.

71. Norman, *supra* note 47, at 987. With statewide suits, DOJ could obtain relief on certain issues for all the offending school districts within a state without having to file separate lawsuits against each individual district.

country.⁷² By 1970, 33.1% of Black students in the South attended schools where the majority of students were White.⁷³ Nationally, in that same year, the typical Black student attended a school that was thirty-two percent White,⁷⁴ and although the Supreme Court had yet to issue a ruling finding an affirmative duty to desegregate with regard to Latino students at that point,⁷⁵ the typical Latino student attended a school that was 43.8% White.⁷⁶ Despite less active enforcement (and even resistance to desegregation) over the next decade and a half, the progress that had been made was resilient and continued on an upward trajectory into the latter half of the 1980s.

President Johnson did not run for a second full term in 1968, and President Richard M. Nixon's election and successful exploitation of the "Southern Strategy"⁷⁷ that year marked a major shift in the federal government's role in school desegregation litigation and civil rights enforcement. A staunch opponent of busing, President Nixon and his political appointees essentially ended the federal government's cooperation with private advocacy groups like LDF and brought a swift end to many of the initiatives of the prior administration. HEW phased out its Title VI fund-withholding work, allowing discriminating school districts to continue receiving federal funds.⁷⁸ This "benign neglect"⁷⁹ stance led to LDF filing a federal lawsuit alleging that HEW failed to execute on its duty to enforce Title VI in *Adams v. Richardson*,⁸⁰ a lawsuit that LDF won but that also long outlived Nixon's tenure in office.⁸¹ In the first year of the Nixon presidency, HEW and new top political officials at DOJ

72. GARY ORFIELD & JOHN T. YUN, THE CIVIL RIGHTS PROJECT (HARVARD), RESEGREGATION IN AMERICAN SCHOOLS 12 (1999), http://www.civilrightsproject.ucla.edu/research/deseg/Resegregation_American_Schools99.pdf.

73. *Id.* at 13.

74. *Id.* at 14.

75. See *supra* notes 29–31 and accompanying text.

76. ORFIELD & YUN, *supra* note 72, at 14.

77. Briefly put, Nixon's electoral strategy was to exploit racial divisions by relying on growing White support for the Republican Party in the South, fueled by White resentment to the expansion of rights for African Americans and other racial minorities. See KLUGER, *supra* note 45, at 763; James Boyd, *Nixon's Southern Strategy, 'It's All in the Charts'*, N.Y. TIMES, May 17, 1970, § 5 (Magazine), at 25.

78. KLUGER, *supra* note 45, at 764–65; SALOMONE, *supra* note 59, at 66.

79. The phrase "benign neglect" has been attributed to Daniel Patrick Moynihan. KLUGER, *supra* note 45, at 765.

80. 356 F. Supp. 92 (D.D.C.), *aff'd in part and modified in part*, 480 F.2d 1159 (D.C. Cir. 1973).

81. See *infra* notes 101–02 and accompanying text. For a more detailed history of the *Adams* litigation in the early years, see STEPHEN C. HALPERN, ON THE LIMITS OF THE LAW: THE IRONIC LEGACY OF TITLE VI OF THE 1964 CIVIL RIGHTS ACT 95–127 (1995).

intervened in an ongoing matter involving some thirty Mississippi school districts to seek a delay in the implementation of desegregation plans that were set to take effect that school year.⁸² This move “provoked revolt and resignation within the ranks of the Justice Department”⁸³ and prompted the Supreme Court to reverse the grant of additional time and declare, in no uncertain terms, that “the obligation of every school district is to terminate dual school systems at once and to operate now and hereafter only unitary schools.”⁸⁴

President Nixon took his anti-busing message to Congress as well. He tried on several occasions to have an anti-busing provision included as part of the Emergency School Aid Act (“ESAA”),⁸⁵ which authorized federal funds to support local school desegregation efforts.⁸⁶ He failed in his initial attempts but ultimately succeeded two years later, when Congress reconsidered and reauthorized ESAA; the legislation included a ban on the use of federal monies for busing “to overcome racial imbalance” or for transportation that threatens the health or education of students.⁸⁷ Although President Nixon never realized his vision of a constitutional amendment that would have banned busing altogether,⁸⁸ he did manage to convince Congress to pass the Equal Educational Opportunities Act of 1974,⁸⁹ which set forth the federal government’s policy favoring neighborhood schools and rejecting racial balance as the goal of school desegregation.⁹⁰ Fueled by the controversial research and testimony of James Coleman⁹¹ on the relationship between desegregation and “white

82. WILKINSON, *supra* note 49, at 119; Norman, *supra* note 47, at 986.

83. WILKINSON, *supra* note 49, at 119; *see also* KLUGER, *supra* note 45, at 764 (noting that the Nixon administration’s policy toward school desegregation was obstructionist); LONG ROAD TO JUSTICE, *supra* note 50, at 14 & n.23 (noting that the Assistant Attorney General tried to delay integration plans); James P. Turner, *Used and Abused: The Civil Rights Division*, WASH. POST, Dec. 14, 1997, at C1 (indicating that many lawyers within the Justice Department did not appreciate political interference).

84. *Alexander v. Holmes County Bd. of Educ.*, 396 U.S. 19, 20 (1969) (per curiam).

85. Pub. L. No. 92-318, §§ 701–720, 86 Stat. 235, 354–71 (1972) (repealed 1978).

86. *Id.*

87. SALOMONE, *supra* note 59, at 60 (citing 20 U.S.C. § 1652(a) (Supp. 1984)).

88. Gary Orfield, *Turning Back to Segregation*, in DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF *BROWN V. BOARD OF EDUCATION* 1, 13 (Gary Orfield & Susan E. Eaton eds., 1996); Richard M. Nixon, Remarks on School Busing in Connection with the Education Amendments of 1972 (Jun. 23, 1972), in THE AMERICAN PRESIDENCY PROJECT (John T. Woolley & Gerhard Peters, archivists), <http://www.presidency.ucsb.edu/ws/?pid=3474>.

89. Pub. L. No. 93-380, 88 Stat. 514 (codified at 20 U.S.C. §§ 1701–1758 (2006)).

90. §§ 202–206, 88 Stat. at 514–16 (codified at 20 U.S.C. §§ 1701–1705 (2006)).

91. James Coleman was a prominent social scientist who, in 1966, had submitted a widely-publicized report to the U.S. Office of Education suggesting that racial

flight,” Congress continued over the next several years to add symbolic provisions and amendments to various other education laws that placed similar limitations on busing.⁹²

Nixon and his close advisors might have had an even greater impact on the course of school desegregation had it not been for Watergate, which reportedly “sapped” the “political energy” from his administration.⁹³ What followed, according to one former career Civil Rights Division attorney, was “a kind of pax Watergate in Nixon’s final decline through the entire Ford administration.”⁹⁴

President Ford’s relatively brief administration was not particularly memorable when it came to school desegregation policy. While not necessarily a leader on the issue, he was also not known to hold a position as aggressively oppositional to desegregation as Nixon.⁹⁵ In dealing with the violence that broke out over desegregation in Boston in 1974, for example, President Ford responded “by speaking equivocally and acting reluctantly,” condemning the violence but offering little in terms of substantive direction.⁹⁶ Many view Ford’s greatest contributions to education law to be the passage of the Education for All Handicapped Children Act of 1975⁹⁷ (the predecessor to the Individuals with Disabilities Education Act⁹⁸) and the promulgation of regulations under Title IX

desegregation positively affected the academic performance of Black students and questioning whether expanding resources in racially isolated schools alone would significantly impact Black achievement. See PATTERSON, *supra* note 26, at 133–36. His subsequent research, released in 1975, controversially linked desegregation efforts to the flight of White parents and students from integrated schools, causing “considerable stir” among civil rights advocates and opponents alike. *Id.* at 175; see GEORGE R. METCALF, FROM LITTLE ROCK TO BOSTON: THE HISTORY OF SCHOOL DESEGREGATION 245–46 (1983).

92. SALOMONE, *supra* note 59, at 61–62 (citing various statutes with anti-busing provisions).

93. Turner, *supra* note 83.

94. *Id.*

95. MARY FRANCES BERRY, AND JUSTICE FOR ALL 140–41 (2009).

96. See *id.* at 143–45; Lawrence J. McAndrews, *Missing the Bus: Gerald Ford and School Desegregation* 27 PRESIDENTIAL STUD. Q. 791, 791 (1997); Gerald Ford, Remarks on Boston School Desegregation Violence (Oct. 12, 1974), in THE AMERICAN PRESIDENCY PROJECT (John T. Woolley & Gerhard Peters, archivists), <http://www.presidency.ucsb.edu/ws/?pid=4457>.

97. Pub. L. No. 94-142, 89 Stat. 773 (codified as amended at 20 U.S.C. §§ 1400–1419 (2006)).

98. 20 U.S.C. §§ 1400–1482 (2006).

of the Education Amendments of 1972 relating to sex discrimination in education programs.⁹⁹ School desegregation was not on the list.

The Carter administration, which came to power in 1977, showed much promise on school desegregation issues in its early days. Carter's appointments to key civil rights positions included experienced civil rights advocates and litigators,¹⁰⁰ suggesting that the issue would take priority under his watch. But things quickly turned sour. LDF revived the *Adams* litigation, accusing Carter's OCR of failing to fulfill its duties and comply with past orders, and that case was consolidated with others involving similar allegations against OCR.¹⁰¹ The parties reached a settlement delineating the time frame required for OCR to resolve complaints in December 1977, but, by then, Congress had passed the so-called Eagleton-Biden Amendment to the Civil Rights Act of 1964.¹⁰² Like other anti-busing laws that preceded it, the Eagleton-Biden Amendment placed limitations on where students could be assigned.¹⁰³ Equally important, it also curtailed the kind of relief that OCR could order through administrative action.¹⁰⁴ As a result, OCR and DOJ under the Carter administration regularly had to delay enforcement in school desegregation matters to negotiate their relationship to one another, limiting their effectiveness and efficiency.¹⁰⁵ Despite these setbacks, however, lawyers from the Civil Rights Division were able to secure a rare, post-*Milliken* decision ordering an interdistrict remedy in

99. 34 C.F.R. pt. 106 (2008); see Michelle R. Davis, *Ford's Legacy to Include Special Education Law He Signed Despite Worries*, EDUC. WEEK, Jan. 3, 2007, http://www.edweek.org/ew/articles/2007/01/03/18ford_web.h26.html.

100. Here are a few of them: Carter appointed Drew S. Days III, a prominent Black civil rights attorney formerly affiliated with LDF, as the Assistant Attorney General for Civil Rights, and Joseph Califano, Johnson's domestic and social affairs advisor, to head HEW. Califano had an all-star cast in OCR: David S. Tatel, a prominent civil rights attorney and former director of the Lawyers' Committee for Civil Rights Under Law, was its director; Cynthia G. Brown, a former OCR attorney under Johnson and a veteran civil rights advocate with the Lawyers' Committee and the Children's Defense Fund, served as the deputy director for compliance and enforcement; and Norman J. Chachkin, who had previously worked at both LDF and the Lawyers' Committee, was the associate director for policy, planning, and research. HALPERN, *supra* note 81, at 139–40.

101. *Adams v. Califano*, 430 F. Supp. 118, 118–21 (D.D.C. 1977). The companion cases in which further relief was sought were *Brown v. Weinberger*, 417 F. Supp. 1215 (D.D.C. 1976) and *Women's Equity Action League v. Weinberger* (WEAL), No. 74-1720 (D.D.C. Nov. 26, 1974). HALPERN, *supra* note 81, at 140–49.

102. Act of Jan. 28, 1976, Pub. L. No. 95-206, § 209, 90 Stat. 3, 22.

103. *Id.*; see SALOMONE, *supra* note 59, at 62.

104. See METCALF, *supra* note 91, at 236–40.

105. HALPERN, *supra* note 81, at 153–62.

Indianapolis,¹⁰⁶ and initiated what was to become the first case finding a link between school and housing policy in Yonkers, New York.¹⁰⁷ The Carter administration also made attempts to coordinate its housing and school desegregation work, but the efforts were cut short by the election of President Ronald Reagan.¹⁰⁸

Even more than President Nixon, President Reagan has been accused of conducting a wholesale assault on civil rights, and school desegregation was no exception.¹⁰⁹ Political operatives from the White House formulated a civil rights policy that consisted of a resistance to traditional school desegregation remedies in favor of voluntary transfer programs, magnet schools, and neighborhood schools; opposition to race-conscious remedies; minimal civil rights enforcement and federal involvement in educational policymaking; and deference to state and local control.¹¹⁰ To execute much of this vision, Reagan appointed William Bradford Reynolds, a seasoned commercial litigator with "little experience in civil rights," as Assistant Attorney General for Civil Rights.¹¹¹ Overnight, the federal government's position in ongoing litigation changed course. In scores of school desegregation cases across the country, DOJ began taking the side of school districts rather than private plaintiffs, Black communities, and civil rights groups, sometimes proposing plans that were so costly and that would undo so much progress that even the school boards opposed them.¹¹² The work of Reynolds and the Civil

106. *United States v. Bd. of Sch. Comm'rs*, 506 F. Supp. 657 (S.D. Ind. 1979), *aff'd in relevant part*, 637 F.2d 1101 (7th Cir. 1980).

107. *United States v. Yonkers Bd. of Educ.*, 624 F. Supp. 1276 (S.D.N.Y. 1985).

108. Orfield, *supra* note 88, at 16.

109. See, e.g., Drew S. Days, III, *The Court's Response to the Reagan Civil Rights Agenda*, 42 VAND. L. REV. 1003, 1008-11 (1989); Drew S. Days, III, *Turning Back the Clock: The Reagan Administration and Civil Rights*, 19 HARV. C.R.-C.L. L. REV. 309, 319-30 (1984) [hereinafter Days, *Turning Back the Clock*]; Joel L. Selig, *The Reagan Justice Department and Civil Rights: What Went Wrong*, 1985 U. ILL. L. REV. 785, 795-817. Stephen Halpern quotes leaders in the civil rights community who, at the time, expressed deep concern about Reagan's civil rights stances. HALPERN, *supra* note 81, at 192-93. Even Clarence Thomas, who had just replaced J. Clay Smith as the head of the Equal Employment Opportunity Commission, criticized DOJ at the time for setting "a negative rather than a positive agenda on civil rights." *Id.* at 193.

110. See generally Days, *Turning Back the Clock*, *supra* note 109, at 319-30 (discussing the Reagan administration's opposition to traditional methods of desegregation, particularly busing).

111. BERRY, *supra* note 95, at 191 (describing Reynolds as "a corporate lawyer with no previous civil rights experience"); see also HALPERN, *supra* note 81, at 191 ("An accomplished lawyer in commercial litigation and regulatory matters, Reynolds had little experience in civil rights law, a deficiency that he saw as an asset.").

112. See SALOMONE, *supra* note 59, at 72 (describing the circumstances relating to desegregation litigation in East Baton Rouge, Louisiana); Days, *Turning Back the Clock*,

Rights Division was so controversial that it led to a revolt among career attorneys even greater than that which took place during the Nixon administration.¹¹³

Reagan's opposition to busing and preference for school choice was felt beyond DOJ as well. Within months after he assumed office, President Reagan signed the Omnibus Budget Reconciliation Act of 1981,¹¹⁴ which terminated funding for hundreds of federal programs, the largest of which was the Emergency School Aid Act of 1972.¹¹⁵ Congress, with Reagan's approval, later restored federal funding only for that portion of ESAA authorizing grants for magnet schools, creating the federal Magnet Schools Assistance Program.¹¹⁶ Officials in DOJ under the Reagan administration also supported an amendment debated in Congress that would have eliminated the authority of federal courts to order busing remedies in school desegregation cases that involved the transportation of students distances beyond five miles or fifteen minutes.¹¹⁷ Not only did Reagan's Attorney General, William French Smith, endorse the proposal, he drafted a letter to Congress stating his opinion that the bill was constitutional, even though senior DOJ officials from the Eisenhower, Nixon, Johnson, and Carter administrations all raised questions about its constitutionality.¹¹⁸

Reagan also left his mark on the Civil Rights Commission. For two and a half decades, it had developed a reputation as a well-functioning, independent entity, providing important research and valuable policy guidance to Republican and Democratic

supra note 109, at 328–29 (same). Joel Selig, a former supervisor in the education and housing sections of the Civil Rights Division, *see* Selig, *supra* note 109, at 785, tells of the Department's politicized handling of the Kansas City desegregation case and its "refus[al] to implement binding case law" under Reynolds. Selig, *supra* note 109, at 810, 796–814; *see also* Orfield, *supra* note 88, at 17–18 (describing the general shift in school desegregation philosophy of DOJ under Reagan).

