Equality Dissonance: Jurisprudential Limitations and Legislative Opportunities

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ARTICLE

EQUALITY DISSONANCE: JURISPRUDENTIAL LIMITATIONS AND LEGISLATIVE OPPORTUNITIES

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INTRODUCTION

In his pivotal¹ concurrence in Parents Involved in Community Schools v. Seattle School District No. 1,² Justice Kennedy articulated two fundamental

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² 551 U.S. 701, 782-98 (2007) (Kennedy, J., concurring) [hereinafter Parents Involved].
strains of an equality ideal for addressing systemic racial segregation and inequality in public education: he eloquently underscored the critical importance of racial integration for educational equity, and reiterated the essential role of the political branches in facilitating this integration. Kennedy noted the compelling government interest in decreasing the effects of de facto racial segregation and isolation and recognized the fallacy of a public/private distinction in defining the constitutional violation of racially segregated educational environments:

The plurality opinion is at least open to the interpretation that the Constitution requires school districts to ignore the problem of de facto resegregation in schooling. I cannot endorse that conclusion. To the extent the plurality opinion suggests the Constitution mandates that state and local school authorities must accept the status quo of racial isolation in schools, it is, in my view, profoundly mistaken.

Further, he called on the more capable political branches to craft legislation addressing these twenty-first century constitutional violations: “Executive and legislative branches, which for generations now have considered these types of policies and procedures, should be permitted to employ them with candor and with confidence.”

This language may appear at odds with the actual holding in Parents Involved, in which a majority of justices struck down two racial integration policies voluntarily adopted by local school boards for not meeting the “strict scrutiny” requirements of current equal protection jurisprudence. Yet, Justice Kennedy focuses on the broader constitutional ideal of fostering racial inclusion in our nation’s schools, a focus implicitly endorsed by the four dissenting justices. While many cast the project of racial integration as a relic of a bygone era, unsuccessful or inadequate to overcome the complex factors contributing to twenty-first century social, economic, and educational inequities, Kennedy highlights the continued relevance of racial integration to the promise of Brown v. Board of Education.

3. Id. at 787-88.
4. Id. at 789.
5. “A compelling interest exists in avoiding racial isolation, an interest that a school district, in its discretion and expertise, may choose to pursue.” Id. at 797 (Kennedy, J., concurring).
6. Id. at 788.
7. Id. at 789.
8. I use the term “voluntarily” to distinguish integration plans that school boards adopted by choice from those plans that school boards adopted pursuant to a court order to eliminate the vestiges of state-mandated segregation.
9. See, e.g., JONATHAN KOZOL, THE SHAME OF THE NATION: THE RESTORATION OF Apartheid SCHOOLLING IN AMERICA 240 (2005) (quoting Professor Roger Wilkins that many Americans feel “morally exhausted” regarding racial integration, although much of this exhaustion may stem from compulsory or court-ordered school integration).
In the twenty-first century, this constitutional ideal survives in key respects, both in the will of our nation’s polity and as a relevant aspect of educational policy. The voluntary racial integration policies at issue in Parents Involved, for example, reflect a desire shared by many school districts to encourage racial diversity in their schools.\(^{11}\) At a time in which this nation is at a crossroads of educational crisis and political opportunity, this ideal seems particularly salient. Barely fifty percent of the nation’s population is white, with a rapidly increasing non-white population. Today’s schoolchildren will live and work in a multiracial society with no racial or ethnic majority.\(^{12}\) Yet, schools are more segregated than at any point in last forty years.\(^{13}\) Such rapidly increasing racial and economic segregation\(^{14}\) accompanies or contributes to a host of other inequalities, including limited resources and fewer experienced and credentialed teachers. Such segregation and profound educational inequality also contribute to a lack of minority participation in higher education and larger racial disparities in employment, even controlling for education.\(^{15}\) Conversely, research detailing the benefits of racial and economic diversity and the harm of racial isolation has been growing steadily since 1990.\(^{16}\) Such evidence demonstrates that racially diverse schools are associated with math and reading achievement, critical thinking skills, intellectual engagement, and a reduction in racial stereotyping.\(^{17}\)

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13. Id. (noting that “[This] country’s rapidly growing population of Latino and black students is more segregated than they have been since the 1960s and we are going backward faster in the areas where integration was most far-reaching.”).

14. Id. at 21 (noting that half of this nation’s schools have less than twenty percent black and Latino students attending them, while another twenty percent of the schools have at least seventy percent black and Latino students). In addition, “students in intensely segregated (90-100%) minority schools are more than four times as likely to be in predominantly poor schools than their peers attending schools with less than ten percent minority students (84% compared to 18%).” Id. In contrast, of the intensely segregated white schools (less than 10% black and Latino), about one-fifth (24%) of the students attended majority poor schools. Id.


17. Id.
There is a unique opportunity to bridge the divide between constitutional ideals and practice in the realm of racial equality in education. A majority of Supreme Court justices have articulated a vision of constitutional protection that allows for a more informed and nuanced approach to addressing racial isolation in schools than in recent history. While this vision outlines existing avenues in the Supreme Court’s current doctrine, it represents a broader normative view of constitutional solutions for twenty-first century racial inequities in education.

In previous work, I have examined the intersection of federal judicial and executive power in delineating the scope and meaning of school integration jurisprudence. This article builds on those earlier efforts. Specifically, in light of existing jurisprudential limitations, I suggest scholars and advocates may consider congressional solutions to existing structural racial disparities in education by creating legislative mechanisms to foster racial inclusion in public education. I argue that Congress may be the appropriate body to bridge the chasm between the constitutional ideal and practice of racially inclusive education, to help strengthen those institutions integral to shaping our democracy and preparing students to be effective citizens.

This article proceeds in three parts. Part I offers an analysis of the jurisprudential shifts in recognizing the right to racially integrated education. There has been a doctrinal change in the framework for evaluating and addressing the substantive equality right to racially integrated schools. To understand the potential role of Congress in remedying or deterring constitutional violations, we must first understand and be able to identify the shifting jurisprudential framework for addressing persistent structural racial inequities. Part II examines the Court’s most recent discussion of a modern substantive equality right to racially integrated education, which more closely resembles an anti-subordination model of equality. Existing jurisprudential avenues to address current constitutional violations in this sphere, however, are limited by an anti-classification framework. Part III discusses the propriety of congressional action to pursue racial inclusion in public education in the face of such institutional jurisprudential limitations. Scholars have long discussed the notion that Congress has independent authority to interpret the Constitution.

18. See infra Part II.A.


20. It is clear that racially diverse schools are not a viable choice for all districts due to demographics. Rather, this Article argues that for those areas in which fostering racial inclusion is a realistic option for increasing educational opportunities, legislative avenues may be an underutilized but potentially transformative choice.

21 Departmentalist scholars posit that each of the federal branches of government possesses coordinate authority to serve as independent constitutional interpreters. See, e.g., Christopher L. Eisgruber, The Most Competent Branches, 38 GEO. L.J. 347 (1994); Michael S. Paulsen, The Most Dangerous Branch, 83 GEO. L.J. 217 (1994). Dean Larry Kramer has
Indeed, the populist branch has a rich history of facilitating equality through legislative measures, particularly in the domain of education. In this Part, I examine both historic forms of equality legislation at the intersection of race and education as well as more contemporary statutes that may serve as interesting models. I argue that institutionally, the “populist branch” has both the flexibility and expertise to significantly ameliorate racial inequality in educational opportunity by providing support and structures for localities to foster racial inclusion.

