Legislating Inclusion

*Lia Epperson**

*[S]egregation now . . . segregation tomorrow . . . segregation forever.***
*The past is never dead. It's not even past.****

Introduction

This article seeks to situate recent jurisprudence on the Constitution's commitment to ending racial segregation in public education in the framework of congressional power to enact enforcement legislation. In previous work, I have examined jurisprudential shifts in recognizing the right to racially integrated education.[1] In recent jurisprudence, a majority of the Supreme Court identified a substantive equality right to eliminate persistent racial isolation and inequality in public education. Specifically, in his sharply worded concurrence in *Parents Involved in Community Schools v. Seattle School District*,[2] Justice Anthony Kennedy found that a "compelling government interest exists in avoiding racial isolation" and that school districts may choose to pursue this interest.[3] Kennedy, with the implicit endorsement of the four dissenting Justices, focused on the broader constitutional ideal of fostering racial inclusion in our nation's schools and highlighted the continued relevance of integration to the promise articulated in *Brown v. Board of Education*.[4]

Existing jurisprudential avenues to address current constitutional violations, however, are limited by the modern anti-classification framework used in adjudicating equal protection claims.[5] I suggest that political branches may have more institutional strength, expertise, flexibility, and enforcement

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** Governor George C. Wallace, The 1963 Inaugural Address (Jan. 14, 1963), *available at* http://www.archives.state.al.us/govs_list/inauguralspeech.html.

*** William Faulkner, Requiem for a Nun (1951).

[1] *See* Lia Epperson, *Equality Dissonance: Jurisprudential Limitations and Legislative Opportunities*, 7 Stan. J. C.R. & C.L. 213 (2011) (examining the doctrinal restraints imposed by the Supreme Court's recent educational equality cases and encouraging legal scholars and advocates to consider congressional solutions to remaining structural racial disparities in education).

[2] 551 U.S. 701 (2007).

[3] *Id.* at 797 (Kennedy, J., concurring) ("A compelling interest exists in avoiding racial isolation, an interest that a school district, in its discretion and expertise, may choose to pursue.").

[4] *Id.* at 788 (referencing Brown v. Bd. of Educ., 347 U.S. 483 (1954)).

[5] *See, e.g.*, Epperson, *Equality Dissonance*, *supra* note 1, at 108 (arguing that the anti-classification model is grounded in the ideal of a "colorblind constitution," which examines with equal suspicion racial classifications aimed at preserving and perpetuating racial subordination and those aimed at remedying past discrimination).

power to pursue racial inclusion in public education.[6] Specifically, I propose that Congress, via Section 5 of the Fourteenth Amendment, should delineate equal protection remedies to address the unique and enduring dilemma of twenty-first century racial isolation and resulting inequality in public education.[7] Though the Supreme Court has issued a series of opinions narrowing congressional power to enact enforcement legislation in recent years,[8] no decisions have addressed congressional enforcement power to legislate at the distinctive intersection of racial equality and educational opportunity.

This article proceeds in four parts. Part I posits Congress has the authority to enact enforcement legislation to alleviate racial isolation in public education. Part II closely examines the scope and contours of congressional enforcement power under Section 5 of the Fourteenth Amendment by analyzing constitutional text and recent Court interpretations of equality and enforcement power. Such analysis highlights Congress's unique power to craft legislation alleviating *de facto* racial segregation[9] and isolation in public schools, institutions integral to shaping our democracy and preparing students to be effective citizens. Part III acknowledges potential judicial constraints posed by the current Court, which underscore the importance of legislative imperatives. Finally, Part IV draws from these doctrinal arguments to offer preliminary considerations on optimal statutory design. I offer some suggestions that may help bridge the divide between our constitutional ideals and the practice of facilitating racial inclusion in public education.

I. Congressional Authority to Enact Legislation to Foster Racially Inclusive Public Education

Congress's constitutional authority to enact legislation fostering racially inclusive public education can take many forms. Theoretically, such congressional power can be found in a number of constitutional provisions, including the Thirteenth Amendment and the Spending[10] and Commerce Clauses of Article I. In 1964, Congress famously used its power under the Commerce Clause to enact the Civil Rights Act.[11] Rather than cloaking the

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[6] *Id.*

[7] I have also argued in earlier work that the desegregative remedy articulated by the judiciary ultimately proved too crude an instrument to address the complex task of "true integration," or integration that includes holistic measures to ensure all students receive the myriad potential short- and long-term benefits of inclusive educational environments. *See* Lia B. Epperson, *True Integration: Advancing* Brown*'s Goal of Educational Equity in the Wake of* Grutter, 67 U. Pitt. L. Rev. 175 (2005).

[8] *See* Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356 (2001); Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000); United States v. Morrison, 529 U.S. 598 (2000); City of Boerne v. Flores, 521 U.S. 507 (1997).

[9] *De facto* racial segregation refers to segregation that is not mandated by the state.

[10] While not strictly viewed as civil rights legislation, Congress passed the No Child Left Behind Act pursuant to its Spending Clause powers.

[11] Pub. L. No. 88-352, 78 Stat. 241 (1964).

legislation in equality and dignity language, an emphasis on congressional commerce power grounded the legislation in such concerns as whether African Americans would be inconvenienced if they traveled across state lines.[12] Thus, to ensure a constitutional remedy for private discrimination, the Civil Rights Act of 1964 sacrificed its grounding in notions of equality. Yet, as Justice Goldberg stated in his concurrence in *Heart of Atlanta Motel v. United States*,[13] the "primary purpose" of the 1964 Civil Rights Act "is the vindication of human dignity and not mere economics."[14]

Section 5 of the Fourteenth Amendment, conversely, is the legislative power that is precisely designed to vindicate human dignity and equality. As such, I argue that Section 5 provides the best means for enacting legislation aimed at reducing racial isolation in education. While practical expediency may have necessitated the use of congressional commerce power in the case of the 1964 Civil Rights Act,[15] congressional action to enforce race-conscious legislation in the domain of schools should not, and need not, take that path.[16] Such legislation should be grounded in the language of equality rather than masking the essence of the constitutional entitlement it seeks to protect. Section 5 of the Fourteenth Amendment serves as the best democratic tool to carry out the judicial expression of equality.

In addition, such proposed legislation would address the intersection of fundamental racial inequality and educational opportunity. While the Court has not found an explicit fundamental right to education under the Equal Protection Clause, education holds a special place of importance in Supreme Court jurisprudence.[17] The Court has held that education is the "very foundation of good citizenship"[18] and is critical to sustaining "our political and cultural heritage."[19] Indeed, education is integral "in maintaining our basic

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[12] *See, e.g.*, S. REP. NO. 872, at 2371 (1964) ("Discrimination or segregation by establishments dealing with the interstate traveler subjects members of minority groups to hardship and inconvenience as well as humiliation, and in that way seriously decreases all forms of travel by those subject to such discrimination.").

[13] 379 U.S. 241 (1964).

[14] *Id.* at 291–92.

[15] Congress expressed concern that if the Act were to be passed solely under Congress's power to enforce the Fourteenth Amendment, those provisions of the Act that barred private discriminatory conduct would be unconstitutional under the Court's ruling in the *Civil Rights Cases*, 109 U.S. 3 (1883) (limiting Congress's ability to use its power under the Reconstruction Amendments to regulate private conduct). For an interesting discussion of the constitutional dialogue between the judiciary and the political branches in delineating the constitutional sources of congressional power to pass the 1964 Civil Rights Act, see Joel K. Goldstein, *Constitutional Dialogue and the Civil Rights Act of 1964*, 49 ST. LOUIS U. L.J. 1095 (2005). *See also* Jack M. Balkin, *The Reconstruction Power*, 85 N.Y.U. L. Rev. 1801, 1802–08 (2010).

[16] *See generally* Goldstein, *supra* note 15.

[17] *See, e.g.*, Bd. of Educ. v. Pico, 457 U.S. 853, 909 (1982) (Rehnquist, J., dissenting) (positing that when the government serves as "educator," it "is engaged in inculcating social values and knowledge in relatively impressionable young people"). *See generally* James E. Ryan, *The Supreme Court and Public Schools*, 86 VA. L. REV. 1335 (2000) (examining application of constitutional principles to schools).

[18] Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).