113. *See* HALPERN, *supra* note 81, at 193; *see also* Selig, *supra* note 109, at 785–86 (discussing the author's negative experience within the Division after President Reagan's election).

114. Pub. L. No. 97-35, 95 Stat. 357.

115. §§ 502–596, 95 Stat. at 441–482.

116. Education for Economic Security Act, Pub. L. No. 98-377, §§ 701–712, 98 Stat. 1267, 1299–1302 (1984), *repealed by* August F. Hawkins-Robert T. Stafford Elementary and Secondary Improvement Amendments of 1988, Pub. L. No. 100-297, § 2303, 102 Stat. 130, 324.

117. *See* SALOMONE, *supra* note 59, at 73–74; Days, *Turning Back the Clock*, *supra* note 109, at 323; Linda Greenhouse, *Busing Bill Backed by Administration*, N.Y. TIMES, May 7, 1982, at A1.

118. SALOMONE, *supra* note 59, at 73–74; Days, *Turning Back the Clock*, *supra* note 109, at 323.

administrations alike.¹¹⁹ But in his first year in office, Reagan fired the Commission's chair, Republican Arthur S. Flemming, for criticizing the administration's civil rights policies, and replaced him with Clarence Pendleton, a conservative, politically-connected Black Republican.¹²⁰ This move did little to silence the Commission, however, which continued over the next few years to issue reports critical of the Reagan administration, prompting the President to seek the removal and replacement of those commissioners with whom he did not agree.¹²¹ Congress sought to resolve the conflict by reorganizing the Commission, expanding its membership from six to eight, dividing up who had the authority to appoint the members, and placing some limitations on the number of seats held by any one party,¹²² but this compromise did not save the Commission's reputation, which had lost too much of its luster and legitimacy in all the political skirmish.¹²³ In the words of Mary Frances Berry, one of the members who publicly resisted Reagan's attempts to remove her, the President had managed to transform the Commission into " 'a lapdog for the administration instead of a watchdog' " on civil rights.¹²⁴

As the Reagan era bled into George H. W. Bush's ("Bush I") presidency, the philosophy remained largely the same, even if the execution was more subtle and the term half as long. Like Reagan,

119. See BERRY, *supra* note 95, at 4 (citing influence of the Civil Rights Commission over the years on major federal civil rights legislation); see also *id.* at 9-181 (tracing Commission's history up through the Reagan years); LEADERSHIP CONFERENCE ON CIVIL RIGHTS EDUC. FUND, RESTORING THE CONSCIENCE OF A NATION: A REPORT ON THE U.S. COMMISSION ON CIVIL RIGHTS 12-23 (2009) [hereinafter RESTORING THE CONSCIENCE OF A NATION], http://www.civilrights.org/publications/reports/commission/lccref_commission_report_march2009.pdf (same); Frye et al., *supra* note 46, at 456-76 (same).

120. Kathy Sawyer, *President to Push Flemming Off Civil Rights Commission*, WASH. POST, Nov. 17, 1981, at A1. Reagan also nominated the former chair of the Republican National Committee to replace Stephen Horn as the Commission's vice-chair. *Id.*

121. See Charles Fishman, *Rights Panel Hits Reagan on Schools*, WASH. POST, July 13, 1983, at A1; Peter Grier, *Senate Grabs Civil Rights Spotlight*, CHRISTIAN SCI. MONITOR, July 14, 1983, at 6.

122. See United States Commission on Civil Rights Act of 1983, Pub. L. No. 98-183, 97 Stat. 1301 (codified as amended at 42 U.S.C. § 1975 (2006)).

123. See generally Frye et al., *supra* note 46, at 478-505 (describing how the Commission's "institutional deficiencies and ideological shifts . . . have . . . damaged the Commission's independence").

124. Juan Williams, *Rights Panel Backs Reagan in Opposing Quotas*, WASH. POST, Jan. 18, 1984, at A1. Mary Frances Berry's recent comprehensive history of the Commission, *And Justice for All*, tells of this power struggle—and the resulting damage to the Commission's reputation—in great detail from her perspective. BERRY, *supra* note 95, at 182-215.

Bush I opposed race-conscious policies, and his administration viewed school desegregation largely as “a wrenching and unsuccessful experiment of racial mixing.”¹²⁵ According to a 1991 report issued by the Citizens’ Commission on Civil Rights,¹²⁶ the Bush I administration eased the pressure that the Reagan administration’s DOJ had applied on school districts to abandon desegregation plans, but its promise to battle racial discrimination was largely empty rhetoric.¹²⁷ When it came to school desegregation, the Civil Rights Division under Bush I acted more as a passive caretaker than an advocate, and its participation in desegregation cases before the Supreme Court, not quite as adversarial toward traditional desegregation as Reagan’s, was criticized nonetheless for its tepid support of civil rights.

Like Bush I, President William J. Clinton, ultimately, is not credited with fundamentally altering the course of school desegregation and integration. With regard to education issues more generally, President Clinton’s reforms sought to address the needs of disadvantaged students and continued to reflect his predecessors’ concern for improving standards and student achievement. In 1994, Clinton signed into law the Goals 2000: Educate America Act,¹²⁸ legislation developed in part under the watch of President George H. W. Bush.¹²⁹ In many ways responsive to the *Nation at Risk* report,¹³⁰ issued under the Reagan administration in 1983, and a precursor to

125. Larry Tye, *US Sounds Retreat in School Integration*, BOSTON GLOBE, Jan. 5, 1992, at 1.

126. The Citizens’ Commission on Civil Rights formed during the Reagan years when it seemed to many progressive advocates that the U.S. Commission on Civil Rights was no longer up to the task. See Citizens’ Commission on Civil Rights, About, History, <http://www.cccr.org/template/page.cfm?id=5> (last visited Feb. 13, 2010).

127. See Elise J. Rabekoff, *Federal Civil Rights Enforcement in Elementary and Secondary Education: The Bush Administration’s Record So Far*, in LOST OPPORTUNITIES: THE CIVIL RIGHTS RECORD OF THE BUSH ADMINISTRATION MID-TERM 37, 37–51 (Susan M. Liss & William L. Taylor eds., 1991) [hereinafter LOST OPPORTUNITIES]; Citizens’ Commission on Civil Rights, *supra* note 126 (explaining motive for forming the Citizen’s Commission).

128. Pub. L. No. 103-227, 108 Stat. 125 (repealed 2002) (allocating funds to states and communities to develop standards for students, creating a national board and national council to monitor and assist in the development of these standards, and providing resources for localities to meet these goals).

129. Mary Jordan, *Vote Nears on National School Goals; \$100 Million at Risk if Standards Aren’t Approved by April 1*, WASH. POST, Mar. 23, 1994, at A1 (noting that the Goals 2000: Educate America Act included standards developed out of an education summit that President Bush I had convened in 1989); Jill Zuckman, *Modest School Reform Bill May Fare Better than Bush’s*, BOSTON GLOBE, Feb. 2, 1994, at 3 (same).

130. NAT’L COMM’N ON EXCELLENCE IN EDUC., A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM (1983), http://datacenter.spps.org/sites/2259653e-ffb3-45ba-8fd6-04a024ecf7a4/uploads/SOTW_A_Nation_at_Risk_1983.pdf.

the No Child Left Behind Act of 2001,¹³¹ Goals 2000 was based on a snowballing standards movement that continues even today.¹³² The Clinton administration sought to advance comprehensive reform through the passage that same year of the Improving America's Schools Act ("IASA"),¹³³ which reauthorized the Elementary and Secondary Education Act of 1965¹³⁴ and further expanded the government's role in public education across many areas, with a large portion of the appropriated federal funds going toward assisting disadvantaged children.¹³⁵

To be sure, Clinton spoke passionately and often about the importance of civil rights and racial diversity, but his actions, for the most part, were moderate in substance and modest in scope. By a mile, he appointed more people of color and women to the federal bench and to Cabinet and sub-Cabinet positions than any of his predecessors.¹³⁶ To promote more open dialogue on issues of race relations, Clinton created a special advisory committee, called the President's Advisory Board on Race, headed by John Hope Franklin.¹³⁷ He also helped revive, to some extent, the Civil Rights Commission, which had languished under the partisan politics of the Reagan and Bush I administrations,¹³⁸ but that shift occurred toward the latter half of his tenure.¹³⁹ Clinton has been credited, too, for

131. Pub. L. No. 107-110, 115 Stat. 1425 (codified in scattered sections of 20 U.S.C.).

132. See Erica Frankenberg & Chinh Q. Le, *The Post-Parents Involved Challenge: Confronting Extralegal Obstacles to Integration*, 69 OHIO ST. L.J. 1015, 1036-37 (2008).

133. Pub. L. No. 103-382, 108 Stat. 3518 (1994) (codified as amended in scattered sections of 20 U.S.C.).

134. Pub. L. No. 89-10, 79 Stat. 27 (codified as amended at 20 U.S.C. §§ 6301-6578 (2006)).

135. Pub. L. No. 103-382, 108 Stat. 3518. IASA also reauthorized funds for the Magnet Schools Assistance Program and slightly modified its objectives. 20 U.S.C. §§ 7202-7203 (1994). Magnet school funding was again modified and reauthorized as part of the No Child Left Behind Act of 2001, 20 U.S.C. § 7231 (2006).

136. Plass, *supra* note 43, at 180-81.

137. Exec. Order No. 13,050, 3 C.F.R. 207 (1998), (*revoked* by Exec. Order No. 13,128, 3 C.F.R. 218 (2000)); Dr. John Hope Franklin, Chair, <http://clinton4.nara.gov/Initiatives/OneAmerica/BIO-JHF.html> (last visited Feb. 12, 2010).

138. See generally Michael J. Kelleher & Michael L. Walker, *The Performance of the U.S. Commission on Civil Rights*, in *THE TEST OF OUR PROGRESS: THE CLINTON RECORD ON CIVIL RIGHTS* 73, 73-96 (Corrine M. Yu & William L. Taylor eds., 1999), available at <http://www.cccr.org/doc/progress.pdf> (discussing the accomplishments of the U.S. Commission on Civil Rights during the Clinton administration). The Commission in these years was embroiled in some controversy, however, when the U.S. General Accounting Office criticized its financial and organizational management. See *id.* at 79-81.

139. BERRY, *supra* note 95, at 275 ("[T]he agency remained fractured and evenly divided along ideological lines until well into Clinton's second term."); *id.* at 302 (citing the "fragile independence" the Commission worked to reestablish during the Clinton

speaking out in strong support of affirmative action,¹⁴⁰ but this did not stem the assault on race-conscious programs by conservative legal groups during his administration.¹⁴¹ Indeed, emboldened by the turning tide in school desegregation law, many of these groups and individuals began more aggressively challenging voluntarily adopted school integration plans as well. In response, DOJ's Civil Rights Division under Clinton—headed by LDF alums, first Deval Patrick, and later Bill Lann Lee¹⁴²—filed amicus curiae briefs supporting the voluntary integration plans that had been challenged in Montgomery County, Maryland,¹⁴³ Arlington County, Virginia,¹⁴⁴ and (at least for the period it was being litigated during Clinton's tenure) Lynn, Massachusetts.¹⁴⁵ Clinton's words and deeds on race issues won him approval from the African American community, and some regarded him as the country's first Black President.¹⁴⁶ Yet, despite these not insignificant contributions, it cannot be said that Clinton articulated much of a coherent vision to reverse the pattern of school resegregation that the nation was already witnessing during his time in office.¹⁴⁷

administration). For Berry's account of the Commission under the Clinton years, see *id.* at 272–301.

140. See, e.g., James Bennet, *President's Press Conference: The Overview, Clinton Urges Education Aid for Minorities*, N.Y. TIMES, Dec. 17, 1997, at A25 (describing one of Clinton's forthright speeches in support of affirmative action).

141. See generally LEE COKORINOS, *THE ASSAULT ON DIVERSITY: AN ORGANIZED CHALLENGE TO RACIAL AND GENDER JUSTICE* (2003) (describing the efforts of conservative groups and individuals to overturn affirmative action programs and other race-conscious civil rights measures).

142. Steven A. Holmes, *Asian-American Is Named to Top Civil Rights Position*, N.Y. TIMES, June 12, 1997, at B16 (noting that Bill Lee is a former LDF attorney); Steven A. Holmes, *Street Survivor via Harvard: Deval Laurdine Patrick*, N.Y. TIMES, Feb. 2, 1994, at A13 (noting that Deval L. Patrick is a former LDF attorney).

143. Brief of the United States as Amicus Curiae Supporting Appellees Urging Affirmance, *Eisenberg ex rel. Eisenberg v. Montgomery County Pub. Sch.*, 197 F.3d 123 (4th Cir. 1999) (No. 98-2503).

144. Brief of the United States as Amicus Curiae, *Tuttle ex rel. Tuttle v. Arlington County Sch. Bd.*, 195 F.3d 698 (4th Cir. 1999) (No. 98-1604).

145. Brief of the United States as Amicus Curiae Interest of the United States, *Comfort ex rel. Neumyer v. Lynn Sch. Comm.*, 100 F. Supp. 2d 57 (D. Mass. 2000) (Civ. A. No. 99-cv-11811), available at <http://www.usdoj.gov/crt/edo/documents/lynnbr.php>.

146. Famed author Toni Morrison is usually credited as one of the first people to dub Clinton as the “first black President.” Toni Morrison, *The Talk of the Town*, NEW YORKER, Oct. 5, 1998, at 31. Of Clinton, she said that he was “[b]lacker than any actual black person who could ever be elected in our children's lifetime. After all, Clinton displays almost every trope of blackness: single-parent household, born poor, working-class, saxophone-playing, McDonald's-and-junk-food-loving boy from Arkansas.” *Id.* at 31–32.

147. See Dennis Parker, *The Clinton Administration's Record on Equal Educational Opportunity in Elementary and Secondary Education*, in *THE TEST OF OUR PROGRESS*,

II. 2001 TO 2008

President George W. Bush's ("Bush II") education agenda included tackling the racial achievement gap, and, early in his first term, he received bipartisan support for the No Child Left Behind Act ("NCLB"),¹⁴⁸ which sought to increase accountability, promote school choice, and place a stronger emphasis on standards.¹⁴⁹ Despite his expressed concern for minority children, however, critics assailed Bush II, like Nixon and Reagan before him, throughout his tenure in office for taking far-right positions on issues of race generally and for being indifferent at best—and by most measures, aggressively opposed—to efforts to promote racial integration and diversity specifically. To add to that chorus of criticism, in the waning days of his administration, several scathing internal governmental investigations and related congressional hearings accused the Bush II administration of unprecedented partisan meddling in the legal affairs of DOJ.¹⁵⁰ The reports charged that within the Civil Rights Division, for instance, senior political appointees and high-level officials

supra note 138, at 187, 187–89 (observing, toward the end of Clinton's tenure, that there remained long-term questions about school desegregation that the Civil Rights Division would have to answer).

148. Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified as amended in scattered sections of 20 U.S.C.).

149. *Id.*; see U.S. Dep't of Educ., Executive Summary of the No Child Left Behind Act, <http://www2.ed.gov/nclb/overview/intro/execsumm.html> (last visited Feb. 13, 2010).

