2008

Undercover Power: Examining the Role of the Executive Branch in Determining the Meaning and Scope of School Integration Jurisprudence

Lia Epperson
American University Washington College of Law, epperson@wcl.american.edu

Follow this and additional works at: https://digitalcommons.wcl.american.edu/facsch_lawrev

Part of the Civil Rights and Discrimination Commons, Education Law Commons, Jurisprudence Commons, and the President/Executive Department Commons

Recommended Citation
https://digitalcommons.wcl.american.edu/facsch_lawrev/1156

This Article is brought to you for free and open access by the Scholarship & Research at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in Articles in Law Reviews & Other Academic Journals by an authorized administrator of Digital Commons @ American University Washington College of Law. For more information, please contact kclay@wcl.american.edu.
Undercover Power:
Examining the Role of the Executive Branch in Determining the Meaning and Scope of School Integration Jurisprudence

Lia Epperson*

INTRODUCTION

We are conditioned to think of civil rights as litigation-oriented, molded and transformed through judicial law, but that is just a fraction of the story of civil rights advocacy. The Executive Branch has had a powerful and arguably dominant role in directing the scope and meaning of civil rights law over the last half-century. The rise of the administrative state has resulted in a brand of civil rights advocacy that includes administrative advocacy as much as any of the traditional forms of litigation-based or legislative advocacy. Understanding the critical role of the Executive Branch in shaping civil rights policy has potentially far-reaching normative and doctrinal implications.

This paper focuses on the interaction of the federal judicial and executive branches of government in one key area of civil rights, determining the scope and direction of school integration. Specifically, this paper examines the extremely powerful role of the United States Department of Education’s Office for Civil Rights (“OCR”) in shaping the application of the Supreme Court’s decisions with respect to racial inclusion in public education in the wake of two watershed rulings, Brown v. Board of Education1 and Grutter v. Bollinger.2 In addition, this paper discusses the possible consequences of executive and judicial interplay in the aftermath of the Court’s most recent ruling regarding school integration in Parents Involved in Community Schools v. Seattle School

* Assistant Professor of Law, Santa Clara University School of Law. Former Director of Education Law and Policy, NAACP Legal Defense & Educational Fund, Inc. J.D. Stanford; A.B., Harvard.

I owe thanks to Michelle Adams, Bradley Joondeph, Melissa Murray, and Beth Van Schaack, for their helpful comments. Special thanks to Santa Clara University School of Law for research support and to Akilah Davis and Thomas Hartnett for invaluable research assistance. Finally, I thank my husband, Benjamin Todd Jealous, and our daughter, Morgan, for their love and support.

In examining the role of OCR in alternately supporting and hindering
the use of race-conscious policies in the wake of key jurisprudence, this paper
argues that OCR may hold “supreme power” in delineating the application of
school integration jurisprudence. Most importantly, the history of this federal
administrative agency indicates that the Executive Branch has the potential to
play an increasingly critical role in addressing persistent racial isolation and
inequality in educational opportunity, mapping the future of racial inclusion in
public education, and determining the role of coordinate branches of the federal
government in effectuating such inclusion.

Part I of this paper provides the context for examining executive power in
shaping school integration jurisprudence by supplying information on the
current state of racial segregation in elementary, secondary, and post-secondary
education. In particular, Part I demonstrates that public schools are more
racially segregated than at any point in the last thirty years. While resurging
racial isolation may not be troubling in itself, such isolation is usually
accompanied by pernicious inequalities in other areas as well. Such persistent
and systemic racial isolation in elementary and secondary education also
contributes to a lack of minority participation in higher education. It is in
addressing these troubling trends that administrative advocacy, not simply civil
rights litigation, may play an increasingly significant role in shaping racial
inclusion in educational opportunity.

Part II of this paper discusses the aftermath of Brown and the role of
administrative power in eliminating state-mandated racial segregation. This
section addresses the relationship between the passage of civil rights legislation
and the rise of administrative civil rights enforcement power. In particular, it
examines the powerful role of OCR, which was tasked with enforcement power
to implement the Brown Court’s directive to desegregate public schools. In
addition, it examines the use of litigation to compel the Office for Civil Rights
to effectuate this enforcement power in elementary, secondary, and post-
secondary education.

Part III contrasts the post-Brown role of administrative power in
eliminating state-mandated racial segregation with the more current role of the
Department of Education’s Office for Civil Rights in addressing voluntary state
efforts to further racial inclusion in public education. Part III discusses the role
of the Executive Branch in shaping the scope and meaning of the Court’s

4. While the Executive Branch’s discretion in such activities is checked, to some degree, by
Congress’s oversight and appropriations powers, this paper argues that such a check does not
diminish the particularly powerful role that the Executive Branch may play shaping the direction
of racial inclusion in public education.
5. See generally GARY ORFIELD & CHUNGMEI LEE, RACIAL TRANSFORMATION AND THE
CHANGING NATURE OF SEGREGATION 13 (2006) (supporting the proposition that school
segregation still persists and has grown in degree and complexity, especially in metropolitan
areas).
approval of race-conscious admissions in *Grutter v. Bollinger*.\(^6\) In the last fifteen years, OCR has alternately supported and hindered voluntary state efforts to use race-conscious policies to eliminate continued racial isolation in elementary and secondary education and promote greater minority participation in higher education. This section includes an analysis of current Department of Education regulations supporting voluntary integration policies, and contrasts these with the Department of Education's compliance in recent efforts to curb affirmative action policies.

Part III also examines the most recent Supreme Court decision addressing the constitutionality of voluntary racial integration plans in elementary and secondary education. In *Parents Involved in Community Schools v. Seattle School District*,\(^7\) a slim majority of the Court struck down race-conscious student assignment policies adopted by local public school boards, holding that they failed to meet the strict scrutiny requirement of the Fourteenth Amendment's Equal Protection Clause.\(^8\) Given the "split" nature of the Supreme Court's reasoning, the decision may be interpreted in a variety of ways by federal administrative agencies, again giving the Office for Civil Rights wide latitude in shaping the decision's application to school districts across the nation.\(^9\)

Part IV of this paper discusses the normative and doctrinal implications of the historic and current actions of this federal administrative agency and the critical role that presidential policies regarding racial inclusion in public education may play in the next presidential administration. This nation has not yet realized true racial equality in educational opportunity. In such a climate, federal administrative agencies hold a controlling position with respect to shaping policies to address persistent racial disparities in access to quality education. This paper suggests that the time is particularly ripe for reconstructing the traditional civil rights advocacy model to include even greater administrative advocacy, and to call on the Executive Branch to use its "supreme power" to build broad-based consensus for the need to improve our collective educational and economic fate. Part IV examines the potential role of OCR and coordinate federal administrative bodies in fostering racial inclusion in public education. This includes (1) examining the role of

---

8. *Id*. at 2746.
9. Courts have long held that Title VI is coextensive with the Fourteenth Amendment's Equal Protection Clause. *See*, e.g., *Grutter v. Bollinger*, 539 U.S. 309, 343 (2003) ("[T]he Equal Protection Clause does not prohibit the Law School's narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body. Consequently, petitioner's statutory claims based on Title VI . . . fail.") (*citing* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 287 (1978) ("Title VI ... proscribe[s] only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment")).
executive appointments to key federal administrative positions in enforcing long-standing civil rights legislation; (2) working with Congress in refining and effectuating legislation in this arena, elucidating existing regulations, and/or adopting new regulations and guidelines on legally permissible race-conscious educational polices and programs; and (3) positioning the administrative agency as a more effective communicator by collecting and disseminating key empirical data to support such efforts.  

I. THE HARMS OF RACIAL ISOLATION IN PUBLIC EDUCATION

Studies demonstrate that racial isolation, baked into the foundation of American democracy, continues to pervade American society in a number of areas. Racial isolation in public educational institutions is particularly perilous because it is connected to a host of other forms of isolation that impede learning opportunities for students of color. The context of persistent racial disparities in educational opportunity provides an essential framework for understanding the key functions federal administrative agencies may play in shaping policies to address educational inequities.

Due in significant part to a trilogy of Supreme Court decisions narrowing the scope and duration of mandatory school desegregation consent decrees, school segregation has risen steadily for several years. Also due in large measure to the persistence of residential segregation, school segregation is at

10. While racial integration policies are by no means the sole avenue to address persistent racial, spatial, and socioeconomic disparities in educational opportunities, this paper is based on the premise that race-conscious measures may be effective as one of myriad of policies, and perhaps even the most effective of a panoply of measures directed at closing racial disparities in educational achievement.