[19] Plyler v. Doe, 457 U.S. 202, 221 (1982).

institutions" and leaves a "lasting impact of its deprivation on the life of the child."[20] Consequently, courts have long upheld significant federal regulation of public schools.[21] Moreover, the Court has held that Congress may exercise its authority under Section 5 to protect myriad rights that do not find explicit protection in the text of the Constitution.[22] Given that such legislation would touch upon equality and substantive rights that the Court has held to be of extraordinary significance, Congress should have expansive constitutional authority to legislate in this realm. In fact, Congress's Section 5 power should be at its apex when passing legislation to root out the persistent, pervasive malady of racial isolation and segregation and its attendant educational inequities.

II. The Scope of Enforcement Power

The Reconstruction Amendments[23] represent the nation's commitment to the protection of individual rights in the wake of the Civil War. In prohibiting state infringement of equal protection, the Fourteenth Amendment provided a constitutional mandate that facilitated the inclusion of African Americans in the national community. Section 5 of the Fourteenth Amendment provides Congress with "the power to enforce, by appropriate legislation," the provisions of the Fourteenth Amendment.[24] This Section gave Congress significant authority to define those individual rights and create the legislative structure necessary to enforce them. As congressional debates show,[25] congressional enforcement power was subject to the test outlined in *McCulloch v. Maryland*:[26] "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the

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[20] *Id.*

[21] *See generally* Susan H. Bitensky, *Theoretical Foundations for a Right to Education Under the U.S. Constitution: A Beginning to the End of the National Education Crisis*, 86 Nw. U. L. Rev. 550 (1992) (considering ways in which constitutional jurisprudence has implied a right to education and supported extensive educational regulation).

[22] As Justice Marshall stated in his dissent in *San Antonio Indep. Sch. Dist. v. Rodriguez*:

> I would like to know where the Constitution guarantees the right to procreate, or the right to vote in state elections, or the right to an appeal from a criminal conviction. These are instances in which, due to the importance of the interests at stake, the Court has displayed a strong concern with the existence of discriminatory state treatment. But the Court has never said or indicated that these are interests which independently enjoy fullblown constitutional protection.

411 U.S. 1, 100 (1973) (Marshall, J., dissenting) (citations omitted).

[23] U.S. Const. amend. XIII; U.S. Const. amend. XIV; U.S. Const. amend. XV.

[24] U.S. Const. amend. XIV, § 5.

[25] *See* Michael W. McConnell, *Institutions and Interpretation: A Critique of* City of Boerne v. Flores, 111 Harv. L. Rev. 153, 178 n.153 (1997) ("[S]upporters of the Amendment continued to invoke McCulloch in interpreting the reach of Section 5, without any protest from opponents." (citing 2 Cong. Rec. 414 (1874))).

[26] 17 U.S. (4 Wheat.) 316 (1819).

letter and spirit of the constitution, are constitutional."[27] Much of this legislative structure focused on the provision and protection of rights to African Americans.[28] The goal of such enforcement legislation was to ensure that Congress, rather than the judiciary, be tasked with remedying Reconstruction Amendment violations.[29]

While the Supreme Court restricted the scope of congressional enforcement power in the nineteenth century, citing principles of federalism,[30] it continued to articulate the *McCulloch* test for congressional enforcement power.[31] In *Katzenbach v. Morgan*,[32] one of the first key Supreme Court decisions of the twentieth century to examine Congress's Section 5 power, the Court again voiced an expansive reading of congressional power to protect fundamental rights and the rights of traditionally excluded groups.[33] The Warren Court found that Section 5 gave Congress the power to legislate for the "perfect equality of civil rights and equal protection of the laws."[34] The Court explicitly rejected the notion that "an exercise of congressional power under § 5 of the Fourteenth Amendment that prohibits the enforcement of a state law can only be sustained if the judicial branch determines that the state law is prohibited by the provisions of the Amendment that Congress sought to enforce."[35] Such a reading would run counter to "congressional resourcefulness and responsibility" for implementing the Fourteenth Amendment.[36] This constitutional enforcement power, particularly in the safeguarding of rights for minorities, means that Congress can exercise its discretion in determining necessary legislation to secure the guarantees of the Fourteenth

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[27] *Id.* at 421.

[28] Shortly after ratification, Congress enacted the Civil Rights Act of 1866, declaring all persons born in the United States "citizens of the United States" and conferring the rights to, among other things, own property and enter into contracts without racial discrimination. Civil Rights Act of 1866, 42 U.S.C. §§ 1981, 1982 (2000). *See also* An Act to Establish a Bureau for the Relief of Freedmen and Refugees, ch. 90, 13 Stat. 507 (1865).

[29] *See* Cong. Globe, 42d Cong., 2d Sess. 535 (1872).

[30] *See* The Civil Rights Cases, 109 U.S. 3, 13 (1883).

[31] *Id.* at 13–14, 20.

[32] 384 U.S. 641 (1996) (holding that Congress, via Section 5, could prohibit the use of a literacy test, as appropriate legislation to enforce the Equal Protection Clause).

[33] *Id.* at 649 ("By including § 5 the draftsmen sought to grant to Congress, by a specific provision applicable to the Fourteenth Amendment, the same broad powers expressed in the Necessary and Proper Clause.").

[34] *Id.* at 650.

[35] *Id.* at 648.

[36] *Id.*

Amendment.[37] Courts continued to reiterate this expansive understanding of congressional enforcement power through the 1980s.[38]

A. The Sea Change of Boerne*?*

In 1997, however, the Supreme Court decided *City of Boerne v. Flores*,[39] which many perceived to signal a constitutional sea change in the interpretation of the Section 5 power.[40] The Court held that the 1993 Religious Freedom and Restoration Act (RFRA)[41] exceeded Congress's Section 5 power.[42] Congress enacted RFRA in response to *Employment Division v. Smith*,[43] a 1990 Supreme Court opinion that significantly limited the religious freedom protections historically afforded individuals under the First Amendment.[44] RFRA provided a different interpretation of First Amendment protection for religious freedom, one that comported with the prevailing standard prior to *Smith*.

In holding RFRA unconstitutional, the Court retreated from its position in *Katzenbach v. Morgan* that Congress has independent interpretive author-

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[37] *See* South Carolina v. Katzenbach, 383 U.S. 301 (1966) (upholding exercise of congressional enforcement power under § 2 of the Fifteenth Amendment). Courts have treated congressional enforcement power under the Fourteenth and Fifteenth Amendments as coextensive. *See* City of Rome v. United States, 446 U.S. 156, 207 n.1 (1980) (Rehnquist, J., dissenting). In *South Carolina*, the Court found that Congress had enforcement power to enact legislation so long as the rights were a "rational means to effectuate the constitutional prohibition of racial discrimination in voting." 381 U.S. at 324. *See also City of Rome*, 446 U.S. at 175 ("Whatever legislation is appropriate, that is, adapted to carry out the objects the [Civil War] amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power." (quoting *Ex parte* Virginia, 100 U.S. 339, 345–46 (1879))).

[38] *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985). In defining the boundary between congressional remedial power and judicial power to enforce the Constitution:

> Section 5 of the Amendment empowers Congress to enforce [the Equal Protection Clause], but absent controlling congressional direction, the courts have themselves devised standards for determining the validity of state legislation or other official action that is challenged as denying equal protection. The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.

Id. at 439–40.

[39] 521 U.S. 507 (1997).

[40] *See, e.g.*, Linda Greenhouse, *Benchmarks of Justice*, N.Y. Times, July 1, 1997, at A18; Linda Greenhouse, *High Court Voids a Law Expanding Religious Rights*, N.Y. Times, June 26, 1997, at D24.

[41] 42 U.S.C.A. §§ 2000bb–2000bb-4 (2006).

[42] *Boerne*, 521 U.S. at 536.

[43] 494 U.S. 872 (1990).