150. See generally OFFICE OF THE INSPECTOR GEN. & OFFICE OF PROF'L RESPONSIBILITY, U.S. DEP'T OF JUSTICE, AN INVESTIGATION OF ALLEGATIONS OF POLITICIZED HIRING AND OTHER IMPROPER PERSONNEL ACTIONS IN THE CIVIL RIGHTS DIVISION (2009), available at <http://www.usdoj.gov/oig/special/s0901/final.pdf> (finding that political and ideological screening was used with regard to career attorneys in DOJ); OFFICE OF THE INSPECTOR GEN. & OFFICE OF PROF'L RESPONSIBILITY, U.S. DEP'T OF JUSTICE, AN INVESTIGATION OF ALLEGATIONS OF POLITICIZED HIRING BY MONICA GOODLING AND OTHER STAFF IN THE OFFICE OF THE ATTORNEY GENERAL (2008), available at <http://www.usdoj.gov/oig/special/s0807/final.pdf> (finding that several high level political staff had considered the perceived political and ideological leanings in hiring of career Assistant United States Attorneys and other DOJ employees, including judges for the Board of Immigration Appeals); OFFICE OF THE INSPECTOR GEN. & OFFICE OF PROF'L RESPONSIBILITY, U.S. DEP'T OF JUSTICE, AN INVESTIGATION OF ALLEGATIONS OF POLITICIZED HIRING IN THE DEPARTMENT OF JUSTICE HONORS PROGRAM AND SUMMER LAW INTERN PROGRAM (2008), available at <http://www.usdoj.gov/oig/special/s0806/final.pdf> (finding that, at least after 2006, political and ideological screens were used to deselect many candidates for summer internships at DOJ Honors Program); OFFICE OF THE INSPECTOR GEN. & OFFICE OF PROF'L RESPONSIBILITY, U.S. DEP'T OF JUSTICE, AN INVESTIGATION INTO THE REMOVAL OF NINE U.S. ATTORNEYS IN 2006 (2008), available at www.justice.gov/oig/special/s0809a/final.pdf (finding that the firing of nine U.S. Attorneys in 2006 was "fundamentally flawed"). The removal of the nine U.S. Attorneys "severely damaged the credibility of the [DOJ] and raised doubts as to the integrity of the Department prosecutive decisions." AN INVESTIGATION INTO THE REMOVAL OF NINE U.S. ATTORNEYS IN 2006, *supra* at 358.

regularly improperly considered political and ideological affiliations to hire and fire career attorneys.¹⁵¹ Civil rights advocates claimed that these actions were made that much worse by Bush II's selections to head major offices affecting civil rights, many of whom lacked relevant experience or were known to have taken policy positions in the past that undermined the very laws they were asked to enforce.¹⁵²

Critics were quick to point out the dramatic effect that this alleged politicization had on the work conducted across the ten substantive practice areas of the Civil Rights Division. Overall, the emphasis of enforcement shifted away from attacking racial discrimination—what had been the bread and butter of the Division since its creation in 1957—to pursuing religious discrimination.¹⁵³ Within individual sections, evidence of the de-emphasis on race could be found in the cases filed and positions taken. In its voting rights practice, for example, the Civil Rights Division initiated one case in eight years on behalf of African Americans alleging voting discrimination under Section 2 of the Voting Rights Act of 1965,¹⁵⁴ compared to eighteen such cases under the Clinton administration.¹⁵⁵

151. See *supra* note 150 and accompanying text.

152. See, e.g., Epperson, *supra* note 19, at 166–67 (“President George W. Bush’s administrative stance . . . may be due in part to his administration’s appointment of several long-time opponents of affirmative action to key administrative positions.”). For instance, John Ashcroft, Bush II’s first selection for Attorney General, was criticized by civil rights advocates for having “resisted court-ordered integration of the public schools” when he was Governor of Missouri. THE BUSH ADMINISTRATION TAKES AIM, *supra* note 17, at 9; see also Wayne Washington, *US Civil Rights Chief Responds to Critics*, BOSTON GLOBE, Mar. 23, 2002, at A1 (describing Ashcroft as “the most conservative attorney general since the Reagan administration”). Gerald Reynolds, Bush II’s first choice for the position of the U.S. Department of Education’s Assistant Secretary for Civil Rights, and the recipient of a recess appointment, was criticized by the civil rights community as a conservative activist who attacked race-conscious remedies as “corrupt” and disparaged traditional civil rights organizations. Michael A. Fletcher, *Civil Rights Watchdog Once Outspoken Critic: Education Official Softens Controversial Views*, WASH. POST, Sept. 16, 2002, at A17.

153. Edward M. Kennedy, *Restoring the Civil Rights Division*, 2 HARV. L. & POL. REV. 211, 225 (2008) (“The few briefs that the [Appellate] Division has filed reflect the general emphasis seen in other Sections [of the Civil Rights Division]: a priority on religious discrimination and away from cases of racial discrimination against African Americans.”); Charlie Savage, *White House to Shift Efforts on Civil Rights*, N.Y. TIMES, Sept. 1, 2009, at A1 (“Under the Bush administration, the agency shifted away from its traditional core focus on accusations of racial discrimination, channeling the resources into areas like religious discrimination and human trafficking.”).

154. Voting Rights Act of 1965, § 2, 42 U.S.C. § 1973 (2006).

155. See Kennedy, *supra* note 153, at 222 (citing *United States v. City of Euclid*, 523 F. Supp. 2d 641 (N.D. Ohio 2007)); see also Joseph D. Rich, Mark Posner & Robert Kengle, *The Voting Section*, in THE EROSION OF RIGHTS, *supra* note 17, at 32, 41 (“Whereas eight of the 22 Section 2 cases filed in the last six years of the Clinton administration were on behalf of African American citizens, and six were on behalf of American Indians, only two Section 2 cases of any type have been filed by [the Bush II] administration on behalf of

The Voting Rights Section under Bush II also filed the first ever case alleging voting discrimination against White voters.¹⁵⁶ Morale in that Section allegedly plummeted.¹⁵⁷ Similar priorities were reflected in the Employment Section, which filed almost as many cases in Bush II's eight years alleging job discrimination against Whites as it did cases alleging discrimination against Blacks and/or Latinos combined.¹⁵⁸

The Educational Opportunities Section, on the other hand, which is responsible for the hundreds of school desegregation cases that remain on DOJ's docket, reportedly "received relatively little public attention during the Bush Administration, and ... has apparently been spared from some of the worst political pressures."¹⁵⁹ Nonetheless, critics charged that the administration's aversion to race-conscious remedies was felt powerfully there as well. For instance, DOJ reversed its course on affirmative action in higher education. Whereas the Clinton administration filed an amicus brief in support of the assignment policies at issue in the University of Michigan cases,¹⁶⁰ the Bush II administration opposed them, arguing that the plans violated the Constitution and asked the Court to find that racial diversity must be pursued only through race-neutral means.¹⁶¹ A similar about-face occurred at the K-12 level. Despite having supported voluntary school integration in *Tuttle ex rel. Tuttle v. Arlington County School Board*,¹⁶² *Eisenberg ex rel. Eisenberg v. Montgomery County Public Schools*,¹⁶³ and *Comfort ex rel. Neumyer*

African American citizens and none has been filed on behalf of American Indian citizens.").

156. *United States v. Brown*, 494 F. Supp. 2d 440 (S.D. Miss. 2007) (Feb. 17, 2005), *aff'd*, 561 F.3d 420 (5th Cir. 2009); see Kennedy, *supra* note 153, at 222; Dan Eggen, *Politics Alleged in Voting Cases: Justice Officials Are Accused of Influence*, WASH. POST, Jan. 23, 2006, at A1 (describing the case filed alleging discrimination against White voters as "the department's first reverse-discrimination complaint on behalf of white voters"); Dan Eggen, *Civil Rights Focus Shift Roils Staff at Justice*, WASH. POST, Nov. 13, 2005, at A1 (same).

157. See Kennedy, *supra* note 153, at 222. By 2007, more than half of the career voting rights attorneys had departed, sometimes involuntarily. *Id.*

158. *Id.* at 224.

159. *Id.* at 226.

160. See Lee C. Bollinger, *A Comment on Grutter and Gratz v. Bollinger*, 103 COLUM. L. REV. 1589, 1595 (2003) (noting that the Clinton administration had filed briefs in the lower courts supporting respondent).

161. THE BUSH ADMINISTRATION TAKES AIM, *supra* note 17, at 27-28; see Brief for the United States as Amicus Curiae Supporting Petitioner at 12-31, *Gratz v. Bollinger*, 539 U.S. 244 (2003) (No. 02-516); Brief for the United States as Amicus Curiae Supporting Petitioner at 9-37, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241).

162. 195 F.3d 698 (4th Cir. 1999).

163. 197 F.3d 123 (4th Cir. 1999).

*v. Lynn School Committee*¹⁶⁴ under Clinton,¹⁶⁵ DOJ under Bush II discontinued its support of the plan in *Comfort*¹⁶⁶ and then switched its position altogether by the time *Parents Involved* reached the Supreme Court.¹⁶⁷ Rather than working to advance racially integrated education, DOJ took the position that race must not be considered to achieve that goal.¹⁶⁸ Meanwhile, hundreds of court orders in the traditional school desegregation cases under the Section's responsibility were dissolved, very few of them formally opposed by DOJ.¹⁶⁹

Critics also assailed the Department of Education's Office for Civil Rights under the Bush II administration for serving the interests of far right-wing groups that opposed any consideration of race, even as that office struggled for stability in leadership.¹⁷⁰ The civil rights community charged, for example, that OCR's complaint investigation procedures provided a venue for opponents of affirmative action to use government resources to intimidate colleges and universities by investigating unmeritorious challenges to recruitment, outreach, and admissions practices designed to increase enrollments of traditionally

164. 100 F. Supp. 2d 57 (D. Mass. 2000).

165. See *supra* notes 142–45 and accompanying text.

166. Cf. Press Release, Citizens' Comm'n on Civil Rights, The Bush Administration v. Affirmative Action (Dec. 9, 2003), <http://www.cccr.org/AffirmativeActionReport.pdf> (discussing the Clinton administration's involvement and arguing that the Bush II administration "put diversity on the shelf").

167. See Brief for the United States as Amicus Curiae Supporting Petitioner at 6–30, *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (No. 05-908).

168. See *id.* at 19–24.

169. See *infra* note 209 and accompanying text.

170. See Peter Schmidt, *The Bush White House Picks Its Civil-Rights Fights Carefully: The President's Appointees Mix Caution with Conservatism in Handling Colleges' Disputes over Race and Gender*, CHRON. HIGHER EDUC., May 19, 2006, at A20. Bush II's first appointee to head OCR, a conservative African American Republican utility-services lawyer, Gerald A. Reynolds, was vigorously opposed by civil rights groups and members of Congress alike for his statements against affirmative action and other race-conscious remedies, which led to his controversial recess appointment and eventual departure after nineteen months in office. See *id.* For more about Reynolds, see *supra* note 152 and *infra* note 196 and accompanying text. Over the next five years, OCR operated without a permanent chief, as Kenneth L. Marcus and then James F. Manning served as interim directors; during this time, observers from both the right and left complained that the office lacked leadership and failed to take on any major initiatives. See Schmidt, *supra*. It was not until June 2005 that Bush II nominated a permanent director, Stephanie J. Monroe, a Republican career Capitol Hill staffer whom the Senate was willing to confirm. See *id.* Critics charged that OCR's race-blind interpretation of civil rights laws evidenced itself throughout the tenure of all four directors. See *id.*

underrepresented groups.¹⁷¹ These investigations and threats of litigation had a chilling effect among higher education institutions, some of which eliminated programs and policies to avoid drawn-out legal battles.¹⁷² Meanwhile, OCR's affirmative enforcement priorities witnessed a shift away from racial discrimination and school desegregation issues, abandoning its traditional focus in these areas.¹⁷³ The total number of affirmative compliance reviews initiated each year also decreased, from as high as 152 under the Clinton years (in 1997), to as few as eleven (in 2002) and nine (in 2006).¹⁷⁴

OCR's guidance on the use of race was similarly revised in the Bush II administration. A year after the Supreme Court approved, in *Grutter v. Bollinger*¹⁷⁵ and *Gratz v. Bollinger*,¹⁷⁶ the limited consideration of race to promote diversity in higher education,¹⁷⁷ OCR issued a report stressing the use of race-neutral admission strategies.¹⁷⁸ Four years later, OCR issued a "Dear Colleague" letter

171. NAACP LEGAL DEF. & EDUC. FUND, INC., CLOSING THE GAP: MOVING FROM RHETORIC TO REALITY IN OPENING DOORS TO HIGHER EDUCATION FOR AFRICAN-AMERICAN STUDENTS 9–10 (2005), available at http://www.naacpldf.org/content/pdf/gap/Closing_the_Gap_-_Moving_from_Rhetoric_to_Reality.pdf. Somewhat amusingly, the LDF report caused enough of a stir from Bush II's first appointee to OCR (who, by then, had moved on to head the Civil Rights Commission, see *infra* note 196 and accompanying text) that he sent a letter on behalf of the Civil Rights Commission stating that a majority of its members "strongly disagree with the Legal Defense Fund's report and would like to set the record straight." Letter from Gerald A. Reynolds, Chairman, U.S. Comm'n on Civil Rights, to the Honorable Margaret Spellings, Sec'y of Educ., U.S. Dep't of Educ. (July 5, 2005), available at <http://www.usccr.gov/correspd/090905spellings.pdf>. One commissioner sent a letter dissenting from the majority view and suggesting that the Department of Education ("DOE") and OCR might have asked the commission to " 'bless' the activities of DOE and OCR and therefore, by association, give its current programs and policies a legitimacy they do not deserve without a full and fair debate on the issue." Letter from Michael Yaki, Comm'r, U.S. Comm'n on Civil Rights, to the Honorable Margaret Spelling, Sec'y of Educ., U.S. Dep't of Educ. (July 6, 2005), available at <http://www.usccr.gov/correspd/090905yaki.pdf>.

172. See Epperson, *supra* note 19, at 169–70 (citing reports from affirmative action opponents that "more than 100 colleges . . . abandoned their race-conscious policies" as a result of OCR investigations and threats of litigation).

173. 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, 287–88 (2004).

174. OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., ANNUAL REPORT TO CONGRESS OF THE OFFICE FOR CIVIL RIGHTS, FISCAL YEAR 2007–08, at 3 (2007) [hereinafter OCR ANNUAL REPORT 2007–08], available at www.ed.gov/about/reports/annual/ocr/annrpt2007-08/annrpt2007-08.pdf.

175. 539 U.S. 306 (2003).

176. 539 U.S. 244 (2003).

177. *Grutter*, 539 U.S. at 334; *Gratz*, 539 U.S. at 270–76.

178. OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., ACHIEVING DIVERSITY: RACE-NEUTRAL ALTERNATIVES IN AMERICAN EDUCATION (2004), available at <http://www.ed.gov/about/offices/list/ocr/edlite-raceneutralreport2.html>. Compare, for instance, this response from OCR (and the Bush II administration generally) to *Grutter*—

again encouraging the use of only race-neutral measures, describing any consideration of race in admissions as “highly suspect,” and setting forth detailed parameters for any college or university that may use race in admissions.¹⁷⁹ This unusually timed guidance prompted LDF to question whether OCR issued the letter “to further its efforts to subvert and give unnecessary pause to higher education institutions that are pursuing a racially diverse student population in a constitutional manner.”¹⁸⁰

Nor did Bush II’s OCR waver in its advice on the consideration of race to advance racial and ethnic integration in elementary and secondary schools. On August 28, 2008, the same day that it released its “Dear Colleague” letter regarding affirmative action in higher education, OCR issued similar guidance to school districts regarding race-conscious student assignment plans in light of *Parents Involved*.¹⁸¹ That letter referenced two prior compelling interests approved by the Supreme Court—remediating past discrimination and achieving diversity in higher education¹⁸²—but neglected to mention that a majority of the Justices recognized that school districts also have a compelling interest to promote integration and avoid racial

an affirmative action victory—to the response of President Clinton after the Supreme Court’s 1995 *Adarand* decision, *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995), which was ostensibly an affirmative action defeat. See William J. Clinton, President of the United States, Statement on the Supreme Court Decision on Affirmative Action (June 13, 1995), in THE AMERICAN PRESIDENCY PROJECT (John T. Woolley & Gerhard Peters, archivists), <http://www.presidency.ucsb.edu/ws/?pid=51488> (expressing support for affirmative action and expressing regret that the Court’s opinion had caused many to abandon the fight for its continued use); William J. Clinton, President of the United States, Satellite Remarks and a Question-and-Answer Session with the National Council of *La Raza* (July 19, 1995), in THE AMERICAN PRESIDENCY PROJECT (John T. Woolley & Gerhard Peters, archivists), <http://www.presidency.ucsb.edu/ws/?pid=51633> (stating that the Clinton administration will continue to pursue affirmative action and that the lesson of the Supreme Court decision is “to mend but not end affirmative action”).

179. Letter from Stephanie J. Monroe, Assistant Sec’y of Civil Rights, U.S. Dep’t of Educ., The Use of Race in Postsecondary Student Admissions (Aug. 28, 2008), available at <http://www.ed.gov/about/offices/list/ocr/letters/raceadmissionpse.html>; see also OCR ANNUAL REPORT 2007–08, *supra* note 174, at 25 (referencing issuance and summarizing contents of letter).

180. Statement of the NAACP Legal Def. Fund on Diversity in Higher Educ., A Response to OCR’s August 28, 2008 “Dear Colleague” Letter (Sept. 19, 2008), available at <http://www.naacpldf.org/content.aspx?article=1323>.

