

RESTORING *BROWN'S* PROMISE OF EQUALITY AFTER *ALEXANDER V. SANDOVAL*: WHY WE CAN'T WAIT

*Sam Spital**

Public education is failing black America.¹ From elementary to graduate school, the fight to provide African Americans with equal (or even barely adequate) educational opportunities has suffered tremendous setbacks over the last decade. After sharp declines in the 1970s and 1980s, the test score gap between black and white schoolchildren grew significantly in the 1990s.² Racial differences in graduation rates are expanding.³ New zero-tolerance policies are leading to unprecedented levels of exclusions for all public school students, but they are also being enforced in a

* B.A., Harvard University, 2000; J.D. Candidate, Harvard Law School, 2004. The idea to write this Note stems from an excellent course I took with Professor Martha Minow and its comprehensive casebook, MARK YUDOF ET AL., *EDUCATIONAL POLICY AND THE LAW* (4th ed. 2002). I am deeply indebted to Adiah Ferron, Harmony Loube, Courtney Dunbar, Shalini Bhargava, Danielle Gray, and most of all Antonio Reynolds and Ashley Hibbett for their suggestions and support. Thank you to Professor Lani Guinier, for extensive improvements to this Note and for inspiring me to remember that social change is possible, and to Shanya Dingle for helping me to grow intellectually and personally more than I could have imagined. Finally, thank you to my uncle Robin, grandmother Elaine, and brother Andy for always challenging me to think in new ways, and to my parents Martha and Aaron for teaching me the value of equality. I write in loving memory of my grandfather Max, who lived his life based on the principle that informs my analysis of why major educational reform is of such pressing importance: "If not now, when?"

1. In this Note I focus only on the barriers faced by black students in obtaining equal educational opportunities but similar issues confront other students of color, especially Latinos, Native Americans, and some Asian Americans. They also can impact poor and working-class whites. For an argument advocating grassroots coalitions led by people of color, but joined by others, as crucial to promoting genuine democracy and lasting social justice, see LANI GUINIER & GERALD TORRES, *THE MINER'S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY* (2002). See also Part IV, *infra*.
2. Kate Zernike, *Gap Widens Again on Tests Given to Blacks and Whites*, N.Y. TIMES, Aug. 25, 2000, at A14. I discuss below the serious problems with using test scores as an indicator of merit, and I certainly do not suggest that a stellar test score is a condition sine qua non for academic success. Nevertheless, the widening of this gap after two decades of decline is disturbing and might signal the increasingly unequal opportunities we provide black and white children in this country.
3. Gary Orfield, *Schools More Separate: Consequences of a Decade of Resegregation*, The Civil Rights Project Harvard University (July 17, 2001) at 14, at http://www.civilrightsproject.harvard.edu/research/deseg/Schools_More_Separate.pdf (last visited Jan. 8, 2003).

discriminatory fashion against blacks.⁴ Affirmative action is clearly on the defensive at public institutions of higher learning across the country—and it has been abandoned or effectively abandoned in California, Texas, Florida and Georgia. Perhaps most disturbing of all, due to striking racial disparities in the educational and criminal justice systems, today almost 200,000 more black men are in prison than in college.⁵

There is not one simple explanation for these increasing racial inequalities in education. Presidents,⁶ Congress,⁷ state legislatures,⁸ local school officials,⁹ white voters,¹⁰ and even some students and faculty at elite law schools¹¹ have all played a role in undermining opportunities for

-
4. A recent joint study conducted by the Advancement Project and the Civil Rights Project found that students of color frequently receive harsher discipline than their white counterparts for similar, or less serious infractions. Nationally, black students constitute 17% of the nation's public school children, but 32% of all suspensions. See *Opportunities Suspended: The Devastating Consequences of Zero Tolerance and School Discipline Policies* at http://www.law.harvard.edu/groups/civilrights/conferences/zero/zt_report.html (last visited Dec. 30, 2002). Moreover, zero tolerance policies have worsened the racially disparate impact of these exclusions from school. See *Applied Research Center, Facing the Consequences: An Examination of Racial Discrimination in U.S. Public Schools* (Mar. 1, 2000) at 9, at <http://www.arc.org/erase/ftc1intro.html> (last visited Mar. 8, 2003).
 5. See Justice Policy Institute, *Cellblocks or Classrooms?: The Funding of Higher Education and Corrections and Its Impact on African American Men*, at <http://justicepolicy.org/coc1/corc.htm> (last visited Dec. 28, 2002). Among college-aged black men (those aged 18–24) there are 2.6 individuals in college for every one person in prison. For their white college-aged counterparts, the ratio is 28 to 1. Cliff Hocker, *More Brothers in Prison than in College?*, GLOBAL BLACK NEWS, Oct. 11, 2002, available at <http://www.globalblacknews.com/Jail.html> (last visited Dec. 28, 2002).
 6. The Nixon and Reagan administrations played a major role in ensuring the non-enforcement of desegregation decrees. See, e.g., Gary Orfield, *supra* note 3, at 3–4.
 7. “When education officials moved to revive school desegregation enforcement under the Carter Administration, Congress took the authority away from them . . .” *Id.* at 4.
 8. Numerous state legislatures continue to rely on funding schemes based largely on local property taxes that severely disadvantage black students. See Parts II.A and II.C, *infra*.
 9. Local school officials across the country have played a dramatic role in fostering segregated, unequal schools. See, e.g., *U.S. v. Yonkers Bd. of Educ.*, 624 F.Supp. 1276, 1526–37 (S.D.N.Y. 1985) (discussing how the Yonkers, NY school board made “deliberately segregative school opening, closing, and attendance zone decisions” over a forty-year period), and *Bd. of Educ. v. Dowell*, 498 U.S. 237, 253–55 (Marshall, J. dissenting) (noting how the Oklahoma City school board implemented special transfer policies and superimposed school attendance zones over residentially segregated areas to ensure continued school segregation).
 10. Proposition 209, which ended affirmative action in California, passed 54%-46%. Whites comprised the only racial group where a majority supported the measure (63%). In contrast, 76% of Latinos, 74% of blacks, and 61% of Asians opposed the measure. *Elections '96: State Propositions: A Snapshot of Voters*, L.A. TIMES, Nov. 7, 1996, at A29.
 11. Any illusion that elite law schools were immune from such racism was shattered in at least one school last year. An open letter by the Black Law Students Association documented the following incidents that occurred within the same week at Harvard Law School in the spring of 2002:

March 7: In an outline posted on HL Central, a 1L described *Shelley v. Kraemer*, which helped end restrictive racial covenants, as follows: “Nigs buy land w/no

African Americans to enjoy the same access to education as their white peers. Due to the limited scope of this Note, however, I focus on the role of one particular set of actors in this move toward racial retrogress—the judiciary, and especially the federal courts.¹²

The last decade has witnessed a slew of judicial decisions that have reduced the ability of black students to obtain equal educational opportunities. Following the Supreme Court's lead, federal courts across the country have ended desegregation decrees, and the nation's public schools are undergoing a major process of resegregation. The result has been schools that are separate and unequal, with many schools that serve communities of color starved for resources in comparison with their richer, whiter counterparts. Moreover, by striking down affirmative action programs as inconsistent with the Equal Protection Clause, many courts have discouraged public institutions of higher learning from undertaking appropriate measures to promote racial equality in education.

The literature is already full of critiques of the judiciary's recent hostility toward desegregation and affirmative action, and thus Part I of this Note only briefly discusses some key developments in these areas. Far less attention has been paid, however, to another area that has similarly

nig covenant; Q: Enforceable?" . . . Black students who complained about the outline received angry, intimidating e-mails from other students.

One e-mail . . . read:

We are at Harvard Law School, a free, private community where any member wishing to use the word "nigger" in any form should not be prevented from doing so. . . . Shame on you! You have done a great disservice both to HLS and to the African-American community. If you, as a race, want to prove that you do not deserve to be called by that word, work hard and you will be recognized. . . . as a result of your complaint I have actually began [sic] using the "nigger" word more often than before the incident.

March 13: [A tenured] professor told his torts class: "Feminism, Marxism, and the Blacks" have contributed nothing to torts, and (to him) torts is the world. Noting that [the professor] mentioned two ideologies and a race as contributing nothing to the world, a Black 1L asked him to clarify his point. [The professor] repeated the statement twice to the class. [The professor] has never apologized.

March 13: A Black 1L entered the [office of a student legal assistance organization] to request a membership application. A member [of the organization], mistaking her for a client, proclaimed: "This is not how we work here! This is not the process if you need legal aid! An accompanying friend explained that the Black 1L was a student seeking an application, but the [organization] member stormed off. Humiliated, the 1L left the building"

Call to Conscience: An Open Letter to Dean Clark and Dean Rakoff, HARV. L. REC., Apr. 11, 2001, at 2.

12. This focus results from the limited scope of this Note and in no way reflects a belief that courts are more important in attaining racial justice than other actors; the claim is simply that the judiciary has an important role to play in facilitating efforts to achieve educational equality. For arguments that advocates for social change often place too much reliance on litigation at the expense of other more effective and empowering tactics, see GERALD ROSENBERG, *THE HOLLOW HOPE* (1991) and Lani Guinier, *Supreme Democracy: Bush v. Gore Redux*, 34 LOY. U. CHI. L.J. 71 (2002). *But see* Erwin Chemerinsky, *Courts Must Share the Blame for the Failure to Desegregate Public Schools*, available at <http://www.civilrightsproject.harvard.edu/research/reseg02/chemerinsky.pdf> (last visited Mar. 23, 2003). Part IV, *infra*, includes a discussion of alternatives to litigation in terms of promoting racial justice in education.

deleterious consequences for achieving racial justice in America's schools: the Supreme Court's recent decision in *Alexander v. Sandoval*, holding that no private cause of action exists to enforce disparate impact regulations promulgated under Title VI of the Civil Rights Act of 1964.

Due to the extremely high bar the Supreme Court has erected for proving intentional discrimination under the Fourteenth Amendment and Title VI, disparate impact regulations provide a crucial vehicle to challenge educational practices that have a discriminatory effect on students of color. These regulations can enable litigants to attack racial disparities in school funding, disciplinary exclusions, high-stakes testing, tracking, special education and numerous other areas. *Sandoval*, however, creates a potentially insurmountable barrier to private parties seeking to bring these disparate impact claims, which is particularly troubling in light of recent rollbacks in desegregation and affirmative action, the increased use of high-stakes tests, and a general state-level shift in resources from schools to prisons.¹³ Part II seeks to demonstrate how essential Title VI regulations have been for advocates seeking to promote racial justice in education by considering litigation before *Sandoval*. After briefly examining the *Sandoval* decision itself, this Part concludes by examining recent cases where courts have relied on *Sandoval* to dismiss challenges brought by blacks and other students of color to discriminatory education schemes.

Part III begins the search for a way out of this morass. It argues that, notwithstanding *Sandoval*, a fair reading of Supreme Court precedent demonstrates that private plaintiffs should still be able to bring disparate impact suits via 42 U.S.C. § 1983. This largely technical issue has thus far divided the circuits, and unfortunately the courts that have allowed plaintiffs to bring disparate impact suits post-*Sandoval* under § 1983 have not undertaken the thorough analysis that might convince other circuits. This Part attempts to make a more persuasive argument in support of these judgments and against other decisions that have found disparate impact regulations unenforceable under § 1983.

Part IV argues that the ultimate solution is for Congress to overturn *Sandoval* by legislation. Moreover, I suggest that the fight to overturn the decision legislatively should be part of a broader grassroots campaign to provide all Americans with equal educational opportunities.

I. EXCLUDING BLACK STUDENTS FIRST FROM THE BEST ELEMENTARY SCHOOLS, THEN FROM THE BEST COLLEGES

A. *Desegregation and Resegregation*

In perhaps the best-known judicial decision of the twentieth century, in 1954 the Supreme Court unanimously declared that "in the field of public education, the doctrine of 'separate but equal' has no place."¹⁴ In reaching its conclusion that segregated schools violate the Equal Protec-

13. For a discussion of increases in prison spending and the concomitant decline in educational expenditures in state budgets, see GUINIER & TORRES, *supra* note 1, at 267.