[44] In *Smith*, the Supreme Court overruled the traditional principle, *see, e.g.*, Sherbert v. Verner, 374 U.S. 398, 403–06 (1963), that facially neutral laws could not be applied to impose substantial burdens on the free exercise of religion unless the state provided a good reason for the burden. Instead, the *Smith* Court upheld state power to deny unemployment compensation to Native Americans who had taken part in a traditional religious ritual that included the drug peyote. 494 U.S. at 886–87.

ity. Instead, the Court distinguished congressional enforcement and interpretive power:

> The design of the Amendment and the text of § 5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the States. Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is. It has been given the power to "enforce," not the power to determine, what constitutes a constitutional violation. Were it not so, what Congress would be enforcing would no longer be, in any meaningful sense, the "provisions of [the Fourteenth Amendment]."[45]

To protect the "vital principles necessary to maintain separation of powers and the federal balance,"[46] the Court set forth a new test for determining the constitutionality of Section 5 legislation: "There must be *congruence and proportionality* between the injury to be prevented or remedied and the means adopted to that end."[47] Absent such a connection, "legislation may become substantive in operation and effect."[48]

One could interpret the scope and breadth of the *Boerne* decision less as a constitutional sea change in the protection of fundamental rights and more as a response to Congress's explicit reversal of prior judicial constitutional interpretation.[49] In addition, *Boerne* may also be distinguished from *Katzenbach v. Morgan* in that, unlike the Voting Rights Act that was at issue in *Morgan*, no facts in the passage of RFRA or its historical background indicated a present pattern of discrimination.[50] In highlighting the distinction between "measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law,"[51] the Court in *Boerne* recognized that Congress "must have wide latitude" with respect to measures that are remedial or prophylactic in nature.[52] Indeed, one reading of *Boerne* suggests its limiting language does not apply to legislation to enforce voting rights, nor does it apply more broadly to legislation directly

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[45] *Boerne*, 521 U.S. at 508.
[46] *Id.* at 536.
[47] *Id.* at 508 (italics added).
[48] *Id.* at 520. Practitioners, policymakers, and scores of academic commentators have expressed concern over a narrowing of congressional authority under Section 5 in part because of the Court's 1996 pronouncement that Congress may only abrogate states' immunity from suits in federal court via unequivocal language in legislation passed pursuant to a valid exercise of Section 5 power. *See also* Seminole Tribe v. Florida, 517 U.S. 44, 47 (1996) ("[N]otwithstanding Congress' clear intent to abrogate the States' sovereign immunity, the Indian Commerce Clause does not grant Congress that power."). In *Seminole Tribe*, the Court held that congressional power to "regulate commerce with foreign nations, and among the several states, and with the Indian tribes," under Article I, Section 8, Clause 3 did not include congressional authority to grant federal jurisdiction over an unconsenting state. *Id.*
[49] *See Boerne*, 521 U.S. at 508, 536.
[50] *Id.* at 530.
[51] *Id.* at 519.
[52] *Id.* at 519–20.

enforcing civil rights for racial minorities. As one federal district court noted, "the basic concerns animating . . . *Boerne* . . . do not apply to legislation designed to prevent . . . racial discrimination—the precise evil addressed by the Civil War Amendments . . . ."[53] Consequently, congressional authority to implement a remedial and prophylactic measure for the reduction and avoidance of racial isolation in public education should be broad.

Interestingly, the *Boerne* Court made clear that Congress may go beyond the judicial articulation of constitutional rights when enacting legislation pursuant to Section 5: "Legislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into 'legislative spheres of autonomy previously reserved to the States.'"[54] On its face, this language suggests Congress may have expansive authority to enact remedial legislation to reduce racial isolation in schools. The Court, however, tempered such language by requiring "congruence and proportionality" between the prevention or remedying of an injury and the means adopted.[55] The RFRA, the Court held, provided no such congruity.

In the five years following *Boerne*, the Supreme Court continued to diminish congressional enforcement power under Section 5 in a series of cases. In *Kimel v. Florida Board of Regents*,[56] *United States v. Morrison*,[57] and *Board of Trustees of University of Alabama v. Garrett*,[58] the Court struck down legislation as beyond the scope of congressional enforcement power under Section 5 of the Fourteenth Amendment. These cases prompted questions about Section 5's continued viability as a mechanism for practical implementation of constitutional remedies to protect individual rights.[59] Interestingly, none of these cases concerned the scope of enforcement legislation aimed at state conduct that affected a suspect class or, like in *Boerne*, protected a fundamental value.[60]

In *Kimel v. Florida Board of Regents*,[61] the Court held that the Age Discrimination in Employment Act, which allowed individuals to seek monetary relief from states for age discrimination,[62] exceeded the scope of Con-

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[53] Nw. Austin Mun. Util. Dist. No. One v. Mukasey, 573 F. Supp. 2d 221, 242–43 (D.D.C. 2008), *rev'd and remanded on other grounds sub nom.* Nw. Austin Mun. Util. Dist. No. One v. Holder, 129 S. Ct. 2504 (2009).

[54] *Boerne*, 521 U.S. at 518 (quoting Fitzpatrick v. Bitzer, 427 U.S. 445, 455 (1976)).

[55] *Id.* at 520.

[56] 528 U.S. 62 (2000).

[57] 529 U.S. 598 (2000).

[58] 531 U.S. 356 (2001).

[59] *See, e.g.*, Sylvia A. Law, *In the Name of Federalism: The Supreme Court's Assault on Democracy and Civil Rights*, 70 U. CIN. L. REV. 367 (2002).

[60] Although *Boerne* concerned religious freedom, the nature of the legislation was arguably *sui generis*. The case concerned congressional power to interpret, not enforce, the provisions of the Fourteenth Amendment. *Boerne*, 521 U.S. at 536.

[61] 528 U.S. 62 (1999).

[62] The Age Discrimination in Employment Act of 1967 prohibits an employer from refusing or failing "to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment,

gress's enforcement power under Section 5. The Court struck down the Act because it went beyond the scope of congressional enforcement power by offering heightened protection for age discrimination. Under the equal protection clause, age is not a suspect classification.[63]

In *United States v. Morrison*,[64] the Court held that the federal Violence Against Women Act[65] exceeded Congress's Section 5 power on the ground that it regulated private conduct.[66] While the legislation at issue targeted violence motivated by gender,[67] a quasi-suspect classification, the Court found Congress had exceeded its Section 5 authority in passing legislation that targeted private conduct.[68] Similar to the legislation in *The Civil Rights Cases*,[69] such action is beyond the scope of the Fourteenth Amendment. While Congress amassed a substantial legislative record documenting "gender-based disparate treatment by state authorities," the Court held that the legislation failed the *Boerne* congruence and proportionality test because the remedy held private individuals, rather than the "culpable state official," liable.[70]

One year later, the Court in *Board of Trustees of the University of Alabama v. Garrett*[71] held that Title I of the Americans with Disabilities Act (ADA),[72] which allowed disabled individuals to sue states for money damages for violation of equal protection rights, exceeded Congress's Section 5 power.[73] The legislation at issue in *Garrett* suffered a similar fate to the Act in *Kimel.* The Court held that Congress could not impose a heightened level of scrutiny for disability discrimination, which has not been recognized as a suspect classification. By rendering illegal a broad swath of state conduct[74]

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because of such individual's age." 29 U.S.C. § 623(a)(1) (2006). In 1974, Congress included state governments in the definition of "employer." *Kimel*, 528 U.S. at 68.

[63] *Kimel*, 528 U.S. at 83.

[64] 529 U.S. 598 (2000).

[65] 42 U.S.C. § 13981 (2000).

[66] *Morrison*, 529 U.S. at 599 ("[T]he [Fourteenth] Amendment prohibits only state action, not private conduct.").

[67] The Violence Against Women Act of 1994 granted a federal civil remedy to victims of gender-motivated violence. Subsection (c) provided that "[a] person (including a person who acts under color of any statute, ordinance, regulation, custom, or usage of any State) who commits a crime of violence motivated by gender . . . shall be liable to the party injured . . . ." 42 U.S.C. § 13981(c) (2000).

[68] *Morrison*, 529 U.S. at 620–24.

[69] 109 U.S. 3 (1883).

[70] *Morrison*, 529 U.S. at 624–25.

[71] 531 U.S. 356 (2001).

[72] 42 U.S.C. §§ 12101-12213 (1994).

[73] *Garrett*, 531 U.S. at 374. *See also* Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999) (concerning Congress' power to craft legislation protecting property rights).

[74] The ADA included language prohibiting states and other employers from "discriminat[ing] against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a).

that exceeded what is constitutionally required under rational basis review,[75] the Court held that provisions of the ADA overstepped Congress's Section 5 authority.