181. Letter from Stephanie J. Monroe, Assistant Sec’y of Civil Rights, U.S. Dep’t of Educ., The Use of Race in Assigning Students to Elementary and Secondary Schools (Aug. 28, 2008), <http://www.ed.gov/about/offices/list/ocr/letters/raceassignmentese.html>; see also OCR ANNUAL REPORT 2007–08, *supra* note 174, at 25 (referencing issuance and summarizing contents of letter).

182. Monroe, *supra* note 181.

isolation.¹⁸³ Moreover, the letter neglected to mention the kinds of permissible race-conscious measures that Justice Kennedy explicitly contemplated in his concurrence.¹⁸⁴

A third “Dear Colleague” letter from OCR, issued just days before Bush II was to leave office, emphasized that the administration’s school choice policies were not to be constrained by any racial considerations (targeting, presumably, only those race-conscious policies that seek to avoid any racial isolation that may be created or exacerbated by the choice to transfer).¹⁸⁵ In other words, the letter established that federal school choice policies trumped any local efforts to consider race to promote integration. The letter further advised that districts must seek court modification if any federal desegregation orders conflict with the transfer provisions of NCLB.¹⁸⁶ At the same time, school district recipients of magnet school funding reported that OCR officials initiated reviews demanding that they justify any consideration of race in their student assignment policies,¹⁸⁷ even though the primary statutory purpose of the federal magnet school program is to promote racial and ethnic integration.¹⁸⁸

Finally, the civil rights community continued to question the activities of the Civil Rights Commission under Bush II. Because the Commission had, since the Reagan administration, essentially been dismissed as little more than a cheerleader for the civil rights initiatives (or lack thereof) of the White House, few expected much

183. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 783 (2007) (Kennedy, J., concurring); *id.* at 804 (Breyer, J., joined by Stevens, J., Souter, J., and Ginsburg, J., dissenting); Statement of the NAACP Legal Def. Fund on Promoting Diversity in Schools, A Response to OCR’s August 28, 2008 “Dear Colleague” Letter (Sept. 19, 2008), available at <http://www.naacpldf.org/content.aspx?article=1317>.

184. See *Parents Involved*, 551 U.S. at 788–89 (Kennedy, J., concurring); Statement of the NAACP Legal Def. Fund on Promoting Diversity in Schools, *supra* note 183.

185. Letter from Stephanie J. Monroe, Assistant Sec’y for Civil Rights, U.S. Dep’t of Educ., Title VI and Public School Choice (Jan. 8, 2009), available at www.ed.gov/about/offices/list/ocr/letters/colleague-20090108.pdf.

186. See *id.*

187. Mark Walsh, *Use of Race as a Concern for Magnet Schools; Decision in Student-Assignment Cases Came as U.S. Reviewed Grant Applications*, EDUC. WEEK, Oct. 31, 2007, at 8.

188. See 20 U.S.C. § 7231(b) (2006) (setting forth purposes of magnet schools); see also OCR ANNUAL REPORT 2007–08, *supra* note 174, at 46 (stating that the OCR has the authority and obligation to “determine whether applicant school districts will meet nondiscrimination assurances” specified in the Magnet School Assistance Program (“MSAP”) and Title VI of the Civil Rights Act of 1964). The OCR Annual Report references, obliquely, the “negotiation of agreements to address specific civil rights concerns” and the provision of “technical assistance to the majority of MSAP recipients to help them comply with the civil rights aspects of the MSAP statute.” *Id.*

else from it under George W. Bush's watch. There had been a brief political scuffle early in Bush II's first term about the legitimacy of one of his appointments, which would have resulted in a shift in which political party held a majority of the seats, but that legal dispute ended with Bush II's appointee the victor.¹⁸⁹ Because Republicans held a majority of the seats, it came as something of a surprise when, in September 2004, the career staff of the Commission released a scathing draft report on the administration's civil rights record.¹⁹⁰ Entitled *Redefining Rights in America: The Civil Rights Record of the George W. Bush Administration, 2001–2004*, the draft criticized Bush's failure to enforce civil rights across the board and concluded that he had neither "defined a clear agenda nor made civil rights a priority."¹⁹¹ Indeed, as its title suggests, the draft report accused Bush of "redefining" the very concept of civil rights by "refer[ring] to programs that have little or no civil rights relevance as ones that promote equality and justice."¹⁹²

The draft was never finalized. Republican political appointees on the Commission attacked it as inaccurate and biased,¹⁹³ and a vote on formal approval of it was delayed until after the 2004 presidential election.¹⁹⁴ Once the outcome was clear, the divided Commission predictably failed to approve the report.¹⁹⁵ Mary Frances Berry—who

189. Clinton appointed Valerie Wilson to the Commission in January 2000 to fill the seat of the late Judge A. Leon Higginbotham. See BERRY, *supra* note 95, at 325–28. In December 2001, shortly after Judge Higginbotham's term would have expired, Bush II appointed Peter Kirsanow to replace Wilson, but Wilson resisted on the theory that she had been appointed to a full six-year term, and not just to complete the term of Judge Higginbotham. See *id.* At first, the Bush II administration insisted that Kirsanow be seated, but Mary Frances Berry, the then-chair, refused to recognize him. See *id.*; *Seat Bush Nominee, Rights Panel Is Told*, N.Y. TIMES, Jan. 11, 2002, at A19. The parties litigated the issue; although Wilson won in the district court, in May 2002, the Court of Appeals for the D.C. Circuit reversed and held that her term had expired. *United States v. Wilson*, 290 F.3d 347, 361–62 (D.C. Cir.).

190. Perhaps it was not entirely a surprise because, until late 2004, Mary Frances Berry remained the Chair of the Commission, continued to resist the influence of her Republican colleagues, and—some contended—played a key role in the drafting of the report that was credited to the career staff. See, e.g., Abigail Thernstrom, *Redefining Rights in America*, WALL ST. J., Oct. 18, 2004, at A18.

191. OFFICE FOR CIVIL RIGHTS EVALUATION, U.S. COMM'N ON CIVIL RIGHTS, *REDEFINING RIGHTS IN AMERICA: THE CIVIL RIGHTS RECORD OF THE GEORGE W. BUSH ADMINISTRATION, 2001–2004*, at vii (Draft Report for Commissioners' Review, Sept. 2004), available at <http://jurist.law.pitt.edu/bushcivilrights.pdf>.

192. *Id.* at 163.

193. See, e.g., Thernstrom, *supra* note 190.

194. BERRY, *supra* note 95, at 331–33; Michael Janofsky, *Study of Bush and Civil Rights Draws Fire*, N.Y. TIMES, Oct. 13, 2004, at A22.

195. See Erica Werner, *Top Two Commissioners Resign from Civil Rights Panel*, WASH. POST, Dec. 8, 2004, at A7.

by then had served nearly twenty-five years on the Commission and was its current chair—resigned, and Gerald Reynolds, Bush II's first OCR director, replaced her.¹⁹⁶

President Bush coupled the appointment of Reynolds as the Commission's chair (and Abigail Thernstrom as its vice-chair) with a second controversial move. That same month—December 2004—he sought and received an opinion from the Office of Legal Counsel that allowed him to appoint two additional Republican members to the eight-member Commission without violating the statute's requirement that “‘[n]ot more than 4 of the members . . . at any one time be of the same political party.’”¹⁹⁷ Bush II was able to achieve this result because, in the period leading up to the new appointments, two of the existing Republican members—Thernstrom and Russell Redenbaugh—switched their party registrations and became independents.¹⁹⁸ The Office of Legal Counsel approved this action in a memo the day before the appointments were made.¹⁹⁹ The move, according to legal experts, was unprecedented, and shortly after it was discovered, civil rights leaders called for a reversal of the legal opinion Bush II had obtained to make it happen.²⁰⁰

But their efforts were unsuccessful, and the newly constituted Commission was able to pursue a relentless attack on traditional civil

196. BERRY, *supra* note 95, at 333–34; Werner, *supra* note 195. Reynolds was referred to as a “conservative who once described affirmative action as a ‘big lie’” and who believes that “traditional civil rights groups . . . overstate the problem” of racial discrimination. Randal C. Archibold, *Shift Toward Skepticism for Civil Rights Panel*, N.Y. TIMES, Dec. 10, 2004, at A22. Berry's departure, however, was again not without controversy. She believed that her term, and that of her colleague and vice-chair, Cruz Reynoso, expired in January 2005, but President Bush II not only named their replacements in December, BERRY, *supra* note 95, at 333–34, he obtained a legal opinion from the Office of Legal Counsel to support the position that their terms were to expire more than a month earlier. See Terms of Members of the Civil Rights Commission, 28 Op. Off. Legal Counsel (Nov. 30, 2004), available at www.justice.gov/olc/2004/11302004_crcterms.pdf.

197. Political Balance Requirement for the Civil Rights Commission, 28 Op. Off. Legal Counsel (Dec. 6, 2004), available at www.justice.gov/olc/2004/12062004_crcbalance.pdf (citing 42 U.S.C. § 1975(b)).

198. See Charlie Savage, *Maneuver Gave Bush a Conservative Rights Panel*, BOSTON GLOBE, Nov. 6, 2007, at A1. Interestingly, the story of these back channel methods that Bush II used did not break until November 2007.

199. Political Balance Requirement for the Civil Rights Commission, *supra* note 197.

200. See Letter from Wade Henderson, President & CEO, Leadership Conference on Civil Rights et al., to the Honorable Michael B. Mukasey, Attorney Gen., U.S. Dep't of Justice, Rescind the OLC Opinion that Undermines the Credibility of the U.S. Commission on Civil Rights (Jan. 29, 2008), available at www.citizensforethics.org/node/30912.

rights.²⁰¹ With regard to issues of educational diversity and school integration, for instance, the Commission held convenings and issued reports, not in support of affirmative action in higher education, but instead “warn[ing] that affirmative action might harm minority law students.”²⁰² The Commission asked the American Bar Association to end its support for racial and ethnic diversity in law school admissions.²⁰³ Critics argued that another lengthy report focused on school desegregation did not press for better enforcement of orders or for reviving the federal government’s commitment to desegregation but instead questioned the value of racial diversity and concluded “that school districts obtaining unitary status do not exhibit less integration.”²⁰⁴ With regularity, the Commission’s findings and recommendations were approved by a vote of five or six to one or two, with a few abstentions.²⁰⁵ The only saving grace for civil rights advocates was that, by this point, the Commission’s credibility had waned.²⁰⁶

III. 2009 AND BEYOND

Just over a year into his first term in office, President Barack Obama’s actions have articulated his administration’s civil rights policy and legislative priorities. The President has also signaled that he intends to change the tone and tenor of how Washington operates. To advance the goal of racially integrated education, however, his words and deeds must clearly establish that educational equity and

201. BERRY, *supra* note 95, at 335–39.

202. Media Advisory, U.S. Comm’n on Civil Rights, U.S. Civil Rights Commission Warns that Affirmative Action Might Harm Minority Law Students (Aug. 28, 2007), <http://www.law.umaryland.edu/marshall/usccr/documents/cr1200710.pdf>. See generally U.S. COMM’N ON CIVIL RIGHTS, AFFIRMATIVE ACTION IN AMERICAN LAW SCHOOLS: A BRIEFING BEFORE THE U.S. COMMISSION ON CIVIL RIGHTS HELD IN WASHINGTON, D.C., JUNE 16, 2006 (2007), available at www.usccr.gov/pubs/AALSreport.pdf (concluding that there is a consensus among experts that there are significant racial disparities in law school performance but disagreement among them regarding whether affirmative action alleviates or exacerbates these disparities).

203. BERRY, *supra* note 95, at 336.

204. Media Advisory, U.S. Comm’n on Civil Rights, U.S. Commission on Civil Rights Reports that School Districts Obtaining Unitary Status Do Not Exhibit Less Integration (Sept. 27, 2007), http://www.usccr.gov/press/2007/092707_statreportmedia.pdf; see U.S. COMM’N ON CIVIL RIGHTS, BECOMING LESS SEPARATE?: SCHOOL DESEGREGATION, JUSTICE DEPARTMENT ENFORCEMENT, AND THE PURSUIT OF UNITARY STATUS 75 (2007) [hereinafter BECOMING LESS SEPARATE?], available at http://www.usccr.gov/pubs/092707_BecomingLessSeparateReport.pdf.

205. See U.S. Commission on Civil Rights, <http://www.usccr.gov/index.html> (see links to “Recent Correspondence” and “Recent Briefing Reports”).

206. See RESTORING THE CONSCIENCE OF A NATION, *supra* note 119, at 4 (“Today, the commission is so debilitated as to be considered moribund.”).

school integration are key priorities on his policy reform agenda. The President and members of his administration will then need to follow through on that commitment with specific, targeted, and conscious efforts in order to reinfuse civil rights objectives into the federal government's key functions affecting educational opportunity at all levels. The balance of this Article proposes some initial steps that can be taken toward that end.

The political, legal, and policy recommendations contained in this Part of the Article are divided into two sections. The first sets forth two related proposals to address the hundreds of traditional school desegregation cases that remain under judicial supervision and the unknown number of OCR's voluntary school desegregation agreements that may technically remain under agency supervision. These suggestions may prove to be controversial among progressives, but the hope is they can at least spark conversation about how best to deal with these cases and dormant agreements in a uniform, responsible, and ethical way. The second section offers a series of recommendations on how the federal government can help promote *voluntary* school integration—not just in the narrow sense of the term, as it is typically used (i.e., by helping or encouraging school districts to adopt student assignment methods that promote racial and ethnic diversity in their schools), but broadly speaking, in all its forms—in creative ways and across the many contexts and disciplines that have direct and indirect impacts on public education.

A. *The Desegregation Docket*

Even among those who may be sympathetic to the cause, these days there seems to be an acknowledgment that traditional school desegregation litigation is passé.²⁰⁷ More than a decade has passed since the Supreme Court has even bothered to signal that it, too, has grown weary of these cases.²⁰⁸ No one knows the exact number for sure, but some hundreds of school systems have been declared unitary in the past (nearly) two decades,²⁰⁹ and in many of these

207. See, e.g., Wendy Parker, *The Future of School Desegregation*, 94 NW. U. L. REV. 1157, 1157 (2000) ("Today, we commonly define the future of court-ordered school desegregation as a non-issue: either desegregation cases are dead or, at the very least, the death knell has sounded."); Ryan, *supra* note 18, at 251 ("It seems unfashionable these days, if not atavistic, to talk seriously about the ways to increase racial integration.").

208. Mark V. Tushnet, *The "We've Done Enough" Theory of School Desegregation*, 39 HOW. L.J. 767, 767 (1996); see also Parker, *supra* note 207, at 1174–76 & nn.120–34 (discussing and citing others who have expressed the same view).

209. Considering only those cases in which DOJ was a party, a recent report from the Civil Rights Commission states that number has dropped from approximately 430 in 2000

districts, patterns of resegregation have emerged almost overnight.²¹⁰ Despite the large number of unitary status findings, few cases in recent years have been fully litigated (instead, many are the result of settlements), and even fewer have been reported in law-making legal opinions.²¹¹ The combination of the Supreme Court's vagueness in *Board of Education of Oklahoma City Public Schools v. Dowell*²¹² and *Freeman v. Pitts*,²¹³ and a dearth of recent district and appellate court guidance on the right standards to apply in unitary status proceedings, has led to something of an ad hoc approach to school desegregation cases.²¹⁴

To make matters worse, over the past forty years, under no administration, Democratic or Republican, has DOJ taken a thoughtful, transparent, comprehensive, and strategic approach to its school desegregation docket, which apparently includes something in

to 266 as of September 2007. BECOMING LESS SEPARATE?, *supra* note 204, at 1. An internal DOJ document listing findings of unitary status between 2007 and 2009 remove several dozen more from the total. Educational Opportunities Section List of School Districts Dismissed Since June 28, 2007 (on file with the North Carolina Law Review).

210. See, e.g., HISTORIC REVERSALS, *supra* note 1, at 42–44 (tracing post-unitary status trends toward resegregation in more than two dozen school districts between 1991 and 2005); Sean F. Reardon & John T. Yun, *Integrating Neighborhoods, Segregating Schools: The Retreat from School Desegregation in the South 1990–2000*, in SCHOOL RESEGREGATION, *supra* note 18, at 51, 64–66 (discussing the public school resegregation trends in several districts declared unitary in the 1980s and 1990s).

