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The Battle of the Branches: The Impact of the Judiciary and Title VI on Desegregation in the American Public School System

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KELSEY D. MCCARTHY*

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"Many people think the issue of school integration is something that was tried and failed . . . . The truth is, we tried for a little while, we succeeded and we gave up." – Gary Orfield[1]

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* © 2015 Kelsey D. McCarthy. J.D. 2015, University of San Diego School of Law; B.S. Kinesiology 2010, California State University San Marcos. Kelsey McCarthy wrote this article as a third-year law student and Lead Articles Editor for the *San Diego Law Review* Editorial Board. She is now an attorney at Wood, Smith, Henning & Berman LLP.

1. Jolie Lee, *Still Apart: Map Shows States with Most-Segregated Schools*, USA TODAY (May 15, 2014, 6:04 PM), http://www.usatoday.com/story/news/nation-now/2014/05/15/school-segregation-civil-rights-project/9115823 [http://perma.cc/Y4LY-CKUQ]. Gary Orfield is the director of the Civil Rights Project at University of California, Los Angeles and is one of the nation's leading experts on desegregation. *See Gary Orfield,*

The "systematic fight for political and civil rights"[2] officially began in 1909 when a biracial group of black and white Americans formed the National Association for the Advancement of Colored People (NAACP) in response to the extrajudicial practice of lynching and the growing number of race riots occurring throughout the county.[3] After several minor victories, the famous grassroots-based civil rights organization took on the institution of racism in the U.S. Supreme Court's 1954 landmark case, *Brown v. Board of Education of Topeka* (*Brown*), scoring a huge victory for civil rights when the Court held the doctrine of "separate but equal" unconstitutional.[4] However, to this day, academic scholars are unable to agree on whether it was the Supreme Court's decision in *Brown* or Congress's subsequent enactment of the Civil Rights Act of 1964—specifically Title VI—that had the greatest impact on desegregation in the American public school system.[5]

This Comment analyzes the debate regarding the catalyst for desegregation in the American public school system: judicial intervention or Congress's legislative action, specifically through implementation of Title VI, which authorized revocation of funds to school districts that did not comply with the desegregation mandate. Part I will summarize the historical events and developments that paved the way to the Supreme Court's decision in *Brown*. Part II looks at how the *Brown* decision alone was not enough to effectuate immediate change in southern schools, despite the court's order in the second *Brown* decision, *Brown v. Board of Education* (*Brown II*) that schools desegregate "with all deliberate speed."[6] Part III discusses Congress's movement to take control over desegregation efforts and protect minority constitutional rights by enacting the Civil Rights Act of 1964. Part IV will evaluate the current state of desegregation in American public schools more than sixty years post-*Brown* and fifty years after Title VI was enacted. It aims to discern whether the *Brown* decision or Title VI's deprivation of

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Ph.D., THE CIVIL RIGHTS PROJECT, http://civilrightsproject.ucla.edu/about-us/staff/gary-orfield-ph.d [http://perma.cc/35K3-DX7F] (last visited Oct. 29, 2015).

2. W.E.B. Du Bois, *Race Relations in the United States: 1917–1947*, 9 PHYLON 234, 234 (1948).

3. The NAACP's mission is to "ensure the political, educational, social and economic equality of minority group citizens of [the] United States and eliminate race prejudice." *NAACP: 100 Years of History*, NAACP, http://www.naacp.org/pages/naacp-history [http://perma.cc/D73D-84HL] (last visited Oct. 30, 2015).

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

5. *See* Vincent James Strickler, Green-*Lighting* Brown*: A Cumulative-Process Conception of Judicial Impact*, 43 GA. L. REV. 785, 791–93, 819, 854 (2009) (comparing the impact of the *Brown* decision with that of Title VI on school desegregation); *see also* Rebecca E. Zietlow, *To Secure These Rights: Congress, Courts and the 1964 Civil Rights Act*, 57 RUTGERS L. REV. 945, 947 (2005) ("[B]y virtually every indicator, the 1964 Act was more effective than *Brown* and the lower courts' enforcement of *Brown*.").

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

funds from noncompliant school districts provided civil rights activists with the necessary clout to ensure students have the right to a racially integrated education.

I. HISTORICAL DEVELOPMENTS: THE PATH TO *BROWN*

After Congress ratified and adopted the Thirteenth Amendment in 1865, formally abolishing slavery and freeing over four million slaves, Southern white legislatures sought to maintain some semblance of power over African-Americans by passing so-called "black codes," which were "designed to restrict freed blacks' activity and ensure their availability as a labor force now that slavery had been abolished."[7] Although these laws were eventually outlawed by the Fourteenth Amendment's ratification in 1868, in reality, very little actually changed about the status of African-Americans in society.