B. Enforcing the Heart of Equal Protection

These recent changes in legal doctrine affecting congressional authority have not limited Section 5 power to legislate in the important context of fundamentally protected rights and the protection of suspect classifications. Even in striking down the provision at issue in *Kimel*, the Court noted that Congress retains broad authority under Section 5 "both to remedy and to deter violation of rights guaranteed" under the Fourteenth Amendment "by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text."[76] In a more recent series of cases that touched upon constitutional protections of fundamental rights and suspect classifications, the Supreme Court upheld congressional enforcement power.[77]

In *Nevada Department of Human Resources v. Hibbs*,[78] the Court found the Family and Medical Leave Act (FMLA)[79] involved an appropriate use of congressional enforcement power pursuant to the Equal Protection Clause.[80] The FMLA created a private right of action for equitable and monetary relief against state agencies and other employers who denied or interfered with those rights guaranteed under the legislation.[81] In applying the *Boerne* congruence and proportionality test, the Court identified the constitutional right at issue as the right "to be free from gender-based discrimination in the workplace."[82] The Court noted that gender-based classifications receive heightened scrutiny under well-established Fourteenth Amendment jurisprudence.[83] It also likened the "difficult and intractable proble[m]" addressed by the FMLA to the voting rights issues of *Katzenbach v. Morgan*.[84] Ultimately, the Court held the FMLA constituted sufficiently proportional pro-

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[75] *Garrett*, 531 U.S. at 372. As in *Kimel*, the Court highlighted the ADA's deficiencies by referencing the 1965 Voting Rights Act at issue in *Morgan*. *Id.* at 373.

[76] Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 81 (2000) ("Congress' § 5 power is not confined to the enactment of legislation that merely parrots the precise wording of the Fourteenth Amendment.") (citation omitted).

[77] *See* United States v. Georgia, 546 U.S. 151 (2006); Tennessee v. Lane, 541 U.S. 509 (2004); Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721 (2003).

[78] 538 U.S. 721 (2003).

[79] 29 U.S.C.A. §§ 2601–2654 (2006).

[80] *Hibbs*, 538 U.S. at 724–27.

[81] The family-care provision of the FMLA requires employers to provide employees with up to twelve weeks of unpaid leave annually. 29 U.S.C.A. § 2612(a)(1)(C) (2006). At issue was whether an "individual [could] sue a State . . . for violation of" the family-care provision. *Hibbs*, 538 U.S. at 725.

[82] *Hibbs*, 538 U.S. at 728.

[83] *Id.*

[84] *Id.* at 737 (citation omitted).

phylactic legislation. It is worth noting that the remedies available under the FMLA exceed those available under existing civil rights legislation.[85]

One year after *Hibbs*, the Court in *Tennessee v. Lane*[86] upheld a requirement in Title II of the ADA that protected the fundamental right of access to the courts.[87] The Court's analysis in *Lane* is particularly enlightening as to the question of congressional power. Like *Garrett*, the case examined the constitutionality of provisions of the ADA. Yet, the *Lane* Court defined the protected constitutional right at issue differently, and in doing so found Title II of the ADA to be a valid exercise of congressional enforcement power.[88] Unlike Title I, Title II "seeks to enforce a variety of other basic constitutional guarantees, infringements of which are subject to more searching judicial review" than disability discrimination.[89] In defining the right at issue as one that courts have repeatedly afforded greater judicial protection, the Court appeared to give Congress wider berth to enact prophylactic legislation.[90]

In referencing such historical treatment,[91] the Court noted that the congressional record reflected "a backdrop of pervasive unequal treatment in the administration of state services and programs, including systematic deprivations of fundamental rights."[92] The Court, in recognizing the importance of the right of access to the courts, found instances of discrimination across a spectrum of activities beyond judicial administration.[93] In addition, the Court looked outside the four corners of the legislative record to find support for the Act.[94] In dicta, the Court also remarked that evidence of discrimina-

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[85] Title VII of the 1964 Civil Rights Act only prohibits discrimination in the administration of leave benefits but offers no method for preventing such discrimination. 42 U.S.C. § 2000e-2(a) (2006). *See Hibbs*, 538 U.S. at 737–38.

[86] 541 U.S. 509 (2004)

[87] *Id.* at 533 (finding Title II of the ADA "a reasonable prophylactic measure, reasonably targeted to a legitimate end").

[88] *Id.*

[89] *Id.* at 522–23 (citing Dunn v. Blumstein, 405 U.S. 330, 336–37 (1972); Shapiro v. Thompson, 394 U.S. 618, 634 (1969); Skinner v. Okla. *ex rel.* Williamson, 316 U.S. 535, 541 (1942)).

[90] *Id.* at 528–29 ("We explained [in *Hibbs*] that because the FMLA was targeted at sex-based classifications, which are subject to a heightened standard of judicial scrutiny, it was easier for Congress to show a pattern of state constitutional violations than in *Garrett* or *Kimel*, both of which concerned legislation that targeted classifications subject to rational-basis review.") (internal quotations omitted).

[91] *Id.* at 523–24 (commenting that congressional enforcement authority is "judged with reference to the historical experience which [Title II] reflects") (citing South Carolina v. Katzenbach, 383 U.S. 301, 308 (1966)).

[92] *Id.* at 524.

> The long history of unequal treatment of disabled persons in the administration of judicial services has persisted despite several state and federal legislative efforts to remedy the problem. Faced with considerable evidence of the shortcomings of these previous efforts, Congress was justified in concluding that the difficult and intractable problem of disability discrimination warranted added prophylactic measures.

Id. at 511(citing Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721 (2003)).

[93] *Id.* at 527–29.

[94] *Id.*

tion need not be limited to state actors and may include actions by lower level government entities[95] and private actors.[96] Finally, the Court noted that Congress has authority to ban conduct that has a discriminatory impact, even in the absence of evidence of a discriminatory motive.[97]

In a powerful dissent in *Lane*, Justice Scalia stated that he believed the Section 5 power should be confined to statutes that provided causes of action for judicially articulated constitutional rules or that would directly facilitate judicial enforcement.[98] With respect to legislation remedying racial discrimination, however, Scalia announced he would apply a version of the relaxed standard set forth in *Katzenbach v. Morgan*.[99] Scalia attributed this reasoning to the Fourteenth Amendment's original concern for racial equality[100] and emphasized that any such legislation could not "violate other provisions" of the Constitution.[101]

Of course, one may question what constitutes current evidence of racial discrimination per Scalia's analysis. Race-conscious policies designed to ameliorate persistent structural racial and social inequities in education may not easily fit into Scalia's conception of valid Section 5 legislation in *Lane*.[102] In his more recent concurrence in the employment case *Ricci v. DeStefano*,[103] Scalia suggested that some measures to reduce racial disparities may not survive constitutional muster.[104] In *Ricci*, the Court held that the city of New Haven, Connecticut violated Title VII of the 1964 Civil Rights Act's ban on intentional discrimination by refusing to certify results of a firefighter promotion examination after discovering that the process had a severely adverse statistical impact on African-American firefighters.[105] Scalia noted the seeming incongruity between the Equal Protection Clause, which prohibits the federal government "from discriminating on the basis of race," and dis-

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[95] *Id.* at 527 n.16 ("[O]ur cases have recognized that evidence of constitutional violations on the part of nonstate governmental actors is relevant to the § 5 inquiry. . . . [M]uch of the evidence in *South Carolina v. Katzenbach* . . . involved the conduct of county and city officials, rather than the States.") (citation omitted).

[96] *Id.* (noting that "the evidence before the Congress that enacted the FMLA related primarily to the practices of private-sector employers and the Federal Government" (citing *Hibbs*, 538 U.S. at 730–35)).

[97] *Id.* at 520 ("When Congress seeks to remedy or prevent unconstitutional discrimination, § 5 authorizes it to enact prophylactic legislation proscribing practices that are discriminatory in effect, if not in intent, to carry out the basic objectives of the Equal Protection Clause.").

[98] *Id.* at 554–65 (Scalia, J., dissenting).

[99] *Id.* at 561–63.

[100] *Id.*

[101] *Id.* at 563–65.

[102] *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 346–49 (2003) (Scalia, J., concurring in part and dissenting in part) (discussing the affirmative action admission policy at issue).

[103] 129 S. Ct. 2658 (2009).