211. While modifications of existing court orders through negotiation may be common, I am unaware of any published case from the last decade and a half in which the plaintiffs have resisted a unitary status finding at full trial, and won. Nor am I aware of any case in which a court rejected a joint motion for unitary status. Indeed, in one instance, when the district court partially denied a joint motion for unitary status, the school board won reversal on appeal. *Robinson v. Shelby County Bd. of Educ.*, 2009 FED App. 0183P, at 2–18, 566 F.3d 642, 646–57 (6th Cir.).

212. 498 U.S. 237 (1991).

213. 503 U.S. 467 (1992). Essentially, *Dowell* created a three-part test that a defendant school district had to satisfy in order to attain unitary status: (1) good faith compliance with the desegregation decree, (2) the elimination of “the vestiges of past discrimination . . . to the extent practicable,” and (3) a continuing commitment to comply with the Fourteenth Amendment upon return of local control. 498 U.S. at 247–50. In *Freeman*, the Court approved of the notion of “partial” unitary status—where a school system could be released from its remedial obligations as to parts or aspects of the school system. 503 U.S. at 490–91. But in reaching its conclusion, the Court also questioned whether existing patterns of segregation were proximately caused by the constitutional violation and seemed to demand a greater fit between continuing segregation and the original bad acts of the school system. See *id.* at 475–77.

214. See *Parker*, *supra* note 207, at 1178–79 (“[T]he Court’s legal standards regarding termination are vague. . . . An individual [district court] judge’s personal preferences can easily influence the outcome of a pliable test such as that in *Dowell*.”); Monika L. Moore, Note, *Unclear Standards Create an Unclear Future: Developing a Better Definition of Unitary Status*, 112 YALE L.J. 311, 317 (2002) (citing different standards used by different courts).

the neighborhood of 250 cases at present.²¹⁵ Nor does it seem as though any administration in recent history has made a serious attempt to coordinate that litigation with civil rights organizations—most notably, the NAACP Legal Defense Fund—which serve as counsel for scores of additional cases on behalf of private plaintiffs.²¹⁶ Accordingly, as part of its effort to recommit the federal government to school integration, the Obama administration should work with the Educational Opportunities Section of the Civil Rights Division, and with OCR, to develop a clear philosophy and approach on these cases. Two related actions that could be taken to resuscitate court-ordered desegregation are described below.

1. Explicit School Desegregation Guidance and Guidelines

First, OCR and DOJ should provide guidance on preconditions for unitary status where the Supreme Court has been vague. Recall that the issuance of similar guidelines had a substantial and positive impact on desegregation in the late 1960s. Commentators have long recognized the continuing need for clearer standards that school districts must meet to attain unitary status,²¹⁷ and some have even floated proposals for consideration.²¹⁸ It may make sense to involve the academy and civil rights practitioners in developing uniform, workable standards, but OCR and DOJ should take the lead. Those two government agencies not only possess the substantive expertise necessary for such a task, but their leadership would lend credence to the process and authority to whatever guidelines that emerge from it. Separate or similar guidelines could be developed through OCR to address the unknown number of school districts that are technically still subject to what were once known as “Form 441-B” voluntary desegregation plans, negotiated by HEW.²¹⁹ These guidelines—for

215. See *supra* note 209.

216. For descriptions of LDF's involvement in major civil rights cases, including school desegregation cases, see generally JACK GREENBERG, *CRUSADERS IN THE COURT: LEGAL BATTLES OF THE CIVIL RIGHTS MOVEMENT* (2004); CONSTANCE BAKER MOTLEY, *EQUAL JUSTICE UNDER LAW 103-202* (1998); JUAN WILLIAMS, *THURGOOD MARSHALL: AMERICAN REVOLUTIONARY* (1998).

217. See *REVIVING THE GOAL*, *supra* note 11, at 31.

218. See, e.g., Moore, *supra* note 214, at 315-17, 319-23 (citing proposals by others for clearer standards).

219. See, e.g., *BECOMING LESS SEPARATE?*, *supra* note 204, at 12 & n.64 (describing 441-B agreements). School districts that did not operate segregated schools, that eliminated segregation from their schools, or that entered into voluntary desegregation plans were required to complete and submit a 441-B Form to HEW to remain eligible for federal funding. *Id.* There is little transparency as to the number of districts subject to these so-called 441-B agreements, and it is also unclear what legal status is afforded to

both court-ordered districts and the old HEW/OCR districts—could be used not only internally within the agencies, for the assessment of active cases on OCR’s and DOJ’s school desegregation docket, but also by private plaintiffs in litigating or negotiating with school districts in cases that do not involve DOJ; by school districts initiating self-evaluations of their desegregation progress; and potentially even by the courts in assessing litigation claims and motions for unitary status.²²⁰

What might such standards look like and what issues might they address? As an initial matter, they should state, based on prior case law, the specific facets of school operations for which the vestiges of desegregation must be eliminated “to the extent practicable,” under *Dowell*.²²¹ Six such areas are predefined in *Green*,²²² but *Green* contemplates the possibility of others, and lawyers in other school desegregation cases have often taken to examining a wide range of areas in which racial disparities may exist. For instance, school desegregation cases have examined racial disparities in student discipline, in enrollment in advanced, gifted, or remedial courses, in assignment of students to alternative schools, and in the identification of students for (and in the provision of) special education.²²³ All of these, and perhaps others, should be included on the list.

OCR and DOJ should also set forth in the guidelines that the school district bears the burden of proof, once disparities are identified, to show that they are not proximately caused by the prior

such plans or whether many of them have been monitored and updated by OCR or whether they have been largely ignored. OCR under this administration should revisit the issue and develop a comprehensive approach to deal with these agreements in a way that provides the school districts subject to them the greatest legal and political flexibility to advance the goal of integration within the limits of the law.

220. Recall, for instance, the deference that federal courts afforded to HEW’s guidelines in the 1960s. *See supra* notes 66–67 and accompanying text. Those were different days and different circumstances, but there is no reason to believe that a similar approach could not be taken today.

221. *Bd. of Educ. of Okla. City Pub. Sch. v. Dowell*, 498 U.S. 237, 250 (1991).

222. The “*Green* factors” include: (1) student assignment, (2) faculty assignment, (3) staff assignment, (4) facilities, (5) transportation, and (6) extracurricular activities. *Green v. County Sch. Bd. of New Kent County*, 391 U.S. 430, 435 (1967).

223. *See, e.g., Anderson v. Sch. Bd. of Madison County*, 517 F.3d 292, 298–303 (5th Cir. 2008) (reviewing school programs for factors such as student assignment, faculty, staff, transportation, extracurricular activities, and facilities); *Lee v. Roanoke City Bd. of Educ.*, No. 3:70-cv-855-MHT, 2007 WL 1196482, at *4–7 (M.D. Ala. Apr. 23, 2007) (analyzing procedures implemented for student discipline, drop-out intervention, and special education); *Harris v. Crenshaw County Bd. of Educ.*, No. 2:66CV2455-MHT, 2006 WL 2590592, at *3–5 (M.D. Ala. Sept. 11, 2006) (considering such factors as student assignment, instruction, and graduation rates).

de jure discrimination and segregation. Making explicit the rebuttable presumption that existing disparities are related to prior bad acts is helpful because courts have not always been clear which party bears that burden,²²⁴ and placing it on the school district has a basis in the case law.²²⁵ Moreover, given the difficulty of proving proximate cause, placing the burden on the school district is a fair but remedy-maximizing interpretation of the law.

Beyond identifying these discrete areas that should be examined for racial disparities, a new set of guidelines from the federal government should also address how to treat demographic changes. There may very well be a handful of school districts under court order that have not changed much since the school desegregation case against it was filed, but they are probably few in number. Most have undergone vast changes. Nationally, whereas, in 1968, Whites made up eighty percent of public school students and Blacks were the dominant minority at fourteen percent,²²⁶ today, Whites comprise only 56.5% of the public school population and the largest minority group is comprised of Latino students, at 20.5%.²²⁷ Insofar as some dormant, decades-old desegregation orders no longer reflect the communities they are intended to serve, OCR and DOJ should define how the desegregation orders will be treated. Perhaps, again, there is a legal basis to place the burden on school districts to account for disparities between Whites and racial minorities who were not part of the original order. Even if not, perhaps the guidelines can provide an opportunity and mechanism for either DOJ or private plaintiffs to intervene in an ongoing case to present additional evidence as to why current patterns of segregation or other racial disparities are proximately caused by the same prior acts that gave rise to the case or

224. See, e.g., Parker, *supra* note 207, at 1205 ("The orders required that the parties show cause why the school districts should not be declared unitary and the cases dismissed.") (describing orders issued by two judges in the Middle District of Alabama)); accord, Parker, *supra* note 147, at 188 (same).

225. Freeman, for example, suggests that current conditions of school segregation can be assumed to be proximately caused by the school district's prior de jure discrimination and segregation, but that such a presumption can be rebutted by evidence of demographic changes that have taken place over the years unrelated to that unconstitutional conduct. Freeman v. Pitts, 503 U.S. 467, 475-77 (1992). In *Jenkins*, the Supreme Court seemed to imply further that school districts were only obligated to remedy the incremental portion of a racial disparity that could be tied to their prior de jure discrimination and segregation. Missouri v. Jenkins, 515 U.S. 70, 101-02 (1995).

226. GARY ORFIELD & CHUNGMEI LEE, THE CIVIL RIGHTS PROJECT (HARVARD), RACIAL TRANSFORMATION AND THE CHANGING NATURE OF SEGREGATION 13 (2006) [hereinafter RACIAL TRANSFORMATION], available at http://www.civilrightsproject.ucla.edu/research/deseg/Racial_Transformation.pdf (reporting 1968 data).

227. REVIVING THE GOAL, *supra* note 11, at 11 (2006-07 school year data).

subsequent acts by the school district that also violate the Fourteenth Amendment. If successful in doing so, such a conclusion could provide additional legal justification for more aggressive judicial remedies or negotiated settlements.

Lastly, the guidelines should somehow address one of the most pressing issues advocates have identified—namely, that unitary status is often followed by immediate racial resegregation.²²⁸ To do so, they could require the court or the parties, first, to determine what desegregative student assignment strategies the school district in question employs (e.g., satellite zones, race-conscious magnet schools, a minority-to-majority program, school pairings, etc.), and, second, to assess how attainment of unitary status will likely affect the continued use of these strategies. If it appears that there is a threat of substantial resegregation, or even if not, the school district should be called upon to explain, under the “continuing good faith compliance” prong of the *Dowell* test, how it intends to continue to assign students in a way that guarantees the government (and/or private plaintiffs) and the community that it has an ongoing commitment to avoid racial isolation and to promote racial integration while complying with the Constitution and requirements set forth in *Parents Involved*. The guidelines should also establish the presumption that districts may continue to use certain student assignment strategies established under court order, such as satellite zones or school pairings, beyond the order’s dissolution, on the theory that even though they were initially adopted with the goal of facilitating desegregation, they have since become institutionalized, and that changing them would not only disrupt existing school feeding patterns but also knowingly recreate racially segregated conditions.²²⁹ Such assurance from the guidelines might give some school districts comfort that they can exist in a post-unitary status world without completely altering something that works well as is.²³⁰

228. See *supra* note 210 and accompanying text.

229. Justice Kennedy suggests that some such strategies are consistent with constitutional obligations, and indeed may not even be subject to strict scrutiny. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 789 (2007) (Kennedy, J., concurring).

230. It is something of an open question how courts should treat race-conscious remedies contained in a unitary status settlement, since technically, if the district is declared unitary, the old court order no longer provides the same constitutional cover. The guidelines, therefore, might also offer some guidance on this issue and state the authority under which the agreement can be enforced.

2. Comprehensive Review of the Federal Government's School Desegregation Docket

A second, related proposal for handling the 250 or so cases currently on DOJ's docket may prove more controversial. There is a sense among civil rights advocates that the continued existence of school desegregation orders is a good thing, and that DOJ and private plaintiffs should do what they can to resist dissolution, the idea being that a court order can provide cover for actions that the school board can take or be required to take that it otherwise would not be allowed to take in the absence of a court order.²³¹ In theory, that is certainly true, as *Parents Involved* made plain: once a district is unitary, the judicial scrutiny applied to its racial integration efforts is intense. Yet, anecdotally, it seems few plaintiffs have actively relied on court orders or consent decrees to continue to press for further integration or desegregation, and some communities subject to them do not even know they exist.²³² As Wendy Parker put it, "most [school desegregation] cases suffer from extreme neglect—little activity will occur for years, if not decades, but the court-ordered remedies remain in place."²³³

If the Obama administration is serious about pursuing integration in public schools, then perhaps it should give serious consideration to making better use of the school desegregation cases to which the government is a party. The perception until now has been that DOJ takes a *reactive* stance to desegregation, and that its litigation activities for much of the past several decades lacked transparency.²³⁴ Indeed, until the Civil Rights Commission issued its 2007 report on desegregation, it was unclear to most observers how many cases the government had on its docket, how many of them were active, and which school systems the government's caseload

231. See, e.g., *LONG ROAD TO JUSTICE*, *supra* note 50, at 38–39 (urging DOJ to declare districts unitary only after it is clear that they will remain integrated even after receiving post-unitary status); *HISTORIC REVERSALS*, *supra* note 1, at 48 ("Communities still under court order should exercise the greatest caution in ending their court orders since such moves could strip local authorities of any right to take actions they believe to be needed to address racial separation and prepare their students for living and working in a multiracial community.").

232. *BECOMING LESS SEPARATE?*, *supra* note 204, at 12 (stating that even some school districts do not know of or understand the scope of the court orders that bind them).

233. Parker, *supra* note 207, at 1160.

234. Immediately upon assuming office, President Obama promised transparency into the workings of the federal government. Sheryl Gay Stolberg, *On First Day, Obama Quickly Sets New Tone*, N.Y. TIMES, Jan. 22, 2009, at A1 (" 'Transparency and rule of law will be the touchstones of this presidency.' " (quoting President Obama)).

covered.²³⁵ In response to the Commission's inquiries, however, the Civil Rights Division's Educational Opportunities Section provided not only information about the cases on its docket but also data revealing that "[s]ince FY 2000, the DOJ has actively pursued the closure of school desegregation cases."²³⁶ Between 1999 and 2007, it initiated 265 desegregation case reviews, resulting in 178 findings of unitary status.²³⁷ In other words, in exercising its caretaker duties monitoring these cases, DOJ under Bush II was also swiftly shuffling the school districts toward unitary status.²³⁸

One might think that the alternative approach would be to protect these court orders and to return to a sort of "let sleeping dogs lie" strategy. But that approach also would not do much to affirmatively advance civil rights or racial integration in a meaningful way, especially if many of these court orders have languished and become irrelevant, or worse, gone unnoticed by the very communities they are supposed to serve. Rather than deal only with those cases that have been awoken by a court or a private party, DOJ should instead continue to revisit these cases in a systematic and uniform way—as it apparently did under Bush II—but do so based on the guidance that it develops together with OCR, with an eye toward finding workable, sustainable, and constitutional integrative solutions. Proceeding proactively in this way need not mean immediately negotiating unitary status for every school district in question, as integration advocates may fear. But it would mean that there is a possibility that the government would be negotiating the terms of an eventual dissolution of the order, if DOJ finds that the school district has indeed met all of its constitutional obligations.

While there is that risk, the benefits could significantly outweigh it. First, something is better than nothing. If a community is not using the cover that a court order provides it, and indeed no one really even knows it exists, then what good does it actually serve? Revisiting the order allows the government an opportunity to conduct site visits, meet with the community and with school district officials, and do a thorough, on-the-ground assessment of the continuing racial

235. BECOMING LESS SEPARATE?, *supra* note 204, at 23–28 (describing the number of cases for which DOJ is responsible, and the actions it has taken in recent years on these cases).

236. *Id.* at 28.

237. *Id.* at 25, 27.

238. While this time period includes a small portion of the Clinton presidency, these statistics are the best available on the Educational Opportunity Section's actions during the Bush II presidency.

disparities and school segregation, and strategize with key stakeholders about how best to address them given the school district's continuing constitutional obligations.

Second, if the guidelines discussed above are properly designed, the government's case review would be comprehensive and uniform, and it would be conducted at the government's initiation and on the government's terms, rather than at a school district's, court's, or third party intervenor's behest. Such a posture allows the government to establish its goals proactively, use its own metrics to evaluate the efforts of the school districts in meeting their obligations, and—because many of these cases do not end up going to a hearing anyway—negotiate the best possible integration-maximizing result for all of the parties involved.