A few years later, the Senate passed the Civil Rights Act of 1875, which prohibited racial discrimination and segregation in "inns, public conveyances on land or water, theaters, and other places of public amusement."[8] However, this victory was short-lived, as the Supreme Court declared it unconstitutional in 1883, stating that Congress did not have "such plenary power . . . conferred upon [it] by the Fourteenth Amendment" to enforce such a law.[9] Unfortunately, no other civil rights legislation would be passed again until 1957. Near the end of the nineteenth century, southern white governments began passing a series of laws and ordinances—famously known as the Jim

7. *Black Codes*, HISTORY, http://www.history.com/topics/black-history/black-codes [http://perma.cc/ARP7-YYXA] (last visited Oct. 30, 2015). Mississippi enacted the first black code in history, shortly followed by South Carolina. *The Southern "Black Codes" of 1865–66*, CONST. RTS. FOUND., http://www.crf-usa.org/brown-v-board-50th-anniversary/southern-black-codes.html [http://perma.cc/V2V9-4EA2] (last visited Oct. 30, 2015).

8. Civil Rights Act of 1875, ch. 114, 18 Stat. 335, *invalidated by* The Civil Rights Cases, 109 U.S. 3 (1883); *Landmark Legislation: Civil Rights Act of 1875*, UNITED STATES SENATE, www.senate.gov/artandhistory/history/common/generic/CivilRightsAct1875.htm [http://perma.cc/N8GZ-JQP6] (last visited Oct. 30, 2015).

9. *The Civil Rights Cases*, 109 U.S. at 19. The case involved five consolidated cases from lower courts where hotels, theatres, and a railroad company denied black citizens admission or accommodations because of their color. *Id.* at 4. In an eight-to-one decision, the Supreme Court determined that the Fourteenth Amendment is "deeper and broader in scope," in that Congress is only empowered to regulate and nullify state legislation, not individual private acts of discrimination. *Id.* at 11. Because the wrongful acts were private in nature, Congress was powerless to regulate them. *Id.* The Court further determined that the Thirteenth Amendment, which abolished the institution of slavery, was too narrow and, thus, was not applicable. *Id.* at 21.

Crow laws—effectively legalizing racial segregation in public institutions, including schools, "to further reduce the societal and legal position of blacks to one that was to be permanently subordinate to the white man."[10]

In 1892, Homer Plessy—a man who was seven-eighths Caucasian and one-eighth black, but treated as black under Louisiana law—triggered the issue of legal racial segregation when, in a planned act of civil rebellion, he refused to leave a whites-only train car.[11] In 1896, after several years of appeals, the U.S. Supreme Court decided *Plessy v. Ferguson*, where a seven-to-one majority, under the doctrine of "separate- but-equal," upheld the constitutionality of state laws requiring racial segregation in public facilities.[12]

In response to the growing levels of violence directed at African-Americans, the NAACP was founded with the principle objective to "ensure the political, educational, social and economic equality of minority group citizens . . . and eliminate race prejudice" as well as "to remove all barriers of racial discrimination through the democratic processes."[13] Spearheaded by the efforts of attorney Thurgood Marshall,[14] the NAACP secured four victories in the realm of public education before finally outlawing segregation in public schools.[15]

On May 17, 1954, the NAACP attorneys secured a victory in *Brown* when the Supreme Court overturned *Plessy*'s separate but equal doctrine and held that "segregation in public education violated the Equal Protection Clause of the Fourteenth Amendment."[16] However, even more important

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10. CHRISTOPHER J. METZLER, THE CONSTRUCTION AND REARTICULATION OF RACE IN A POST-RACIAL AMERICA 4 (2008).

11. Plessy v. Ferguson, 163 U.S. 537, 538 (1896). Although the Court touches on the issue of what "proportion of colored blood [is] necessary to constitute a colored person, as distinguished from a white person," it determines that this question is better left to the states to decide. *Id.* at 552.

12. *Id.* at 544 ("Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other . . . ."). Interestingly, Justice John Marshall Harlan—the lone dissenter and a former slave owner—wrote that "[o]ur constitution is color-blind" and recognizes "no superior, dominant, ruling class of citizens." *Id.* at 559. Justice Harlan disagreed with the majority holding, which he believed provided states with the power "to place in a condition of legal inferiority a large body of American citizens." *Id.* at 563.