[104] *Id.* at 2682 (Scalia, J., concurring) ("Title VII's disparate-impact provisions place a racial thumb on the scales, often requiring employers to evaluate the racial outcomes of their policies, and to make decisions based on (because of) those racial outcomes. That type of racial decisionmaking is . . . discriminatory.").

[105] *Id.* at 2677. The Court rejected the city's claim that its refusal to certify exam results was mandated by Title VII's disparate impact doctrine, which prohibits the use of many written tests with such disparate effects. *Id.* at 2664, 2673; *see* 42 U.S.C. § 2000e-2(k) (2006).

parate impact laws like Title VII that "mandat[e] that third parties—*e.g.*, employers, whether private, State, or municipal—discriminate on the basis of race."[106] Some have argued that Scalia's opinion in *Ricci* portends the Court's dismantling of voluntary employer measures to remedy disparate impact violations.[107] Even if this were the case, broad voluntary measures to foster racial inclusion in education may be distinguished. As Chief Justice Roberts stated in the *Ricci* oral argument, the *Parents Involved* plurality and concurrence agreed that some actions aimed at eliciting racial integration, such as drawing attendance zone lines and strategic site selection, may not trigger strict scrutiny, because they do not classify individual students on the basis of race.[108]

III. Current Judicial Constraints and Legislative Imperatives

In its examination of Section 5 power to protect fundamental rights and suspect classes, the Court has continued to underscore Congress's substantial authority. *Hibbs* and *Lane* suggest that to survive *Boerne*'s congruence and proportionality requirements, such legislation need not directly target adjudicated constitutional violations. The FMLA at issue in *Hibbs*, for example, provided remedies beyond existing civil rights legislation.[109] In *Lane*, the Court found support for Title II of the ADA outside the legislative record provided and in instances without evidence of a discriminatory motive.[110] It is worth noting, however, that the wide latitude the majority afforded in *Hibbs* and *Lane* may not be easily replicated given the changing composition of the Court. Since 2004, Chief Justice Roberts and Justices Samuel Alito, Sonia Sotomayor, and Elena Kagan have replaced Justices Rehnquist, O'Connor, Souter, and Stevens, respectively; the former Justices all voted to uphold the policies at issue in those cases.[111] While the replacement of Justices Souter and Stevens with Justices Sotomayor and Kagan may not portend a jurisprudential shift, the addition of Chief Justice Roberts and Justice Alito may augur more considerable changes. Roberts replaced Rehnquist, the author of the majority opinion in *Hibbs*, and Alito replaced O'Connor, the author of the majority opinion in *Lane*. In addition, while Justice Kennedy offered hopeful language in his *Parents Involved* concurrence, he joined the dissent in *Lane* and *Hibbs*. One could argue, however, that some

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[106] *Ricci*, 129 S. Ct. at 2682 (Scalia, J., concurring).

[107] *See, e.g.*, Richard Primus, *The Future of Disparate Impact*, 108 Mich. L. Rev. 1341, 1385 (2010) (noting Scalia's contention that "the war between disparate impact and equal protection will be waged sooner or later, and it behooves us to begin thinking about how—and on what terms—to make peace between them." (quoting *Ricci*, 129 S. Ct. at 2683 (Scalia, J. concurring))).

[108] Transcript of Oral Argument at 54, *Ricci* 129 S. Ct. 2658 (Nos. 07-1428, 08-328), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/07-1428.pdf.

[109] Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 738 (2003).

[110] Tennessee v. Lane, 541 U.S. 509, 519, 528–30 (2004).

[111] Justice Rehnquist did not, however, vote to uphold the policy at issue in *Lane*. *See id.* at 538.

of Kennedy's more recent jurisprudence suggests an evolving understanding of issues of fundamental racial inequality and access to opportunity.[112] His opinion in *Parents Involved* and his recent voting rights jurisprudence evince a more nuanced awareness of structural racial inequities and the relevance of racial identity and dynamics than in previous decisions.[113] Kennedy, with the implicit endorsement of the four dissenting Justices, has clearly found a compelling government interest in avoiding racial isolation in schools, regardless of whether such isolation is the result of a discriminatory motive or more complex structural inequities.[114] Moreover, he has called on the legislative and executive branches to go forth and craft remedial policies.[115] As such, it is certainly possible that he could uphold Congress's authority to craft carefully tailored legislation to address *de facto* racial segregation in schools.[116]

Since *Boerne*, the Court has not addressed the scope of congressional enforcement power in areas that touch on fundamental racial inequality. In 2009, the Court considered congressional enforcement power under the Fifteenth Amendment to enact the Voting Rights Act of 1965,[117] but unanimously applied the principle of constitutional avoidance to refrain from deciding whether the preclearance requirements of Section 5 of the Voting Rights Act exceeded Congress's powers.[118] In dicta, the Court referenced the need identified in post-*Boerne* cases for legislation that is designed to address recent patterns or practices of discrimination.[119] The Court suggested that the Voting Rights Act raises serious constitutional concerns in that it "imposes current burdens and must be justified by current needs."[120] The ruling is instructive insofar as it hints at the level of evidence of contempo-

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[112] *See supra* Part I.

[113] *See, e.g.*, Heather K. Gerken, Comment, *Justice Kennedy and the Domains of Equal Protection*, 121 HARV. L. REV. 104 (2007) (discussing the evolution of Kennedy's equal protection jurisprudence in *Parents Involved* and *League of United Latin Am. Citizens (LULAC) v. Perry*, 548 U.S. 399 (2006)). While Justice Kennedy has historically eschewed the use of race in redistricting, he objected to the dismantling of a majority-minority district in *LULAC* on the "rather remarkable ground that the Latinos mobilizing there 'had found an efficacious political identity,'" *id.* at 105 (quoting *LULAC*, 548 U.S. at 435), which along with Kennedy's concurrence in *Parents Involved* supporting some race-conscious measures to alleviate racial isolation in schools, "run directly contrary to Justice Kennedy's prior equal protection jurisprudence," *id.* (citing Miller v. Johnson, 515 U.S. 900, 911–14 (1995); Grutter v. Bollinger, 539 U.S. 306, 389 (2003) (Kennedy, J., dissenting)).

[114] Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., 551 U.S. 701, 798 (2007) (Kennedy, J., concurring).

[115] *Id.* at 789–90.

[116] The likelihood of such legislation withstanding judicial review depends in large part on its language and design. *See infra* Part IV.

[117] Nw. Austin Mun. Util. Dist. No. One v. Holder, 129 S. Ct. 2504 (2009).

[118] *Id.* at 2513.

[119] *Id.* at 2525.

[120] *Id.*

rary discrimination the Roberts Court may require to uphold congressional enforcement legislation intruding upon state sovereignty.[121]

The aforementioned adjudicatory considerations of the reach of equal protection indicate that carefully tailored race-conscious legislation to eliminate racially isolated schools and address broad-based racial inequality in educational opportunity may be well within the Supreme Court's construction of congressional enforcement power under Section 5. Proposed legislation may be designed as a constitutional response to address the educational inequality facing racial minorities, which falls into the type of remedial legislation for the protection of traditionally excluded groups that the Court is more likely to uphold. Moreover, as discussed above, the nature of the legislative branch is that it does not suffer from the same constraints as the judiciary. As an institution, it is designed to gather facts from a broad range of constituents across the nation, the very data that would be necessary to develop appropriate remedial and prophylactic legislation addressing the compelling interest in alleviating persistent racial isolation in education.

IV. Statutory Design Considerations

In the wake of narrowed judicial avenues to remedy the structural racial inequality in education, Congress may be better situated to create a meaningful response. First, Congress has a clear responsibility under Section 5 of the Fourteenth Amendment to enforce racial equality. In addition, such responsibility is especially critical in the domain of education.[122] Given the text, history, and structure of congressional enforcement power under Sec-

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[121] Interestingly, the lower court's opinion stresses that post-*Boerne* precedent dictates "the greater the level of scrutiny and the stronger the record of [Fourteenth Amendment] violations, the more deference Congress deserves in crafting enforcement schemes that may 'prohibit[ ] conduct which is not itself unconstitutional and intrude into legislative spheres of autonomy previously reserved to the states.'" Nw. Austin Mun. Util. Dist. No. One v. Mukasey, 573 F. Supp. 2d 221, 269 (D.D.C. 2008) (quoting City of Boerne v. Flores, 521 U.S. 507, 530 (1997)). As such, the court held that the 2006 legislative record reauthorizing the Voting Rights Act provided sufficient evidence of contemporary discrimination to uphold the legislation as a valid exercise of congressional enforcement power. *Id.* at 265.