Third, negotiating a modified order or, if appropriate, terms for the eventual dissolution of a court order can allow for concessions from a defendant school district that may not have been possible if the case were litigated. For example, given the stringent standards for proximate cause under *Freeman* and *Missouri v. Jenkins*,²³⁹ it is quite unlikely that a court will find disparities in achievement, in assignment, or in discipline in existence today that are traceable to constitutional violations that occurred decades prior. However, a district might be willing to agree to take concrete steps toward progress in those areas, and a court might be willing to approve a stipulation that includes such relief on the ground that the parties have made reasonable calculations as to the likelihood of success at trial and decided that the concessions by both sides in the settlement fairly recognize those risks.²⁴⁰

Fourth, should any such negotiated, post-unitary status agreement containing some race-conscious elements be challenged by a dissatisfied parent in the future, the hope is that a court evaluating its validity may find multiple justifications for it, such as: (1) vestiges of any remaining duties to eliminate de jure segregation;²⁴¹ (2)

239. 515 U.S. 70 (1995). An integration-maximizing interpretation of the standards for a judicial finding of proximate cause that current disparities are linked to prior unconstitutional actions are discussed *supra* note 225.

240. It is also often assumed, incorrectly, that school districts are either actively seeking or at least interested in achieving unitary status, but, in fact, many school districts are content to remain under court order for extrajudicial reasons. See BECOMING LESS SEPARATE?, *supra* note 204, at 13–14; Parker, *supra* note 207, at 1212–13.

241. An unexplored issue is this: *Dowell* continues the constitutional remedial duty until the vestiges of the prior segregation are eliminated “to the extent practicable.” Bd. of Educ. of Okla. City Pub. Sch. v. Dowell, 498 U.S. 237, 250 (1991). But surely there might still be vestiges of that prior segregation for which it is not “practicable” to order

demonstration of continuing commitment to sustain gains obtained while under court order; and (3) pursuit of the compelling interest of racially integrated education as established in *Parents Involved*. And, because both (or in some cases, several) parties will have agreed to any negotiated settlement, the parties will be in the position of working together to defend the agreement, should the court or an intervenor raise questions.

Revisiting cases in a systematic and uniform way, whether or not already awoken by another party, has other benefits as well. It could significantly reduce the costs of litigation to both the school district and the government. It also moves negotiations, initially, outside of the adversarial context of litigation. And it may allow for more flexibility and community involvement than the litigation model might otherwise permit. Further, the federal government may call upon certain resources that are well-suited to facilitate the process. Pursuant to the Civil Rights Act of 1964 and its implementing regulations, the government created two agencies in the 1960s that remain in existence today: the Desegregation Assistance Centers (now called Equity Assistance Centers (“EACs”)) in the Department of Education and the Community Relations Service (“CRS”) in the Department of Justice.²⁴² The EACs and CRS have relatively modest annual budgets—about \$7 million and \$10 million, respectively—and while they have both served important functions in the past,²⁴³ their roles have not been as well-defined in recent years.²⁴⁴ That said, given

continuing constitutional remedies. A good example might be patterns of segregation that are attributable in part to past de jure segregation and in part to demographic changes. Should not the Constitution allow a school district to try, voluntarily, to cure such disparities if it so chooses?

242. There are ten regional EACs across the country, which “provide assistance in the areas of race, gender, and national origin equity to public school districts to promote equal educational opportunities.” United States Department of Education, Training and Advisory Services Equity Assistance Centers, <http://www.ed.gov/programs/equitycenters/contacts.html> (last visited Feb. 13, 2010). CRS has ten regional offices and four field offices, and is a “‘peacemaker’ for community conflicts and tensions arising from differences of race, color, and national origin.” United States Department of Justice, Community Relations Service, <http://www.usdoj.gov/crs/map.htm> (last visited Feb. 14, 2010).

243. See, e.g., BETRAM LEVINE, *RESOLVING RACIAL CONFLICT: THE COMMUNITY RELATIONS SERVICE AND CIVIL RIGHTS, 1964–1989*, at 155–80 (2005) (describing the role that CRS played in addressing the violence that erupted following Judge Garrity’s 1974 Boston school desegregation ruling).

244. An article written about the CRS in 1993, for example, reported: “Even some people in the Department of Justice don’t know of CRS’s existence. When a reporter called the department, a Justice spokesman said he had never heard of CRS.” Mark Curriden, *Settling Racial Conflicts Is CRS Goal: Little-Known Division of Justice Dispatched to Resolve School Bus Dispute*, A.B.A. J., Oct. 1993, at 34, 34.

their charge, expertise, historical importance, and connections to and work with the communities in which they operate, these agencies may be perfectly positioned to assist OCR and the Educational Opportunities Section of DOJ with its school desegregation docket and the old 441-B agreements. A new administration and new leadership provide an ideal opportunity to rethink the mission and work of these agencies. Any comprehensive strategy to deal with the federal government's desegregation docket, therefore, should contemplate the role that CRS and the EACs can play in that process.

The sad reality is that the law is stacked against school desegregation plaintiffs. Given the state of the law and the general resistance of the federal judiciary to continued supervision, it is hard to imagine what kind of conditions a court would need to find to reject, outright, a school district's request for unitary status and order more aggressive relief. Under these conditions, whatever benefit there may be to minority students and parents to know that a dormant court order exists in their school district is limited. On the other hand, by reviving desegregation cases and using them to focus school districts on existing racial disparities, these cases may still serve some good. The Obama administration, therefore, should give serious consideration to a more proactive approach to the hundreds of desegregation cases for which it is responsible.

B. Affirmative Strategies

Despite the large number of school desegregation cases that remain on the books, these cases do not cover the vast majority of school districts in the nation, and the United States Supreme Court has already declared that their reach and duration is limited, as is the relief that can be achieved through them.²⁴⁵ Thus, an administration committed to educational equity and integrated schooling cannot rely on reviving that docket alone to make much progress. Instead, it

245. See *Missouri v. Jenkins*, 515 U.S. 70, 100–02 (1995) (holding that a district court exceeded its authority when it ordered a remedy that sought to improve urban schools to the point where they could draw Whites from the surrounding areas to return them voluntarily); *Freeman v. Pitts*, 503 U.S. 467, 475–77 (1992) (stating that school districts are not responsible for demographic changes that lacked a causal relationship to the original constitutional violation); *Bd. of Educ. of Okla. City Pub. Sch. v. Dowell*, 498 U.S. 237, 247–50 (1991) (holding that school districts can be released from their obligations with reasonable compliance with prior orders and when a court deems the vestiges of discrimination eliminated “to the extent practicable”); *Milliken v. Bradley*, 418 U.S. 717, 745 (1974) (holding that an interdistrict remedy was not available absent a finding of an interdistrict violation).

should put the bulk of its resources behind political, legislative, and policy efforts and to coordinating federal agency functions that promote racial integration and equity.

1. Reframing the School Integration Debate and Advancing Research to Support It

For much of the past several decades, advocates of school integration have been playing defense under Republican and Democratic administrations alike. If President Obama is to advance an agenda that prioritizes racially integrated public education, he must begin with clear and forceful words. He must remind his colleagues in Congress and the nation at large that it is an issue of pedagogy and of civil rights, and that civil rights, properly understood, have historically been and should return to being a bipartisan issue, not a liberal or Democratic issue. Nor is integrated education a 1960s issue. All Americans, be they White or non-White, rich, middle-class, or poor, from the Left or from the Right, in cities, suburbs, or rural regions of the country, should support the rigorous enforcement of civil rights laws. Obama must make clear that *Brown's* vision of equal, integrated public schools continues to be relevant and critical to the health and prosperity of our democracy. Indeed, as our nation has become more racially and ethnically diverse, and our society more global than ever, *Brown's* goal is only more compelling. Yet, by so many measures, the nation is moving farther away from making it a reality. The current administration must employ the federal agencies and urge Congress and the nation as a whole to work together to fully support affirmative efforts, within the limits of the law, to promote equality of opportunity for all students and greater racial and ethnic integration in our public schools.²⁴⁶

Some immediate steps to demonstrate a commitment to racially integrated education might include, for example, engaging the Department of Education to educate the public about the benefits of integration and the harms of racial isolation. Public opinion polls conducted after the Supreme Court decision in *Parents Involved* that measured the public's support for racial integration at the K-12 level

246. One small window that the President had to make such a forceful statement has closed. In Obama's first national address as President on education issues, he neglected to mention anything about integration or *Brown's* promise, instead focusing primarily on charter schools, accountability, early childhood education, and merit-pay for teachers. See David Stout, *Obama Outlines Plan for Education Overhaul*, N.Y. TIMES, Mar. 11, 2009, at A14.

are somewhat deceiving, with results varying significantly depending on how the question was asked.²⁴⁷ But this variance suggests that many people can still be convinced of its benefits if they are better informed. Public education and messaging, therefore, are key. A substantial body of research already exists from which the federal government can draw,²⁴⁸ but its reach does not extend to those who work and write outside the halls of universities, where the research is conducted and discussed, or the courtrooms, where these matters are sometimes litigated. Intuitively, diversity in classrooms makes sense. If this administration wants to take integrated schooling seriously, it should use the resources of the federal government to digest the research already available that confirms this intuition and help the public better understand it.

Beyond sharing and democratizing knowledge that already exists, the current administration should also help researchers develop more of it. As much as is known about race and schooling today, there remains much more to know. The nation's demographics have shifted radically since the 1950s and 1960s, when the foundational research was conducted on the harms of racial isolation. Today, not only are there far more students of non-White backgrounds in public school, these students represent diversity on many other fronts too—language, class, ethnicity, religion, and culture.²⁴⁹ Issues of integration and isolation are increasingly layered, with some students facing segregation, for example, by race and poverty, as well as language.²⁵⁰ The difficulties faced are also vastly

247. When asked, "As you may know, the Supreme Court recently ruled that public schools may not consider an individual's race when deciding which students are assigned to specific schools. Do you agree or disagree with this ruling?," seventy-one percent of respondents approved of the decision and twenty-four percent disapproved. Public Opinion Poll, Quinnipiac University, Voters Back Supreme Court Limit on School Deseg 3-1 (Aug. 16, 2007), <http://www.quinnipiac.edu/x1295.xml?ReleaseID=1093>. However, when asked, "As you may know, the Supreme Court recently restricted how local school boards can use race to assign children to schools. Some argue (this is a significant setback for efforts to diversify public schools), others say (race should not be used in school assignments). On balance, do you approve or disapprove of this decision?," forty percent of respondents approved and fifty-six disapproved. Public Opinion Poll, Washington Post-ABC News, News Poll (July 30, 2007), http://media.washingtonpost.com/wp-srv/politics/ssi/polls/postpoll_072307.html.

248. See, e.g., Brief of 553 Social Scientists as Amici Curiae in Support of Respondents, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007) (Nos. 05-908 & 05-915) (citing work of social scientists supporting goals of racial integration and the reduction of racial isolation).

249. See generally RACIAL TRANSFORMATION, *supra* note 226 (examining the transformation of racial composition in the nation's schools).

250. See generally *id.* (examining the changing patterns of segregation in American public schools).

different in cities and in suburbs, for the West and for the South. The questions are many: public schools find themselves constantly struggling with which training, teaching, and learning methods are most effective (and for whom). To be sure, some of this thinking is already being done by innovative teachers and researchers, and funded by private foundations,²⁵¹ but there is no reason why the government should not only participate but also lead the charge. The current administration, therefore, can help coordinate public and private groups to develop a research agenda and execute it in ways that inform public policy and, if necessary, litigation.²⁵² Planning and conducting this research will take time, but the President should immediately call for a renewed commitment to using the resources and the bullhorn of the federal government to realize the promise of *Brown*.

2. Undoing Obstacles to Effective Civil Rights Enforcement and Integration Innovation

President Obama must also signal a change from the perceived politicized and partisan culture of Washington, especially in those federal agencies with influence over education and civil rights policy that should function without political influence. Top on the list for de-politicization is DOJ.²⁵³ Detailed reports issued in 2008 by DOJ's Office of the Inspector General and Office of Professional Responsibility set forth proposals that the current administration should review and, as appropriate, implement to restore confidence, integrity, and fairness to that critical law-enforcement agency.²⁵⁴ These recommendations should be given serious consideration. Obama and the Attorney General must follow through with their unequivocal statements that ideological screening for career positions within DOJ—or anywhere else in the federal government, for that

251. For example, several of the sources cited in this Article that pertain to the benefits of racial integration are produced by The Civil Rights Project/*Proyecto Derechos Civiles*, and funded by private philanthropy groups like the Ford Foundation and the Open Society Institute. See, e.g., Ford Foundation, <http://fordfound.org/>; Open Society Initiative & Soros Foundations Network, <http://www.soros.org>; The Civil Rights Project/*Proyecto Derechos Civiles* (UCLA), <http://www.civilrightsproject.ucla.edu>.

252. REVIVING THE GOAL, *supra* note 11, at 30 (citing the need for “basic research, and for new thought about race and schooling” and recommending that federal agencies work together with private groups such as the National Academy of Education and the American Educational Research Association).

253. See Carrie Johnson, *Obama Team Faces Major Task in Justice Dept. Overhaul: Goal Is to Restore Confidence in Law Enforcement Actions*, WASH. POST, Nov. 13, 2008, at A2 (“Political considerations affected every crevice of the [DOJ] during the Bush years.”).

254. See policy recommendations in sources cited *supra* note 150.

matter—is a thing of the past.²⁵⁵ There must be no screens to enlist conservatives in career civil servant posts, but nor can there be similar screens to hire or promote only liberals in such positions. The goal of DOJ is the administration of justice, and, as such, the primary qualification to serve as a career employee there should be an interest to enforce the laws and to perform the functions of the position professionally and ethically, under the leadership of those who are and should be politically appointed.²⁵⁶

In addition, the President and his administration should move quickly to reverse those policies the Bush II administration put into place that undermine civil rights enforcement,²⁵⁷ or as related to issues of integrated schooling, that stifle innovation and the development of constitutionally sound practices of local communities and school districts. The Department of Education and its Office for Civil Rights can begin this process by withdrawing or amending the “Dear Colleague” letters that it issued in the waning days under Bush II. With regard to the two letters that purport to provide guidance on the consideration of race in K–12 student assignment and in higher education admissions, any revision should more accurately describe the law. It should also actively encourage, rather than discourage, school districts and institutions to explore legally permissible strategies that expand educational opportunities and expose students to diverse educational settings. To be sure, those strategies that do take race into account must satisfy the obligations of strict scrutiny. But race-conscious efforts to expand equal educational opportunity

255. In his confirmation hearing, for instance, Eric Holder stated: “‘Law enforcement decisions and personnel actions must be untainted by partisanship.’ ... ‘Under my stewardship, the Department of Justice will serve justice, not the feeling interests of any political party.’” Josh Meyer, *Holder Calls Waterboarding Torture; Obama’s Nominee for Attorney General Promises Big Changes at ‘Badly Shaken’ Justice Department*, L.A. TIMES, Jan. 16, 2009, at A10; accord Carrie Johnson, *Waterboarding Is Torture, Holder Tells Senators; Justice Dept. Nominee Rejects Policies of Bush Era but Stresses Bipartisanship*, WASH. POST, Jan. 16, 2009, at A2 (quoting Holder as describing the partisan conduct in DOJ under Bush II as “‘appalling,’” and stating that he would “closely examine [its] record on civil rights enforcement”).

256. See generally Kennedy, *supra* note 153, at 227–36 (suggesting steps the new administration should take to rebuild and strengthen the Civil Rights Division).

257. See Neil A. Lewis, *Justice Dept. Under Obama Is Preparing for Doctrinal Shift in Policies of Bush Years*, N.Y. TIMES, Feb. 2, 2009, at A14 (“[T]here were expectations that the [Civil Rights Division] would be restored to its historic role of largely enforcing prohibitions against racial and ethnic discrimination. Under the Bush administration, the division significantly diminished its involvement in those areas and shifted resources to fighting instances of religious discrimination.” (citing a career attorney in the Department of Justice)).

are by no means per se invalid,²⁵⁸ and OCR should offer its technical assistance to entities that contemplate employing such means to make sure that they are used in ways consistent with the law. Moreover, OCR leadership should also reexamine its existing docket of technical assistance reviews and its affirmative compliance reviews to determine which, if any, were ideologically motivated; any such investigations or reviews should be approached with a more balanced eye and, if appropriate, brought to a responsible and ethical close.