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

tion Clause, the Court stressed the unique role education plays in our polity:

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awaking the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.¹⁵

Despite these moving words, in the face of intense white opposition, the Court never effectuated its promise to desegregate the nation's schools.¹⁶ Indeed, as early as the following year, the Court wavered in its commitment to desegregation when it held that states and localities had to implement constitutionally mandated reforms with "all deliberate speed."¹⁷ This step was unusual, as judicial relief usually requires immediate implementation.¹⁸ Justice Black stated the obvious when he noted that the all deliberate speed formula "delayed the process of outlawing segregation."¹⁹

By the late 1960s, the other branches of the federal government began taking a more active role in desegregation, and the Supreme Court issued a number of rulings against various tactics states and localities had implemented to perpetuate the racial caste system in education.²⁰ But in the 1974 case *Milliken v. Bradley*,²¹ the Court once again clearly limited *Brown's* scope when it overturned a district court's order requiring inter-district desegregation involving Detroit and its suburbs. The Court held that the suburban districts had not engaged in intentional segregation, so they could not be included in the judicial remedy.²² The court's conclusion is perplexing, as the Equal Protection Clause applies to states, not local school districts, and states have plenary powers in drawing school district lines.²³ In his dissent, Justice White summed up the result nicely by stating that, as a result of the majority's decision, "the State of Michigan, the

15. *Id.* at 493.

16. For a brief overview of the judiciary's role in desegregation since *Brown*, see Chemerinsky, *supra* note 12, at 18. See also Michael J. Klarman, *Brown, Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7 (1994).

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

18. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 247 (1962).

19. *Justice Black and the Bill of Rights*, 9 SW. U. L. REV. 937, 941 (1977).

20. See, e.g., *Green v. County School Bd.*, 391 U.S. 430 (1968), *Swann v. Bd. of Educ.* 403 U.S. 912 (1971), *Keyes v. School District No. 1*, 413 U.S. 189 (1973).

21. 418 U.S. 717 (1974).

22. *Id.* at 745.

23. See *id.* at 772 (White, J. dissenting).

entity at which the Fourteenth Amendment is directed, has successfully insulated itself from its duty to provide effective desegregation remedies by vesting sufficient power over its public schools in its local school districts."²⁴ Researchers have concluded that *Milliken* contributed to increasing segregation in urban schools nationwide.²⁵

But whatever faults one can find in the Court's desegregation jurisprudence before 1990, they pale in comparison to a trilogy of decisions it has delivered over the past decade, beginning with *Board of Education v. Dowell*.²⁶ In *Dowell*, the majority upheld the district court's dissolution of a desegregation decree despite evidence demonstrating that ending the order would result in significant resegregation.²⁷ The year after *Dowell*, the Supreme Court ruled in *Freeman v. Pitts* that a district court could withdraw supervision from a school system with respect to specific categories where it had desegregated (e.g., student assignment), even if the system had not achieved desegregation in other areas (e.g., teacher assignment).²⁸ Then, in 1995, a sharply divided Court essentially extended *Milliken* and worsened the prospects for students of color in large urban districts to achieve quality education. In *Missouri v. Jenkins*, the district court had developed a desegregation plan that the Supreme Court noted had been "described as the most ambitious and expensive remedial program in the history of school desegregation."²⁹ But the majority viewed this broad effort to remedy the legacy of educational racism as a liability rather than a reasonable attempt to achieve the mandate of equal protection. The Supreme Court held that the district court exceeded its authority because its purpose was "to attract non-minority students from outside the [Kansas City] schools" even though the original segregation order had only found an intra-district violation within Kansas City.³⁰ Justice Souter's dissent stressed that the majority had no justified basis for rejecting the concurrent factual findings of the district court and the Eighth Circuit Court of Appeals that the prior segregative actions of city and state officials fostered white flight from Kansas City.³¹ And as a result of these lower court findings, Justice Souter explained that the inter-district aspect of the dis-

24. *Id.* at 763.

25. See GARY ORFIELD & SUSAN EATON, *DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF BROWN V. BOARD OF EDUCATION* (1996).

26. 498 U.S. 237 (1991).

27. *Id.* See also Chemerinsky, *supra* note 12, at 31.

28. 503 U.S. 467 (1992).

29. *Missouri v. Jenkins*, 515 U.S. 70, 78 (1995).

30. *Id.* at 92.

31. *Id.* at 164 (Souter, J. dissenting). Justice Souter noted that the Court's suggestion that white flight must result from integration rather than segregation rested on untenable logical foundations:

At the more obvious level, there is in fact no break in the chain of causation linking the effects of desegregation with those of segregation. There would be no desegregation orders and no remedial plans without prior unconstitutional segregation as the occasion for issuing and adopting them, and an adverse reaction to a desegregation order is traceable in fact to the segregation that is subject to the remedy.

Id.

trict court's remedy was fully within its proper equitable powers.³² In a separate dissent, Justice Ginsburg powerfully documented Missouri's long history of slavery and segregation, and noted that a district court had found as recently as 1984 that city and state officials had failed to take constitutionally required action to remedy the terrible legacy of racism in Kansas City schools. She concluded: "Given the deep, inglorious history of segregation in Missouri, to curtail desegregation at this time and in this manner is an action at once too swift and too soon."³³

As Professor Erwin Chemerinsky has put it, *Dowell, Pitts, and Jenkins* "together have given a clear signal to lower courts: the time has come to end desegregation orders, even when the effect will be resegregation."³⁴ Indeed, in recent years dozens of desegregation decrees have been lifted across the country.³⁵

The results of these decisions have been dramatic. Beginning in the late 1960s, the South, where the majority of African Americans live, witnessed significant school integration. The average percentage of black students in majority-white schools went from .001% in 1954 to 2.3% in 1964 to 33.1% in 1970. This trend continued through the 1970s and most of the 1980s, reaching a peak of 43.5% in 1988. The 1990s, however, were a decade of retrenchment. By 1998, the percentage of black students in majority white schools fell to 32.7%; Southern schools are now more segregated than they were thirty years ago.³⁶ Nationwide statistics reveal a similar level of resegregation during the 1990s for black students.³⁷

While judicial decisions were not the only factor behind this striking resegregation, they clearly played a roll. As Gary Orfield has explained,

The Supreme Court's re-segregation decisions took place at the very time there was a turn toward increased segregation for black students There may be several reasons for this re-segregation, but the impact of the repeal or non-enforcement of desegregation plans became apparent in a number of regions, particularly in the South, where most of the mandatory desegregation occurred.³⁸

And the problem with this increasing segregation is *not* that black students can only learn if they are in the presence of white students. As W. E. B. Du Bois explained almost seventy years ago, "Negro children need neither segregated schools nor mixed schools. What they need is

32. *Id.* at 160–66 (Souter, J. dissenting).

33. *Id.* at 176 (Ginsburg, J. dissenting).

34. Chemerinsky, *supra* note 12, at 34.

35. See, e.g., Anne Pressley, *Charlotte Schools Are Scrambling; New Ways to Assign Students Sought After Order to End Busing*, WASH. POST, Nov. 8, 1999 at A03.

36. Orfield, *supra* note 3, at 29–30.

37. The percentage of black students in schools where students of color constituted a majority increased from 63.3% in 1986–87 to 70.2% in 1998–99. Unlike the situation of the South, however, the 1980s were not a period of significant desegregation for black students nationwide. Note also that Latino students have seen steady increases in their segregation levels since the late 1960s. Currently, 75.6% of Latino students attend schools where students of color form a majority—almost an identical percentage as black students who attended majority-minority schools in 1968–69 (76.6%). *Id.* at 30–32.

38. Orfield, *supra* note 3, at 5. See also Chemerinsky, *supra* note 12, at 15.

education."³⁹ Or, as Justice Clarence Thomas put it more recently, "It never ceases to amaze me that the courts are so willing to assume that anything that is predominately black must be inferior."⁴⁰ The problem with segregation is that, due to the legacy of racial subjugation, "highly segregated black and/or Latino schools are many more times likely than segregated white schools to experience concentration of poverty."⁴¹ High poverty schools, in turn, generally have lower test scores and higher drop out rates than their more affluent counterparts. They also are more likely to have teachers teaching subjects they did not study, and to offer fewer upper-level courses that are highly valued in the college admissions process.⁴²

B. Affirmative Action

Recent years have witnessed a number of lawsuits by white applicants claiming that public university affirmative action programs violate the Equal Protection Clause of the Fourteenth Amendment. Under the equal protection analysis, courts apply strict scrutiny whenever government actors engage in facial classifications by race, which means that to be constitutionally permissible the classification must: (1) serve a compelling government interest, and (2) be narrowly tailored to meet that interest.⁴³ Despite the fact that Justice Powell's controlling opinion for the Court in the 1978 case *Regents of the University of California v. Bakke* explicitly ruled that educational diversity can be a compelling government interest that satisfies the first prong of strict scrutiny,⁴⁴ in *Hopwood v. Texas*, the Fifth Circuit decided that it need not follow binding Supreme Court

39. W. E. B. DuBois, *Does the Negro Need Separate Schools?* 4 J. NEGRO EDUC. 328 (1935). See also Derrick Bell, *Reinventing Brown v. Board of Education*, in *WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID* (Jack M. Balkin ed., 2001).

40. *Jenkins*, 515 U.S. 70 at 114 (Thomas, J. concurring).

41. Orfield, *supra* note 3, at 10.

42. *Id.* These disparities can even have a negative impact on the black middle class: a major part of the achievement gap between middle-class black and white students "is due to the fact that black middle class families tend to live in communities with far more poor people than white middle class families and often live near and share schools with lower class black neighborhoods." *Id.* at 11.

43. See, e.g., *Adarand Constructors v. Peña*, 515 U.S. 200, 237-38 (1995).

44. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 311-12 (1978) (Opinion of Powell, J.) (holding that "the interest of diversity is compelling in the context of a university's admissions program."). Justice Powell's opinion is binding because he applied strict scrutiny in ruling that the University of California could use race-conscious admissions policies (though not strict racial quotas). *Id.* at 304-07. "When a fragmented court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest ground." *Marks v. United States*, 430 U.S. 188, 193 (1977). In *Bakke*, Justices Brennan, White, Marshall, and Blackmun filed a concurring opinion suggesting that affirmative action programs should be analyzed under intermediate scrutiny. "Because the set of constitutionally permissible racial classifications under intermediate scrutiny by definition includes those classifications constitutionally permissible under strict scrutiny, Justice Powell's rationale would permit the most limited consideration of race; therefore, it is Bakke's narrowest rationale. Accordingly, Justice Powell's opinion constitutes Bakke's holding and [is binding on lower courts]." *Grutter v. Bollinger*, 288 F.3d 732, 741 (6th Cir. 2002).

precedent on this point.⁴⁵ While other appellate courts have not had been as bold as *Hopwood*, the First,⁴⁶ Fourth,⁴⁷ and Eleventh⁴⁸ Circuits have also struck down race-conscious admissions programs at public schools and universities over the last five years. These courts have assumed that educational diversity can be a compelling government interest, but they have found the programs did not meet strict scrutiny's narrow tailoring prong despite the fact that, even under these policies, black and Latino students were severely underrepresented in elite educational institutions in comparison to their percentage of the population. Thus, when the Eleventh Circuit struck down race-conscious admissions at the University of Georgia, blacks represented less than 6% of the student body in a state where African Americans constitute over one quarter of the population.⁴⁹ When the Fifth Circuit invalidated race-conscious admissions at the University of Texas Law School, the student body was roughly 5% black⁵⁰ in a state that is 12% black.⁵¹ And when the First Circuit struck down affirmative action at the prestigious Boston Latin high school, blacks and Latinos represented 74% of Boston's public school population but only 31% of those admitted to Boston Latin.⁵²

Given that a number of scholars have already critiqued the reasoning behind these opinions,⁵³ the purpose of this Note is not to offer a systematic analysis of how courts have used the Equal Protection Clause to hurt the very people the Clause was adopted to help. Moreover, the Supreme Court will have decided *Grutter v. Bollinger*, its first educational affirmative action case since *Bakke*, by the time you read this Note, and the terms of the jurisprudential debate may well have shifted.