11. See, e.g., Douglas S. Massey & Mary J. Fischer, Does Rising Income Bring Integration? 28 SOC. SCI. RES. 316, 317 (1999) (finding that African Americans continue to lag far behind other groups in achieving integration, regardless of their class); Richard D. Alba et al., How Segregated Are Middle-Class African Americans?, 47 SOC. PROBS. 543, 556 (noting that African Americans never reach “residential parity” with whites, in that the neighborhoods in which African Americans reside have less affluence and less desirable characteristics, such as crime, than similarly situated white communities).


its highest point in more than three decades.\textsuperscript{15} Such segregation is most acute among white students who, on average, attend schools where roughly 80 percent of the student body is white.\textsuperscript{16} It is widely documented that the schools with the highest concentrations of African-American and Latino students also have on average the highest concentrations of poverty.\textsuperscript{17} Specifically, African-American and other minority students are nearly three times as likely to be poor as their white counterparts.\textsuperscript{18} Those schools with the highest concentrations of African-American and Latino students also have very limited resources and are more likely to have fewer experienced and credentialed teachers.\textsuperscript{19} This lack of resources at the primary and secondary level affects access to post-secondary education as well. African-American students are far less likely than white students to gain access to information on higher education opportunities from their families or communities.\textsuperscript{20}

Yet, when low-income students are placed in schools with a higher concentration of higher-income students,\textsuperscript{21} studies show those students perform better.\textsuperscript{22} Indeed, after the socioeconomic status of a student’s family, the socioeconomic status of a student’s school is the largest forecaster of academic success.\textsuperscript{23} The National Assessment of Educational Progress, for example, found that low-income students in affluent schools performed the equivalent of having two more years of education than low-income students in schools with high concentrations of poverty.\textsuperscript{24}

In the twenty-first century, social science research almost universally concludes that more racially integrated academic environments provide


\textsuperscript{17} Id. See also Gary Orfield, The Growth of Segregation, in DISMANTLING DESEGREGATION 53 (Gary Orfield et al. eds., 1996).

\textsuperscript{18} See, e.g., Integrating Schools, WASH. POST, Jul. 23, 2007, at A16.


\textsuperscript{21} It is worth noting, however, that even controlling for income, African Americans experience higher levels of racial isolation in education and other facets of American life. See, e.g., HIRSCH, supra note 14. See also MARY PATILLO-MCCOY, BLACK PICKET FENCES 27 (1999)(Supporting the proposition that African Americans in general, and middle class African Americans in particular, are more segregated from whites than any other racial or ethnic group).

\textsuperscript{22} See, e.g., Integrating Schools, WASH. POST, Jul. 23, 2007, at A16.

\textsuperscript{23} Id.

significant educational and social benefits for students of all races. These include improved critical thinking skills, higher graduation rates and college attendance, and greater civic participation for all students. De facto segregation, and the educational inequities that accompany it, threaten public schools’ ability to prepare children to be well-equipped and active members of the nation’s citizenry. Correspondingly, research confirms the significant “citizenship” or “democracy” benefits of racial diversity in higher education.

Indeed, white students have been found to receive particularly positive benefits from such experiences, since they are more likely to have grown up with little interracial contact.

Nevertheless, significant racial disparities in higher education participation remain. Although African Americans, Latinos, and Native Americans have made considerable gains in college enrollment, striking variances persist between white and non-white college attendance rates. At least fifty percent of all African-American, Latino, and Native-American students will not graduate from high school this year. In fact, African Americans aged twenty-five and older are more likely to be without a high school diploma than with a college degree. Conversely, whites aged twenty-five and older are nearly three times more likely to have a college degree than to be without a high school diploma.

The implications of such disparities have far-reaching employment implications for all Americans, but the relationship between education and employment rates are greatest among African Americans. In 1999, for example, less than half of African-American men aged 26 to 45 who lacked a

25. See generally NATIONAL ACADEMY OF EDUCATION, RACE-CONSCIOUS POLICIES FOR ASSIGNING STUDENTS TO SCHOOLS: SOCIAL SCIENCE RESEARCH AND THE SUPREME COURT CASES (2007) available at http://www.naededucation.org/1Meredith_Report.pdf. This meta-analysis, authored by a diverse group of prominent scholars, notes that “although racially diverse schools and classrooms will not guarantee improved intergroup relations, current research generally supports the conclusion that such diverse environments are likely to be constructive in [improving inter-group relations in the near term] . . . and experience in desegregated schools increases the likelihood of greater tolerance and better intergroup relations among adults of different racial groups [in the long term].” Id. at 2.

26. Id.


28. See, e.g., Gary Orfield & Dean Whitt, Diversity and Legal Education, in DIVERSITY CHALLENGED, supra note 27 at 143, 172.


30. See, e.g., Derek Neal, Why Has Black-White Skill Convergence Stopped?, in HANDBOOK OF ECONOMICS OF EDUCATION (ERIC HANUSHEK & FINIS WELCH, EDs. 2005).
high school diploma were employed at all during the year. Conversely, only 25 percent of white men who lacked a high school diploma were unemployed during that time.

Such statistics suggest that educational opportunities for African Americans and other racial minorities play a particularly critical role in determining life opportunities. In this arena, federal administrative agencies have played a significant role in shaping civil rights policy that may support or hinder efforts to close racial disparities in educational opportunity. In so doing, executive policies regarding racial inclusion in public education have implications that reach far beyond the simple racial composition in a classroom, and influence long-term employment and wealth opportunities.

II. THE POST-BROWN ERA: ENDING STATE-MANDATED RACIAL SEGREGATION IN K-16 EDUCATION

The role of the Supreme Court's 1954 *Brown v. Board of Education* ruling and its 1955 companion case, calling for an end to racial segregation in public schools "with all deliberate speed," is well-documented. The opinions helped eliminate state-mandated racial segregation in public schools. It is also no secret that in the immediate aftermath of the *Brown* decision, governmental and private entities used innumerable methods to stall, disrupt, and destroy chances for the desegregation of public schools that the Court ordered "with all deliberate speed." These efforts effectively prevented any meaningful desegregation of American public schools in the deep South for a decade. Local southern communities dressed racial animus in the disguise of

31. *Id.*
32. *Id.*
34. 347 U.S. 483 (1954) (hereinafter "Brown I").
37. *Id.* at 301
38. In the first years after *Brown I* and *Brown II*, little desegregation occurred, with barely two percent of African-American students in the eleven states of the former Confederacy attending desegregated schools. ERICA FRANKENBERG ET AL., *A MULTICULTURAL SOCIETY WITH SEGREGATED SCHOOLS* 17 (2003).
"federalism" and states' rights, organizing resistance movements to curb efforts of civil rights advocates. One month after the Brown decision, eight governors of states of the former Confederacy, and three representatives of the governors of Arkansas, Tennessee, and Texas, met and unanimously voted to refuse compliance with the decision. In addition, members of the federal legislature clearly voiced disapproval of the Court's ruling. Shortly after the Brown decision, every congressman and all but three senators from the states of the former Confederacy signed the Southern Manifesto that pledged to overturn Brown.

Publicly, the Executive Branch provided almost no direction on implementing desegregation policies in the immediate wake of the Brown decision. On the contrary, President Dwight Eisenhower famously opined that "you can’t change men’s hearts with laws," and privately expressed support for states' rights. In criticizing the Court's desegregation decision, Eisenhower promised Southern leaders he would "make haste slowly." It took four years after the Brown decision for Eisenhower to recommend school desegregation legislation. Indeed, near the end of his administration, Eisenhower opposed a measure prohibiting discrimination in schools that received federal funds. It is no surprise, then, that a full decade after Brown, ninety-eight percent of African-American students in Southern states still attended fully segregated schools.

A. The Rise of Administrative Enforcement Power

While Eisenhower implicitly mirrored the Southern intransigence that unmistakably marked the post-Brown years, the passage of federal legislation
in the 1960s helped pave the way for a more public and powerful Presidential role in shaping civil rights policy. An examination of the role of the Executive Branch in the decades after *Brown* demonstrates the increasing breadth of executive power in implementing Supreme Court jurisprudence pertaining to racial equality in schools. This rise in executive power is certainly due in significant part to the hard-fought political battles for enlarging the role of the Executive Branch in civil rights enforcement.47 With the continued growth of the administrative state, and the "presidential control model" of agency decision-making, the Executive Branch has become a dominant force in shaping civil rights policy in education over the last four decades.48 This presidential power has grown in direct proportion to federal legislation granting the Executive Branch a more prominent role in the development of civil rights policy.

Although civil rights policy was not a significant part of President John Kennedy's early presidential platform, President Lyndon Johnson became known as one of the strongest civil rights advocates ever to serve in the White House. With his vigorous support, Congress passed the Civil Rights Act of 196449 that provided some of the most effective tools for dismantling racial apartheid in American public schools. Titles IV and IX of the legislation, for example, authorized the Attorney General to initiate or intervene in pending school desegregation litigation.50

In addition, and perhaps most importantly, Title VI of the Civil Rights Act prohibits racial discrimination by any entity receiving federal funds. To facilitate enforcement of Title VI, the Secretary of the United States Department of Health, Education, and Welfare ("HEW")51 was allowed to deny federal funds to any educational institution engaging in racial segregation.52 HEW's Office for Civil Rights ("OCR") was given the power to enforce Title

---

47. See, e.g., PHILIP A. KLINGNER & ROGERS M. SMITH, THE UNSTEADY MARCH: THE RISE AND DECLINE OF RACIAL EQUALITY IN AMERICA 242-288 (1999) (discussing the impact of civil rights activism on efforts to expand federal civil rights enforcement power).


50. Id.

51. In 1980, the Department of Health, Education, and Welfare ("HEW") was reorganized into two departments. These are currently the Department of Education and the Department of Health and Human Services. Pursuant to the Department of Education Organization Act of 1980, the Department of Education assumed responsibility for enforcing the provisions of Title VI as applied to educational institutions. 80 Fed. Reg. 25030 (Aug. 15, 1980).