3. Reframing School Choice: NCLB, Charters, and Magnets

For decades, national as well as local educational policy have been obsessed with school choice as part of the solution to society's educational ills,²⁵⁹ and the Bush II administration raised the stakes by expanding public school choice options. NCLB provides students in failing schools the right, theoretically, to transfer elsewhere.²⁶⁰ Charter schools, an increasingly popular alternative to traditional public schools, have also expanded their reach under Bush II, and the early signals from the Obama administration suggest that their growth will continue.²⁶¹ Meanwhile, the federal magnet schools program, now nearly four decades old, continues to purport to offer unique curricula and exposure to greater student diversity, even as that latter promise has been diluted over the years.²⁶² With regard to each of these choice options, however, the federal government has taken a weak and somewhat counterproductive stance toward integration. This must change under new leadership. A full discussion of the shortcomings and possible reforms to NCLB, charters, and magnets is beyond the scope of this Article, but it is clear that proposed reforms must eliminate the perverse incentives that these school choice mechanisms create and replace them with positive ones.

NCLB, for example, does not have any structures in place to encourage integrative transfers or discourage segregative ones, and, as a result, commentators have noted that it can and has contributed

258. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No 1*, 551 U.S. 701, 788–89 (2007) (Kennedy, J., concurring).

259. See Frankenberg & Le, *supra* note 132, at 1041–45.

260. 20 U.S.C. § 6316(b)(1)(E)(i) (2006 & Supp. 2009).

261. In his testimony before the House and Senate Appropriations Subcommittees, for example, Secretary of Education Arne Duncan stated the Department of Education's intention to double charter school funding over the next four years. *Hearings Before a Subcomm. of the Comm. on Appropriations*, 111th Cong. 461 (2009) (statement of Arne Duncan, Sec'y of Educ.), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=2010_happ_lab_5&docid=f:50763.pdf#page=467.

262. Frankenberg & Le, *supra* note 132, at 1056–59.

to greater racial isolation.²⁶³ Indeed, not only does the text of NCLB itself lack such positive incentives, but a “Dear Colleague” letter issued by OCR under Bush II explicitly rejects any interpretation of NCLB that would allow school districts to harmonize their voluntary integration efforts with the statute if doing so would limit the transfer option in any way.²⁶⁴ Even if NCLB did include some integration incentives, its transfer provisions remain severely underutilized (only about one percent of students eligible for transfers appear to use them),²⁶⁵ and they also fail to provide for or encourage the movement of students between districts, thus greatly reducing their effectiveness as a possible integration tool.²⁶⁶ The evidence on student diversity in charters is also mixed, but on the whole, it appears they do not tend to be centers of racial or socioeconomic integration either.²⁶⁷ Lastly, though certainly the most effective of the three in promoting integration, magnets in recent years are also increasingly less successful at achieving meaningful levels of integration, despite their origins as an explicit desegregation tool.²⁶⁸

Given these realities, the current administration should actively seek to develop regulations, legislative revisions, and policy positions that create positive, integration-encouraging incentives, within the limits of the law. For Bush II’s Department of Education, the policy message seemed to be that school choice, whatever form it took, was unambiguously a good thing, with little regard for what kind of

263. See, e.g., Jennifer Jellison Holme & Amy Stuart Wells, *School Choice Beyond District Borders: Lessons for Reauthorization of NCLB from Interdistrict Desegregation and Open Enrollment Plans*, in *IMPROVING ON NO CHILD LEFT BEHIND: GETTING EDUCATION REFORM BACK ON TRACK* 139, 139–54 (Richard Kahlenberg ed., 2008).

264. See Letter from Stephanie J. Monroe, *supra* note 181.

265. GEORGES VERNEZ ET AL., *STATE AND LOCAL IMPLEMENTATION OF THE NO CHILD LEFT BEHIND ACT: VOL. VII—TITLE I SCHOOL CHOICE AND SUPPLEMENTAL EDUCATION SERVICES: FINAL REPORT 1–2* (2009), www.rand.org/pubs/reprints/2009/RAND_RP1383.sum.pdf.

266. Losen, *supra* note 173, at 289 (“[N]o school districts are required to receive students attending failing schools from other districts, and the law’s structure allows for, but does not encourage (by money grant or other incentives) inter-district transfers.”).

267. See, e.g., ERICA FRANKENBERG & CHUNGMEI LEE, *THE CIVIL RIGHTS PROJECT (HARVARD), CHARTER SCHOOLS AND RACE: A LOST OPPORTUNITY FOR INTEGRATED EDUCATION* (2003), http://www.civilrightsproject.ucla.edu/research/deseg/Charter_Schools03.pdf, 3–48; INST. ON RACE & POVERTY, *FAILED PROMISES: ASSESSING CHARTER SCHOOLS IN THE TWIN CITIES* 3–15 (2008), available at http://www.irpumn.org/uls/resources/projects/2_Charter_Report_Final.pdf; Amy Stuart Wells et al., *Charter Schools and Racial and Social Class Segregation: Yet Another Sorting Machine?*, in *A NOTION AT RISK: PRESERVING PUBLIC EDUCATION AS AN ENGINE FOR SOCIAL MOBILITY* 169, 172 (Richard D. Kahlenberg ed., 2000).

268. Frankenberg & Le, *supra* note 132, at 1045–55.

schools resulted from it.²⁶⁹ This hands-off governmental stance toward school choice, however, allows it to be used in ways that undermine *Brown's* promise. The Department of Education, therefore, in addition to withdrawing or revising any OCR guidance that incentivizes resegregation, should direct OCR to affirmatively offer its technical assistance to school districts that wish to take steps to promote greater integration—again, in ways consistent with the law.

Further, if the current administration intends to stand behind NCLB's transfer provisions as an appropriate way to address "failing schools," then it should make sure that the opportunities to transfer are meaningful, and not illusory. Seats must be made available in eligible receiving schools and information must be properly distributed to all parents of students entitled to a transfer. Beyond that, the government should provide incentives to encourage *interdistrict* NCLB transfer opportunities and promote greater cooperation between and among neighboring school districts, especially at the borders along which substantial residential segregation exists. If additional federal money is made available for charter schools under the current administration, then recipients of those funds, too, should be asked to take affirmative steps to attract a diverse body of teachers and students, as magnet schools are expected to do, and to comply with state laws requiring greater racial integration in charter schools.²⁷⁰

As it revamps the landscape of school choice, the current administration can do more to elevate the status of magnet schools as an important contributor to the patchwork of options available to parents and students. Although charter schools have gotten most of the attention under the Obama administration so far, magnet schools currently enroll twice as many students and offer many of the same

269. Consider the various Web site resources that were created under Bush II and that remain active today. See, e.g., United States Department of Education, Building Choice, <http://buildingchoice.org> (last visited Feb. 13, 2010) ("This website is designed to help implement and maintain public school choice programs."); United States Department of Education, Choices for Parents, <http://www.ed.gov/nclb/choice/index.html> (last visited Feb. 13, 2010) (describing and providing hyperlinks to investigate "the full range of choices" provided for under NCLB).

270. See ERICA FRANKENBERG & GENEVIEVE SIEGEL-HAWLEY, THE CIVIL RIGHTS PROJECT/PROYECTO DERECHOS CIVILES (UCLA), THE FORGOTTEN CHOICE? RETHINKING MAGNET SCHOOLS IN A CHANGING LANDSCAPE 15 (2008), http://www.civilrightsproject.ucla.edu/research/magnet/the_forgotten_choice_rethinking_magnet_schools.pdf (noting that few states have racial or socioeconomic integration requirements for charter schools); Susan Eaton & Gina Chirichigno, Op-Ed, *Charters Must Commit to Diversity*, BOSTON GLOBE, July 19, 2009, at C9 (urging federal funds directed to charters to include integration goals).

things that charters do, and more.²⁷¹ Properly imagined, they provide specialized curricula and programs, include free transportation, draw a diverse core of teachers and administrators, and offer the opportunity to learn in an integrated educational setting.²⁷² To the extent that some magnet schools are not actually doing these things, or are not doing them well, the federal government should pour its resources into making them better, not drain funds away to fund other less-tested programs that may not hold the same promise that magnets do.²⁷³

Finally, across all of its school choice programs, the federal government should be mindful of incentivizing meaningful choice that expands the opportunity of students to learn in integrated educational environments. Because substantially more school segregation exists *between* school districts than *within* them,²⁷⁴ encouraging more *interdistrict* magnet schools, creating opportunities for interdistrict NCLB transfers, and facilitating the creation of charter schools that draw students from more than one school district are all important strategies to increase the reach of school integration. Despite recent backsliding, the South—where courts have most actively supervised desegregation litigation, and where many metropolitan-wide school systems exist—has been the nation's leader in school desegregation for much of the past four decades.²⁷⁵ Meanwhile, the Northeast and Midwest—where there has been much less court-ordered school desegregation activity, and where there can sometimes be dozens of small school systems in a single metropolitan area—have been the most segregated regions in the country.²⁷⁶ We can learn from our desegregation experience in the South that greater regional cooperation, whether through interdistrict programs or through actual school district consolidation, creates more opportunities for meaningful integration.

4. Promoting Smart School District Consolidation

Facilitating student mobility between districts is one way to get at the problem that much of the existing segregation can be found

271. FRANKENBERG & SIEGEL-HAWLEY, *supra* note 270, at 15.

272. *Id.* at 47–51.

273. For some suggestions on magnet school reform, see *id.* at 47–51; Frankenberg & Le, *supra* note 132, at 1064–69.

274. CHARLES T. CLOTFELTER, *AFTER BROWN: THE RISE AND RETREAT OF SCHOOL DESEGREGATION* 59–74 (2004); Reardon & Yun, *supra* note 210, at 51–69.

275. CLOTFELTER, *supra* note 274, at 56–57.

276. *Id.*; Frankenberg & Le, *supra* note 132, at 1027–29 (discussing the changing nature of school segregation and citing sources).

between and not within school districts. But another is simply attempting to erase the lines that divide racially and socioeconomically distinct communities altogether. Different state governments have tried, at times, to require school district consolidation, usually for fiscal and administrative reasons,²⁷⁷ and certainly these efforts have been met with some resistance (especially from smaller rural communities),²⁷⁸ but it is not entirely clear whether there has ever been a substantial *federal* effort to facilitate that objective on a broad scale, or even to have federal education officials participate in the consolidation conversation. Yet, school district consolidation can be an attractive possibility as a means of increasing school integration because its fiscal benefits may prove attractive to those who would otherwise be indifferent to the integration opportunities it can provide.

In this fiscally challenged climate, consolidation could prove an attractive solution to state budgets at the local level. The Department of Education under the Obama administration, therefore, should give serious consideration to throwing the weight of the federal government, strategically, behind consolidation that serves important national educational objectives as well. Research is required to better understand the possible benefits and costs of consolidation,²⁷⁹ and the best political and legislative strategies. The White House's domestic policy team is well situated to initiate, coordinate, and conduct the initial feasibility assessments. While consolidation, in the abstract, has

277. See, e.g., Marvin E. Dodson III & Thomas A. Garrett, *Inefficient Education Spending in Public School Districts: A Case for Consolidation*, 22 CONTEMP. ECON. POL'Y 270, 270–79 (2004) (estimating the economies of scale for consolidation of school districts in Arkansas and concluding that consolidation would result in significant cost savings). The Maine legislature, for instance, enacted school reorganization legislation that requires a massive restructuring of the school districts in the state, with the goal of reducing the total number of districts from about 290 to no more than eighty, each with at least 2,500 students (barring a few exceptions). The reorganization was set to be complete by July 1, 2009. See Maine Department of Education, Summary of the Reorganization Law, <http://www.maine.gov/education/reorg/lawssummary.html> (last visited Feb. 13, 2010). Meanwhile, in Pennsylvania, Governor Ed Rendell is trying to convince the legislature to consider a bill that consolidates the state's 500 school districts into about 100. See, e.g., Amy Worden, Mario F. Cattabiani & Angela Coulombis, *Rendell's Budget Up, but No Big Tax Hikes*, PHILA. INQUIRER, Feb. 2, 2009, at A1.

278. See, e.g., *Shrinking Pains*, ECONOMIST, Apr. 26, 2008, at 49, 49 (discussing the concern of certain rural school districts following passage of South Dakota's school district consolidation law).

279. Just as there may be non-fiscal benefits to consolidation, so too might there be social and political costs. See Thomas L. Asbury & Nanci L. Shaw, *Policy Implications for Social Justice in School District Consolidation*, 4 LEADERSHIP POL'Y SCHS. 105, 105–26 (2005).

long been desired by integration advocates,²⁸⁰ not enough thought has been given to using the government's resources to encourage what has normally been thought of as a state and local activity. This administration may provide an opportunity to do just that.

5. Prioritizing Fair Housing and Housing Integration Initiatives

Researchers have long recognized the enduring but complicated relationship between residential segregation and school segregation.²⁸¹ Because the vast majority of school districts assign students to public schools based on where they live, public policy and private acts and "choices" that result in residentially segregated housing patterns are reflected in segregated schools. To the extent that enforcement of fair housing laws can have a dramatic impact on where people live, they can also affect where children go to school.

Under the Fair Housing Act of 1968,²⁸² the Department of Housing and Urban Development ("HUD") is responsible for conducting impartial investigations of fair housing complaints through its administrative processes,²⁸³ and the Civil Rights Division of DOJ (specifically, the Housing and Civil Enforcement Section) is granted broad authority to initiate or intervene in litigation that raises issues of general public importance involving charges of systematic housing discrimination.²⁸⁴ Yet, according to a December 2008 report of the National Commission on Fair Housing and Equal Opportunity, during the Bush II administration, HUD issued charges in substantially fewer fair housing cases, and DOJ enforcement of fair

280. See, e.g., Paul L. Tractenberg, *The Evolution and Implementation of Educational Rights Under the New Jersey Constitution of 1947*, 29 RUTGERS L.J. 827, 880–81 (1998) (observing that resistance to consolidation is "a root cause of racial imbalance in the [New Jersey] schools"); Amy Stuart Wells, Op-Ed, *Standards Can't Make Separate Equal, New Commissioner of Education Should Focus on Our Still-Segregated Schools*, NEWSDAY, Oct. 2, 2009, at A35 (suggesting consolidation of "some of Long Island's tiny and thus costly school districts" as a way of achieving greater integration).

281. See, e.g., Brief of Housing Scholars and Research & Advocacy Organizations as Amici Curiae in Support of Respondents, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007) (Nos. 05-908 & 05-915); Nancy A. Denton, *The Persistence of Segregation: Links Between Residential Segregation and School Segregation*, in IN PURSUIT OF A DREAM DEFERRED: LINKING HOUSING AND EDUCATION POLICY 89, 89–120 (John A. Powell, Gavin Kearney & Vina Kay eds., 2001).

282. 42 U.S.C. §§ 3601–3619, 363 (2006).

283. §§ 3608, 3610.

284. See § 3614; 28 C.F.R. § 0.50(a) (vesting the Civil Rights Division with power to enforce "all Federal statutes affecting civil rights" on behalf of the government); United States Department of Justice, Civil Rights Division, Housing and Enforcement Section, Enforcement Overview, http://www.justice.gov/crt/housing/housing_main.php (last visited Feb. 13, 2010).

housing laws was significantly less aggressive than in prior years.²⁸⁵ The Obama administration must reverse this trend and vigorously enforce federal fair housing laws at both the administrative and “pattern and practice”²⁸⁶ levels. Moreover, HUD should develop guidance for grantees of federal housing assistance funds, as well as for federal governmental agencies, clearly defining what must be shown to meet the Fair Housing Act’s requirement that the federal government and the monies it disburses affirmatively further fair housing.²⁸⁷

6. Coordinating Legal and Policy Work on Integration Issues

The White House under the Obama administration may also serve as a home to coordinate non-litigation, interagency strategies that connect schools and housing. There are dozens of independently operated federal education and housing programs that currently exist to promote integration, either explicitly or implicitly.²⁸⁸ Yet, even though they are interrelated, they seem to function independently. Moreover, policy leaders both within and outside of the federal government have offered various cross-disciplinary proposals that view access to various services or opportunities at a regional (rather than local or municipal) level or that seek to achieve several different community revitalization goals while also bringing together racially,

285. NAT’L COMM’N ON FAIR HOUSING AND EQUAL OPPORTUNITY, *THE FUTURE OF FAIR HOUSING* 13–14, 22–24 (2008), <http://nationalfairhousing.org/PublicPolicy/FutureofFairHousingAbouttheCommission/tabid/3379/Default.aspx> (click on “Entire report in pdf format” hyperlink).