I would, however, like to reiterate some broad observations relevant to race-conscious admissions policies that various scholars, notably among them Lani Guinier, Susan Sturm, and Gerald Torres, have already made, but which too rarely are addressed in litigation or public debate. First, the controversy over affirmative action stems in large part from a false premise. The assumption is that admissions to institutions of higher education are generally based on relevant measures of individual merit, and affirmative action is an exception to that meritocracy.⁵⁴ Thus, in *John-*

45. 78 F.3d 932, 944 (1996).

46. *Wessmann v. Gittens*, 160 F.3d 790 (1998).

47. *See Eisenberg v. Montgomery County Public Schools*, 197 F. 3d 123 (1999), *cert. den.*, 529 U.S. 1019 (2000); and *Tuttle v. Arlington County School Board*, 195 F. 3d 698 (1999), *cert. dismissed*, 529 U.S. 1050 (2000).

48. *Johnson v. Bd. of Regents*, 263 F.3d 1234 (2001).

49. Edward Walsh, *Federal Appeals Panel Finds University's Race-Based "Point" System Unconstitutional*, WASH. POST, Aug. 28, 2001, at A5.

50. *See Adam Liptak, Racial Math; Affirmative Action by Any Other Name*, N.Y. TIMES, Jan. 19, 2003 at § 4, 1.

51. *See data from the United States Census 2000 (2000), available at <http://quickfacts.census.gov/qfd/states/48000.html> (last visited Jan. 13, 2003).*

52. *See Wessmann*, 160 F.3d at 830–31 (Lipez, J. dissenting).

53. *See, e.g., Reva B. Siegel, The Racial Rhetorics of Colorblind Constitutionalism: The Case of Hopwood v. Texas*, in RACE AND REPRESENTATION: AFFIRMATIVE ACTION 29 (Robert Post & Michael Rogin eds., 1998); Lani Guinier, *Colleges Should Take 'Confirmative Action' in Admissions*, CHRON. HIGHER EDUC., Dec. 14, 2001, at B10.

54. *See Lani Guinier & Susan Sturm, The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 CALIF. L. REV. 953, 956–57 (1996).

son v. Board of Regents, the Eleventh Circuit struck down the University of Georgia's use of race as a "plus factor" in evaluating the applications of black students. Yet the Court did not question the university's use of parental or sibling affiliation with UGA as a plus factor,⁵⁵ notwithstanding the fact that one's merit certainly is not tied to where her parents attended college, or that this alumni preference policy has a discriminatory impact on poor people and people of color. Even more significantly, standardized tests such as the SAT and LSAT play a major role in the admissions process, and they have a severely discriminatory impact on black, Latino, American Indian, and poor white applicants.⁵⁶ Yet, their ability to predict anything that matters is marginal at best. While the tests are supposed to be best at forecasting first-year grades, the LSAT is only nine percent better than random in predicting first-year law school grades,⁵⁷ and the SAT correlates better with grandparents' socioeconomic status than with how students perform in their first year of college.⁵⁸ Researchers have found that the University of Michigan Law School's test-centered admission index has no correlation with future income as an attorney, although there was a *negative* correlation between the index and both career satisfaction and likeliness to give back to the community.⁵⁹ The truth is that traditional admissions criteria severely disadvantage poor people and people of color in a way that has little, if anything, to do with merit.

This leads to the second, related point: racial diversity is essential to public institutions of higher education in carrying out their self-proclaimed missions. According to Mindy Kornhaber, who has studied the mission statements of public universities, these institutions claim their purpose is "[t]o train leaders . . . who will occupy positions of power and responsibility, people who will participate in their chosen discipline in ways that have lasting impact, people who will contribute to civic life and people who are committed to public service."⁶⁰ The public emphasis of these institutions is not surprising—they are, after all, financed by taxpayers. Moreover, graduates of color play a vital role in helping public universities meet this goal. According to a three-decade study of graduates at the University of Michigan Law School, black and Latino alumni were more likely than their white peers to perform "such activities as mentoring younger attorneys, serving on the boards of public and private nonprofit organizations, exercising community leadership through political involvement, and providing legal services on a pro bono basis."⁶¹

Finally, litigation over affirmative action has framed the debate in a way that is potentially disabling its supporters. Taking a cue from Justice

55. *Johnson*, 263 F.3d at 1241.

56. Guinier & Sturm, *supra* note 54, at 989.

57. GUINIER & TORRES, *supra* note 1, at 366 n.55.

58. Guinier, *supra* note 53, at B11.

59. Richard O. Lempert, David L. Chambers & Terry K. Adams, "From The Trenches and Towers": Law School Affirmative Action: An Empirical Study Michigan's Minority Graduates in Practice: The River Runs Through Law School, 25 LAW & SOC. INQUIRY 395, 468 (2000).

60. Guinier, *supra* note 53, at B10.

61. Lempert, Chambers & Adams, *supra* note 59, at 453–55.

Powell's controlling opinion in *Bakke*,⁶² the debate about affirmative action in the courts has in recent years turned almost exclusively on whether achieving a racially diverse student body is a compelling government interest and whether affirmative action plans are narrowly tailored to meet that interest. The data does indeed demonstrate that students of all races learn better in a diverse environment and become better prepared to participate in our pluralistic, democratic society.⁶³ But the exclusive focus on diversity denies proponents of affirmative action the opportunity to emphasize the even more important point that affirmative action has a slight remedial effect for the inferior opportunities available to black students as a result of the legacies of slavery and segregation. Due to both historic and present discrimination, the wealth and education attainment disparities for black and white adults is enormous.⁶⁴ And these factors are significant predictors of children's educational success.⁶⁵ Moreover, Supreme Court decisions such as *Milliken* have enabled states to maintain vast disparities in the educational opportunities they furnish black and white children.⁶⁶ But the exclusive emphasis on diversity in affirmative action litigation allows courts to avoid these issues. Thus, in *Johnson v. Board of Regents*, the Court of Appeals noted that:

For the first 160 years of its existence, no African-American student was admitted to UGA. The first African-American students were admitted in 1961. In 1969, the federal government, through the Office of Civil Rights ("OCR"), determined that Georgia's university system was still "operating a dual track of higher education based on race in that past patterns of racial segregation have not been eliminated from most of the institutions within the system."⁶⁷

62. Powell wrote that rectifying general societal discrimination was not a compelling interest justifying racial classifications by educational institutions. *Bakke*, 438 U.S. at 310 (Opinion of Powell, J.). However, he also held that universities do have a compelling interest in maintaining a racially diverse student body, which thus means race-conscious admissions programs satisfy the first prong of the strict scrutiny analysis. *Id.* at 314.

63. *Grutter*, 288 F.3d at 760 (Clay, J. concurring, citing Patricia Gurin, *Reports submitted on behalf of the University of Michigan: The Compelling Need for Diversity in Higher Education*, 5 MICH. J. RACE & L. 363, 364 (1999)) ("A racially and ethnically diverse university student body has far-ranging and significant benefits for all students, non-minorities and minorities alike. Students learn better in a diverse educational environment, and they are better prepared to become active participants in our pluralistic, democratic society once they leave such a setting. In fact, patterns of racial segregation and separation historically rooted in our national life can be broken by diversity experiences in higher education. This Report describes the strong evidence supporting these conclusions derived from three parallel empirical analyses of university students, as well as from existing social science theory and research.")

64. GUINIER & TORRES, *supra* note 1, at 47.

65. See, e.g., DENNIS GILBERT, *THE AMERICAN CLASS STRUCTURE* 159, 168–71 (5th ed. 1998).

66. See also *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973) (holding that Texas's system of financing public schools, which resulted in severe funding inequalities in different school districts based on local wealth, did not violate the Equal Protection Clause).

67. 263 F.3d at 1239–40.

Because the litigation turned solely on the issue of diversity, the Court was able to avoid engaging the legacy of discrimination faced by black students in Georgia. Moreover, to the degree that this rhetorical focus on diversity carries over to the public debate, it may inhibit grassroots organizing, which might be more effective if affirmative action is framed as an issue of racial justice rather than a narrow inquiry into the pedagogical benefits of diversity.⁶⁸

II. ERASING THE PROMISE OF THE CIVIL RIGHTS ACT OF 1964

While the fight for racial equality in education has never been easy, in contrast to the retrenchment of the 1990s, the 1960s was a decade when the grassroots power of the Civil Rights movement helped advocates win important legislative and judicial victories. One such success was the Civil Rights Act of 1964. Title VI of the Civil Rights Act is designed to combat racial discrimination by subjecting state and local governments that receive federal funding to certain anti-discrimination provisions. Section 601 of that title mandates that no person shall “on the ground of race, color or national origin be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity.”⁶⁹ Section 602 authorizes federal agencies to issue rules and regulations to effectuate this anti-discrimination law. Pursuant to § 602, at least forty federal agencies,⁷⁰ including the Department of Education and Department of Justice, have promulgated regulations that prohibit covered government entities from utilizing “criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color or national origin.”⁷¹

A. *Litigation Pre-Sandoval*

Until 2001, federal courts interpreted these “disparate impact” or “effects” regulations to include a private right of action, meaning that individual plaintiffs could sue to compel their enforcement. In the words of Justice Stevens, “Giving fair import to our language and our holdings, every Court of Appeals to address the question has concluded that a private right of action exists to enforce the rights guaranteed both by the text of Title VI and by any regulations validly promulgated pursuant to that Title.”⁷²

68. Cf. Lucie White, *Mobilization on the Margins of the Lawsuit: Making Space for Clients to Speak*, 16 N.Y.U. REV. L. & SOC. CHANGE 535, 545 (1988) (“Not only do clients feel incapable of speaking and acting freely in the strange language and culture of the courtroom; in addition, their own lawsuits are often framed to render their perceptions and passions irrelevant to the legal claims.”).

69. 42 U.S.C. § 2000d (2000).

70. *So. Camden Citizens in Action v. N.J. Dep’t of Env’tl. Protection*, 274 F.3d 771, 790 (3d Cir. 2001) (citing *Powell v. Ridge*, 189 F.3d 387, 393 (3d Cir. 1999)).

71. 34 C.F.R. § 100.3(b)(2) (2003). See also 28 C.F.R. § 42.104(b) (2003).

72. *Sandoval*, 532 U.S. at 294 (Stevens, J. dissenting). In a footnote, Justice Stevens noted that “Just about every Court of Appeals has either explicitly or implicitly held that a private right of action exists to enforce all of the regulations issued pursuant to Title VI, including the disparate-impact regulations. For decisions holding so most explicitly, see, for example, *Powell v. Ridge*, 189 F.3d 387, 400 (CA3 1999); *Chester Residents Concerned for Quality Living v. Seif*, 132 F.3d 925, 936–37 (CA3 1997), summa-

Using this private right of action, people of color could bring suit where educational practices or procedures had a discriminatory impact even if they could not meet the normally insurmountable burden of proof necessary to demonstrate that decision-makers had engaged in intentional discrimination.⁷³ And the fact that private individuals could employ this disparate impact tool was crucial because administrative agencies lack the resources to investigate and bring suit in more than a tiny fraction of cases where governmental units engage in practices that have a racially discriminatory effect.⁷⁴

Plaintiffs in disparate impact suits bear the initial burden of demonstrating that a facially neutral government practice has a detrimental impact on “persons of a particular race to a greater extent than other races.”⁷⁵ If the plaintiff establishes this prima facie case of disparate impact, the burden shifts to the defendant to demonstrate that a “substantial legitimate justification” exists for the policy.⁷⁶ In response, the plaintiffs can still succeed if they can demonstrate “that the defendant overlooked an equally effective alternative with less discriminatory effects or that the proffered justification is no more than a pretext for racial discrimination.”⁷⁷

Before *Sandoval*, individuals used their private right of action under § 602 to confront discriminatory practices that would have otherwise been largely immune from legal challenges. In *Larry P. v. Riles*,⁷⁸ the district court enjoined California’s use of non-validated standardized IQ tests to place students in special classes for the Educable Mentally Retarded (E.M.R.), designed for students considered “incapable of learning in the regular classes.”⁷⁹ As a result of a racial disparity in test perform-

rily dism’d, 524 U.S. 974 (1998); *David K. v. Lane*, 839 F.2d 1265, 1274 (CA7 1988); *Sandoval v. Hagan*, 197 F.3d 484 (CA11 1999) (case below). See also *Latinos Unidos De Chelsea v. Secretary of Housing and Urban Development*, 799 F.2d 774, 785, n.20 (CA1 1986); *New York Urban League, Inc. v. New York*, 71 F.3d 1031, 1036 (CA2 1995); *Ferguson v. Charleston*, 186 F.3d 469 (CA4 1999), rev’d on other grounds, 532 U.S. (2001); *Castaneda v. Pickard*, 781 F.2d 456, 465, n.11 (CA5 1986); *Buchanan v. Bolivar*, 99 F.3d 1352, 1356, n.5 (CA6 1996); *Larry P. v. Riles*, 793 F.2d 969, 981–82 (CA9 1986); *Villanueva v. Carere*, 85 F.3d 481, 486 (CA10 1996).” *Id.* at 295 n.1.