I. JURISPRUDENTIAL SHIFTS IN RIGHTS RECOGNITION

Since Brown, jurists, scholars, and legal practitioners have offered disputed definitions of the constitutional violation identified in the opinion and alternative views on the efficacy of adjudicated constitutional law versus statutory law in recognizing a robust constitutional requirement to affirmatively eliminate racial segregation in education. While the opinion clearly outlawed state-sanctioned racial segregation in education, the remedial ruling in Brown II allowed school districts to proceed at a sluggish pace in removing firmly entrenched barriers to educational opportunity for African Americans. The passage of the Civil Rights Act of 1964 provided some substance to the Brown directive by linking the receipt of federal funds to desegregation efforts, and threatening litigation to those districts that refused to comply. In addition, a series of Supreme Court opinions in the late 1960s and early 1970s fleshed out the Brown directive by imposing an affirmative duty on school districts to eliminate all vestiges of racially segregated educational systems, and by


recognizing the strong link between educational segregation and residential segregation.\textsuperscript{25}

Thus, at least for a time, both adjudicated constitutional law and statutory law recognized a robust constitutional requirement to affirmatively eliminate racial segregation in education. The laws armed school districts with the necessary tools to begin the challenging process of reversing deeply entrenched racial discrimination and inequality, and federal legislation provided both a carrot and stick.\textsuperscript{26} These efforts resulted in increased racial integration in schools and a decrease in many barriers to educational opportunity for African Americans and other racial minorities.\textsuperscript{27}

After a period of vigorous adjudicatory and statutory laws promoting racial integration in schools, courts significantly narrowed the scope of the constitutional guarantee of equal protection for African Americans in education and other facets of life. In the education realm, a series of opinions decreased the burden that school districts must show to be released from court orders mandating desegregation, regardless of whether evidence suggested the school district would resegregate as a result of the unitary status order.\textsuperscript{28} These desegregation doctrines marked a significant shift from the deeper understanding of the constitutional violation articulated in earlier cases, and they also signaled a jurisprudential reticence to identify and address any racial inequality not clearly flowing from specific instances of de jure school segregation. While countless districts remained segregated years after the \textit{Brown} ruling, the Court seemed loathe to incorporate into its rulings an understanding of the historical and social context surrounding persistent racial


\textsuperscript{26} For a more detailed discussion on the role of the Department of Education's Office for Civil Rights' enforcement of Title VI of the Civil Rights Act, see Epperson, \textit{supra} note 19.


\textsuperscript{28} Bd. of Educ. \textit{v.} Dowell, 498 U.S. 237, 248-50 (1991) (holding that a federal court desegregation order should end once a "unitary" system could be established, even if it resulted in a resegregation of schools); \textit{see also} Missouri \textit{v.} Jenkins, 515 U.S. 70 (1995); Freeman \textit{v.} Pitts, 503 U.S. 467, 490-91 (1992) (holding that a formerly segregated school district may be declared partially "unitary" and released from federal oversight, so long as the district meets part of its desegregation order).
Segregation and inequality in public education. In more recent years, even those formerly segregated districts who wanted to maintain racially integrative policies after achieving "unitary status" have been stymied by existing judicial models of redress.

At the same time the Court retreated from addressing pervasive racial inequities in elementary and secondary education, it issued a number of opinions marking a retreat from addressing structural, or systemic, racial inequities in other domains. In public higher education and in contracting, the Court rejected race-conscious remedies designed to ameliorate "societal discrimination," which may include more widespread evidence of discrimination in an industry and/or across the nation. According to the Court, "societal discrimination" was "an amorphous concept of injury that may be ageless in its reach into the past." It did not rise to the level of a constitutional violation because it failed to identify a specific injury by a clearly identifiable actor. While affirmative action jurisprudence has allowed for some race-

29. See, e.g., ERICA FRANKENBERG ET AL., CIVIL RIGHTS PROJECT AT HARVARD UNIV., A MULTIRACIAL SOCIETY WITH SEGREGATED SCHOOLS: ARE WE LOSING THE DREAM? 17 (2003), available at http://www.civilrightsproject.ucla.edu/research/reseg03/resegregation03.php (noting that a decade after the Brown ruling, 98 percent of black students in Southern states attended fully segregated schools); see also Missouri v. Jenkins, 515 U.S. at 176 (Ginsburg, J., dissenting). Although the "remedial programs at issue in Jenkins had been in place for only seven years, the State of Missouri has a long and well-documented history of racial subjugation, including slavery, slave-era 'compulsory ignorance' laws forbidding the education of blacks and state-sponsored racial segregation." LIA B. EPPERSON, TRUE INTEGRATION: ADVANCING BROWN'S GOAL OF EDUCATIONAL EQUITY IN THE WAKE OF GRUTTER, 67 U. PITTSBURGH L. REV. 175, 186 n.63 (2005) (citing Jenkins, 515 U.S. at 175 (Ginsburg, J., dissenting)).

30. The Jefferson County, Kentucky Board of Education is but one example of a formerly segregated school district committed to maintaining integrated schools even after the court declared the district "unitary" and released it from federal judicial oversight.


32. In Regents of University of California v. Bakke, the University of California, Davis School of Medicine unsuccessfully defended its race-conscious admissions policy as a means to redress "societal discrimination." 438 U.S. 265, 306 (1978). In City of Richmond v. Croson, the Court rejected a race-conscious remedy in contracting in favor of a race-neutral approach. 488 U.S. 469, 508-510 (1989) (plurality opinion). For the first time, the Court rejected a race-conscious remedy designed to alleviate "societal discrimination," even after reviewing detailed findings of racial discrimination in the contracting industry. Id. at 531-36 (Marshall, J. dissenting) (citing congressional findings). See also Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 276 (1986) (plurality opinion) (holding that "[s]ocietal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy" because a "court could uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future.").


34. For additional analysis of this phenomenon, see Lia Epperson, The Rehnquist Court, the Resurrection of Plessy, and the Ever-Expanding Definition of "Societal...
conscious policies in higher education, the Court failed to recognize a constitutional duty to eliminate the various forms of structural racial inequality that cannot be easily cabined into the traditional definitions of state-mandated racial discrimination and segregation that existed at the time of *Brown*. In its rulings on the constitutionality of societal discrimination, the Court articulated a narrower view of constitutional protections, which did not include an acknowledgement or understanding of the myriad historical, social, spatial, political, and economic factors contributing to the continued racial inequities in education or other spheres. Accordingly, adjudicated constitutional law has limited constitutional remedies to a narrow band of injustices. As Justice Powell expressed in *Regents of University of California v. Bakke*, the Constitution requires redress for identifiable state-sponsored discrimination in education, but not for the more nebulous forms of societal discrimination.