13. *NAACP: 100 Years of History*, *supra* note 3.

14. Thurgood Marshall went on to serve as the first African-American Justice on the United States Supreme Court from 1967 to 1991. TIMOTHY L. HALL, SUPREME COURT JUSTICES: A BIOGRAPHICAL DICTIONARY 380 (2001).

15. *See* McLaurin v. Okla. State Regents for Higher Educ., 339 U.S. 637 (1950); Sweatt v. Painter, 339 U.S. 629 (1950); Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938); Pearson v. Murray, 182 A. 590 (Md. 1936).

16. *NAACP Legal History*, NAACP, http://www.naacp.org/pages/naacp-legal-history [http://perma.cc/NBG6-55EP] (last visited Oct. 30, 2015). As part of their strategy, NAACP lawyers documented "substantial racial inequality in per pupil expenditures, teacher salaries,

than the Court's holding, *Brown* gave rise to the civil rights policy of "formal equal opportunity," where all Americans would be equal, regardless of their race or color.[17]

II. POST-*BROWN I*: JUDICIAL INTERVENTION

After *Brown*, the Supreme Court convened again in *Brown II* to determine what remedies, if any, courts could implement to remedy existing segregation.[18] However, due to the vagueness of the Court's order to desegregate with "all deliberate speed,"[19] many states and critics viewed it not as an invitation to implement desegregation plans immediately, but rather as an invitation to avoid desegregation altogether.[20] For some critics, *Brown* represents judicial impotence and failure rather than an "icon . . . of judicial success."[21] One critic described the separate opinions in *Brown* and *Brown II* as "not a symbol of what courts could do, but a symbol of what they could not do."[22]

Despite the Supreme Court's decision to overturn the separate but equal doctrine set forth in *Plessy*, southern states continued to fight the public school desegregation mandate. Following *Brown*, the Arkansas legislature amended its state constitution to oppose "in every Constitutional manner the unconstitutional desegregation decisions of [*Brown*] and [*Brown II*]."[23] Pursuant to this constitutional amendment, the Arkansas legislature passed

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and working conditions throughout the South, even among African American and white schools in the same school district." ROY L. BROOKS ET AL., THE LAW OF DISCRIMINATION: CASES AND PERSPECTIVES 8 (2011).

17. BROOKS ET AL., *supra* note 16, at 10.

18. *See Brown II*, 349 U.S. 294, 298 (1955); Jack M. Balkin, Brown *as Icon*, *in* WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S LANDMARK CIVIL RIGHTS DECISION 3 (Jack M. Balkin ed., 2002).

19. *Brown II*, 349 U.S. at 301 (ordering the District Courts to "enter such orders and decrees consistent with this opinion as are necessary and proper to admit [students] to public schools on a racially nondiscriminatory basis with all deliberate speed").

20. BROOKS ET AL., *supra* note 16, at 71.

21. Balkin, *supra* note 18, at 22. *See, e.g.*, Ellis Washington, Brown v. Board of Education*: Right Result, Wrong Reasoning*, 56 MERCER L. REV. 715, 716 (2005) ("*Brown* did infinitely more to harm the 'educational opportunities' of Black people than it did to help them—deconstructing quality educational access for Black children for generations—even until this day.").

22. Balkin, *supra* note 18, at 22.

23. Cooper v. Aaron, 358 U.S. 1, 8–9 (1958) (citing ARK. CONST. amend. XLIV (repealed 1990)).

several laws in defiance, including a law that relieved children from mandatory attendance at integrated schools.[24] Some schools took more extreme measures, such as cutting off funding to any school that attempted to integrate and even shutting down schools to avoid desegregation altogether.[25] Three years later, the Supreme Court once against stepped in to reaffirm the *Brown* decisions when nine black students were removed from a high school campus in the school district of Little Rock pursuant to the state's antidesegregation laws.[26] In a joint opinion authored by all nine Justices, the Court stated:

> The Constitution created a government dedicated to equal justice under law. The Fourteenth Amendment embodied and emphasized that ideal. State support of segregated schools through any arrangement, management, funds, or property cannot be squared with the Amendment's command that no State shall deny to any person within its jurisdiction the equal protection of the laws.[27]

While the Court's opinion was not met without staunch criticism, it reaffirmed the precedent set forth in *Brown* as the constitutional standard for racial equality.[28] However, following the lead of the Arkansas Governor, other states continued to employ a variety of tactics to resist the integration of public schools.[29] As a result, the years immediately following *Brown* resulted in very low percentages of children attending integrated schools.[30]

While *Brown* did not end racial segregation alone, some scholars argue its true value is in the indirect effects of its holding, where it opened the door for change in the socio-political climate surrounding civil rights and desegregation.[31] One scholar has argued that "*Brown*'s real contribution

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24. *Id.* at 9 (citing ARK. STATS. § 80–1525 (1957) (repealed 1987)).