73. For a discussion of the extremely difficulty of proving intentional discrimination under current equal protection jurisprudence, see K. G. Jan Pillai, *Shrinking Domain of Invidious Intent*, 9 WM. & MARY BILL RTS. J. 525, 530 (2001); see also Reva Siegel, *Symposium: The Critical Use of History: Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1134 (1997). The key cases in which the Supreme Court developed this intentional discrimination approach for equal protection violations are *Washington v. Davis*, 426 U.S. 229 (1976), *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977), and *Personnel Adm’r v. Feeney*, 442 U.S. 256 (1979). Also relevant is *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978), where the Supreme Court held that § 601 only prohibits racial classifications prohibited by the Constitution. *Sandoval* re-affirmed this aspect of *Bakke*. 532 U.S. at 281.

74. See *infra* note 92.

75. *Ga. State Conference of Branches of NAACP v. Georgia*, 775 F.2d 1403, 1421 (11th Cir. 1985).

76. *N.Y. Urban League, Inc. v. New York*, 71 F.3d 1031, 1036 (2d Cir. 1995) (citing *Ga. State Conference of Branches of NAACP*, 775 F.2d at 1417).

77. *Powell v. Ridge*, 189 F.3d 387, 394 (3d Cir. 1999).

78. 793 F.2d 969 (9th Cir. 1984).

79. *Id.* at 973.

ance, blacks constituted 9% of California's children and 27% of the E.M.R. population,⁸⁰ even though California could not demonstrate that IQ tests accurately reflected whether or not elementary students were mentally retarded.⁸¹ The district court found that E.M.R. classes "are conceived of as a 'dead-end' classes, and a misplacement in E.M.R. causes a stigma and irreparable injury to the student."⁸²

The district court relied upon three separate grounds in enjoining the use of these non-validated tests because of their racial bias: (1) the equal protection provision of the California constitution, (2) the Fourteenth Amendment, and (3) § 602 disparate impact regulations.⁸³ On appeal, the Ninth Circuit dismissed the state constitutional claim on jurisdictional grounds.⁸⁴ Furthermore, the Court found that the "pervasiveness of the discriminatory effect" could not, without more, demonstrate a violation of the Fourteenth Amendment, which requires discriminatory intent.⁸⁵ However, the § 602 disparate impact regulations preserved the plaintiffs' victory. The Court of Appeals reasoned that the plaintiffs "clearly demonstrated the discriminatory impact of the challenged tests."⁸⁶ As the state was unable to persuade the Court that any nondiscriminatory factors adequately explained the disparate impact, the Court upheld the injunction.⁸⁷

More recently, § 602 disparate impact regulations allowed a major school challenge to racial disparities in Pennsylvania's school finance system to overcome a 12(b)(6) motion to dismiss for failure to state a cause of action. In *Powell v. Ridge*, the plaintiffs, who included children attending Philadelphia's public schools and their parents, brought a complaint alleging that Pennsylvania's school financing scheme discriminated based on race even controlling for district poverty rates: "On average, for 1995-96, for two school districts with the same level of poverty . . . the school districts with higher non-white enrollment received \$52.88 less per pupil for each increase of 1% in non-white enrollment."⁸⁸ Despite this disturbing allegation, the district court granted defendants' 12(b)(6) motion. On appeal, the Third Circuit overturned the dismissal, relying on the plaintiffs' private right of action to enforce § 602 effects regulations.⁸⁹ The

80. *Id.*

81. *Id.* at 976.

82. *Id.* at 973.

83. *Id.* at 972. A fourth ground for the district court's decision was that California's use of non-validated standardized tests to place students in E.M.R. classes violated the federal statutes designed to protect the rights of handicapped individuals (the Rehabilitation Act of 1973 and Education for All Handicapped Children Act) and their accompanying regulations. The Court of Appeals affirmed this part of the district court's opinion as well. *Id.* at 979-81.

84. *Id.* at 984.

85. *Id.*

86. *Id.* at 982-83.

87. *Id.* at 984.

88. *Powell*, 189 F.3d at 394.

89. The Court also ruled that the plaintiffs could maintain a claim under § 1983 for a violation of the § 602 disparate impact regulations. *Id.* at 403. The Third Circuit later argued that *Powell* was not controlling on this point because "Powell did not analyze . . . whether a regulation in itself can create a right enforceable under section 1983. In *Powell*, we seemed simply to assume for section 1983 purposes that it could." *So.*

Court of Appeals pointed out that the plaintiffs' complaint had plead that the state's facially neutral funding scheme had averse effects on non-white students, which was sufficient to survive a 12(b)(6) motion.⁹⁰

B. *Alexander v. Sandoval*

In 2001, the Supreme Court appeared to deliver a major blow to disparate impact litigation. In *Alexander v. Sandoval*,⁹¹ a divided Court held that there is no private right of action to enforce § 602 disparate impact regulations.⁹² The conservative five-justice majority acknowledged that individual plaintiffs can bring suit under § 601 of the Civil Rights Act, but noted that the Court has interpreted § 601 to prohibit only intentional discrimination.⁹³ While the majority assumed that disparate impact regulations were a valid exercise of agency authority under § 602,⁹⁴ it found no evidence of Congressional intent to provide a private right of action to enforce those regulations. In particular, the Court argued that § 602 simply grants regulatory agencies the power to effectuate individual rights created by § 601. As the language of § 602 focuses on granting power to government agencies rather than protecting individuals, the majority could not find any textual support for the proposition that Congress intended to create a private cause of action to enforce § 602 regulations.⁹⁵

In dissent, Justice Stevens, joined by Justices Souter, Ginsburg and Breyer, called the decision "unfounded in our precedent and hostile to decades of settled expectations."⁹⁶ Commentators have similarly criticized *Sandoval's* legal analysis, suggesting that it required "interpretive gymnastics" and "demonstrates a misunderstanding of Title VI."⁹⁷ The dis-

Camden, 274 F.3d at 784. See Part III, *infra*. The dissent called the majority's reasoning "analytical alchemy" and argued that *Powell's* holding that there was a cause of action under § 1983 to enforce § 602 regulations was binding precedent. *Id.* at 792–94 (McKee, J. dissenting).

90. *Id.* at 394–95. The Court also held that the complaint was adequately specific to put defendants on notice of what the plaintiffs intended to prove at trial. *Id.* at 395

91. 532 U.S. 275 (2001).

92. Agencies can still investigate complaints of disparate impact violations, and refer appropriate cases to the Department of Justice to bring suit in federal court. But investigative agencies, as well as the Department of Justice itself, lack the resources to bring suits in even nearly all the situations where covered entities violate these regulations. See, e.g., Julie Zwibelman, Note, *Broadening the Scope of School Finance and Resource Comparability Litigation*, 36 HARV. C.R.-C.L. L. REV. 527, 554 (2001); Note, *After Sandoval: Judicial Challenges and Administrative Possibilities in Title VI Enforcement*, 116 HARV. L. REV. 1174 (2003). The latter Note offers an innovative analysis of how agencies can utilize a decentralized, participatory model to prevent the implementation of government practices that have the effect of discriminating against people of color. This proposed approach seeks to ensure that agencies enforce Title VI by requiring that "funding recipients adopt decisionmaking processes that take into account their potential impact on racial and ethnic communities *before* implementing a policy or program, rather than *after*." *Id.* at 1790.

93. *Sandoval*, 532 U.S. at 279–80.

94. *Id.* at 281–82.

95. *Id.* at 288–89.

96. *Id.* at 294 (Stevens, J. dissenting).

97. Note, *Leading Case*, 115 HARV. L. REV. 497, 498, 507 (2001). See also Adele P. Kimmel et al., *The Sandoval Decision and its Implications for Future Civil Rights Enforcement*, 76 FLA. BAR J. 24 (2002) ("*Sandoval* abruptly reversed nearly three decades of precedent.").

senters and commentators have argued that § 601 and § 602 operate together, so the rights-creating language in § 601 can in fact give rise to a private right of action to enforce regulations promulgated under § 602.⁹⁸ Moreover, they have noted that, when Title VI was enacted in 1964, the courts had a much more generous approach to recognizing private rights of action, and the legislative history indicates Congress intended to confer such a right.⁹⁹ While I agree with these critics, we must acknowledge that a judicial reversal of *Sandoval* in the near future is extremely unlikely. With that in mind, I now turn to the devastating effects the decision has already had for litigators seeking to advance racial justice, and I then consider strategies to allow plaintiffs to pursue disparate impact claims despite the decision.

C. *Litigation Post-Sandoval*

1. *Testing*

In *Clyburn v. Shields*,¹⁰⁰ the Second Circuit affirmed the district court's decision to grant a 12(b)(6) motion for failure to state a claim against two black men challenging the University of Buffalo School of Law's (UBSOL) reliance on the LSAT as an admission criterion. The plaintiffs alleged that the Law School's reliance on this test, despite its discriminatory impact on black candidates, violated the Equal Protection Clause and Title VI of the Civil Rights Act. The Court explained, "At best, the plaintiffs allege that UBSOL defendants were aware that the LSAT disproportionately affects such applicants yet continued to use it as an admissions criterion."¹⁰¹ This assertion was simply not enough to state a claim of intentional discrimination as required by the Equal Protection Clause and § 601. Indeed, the Court's opinion demonstrated once more just how difficult it is for plaintiffs to succeed in intentional discrimination lawsuits: "Even if the complaint can be read to allege that those defendants use the LSAT 'because of' its adverse effect on African American applicants, this bare allegation, without any facts alleged in support, is insufficient to state a claim for intentional discrimination."¹⁰² And the effect of *Sandoval* was dramatic: plaintiffs could no longer challenge the use of this test, despite its previously discussed poor predictive validity and discriminatory impact on blacks, on the basis of § 602 effects regulations. The Second Circuit explained that the plaintiffs did not include a claim of disparate impact discrimination in their complaint, but "[e]ven had the complaint done so, the Supreme Court recently held in *Alexander v. Sandoval*, that no private cause of action exists to enforce disparate impact regulations promulgated pursuant to Title VI."¹⁰³

98. *Sandoval*, 532 U.S. at 294 (Stevens, J. dissenting); *Leading Case*, *supra* note 97, at 503.

99. *Sandoval*, 532 U.S. at 294 (Stevens, J. dissenting); *Leading Case*, *supra* note 97, at 502.

100. 33 Fed. Appx. 552 (2d Cir. 2002).

101. *Id.* at 555.

102. *Id.* at 555. The Court also rejected claims that plaintiffs were discriminated against based on their age and gender in violation of federal statutes and the Constitution. *Id.* at 556.

103. *Id.* at 555.

2. School Finance

Sandoval also poses a serious obstacle to advocates seeking to reduce the vast disparity in resource allocation between predominately white and predominately minority school districts that continues to plague our nation's public schools. In 1973, the Supreme Court ruled that education is not a fundamental right; thus, vast inequalities in funding for public schools can survive judicial scrutiny under the Equal Protection Clause.¹⁰⁴ In recent years, litigators have successfully challenged funding disparities under state constitutions in many parts of the country. But other state courts have refused to find any mandate for equitable funding in their constitutions; the emerging trend in this field is to bring litigation arguing that, under their own constitutions, states must provide all children with an adequate level of education rather than an equitable one.¹⁰⁵ A recent case from New York demonstrates just how inadequate this adequacy strategy can be for black students, and just how devastating the consequences of *Sandoval* are for efforts to achieve racial equality in our public schools.