286. See § 3614(a) (“Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights granted by [the Fair Housing Act].”).

287. § 3608(e)(5) (establishing mandate that federal grantees must “affirmatively further [fair housing]”); Exec. Order No. 12,892, 3 C.F.R. 849 (1995), *reprinted in* 42 U.S.C. § 3608 (2006) (requiring that federal agencies “affirmatively further fair housing in [their] programs and activities” and establishing the President’s Fair Housing Council); see also *United States ex rel. Antidiscrimination Ctr. of Metro N.Y., Inc. v. Westchester County, N.Y.*, No. 06 Civ. 2860 (DLC), 2009 WL 455269, at *1–22 (S.D.N.Y. Feb. 24, 2009) (finding that Westchester County obtained approximately \$52 million from the federal government even though it “utterly failed” to meet its duty under the Fair Housing Act to “affirmatively further fair housing”).

288. See, e.g., 20 U.S.C. §§ 7231–7321j (2006) (Magnet Schools Assistance Program); 26 U.S.C. § 42 (2006) (Low Income Housing Credit Program); 42 U.S.C. § 1437f (2006) (Section 8 housing programs); Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27 (codified as amended at 20 U.S.C. §§ 6301–6304 (2006)); Act of Dec. 16, 2003, Pub. L. No. 108-186, § 203, 117 Stat. 2685, 2694 (codified as amended at 42 U.S.C. § 1437v (2006)) (Hope VI Housing Program).

ethnically, and socioeconomically diverse communities.²⁸⁹ Federal executive leadership is needed, however, to implement these actions through existing federal programs and to build better bridges across the relevant federal agencies that oversee them. The White House, perhaps through its Domestic Policy Council, can also work with HUD, the Department of Education, the Department of Transportation, the newly created Office of Urban Affairs, and other federal (and state or local) agencies to develop new, proactive policies and legislation that can go even further in addressing school and housing issues comprehensively, and then, if necessary, champion such proposals through Congress.²⁹⁰

Similar coordination can occur with regard to litigation within DOJ. Certainly, if this administration substantially increases enforcement of traditional fair housing and civil rights laws, that work alone will go a great distance toward improving mobility for minority families to live and work in more integrated communities. But, for decades, civil rights lawyers have tried, mostly in vain, to pursue legal theories and remedies that recognize the relationship between housing discrimination and school segregation.²⁹¹ The difficulty of proving the necessary causal connection, however, has stymied many of these efforts. Meanwhile, major attempts at the federal level to

289. See generally BREAKTHROUGH COMMUNITIES: SUSTAINABILITY AND JUSTICE IN THE NEXT AMERICAN METROPOLIS (M. Palmona Pavel ed., 2009) (collecting essays and proposals to discuss metropolitan-wide regional equity solutions that seek to address housing, transportation, schools, and other issues at a regional level); PHILIP TEGELER, SUSAN EATON & WESTRA MILLER, CHARLES HAMILTON HOUSTON INST. & POVERTY & RACE RESEARCH ACTION COUNCIL, BRINGING CHILDREN TOGETHER: MAGNET SCHOOLS AND PUBLIC HOUSING REDEVELOPMENT 10-20 (2009), <http://www.charleshamiltonhouston.org/Publications/Item.aspx?id=100017> (Under "Event Documents" click on "Full Report" hyperlink) (examining possibility of using Hope VI housing program to promote racial and socioeconomic diversity in public schools located in high poverty, high incarceration neighborhoods).

290. Some initial signs of such coordination on urban and metropolitan issues emerged several months into the Obama presidency from the Office of Urban Affairs, which purports to be working with other federal agencies to "change urban growth patterns and foster opportunity, reduce sprawl, and jump-start the economy." Robin Shulman, *New White House to Redefine What Urban Policy Encompasses*, WASH. POST, July 3, 2009, at A6; Robin Shulman, *White House to Push Forward on National Urban Policy Agenda*, WASH. POST, July 12, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/07/12/AR2009071200948.html>.

291. See, e.g., Erin Nave, Note, *Getting to the Roots of School Segregation: The Challenges of Housing Remedies in Northern School Desegregation Litigation*, 21 NAT'L BLACK L.J. 173, 174 (2009) ("Despite this close interrelationship between residential segregation and the racial composition of northern schools, civil rights litigators have been frustrated in attempts to gain the courts' approval of combined school and housing remedies.").

develop litigation combining those two critical areas occurred only briefly in the late 1970s,²⁹² and while some good came out of it, ultimately, the coordination did not endure.²⁹³ In addition to traditional enforcement of fair housing and civil rights laws, therefore, the Civil Rights Division under the Obama administration should re-explore more inter-section work in order to attack the complex barriers that stand in the way of equal opportunity for all Americans. Doing so would entail forging relationships across the Division's related practice areas and with other federal agencies to develop innovative, cross-disciplinary litigation strategies.

Within the Division itself, one possible place to turn to forge the necessary relationships and develop a cohesive strategy to combat twenty-first century civil rights problems is the Coordination and Review Section. Although that Section is among the Division's smallest,²⁹⁴ its authority and unrealized potential is limitless. Tasked to do everything from providing interagency coordination and technical assistance to assuring efficient and effective civil rights enforcement under Title VI of the Civil Rights Act of 1964,²⁹⁵ the Section should take a more proactive role in coordinating comprehensive, interdisciplinary enforcement plans and convening strategic planning conferences around key civil rights issues that span

292. Orfield, *supra* note 88, at 16 ("By the end of its term, however, the Carter administration was trying to craft coordinated school and housing desegregation policies."); *The 50th Anniversary of the Civil Rights Act of 1957 and Its Continuing Importance Before the S. Comm. on the Judiciary*, 110th Cong. 125 (2007), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_senate_hearings&docid=f:47679.pdf (testimony of Theodore M. Shaw, President, NAACP Legal Defense & Education Fund) (referring to the General Litigation Section created during the Carter administration "in recognition of the link between school and housing discrimination").

293. One brief exception might be the work of the Civil Rights Division under President Carter, which combined the Division's education and housing sections and ultimately filed the school case in Indianapolis that resulted in an order that included both interdistrict relief and limited housing relief. *United States v. Bd. of Sch. Comm'rs of Indianapolis*, 456 F. Supp. 183, 191–92 (S.D. Ind. 1978), *aff'd in part and vacated in part*, 637 F.2d 1101 (7th Cir. 1980).

294. AN INVESTIGATION OF ALLEGATIONS OF ALLEGED POLITICIZED HIRING AND OTHER IMPROPER PERSONNEL ACTIONS IN THE CIVIL RIGHTS DIVISION, *supra* note 150, at 8 (showing number of lawyers in each section in chart form).

295. United States Department of Justice, Civil Rights Division, Coordination and Review Section, <http://www.justice.gov/crt/cor/purpose.php> (last visited Feb. 13, 2010) ("The Civil Rights Division's Coordination and Review Section operates a comprehensive, government-wide program of technical and legal assistance, training, interagency coordination, and regulatory, policy, and program review, to assure that federal agencies consistently and effectively enforce various landmark civil rights statutes and related Executive Orders that prohibit discrimination in federally assisted programs and in the federal government's own programs and activities.").

across subject matter areas.²⁹⁶ The Coordination and Review Section should work with the Division's other sections, as well as other federal government partners, to expand the number of compliance reviews under—and provide clearer, more effective guidance on—Title VI's obligations. The role that the Section plays in this regard is especially important given the inability of private parties to enforce Title VI's disparate impact regulations.²⁹⁷

Within OCR, that agency's new leadership should resume compliance work that focuses on the continuing educational disparities by race and ethnicity (without disregard to its other responsibilities, of course). The agency's statutory authority to investigate and make findings based on a disparate impact theory is particularly valuable in this day and age for two reasons: first, as already noted, unless there is a change to the law, private plaintiffs are no longer able to bring such claims under Title VI,²⁹⁸ so they must rely on federal enforcement by governmental entities like OCR. Second, in education, as elsewhere, evidence of racial disparities abounds, but proof of intentional discrimination is scant. Under Bush II and undoubtedly long before, recipients of federal funds have been operating in ways that perpetuate disparities with implicit approval by the government. OCR must take steps to end this by investigating gross disparities in areas such as graduation rates,²⁹⁹ the mis-, under-, and over-identification or placement of minority students with learning disabilities,³⁰⁰ and zero tolerance policies and other forms of student discipline.³⁰¹ Some of the same kinds of relief that can be extracted in court-ordered desegregation litigation can be obtained through the proper exercise of OCR's enforcement powers under

296. One such conference was held in celebration of the 45th anniversary of Title VI of the Civil Rights Act of 1964. *See* Press Release, U.S. Dep't of Justice, Office of Pub. Affairs, Justice Department Hosts Conference Celebrating the 45th Anniversary of Title VI of the Civil Rights Act of 1964 (July 20, 2009), <http://www.justice.gov/opa/pr/2009/July/09-crt-704.html>.

297. *See supra* notes 3–5 and accompanying text.

298. *See* *Alexander v. Sandoval*, 532 U.S. 275, 293 (2001).

299. *See, e.g.*, CHRISTOPHER B. SWANSON, URBAN INST., EDUC. POL'Y CENTER, WHO GRADUATES? WHO DOESN'T?: A STATISTICAL PORTRAIT OF PUBLIC HIGH SCHOOL GRADUATION, CLASS OF 2001, at 19–23 (2004), www.urban.org/UploadedPDF/410934_WhoGraduates.pdf.

300. *See generally* RACIAL INEQUITY IN SPECIAL EDUCATION (Daniel J. Losen & Gary Orfield eds., 2002) (describing racial disparities in both the identification of children with special needs and the provision of special education).

301. *See, e.g.*, FLA. STATE CONFERENCE NAACP, ADVANCEMENT PROJECT & NAACP LEGAL DEF. & EDUC. FUND, INC., ARRESTING DEVELOPMENT: ADDRESSING THE SCHOOL DISCIPLINE CRISIS IN FLORIDA 6–54 (2006), http://www.naacpldf.org/content/pdf/pipeline/arresting_development_full_report.pdf.

Title VI, so these cases can achieve critical racial justice results. In conducting this work, OCR may choose to coordinate with lawyers from the Educational Opportunities Section of DOJ's Civil Rights Division, who would later accept referrals from OCR for litigation, should OCR's administrative enforcement proceedings prove insufficient.

7. Using Strategically the Civil Rights Commission's Charge and Resources

Finally, there is the question of how to deal with the U.S. Commission on Civil Rights. For most of the past twenty-five years, it has suffered from partisan wrangling. On both the Left and the Right, many prominent voices have called for the Commission to be dismantled and abolished, either because it no longer served a meaningful purpose, or because it was no longer effective in pursuing its mission.³⁰² Because commissioners serve six-year terms, and six of the eight members are either conservative Republicans or "Independents,"³⁰³ it may be a while before this President or Congress can have much effect on the Commission's composition. It is clear that the Commission no longer serves the same purpose that it once did, and it is difficult to see how—given its current state—there is much this administration could do in the near future to help to restore the public's confidence in the Commission as a nonpartisan, civil rights watchdog. Yet, it is also clear that the federal government sorely *needs* a watchdog, regardless of whether the party in power thinks it is favorable toward or aggressively opposed to civil rights. And it is unlikely that any new entity that President Obama may create to serve this function would have the kind of impact that the Civil Rights Commission has had in the past, nor would such a presidentially appointed commission likely have as many resources or as much authority (e.g., subpoena power).³⁰⁴

302. See, e.g., Mary Frances Berry, Op-Ed, *Gay but Equal?*, N.Y. TIMES, Jan. 16, 2009, at A29; John H. Bunzel, Op-Ed, *Eliminate the Civil Rights Commission*, S.F. CHRON., Jan. 25, 2009, at G4; Linda Chavez, *A Commission Without a Cause*, WALL ST. J., Apr. 19, 2000, at A30; George F. Will, Op-Ed, *Retire the Civil Rights Commission*, PITTSBURGH TRIB.-REV., Mar. 10, 2005, at 1; Bruce Fein, Visiting Fellow for Constitutional Studies, The Heritage Foundation, Executive Memorandum 134, *Time to Abolish the U.S. Civil Rights Commission* (Sept. 19, 1986), http://edgeweb.heritage.org/Research/GovernmentReform/upload/91838_1.pdf.

303. See U.S. Commission on Civil Rights, *Commissioners*, <http://www.usccr.gov/cos/cos.htm> (last visited Feb. 13, 2010) (stating the party affiliation for each commissioner).

304. Consider, too, the relative ineffectiveness of Clinton's Advisory Board on Race. See *supra* notes 137–47 and accompanying text.

The immediate impact that this administration can have on the Commission, therefore, appears to be relatively limited. That said, a March 2009 report from the Leadership Conference on Civil Rights offers a series of reform recommendations that it argues would help both to restore faith in the Commission as well as broaden its mandate and authority.³⁰⁵ All of these suggested reforms are worthwhile, but they may also require the expenditure of substantial political capital to execute. Short of making these kinds of changes, or at least in the interim while the administration lobbies for them, there may be another important function for the Commission to serve.

While it may not be possible for the Commission in its current form to play a meaningful, active role in the monitoring and development of civil rights law and policy, it can still serve the very important function of data gathering. Although commissioners choose which areas of civil rights to investigate, and they are actively involved in conducting hearings and developing the findings and recommendations that emerge from the reports produced, they are not the ones who collect and analyze the data in the first instance. A great deal of that work is conducted by the career staff, the six regional offices, and the fifty-one state advisory committees which are “composed of citizens familiar with local and state civil rights issues.”³⁰⁶ Thus, even where the findings and recommendations may be ideologically driven, the data and much of the substantive content of the Commission’s reports can still be useful to advocates and to other government agencies as well.³⁰⁷ Perhaps the best interim solution, then, is for the administration to recommend to the Civil Rights Commission areas where additional information or data gathering is needed, and the Commission can serve the relatively neutral function of collecting and making such information more accessible. In 2010 at least two of the commissioners’ terms will expire,³⁰⁸ and at that point, additional thought can be given to how a

305. RESTORING THE CONSCIENCE OF A NATION, *supra* note 119, at 43–45.

306. U.S. Commission on Civil Rights, State Advisory Committees, <http://www.usccr.gov/> (click on “State Advisory Committees” hyperlink).

307. The Civil Rights Commission’s recent report, BECOMING LESS SEPARATE?, *supra* note 204, is a good example. Regardless of whether one agrees with its findings and recommendations, the report provides a great deal of information that otherwise may not have been accessible to most Americans, and probably not easily accessible even within the government.

308. The commissioners serve staggered six-year terms. Thus, the terms of two commissioners appointed in 2004—Gerald Reynolds and Ashley Taylor—are set to expire in 2010. U.S. Commission on Civil Rights, <http://www.usccr.gov/> (click on “Commissioners” hyperlink; click on the “Gerald Reynolds” and “Ashley Taylor” hyperlinks for bios stating they were appointed in 2004) (last visited Feb. 8, 2010).

reconstituted Commission could, once again, become a leader in the fight for civil rights.

CONCLUSION

This Article proposes that the federal government both use its existing tools and create new opportunities to promote integration and equity. First, to capture what gains can be obtained from school desegregation cases that remain under court order or subject to administrative agreements, the Civil Rights Division of the U.S. Department of Justice, together with the Office for Civil Rights of the U.S. Department of Education, should develop a clear, proactive strategy to revisit all of the cases on its dockets. Virtually all of the communities that remain beholden to court orders and administrative agreements are vastly different—in size, in demographics, and in culture—today than they were when the orders or agreements that technically govern them were first issued. Accordingly, whatever guidance OCR and/or DOJ develop to inform their work here should take account of the current realities of the communities in question, while emphasizing sustainable, integration- and equity-maximizing results, within the limits of the law.

Second, recognizing the limitations of school desegregation litigation, the White House must also provide leadership in the development of an affirmative school integration strategy that involves not just the usual suspects but also those who all too often have been left out of the conversation—housing officials, transportation officials, urban and metropolitan policy officials, and others. The federal agencies that administer programs with integration and equity implications should give serious consideration to how the programs can operate, separately and together, to reduce rather than exacerbate racial, ethnic, and socioeconomic disparities. Meanwhile, DOJ and OCR must ramp up their enforcement of key civil rights laws and revise guidance to encourage state and local officials to adopt their own integration measures voluntarily. Finally, to establish public support for these interagency efforts, the Department of Education can and should lead an effort to develop a strong body of research on the continuing importance of and necessary resources to attain sustainable, racially integrated public schools.