25. Robert D. Loevy, *Introduction: The Background and Setting of the Civil Rights Act of 1964*, *in* THE CIVIL RIGHTS ACT OF 1964: THE PASSAGE OF THE LAW THAT ENDED RACIAL SEGREGATION 18 (Robert D. Loevy ed., 1997); *School Desegregation and Equal Educational Opportunity*, THE LEADERSHIP CONF. ON CIV. AND HUM. RTS., www.civilrights.org/resources/civilrights101/desegregation.html [http://perma.cc/C6L8-NAEG] (last visited Oct. 30, 2015).

26. *Cooper*, 358 U.S. at 9.

27. *Id.* at 19.

28. Former U.S. Attorney General Edwin Meese issued one of the most famous critiques of the Supreme Court's decision in *Cooper*. Edwin Meese III, *The Law of the Constitution*, 61 TUL. L. REV. 979 (1987). In his article, Meese accuses the Supreme Court of instilling too much power in itself by reducing the Constitution "to the status of ordinary constitutional law" and holding its rulings to the status of supreme law of the land. *Id.* at 987.

29. *School Desegregation and Equal Educational Opportunity*, *supra* note 25 and accompanying text.

30. *Id.*; *see also* Lee, *supra* note 1 (showing shifts in segregation since 1954).

31. Strickler, *supra* note 5, at 795. Stickler argues that "it seems more than reasonable to view the independent power of the courts as the more likely cause of desegregation successes." *Id.* at 861.

was to put civil rights on the liberal political agenda, force white politicians to respond, raise public consciousness of racial injustice, and inspire civil rights organizations and the black community to take to the streets and the voting booths."[32] On the other hand, other scholars reject *Brown*'s significance, arguing that no evidence exists to show the Supreme Court's holding produced any real social change.[33]

While both sides of the debate have received significant amounts of praise from legal scholars, there are others who argue it was not the actions of the Court that, directly or indirectly, jettisoned society toward desegregation, but rather it was the financial incentives put in place by the Civil Rights Act of 1964 that played a causal role in desegregating public schools.[34]

III. STATUTORY INTERVENTION: TITLE VI OF THE CIVIL RIGHTS ACT OF 1964

In the decade following *Brown*, the Supreme Court publicly aired its frustration with the states' lack of effort to implement school desegregation plans.[35] As a result, the judiciary began interjecting itself into the states'

32. Peter H. Schuck, *Public Law Litigation and Social Reform*, 102 YALE L.J. 1763, 1775 (1993) (book review).

33. *See* GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 107–56 (2d ed. 2008) (summarizing a long list of facts to show the *Brown* decision was not the direct or indirect catalyst for socio-political change); *see also* JAMES C. COBB, THE BROWN DECISION, JIM CROW, AND SOUTHERN IDENTITY 31 (2005) ("As I surveyed the predictable flood of media assessments of the fifty-year legacy of the *Brown v. Board of Education* decision, I was struck by what seemed to be the overwhelmingly negative tone of these appraisals.").

34. *See, e.g.*, Elizabeth Cascio et al., *Paying for Progress: Conditional Grants and the Desegregation of Southern Schools* 125 Q.J. ECON. 445, 470 (2010); Philip Tegeler, *The "Compelling Government Interest" in School Diversity: Rebuilding the Case for an Affirmative Government Role*, 47 U. MICH. J.L. REFORM 1021, 1026 n.18 (2014); Kenneth M. Holland, Compliance with Brown v. Board of Education: The Role of the Elementary and Secondary Education Act of 1965, Address at the Kansas State University Benjamin L. Hooks Symposium: America's Second Revolution: The Path to and From *Brown v. Board of Education* 17–18 (Mar. 12–14, 2004).