52. Id. At the time of the Act's passage, however, most public school funding came from state and local government. See KEVIN BROWN, RACE, LAW, AND EDUCATION IN THE POST-DESEGREGATION ERA, supra note 38 at 174.
During the remainder of the decade, HEW regularly set firm guidelines requiring schools to desegregate. Under a complaint procedure devised by HEW, individuals were permitted to file administrative complaints identifying allegedly noncompliant aid recipients. If OCR investigated and determined the complaint to be meritorious, the agency was then directed to undertake various compliance efforts, potentially culminating in the ultimate sanction of fund termination. This complaint and compliance procedure remains in effect today.

Indeed, the United States Department of Justice’s Civil Rights Division has also played a constructive role in assisting OCR in facilitating compliance with Title VI. If, after investigating a charge of discrimination against a school, school district, or institute of higher education, OCR concludes that an entity is in violation of the law, and if voluntary compliance is not forthcoming, the matter may be referred to the Department of Justice. At that time, the Department of Justice has the prosecutorial discretion to initiate litigation against the noncomplying school, school district, or college.

While at the time of the passage of the 1964 Civil Rights Act, most public school funding came from state and local governments, subsequent federal legislation increased the power of the potential loss of federal funds. In fact, OCR’s enforcement power impacted the provision of funds to educational institutions from numerous sources. In 1965, for example, Congress passed the Elementary and Secondary Education Act (ESEA). This Act provided funds for remedial aid in math and reading to schools with a disproportionate number of low-income children. Since the Deep South was one of the poorest regions of the nation, those states that had resisted desegregation efforts stood to gain a significant amount of the ESEA funds if they discontinued their discriminatory actions. To receive these funds, schools had to comply with the guidelines set forth by HEW regarding non-discriminatory school systems. Similarly, the

54. See 34 C.F.R. § 100.8 (a):
If there appears to be a failure or threatened failure to comply with this regulation, and if the noncompliance or threatened noncompliance cannot be corrected by informal means, compliance with this part may be effected by the suspension or termination of or refusal to grant or to continue Federal financial assistance or by any other means authorized by law. Such other means may include, but are not limited to, (1) a reference to the Department of Justice with a recommendation that appropriate proceedings be brought to enforce any rights of the United States under any law of the United States (including other titles of the Act), or any assurance or other contractual undertaking, and (2) any applicable proceeding under State or local law.
55. Id.
57. See, e.g., BROWN, supra note 38 at 174.
58. Id.
Emergency School Aid Act of 1971 gave funding authority to HEW.59

In the years of the Johnson administration, OCR took the lead in pushing an end to racially segregated and discriminatory public education. Between 1964 and 1970, it vigorously used its enforcement power under Title VI of the Civil Rights Act to push schools to comply. During that time, OCR initiated approximately 600 administrative proceedings against school districts that failed to comply with Title VI.60 In 1968 and 1969 alone, OCR initiated close to 200 enforcement proceedings.61

In the wake of Brown and the protracted battle to eliminate segregation with “all deliberate speed,”62 federal administrative agency power became an especially critical avenue for enforcement of civil rights legislation, not only in the area of elementary and secondary education, but also in the desegregation of institutions of higher education. In the years leading up to the Supreme Court’s decision in Brown, the multi-faceted litigation strategy employed to dismantle the system of racial apartheid in the United States focused squarely on all levels of public education. Indeed, a strong component of that strategy included a number of cases challenging segregation in universities.63 Unlike the arena of elementary and secondary education, however, there were no significant Supreme Court cases regarding higher education desegregation from 1954 to 1992.64 Still, civil rights advocates challenged federal administrative agencies to use all enforcement powers available to enforce Brown’s mandate of desegregation in public higher education.

Due in part to OCR’s efforts under the leadership of President Johnson, public elementary and secondary schools became significantly less segregated. The percentage of black students in majority white elementary and secondary schools rose from two to thirty-three percent between 1964 and 1970.65 By the late 1980s, forty-four percent of black students attended majority white

59. The Emergency School Aid Act was passed to “(a) meet the special needs incident to the elimination of racial segregation and discrimination among students and faculty in elementary and secondary schools, and (b) to encourage the voluntary elimination, reduction, or prevention of racial isolation in elementary and secondary schools with substantial proportions of minority group students.” 20 U.S.C. §§1601 et seq.

Three years later, Congress passed the Equal Educational Opportunities Act in 1974. This Act prohibits specific discriminatory conduct, including segregating students on the basis of race, color or national origin, and discrimination against faculty and staff. 20 U.S.C. § 1706.


61. Id.


64. But see Florida ex rel. Hawkins v. Board of Control, 350 US 413 (1956) (applying Brown mandate to higher education institutions).

In addition, OCR utilized its enforcement powers during the Johnson administration to begin to address persistent racial segregation in colleges and universities. Though it was clearly unconstitutional under Brown, racially separate and unequal colleges and universities in recalcitrant states persisted. For example, the University of Maryland’s flagship campus remained ninety-nine percent white in the late 1960s. In 1969, OCR wrote to the governors of ten southern and border states to inform them that their racially dual systems of higher education violated Title VI. However, the 1969 efforts of OCR to desegregate colleges and universities did not bear fruit until later years.

B. Litigating to Effectuate Administrative Enforcement Power

By the dawn of the 1970s, the growth of federal administrative agency power resulted in the executive branch taking a more prominent role with respect to civil rights enforcement and school desegregation. Due in part to political shifts and to Supreme Court jurisprudence sharply limiting the extension of desegregation to Northern metropolitan areas and reducing the remedies available for expanding educational opportunities for low-income minority children, the center of policy-making moved from the courts and Congress to include bureaucratic enforcement of the federal legislation and court orders. In addition to court decisions, any movement, or lack of movement, toward eliminating racial inequities in education emanated from executive enforcement of statutory law and presidential directives.

Unfortunately, the civil rights advocacy that characterized the Johnson administration in the 1960s was supplanted by President Richard Nixon’s civil rights retreat in the next decade. Nixon ran on an “anti-desegregation” platform to court more Southern voters. In 1969, Nixon ended executive
The change in executive leadership in 1969 signaled an end to the vigorous enforcement policy that characterized OCR under President Johnson. Unlike the nearly 200 enforcement proceedings initiated under President Johnson's leadership from 1968 to 1969, OCR enforcement efforts dropped precipitously in the following years. Indeed, from the time that President Nixon's appointee to direct the Office for Civil Rights assumed the position in March 1970 until February 1971, OCR failed to initiate any enforcement proceedings.

As a result of OCR's failure to enforce Title VI, civil rights litigators sued the HEW and OCR for abdicating their statutory duty. In the fall of 1970, litigators initiated the suit, known as Adams v. Richardson, in the federal district court for the District of Columbia on behalf of thirty-one students, through their parents, and two citizens. The suit challenged the Nixon administration's defiance of congressional commands. Specifically, the suit alleged that the administration had a purposeful policy of nonenforcement against public school districts, colleges, and universities in ten southern and border states that continued to segregate. The district court held, and the Court of Appeals for the District of Columbia affirmed, that once it was determined that a state was operating a dual system of higher education and had not voluntarily complied with Title VI within a reasonable period of time, OCR was required to initiate enforcement proceedings against the state.

The Adams court required HEW to adopt plans to remedy continued racial segregation and discrimination in state systems of higher education in those ten

---

75. Cf. Adams v. Richardson, 480 F. 2d 1159, 1164-69 (D.C. Cir. 1973) (examining Executive Branch's lengthy delay in enforcing desegregation of institutions of higher education through Title VI). Throughout the 1970s, the principal concern with respect to school integration at the K-12 level was the efficacy of busing programs. While enacted in an effort to integrate neighborhood schools, opponents of busing programs argued that their children should not be "forced" to attend schools in other parts of a district. Both Presidents Nixon and Gerald Ford questioned the efficacy of busing as a means to achieve racial integration. SHULL, supra note 42 at 37. Early in his presidency, Nixon opposed using federal funds for busing, and in 1972 sought a one-year moratorium on busing orders. Id. at 37-38. In fact, most presidents, with the exception of Johnson and Carter, were less committed to such desegregation efforts. Id. at 12. President Jimmy Carter exercised one of the few vetoes of a civil rights measure. In 1980, Carter blocked an appropriations bill that would have stripped the Department of Justice of authority to order busing for school desegregation. Id. at 38. See also GARY ORFIELD & SUSAN EATON, DISMANTLING DESEGREGATION 8 (1996).


79. The states were Arkansas, Florida, Georgia, Louisiana, Maryland, Mississippi, North Carolina, Oklahoma, Pennsylvania, and Virginia. See Adams v. Richardson, 351 F. Supp. 636, 637 (D.D.C. 1972)

southern and border states identified in the lawsuit. In addition, the court required HEW to commence enforcement proceedings against seventy-four primary and secondary schools "found to have reneged on previously approved desegregation plans or to be otherwise out of compliance with Title VI," and to commence proceedings against forty-two additional districts previously deemed to be in violation of the Supreme Court's ruling in *Brown.* The lawsuit essentially used a legislative mandate to force a federal administrative agency to comply with the original directive of *Brown* to eradicate racially segregated and discriminatory educational systems.