II. ANTI-SUBORDINATION IDEALS IN ANTI-CLASSIFICATION JURISPRUDENCE

I suggest that Justice Kennedy's concurrence in *Parents Involved* outlines an ideal of twenty-first century equality in educational opportunity that more closely resembles an anti-subordination model of equality than the anti-classification definition that has dominated jurisprudence in recent decades. While the anti-classification model is rooted in the notion of a "colorblind constitution" that views with equal skepticism racial classifications aimed at preserving and perpetuating racial subordination and those aimed at remedying past discrimination, the anti-subordination definition of the Fourteenth Amendment is color conscious in nature. Under the anti-subordination definition, the central purpose of the equal protection clause is to eliminate a racial caste system by prohibiting policies and official practices "that aggravate[] or perpetuate[] the subordinate position of a specially disadvantaged group." Kennedy articulates a constitutional ideal whose aim is to address persistent structures of racial inequality in education, even when not directly linked to identifiable state-sponsored discrimination. Ultimately,

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36. *See id.* at 353.

37. Justice Powell held "[i]n the school cases, the States were required by court order to redress the wrongs worked by specific instances of racial discrimination. That goal was far more focused than the remedying of the effects of 'societal discrimination,' an amorphous concept of injury that may be ageless in its reach into the past." 438 U.S. 265, 307 (1978).


however, Kennedy limits his suggested constitutional tools to address such inequality by steering the final analysis closer to the anti-classification model that the strict scrutiny framework requires. The institutional limitations of the judiciary underscore the vital role the legislature may play in facilitating more workable solutions for the persistent inequality that Kennedy identifies.

A. Twenty-First Century Constitutional Ideal

In his concurrence in *Parents Involved*, Justice Kennedy conveys an understanding of constitutional requirements for racial equality that is strikingly different to the rhetoric used in the equality jurisprudence of the last several years. An examination of such language illuminates potential doctrinal shifts in equality jurisprudence at the intersection of race and education. Indeed, the language is also important for the normative constitutional ideal it articulates. This broader ideal provides a twenty-first century understanding of the persistent and complex systemic racial inequities in education, which is implicitly endorsed by four other Justices.

Justice Kennedy posits a definition of equality and constitutional duty that is more realistic and idealistic than his less moderate colleagues or his own prior jurisprudence. He does so by acknowledging the persistence of racial

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40. Scholars have noted that the boundary between the Constitution and constitutional law includes the question of whether constitutional law “subsists[s] in the principles and reasons advanced in judicial opinions, or . . . [is] confined to the specific holdings of judicial judgments.” Post & Siegel, supra note 21, at 1040 (citing Thomas W. Merrill, *Judicial Opinions as Binding Law and as Explanations for Judgments*, 15 CARDOZO L. REV. 43 (1993)). With respect to this portion of the Court’s equal protection analysis, Justice Kennedy’s concurrence is arguably the controlling opinion given that *Parents Involved* is a “fragmented” Supreme Court decision. See *Marks v. United States*, 430 U.S. 188, 193 (1977); *accord Panetti v. Quarterman*, 551 U.S. 930, 949 (2007). As the Supreme Court noted in *Planned Parenthood v. Casey*, “[w]here a Justice or Justices concurring in the judgment . . . articulates a legal standard which, when applied, will necessarily produce results with which a majority of the Court from that case would agree, that standard is the law of the land.” 947 F.2d 682, 693 (3d Cir. 1991), rev’d in part on other grounds, 505 U.S. 833 (1992) (applying *Marks*). Kennedy garnered the votes of the four dissenting Justices with respect to identification of a school district’s interest in reducing racial isolation. Doe 1 v. Lower Merion Sch. Dist., 689 F. Supp. 2d 742, 750 (E.D. Pa. 2010).

41. In prior jurisprudence, Justice Kennedy exhibited skepticism and disdain for the use of race-conscious measures for the sake of “racial balancing.” See, e.g., *Grutter*, 539 U.S. at 389 (Kennedy, J., dissenting) (contending that a law school cannot avoid strict scrutiny by utilizing “the concept of critical mass . . . to mask” efforts to achieve “racial balance”). Similarly, in voting rights rulings, Kennedy repeatedly rejected race-conscious districting. See, e.g., *Miller v. Johnson* 515 U.S. 900, 911-12 (1995) (“When the State assigns voters on the basis of race, it engages in the offensive and demeaning assumption that voters of a particular race, because of their race” have similar voting interests); *Bush v. Vera*, 517 U.S. 952 (1996). Kennedy appears to have softened his position with respect to race-conscious districting in recent jurisprudence. *League of United Latin American Citizens*
inequality in education; the compelling government interest in addressing racial isolation in education, even if it cannot be clearly and easily traced to state-sponsored segregation; and the appropriate role of political branches in developing measures to combat racial isolation in education. Finally, Kennedy underscores the importance of addressing racial isolation and inequality in the unique domain of education.

First, Kennedy confirms that "[s]chool districts can seek to reach Brown's objective of equal educational opportunity." In doing so, Kennedy notes the futility of race neutrality in the face of the existing racial reality: "The enduring hope is that race should not matter; the reality is that too often it does." This legal-realist language distinguishes Kennedy's understanding of equality violations from those of his more conservative colleagues, with whom he ultimately voted to strike down the policies at issue, and from his own prior equality jurisprudence. In City of Richmond v. Croson, for example, Kennedy famously wrote that "[t]he moral imperative of racial neutrality is the driving force of the Equal Protection Clause.

Second, Justice Kennedy finds that "a compelling interest exists in avoiding racial isolation," regardless of whether that isolation is the direct result of state-sponsored racial discrimination. Rather, his equal protection analysis clearly acknowledges the discrepancy between historic instances of de jure racial segregation in education and its current manifestations, which are more systemic in nature, but no less pernicious. Unlike prior jurisprudence, which often disregarded present-day manifestations of racial segregation and isolation as amorphous societal discrimination for which the Constitution provides no remedy, Kennedy articulates an understanding of the thorny reality of persistent racial injustice in the twenty-first century:

From the standpoint of the victim, it is true, an injury stemming from racial prejudice can hurt as much when the demeaning treatment based on race identity stems from bias masked deep within the social order as when it is imposed by law. The distinction between government and private action, furthermore, can be amorphous both as a historical matter and as a matter of present-day finding of fact. Laws arise from a culture and vice versa. Neither can assign to the other all responsibility for persisting injustices.

Consequently, Kennedy finds that constitutional protections cannot rest on a hazy public/private distinction. This language contemplates a compelling

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v. Perry, 126 S. Ct. 2594, 2619 (2006) (objecting to the dismantling of a majority-minority district on the ground that Latinos "had found an efficacious political identity").

43. Id. at 787.
45. 551 U.S. at 798 (italics added).
46. Id. at 795.
interest in addressing the forms of racial inequality ignored in prior jurisprudence.

Further, Kennedy notes that the political branches should have the freedom to explore policies that may address these persistent inequities: "Executive and legislative branches, which for generations now have considered these types of policies and procedures, should be permitted to employ them with candor and with confidence." School districts have unique "expertise," and should be able to devise policies to address racial isolation. Kennedy endorses certain strategies to put this constitutional ideal into practice. These strategies include general mechanisms to foster the sort of racial inclusion that Kennedy suggests is an integral part of our society. Policies include strategic site selection of new schools, targeted student and faculty recruitment, and drawing attendance zone lines to maximize racial integration.