In May 1993, advocates for New York City schoolchildren brought a number of claims against the state's school financing system and the resulting inequalities between funds allocated to New York City and the rest of the state. The implications of this case for racial justice in New York State's schools are enormous. Over 70% of New York State's black citizens reside in the City of New York.¹⁰⁶ Students of color make up 84% of New York City's public school population, and 73% of all of New York State's minority students live in the City.¹⁰⁷

In 1995, New York's highest court (the Court of Appeals) held that plaintiffs had stated causes of action under both the state constitution's Education Article and Title VI's disparate impact regulations.¹⁰⁸ On remand, the Supreme Court for New York County ruled for the plaintiffs on two grounds: (1) the state's funding system deprived New York City schoolchildren of a "sound basic education" as mandated by the state constitution;¹⁰⁹ (2) the financing scheme violated Title VI's disparate im-

104. *Rodriguez*, 411 U.S. at 37. The Court also held that wealth was not a suspect classification. *Id.* at 28.

105. Julie Zwibelman, *supra* note 92, at 532. Note that the focus on adequacy is not always bad. If interpreted by favorable courts, it may allow litigators to bring suits addressing a broad range of resource deficiencies at underperforming schools rather than only school funding inequities. *Id.*

106. According to the United States Census 2000 (2000), the African American population of New York City is 2,129,762; the black population of New York State is 3,014,385. Statistics available at <http://www.census.gov> (last visited Dec. 30, 2002).

107. *Campaign for Fiscal Equity v. State*, N.Y.S.2d 475, 544 (N.Y. Gen. Term 2001). Litigators have also unsuccessfully brought challenges to underperforming schools in other parts of the state with high concentrations of blacks and other people of color. *See Paynter v. State*, 290 A.D.2d 95 (N.Y. App. Div. 2001) (holding that plaintiffs had failed to state valid causes of action under state and federal law that the poor performance of Rochester City's schools violated the rights of the district's predominately poor and minority students).

108. *Campaign for Fiscal Equity v. State*, 86 N.Y. 2d 307.

109. *Campaign for Fiscal Equity v. State*, 719 N.Y.S.2d 475, 478 (N.Y. Gen. Term 2001).

pact regulations.¹¹⁰ The court directed the state legislature to reform its school financing scheme to address the severe inequities between funding available to schools in New York City compared with those in the rest of the state.¹¹¹

On appeal, the state intermediate appellate court reversed. The Supreme Court of New York, Appellate Division, acknowledged that city schools had half as many computers per pupil as non-city schools and far fewer books per student.¹¹² The Court also pointed out that,

as of the 1997-1998 academic year, 31.3% of city public school teachers had failed the basic certification test . . . at least once, and the mean score for first time takers was 236.3 [on a test where 220 is a passing score]. Outside the city, 4.7% of public school teachers had failed it once and had a mean first time score of 261.6.¹¹³

Moreover, at trial, plaintiffs had introduced evidence from other parts of the country suggesting a correlation between student scores on state examinations and teacher scores on teacher certification tests.¹¹⁴ Finally, the appellate court admitted that City students received less money per capita than their counterparts in the rest of the state.¹¹⁵

Nevertheless, the court concluded that the plaintiffs had not demonstrated that the City's public schools failed to provide an adequate education. The Court acknowledged that 30% of New York City students drop out of school and an additional 10% receive GEDs rather than traditional diplomas. But it concluded that these data did not indicate the state was failing to provide City students with an adequate education for two remarkable reasons. First, a sound basic education does not require a high school diploma. The appellate court chastised the trial court for concluding "that the state constitution should require something more than a ninth-grade education."¹¹⁶ After all, the appellate court cited evidence that students generally learned the basic skills to obtain employment, vote and serve on a jury by ninth grade. The trial court's assertion that an adequate education required something more than preparing students for the lowest-level service sector jobs "went too far."¹¹⁷ Indeed, "society needs workers in all levels of jobs, the majority of which may well be low level."¹¹⁸ Second, when New York City students do not achieve even this minimal level of education, it may well be their fault: "nor can the State be faulted if students do not avail themselves of the opportunities presented."¹¹⁹ In short, New York's constitution is agnostic as to whether its school funding scheme perpetuates a racial caste system in which pre-

110. *Id.*

111. *Id.* at 113-15.

112. *Campaign for Fiscal Equity v. State*, 744 N.Y.S. 2d 130, 140 (N.Y. App. Div. 2002).

113. *Id.* at 141.

114. *Id.*

115. *Id.* at 145.

116. *Id.* at 138.

117. *Id.*

118. *Id.*

119. *Id.* at 143.

dominately minority districts educate a disproportionate number of their students for the worst paying jobs.

Recall that the trial court had also ruled for plaintiffs on a second ground—that the state's funding scheme had a discriminatory impact on students of color. But once again, *Sandoval*, which had not been decided when the trial court delivered its opinion, played a decisive role. The New York appellate court concluded that the trial court's opinion could not be sustained under federal law as individual plaintiffs can no longer bring suit to enforce disparate impact regulations promulgated pursuant to § 602.¹²⁰

Plaintiffs are currently appealing this decision to New York's Court of Appeals, which will issue a ruling by the summer of 2003.¹²¹ Regardless of how that court decides, however, the traumatic impact of *Sandoval* is well illustrated by this New York litigation. Many state high courts will conclude (or already have concluded) that their constitutions do not require any changes to school finance schemes despite severely discriminatory effects on students of color.¹²² If *Sandoval* truly forecloses disparate impact suits, these plaintiffs will have no private remedy. Moreover, unlike judgments based on Title VI, even favorable decisions under state constitutions often fail to engage specifically with racial disparities in resource allocation.¹²³ Thus, remedies are less likely to address these racial inequalities.¹²⁴

The *Sandoval* decision, of course, has a potentially devastating impact for efforts to rectify educational racism in numerous areas, not just high-stakes testing and school finance. If the decision does indeed mean that private litigants can no longer bring suits based on § 602 disparate impact regulations, it erects a virtually insurmountable barrier for private plaintiffs seeking to use federal law to redress racial discrimination in disciplinary exclusions, special education programs, and tracking programs. It is with this sobering reality in mind that I turn to possible responses to *Sandoval*.

III. BRINGING DISPARATE IMPACT CLAIMS UNDER 42 U.S.C. § 1983

Sandoval arguably left open an escape route that litigants have already sought to utilize in a number of cases. As Justice Stevens noted in dissent, the majority's opinion did not foreclose the possibility that individuals could bring private actions to enforce Title VI's disparate impact regulations indirectly through 42 U.S.C. § 1983.¹²⁵ Under § 1983,

120. *Id.* at 146. The court held that disparate impact regulations also could not be enforced indirectly through § 1983. *Id.* One of the central arguments of this Essay is that this holding misinterprets binding precedent. See Part III, *infra*.

121. *High Court Expedites CFE Appeal; Sets Firm Date for Argument*, at <http://www.cfequity.org> (last visited Dec. 29, 2002).

122. See, e.g., *Vincent v. Voight*, 614 N.W. 2d 388 (Wis. 2000); *Scott v. Commonwealth*, 443 S.E. 2d 138 (Va. 1994); *Skeen v. State*, 505 N.W.2d 299 (Minn. 1993).

123. A major exception is the Connecticut Supreme Court's opinion in *Sheff v. O'Neill*, 678 A.2d 1267 (1996).

124. Cf. *Zwibelman*, *supra* note 92, at 554.

125. *Sandoval*, 532 U.S. at 299–300.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.¹²⁶

Private plaintiffs have argued that even if, after *Sandoval*, they can no longer enforce disparate impact regulations directly, they can still bring disparate impact suits because § 602 regulations create enforceable rights under § 1983. At least three federal courts have accepted this argument, including one Court of Appeals.

In the wake of *Sandoval*, the state of Kansas filed a motion to dismiss a claim that its school finance scheme provided less funding for districts with high concentrations of students of color in contravention of federal law. The state argued that private plaintiffs could no longer rely upon disparate impact regulations in bringing such a suit. The Tenth Circuit disagreed. It held simply: “Disparate impact claims may still be brought against state officials for prospective relief through an action under 42 U.S.C. § 1983 to enforce section 602 regulations.”¹²⁷

Unfortunately, the Tenth Circuit’s holding on this point was not supported by a reasoned analysis that will likely persuade other circuits. The Tenth Circuit cited a comment from Justice Stevens’ dissent to conclude that *Sandoval* “does not bar *all* claims to enforce such regulations, but only disparate impact claims brought by parties directly under Title VI.”¹²⁸ The relevant portion of Justice Stevens’ opinion reads as follows:

[T]o the extent that the majority denies relief to the respondents merely because they neglected to mention 42 U.S.C. § 1983 in framing their Title VI claim, this case is something of a sport. Litigants who in the future wish to enforce the Title VI regulations against state actors in all likelihood must only reference § 1983 to obtain relief¹²⁹

The *Sandoval* majority, however, was entirely silent on this issue. The Tenth Circuit conveniently glossed over this fact—as well as Justice Stevens’ use of phrases such as “to the extent that” and “presumably”—in concluding that private plaintiffs can clearly continue to bring disparate impact claims under § 1983.

In *Lucero v. Detroit Public Schools*,¹³⁰ the District Court for the Eastern District of Michigan also held that plaintiffs could still bring disparate impact cases under § 602 regulations via § 1983. *Lucero*, which involved a challenge to the placement of a heavily black and Latino elementary

126. 42 U.S.C. § 1983 (2000).

127. *Robinson v. Kansas*, 295 F.3d 1183, 1187 (2002).

128. *Id.*

129. *Sandoval*, 532 U.S. at 299–300.

130. 160 F. Supp. 2d 767 (2001).

school on an allegedly contaminated site,¹³¹ engaged in a far more detailed analysis than the Tenth Circuit did in *Robinson*. Thus, *Lucero* offers the prospect of an approach that could prove useful to litigants seeking to persuade courts in other circuits to allow private parties to bring disparate impact claims under § 1983.

Lucero starts from the assumption that federal regulations having the full force of law can create rights under § 1983, a principle that had been established in the Sixth Circuit in *Loschiavo v. City of Dearborn*.¹³² *Lucero* reasoned that such federal regulations can create enforceable rights under § 1983 in the same manner as federal statutes, by meeting the three-prong test the Supreme Court laid out in *Blessing v. Freestone*.¹³³ According to this test, statutory provisions give rise to federal rights if: (1) Congress intended that the provision in question benefit the plaintiff; (2) the asserted right is not so “vague and amorphous” as to strain judicial competence; and (3) the provision is couched in mandatory rather than precatory terms.¹³⁴

After concluding that § 602 disparate impact regulations clearly have the full force of law, *Lucero* found the three *Blessing* criteria met. It looked to both the statute and the accompanying regulations to conclude that: (1) as the Supreme Court recognized in *Cannon v. University of Chicago*, § 602 is clearly intended to benefit people of color by protecting them against discriminatory practices; (2) its provisions “are not vague and amorphous but clearly state that discrimination based upon race, color or national origin should not be the basis for exclusion of the denial of benefits of any program or activity receiving Federal Financial Assistance”; and (3) the use of the term “shall” indicates that the provision is mandatory rather than precatory.¹³⁵ Thus, the Court held that § 602 disparate impact regulations give rise to enforceable rights under § 1983. In *White v. Engler*,¹³⁶ another judge in the Eastern District of Michigan undertook a similar analysis to determine that, even after *Sandoval*, disparate impact regulations are enforceable via § 1983. Based on this holding, the *Engler* court dismissed defendants’ 12(b)(6) motion in a case challenging Michigan’s use of a standardized test with a severely disparate impact on students of color to award merit scholarships.¹³⁷

The strongest contrary precedent to *Lucero* is *South Camden Citizens in Action v. New Jersey Department of Environmental Protection*,¹³⁸ a case involving a claim of environmental racism, where the Third Circuit held that disparate impact regulations are not enforceable through § 1983. The *South Camden* Court began by acknowledging that “inasmuch as the

131. The court refused to grant a preliminary injunction against locating the school on that site as it found that the plaintiffs could not succeed on the disparate impact claim in this case. *Id.* at 789.