While the *Adams* case was by no means a panacea for all of the ills regarding persistent racial segregation and discrimination, the litigation was a critical tool in expanding access to higher education institutions for students of color. As a result of the *Adams* litigation, OCR remained under court supervision throughout the 1970s and 1980s. During that time, OCR reached desegregation agreements with a number of southern and border states, and supervised states' desegregation advancements under the plans. The remedial plans included a number of components, such as affirmative action policies for student admissions, recruitment, and retention. In addition, the plans addressed placement and duplication of offerings at historically black and majority white state colleges and universities, funding and programs at historically black colleges and universities, and the racial composition of faculties at various institutions. In 1978, OCR also adopted specific guidelines for desegregating higher education.

By the mid-1980s, however, the Executive Branch squarely retreated from its sporadic but vigorous enforcement of Title VI provisions. In the mid-1980s, for example, the Reagan administration did not emphasize any such enforcement mechanisms. In fact, Reagan supported abolishing the newly

---

81. Adams, 480 F.2d at 1161, 1164.
82. *Id.*
84. The Office for Civil Rights issued the guidance in direct response to the Supreme Court's decision in *Regents of University of California v. Bakke,* 438 U.S. 265 (1978), which struck down a minority set-aside admissions policy at the University of California at Davis' medical school. While the Court held that the policy at issue was unconstitutional, the Court outlined the types of policies that might withstand judicial scrutiny.
85. Revised criteria specifying the ingredients of acceptable plans to desegregate state systems of public higher education (1978, February 15), 43 Federal Register 32, 6658-6664.
formed Department of Education, which housed the Office for Civil Rights.  

Similarly, under the administration of President George H.W. Bush in the late 1980s, the Department of Education's Office for Civil Rights precipitously released eight states from any further obligations under Title VI. These states were released on a finding that the states had implemented significant portions of their desegregation plans, a finding that later proved to be under the incorrect legal standard.  

In 1992, in United States v. Fordice, the Supreme Court articulated a more rigorous standard for releasing from OCR oversight those states that had engaged in discrimination in public higher education. The Court required the "elimination" of policies and practices traceable to the segregated system that have "continuing discriminatory effects."  

In 1990, the United States Court of Appeals for the District of Columbia Circuit dismissed the Adams case and states were released from continuing court supervision. The court found that, in light of intervening jurisprudence that provided for a private right of action to directly sue public institutions to enforce Title VI, there was no legal cause of action to sue the federal government for failure to enforce Title VI. Yet the Supreme Court's subsequent ruling in Alexander v. Sandoval held that private citizens have no right to sue public educational institutions for failure to comply with Title VI. As a result of the Sandoval decision, private citizens have lost the right to sue public educational institutions for persistent racial segregation and discrimination, unless they can prove that the discrimination was intentional.  

The Adams litigation provides insight into the complex interaction between the federal judicial and executive branches in addressing racial segregation and isolation in public education through federal policy, as well as the symbiotic relationship between executive action and private civil rights advocacy. Due to the rise in the administrative state, the Executive Branch has substantial latitude to address racial disparities in educational opportunities. Yet the extent to which this power has been utilized to support racial inclusion  

87. Id. See also O'REILLY, supra note 43 at 279-370. 
88. The states were Arkansas, Delaware, Georgia, North Carolina, Missouri, Oklahoma, South Carolina, and West Virginia. 
89. See United States v. Fordice, 505 U.S. 717 (1992) (holding that merely adopting and implementing race neutral policies to govern colleges and universities did not necessarily fulfill the states' affirmative obligation to disestablish a prior de jure segregated system). 
92. In 1979, the Supreme Court confirmed that, in addition to this administrative complaint process, individuals who are injured by discriminatory practices have an implied right of action against the discriminating institutions. The Court held that such a right of action derives directly from the 1964 Civil Right Act. See Cannon v. University of Chicago, 441 U.S. 677, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979) (finding such a right of action under Title IX based on an analysis of the virtually identical provisions of Title VI). 
in public education has varied with each presidential administration. When administrative enforcement of anti-discrimination laws ebbed during the Nixon administration, the federal judiciary, at the urging of private citizens, intervened to mandate that the Executive Branch exercise its statutory duty to desegregate public education. Due to jurisprudential shifts, however, private citizens no longer have the ability to use the courts to compel federal administrative agencies to address systemic racial isolation and discrimination in public educational institutions. Nonetheless, administrative power in this arena remains extremely broad in scope.

Through the enforcement power afforded under Title VI of the 1964 Civil Rights Act, the Executive Branch gained significant and substantial authority for carrying out the directive of the Brown ruling. Though the Supreme Court had required the dismantling of state-mandated racial segregation in education, the initiation of this process did not begin in earnest until the passage of civil rights legislation granting the Executive Branch the necessary enforcement power. The Department of Health, Education, and Welfare’s Office for Civil Rights served as the dominant actor, first through voluntary efforts, and later as required via litigation, in giving meaning to the mandate of Brown.

III. THE NEW PARADIGM: FOSTERING RACIAL INCLUSION THROUGH VOLUNTARY RACIAL INTEGRATION

The Brown decision, its jurisprudential progeny, and the resulting administrative and legislative policies enacted in the wake of the decision focused on the elimination of state-mandated racial segregation in schools. Many of the resulting plans to eliminate racial segregation in public education also included affirmative action components, or policies that explicitly sought to increase minority representation in previously all-white schools, colleges, and universities. These policies were originally designed to address the effects of deeply entrenched racial subjugation and discrimination, and also served the purpose of increasing the diversity of students attending such institutions. Indeed, even school districts, colleges, and universities not required by courts or administrative compliance reviews to institute such policies often chose to do so to address persistent racial inequalities in educational opportunity.

In addition to the Department of Education’s specific guidelines regarding the withdrawal of funds to public institutions that engage in racial discrimination, the Department of Education also issued implementing

96. In the 1968 Green v. County School Board ruling, for example, the Court struck down "freedom-of-choice" desegregation plans and stated that schools had an "affirmative duty" to eliminate the vestiges of segregation "root and branch." 391 U.S. 430, 437-38 (1968). Similarly, in the 1971 Swann v. Charlotte-Mecklenburg Board of Education decision, the Court held that district courts had wide latitude in fashioning remedies to eliminate racial segregation. 402 U.S. 1, 21 (1971).
guidelines that specifically addressed the legality of voluntary affirmative action programs at colleges and universities under Title VI of the 1964 Civil Rights Act. The Education Department promulgated these guidelines to address the legality of such programs in light of growing attacks. Although the Education Department never rescinded the guidance - and it remains in effect - the Department has more recently used its authority to hinder rather than support race-conscious efforts by educational institutions.

A.Affirmative Action Guidelines

The guidelines promulgated by the Department of Education clarified that Title VI was not meant to serve as a mechanism to withhold funds from those public educational institutions that voluntarily implemented race-conscious policies and programs to foster racial inclusion in public education. The Title VI guidelines, for example, permit a college or university to take voluntary action, even in the absence of past discrimination, to address conditions that have limited the participation of racial and ethnic minorities in higher education. Specifically, the guidelines provide:

(6)(i) In administering a program regarding which the recipient has previously discriminated against persons on the ground of race, color, or national origin, the recipient must take affirmative action to overcome the effects of prior discrimination.

(ii) Even in the absence of such prior discrimination, a recipient in administering a program may take affirmative action to overcome the effects of conditions which resulted in limiting participation by persons of a particular race, color, or national origin.

The guidelines suggest that such race-conscious measures may be used in a number of ways, including for the recruitment and admission of underrepresented racial and ethnic groups.

97. Such attacks arguably gained even more momentum in the years of the administration of President Ronald Reagan. President Reagan is well-known as a president who disregarded numerous civil rights programs; indeed, some scholars have suggested he wrought a transformation in the way civil rights activism is viewed, by narrowing of the scope of legislative and executive efforts to reduce the continued harms of racial segregation and discrimination. See, e.g., Dawn Johnsen, Ronald Reagan and the Rehnquist Court on Congressional Power: Presidential Influences on Constitutional Change, 78 INDIANA L. J. 363 (2003).

98. See 34 C.F.R. § 100.3(b)(6).

99. Id.

100. See 34 C.F.R. § 100.5:

(h) In some situations, even though past discriminatory practices attributable to a recipient or applicant have been abandoned, the consequences of such practices continue to impede the full availability of a benefit. If the efforts required of the applicant or recipient under § 100.6(d), to provide information as to the availability of the program or activity and the rights of beneficiaries under this regulation, have failed to overcome these consequences, it will become necessary under
In addition, the Department of Education’s OCR issued policy guidance in 1994 during the administration of President William Clinton. OCR drafted the guidance for the express purpose of “assist[ing] colleges in fashioning legally defensible affirmative action programs to promote the access of minority students to postsecondary education.” The guidance clarified the permissibility of various types of race-conscious policies voluntarily adopted by colleges and universities. Specifically, the OCR guidance sought to “clarify how colleges can use financial aid to promote campus diversity and access of minority students to postsecondary education without violating Federal anti-discrimination laws,” though the Secretary of Education encouraged such efforts in other policies, as well. According to the guidance, “[t]he Secretary of Education encourages continued use of financial aid as a means to provide equal educational opportunity and to provide a diverse educational environment for all students. The Secretary also encourages the use by postsecondary institutions of other efforts to recruit and retain minority students, which are not affected by this policy guidance.”