It is also noteworthy that Kennedy identifies this compelling interest in the context of elementary and secondary education. In the first sentence of his concurrence, Kennedy recognized that our "[n]ation’s schools strive to teach that our strength comes from people of different races, creeds, and cultures uniting in commitment to the freedom of all." Schools are the institutions that teach our children democratic ideals and that shape them to be successful and productive citizens. The Court has long acknowledged the unique role of elementary and secondary schools in teaching such civic and moral skills to students, and the role of the government in ensuring that every child receives

47. Id. at 789.
48. Id.
49. Kennedy underscores the constitutionality of considering racial composition: In the administration of public schools by the state and local authorities it is permissible to consider the racial makeup of schools and to adopt general policies to encourage a diverse student body, one aspect of which is its racial composition. (citations omitted). If school authorities are concerned that the student-body compositions of certain schools interfere with the objective of offering an equal educational opportunity to all of their students, they are free to devise race-conscious measures to address the problem in a general way and without treating each student in different fashion solely on the basis of a systematic, individual typing by race. School boards may pursue the goal of bringing together students of diverse backgrounds and races through other means, including strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race.

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50. For a critique of the efficacy of such methods, see infra Part II.B.
51. Parents Involved, 551 U.S. at 782.
52. See, e.g., Bd. of Educ. v. Pico, 457 U.S. 853, 909 (Rehnquist, J., dissenting) (when the government serves as "educator," it "is engaged in inculcating social values and knowledge in relatively impressionable young people."); Plyler v. Doe, 457 U.S. 202, 221 (1982) (noting "the importance of education in maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child."). See generally James E. Ryan, The
an education. Kennedy’s language extends the imperative of civic education to embrace racial inclusion, lamenting that “our highest aspirations are yet unfulfilled.” To meet the constitutional ideal of equality, one must allow for constitutional solutions to address twenty-first century impediments to equality in educational opportunity. While the Supreme Court has never identified a fundamental right to education under the Equal Protection Clause, it has repeatedly recognized public education as an essential foundation of American society. This importance, according to the Court, stems in large part from the role public schools play in providing children the knowledge and value base necessary to uphold our democracy. Kennedy’s justification for racially integrated education is based more on the social capital gained from integrated educational environments than on more traditional arguments about decreasing stigma or increasing academic achievement.

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54. Parents Involved, 551 U.S. at 782.


57. See generally Heather K. Gerken, Justice Kennedy and the Domains of Equal Protection, 121 HARV. L. REV. 104 (2007-08) (arguing that Kennedy’s novel claims about racial equality in Parents Involved may be explained by Kennedy’s belief in the important function of educational institutions and may be limited to the constitutional domain of education). See also ROBERT C. POST, CONSTITUTIONAL DOMAINS (1995).

58. The characterization of school integration as an effort to decrease racial stigma has its roots in the social science evidence proffered in Brown, which has been criticized by academic commentators See, e.g., Charles L. Black, The Lawfulness of Segregation Decisions, 69 YALE L.J. 421, 426 (1960) (suggesting segregation’s purpose was clear, and thus litigators need not have introduced such evidence to prove its harm). See also Missouri v. Jenkins, 515 U.S. 70, 121-22 (1995) (Thomas, J., concurring) (“Given that desegregation has not produced the predicted leaps forward in black educational achievement, there is no reason to think that black students cannot learn as well when surrounded by members of their own race as when they are in an integrated environment.”).

59. Early evidence showed only modest academic gains as measured by test scores. See, e.g., NANCY HOYT ST. JOHN, SCHOOL DESEGREGATION OUTCOMES FOR CHILDREN (1975). However, more recent research confirms significant academic benefits from desegregated educational environments. See generally Roslyn A. Michelson, Twenty-First Century Social Science Research on School Diversity and Educational Outcomes, 69 OHIO ST. L.J. 1173 (2008); National Academy of Education, Race-Conscious Policies for Assigning Students to Schools: Social Science Research and the Supreme Court Cases (2007), http://www.naeducation.org/Meredith_Report.pdf.
While Kennedy does not refer to empirical evidence in his opinion, his rationale closely mirrors the robust body of more contemporary social science research that finds considerable long-term social benefits from racially integrated schools.60 Indeed, Justice Breyer's dissent, joined by three other justices, explicitly references such evidence.61 Scholars and jurists have focused on these democratic and citizenship benefits, as well as the educational benefits of integrated education, as some of the strongest reasons for pursuing integration in the twenty-first century.62 In highlighting the need to alleviate the scourge of de facto racial segregation and trumpeting the democratic benefits of racially integrated educational environments, this language bridges the "jurisprudence of fragmentation" that has historically plagued this area of the law.63

In addition to the robust body of empirical evidence supporting racial integration in education, evidence also highlights the political will to engage in such policies.64 Prior to the ruling, there were at least 1000 school districts employing some form of voluntary racial integration plans.65 After twenty-six years of court-ordered desegregation, Jefferson County, Kentucky's school board voluntarily continued its racial integration policy to maintain the benefits

60. See also James E. Ryan, The Supreme Court and Voluntary Integration, 121 HARV. L. REV. 131, 132, 142-43 (2007) ("The defense of integration has always been on surer footing when one also considers its social benefits—the ways in which integration can break down or prevent stereotypes and prejudice, lead to long-term relationships across racial and ethnic boundaries, and increase the possibility that students will continue to seek out integrated colleges, workplaces, and neighborhoods."); Erica Frankenberg, Introduction: School Integration—The Time is Now, in LESSONS IN INTEGRATION: REALIZING THE PROMISE OF RACIAL DIVERSITY IN AMERICAN SCHOOLS 13-16 (Erica Frankenberg & Gary Orfield, eds., 2007). See generally AMY STUART WELLS ET AL., BOTH SIDES Now: THE STORY OF SCHOOL DESEGREGATION'S GRADUATES (2009).

61. Parents Involved, 551 U.S. 701, 837-43 (2007) (Breyer, J., dissenting) "[T]his Court from Swann to Grutter has treated these civic effects as an important virtue of racially diverse education." Id. at 841.

62. Id. A focus on the democracy benefits of racially integrated education also allows for the acknowledgement that alternative avenues for increasing academic achievement may be used in tandem with integrative efforts. For example, in those regions in which demographic factors make achieving racial integration more prohibitive, scholars have argued school choice initiatives such as charter schools and voucher programs may be better alternatives for increasing academic achievement. For an interesting discussion, see the Century Foundation and the Center for American Progress, School Turnaround Strategies: A Debate (Nov. 12, 2009), http://www.centuryinstitute.org/list.asp?type=EV&pubid=264.

63. Rachel F. Moran, Rethinking Race, Equality, and Liberty: The Unfulfilled Promise of Parents Involved, 69 OHIO ST. L.J. 1321 (2008) (arguing, inter alia, that school desegregation cases based on "corrective justice" have a different jurisprudential grounding than affirmative action admissions decisions in higher education that address the benefits of diversity).