132. 33 F.3d 548, 551 (1994).

133. 520 U.S. 329 (1997).

134. *Id.* at 340–41.

135. *Lucero*, 160 F. Supp. 2d at 784.

136. 188 F. Supp. 2d 730 (2001).

137. *Id.*

138. 274 F.3d 771 (2001). For a thorough analysis of this decision, see Lisa M. Lamb, *Issues in the Third Circuit: The Third Circuit’s Approach to the Private Enforcement of Administrative Agency Regulations under Section 1983*, 47 VILL. L. REV. 1139 (2002).

plaintiffs in *Sandoval* did not advance a cause of action under section 1983 to enforce Title VI and its implementing regulations, the majority did not consider whether such an action is available.¹³⁹ However, unlike the *Lucero* Court, *South Camden* did not simply apply *Blessing* to determine whether or not § 602 regulations create enforceable rights under § 1983. Rather, the Court first considered whether federal regulations, standing alone, could give rise to § 1983 rights.

To address that prior question, *South Camden* began by claiming that a majority of the Supreme Court has never expressly held that a regulation can itself create enforceable rights under § 1983.¹⁴⁰ The Court then looked at prior Third Circuit decisions, which it did not find dispositive because even though a number of cases had assumed that federal regulations were enforceable via § 1983, in none did the holding depend on this conclusion and so the earlier opinions' assumptions were non-binding dicta.¹⁴¹ The Court then looked to cases from the Fourth and Eleventh Circuits,¹⁴² which had concluded that federal regulations standing alone could not give rise to § 1983 rights, and decided that they were better reasoned than *Loschiavo*.¹⁴³

The key inquiry, according to *South Camden*, is whether Congress intends to create an enforceable right through a statute and its associated regulations. The Court relied upon the Eleventh Circuit's decision in *Harris*, which determined that federal regulations can only create § 1983 rights when they explicate the specific content of a statute rather than imposing "distinct obligations in order to further the broad objectives underlying the statutory provision."¹⁴⁴ Under the latter circumstances, the "nexus" between the regulations and Congress's intent to create a federal right is simply too attenuated.¹⁴⁵

South Camden also looked at the Supreme Court's recent § 1983 jurisprudence, which it characterized as focusing primarily on whether Congress intended to create the particular federal right that a plaintiff sought to enforce.¹⁴⁶ The Third Circuit then emphasized that in *Alexander v. Sandoval*, the Supreme Court had found no evidence of Congressional intent to create a private right to be free from government programs with a racially disparate impact.¹⁴⁷ Thus, *South Camden* concluded that the situation at hand was similar to *Smith* and *Harris*, in that the disparate impact regulations went beyond fleshing out clear statutory language, and rather imposed distinct obligations. As a result, the regulations could not give rise to enforceable rights under § 1983.¹⁴⁸ Recently, two district courts in the Southern District of New York and one in Oregon have followed *South*

139. *So. Camden*, 274 F.3d at 779.

140. *Id.* at 781.

141. *Id.* at 784–85. See also *supra* note 89.

142. See *Smith v. Kirk*, 821 F.2d 980 (4th Cir. 1987), and *Harris v. James*, 127 F.3d 993 (11th Cir. 1997).

143. *So. Camden*, 274 F.3d at 787–88.

144. *Harris*, 127 F.3d at 1009.

145. *Id.* at 1009–10.

146. *So. Camden*, 274 F.3d at 788.

147. *Id.* at 788–90.

148. *Id.* at 788.

Camden and held that Title VI disparate impact regulations cannot be enforced under § 1983.¹⁴⁹

The dispute between *South Camden* and *Lucero* turns on a 1987 Supreme Court decision *Wright v. City of Roanoke Redevelopment and Housing Authority*.¹⁵⁰ In *Loschiavo*, which again provides the foundation for *Lucero*, the Sixth Circuit relied on *Wright* in holding that federal regulations which have the force of law may create § 1983 rights if the regulations meet the same three-part test that statutes must meet.¹⁵¹ In contrast, according to *South Camden*, “Critically, as pertains to this case, *Wright* does not hold that a regulation alone—i.e., where the alleged right does not appear explicitly in the statute, but only appears in the regulation—may create an enforceable federal right.”¹⁵²

So, who is right about *Wright*? In *Wright*, public housing tenants argued that the Roanoke Housing Authority violated the Brooke Amendment to the Housing Act of 1937, which had established a maximum percentage of income that public housing tenants should pay as rent. The tenants claimed that the Roanoke Housing Authority breached this law because it failed to include a reasonable amount for utility use in determining a tenant’s rent, in contravention of HUD regulations.¹⁵³

In an opinion by Justice White, joined by justices Brennan, Marshall, Blackmun, and Stevens, the Court sided with the tenants. The Court began by noting, “‘We do not lightly conclude that Congress intended to preclude reliance on § 1983 as a remedy’ for the deprivation of a federally secured right.”¹⁵⁴ The Court proceeded to determine that the Brooke Amendment and related HUD regulations did indeed create enforceable rights under § 1983. The Court explained its reasoning as follows:

[R]espondent asserts that neither the Brooke Amendment nor the interim regulations gave the tenants any specific or definable rights to utilities, that is, no enforceable rights within the meaning of § 1983. We perceive little substance in this claim. The Brooke Amendment could not be clearer: as further amended in 1981, tenants could be charged as rent no more and no less than 30 percent of their income. This was a mandatory limitation focusing on the individual family unit and its income. The intent to benefit tenants is undeniable. Nor is there any question that HUD interim regulations . . . expressly required that a ‘reasonable’ amount for utilities be included in rent that a PHA was allowed to charge, an interpretation to which HUD has adhered both before and after the adoption of the Brooke Amendment. HUD’s view is entitled to

149. See *Ceaser v. Pataki*, 2002 U.S. Dist. LEXIS 5098 (S.D.N.Y.); *Gulino v. Board of Education* 2002 U.S. Dist. LEXIS 22698 (S.D.N.Y.); and *Lechuga v. Crosley*, 2001 U.S. Dist. LEXIS 23589 (D. Or.).

150. 479 U.S. 418.

151. *Loschiavo v. City of Dearborn*, 33 F.3d 548, 551 (6th Cir. 1994).

152. *So. Camden*, 274 F.3d at 783.

153. *Wright*, 479 U.S. at 419.

154. *Id.* at 423–24, (quoting *Smith v. Robinson*, 468 U.S. 992, 1012 (1984)).

deference as a valid interpretation of the statute, and Congress in the course of amending that provision has not disagreed with it.¹⁵⁵

In *South Camden*, the Third Circuit put the following spin on the *Wright* Court's analysis:

Clearly, therefore, the regulation at issue in *Wright* merely defined the specific right that Congress already had conferred through the statute There should be no doubt on this point, for the Court plainly stated that 'the benefits Congress intended to confer on tenants are sufficiently specific and definite to qualify as enforceable rights under . . . § 1983, rights that are not, as respondent suggests, beyond the competence of the judiciary to enforce.' Therefore, *Wright* located the alleged right in the statutory provision and then relied upon the implementing regulations to define and interpret that right.¹⁵⁶

This is a fair reading of *Wright*, and to the extent that *Lucero* suggests that regulations, standing alone, always give rise to § 1983 rights as long as they meet the *Blessing* criteria, *Lucero* admittedly skips an important analytic step.¹⁵⁷ But conceding this point does little to illuminate the an-

155. *Id.* at 429–30. At least one commentator who advances a narrow reading of *Wright* reaches his conclusion by conflating the Court's application of the three-part *Blessing* test (as earlier articulated in *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1 (U.S. 1981)) with its discussion of the analytically prior question of whether a specific regulation should be treated like a statute appropriate to be tested under the *Blessing* framework. Todd E. Pettys, *The Intended Relationship Between Administrative Regulations and Section 1983's "Laws,"* 67 GEO. WASH. L. REV. 51, 74 (1998). For an argument that *South Camden* made a similar error in conflating these two distinct inquiries, see Brendan Cody, *Annual Review of Environmental and Natural Resources Law: South Camden Citizens in Action: Siting Decisions, Disparate Impact Discrimination, and Section 1983*, 29 ECOLOGY L.Q. 231 (2002). Cody's piece also critiques the effects of the *South Camden* decision for achieving racial justice in environmental regulation and illuminates the serious consequences of *Sandoval* for civil rights advocates in one of the many fields beyond education where § 602 disparate impact regulations are in place. *Id.*

156. *So. Camden*, 274 F.3d at 783. Oddly, the Court also implied that the district court, which had held that plaintiffs could enforce § 602 disparate impact regulations via § 1983, should have paid more attention to the views of the four dissenters in *Wright*. *Id.* at 781. If anything, the dissent suggests that the *Wright* majority may have believed that federal regulations could give rise to an enforceable right under § 1983 regardless of Congressional intent: "I am concerned, however, that lurking behind the Court's analysis may be the view that, once it has been found that a statute creates some enforceable right, any regulation adopted within the purview of the statute creates rights enforceable in federal courts, regardless of whether Congress or the promulgating agency ever contemplated such a result." *Wright*, 479 U.S. at 438 (O'Connor, J. dissenting).

157. In my view, Professor Bradford C. Mank's insightful analysis of the enforcement of disparate impact regulations under § 1983, written before *Sandoval*, also skips this step. He argues that, "In light of § 1983's presumption in favor of enforcing federal statutory rights, there is no need to prove that Congress specifically intended that a particular statutory right be enforceable under § 1983. Instead, a plaintiff only needs to comply with the three-part test for determining whether a federal right is enforceable under § 1983." Bradford C. Mank, *Using § 1983 to Enforce Title VI's Section 602 Regulations*, 49 KAN. L. REV. 321, 357–58 (2001) (footnotes omitted). While Professor Mank's approach is perhaps how the Supreme Court should have analyzed the question in *Wright*, in my view *Wright* clearly does look into Congressional intent as

swer as to whether or not disparate impact regulations create enforceable rights under § 1983. Plaintiffs can easily argue that Title VI (“the statutory provision”) creates a right to be free from discrimination, which various agencies “define and interpret” to mean a right to be free from programs that result in a disparate racial impact. *Wright* in no way adopts the demanding nexus approach that the Courts of Appeals employed in *Smith*, *Harris*, and *South Camden*. The main question is indeed one of Congressional intent, but the factors that *Wright* emphasized in determining that the intent requirement was satisfied were: (1) that the agency’s interpretation of the statute was valid, and (2) that Congress had since amended the statutory provision without disagreeing with the agency’s interpretation.¹⁵⁸ Both of these factors similarly suggest that disparate impact regulations are a valid expression of Congressional intent under the Civil Rights Act of 1964.

First, while the Supreme Court has indicated it has some doubts about whether disparate impact regulations are a valid interpretation of Title VI, it has explicitly assumed that they are.¹⁵⁹ Second, Congress has clearly amended the Civil Rights Act without overturning those regulations, as Justice Stevens pointed out in an extensive footnote in his *Sandoval* dissent. He noted that, “In addition to numerous other small-scale amendments, Congress has twice adopted legislation expanding the reach of Title VI. See Civil Rights Restoration Act of 1987 . . . (expanding definition of ‘program’); Rehabilitation Act Amendments of 1986 . . . (explicitly ab-

an analytically distinct matter from the analysis of whether the regulation itself meets the three-part test under *Pennhurst* (and later *Blessing*). In trying to persuade courts that § 602 disparate impact regulations give rise to enforceable rights under § 1983, I have argued that advocates should base their arguments rigidly on established Supreme Court precedent.

158. See *Wright*, 479 U.S. 418. There is arguably a third element that the *Wright* court emphasized, which was that HUD had already developed regulations that provided a background rule when Congress enacted the Brooke Amendment. This would clearly distinguish *Wright* from an analysis of disparate impact regulations promulgated pursuant to Title VI, which were passed after the enactment of the underlying statute and do not form any background rule. But the better reading of *Wright* indicates that this factor was not critical, or even significant, to the Court’s conclusion. The Brooke Amendment itself amends an underlying statute—the Housing Act of 1937—and *Wright* suggests that in enacting the Brooke Amendment without disturbing HUD’s interpretation of the word “rent,” Congress essentially ratified HUD’s interpretation of the statute. *Id.* at 430. Similarly, by amending Title VI without disturbing disparate impact regulations, Congress can be seen as having ratified those regulations.