It is worth noting that the guidance touts both “equal educational opportunity” and diversity as goals to be furthered by such race-conscious policies. The guidelines discuss a number of ways to increase racial inclusion in public education. These include race-neutral policies to increase racial inclusion, race-conscious policies to remedy the present effects of historical discrimination, and race-conscious policies to increase student body

the requirement stated in paragraph (i) of § 100.3(b)(6) for such applicant or recipient to take additional steps to make the benefits fully available to racial and nationality groups previously subject to discrimination. This action might take the form, for example, of special arrangements for obtaining referrals or making selections which will insure that groups previously subjected to discrimination are adequately served.

(i) Even though an applicant or recipient has never used discriminatory policies, the services and benefits of the program or activity it administers may not in fact be equally available to some racial or nationality groups. In such circumstances, an applicant or recipient may properly give special consideration to race, color, or national origin to make the benefits of its program more widely available to such groups, not then being adequately served. For example, where a university is not adequately serving members of a particular racial or nationality group, it may establish special recruitment policies to make its program better known and more readily available to such group, and take other steps to provide that group with more adequate service.

102. Id.
103. Id.
104. Id.
105. The guidelines define “race-neutral” as “not based, in whole or in part, on race or national origin.” Id.
106. Id. “‘Financial Aid to Remedy Past Discrimination’ ... permit[s] a college to award financial aid based on race or national origin as part of affirmative action to remedy the effects of its past discrimination without waiting for a finding to be made by the Office for Civil Rights (OCR), a court, or a legislative body, if the college has a strong basis in evidence of discrimination justifying the use of race-targeted scholarships.”
diversity. Indeed, the OCR guidelines lauded the efforts of those higher education institutions that sought to create an "intellectual environment" reflective of the diversity inherent in American society. As such, the guidance noted that colleges should have significant discretion to consider many factors, "including race and national origin... to attract and retain a student population of many different experiences, opinions, backgrounds, and cultures—provided that the use of race and national origin is consistent with the constitutional standards reflected in Title VI..."

This language was further reiterated in a 1996 "Dear Colleague" letter to college and university general counsels written by the United States Department of Education’s General Counsel in response to a decision by the United States Court of Appeals for the Fifth Circuit striking down affirmative action policies in university admissions. In the letter, the general counsel underscored the Department’s support of race-conscious policies to further student-body diversity and the historic and continued lack of minority participation in higher education:

[It is] the Department of Education’s position that, under the Constitution and Title VI of the Civil Rights Act of 1964, it is permissible in appropriate circumstances for colleges and universities to consider race in making admissions decisions and granting financial aid. They may do so to promote diversity of their student body, consistent with Justice Powell’s landmark opinion in Regents of the University of California v. Bakke. They also may do so to remedy the continuing effects of discrimination by the institution itself or within the state or local educational system as a whole.

In light of such detailed guidelines regarding the permissibility of voluntary race-conscious policies to address persistent racial disparities and isolation in public education, it is striking that the Department of Education has chosen to largely ignore these guidelines in more recent years. The Department has done so even in the wake of the Supreme Court’s landmark 2003 decision regarding the constitutionality of race-conscious admissions policies for colleges and universities. Though it has not rescinded the guidelines, it has not issued any new guidelines, and has arguably used its administrative power

107. Id. "'Financial Aid to Create Diversity'... permit[s] the award of financial aid on the basis of race or national origin if the aid is a necessary and narrowly tailored means to accomplish a college's goal to have a diverse student body that will enrich its academic environment."

108. Id.

109. Id.

110. Dear Colleague Letter to College and University General Counsels from Department of Education General Counsel Judith Winston (Jul. 30, 1996), available at http://www.ed.gov/about/offices/list/ocr/docs/dearcol.html (following 5th Circuit Hopwood decision striking down affirmative action admissions plan at University of Texas).

111. Id.

to hinder the use of any voluntary race-conscious policies by public educational institutions.

**B. The Grutter Decision and the Administrative Response**

In 2003, the Supreme Court issued a momentous decision regarding the constitutionality of race-conscious admissions programs for colleges and universities. In *Grutter v. Bollinger*, a white applicant challenged the affirmative action admissions policy of the University of Michigan Law School. The applicant alleged that the policy violated the Equal Protection Clause of the Fourteenth Amendment, and was not narrowly tailored to meet a compelling government interest.

The Court upheld the school’s affirmative action policy and found that race-conscious admissions policies are a constitutionally appropriate and permissible way to further the compelling government interest in student body diversity in colleges and universities. *Grutter* is arguably one of the Supreme Court’s most optimistic pronouncements on race and racial inclusion in decades. To indicate the perceived importance of race-conscious policies in strengthening the nation’s economy and educational institutions, one need only examine the volume of amicus briefs submitted on behalf of the University of Michigan in the case. More than 300 organizations, including scores of colleges and universities, Fortune 500 companies, and several former chairmen of the Joint Chiefs of Staff of the United States Armed Forces, filed briefs in support of the policy. Indeed, there were more amicus briefs filed in this case than in any other case in recent Supreme Court history.

*Grutter* encompassed three salient points with respect to the importance of racial inclusion in public education. First, the Court acknowledged the persistent significance of race in our society and the need for policies to address inequalities. In doing so, the Court quoted directly from *Brown* that “education is the very foundation of good citizenship.” In addition, the Court referenced the spirit of the *Brown* decision in stressing that “[e]ffective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized.”

---


115. See, e.g., *A Case about Diversity: Affirmative Action Lawsuits at the University of Michigan*, available at http://www.umich.edu/pres/aate/amicus/#umgrutter (listing amicus briefs filed on behalf of the University of Michigan).

116. *Id*.


118. *Grutter*, 539 U.S. at 333.

119. *Id* at 331.

120. *Id*. 
In doing so, the Court appeared more willing to acknowledge links between current and historic patterns of residential and educational segregation, and the impact such isolation has on opportunities for academic achievement.\footnote{121}

Second, the *Grutter* Court acknowledged that students of all races benefit from racially inclusive systems of public education. The Court referenced benefits such as better cross-racial understanding, a better-prepared citizenry, and more effective economic and national security systems.\footnote{122} Finally, the Court gave deference to educational institutions' judgment in fashioning race-conscious policies that further their academic goals.\footnote{123}

The *Grutter* decision was grounded in the context of higher education and those institutions' admissions policies. In the wake of the decision, significant questions arose as to the decision's applicability outside of the context of admissions policies in higher education. It was largely an open question as to how the decision might inform the use of other race-conscious policies in higher education in areas such as financial assistance, outreach, recruitment, and retention. In addition, it remained an open question as to how the decision might impact education policies for elementary and secondary schools.\footnote{124}

For all the open questions, however, the *Grutter* Court's ruling was summarily ignored by the Department of Education's Office for Civil Rights.\footnote{125} While the Department of Education promptly issued legal guidance to colleges in response to earlier federal court decisions on affirmative action in 1978 and 1996,\footnote{126} the Executive Branch issued no such guidance in the wake of *Grutter*. Perhaps even more surprising, the Department of Education never actually rescinded the 1994 OCR guidance encouraging the use of race-conscious policies in certain circumstances. This seems noteworthy, since the Department is certainly empowered to do so. Most remarkably, the Office for Civil Rights, a federal administrative agency historically tasked with protecting civil rights, effectively subverted its enforcement power to help eliminate the very policies and programs that sought to achieve racial inclusion in public education.

President George W. Bush's administrative stance surrounding the *Grutter* ruling may be due in part to his administration's appointment of several

\footnotesize{\begin{itemize}
\item \footnote{121}{Id. at 333.}
\item \footnote{122}{Id. at 330.}
\item \footnote{123}{Id. at 328-29.}
\item \footnote{124}{See, e.g., Epperson, supra note 117 (suggesting the Court’s reasoning in *Grutter* could be used to uphold voluntary racial integration plans in elementary and secondary schools).}
\item \footnote{125}{See, e.g., Peter Schmidt, *After Supreme Court Rulings on Race: Silence*, CHRON. OF HIGHER EDUC., May 19, 2006, at A21.}
\item \footnote{126}{OCR issued guidance in 1978 in response to *Regents of the University of California v. Bakke*. See supra note 83 and accompanying text.}
\item \footnote{127}{The Department of Education's general counsel issued a letter to college and university counsels in the wake of the United States Court of Appeals for the Fifth Circuit's decision in *Hopwood v. Texas*. See supra note 113 and accompanying text.}
\end{itemize}}
long-time opponents of affirmative action to key administrative positions. These include the Education Department’s General Counsel, the director of the Education Department’s Office for Civil Rights, and the Solicitor General of the United States. During litigation in the *Grutter* case, President Bush clearly voiced his opposition to the law school’s admissions policy. Likewise, the Solicitor General alleged in the United States’ brief to the Supreme Court that only race-neutral policies were legally acceptable. In addition, shortly before the Supreme Court issued its opinion in *Grutter*, the Department of Education’s Office for Civil Rights held a national conference urging the use of race-neutral efforts to support diversity.