64. Parents Involved, 551 U.S. at 837-48 (Breyer, J., dissenting) (citing empirical evidence for the support of race-conscious educational policies).

that flowed from highly integrated schools. In that county, a majority of parents had been in favor of the voluntary racial integration plan. On a national level, some of those students who benefited most from the most aggressive and progressive public school desegregation policies of the twentieth century have also highlighted the democratic and civic importance of a racially inclusive education.

In outlining the compelling interest in avoiding racial isolation in education, Justice Kennedy evinces an awareness and recognition that we must "expound" the Constitution to accommodate current manifestations of fundamental inequality: "our tradition is to go beyond present achievements, however significant, and to recognize and confront the flaws and injustices that remain." Kennedy, with the implicit endorsement of the four dissenting justices, has outlined a constitutional definition of equality in educational opportunity that is more flexible and realistic than prior notions of equal protection. Again, while it is unclear whether the Court will adhere to such a definition in future jurisprudence, Kennedy's language is noteworthy for the broader constitutional values it sets forth—values that have particular normative significance when considering their application in the legislative sphere.

B. Limitations of Current Jurisprudential Remedies for Racial Inequality in Educational Opportunity

To advance the constitutional ideal that Justice Kennedy articulates with force and eloquence in Parents Involved, the goal must be to find a workable solution. The vexing reality is that the current Court is unlikely to give the ideal practical strength when faced with continuing civil rights violations. This dilemma results directly from existing jurisprudential limitations in remediating

66. For an in-depth analysis of the benefits of the Jefferson County, Kentucky integration policy, see Olatunde C.A. Johnson, Integration Reconstructed, 1 DUKE J.L. & SOC. CHG. 19 (2009).

67. In a 2000 survey by the University of Kentucky, sixty-seven percent of parents said they believed that a school's enrollment should reflect the overall racial diversity of the school district. Sam Dillon, Schools' Efforts Hinge on Justices' Ruling in Cases on Race and School Assignments, N.Y. TIMES, Jun. 24, 2006, http://query.nytimes.com/gst/fullpage.html?res=9802E7DB1630F937A15755C0A9609C8B63.

68. See generally AMY STUART WELLS ET AL., BOTH SIDES NOW: THE STORY OF SCHOOL DESEGREGATION'S GRADUATES (2009) (study showing that blacks, whites, and Latinos who graduated from racially diverse schools in 1980 felt that desegregation better prepared them for life in a global society, were disheartened by lack of continued governmental efforts toward racial diversity, and were eager to replicate their racially integrated educational experiences for their children).

69. McCulloch v. Maryland, 17 U.S. 316, 407 (1819) ("[I]t is a constitution we are expounding.").

70. Parents Involved, 551 U.S. at 787 (Kennedy, J., concurring).
twenty-first century structural, racial, and educational disparities. While Justice Kennedy voiced a clear admonition of the persistent resegregation in public schools and the need for policies to address the violation, a majority of Justices failed to uphold the well-intended efforts of the school districts to racially integrate their student bodies. Instead, a majority of Justices held that the policies lacked the narrow tailoring necessary to survive a strict scrutiny analysis. In evaluating the Jefferson County plan, Kennedy noted that the "County fail[ed] to make clear to this Court... whether in fact it relie[d] on racial classifications in a manner narrowly tailored to the interest in question, rather than in the far-reaching, inconsistent, and ad hoc manner that a less forgiving reading of the record would suggest."71 While Kennedy found the Seattle school district had more clearly defined methods and criteria for its student assignment plan, he eschewed the binary categories Seattle used to racially classify students.72

Justice Kennedy’s frustration with the Seattle and Jefferson County integration policies highlights the judiciary’s institutional limitations in adequately addressing present-day manifestations of racial inequality in educational opportunities. At the aspirational level, Kennedy offers an analysis that more closely resembles an anti-subordination model of equal protection. Yet, ultimately, Kennedy limits his suggested constitutional tools by steering the final analysis closer to an anti-classification model. The blunt force of Kennedy’s narrow tailoring analysis ultimately saturates his idealism. Current equality jurisprudence cabins analysis to the basic line of questioning required under strict scrutiny without allowing for a depth or breadth of inquiry and evidence that would permit more flexible policies. The overarching question—whether the policies at issue are narrowly tailored to serve a compelling government interest—limits the investigation. Such an examination is insufficient to elicit the kind of widespread results necessary to fully address persistent racial isolation in educational institutions.

An elaboration of the Court’s articulation of the policies’ shortcomings illustrates this point. First, even Justice Kennedy acknowledges that narrow tailoring analysis requires the Court to understand the scope and availability of less restrictive alternatives.73 Such an inquiry also requires "in many cases a thorough understanding of how a plan works."74 According to Kennedy, the Jefferson County Board of Education failed to meet this mandate.75 One might

71. Id. at 786.
72. Id. ("It has failed to explain why, in a district composed of a diversity of races, with fewer than half of the students classified as ‘white,’ it has employed the crude racial categories of ‘white’ and ‘non-white’ as the basis for its assignment decisions.").
73. Id. at 784.
74. Id.
75. Id.
question, however, whether the judiciary has the institutional capacity to thoroughly understand whether and how alternative policies might be used.

Second, both the Seattle and Jefferson County integration policies used binary racial classifications. While this may be more understandable in Jefferson County, where the student population is largely composed of African American and white students, Seattle has a diverse number of races. Justice Kennedy seems deeply disturbed that the policy forces Seattle school children to be categorized in such a fashion. The Court does not consider the merits of policies that might allow for more nuanced racial classifications, or discuss plans that might be alternatives to the Seattle plan.

This lack of inquiry into alternative policies is, obviously, a result of the strict scrutiny analysis that places the burden of proof on the state actors. Yet, the policies' dismissal and the Court's limited inquiry into feasible alternatives highlight a limitation of the adjudicatory model. If the desired goal is fostering racial inclusion to increase educational opportunity, then the inquiry should include some analysis as to whether and how promising plans may operate. There is substantial empirical evidence to support the use of race-conscious policies, which the Court has in other instances acknowledged. Litigants in Parents Involved provided substantial empirical evidence to support the use of race-conscious policies in schools, but Kennedy neither acknowledged the literature nor incorporated it into his analysis. Litigants necessarily limited the proffered empirical evidence to the cases at hand. A

76. Id. at 723. ("[P]lans here employ only a limited notion of diversity, viewing race exclusively in white/nonwhite terms in Seattle and black/‘other’ terms in Jefferson County.")
78. Parents Involved, 551 U.S. at 786.
79. Id. at 783.
80. In Oregon v. Mitchell, the Court discussed the incompetence of the judiciary to tackle such issues: "The nature of the judicial process makes it an inappropriate forum for the determination of complex factual questions of the kind so often involved in constitutional adjudication. Courts, therefore, will overturn a legislative determination of a factual question only if the legislature’s finding is so clearly wrong that it may be characterized as ‘arbitrary,’ ‘irrational,’ or ‘unreasonable.’" 400 U.S. 112, 247-48 (1970) (Brennan, J., concurring in part and dissenting in part).
82. But see Parents Involved, 551 U.S. at 838-45 (Breyer, J., dissenting) (citing empirical evidence for the support of race-conscious educational policies).
83. The American Educational Research Association filed an amicus brief, which documented the wide range of studies showing the benefits of racially diverse schools, as well as the harms associated with racial isolation and the resegregation of previously desegregated school systems. Brief for American Educational Research Association as Amicus Curiae Supporting Respondents, Parents Involved, 551 U.S. 701 (2007) (Nos. 05-908 & 05-915). Shortly after the Parents Involved decision, the National Academy of Education produced a meta-analysis. NATIONAL ACADEMY OF EDUCATION, RACE-CONSCIOUS
non-adjudicatory context may allow for the consideration and use of information on precise methods or permutations of race-conscious policies that have proven beneficial in other circumstances.