159. See *Sandoval*, 532 U.S. at 275. As the *Sandoval* majority explained,

[W]e must assume for purposes of deciding this case that regulations promulgated under § 602 of Title VI may validly proscribe activities that have a disparate impact on racial groups, even though such activities are permissible under § 601. Though no opinion of this Court has held that, five Justices in *Guardians* voiced that view of the law at least as alternative grounds for their decisions, and dictum in *Alexander v. Choate* is to the same effect. These statements are in considerable tension with the rule of *Bakke* and *Guardians* that § 601 forbids only intentional discrimination, but petitioners have not challenged the regulations here. We therefore assume for the purposes of deciding this case that the DOJ and DOT regulations proscribing activities that have a disparate impact on the basis of race are valid.

Id. at 282–83 (internal citations omitted).

rogating States' Eleventh Amendment immunity in suits under Title VI).¹⁶⁰ Justice Stevens also looked to the legislative histories of these statutes, which provide direct evidence that Congress understood that agencies had issued disparate impact regulations under Title VI, and that such regulations are enforceable by private parties.¹⁶¹

It is also important to note that the reasoning of *Sandoval* itself does not alter this § 1983 analysis. As *South Camden* pointed out, the *Sandoval* majority did stress that there was no evidence Congress intended to create a private cause of action under § 602.¹⁶² However, the inquiry into Congressional intent in determining whether a statute confers a private cause of action is clearly distinct from the inquiry as to whether, combined with its regulations, it creates enforceable rights under § 1983.¹⁶³ Admittedly, in *Gonzaga University v. Doe*, the Supreme Court largely collapsed the implied cause of action and § 1983 inquiry in determining whether a statute confers a private enforcement right.¹⁶⁴ However, no one disputes that Title VI confers such personal rights on litigants; indeed, in *Gonzaga*, the majority specifically referred to Title VI as an example of a statute where Congress had clearly created individual rights.¹⁶⁵ The key issue, then, is whether § 602 disparate impact regulations are a valid administrative application of Title VI, and as such enforceable by private litigants. *Gonzaga*, which focuses only on whether a particular statute creates individual rights in the first place and says nothing about the role of regulations implemented pursuant to a statute, provides no guidance for courts seeking to address this question. Perhaps not surprisingly, then, the two federal courts to confront this issue since *Gonzaga*—including the Tenth Circuit, which in *Robinson* held that disparate impact regulations do give rise to enforceable rights under § 1983—did not even mention *Gonzaga*.¹⁶⁶

The *Sandoval* Court did not lend much weight to the fact that Congress had amended Title VI without overturning many courts' interpretation that the statute granted a private cause of action to enforce § 602 disparate impact regulations. However, Congress's failure to act while amending other portions of the statute does, under *Wright*, suggest Congressional intent to recognize that the regulations are a valid interpretation of the statute, which then create enforceable rights under § 1983 as long as they meet the *Blessing* criteria. Indeed, no court has held that *Sandoval* resolves the question of whether § 602 effects regulations are enforceable under § 1983. Even *South Camden* had to recognize that *Sandoval* left open that issue, and, the most the Third Circuit could argue was that it was following the "teaching of *Sandoval*."¹⁶⁷

160. *Sandoval*, 532 U.S. at 302 n.9.

161. *Id.*

162. 274 F.3d at 789.

163. Mank, *supra* note 157, at 323.

164. *Gonzaga University v. Doe* 122 S. Ct. 2268, 2276 (2002).

165. *See id.* at 2275.

166. *See Robinson*, 295 F.3d 1183 (10th Cir. 2002); *and Gulino v. Board of Education* 236 F. Supp. 2d 314 (S.D.N.Y. 2002).

167. *So. Camden*, 274 F.3d at 788. Emphasis added. In dissent, Judge McKee noted, "I think it noteworthy that my colleagues so readily dismiss statements from our own juris-

Perhaps the Supreme Court will ultimately conclude that the nexus test is the optimal way to examine whether regulations promulgated pursuant to a statute that gives rise to § 1983 rights can themselves create enforceable rights under § 1983. To do so would require that the Court overrule *Wright*, which clearly used a different methodology in addressing that question, and this is a decision for the Supreme Court, not for lower federal courts. As the Supreme Court recently noted,

We do not acknowledge . . . that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent. We reaffirm that “if a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its earlier decisions.”¹⁶⁸

Here, *Wright* has direct application in analyzing whether or not federal regulations create enforceable rights under § 1983. To recapitulate, according to *Wright*, two conditions must be satisfied for regulations to give rise to § 1983 rights. First, the regulation must be a valid interpretation of the statute. Second, Congress’s decision to amend the relevant statute without taking issue with the regulation indicates it understood and did not quarrel with the agency’s interpretation of that statute. Both conditions are clearly met with regard to the disparate impact regulations promulgated under § 602; thus, a fair interpretation of *Wright* acknowledges that disparate impact regulations give rise to enforceable rights under § 1983. Lower federal courts (and state courts) have the duty to give *Wright* its full, proper reading unless and until the Supreme Court garners five voters to overrule that decision. The Court’s utter silence on the relevance of *Sandoval* to § 1983 actions cannot possibly serve as a valid basis

prudence as ‘dicta’ while relying upon dicta from cases that support its analysis and identifying the ‘dicta’ as ‘teachings.’” *Id.* at 799.

168. *Agostini v. Felton*, 521 U.S. 203 (quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484). And, far from overturning *Wright*, recent Supreme Court precedent has continued to suggest that federal regulations can indeed give rise to enforceable rights under § 1983. Thus, in *Suter v. Artist M.*, 503 U.S. 347 (1992), the Court confronted the issue as to whether private individuals had the right to enforce through § 1983 a provision of the Adoption Assistance and Child Welfare Act of 1980 designed to keep families intact. The Court ultimately decided that Congress did not intend to create such a right, as the legislation simply required states to submit a plan to the Secretary of Health and Human Services that made reasonable efforts to keep families together. However, the opinion in no way sought to overrule *Wright*, or for that matter suggest that federal regulations could not be a valid indication of Congressional intent to create an enforceable right under § 1983. Rather, the *Suter* Court stated that the regulations did not clearly impose any duty on the state beyond having their plan approved by HHS: “What is significant is that the *regulations* are not specific and do not provide notice to the States [of specific duties beyond having their plans approved] as a further condition on the receipt of funds from the federal government.” *Id.* at 362 (emphasis added). The regulations issued pursuant to § 602, in contrast, are extremely clear and specific—states and localities cannot enact programs that will have a discriminatory impact if they wish to continue receiving federal funding.

for a lower court to conclude that the Supreme Court has overruled *Wright*.

* * *

Finally, the *Lucero* approach has the added advantage of avoiding a significant non-delegation issue raised by *South Camden*, *Harris* and *Smith*. In *South Camden*, the Court described the disparate impact regulations promulgated under § 602 as follows:

In sum, the regulations, though assumedly valid, are not based on any federal right present in the statute. Thus, this case is very similar to *Smith* and *Harris*. Here, as there, the regulations do more than define or flesh out the content of a specific right conferred upon the plaintiffs by Title VI. Instead, *the regulations implement Title VI to give the statute a scope beyond that Congress contemplated*, as Title VI does not establish a right to be free of disparate impact discrimination.¹⁶⁹

If *South Camden's* analysis is correct, it is difficult to see how the regulations can be valid. As Justice Scalia recently stressed in a majority opinion, "Article I, § 1, of the Constitution vests 'all legislative Powers herein granted . . . in a Congress of the United States.' This text permits no delegation of those powers."¹⁷⁰ To ensure that no delegation of legislative powers has occurred, the Supreme Court requires that, when Congress confers decision-making authority upon administrative agencies, it must set down an "intelligible principle to which the person authorized to [act] is directed to conform."¹⁷¹ It is difficult to understand how disparate impact regulations can both be a legitimate exercise of authority following an intelligible principle laid out by §§ 601 and 602, and simultaneously give those provisions a scope beyond which Congress contemplated. Yet this anomaly is precisely what *South Camden* suggests, as the decision assumed the disparate impact regulations were valid.

IV. A NEW CIVIL RIGHTS RESTORATION ACT

While the Fourth and Eleventh Circuits have not yet addressed the precise question of whether disparate impact regulations promulgated pursuant to § 602 give rise to enforceable rights under § 1983, the odds that courts in those circuits will answer that inquiry affirmatively are admittedly slim. This Note has argued that *South Camden's* error is to employ a methodology for determining whether Congress intended to create § 1983 rights—the "nexus" test—which is at odds with *Wright*. However, once a circuit has chosen to adopt this demanding approach, that circuit will likely conclude that § 602 disparate impact regulations fail the nexus test as these regulations appear to do more than explicate the statutory language of Title VI in the very narrow sense that *Harris* and *Smith* re-

169. *So. Camden*, 274 F.3d at 790 (emphasis added).

170. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001).

171. *Id.*, quoting *J. W. Hampton, Jr., & Co. v. U.S.*, 276 U.S. 394 (1928).

quire.¹⁷² Thus, even if some other Circuits follow the lead of *Lucero* and *Robinson*, the Fourth and Eleventh Circuits will likely conclude that plaintiffs cannot sue to enforce disparate impact regulations via § 1983. And, unfortunately, these two Circuits cover states where a huge percentage of African Americans reside; over 11.5 million of the country's nearly 35 million black citizens live in either the Fourth or Eleventh Circuit. That number reaches over 14 million once the states covered by the Third Circuit are also included. In short, if the Fourth and Eleventh Circuits agree with *South Camden*, as they probably will, over 40% of black Americans will be unable to bring disparate impact suits in federal courts even if every other circuit rejects *South Camden* and follows *Lucero* and *Robinson*.¹⁷³

172. Nevertheless, there is an argument that § 602 effects regulations do meet this test:

Even under the Eleventh Circuit's restrictive test that agency regulations may only 'define' statutory rights that are enforceable under § 1983, Title VI's administrative regulations merely flesh out the anti-discrimination rights Congress established in the statute. . . . [I]n the Eleventh Circuit, the district court in *Sandoval* concluded that section 602 regulations simply "further define" or "flesh out the anti-discrimination right that Congress clearly created in Title VI.

Mank, *supra* note 157, at 380–81. *Cf. also So. Camden*, 274 F.3d at 791, 798 (McKee, dissenting) ("The regulations the *South Camden* plaintiffs are attempting to enforce can also be traced to Title VI. The majority focuses on the fact that § 601 proscribes only intentional discrimination. Nevertheless, disparate-impact regulations may very well reflect an agency's practical considerations and definition of discrimination, just as 'rent' was defined by the Department of Housing and Urban Development in the regulations in *Wright*.")

173. All calculations are based on figures from the United States Census 2000 (2000) available at <http://www.census.gov> (last visited Dec. 30, 2002). In 2000, the number of Americans who identified as black or African American was 34,658,190. There were over 5.8 million individuals who identified black in the states comprising both the Fourth (Maryland, North Carolina, South Carolina, West Virginia and Virginia) and Eleventh (Alabama, Florida, and Georgia) circuits. There were an additional 2.5 million people who identified black in the three states comprising the Third Circuit (Delaware, New Jersey, and Pennsylvania). *Id.* Note also that the Fifth Circuit has "has indicated a willingness to reach the same conclusion" as *Harris, Smith* and *South Camden*. See *Pettys*, *supra* note 155, at 79. *Pettys* notes that, in *Gracia v. Brownsville Hous.*, 105 F.3d 1053, 1057 (5th Cir. 1997), the Court stated: "It is not clear that regulations can be considered 'laws' for purposes of creating a right actionable under section 1983" (citing Justice O'Connor's dissenting opinion in *Wright*). *Pettys*, *supra* note 155, at 79 n.180. The Fifth Circuit encompasses Louisiana, Mississippi, and Texas, where roughly 5 million additional African Americans reside according to the 2000 census. See United States Census 2000 (2000), available at <http://www.census.gov> (last visited Dec. 30, 2002).