Though the Court rejected the Bush administration’s position, the Department of Education’s Office for Civil Rights continued to advocate on behalf of race-neutral alternatives, and offered no guidance on the use of affirmative action plans in the wake of the decision. Instead, the Office for Civil Rights issued a lengthy report on race-neutral alternatives in American education. The report included a letter indicating that President Bush challenged the education community to eschew “illegal quotas.” Ultimately, the letter and accompanying report had a chilling effect on those colleges and universities seeking to implement race-sensitive admissions, recruitment, and

128. At the time of the ruling, Brian W. Jones served as the Education Department’s general counsel, Gerald A. Reynolds served as the head of the Department’s Office for Civil Rights, and Theodore B. Olson served as Solicitor General. Both Jones and Reynolds formerly served as president of the Center for New Black Leadership, a group vociferously opposed to affirmative action policies. As a lawyer in private practice, Mr. Olson provided *pro bono* assistance to the Center for Individual Rights in litigating to end affirmative action policies in Texas. See Peter Schmidt, *Behind the Fight Over Race-Conscious Admissions*, CHRON. OF HIGHER EDUC., Apr. 4, 2003, at A22.

129. See, e.g., President’s address to the nation, Jan. 15, 2003, available at http://www.whitehouse.gov/news/releases/2003/01/20030115-7.html (last visited Mar. 8, 2008) ("The motivation for such an admissions policy [as the University of Michigan’s] may be very good, but its result is discrimination and that discrimination is wrong.").


133. *Id.* The letter was signed by Kenneth L. Marcus, Delegated the Authority of the Assistant Secretary for Civil Rights, U.S. Department of Education.
retention policies.134

The OCR Report first points out that the majority of higher education institutions reach the goal of student body diversity without using “quotas,” which the report seemingly, and erroneously, equates with all race-conscious programs.135 According to a survey by the National Association of College Admission Counseling, the report states that only one-third of colleges and universities surveyed used race or ethnicity as one of its criteria in admissions decisions.136 The remainder reportedly attempt to reach diversity objectives without such “quotas.” The report emphasizes race-neutral approaches utilized in Texas, California, and Florida, states in which affirmative action policies had been outlawed prior to the Grutter decision.137 These approaches are underlined as significant and successful, even though there has been substantial criticism regarding the efficacy of such plans as sufficient proxies for race-conscious admissions plans.138

In the aftermath of the Court’s ruling upholding the constitutionality of narrowly tailored affirmative action policies for university admissions, a troubling shift occurred in the way in which OCR viewed those very desegregative mechanisms it helped to establish. The Office ceased to follow its own guidelines set forth in the 1990s. Moreover, the agency’s actions ran counter to the historic mandate of federal legislation—to forbid racial discrimination and to allow for the use of remedial plans redressing the cumulative effects of centuries of government-sanctioned discrimination. Instead, the federal administrative agency turned that purpose on its head by using Title VI to limit the ability of the government to help rectify the effects of historic racial subjugation and persistent racial disparities in access to quality K-16 education.

In the months following the Grutter decision, opponents of affirmative action sought and gained the support of the federal government in efforts to circumvent the Court’s decision upholding affirmative action programs. Such advocacy groups led a campaign to dismantle race-conscious policies in the areas of recruitment, retention, financial aid, and other support programs across the country. Specifically, the advocacy groups American Civil Rights Institute and the Center for Equal Opportunity, argued that race-targeted outreach and

134. See discussion infra.
136. Id.
137. See Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996) (holding that diversity is not a compelling state interest and striking down University of Texas affirmative action admissions plan). Florida Executive Order; California Proposition 209.
recruitment efforts of the sort endorsed under OCR’s 1994 guidance actually violate Title VI as well as the Fourteenth Amendment’s equal protection clause.\textsuperscript{139} Even after the \textit{Grutter} decision, these groups alleged that such programs are unconstitutional because they lack the individualized review necessary to satisfy the narrow tailoring prong of the strict scrutiny test.\textsuperscript{140}

While most educational institutions that have been the targets of such attacks have argued that their race-targeted outreach, recruitment, retention, and aid programs are legal because they do not guarantee admission, many such institutions have nonetheless modified or discontinued such programs. These institutions have done so in response to threats of litigation and of investigation by the Office for Civil Rights.\textsuperscript{141} In the year following the \textit{Grutter} decision, for example, it has been reported that more than 100 educational institutions received letters threatening that complaints would be filed with the Office for Civil Rights if those institutions did not eliminate race as a criterion for eligibility in a variety of programs.\textsuperscript{142} According to reports by the American Civil Rights Institute and the Center for Equal Opportunity, more than 100 colleges contacted have since “voluntarily” abandoned their race-conscious policies.\textsuperscript{143} The Center for Equal Opportunity reports that these institutions include Carnegie Mellon University, Harvard University, Indiana University, the Massachusetts Institute of Technology, Northwestern University, Princeton University, the University of Illinois at Urbana-Champaign, Williams College, Yale University, and “dozens of others.”\textsuperscript{144}

When colleges have refused to change such programs, the advocacy groups regularly lodge complaints with OCR.\textsuperscript{145} In addition, when the

\begin{itemize}
\item\textsuperscript{139} Roger Clegg, \textit{Time Has Not Favored Racial Preferences}, CHRON. OF HIGHER EDUC., Jan. 14, 2005, at B10.
\item\textsuperscript{140} Id.
\item\textsuperscript{141} Id.
\item\textsuperscript{142} See Peter Schmidt, \textit{Civil-Rights Group Challenges CUNY’s Efforts to Help Black Men}, CHRON. OF HIGHER EDUC., Apr. 28, 2006, at A32.
\item\textsuperscript{143} Peter Schmidt, \textit{From Minority to Diversity}, CHRON. OF HIGHER EDUC., Feb. 3, 2006, at A24.
\item\textsuperscript{144} Roger Clegg, \textit{supra} note 139.
\item\textsuperscript{145} The Center for Equal Opportunity (“CEO”) has filed four letters of complaint with OCR accusing Texas universities of violating Title VI. See Peter Schmidt, \textit{Critics Challenge Affirmative Action in Texas, Citing Success of Alternatives}, CHRON. OF HIGHER EDUC., Aug. 3, 2007, at A20. The universities under attack include Texas Tech University, Rice University, and the University of Texas at Austin. \textit{Id.} In addition, CEO has lodged complaints with OCR alleging similar Title VI violations by Virginia Tech University. \textit{CEO Uncovers More Discrimination at Virginia Tech}, Press Release, June 10, 2003, available at http://www.ceousa.org/content/view/456/119/ (last visited Mar. 8, 2008). OCR has also received complaints regarding the University of Virginia, North Carolina State University, the University of Maryland’s Baltimore School of Medicine, the law schools at the University of Virginia and the College of William and Mary, Pepperdine University, and Southern Illinois University. See Peter Schmidt, \textit{Federal Civil-Rights Officials Investigate Race-Conscious Admissions}, CHRON. OF HIGHER EDUC., Dec. 17, 2007, at A26; Peter Schmidt, \textit{From Minority to Diversity}, CHRON. OF HIGHER EDUC., Feb. 3, 2006, at A24.
\end{itemize}
challenged institutions happen to be public universities, the Center for Equal
Opportunity regularly forwards the complaints to the Justice Department’s
Civil Rights Division. The complaints allege that universities’ race-
conscious policies violate Title VI, because race-neutral alternatives were
available but the institutions chose not to utilize them. Based on its original
complaint procedure, OCR is required by law to investigate every complaint it
receives. This means that the very threat of an OCR investigation can have a
coercive and silencing effect on race-conscious policies, even if the complaint
has no merit. As a result of those filed complaints, OCR has allegedly
investigated a number of colleges, several of which have altered programs in
response to investigations.

It is ironic that so many institutions have altered race-conscious policies at
the very time the Supreme Court upheld such policies in the context of higher
education admissions. The threat that groups like the American Civil Rights
Institute and the Center for Equal Opportunity will lodge a complaint with the
Office for Civil Rights has led colleges and universities to modify the structure,
eligibility criteria and focus of their academic support and financial assistance
programs. Yet, the Department of Education has never rescinded its guidance
that encourages the use of race-targeted policies in academic support and
financial assistance programs, nor issued alternative guidance.

The actions of the Executive Branch in the wake of *Grutter* provide a
provocative lesson in the “supreme power” that federal administrative agencies
may hold in shaping civil rights policy and the meaning of school integration
jurisprudence. The *Grutter* Court issued a potentially transformative decision
regarding the persistence of racial disparities in access to education and the
importance of encouraging voluntary efforts to address the disparities, thereby
creating a stronger and more effective citizenry. Arguably, it was the Court’s
strongest endorsement of the constitutionality of race-conscious policies in
almost three decades. Yet, the Executive Branch effectively quashed the
potential for these words to have any transformative effect. Instead, many
colleges and universities felt as precarious as before the Supreme Court issued
its directive on the constitutionality of race-conscious admissions policies in
higher education. Intense pressure from anti-affirmative action groups who

146. See Roger Clegg, supra note 139.
147. Id. See also Peter Schmidt, *From Minority to Diversity*, supra note 143.
148. OFFICE FOR CIVIL RIGHTS, DEPT. OF EDUC., OCR Case Resolution and Investigation
8, 2008).
149. These institutions include the State University of New York, Washington University at
St. Louis, Massachusetts Institute of Technology, and Princeton University. See, e.g., Peter
Schmidt, *Federal Pressure Prompts Washington U. in St. Louis to Open Minority Scholarship
Programs to All Races*, CHRON. OF HIGHER EDUC., Apr. 16, 2004, at A23; Peter Schmidt &
Jeffrey Young, *MIT and Princeton Open 2 Summer Programs to Students of All Races*, CHRON.
worked with a compliant Office for Civil Rights resulted in a climate that is far more hostile to voluntary racial integration than anyone would have predicted in the immediate wake of the *Grutter* decision.