Kennedy attempts to do so, but he proffers solutions that move away from any individual racial classification so as to avoid the rigidity of a strict scrutiny analysis. Kennedy suggests that districts are “free to devise race-conscious measures to address the problem in a general way and without treating each student in a different fashion based solely on the basis of a systematic, individual typing by race.” Instead, his constitutional tools either focus on race-neutral means or generalized race-conscious policies, which he argues may not trigger a strict scrutiny analysis. It may be, however, that a combination of the two in conjunction with individual racial classifications would be most beneficial without being unduly burdensome. This analysis shows that an adjudicatory model, limited to the facts at hand, is less likely to take note of the breadth of instances in which flexible race-conscious policies can be and have been employed that are not as “ambiguous” as the plan employed by the Jefferson County School District or as “binary” as the one employed by the Seattle School District.

In contrast, as Justice Kennedy notes with approval, legislative and executive branches have considered such flexible race-conscious policies for years to address systemic racial inequality in education. Indeed, these bodies may be best suited to continue to examine these thorny issues and facilitate solutions for the future. While Kennedy may have envisioned a specific emphasis on local political bodies addressing these issues, there may be even

Policies for Assigning Students to Schools: Social Science Research and the Supreme Court Cases (2007), available at http://www.naeducation.org/Meredith_Report.pdf. Drafted by an ideologically diverse group of renowned scholars, the analysis found that desegregated schools offer short- and long-term benefits. In the short term, racially desegregated schools are likely to improve inter-group relations, and in the long term, they increase the likelihood of greater tolerance and better intergroup relations among adults of different racial groups. Id. at 2.

84. Parents Involved, 551 U.S. at 789 (Kennedy, J., concurring) (“These mechanisms are race conscious but do not lead to different treatment based on a classification that tells each student he or she is to be defined by race, so it is unlikely any of them would demand strict scrutiny to be found permissible.”).

85. Id. at 706.

86. As noted earlier, Justice Kennedy has exhibited a disdain for individual racial classifications in prior jurisprudence. See Grutter, 539 U.S. at 389. But see Ian Ayres, Don’t Ask Don’t Tell: Narrow Tailoring After Grutter and Gratz, 85 Tex. L. Rev. 517, 521 (2007) (arguing the race-conscious law school admissions policy upheld in Grutter had a greater racial preference than the policy struck down in Gratz v. Bollinger).

87. Kennedy notes that “[t]hese mechanisms are race conscious but do not lead to different treatment based on a classification that tells each student he or she is to be defined by race, so it is unlikely any of them would demand strict scrutiny to be found permissible.” Parents Involved, 551 U.S. at 789 (Kennedy, J., concurring).
greater opportunity for Congress to play a strong role in facilitating such work on the ground.

III. LEGISLATIVE OPPORTUNITIES TO BRIDGE THE CONSTITUTIONAL DIVIDE

A. Popular Constitutionalism

Any court-articulated vision of the substantive equality right of racially integrated education raises the question of how to connect the ideal to workable solutions. Ultimately, the juricentric model\(^8\) remains ineffective at mapping out the most appropriate and effective constitutional remedies. Existing jurisprudential remedies, while helpful to some, cannot be the panacea for systemic and entrenched racial inequality.

Throughout history, the federal branches of government have engaged in a dialogue about the shape and contours of constitutional protections that has allowed our nation to bridge the gap between constitutional ideals and practice. As scholars Reva Siegel and Robert Post have stated, these struggles over constitutional meaning have shaped the very content of our constitutional law.\(^9\)

The evolution of rights for African Americans and other racial minorities in the United States is the product of an often tense political/judicial dialogue rooted deep in the fabric of our Constitution\(^9\) that extends to current debates on the most prudent ways to make real the promise of ensuring "equal protection" under the law. The constitutional guarantee set forth in *Brown* remains elusive in part because of the widening chasm between our constitutional ideals and adjudicated constitutional law,\(^9\) as evidenced by recent Supreme Court


\(^9\) See Robin West, *The Missing Jurisprudence of the Legislated Constitution*, in THE CONSTITUTION IN 2020, at 25 (Reva B. Siegel and Jack Balkin, eds., 2009) (highlighting the difference in the concepts of "adjudicated," or court-interpreted, and legislated constitutional law, arguing that the legislated Constitution is more in line with progressive goals).
decisions regarding the inability or impropriety of adjudicated constitutional law to ameliorate persistent racial inequities.\footnote{92 See, e.g., Derek W. Black, The Contradiction Between Equal Protection’s Meaning and its Legal Substance: How Deliberate Indifference Can Cure It, 15 WM. & MARY BILL RTS. J. 533 (2006) (discussing the Court’s inability to provide clear definition on meaning of equal protection).}

The variance is especially apparent in the pervasive nature of racial inequality in educational opportunity. While Brown issued a mandate to eliminate racial segregation in public education, the type of racial resegregation\footnote{93 See, e.g., School Resegregation: Must the South Turn Back? (John Charles Boger & Gary Orfield, eds., 2006); Gary Orfield & Chungmei Lee, Racial Transformation and the Changing Nature of Segregation (2006) available at http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/racial-transformation-and-the-changing-nature-of-segregation/orfield-racial-transformation-2006.pdf; Jonathan Kozol, The Shame of the Nation: The Restoration of Apartheid Schooling in America, (2005).} occurring in public elementary and secondary schools today takes on a different form. But, it is no less pernicious than the constitutional violation identified nearly sixty years ago. Indeed, many American schools have “apartheid” levels of racial segregation,\footnote{94 Id. at 9.} yet the segregation is not easily traceable to a state mandate. Adjudicated constitutional law addressing racial segregation in public education has been ill-equipped to identify and address these current manifestations of racial inequality in public education. Rather, existing jurisprudential remedies redress state-mandated racial inequalities, and they are a feeble tonic in the face of twenty-first century systemic racial inequities.