[122] It should be noted that Congress has passed a number of statutes that address the provision of education, which civil rights practitioners have used to advocate for racial equality in education. For a discussion of the role of Title VI of the 1964 Civil Rights Act in furthering school integration, see Lia Epperson, *Undercover Power: Examining the Role of the Executive Branch in Determining the Meaning and Scope of School Integration Jurisprudence*, 10 Berkeley J. Afr.-Am. L. & Pol'y 146 (2008). *See also* Epperson, *Equality Dissonance*, *supra* note 1 (discussing No Child Left Behind; General Education Provision Act; Magnet Schools Assistance Program; and Emergency School Aid Act of 1972, which offered funding to help "eliminate[ ] racial segregation and discrimination" in elementary and secondary schools, but ended with the passage of the l981 Omnibus Budget Reconciliation Act under President Ronald Reagan). For a discussion of the Emergency School Aid Act of 1972, see Gary Orfield, *Desegregation and the Politics of Polarization*, *in* Congressional Power: Congress and Social Change 173 (1975). The fact remains, however, that Congress has not passed broad-based legislation to effectuate the constitutional ideal of remedying *de facto* racial isolation and segregation as outlined by Justice Kennedy in *Parents Involved*.

tion 5 of the Fourteenth Amendment, Congress should have broad power to establish national standards to protect basic educational rights and solve persistent racial inequality. From a practical perspective, however, such policies might be strongest if designed with a keen awareness of judicially defined limits on congressional enforcement power. Statutory design helps determine the probability of such legislation withstanding judicial scrutiny. The principles of flexibility and fostering local choice in creating remedies should guide the creation of statutory language to ameliorate racial inequality and promote racial inclusion in public education.

To stand on the strongest footing, proposed legislation at the intersection of racial equality and education should be designed with an understanding of the Supreme Court's narrower "congruence and proportionality" test set forth in *Boerne*.[123] To craft legislation that comports with the *Boerne* requirement of congruence and proportionality, legislators may need to clearly define the remedial and/or prophylactic purpose of the statute. If the statute's purpose is to remedy existing racial isolation and avoid continuing isolation, the legislation will be well within the definition of constitutionally authorized remedial or prophylactic legislation.[124] Yet, the question of how far such legislation should go in reaching this goal raises more complicated statutory questions. For example, such legislation may provide constitutional protection for ongoing voluntary integration efforts by school districts like Jefferson County, Kentucky, a district committed to creatively working to eliminate racial isolation even in the wake of the Supreme Court's decision striking down its previous policy. In addition, legislation might go further and articulate a broad directive to prod recalcitrant, less informed, or less aware districts to follow suit and begin to craft measures to foster racial integration.

This article does not purport to answer all of the questions raised by suggesting that Section 5 serve as the vehicle for federal legislation addressing *de facto* racial segregation in education. Rather, I offer some broad suggestions for ways in which lawmakers might conceive of maximizing the potential of a federal legislative structure aimed at ameliorating racial isolation and inequality in education. Such suggestions focus on three substantive areas: (1) the use of statutory language mirroring integration language in the fair housing context; (2) data collection to support legislation and to

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[123] The *Boerne* test requires courts to (1) identify the scope of the constitutional right at issue, and the appropriate level of judicial scrutiny for the right that Congress aims to enforce; (2) examine the wrong that Congress intended to remedy; and (3) determine whether the legislation to remedy and prevent violations of the protected right is congruent and proportional to the record Congress developed and to the risk of future constitutional harm. City of Boerne v. Flores, 521 U.S. 507, 529–34 (1997).

[124] Note that some successful bipartisan legislation was enacted as consciously "corrective" civil rights legislation. *See, e.g.*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009); Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (enacted to change Supreme Court rulings on employment discrimination).

provide information on successful models of racially integrated education; and (3) implementing such legislation through a principle of shared burden.

A. Coupling the Fair Housing Analogy With Clear Enforcement Mechanisms

The aforementioned concerns regarding statutory language suggest that congressional efforts to further racial inclusion may be on stronger footing when such legislation does not require students to be individually classified by race or ethnicity. The context of fair housing provides an interesting model. The Fair Housing Act of 1968[125] requires federal government agencies and the programs and activities they fund to be operated in a manner that *affirmatively furthers* fair housing.[126] Federal courts have repeatedly held that § 3608 reflects a congressional "desire to have [the U.S. Department of Housing and Urban Development (HUD)] use its grant programs to assist in ending discrimination and segregation . . . ."[127] Section 3608 imposes an affirmative obligation on HUD and its grantees to ensure that federal housing and community development funds are used to reduce rather than perpetuate racial segregation.[128] In fact, courts have held that in determining site selection of new schools or attendance zone lines, "[HUD cannot] remain blind to the very real effect that racial concentration has had in the development of urban blight . . . [and] must utilize some institutionalized method whereby, in considering site selection or type selection, it has before it the relevant racial and socio-economic information necessary for compliance with its duties under the 1964 and 1968 Civil Rights Acts."[129] Interestingly, congressional language affirmatively furthering fair housing has been one of the few race-conscious policies to remain relatively unscathed in the more recent proliferation of "reverse discrimination" lawsuits in the domains of education, public contracting, employment, and voting rights.[130] Rather, in recent litigation, section 3608 has provided a mechanism to address entrenched residential segregation and provide a legal hook for promoting racially inclusive housing opportunities.[131]

Language in the education context might read as follows: *Within the limitations set forth by the Constitution, this Act shall require states to af-*

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[125] 42 U.S.C. §§ 3601–3631 (2006).

[126] *Id.* at § 3608(d).

[127] NAACP v. Sec'y of Hous. and Urban Dev., 817 F.2d 149, 155 (1st Cir. 1987).

[128] *See* Otero v. N.Y.C. Hous. Auth., 484 F.2d 1122, 1134 (2d Cir. 1973).

[129] Shannon v. HUD, 436 F.2d 809, 820–21 (3d Cir. 1970). For a discussion of the legislative history, interpretation, and application of Section 3608, see Florence Wagman Roisman, *Affirmatively Furthering Fair Housing in Regional Housing Markets: The Baltimore Public Housing Desegregation Litigation*, 42 WAKE FOREST L. REV. 333 (2007) (discussing Thompson v. HUD, 348 F. Supp. 2d 398, 461 (D. Md. 2005)).

[130] *See* Philip Tegeler, *The Future of Race-Conscious Goals in National Housing Policy*, *in* PUBLIC HOUSING AND THE LEGACY OF SEGREGATION 145–69 (Margery Austin Turner et al. eds., 2009).

[131] *See, e.g.*, United States *ex rel.* Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester Cnty., 668 F. Supp. 2d 548 (S.D.N.Y. 2009); *Thompson*, 348 F. Supp. 2d 398.

firmatively further the compelling government interest in alleviating racial isolation in the provision of public education. While requiring states to "affirmatively further" racially integrated education is a worthy goal, it will need strong enforcement language to work effectively. In addition, clear statutory language conferring rulemaking and regulatory authority to an administrative agency may help insulate legislation from judicial attack.[132] Such enforcement, I suggest, should go beyond requiring integrative efforts as a precondition of the receipt of federal funds by states. Rather, such legislation should explicitly include a private right of action for parties to sue for equitable relief if states fail to take measures to affirmatively reduce racial isolation in schools.[133] Corrective legislation addressing the ability of private parties to bring claims offers an important means of ensuring those

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[132] In *Smith v. City of Jackson*, for example, Justice Scalia deferred to agency interpretation of the Age Discrimination in Employment Act. 544 U.S. 228, 243 (2005) (Scalia, J., concurring) ("This is an absolutely classic case for deference to agency interpretation. The Age Discrimination in Employment Act . . . confers upon the [Equal Employment Opportunity Commission] authority to issue such rules and regulations as it may consider necessary or appropriate for carrying out the ADEA.") (citations and quotations omitted).