**C. The PICS Case and Voluntary Racial Integration in K-12**

While the impact of the *Grutter* decision on elementary and secondary education appeared to be an open question, the Supreme Court directly addressed this issue in its 2007 decision, *Parents Involved in Community Schools v. Seattle* ("PICS").\(^{150}\) The Executive Branch’s “supreme power" also has important consequences in the wake of this decision regarding the constitutionality of voluntary racial integration plans in public elementary and secondary schools. In the case, a slim majority of the Supreme Court struck down race-conscious student assignment plans implemented by local school boards in Seattle, Washington and Jefferson County, Kentucky, which encompasses the Louisville metropolitan area.\(^{151}\) Local school boards had voluntarily adopted plans to address persistent residential and educational segregation. Directly referencing *Grutter*, a majority of the Court noted that, at least in the context of higher education, remedying the effects of discrimination and encouraging student body diversity remain compelling government interests.\(^{152}\) However, a plurality of the Court held that the race-conscious student assignment plans at issue in this case served no such compelling government interest.\(^{153}\)

While a majority of the Court held that the plans at issue were not sufficiently narrowly tailored to further any compelling government interest as required by the Fourteenth Amendment’s Equal Protection Clause, the decision struck down the plans on fairly narrow grounds that were specific to the intricacies of the student assignment plans at issue.\(^{154}\) Indeed, the decision did not garner a majority of justices for all of its reasoning. As a result, school districts arguably still have ample latitude in fashioning policies to further racial inclusion in public education, shaped again by the Executive Branch’s broad power to elucidate the legal contours of race-conscious educational policies.

Of particular interest is Justice Anthony Kennedy’s concurrence.\(^{155}\) While Justice Kennedy concurred in the judgment, he did not concur in all of the reasoning. He joined the opinion of Chief Justice John Roberts to strike down policies on narrow tailoring grounds. His concurrence is remarkable for a

\(^{150}\) 127 S. Ct. 2738 (2007) (hereinafter “PICS”)

\(^{151}\) Id. at 2746.

\(^{152}\) Id. at 2753.

\(^{153}\) Id. at 2754.

\(^{154}\) Id. at 2759-61.

\(^{155}\) Id. at 2788-97.
number of reasons, including its significant departure from the plurality with respect to its discussion of the persistence of educational and residential segregation, the importance of fostering racial inclusion, and the constitutionality of utilizing race-conscious means to do so. Justice Kennedy discusses the government’s “legitimate interest... in ensuring all people have equal opportunity regardless of their race.” In addition, he outlines the possibility that governments may continue to employ measures that take account of racial demographics in a general way, and that may not even trigger heightened review by the Court. Kennedy argues that such mechanisms do not lead to different treatment based on a racial classification, and so “it is unlikely any of them would demand strict scrutiny to be found permissible.” These permissible means include strategic site selection of new schools; drawing attendance zone lines with a recognition of neighborhood demographics; allocating resources for special programs; targeted recruiting of students and faculty to increase racial diversity; and tracking enrollments, performance, and other statistics by race. As the “swing” voter on the current Court, Kennedy’s pivotal concurrence provides a barometer of the Court’s views with respect to racial inclusion in education, and the types of policies that may be employed in the future.

While the exact number of school districts that have voluntarily adopted race-conscious student assignment policies is unknown, it is estimated that at least 1,000 of approximately 15,000 public school districts voluntarily employ some method of race-conscious student assignments. The experience of colleges and universities in the wake of Grutter suggests that the Executive Branch may exert tremendous influence in how public school districts develop and implement racial integration plans in the future. In fact, Justice Kennedy suggested that the federal government’s coordinate branches have long played a positive role in using race-conscious policies in elementary and secondary schools to address persistent racial isolation, and should continue to do so:

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 that a constitutional violation does not occur whenever a decisionmaker considers the impact a
given approach might have on students of different races. 162

In addition to court- or administrative-ordered race-conscious student assignment plans in elementary and secondary education, the Department of Education has long supported voluntary state efforts to decrease racial isolation in schools. This includes executive support of magnet schools, one of the more popular voluntary methods to reduce racial isolation in public elementary and secondary schools. The Department of Education first introduced the Magnet Schools Assistance Program in 1984. There are approximately 4,000 such programs in the United States. 163 The core purpose of the program is “the elimination, reduction, or prevention of minority group isolation in elementary schools and secondary schools with substantial proportions of minority students.” 164

In the wake of the PICS decision, OCR maintained a silence similar to its silence in the wake of the Grutter decision. Yet, four months after the decision, the Education Department announced a $100 million award of magnet school grants, to be distributed to forty-one school districts in seventeen states. 165 This is the Department’s first award of magnet school grants in three years. 166 It remains unclear precisely how the Supreme Court’s recent decision will impact the ways in which districts may utilize such funds to further racial inclusion in their schools. The Education Department, in the wake of the PICS decision, may choose to place more detailed restrictions on the use of such funds. 167 It is clear, nonetheless, that OCR continues to hold authoritative power in this arena. Indeed, based on the Court’s narrow ruling in PICS, and the lack of a majority reasoning in the decision, the Executive Branch could have broad latitude in allocating such funding in even more creative ways to address racial isolation in education. This includes some of the avenues suggested by Justice Kennedy in his concurrence. 168

IV. NORMATIVE AND DOCTRINAL IMPLICATIONS FOR ADMINISTRATIVE ADVOCACY IN K-16 EDUCATION

While the traditional perception of civil rights advocacy is that it is a model focused on litigation, shaped through judicial law, such efforts are but one piece in the advocacy puzzle. As the previous sections of this paper demonstrate, the Executive Branch has had a powerful and arguably dominant

162. PICS, 127 S. Ct. at 2793-94.
166. Id.
167. See, e.g., Walsh, Use of Race a Concern for Magnet Schools, supra note 166.
168. PICS, 127 S. Ct. at 2792. See also Part IVC, infra.
role in directing the scope and meaning of school integration jurisprudence over the last half-century. The rise of the administrative state dictates that civil rights advocacy include administrative advocacy as much as any of the traditional forms of litigation-based or legislative advocacy. Indeed, the current political context suggests that there may be benefits from constructing civil rights coalitions that are even more consciously focused on executive advocacy.

How might the Executive Branch play a more constructive role in addressing persistent critical racial disparities in educational opportunity in the twenty-first century? At the dawn of a new presidential administration, we are arguably at a watershed moment in our political history. It is at this moment that broad-based civil rights advocacy for executive action—action acknowledging and addressing persistent disparities that hinder the educational advancement and life opportunities of all Americans—is critical. As Justice Kennedy opined, the executive branch should be permitted to employ race-conscious policies to address persistent racial inequalities in education "with candor and with confidence that a constitutional violation does not occur whenever a decision maker considers the impact a given approach might have on students of different races." Given the rise in administrative enforcement power, federal administrative agencies have a unique position as frontrunners in the enforcement and preservation of civil rights protections. Arguably, the role of these agencies can and should be more than simply reiterating constitutional jurisprudence. Federal administrative agencies have the potential to fashion a more progressive interpretation of federal civil rights legislation. While this role may have been clearer in the era when OCR was tasked with dismantling the formerly legal system of racial apartheid in American schools, there is a comparable role the Department of Education may play today in encouraging voluntary efforts toward racial inclusion in public education. In this era of increasing diversity and globalization, there is an especially urgent need to focus efforts on executive advocacy to boldly address persistent racial inequality in education, and to better the nation's collective educational and economic destiny.

Part IV of the paper proceeds in three sections. First, I examine the critical role that executive appointments play in determining the influence of executive policy in shaping the application of school integration jurisprudence. Secondly, I outline the ways in which the Executive Branch, and more specifically OCR, may play a more supportive role in addressing racial inequalities in public education through working with Congress in refining and effectuating legislation in this arena, elucidating existing regulations, and/or adopting new regulations and guidelines on legally permissible and appropriate race-conscious educational polices and programs. Finally, I suggest the Office

169. Id. at 2792.
may serve as a more effective communicator by collecting and disseminating key empirical data on the persistence of racial inequality in public education and the benefits of racially inclusive policies in addressing such inequalities.  

A.Importance of Executive Appointments

With the continued rise of the administrative state, presidential decisions regarding appointments to administrative leadership positions are of ever greater magnitude. While the Department of Education and its Office for Civil Rights are clearly agents of the Executive Branch, experience indicates that the role of these administrative positions may vary widely based on the level of "politicization" of these appointments. Looking at the potential for more effective civil rights policies addressing persistent racial disparities in educational opportunity the question remains, to what degree can and should the Department of Education’s Office for Civil Rights operate outside of the political arena?

The politicization of federal administrative appointments to civil rights positions has risen in the last presidential administration. While top administrative positions generally change with each new administration, there has been growing attention to political leanings in choices of appointments and adherence to established administrative law in the last administration. This politicization has been extremely apparent in the Department of Justice, including its Civil Rights Division that is charged with the enforcement and preservation of civil rights protections for many Americans. While historically, civil servants hired attorneys to the Civil Rights Division, the Bush administration altered hiring procedures in 2002, allowing political appointees greater influence in the hiring process.