On a foundational level, it is the populist branch of our national government that may be an appropriate place to renew the country’s commitment to racial inclusion. As other scholars have suggested, the national legislature affords several crucial components that neither the judiciary nor executive branches of federal government possess.\footnote{95 See generally Rebecca E. Zietlow, Enforcing Equality: Congress, the Constitution, and the Protection of Individual Rights (2006).} First, by its very scope, the national legislature provides more weight and authority to the causes it champions than any other political body. Second, political debate and the legislative process mandate an unparalleled level of political accountability. Third, the legislative process requires significant involvement from a variety of advocates on many different levels. The process also allows greater flexibility than the judiciary in fashioning narrowly tailored remedies. Finally, Congress has the critical ability to enforce its policies. Given its unique position in our national landscape, it is no wonder that scholars have long argued its essential role in constitutional interpretations of civil rights norms.\footnote{96 See, e.g., West, supra note 91; William N. Eskridge, Jr., America’s Statutory Constitution, 41 U.C. DAVIS L. REV. 41, 44 (2007) (contending that democratic institutions}
In the face of persistent resegregation of the nation’s public schools, our national legislature may be a particularly appropriate institution to facilitate the creation and maintenance of holistic measures to improve educational opportunity structures. Rather than foreclosing possibilities for race-conscious policies, a majority of justices seem to invite the development of carefully tailored legislative policy in this arena. Justice Kennedy confirms legislative and executive power and acumen to address constitutional violations and structure practical remedies. Such a conception of equal protection jurisprudence allows political bodies to address de facto racial isolation “with candor and with confidence” that the Constitution supports their laudable efforts. The Court has implicitly recognized the distinctive role that political branches play in protecting equality values in areas where courts are not prepared to handle them without congressional guidance.

B. Existing Models

Given the jurisprudential trajectory away from addressing critical racial inequalities in educational opportunity, it is an apt time to consider the existing models of regulatory movement for equality at the intersection of race and education and how these may inform efforts to craft innovative models addressing twenty-first century disparities. Indeed, there is a long history of the federal political branches drafting and enforcing strong civil rights protections when jurisprudential remedies proved limited.

While one traditionally views educational policy as a function of state and local governments, with schools receiving a majority of their funding from these bodies, Congress has played

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97. See Parents Involved, 551 U.S. at 789 (2007) (Kennedy, J., concurring). See also id. at 822 (Breyer, J., dissenting).

98. Id. at 791-92.

99. Id. at 837. While it is likely that Justice Kennedy may have envisioned local school boards, rather than the national legislature, when making the comment, I argue that his message is just as salient when one views the role of Congress.

100. See, e.g., Pamela S. Karlan, Section 5 Squared: Congressional Power to Extend and Amend the Voting Rights Act, 44 Hous. L. Rev. 1 (2007) (examining how recent changes in legal doctrine have impacted congressional authority to protect voting rights).


a pivotal role in shaping school desegregation policy for more than half a century.

As scholars have opined, the decade following Brown offers a stark example of the power of federal legislation to spur reform. In Brown's immediate aftermath, districts lacked such a broad base of support and a legislative structure to realize the desegregation mandate. Local districts that wanted to eliminate segregation lacked any tools or roadmap for doing so, and were weak in the face of staunch political opposition. Prior to the passage of national legislation, the vast majority of African American students in southern states still attended fully segregated schools. Yet, Congress played a pivotal role in changing the tide of racially segregated public education. These efforts took the form of race-conscious legislation such as the 1964 Civil Rights Act, the 1972 Emergency School Aid Act, the 1974 Equal Educational Opportunities Act, and the Magnet Schools Assistance Program, as well as "race-neutral" legislation like the 1965 Elementary and Secondary Education Act and its most recent iteration, the No Child Left Behind Act.

With President Lyndon Johnson's vigorous support, the Civil Rights Act of 1964 provided some of the most effective tools for dismantling racial apartheid in American public schools. Title VI prohibits racial discrimination by any entity receiving federal funds, and permits the denial of federal funds to any educational institution engaging in racial segregation. The Department of Education's Office for Civil Rights (OCR) continues to hold this enforcement power and set guidelines requiring schools to desegregate. In addition, the Civil Rights Act authorizes the Department of Justice's Civil Rights Division to initiate litigation if such compliance efforts are unsuccessful.

While at the time of the Civil Rights Act's passage most public school funding came from state and local governments, the Elementary and Secondary Education Act of 1965 (ESEA) increased the power of the potential loss of federal funds. ESEA provided funds for remedial aid to schools with a disproportionate amount of low-income students. Since the Deep South was one of the poorest regions of the nation, much of this funding was ear-marked for those states that had resisted desegregation efforts. To receive funds,

schools had to comply with Title VI. In addition, the Emergency School Aid Act of 1972 (ESAA) offered funding to help eradicate segregation and racial discrimination in elementary and secondary schools. Congress enacted the ESAA in 1972, agreeing that "racially integrated education improves the quality of education for all children."\textsuperscript{107} The ESAA passed with bipartisan support, as well as the support of President Richard Nixon. Due in part to such efforts, the percentage of black students in majority white schools rose from two to thirty-three percent between 1964 and 1970.\textsuperscript{108} Although such efforts were later constrained by an amendment that limited federal funding for busing,\textsuperscript{109} Congress continued to enact legislation aimed at reducing racial isolation in public education.

Some legislative developments have emphasized choice as a means of reducing racial isolation in schools and identifying existing structural racial inequality in the provision of public education. In the 1980s, for example, Congress passed the Magnet Schools Assistance Program to provide assistance to school districts implementing magnet schools. The goal was to "meet the special needs incident to the elimination of minority group segregation and discrimination among students and faculty in elementary and secondary schools [and] to encourage the voluntary elimination, reduction, or prevention of minority group isolation in elementary and secondary schools with substantial proportions of minority students."\textsuperscript{110} In reauthorizing the program in 1994, Congress explicitly found that the federal government should support those districts seeking to "foster meaningful interaction among students of different racial and ethnic backgrounds," particularly at the earliest educational levels.\textsuperscript{111} By the late 1980s, forty-four percent of black students attended majority white schools.\textsuperscript{112} In updating the Magnet Schools Assistance Program, Congress has affirmed that it is in the best interests of the nation to continue federal support of both court-ordered desegregation plans, and those voluntarily implemented by local school boards to maximize meaningful interaction among racially and ethnically diverse students.\textsuperscript{113}

\textsuperscript{107} H.R. REP. No. 92-576, at 3 (1971). Congress recognized that "education in an integrated environment, in which [all] children are exposed to diverse backgrounds, is beneficial." S. REP. No. 92-61, at 7 (1971).

\textsuperscript{108} ORFIELD & LEE, supra note 12 at 23.


\textsuperscript{113} 20 U.S.C. § 7231(a)(4)(A), (C) ("It is in the best interests of the United States . . . to continue the Federal Government's support of local educational agencies that are implementing court-ordered desegregation plans and local educational agencies that are voluntarily seeking to foster meaningful interaction among students of different racial and
The most recent reauthorization of the Elementary and Secondary Education Act is the much-debated No Child Left Behind Act (NCLB),\textsuperscript{114} which represented the federal government's largest foray into educational policy at its passage. It signaled a momentous change in the balance of power between the states and the federal government in shaping the scope and direction of public education, and it has been the subject of controversy for its imposition of federal mandates on states and its reliance on tests.\textsuperscript{115} Among other provisions, NCLB allows for the transfer of students from "low-performing schools" to those that are higher performing within their district. In addition, the Act requires that results of annual statewide testing be published and disaggregated at every level by race and ethnicity. Yet, it does not hold state agencies accountable to schools for resources, and is not funded by the federal government.