[133] Since the Court's 1995 decision in *Seminole Tribe v. Florida*, 517 U.S. 44 (1996) (holding that Congress could not use its Article I powers to subject states to suit in federal court absent the states' consent), the Court has used the Eleventh Amendment to limit the reach of federal civil rights laws. *See, e.g.*, Alden v. Maine, 527 U.S. 706 (1999) (holding that Congress could not use its Article I powers to subject states to private suits in their own courts); Fl. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999) (Congress' explicit abrogation of states' sovereign immunity under the Patent and Plant Variety Protection Remedy Clarification Act and the Trademark Remedy Clarification Act exceeded its Section 5 authority). Under the text of the Eleventh Amendment, "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI. While such decisions have hindered the ability to sue states for money damages absent a valid exercise of Congress's Section 5 authority, such limitations have not hindered the ability of individuals to seek equitable relief from state officials in other ways. For a discussion, see, e.g., John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47 (1998); John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87 (1999); Henry Paul Monaghan, Comment, *The Sovereign Immunity "Exception,"* 110 HARV. L. REV. 102 (1996). Specifically, absent valid Section 5 legislation abrogating state sovereign immunity, private individuals may still sue state officials either under the fiction for injunctive relief, *see Ex parte* Young, 209 U.S. 123 (1908), or under 42 U.S.C. § 1983 (2006), which provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, 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.

Professor Pamela Karlan has noted that "a key consequence" of the state's Eleventh Amendment immunity is that it limits the "possibility of an adequate damages remedy for the intended beneficiaries of congressional regulation . . . [and] creates the potential for an irreparable injury . . . precisely the circumstance that justifies injunctive relief under both *Ex parte Young* and § 1983." Pamela S. Karlan, *The Irony of Immunity: The Eleventh Amendment, Irreparable Injury, and Section 1983*, 53 STAN. L. REV. 1311, 1314 (2001). Such injunctive relief "may turn out to be far broader and more intrusive than the damages that would have been available after the fact." *Id.*

who have been harmed by persistent racial isolation have meaningful constitutional protection.[134] Such a statutory scheme should work in conjunction with existing civil rights legislation under Titles IV and VI of the 1964 Civil Rights Act. As Title VI has done, the proposed scheme could empower an administrative body such as the Office for Civil Rights in the Department of Education or an independent agency directed by a career employee, rather than a political appointee, to provide federal oversight and enforcement. This body could investigate and resolve complaints. Moreover, legislation could authorize action by the Department of Justice for those states that refuse compliance. Language might also allow for liability on the part of the Department of Education if the Department knows of states' failure to comply and has made no effort to require compliance.

B. Data Collection: Creating a Legislative Record and a National Repository

Any proposed legislation to address structural racial inequality in education should include deliberations that both document the current racial inequities in educational opportunity and provide useful data that may assist states and localities in fostering racially inclusive educational opportunities. The post-*Boerne* decisions striking down congressional enforcement legislation stressed the critical role of congressional fact-finding in safeguarding legislation from judicial scrutiny.[135] In *Garrett*, for example, the Rehnquist Court struck down the application of a provision of the ADA to state actors in part due to insufficient legislative findings.[136] Rather than assuming the existence of state discrimination against disabled persons, the Court held that Congress must first "identif[y] a history and pattern of unconstitutional state transgressions."[137] Similarly, in *Kimel*, the Court stressed the impor-

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[134] *See* Pamela S. Karlan, *Disarming the Private Attorney General*, 2003 U. ILL. L. REV. 183 (2003). Such language should be explicitly stated in unequivocal "rights creating" language. This would then resolve the problem the Supreme Court found in *Alexander v. Sandoval*, 532 U.S. 275, 288–89 (2001) (holding Title VI of the 1964 Civil Rights Act did not create a private right of action for individuals to sue states for violations).

[135] Of course, jurisprudential emphasis on congressional fact-finding for support of Section 5 legislation began long before *Boerne*. In *Katzenbach v. Morgan*, the court relied on congressional fact-finding to establish congressional authority to employ Section 5 to set aside New York's literacy requirement. 384 U.S. 641, 654–55 (1966) (writing that Congress might have determined that "prejudice played a prominent role in the enactment of the requirement. . . . Congress undertook to legislate . . . and did so in the context of a general appraisal of literacy requirements for voting to which it brought a specially informed legislative competence.") (citations omitted).

[136] Bd. of Trustees of Univ. of Ala. v. Garrett, 531 U.S. 356, 358 (2001).

[137] *Id.* at 368; *see also id.* at 368–70. Scholars have raised the point that it is not entirely clear what constitutes a legislative finding of "state transgressions" for purposes of upholding Section 5 legislation. *See, e.g.*, Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section 5 Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943, 1968 (2003) (noting that judicial interpretations of substantive constitutional rights are inextricably linked to the "procedural context of adjudication," making it difficult to interpret them in a legislative context).

tance of a strong evidentiary record supporting the legislation.[138] The Court found a constitutional right to enact enforcement legislation prohibiting age discrimination only if Congress can identify "any pattern of age discrimination by the States" that reaches "the level of a constitutional violation."[139] According to dicta in *Lane*, such findings need not be limited to state discrimination and may include evidence of private party conduct.[140]

When congressional enforcement legislation protects suspect classes or a fundamental right, however, the Court has held that such deliberations need not take the form of formal congressional hearings from which findings are officially compiled. Rather, Congress may create a task force that is charged with receiving and compiling evidence on racial isolation and inequality in education. The Supreme Court has accepted such evidence as valid congressional findings when reviewing and upholding congressional enforcement legislation in the wake of *Boerne*.[141]

Ultimately, Congress may serve a key function by creating and housing a national repository of critical data on the pervasiveness and permutations of racial and socioeconomic segregation in public education. By providing examples of successful integration policies that have been used in school districts throughout the country, such a repository may turn out to be one of the most helpful and least controversial aspects of fostering racial inclusion in public education. An interesting analogy may be the use of racial disparity studies in the public contracting context. In the wake of the 1989 Supreme Court decision in *Richmond v. Croson*,[142] striking down Richmond, Virginia's affirmative action policy in public contracting, various state and local governments as well as the United States Commission for Civil Rights have commissioned studies to document continued racial disparities in public employment and contracting.[143] Such studies help to satisfy the Court's requirement that existing race-conscious policies in public employment and contracting remedy the present effects of past, particularized discrimination in specific geographic regions and industries.[144]

In this vein, one could also look to the fair housing context for a model to address some of the evidentiary considerations. The components of "affirmatively furthering" fair housing legislation that may be replicated in the education context include (1) conducting analysis to identify the impediments to racially integrated education within jurisdictions; (2) taking appropriate actions to overcome the effects of the impediments identified through

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[138] *See* Kimel v. Florida Bd. of Regents, 528 U.S. 62, 89 (2000).

[139] *Id.*

[140] *See* Tennessee v. Lane, 541 U.S. 509, 527 n.16 (2004).

[141] *See id.* at 527 (citing TASK FORCE ON THE RIGHTS AND EMPOWERMENT OF AMERICANS WITH DISABILITIES, FROM ADA TO EMPOWERMENT: THE REPORT OF THE TASK FORCE ON THE RIGHTS AND EMPOWERMENT OF AMERICANS WITH DISABILITIES (1990)).

[142] 488 U.S. 469 (1989).

[143] *See, e.g.*, U.S. COMMISSION ON CIVIL RIGHTS, DISPARITY STUDIES AS EVIDENCE OF DISCRIMINATION IN FEDERAL CONTRACTING (2006).

[144] *See, e.g.*, JON S. WAINWRIGHT, RACIAL DISCRIMINATION AND MINORITY BUSINESS ENTERPRISE (2000).

analysis; and (3) maintaining records reflecting analysis and actions taken in this regard.[145] Such a model led to the settlement of litigation in Westchester County, New York, where HUD alleged that the County failed to affirmatively further fair housing by concentrating government-funded housing developments in low-income and minority communities.[146] Under the settlement negotiation, the County must build affordable housing in more affluent areas.[147]

Moreover, such data collection serves the key function of elucidating the benefits of racially integrated education. Social science evidence supporting racial integration in education has detailed the democracy-reinforcing benefits of racially integrated educational environments.[148] This evidence can be helpful in researching and documenting effective integration policies at the federal level. Data collection should include evidence of creative racially inclusive policies that have been successfully used by districts. A number of school districts throughout the country have created or maintained policies aimed at fostering racial and socioeconomic diversity in schools.[149] Jefferson County, Kentucky, which encompasses the city of Louisville, still considers income, place of residence, and race and ethnicity when assigning students to schools; however, its consideration of race is "global," in that it eschews individual classification in favor of census tract data.[150] In northern California, the Berkeley Unified School District considers several variables in granting school choice, including race, socioeconomic status, geography, and linguistics.[151] Again, the Berkeley example uses global policies that do not allocate benefits and burdens on the basis of individual racial classification.[152] Such examples show that there are com-

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[145] Federal capacity to review and analyze such data in the education context may be enhanced by working with nonprofit education groups nationally.