While political appointments to the Department of Education have received less media scrutiny, the inaction of the Office for Civil Rights that served as fodder for the Adams litigation, as well as the actions surrounding the Grutter litigation and its aftermath, illustrate that political appointees to the Education Department can have a substantial impact on the shaping of educational civil rights policies and practices. President Bush’s appointment of

170. Each of these observations raises interesting and complex questions regarding the relationship between the federal executive and legislative branches in furthering educational opportunity, and the impact of political pressures on these efforts. A full investigation of these topics is beyond the scope of this project, but may be addressed by future research endeavors.


173. Id.

174. Savage, supra note 171 (noting that only 42 percent of the Civil Rights Division attorneys hired since the rule change have civil rights experience, compared to 77 percent of those hired in the two years prior to the change).
long-time opponents of affirmative action to serve as the Education Department's General Counsel and Director of the Office for Civil Rights\textsuperscript{175} cemented an administrative position in direct opposition to the Supreme Court's ruling in \textit{Grutter} and ensured that the Court's opinion would have limited application. The degree to which a presidential administration identifies persistent racial isolation and inequality in education as a critical issue dictates to what degree educational institutions are permitted or encouraged to utilize race-conscious measures to address continuing racial inequities in educational opportunity.\textsuperscript{176}

\textit{B. Legislation, Regulations, and Guidance}

There are a number of ways in which the Executive Branch, and more specifically OCR, may play a more supportive role in addressing racial inequalities in public education. This administrative agency may serve a key function through working with Congress in refining and effectuating legislation in this arena, elucidating existing regulations, and/or adopting new regulations and guidelines on legally permissible and appropriate race-conscious educational policies and programs.

In light of the persistent and debilitating racial inequities in education and the well-documented social and educational benefits of racially desegregated educational environments, there is a powerful role for the executive and legislative branches to collectively play in addressing and attacking continuing racial disparities in educational opportunity. The nation no longer suffers from the pernicious scourge of state-mandated racial segregation and discrimination, yet racial barriers to educational opportunity continue. These barriers have long-term effects on employment, economic, and other life opportunities.\textsuperscript{177}

Given the persistent state of racial inequities in education, and the

\textsuperscript{175} See supra notes 131 – 134 and accompanying text.

\textsuperscript{176} The 2008 presidential race of Senator John Edwards is illustrative, although it targets economic isolation rather than directly addressing racial isolation. Running on a "populist" platform, Edwards endorsed a plan to promote economic diversity in public schools by allotting $100 million for schools that implement economic integration programs. The funding would pay for transportation and additional resources to the schools that accepted the transferring students. In addition, Edwards would double federal funding for magnet schools and dedicate the dollars to schools drawing students from across school district lines, thus encouraging middle-class suburban students to attend schools in low-income urban neighborhoods. \textit{Integrating Schools, WASH. POST,} Jul. 23, 2007 at A16. See also, David J. Hoff, \textit{The Next Education President?}, \textit{EDUC. WEEK,} Nov. 7, 2007, at 24 (discussing the impact of presidential candidates' education platforms on their actions once elected).

widespread acknowledgement of such disparities, the Executive Branch and Congress could work collectively to develop, implement, and execute legislation addressing states' ability to voluntarily implement race-conscious policies to address racial isolation and the continued effects of discrimination. Continued research in this arena would help to elucidate the specific parameters of such policies. Similar to the Office for Civil Rights' enforcement power under Title VI, Congress also has the ability to ensure that the Executive Branch continues to fulfill its statutory duties. When the Executive Branch fails to fulfill its responsibilities under Title VI, Congress may weigh in and hold oversight hearings to determine if OCR has abdicated its duty.

Independent of Congress, OCR may also serve a key strategic role by issuing new guidelines. The Office has not issued any new guidance in this area in nearly fifteen years. First, OCR should issue guidance for the 2003 Grutter decision outlining legally permissible policies for racial inclusion in higher education. Secondly, in the wake of the PICS v. Seattle School District ruling, the Office for Civil Rights could also play a key role in providing guidance on the legality of narrowly tailored race-conscious policies for elementary and secondary schools. Such policy guidance may include issuing implementing guidelines for the twenty-three-year-old Magnet Schools Assistance Program, which has long been used as a desegregation tool. In such instances, policy guidance serves a key role in elucidating the ways in which school districts may employ racially integrative measures.

C. The Administrative State as Communicator: The Role of Data Collection and Dissemination

While there is a significant body of social science research that has been recognized by members of the Court, outlining the benefits of racial integration in public education, this information has not been communicated to the larger public in the most effective manner. Moreover, there is a dearth of social science data in a number of critical areas. Specifically, there are a number of empirical avenues regarding K-12 education that could be pursued in light of the Supreme Court's ruling in the PICS case. It is in these areas that the Executive Branch could play a role in the collection and dissemination of data.

Few studies, for example, have examined the impact of policies that take account of race in general terms, but do not use race in assigning individual

178. See Part IIIA supra.
179. See Part IVC infra.
180. See, e.g., Peter Schmidt, Historically Black Colleges Seek Congress's Help in Desegregation Disputes, CHRON. OF HIGHER EDUC., Mar. 30, 2007, at A26 (discussing possible Congressional oversight hearings).
students to schools. In his concurrence in *PICS*, Justice Kennedy suggests that a number of such policies might be just as effective in reducing racial isolation in elementary and secondary schools and might not trigger strict scrutiny. Kennedy argues that when school districts use more general mechanisms that take account of racial demographics but that do not lead to different treatment based on a racial classification, "it is unlikely any of them would demand strict scrutiny to be found permissible."182 Such permissible means include strategic site selection of new schools; drawing attendance zone lines with a general recognition of 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.183

In addition to research on policies that take account of race in a general manner, there is a need for social science data to delineate the results of voluntary integration plans that elementary, secondary, and post-secondary educational institutions across the nation have successfully employed. Indeed, at least 1,000 school districts reportedly employed such policies prior to the Supreme Court's ruling in *PICS*. To survive the Supreme Court's strict scrutiny analysis under the equal protection clause, school districts, colleges, and universities wishing to employ race-conscious policies would benefit from studies much like those conducted by localities after the Supreme Court's ruling in *Adarand v. Pena* regarding the constitutionality of affirmative action policies in public contracting. These studies demonstrated racial disparities and persistent discrimination nationwide and at the local level, thus buttressing the argument that race-conscious policies are necessary. While school desegregation is certainly a different experience than public contracting, the contracting arena may still provide an interesting model.

Finally, the Executive Branch may play a key role in collecting data on effective race-neutral alternatives to addressing racial isolation in elementary and secondary education. While the Bush Administration advocated race-neutral alternatives in its brief opposing the school districts' race-conscious student assignment plans in the *PICS* case,184 little evidence has been synthesized that demonstrates successful and unsuccessful plans using factors like income as a proxy for race. In collecting the above-mentioned data, the Executive Branch has the power to play a positive role in educating the public about the negative impact of racial isolation and segregation in K-12 education, and the lack of minority participation in higher education.

182. *PICS*, 127 S. Ct. at 2792.
183. *Id.*
CONCLUSION

In the last half-decade, the Executive Branch has had a growing role in shaping the scope and meaning of school integration jurisprudence. The interplay between the Supreme Court and the Executive Branch in the wake of *Brown* and *Grutter* exemplifies this tremendous power, both to support and to hinder efforts to further racial inclusion in public education. With the Supreme Court's most recent split decision on the constitutionality of voluntary racial integration in elementary and secondary education, there are even greater possibilities for administrative influence in this arena. The persistent racial, spatial, and socioeconomic isolation that plagues American schools suggests the time is particularly ripe for examining the ways in which coordinate branches of the federal government may serve to lessen such inequalities in educational opportunity.

An examination of the historic and current actions of the Education Department's Office for Civil Rights elucidates the critical role that presidential policies regarding racial inclusion in public education may play in the twenty-first century. The Office for Civil Rights and coordinate federal administrative bodies have enormous power to further racial inclusion in public education. The key is to determine the role that such administrative agencies can and should play in the future of civil rights policy and educational opportunity, whether solely as political agents of the Executive Branch or as bodies with a deep-rooted role in developing and disseminating information and guidance to shape the application of school integration jurisprudence on public educational institutions nationwide.

In the battle to increase educational opportunities, race is almost always a significant part of the subtext, if not the explicit issue. So it is in other areas such as health care,185 immigration,186 and domestic labor policies as well. In the approaching presidential election, Americans have an opportunity to forge a new path for improving our collective educational and economic destiny. The upcoming election offers an occasion for the Executive Branch to raise a shared consciousness through education and to help garner consensus in addressing and correcting persistent racial inequities in educational opportunity.

In this context, civil rights enforcement need not be a partisan issue. Given the shifting political landscape and the limits of traditional civil rights litigation, the Executive Branch may serve an even greater role as the architect of a more inclusive society that has prominent supporters of all political stripes.

The key is to expand our political imagination beyond the reality of the moment. The reality going forward may be that the Executive Branch’s power is the most potent tool in the civil rights arsenal to address the deeply entrenched racial inequities in educational opportunity and to foster a more inclusive form of education.