C. Lessons for the Twenty-First Century

Historic civil rights legislation has addressed some of the deficits in jurisprudential remedies for racial inclusion in education and facilitated more forceful desegregative measures. These forms of legislation have provided critical tools to ameliorate the scourge of racial discrimination in public education since the time of the \textit{Brown} ruling. Yet, much historic legislation enacted at the intersection of race and education has focused on eliminating racial disparities in education caused by an identifiable perpetrator of discrimination.\textsuperscript{116} Present manifestations of systemic racial inequality and isolation in elementary and secondary schools may require innovative legislative approaches to equality not focused on eliminating specific instances of de jure discrimination. As Justice Kennedy's concurrence eloquently noted, today's racial disparities in educational opportunity are not so easily traced to a specific instance of harm by a state actor.

Title VI of the 1964 Civil Rights Act, for example, is a necessary tool to address instances of racial discrimination in public education, but remains

\textsuperscript{114} 20 U.S.C. §§ 6301, et seq.


\textsuperscript{116} See, e.g., 20 U.S.C. § 6301 (describing Act's goal of "closing the achievement gap between high-and low-achieving children, especially the achievement gaps between minority and nonminority students, and between disadvantaged children and their more advantaged peers").
focused on identifying harm caused by a state actor. In addition, recent anti-
classification frameworks of equality jurisprudence have hampered the reach of 
enforceability under Title VI, limiting opportunities for redress to an 
administrative complaint process rather than also allowing for a private right of 
action.\(^{117}\) As such, while Title VI is one important instrument to address 
persistent racial inequities in education, there is an opportunity to look at ways 
in which existing regulations may be enhanced by innovations that specifically 
respond to twenty-first century systemic inequities.

At this juncture, Congress may provide some solutions to the disconnect 
between the existing anti-classification framework and the anti-subordination 
ideal by enacting legislation to facilitate innovative responses by localities to 
these twenty-first century equal protection violations. Existing models of so-
called choice legislation, such as the Magnet Schools Assistance Program, have 
offered interesting provisions for facilitating racial inclusion in public 
education. To be sure, such programs are most effective when coupled with 
sufficient funding, an understanding of current racial demographics, and an 
acknowledgement of the complexities of persistent racial segregation and 
disparities in education. This includes an emphasis on supporting voluntary 
measures to reduce racial isolation, and furthering diversity beyond the 
"binary" categorizations eschewed by the Court in \textit{Parents Involved}.

In fact, models of choice legislation may be most effective when coupled 
with mechanisms that facilitate the information gathering and data sharing 
features of other "race-neutral" legislation like the No Child Left Behind Act 
(NCLB). At a minimum, the information gathering and data-sharing aspects of 
recent federal legislation like NCLB provide an opportunity for using evidence 
of racial disparities in educational attainment to craft policy that speaks to some 
of the demographic, social, economic, and racial differences in existing 
educational environments.\(^{118}\) While some scholars and advocates have argued 
that NCLB is problematic due to a misplaced reliance on sanctions to promote 
educational reform,\(^{119}\) the transparency of such provisions allows for a fuller 
understanding of some of the persistent inequities in educational opportunity 
and attainment.

At present, public education in the United States is extremely 
decentralized, as nearly 16,000 school districts develop policies through their

\(^{117}\) \textit{See} Alexander v. Sandoval, 532 U.S. 275 (2001) (eliminating a private right of 
action to sue for racial discrimination in education under Title VI of the Civil Rights Act).

\(^{118}\) \textit{See}, \textit{e.g.}, Daniel J. Losen, \textit{Challenging Racial Disparities: The Promise and 
Pitfalls of the No Child Left Behind Act’s Race-Conscious Accountability}, 47 \textit{How. L.J.} 243, 

\(^{119}\) \textit{See generally \textit{HOLDING NCLB ACCOUNTABLE: ACHIEVING ACCOUNTABILITY, 
EQUITY, AND SCHOOL REFORM} (Gail Sunderman, ed., 2008); HEINRICH MINTROP ET AL., \textit{WHY 
HIGH STAKES ACCOUNTABILITY SOUNDS GOOD BUT DOESN’T WORK—AND WHY WE KEEP 
DOING IT ANYWAY} (2009).
own departments. They lack the resources to determine the forms of racially inclusive policies that will work best. The national legislature is a logical body to focus these efforts because there is a benefit of scale. By soliciting input from a variety of actors and gathering data at a national level, the legislative process serves an educational and heuristic function. National information gathering and data sharing help illuminate the optimal means of achieving integrated learning in a variety of demographic contexts. In addition, the large scale collection and dissemination of social science research on benefits of various voluntary integration policies and normative stories may encourage other districts to do better in their efforts to provide quality education for all students.

Recent legislation and congressional appropriations support this conclusion. In 2009, Congress appropriated $2.5 million to the Department of Education to distribute through competitive grants to school districts seeking technical assistance in designing or implementing student assignment plans. Through these methods, congressional action may provide the means to secure the constitutional entitlement to racially inclusive education. Such congressional action can provide structure and support to local government actors currently attempting to further the constitutional mandate, and provide the force of law to persuade others to follow suit.

While current legislation offers some hopeful tools to help dismantle deeply entrenched structures of racial inequality, such tools are most effective when coupled with enforcement mechanisms and accountability measures. The potential for creating regulatory structures that include strong enforcement mechanisms and accountability measures depends on a number of factors, including the potential for collaboration with the Executive Branch. In addition, the potential for truly substantial legislative innovations may be through an examination of the scope of legislative power to enact new enforcement legislation at the intersection of race and education. Theoretically,

121. 42 U.S.C. §§ 2000c-2000c-2, 2000c-5. The Technical Assistance for Student Assignment Plans Program assists in “preparing, adopting, or modifying, and implementing student assignment plans to avoid racial isolation and resegregation . . . and to facilitate student diversity. . . .” U.S. Department of Education, Technical Assistance Support for Student Assignment Plans Program, available at http://www2.ed.gov/programs/tasap/index.html. School districts “use these grant funds to seek assistance and expertise from student assignment specialists, demographers, community relations specialists, facility and other planners, or curriculum specialists and . . . specialists and consultants from academia, non-profit organizations, civil rights organizations, and the private sector.” Id.
122. See Technical Assistance Support Program, USDOE.
power to enact such legislation may derive from the Congress’s power under the Commerce or Spending Clauses or under the Reconstruction Amendments. In future work, I explore the scope of congressional enforcement power under Section Five of the Fourteenth Amendment to enact legislation that may specifically address continuing racial isolation in education. Ultimately, such provisions depend on the political will of the national legislature to identify and acknowledge structures that discourage racial equality in education and create mechanisms to foster innovations by local legislative bodies to address disparities and foster educational opportunity.

CONCLUSION

The crossroads of educational crises and jurisprudential limitations suggest the time has come for an examination of potential legislative opportunities to facilitate equal protection guarantees in the context of racial equality and education. While recent jurisprudence has complicated the equality terrain with respect to public education, the political branches play an important role in shaping the contours of the Constitution’s equality guarantee. Congressional power in this realm is, at its core, a mechanism for ensuring that the promise of equality is realized for all. One hopeful and substantive path for addressing hyper-segregation in American schools and its attendant inequities may be to capitalize on congressional power to remedy twenty-first century structural ills. As a co-equal branch of the federal government, Congress plays an important institutional role in fleshing out the shape and meaning of the constitutional remedy associated with the basic constitutional guarantee to racial equality in the opportunity to learn.