There is also one further obstacle to plaintiffs arguing that disparate regulations are enforceable under § 1983. Even if a court decides that disparate impact regulations meet the "enforceable rights" test under § 1983, if it concludes that Title VI has itself provided a comprehensive enforcement scheme, then a § 1983 remedy would still be foreclosed. Indeed, in *Alexander v. Chicago Park District*, 773 F.2d 850 (1985), the Seventh Circuit held that § 602 regulations could not be enforced under § 1983 for precisely this reason. The Seventh Circuit decision on this point appears to be an outlier. In *Powell v. Ridge*, a much more recent case, the Third Circuit explicitly rejected this approach. One commentator has noted that the decision seems to conflict with "subsequent Supreme Court decisions [which] have emphasized that statutory preclusion is an unusual exception to the general presumption that federal rights may be enforced in a § 1983 suit." *Mank*, *supra* note 157, at 368. Federal court opin-

Even worse, given the current ideological make-up of the Supreme Court, it is possible that the Court in coming years will decide to resolve this emerging conflict within the circuits by embracing *South Camden*, notwithstanding the contrary outcome that this Note has suggested is dictated by applying the Court's own analysis *Wright*. Indeed, although the issues raised by *Gonzaga* are distinguishable from those presented in analyzing whether § 602 disparate impact regulations create enforceable rights under § 1983, that decision perhaps suggests that at least some members of the Court might be receptive to the *South Camden* approach.¹⁷⁴

A better ultimate solution, then, is for Congress to overturn *Sandoval* by legislation. As the New York City Committee on Civil Rights recently noted, "The *Sandoval* rule can be easily corrected by legislation, since the decision simply interpreted the language of a federal law, which can be changed."¹⁷⁵ The Committee also recognized that this statutory amendment should not be limited to providing a private right of action to enforce § 602 disparate impact regulations.¹⁷⁶ While the *Sandoval* majority, following past Supreme Court holdings, assumed these regulations are a valid interpretation of § 601, it stated that there was "considerable tension" between that assumption and prior rulings that § 601 forbids only intentional discrimination.¹⁷⁷ Thus, Congress should amend Title VI so that the statute itself forbids covered government entities from engaging

ions on this issue since *Sandoval* have not even cited *Chicago Park District*, and none has suggested that Title VI entails a comprehensive enforcement scheme that forbids enforcing disparate impact regulations through § 1983. See *S. Camden*, 274 F.3d 771 (3d Cir. 2001); *Robinson*, 295 F.3d 1183 (10th Cir. 2002); *Lucero*, 160 F. Supp. 2d 767 (E.D.M. 2001); *Engler*, 188 F. Supp. 2d 730 (2001); *Ceaser v. Pataki*, 2002 U.S. Dist. LEXIS 5098 (S.D.N.Y.); *Gulino v. Board of Education* 236 F. Supp. 2d 314 (S.D.N.Y. 2002); *Lechuga v. Crosley*, 2001 U.S. Dist. LEXIS 23589 (D. Or.). It is also not clear if *Sandoval*'s rejection of a private right of action under § 602 undermines *Chicago Park District*'s analysis even in the Seventh Circuit. If the Seventh Circuit adheres strictly to *Chicago Park District*, however, people of color in the states of Illinois, Indiana, and Wisconsin, including an additional 2,691,369 blacks, will not be able to bring disparate impact suits under § 1983. Statistics calculated from 2000 census data available at <http://www.census.gov> (last visited Dec. 30, 2002).

174. Cf. Derek Black, *Picking up the Pieces after Alexander v. Sandoval: Resurrecting a Private Cause of Action for Disparate Impact*, 81 N.C.L. REV. 356, 364 (2002) ("One could argue that *Gonzaga* is not directly controlling on a Title VI inquiry. In fact, the Court distinguished Title VI from FERPA, stating that unlike Title VI, Congress expressed no intent for any type of cause of action under FERPA. Notwithstanding this distinction, when *Sandoval* and *Gonzaga* are read together, it seems likely the Court would not permit a cause of action to enforce Title VI disparate impact regulations under 1983.")

175. The Committee on Civil Rights, *Salvaging Civil Rights Undermined by the Supreme Court: Extending the Protection of Federal Civil Rights Laws in Light of Recent Restrictive Supreme Court Decisions*, 56 RECORD 510, 529 (2001).

176. *Id.* at 527-28.

177. 532 U.S. at 282. One commentator has concluded that a close reading of "*Sandoval* strongly suggests that a majority of the Court, in a rejection of ostensibly settled precedent, views the adoption of disparate impact regulations as an invalid exercise of administrative power under section 602." John Arthur Laufer, *Note, Alexander v. Sandoval and its Implications for Disparate Impact Regimes*, 102 COLUM. L. REV. 1613, 1614 (2002).

in practices that have the effect of discriminating based on race, color or national origin.¹⁷⁸

The current political climate is admittedly not propitious for legislatively overturning *Sandoval*.¹⁷⁹ Still, while it is unlikely that the current Republican-dominated Congress will pass such legislation, Republicans have voted for civil rights restoration acts in the past, and Republican presidents have signed these laws.¹⁸⁰ As a first step, advocates should at least try to ensure that the importance of overturning *Sandoval* makes it on the radar screen of sympathetic lawmakers. One possibility along these lines is for law school students and faculty to start a petition urging the reversal of *Sandoval* and then present it to groups such as the Congressional Black Caucus and the Congressional Latino Caucus. Black and Latino student organizations, as well as progressive journals and the emerging American Constitution society, could play a crucial role in facilitating such a petition drive.

A related, but potentially far more transformative, avenue for overturning *Sandoval* is to imagine a broad-based, grassroots movement dedicated to restoring racial and class equality in American education. This Note has attempted to situate *Sandoval* in light of a broader attack on the educational opportunities available to black students. In *The Miner's Canary*, Lani Guinier and Gerald Torres argue that well-organized grassroots movements led by people of color, but joined by others, can illuminate and address larger inequalities in our society. The Texas Ten Percent Plan is perhaps the quintessential success story of this approach, which the authors call the "political race project."¹⁸¹ After *Hopwood* eliminated affirmative action at the University of Texas, a coalition of black and Latino activists responded by formulating a plan whereby students in the top ten percent of their high school class would automatically gain admission to the University of Texas. This plan passed the legislature by a single vote, due to the support of conservative rural legislators who realized that their predominately white constituents had also faced systemic

178. The Supreme Court, of course, has held that the Equal Protection Clause only prohibits intentional discrimination. However, Title VI is enacted under Congress's Spending Clause powers rather than its enforcement powers under the Equal Protection Clause. Laufer, *supra* note 177, at 1616, citing *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 598 (1983). Thus, there should be no constitutional bar to Congress making this amendment. *Contrast* *City of Boerne v. Flores*, 521 U.S. 507 (1997) (closely scrutinizing Congressional action under § 5 of the Fourteenth Amendment for congruence and proportionality) *with* *South Dakota v. Dole*, 483 U.S. 203 (1987) (granting Congress broad latitude to regulate states indirectly through the Spending Clause).

179. Kimmel et al., *supra* note 97, at 28 ("Congress is, of course, free to overturn *Sandoval*—as it has done with several other Supreme Court decisions that narrowed the scope of civil rights laws—because the decision involved statutory rather than constitutional interpretation. But this seems unlikely to occur any time in the near future, given the current political climate.") The authors made this point before the Republican victories in the 2002 Congressional elections.

180. Consider, for instance, the Civil Rights Act of 1991, 101 Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended at 42 U.S.C. §§ 2000e-2(k) (2000)). See also *supra* note 160 and accompanying text.

181. GUINIER & TORRES, *supra* note 1, at 14.

barriers to entrance at the University of Texas.¹⁸² The coalition successfully articulated a broad vision of public education that benefited blacks and Latinos but also included within its ambit others who were in fact under-represented in the flagship universities. The coalition's vision redefined who was part of the "public" that should be served by a public institution.

Advocates committed to racial equality in education should likewise seek to reframe controversial issues in order to destabilize deeply held cultural assumptions, such as the widespread notion that we live in a race-neutral meritocracy where individuals who work hard succeed. It is through this culture shifting that we can begin to build multi-racial coalitions at the grassroots level to challenge structural inequalities that limit opportunities for Americans of all races. Moreover, these broad-based coalitions can facilitate lasting reform because they work to modify the perspectives of the citizenry and not just the government. As Tom Stoddard explains in discussing the influence of the original Civil Rights Act:

[T]he Civil Rights Act of 1964 has had such a powerful cultural impact not just because of what it said, but also because of how it came into being. The Act was the product of a continuing passionate and informal national debate of at least a decade's duration . . . over the state of race relations in the United States. The debate took place every day and every night in millions of homes, schools, and workplaces. It is this debate—not the debate in the Congress—that really made the Act a reform capable of moral force. Through a continuing national conversation about race, ordinary citizens (especially white citizens) came to see the subject of race anew.¹⁸³

The discrimination against black students in the American educational system is complex and multi-faceted. But from inequalities in school funding to the misuse of high-stakes tests, many key issues affecting African Americans also disadvantage other students of color as well as poor and working-class whites. The singular importance of education in shaping individuals' ultimate access to social, economic and political opportunities means that vast racial and class inequalities in education are particularly disturbing manifestations of the disconnect between the promise and the reality of American democracy. The response must be commensurate to the problem: civil rights advocates need to galvanize support and begin to think about ways to create a national movement that seeks to address these inequalities using every conceivable tool—from litigation and traditional lobbying of Congress, state legislatures, local governments, and administrative agencies, to the more direct action tactics that characterized the Civil Rights movement. The agenda of this movement would include fundamental reform to school finance schemes, a reexamination of university admissions criteria, changes to tracking

182. See *id.* at 67–74.

183. Thomas B. Stoddard, *Bleeding Heart: Reflections on Using the Law to Make Social Change*, 72 N.Y.U.L. REV. 967, 975–76 (1997). I am indebted to Professor Guinier for alerting me to Mr. Stoddard's analysis.

plans that create segregation within even integrated schools, and an end to discriminatory school discipline and exclusionary policies. Overturning *Sandoval* would be an important aspect of the movement's agenda because it facilitates effective litigation to fight discrimination in each of these areas, but the movement would also seek to respond to these inequalities through innovative political solutions, as advocates did in Texas after *Hopwood*. The political race project that Guinier and Torres articulate provides a promising first step to the creation of such a broad-based grassroots movement.

Hopefully, that step will enable us to build on the steps Dr. Martin Luther King described in the introduction to his classic exploration of the Civil Rights movement, *Why We Can't Wait*. The year was 1963, and Dr. King spoke metaphorically of seeing two black children, one living in poverty in the heart of New York, one living in poverty in the heart of the South:

The boy in Harlem stood up. The girl in Birmingham arose. Separated by stretching miles, both of them squared their shoulders and lifted their eyes toward heaven. Across the miles they joined hands, and took a firm, forward step. It was a step that rocked the richest, most powerful nation to its foundations.¹⁸⁴

It is forty years later, but despite the courageous achievements of the Civil Rights movement, the story is much the same. Black children from New York to Birmingham and beyond are systematically denied the opportunities available to their white peers. Three out of ten black children live in poverty in the richest nation in the history of the world.¹⁸⁵ More black men are in prison than in college. White resistance to desegregation has carried the day, and black children receive starkly separate *and* unequal educational opportunities as we celebrate *Brown's* fiftieth anniversary. Indeed, this essay has sought to demonstrate that the 1990s have witnessed major rollbacks in many of the civil rights gains in education of the previous three decades. I argue that a dramatic response that shifts the cultural assumptions behind these rollbacks is necessary. For all the progress we have made in dismantling the formal legal barriers of Jim Crow, too many children are still living the same story that Dr. King sought to tell forty years ago. It is the story of *Why We Can't Wait*.

184. MARTIN LUTHER KING, JR., *WHY WE CAN'T WAIT* x (2000).

185. According to the United States Bureau of Labor Statistics, whereas 30.2% of blacks under eighteen live in poverty, the number declines to 13.4% for their white counterparts. Statistics available at http://ferret.bls.census.gov/macro/032002/pov/new01_001.htm (last visited Mar. 22, 2003).