[146] *See* U.S. *ex rel.* Antidiscrimination Ctr. of Metro N.Y., Inc. v. Westchester Cnty., 688 F. Supp. 2d 548 (S.D.N.Y. 2009).

[147] Press Release, Anti-Discrimination Center, Inc., Anti-Discrimination Center Wins Unprecedented $62.5 Million Settlement in Housing De-Segregation Case Against Westchester County (Aug. 10, 2009), http://www.antibiaslaw.com/sites/default/files/files/ADCrelease20090810.pdf (on file with the Harvard Law School Library).

[148] *See, e.g.*, AMY STUART WELLS ET AL., BOTH SIDES NOW: THE STORY OF SCHOOL DESEGREGATION'S GRADUATES (2009); Amy Stuart Wells & Robert L. Crain, *Perpetuation Theory and the Long-Term Effects of School Desegregation*, 64 REV. EDUC. RES. 531, 552 (1994); Janet W. Schofield, *School Desegregation and Intergroup Relations, A Review of the Literature*, 17 REV. EDUC. RES. 335, 339 (1991).

[149] *See* Susan Eaton, *Diversity's Quiet Rebirth*, EDUC. WEEK, Aug. 18, 2008 (detailing programs implemented in Boston, Massachusetts; Hartford, Connecticut; Milwaukee, Wisconsin; and Palo Alto, California, that facilitate student transfers between urban schools, with higher concentrations of poverty and a higher population of students of color, and whiter, wealthier suburban schools). *See also* AMY STUART WELLS ET AL., BOUNDARY CROSSING FOR DIVERSITY, EQUITY, AND ACHIEVEMENT: INTER-DISTRICT SCHOOL DESEGREGATION AND EDUCATIONAL OPPORTUNITY (2009).

[150] Eaton, *supra* note 149.

[151] *See, e.g.*, LISA CHAVEZ & ERICA FRANKENBERG, INTEGRATION DEFENDED: BERKELEY UNIFIED'S STRATEGY TO MAINTAIN SCHOOL DIVERSITY (2009).

[152] *See id.*

munities who desire the ability to implement integration plans, so it is imperative to find avenues of support for such efforts.

Congressional legislation should also fund research, development, and policy replication to preserve and strengthen federal, state, and local efforts to protect equal access to educational opportunities. Such funding would include providing technical assistance to localities devising programs to alleviate racial disparities, which would allow flexibility in fashioning the best remedies for a particular locale. Recently, Congress began funding demonstration projects in a number of school districts.[153] Funding for research and replication grants could further be utilized to assist those districts with the most persistent racial isolation and largest disparity issues. In addition, grants might fund research that will show best practices in reducing racial isolation and disparities. Such funding for research and development could help fuel improvement by facilitating the replication of successful programs. Indeed, a critical role of federal legislative involvement in this arena is to educate the public and facilitate flexible, holistic, and varied race-conscious and race-neutral measures. The benefit of proposed replication grants is that such grants may encourage school diversity by helping those districts that voluntarily adopt carefully tailored race-conscious measures to promote the educational, social, and democratic benefits of racially and ethnically diverse classrooms. The aim would be to allow local discretion in collaborating to determine optimal ways to increase racial inclusion in local school districts. As such, legislation should give jurisdictions the flexibility to choose one mode of inclusion over another. This would allow for more nuanced and holistic ways of operating effectively.

In addition, such legislation should take account of the increased political feasibility of "global" policies designed to foster racial inclusion while refraining from classifying or assigning individual students on the basis of their race. For example, in his pivotal concurrence in *Parents Involved*, Justice Kennedy talked about the necessity of race-conscious measures to alleviate racial isolation and proffered generalized race-conscious policy options that do not categorize individual students based on race.[154] Significantly, Kennedy eschewed individualized racial classifications, even though they have been the mainstay remedy for *de jure* segregation.[155] Kennedy championed policies that may be neutral on their face, though developed out of a desire to increase racial inclusion.[156] These included strategic site selection of new schools, targeted student and faculty recruitment, and drawing attendance zone lines to maximize racial integration.[157] Kennedy reasoned that such facially neutral, racially motivated plans may not even trigger strict

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[153] *See, e.g.*, 34 CFR §§ 74, 75, 77, 79–82, 84, 85, 97–99 (2011); 42 U.S.C. §§ 2000c, 2000c-2, 2000c-5 (2006); U.S. DEP'T OF EDUC., TECHNICAL ASSISTANCE FOR STUDENT ASSIGNMENT PLANS: PURPOSE, *available at* http://www.ed.gov/programs/tasap/index.html.

[154] *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 787–88 (2007) (Kennedy, J., concurring).

[155] *See id.* at 794–95.

[156] *See id.* at 788–89.

[157] *See id.* at 789.

scrutiny.[158] Legislation that calls for "race-conscious," "race-neutral," or "facially neutral yet racially motivated" measures or uses race on a "global" level, while refraining from individualized racial classifications, has tremendous import for purposes of constitutional endurance.[159] Moreover, Congress may cull evidence to support the use of additional race-conscious measures over measures that are facially neutral.

C. Furthering a Principle of Shared Burden

Such proposed legislation should also further the principle of "shared burden"—combining flexibility and choice to maximize benefits and decrease burdens for all. For example, models that foster increased racial and economic integration between city and suburban districts may include structures to minimize inner-city fiscal burdens and potential overcrowding in suburban schools. Policies might include the provision of transportation and construction funding to suburban schools, while also increasing magnet school funding for inner-city schools.[160] Such programs work best when implemented in the earliest years of education. The flexibility of these programs might include increased funding for transportation and creation of experimental districts. Obviously, there are myriad considerations regarding the scope of legislation of this kind. For instance, placing a premium on choice and flexibility in this context may raise concerns regarding the effectiveness of the proposed requirements. In addition, specific attention to racial, socioeconomic and spatial characteristics of school districts and regions is critical to facilitating truly effective reform. The key factor in such policy considerations is grounding them in the tenets of *structural disparities* rather than focusing on intentional racial discrimination. In this vein, one might look to examples of existing measures used to identify sources of intractable racial inequality and lack of opportunity. Such examples include "racial impact statements" conducted by some state governments prior to engaging in new construction projects or social initiatives. Similar to fiscal and environmental impact statements, such assessments are viewed as responsible measures to minimize the burden of new initiatives.[161]

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[158] *Id.*

[159] There may be constitutional questions raised about "facially neutral but racially motivated" legislation under the Supreme Court's standard articulated in *Washington v. Davis*. 426 U.S. 229, 239–42 (1976) (eliminating disparate impact causes of action under equal protection guarantees of the Constitution).

[160] *See generally* AMY STUART WELLS & ROBERT L. CRAIN, STEPPING OVER THE COLOR LINE: AFRICAN-AMERICAN STUDENTS IN WHITE SUBURBAN SCHOOLS (1997) (detailing the success of and bipartisan support for a St. Louis, Missouri, voluntary urban-suburban integration plan, due in part to a funding boost).

[161] *See, e.g.*, CONN. GEN. STAT. ANN. § 2-24b (2011); IOWA CODE ANN. § 2.56 (2011).

Conclusion

Given its unique position in our national landscape, it is no wonder that scholars have long argued about the essential role of Congress in constitutional interpretations of civil rights norms. The complicated tapestry of systemic racial, economic, and demographic factors that have contributed to sustained racial isolation in education necessitate effective and nuanced solutions that emanate from policy reform rather than court-ordered redress. Congressional enforcement power is, at its core, a mechanism for ensuring that the promise of equality is realized for all. One of the more hopeful and substantive paths for addressing racial segregation and isolation in American schools and their attendant inequities may be in capitalizing on Congress's significant enforcement power under Section 5 of the Fourteenth Amendment to consciously create a remedy for twenty-first century structural ills.