35. *See* Bradley v. Sch. Bd., 382 U.S. 103, 105 (1965) (per curiam) ("[M]ore than a decade has passed since we directed desegregation of public school facilities 'with all deliberate speed.'" (citing *Brown II*, 349 U.S. 294, 301 (1955)); Griffin v. Cnty. Sch. Bd., 377 U.S. 218, 234 (1964) (quoting *Brown II*, 349 U.S. at 301 ("[T]he time for mere 'deliberate speed' has run out. . . .").

affairs to implement desegregation "with all deliberate speed."[36] Although the Court initially envisioned allowing the school districts themselves to implement appropriate remedies to end segregation in the public school system, the Court began not only to remove deference from the parties, but also to control how desegregation would take place.[37] However, despite the Courts' efforts, the decade following *Brown* resulted in very few black students attending integrated schools.[38]

In the 1960s, in response to various methods used by states and localities to avoid compliance with the Supreme Court's desegregation rulings, demand grew for the United States government to implement a nationwide attack on racial discrimination.[39] Although the executive and judicial branches made several attempts using a variety of measures to prohibit racial discrimination,[40] Congress recognized the necessity of enacting a "statutory nondiscrimination provision" to ensure federal funds were not used by the states to support racially discriminatory programs.[41] One of the most influential voices in this battle was that of Congressman Adam Clayton Powell, a former minister known for his persistence and dynamicity

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36. *Brown II*, 349 U.S. at 301; *see* Wendy Parker, *Connecting the Dots:* Grutter*, School Desegregation, and Federalism*, 45 WM. & MARY L. REV. 1691, 1717 (2004).

37. *See* Green v. Cnty. Sch. Bd., 391 U.S. 430, 441 (1968) (holding the school district's freedom-of-choice plan unacceptable as a step toward integrated education); *see also* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 11, 14–16 (1971) (determining the scope of the remedy).

38. Due to the states' resistance to integration, "only 2.3 percent of African American children in the Deep South attended integrated schools" by the end of the decade following *Brown*. *School Desegregation and Equal Educational Opportunity*, *supra* note 25 and accompanying text; *see* Lee, *supra* note 1 (showing shifts in segregation since 1954).

39. CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, TITLE VI LEGAL MANUAL 3 (2001), http://www.justice.gov/crt/about/cor/coord/vimanual.pdf [http://perma.cc/4DC2-MS77] [hereinafter TITLE VI LEGAL MANUAL]; *see School Desegregation and Equal Educational Opportunity*, *supra* note 25.

40. The president issued multiple Executive Orders in an attempt to curb racial discrimination. *See* Exec. Order No. 11,063, 3 C.F.R. 652 (1959–1963) (banning segregation in federally funded housing), as amended by Exec. Order No. 12,259, 3 C.F.R. 307 (1981); Exec. Order No. 10,479, 3 C.F.R. 961 (1949–1953), as amended by Exec. Order No. 10,482, 3 C.F.R. 968 (1949–1953) (equal employment opportunity by the United States government); Exec. Order No. 9981, 3 C.F.R. 722 (1943–1948) (abolishing racial discrimination in the armed forces). Federal court holdings also assisted to remove racial discrimination from federally assisted programs. *See, e.g.*, Cooper v. Aaron, 358 U.S. 1, 17, 19–20 (1958); Simkins v. Moses H. Cone Mem'l Hosp., 323 F.2d 959, 969 (4th Cir. 1963).

41. *See* 110 CONG. REC. 6544 (1964) (statement of Sen. Humphrey). Congress recognized that, through enactment of a uniform statutory provision, it would insure uniformity of nondiscrimination policy and minimize Congressional debate regarding any new legislative efforts that would authorize Federal funding. TITLE VI LEGAL MANUAL, *supra* note 39, at 4.

as a public civil rights figure.[42] Powell became famous for attaching riders—additional provisions, which were often controversial or unrelated to the subject matter of the bill under consideration—to legislation that would require denial of federal funds to state programs that maintained racially discriminatory practices.[43] These customary antisegregation amendments, which famously became known as "Powell Amendments," were eventually included in the Civil Rights Act of 1964 as Title VI, officially providing Congress with the "power of the purse" in its ability to "authorize[] federal agencies to terminate financial support to any agencies that practice[] racial segregation or discrimination."[44]

Congress officially took action when it passed the Civil Rights Act of 1964, which established a set of measures designed to enforce the prohibition against "discrimination on the basis of race, color, and national origin in programs and activities receiving federal assistance."[45] Title VI provides that "[n]o person in the United States 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 receiving Federal financial assistance."[46] It also enabled the legislature to delegate explicit authority to the Department of Health, Education, and Welfare (HEW) to take federal funding away from any schools, including public and many private institutions, that refused to comply with school desegregation guidelines developed by the HEW.[47] Because "Title VI applied to more than

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42. *Powell, Adam Clayton, Jr.*, HIST., ART & ARCHIVES, U.S. HOUSE OF REPRESENTATIVES, http://history.house.gov/People/Listing/P/POWELL,-Adam-Clayton,-Jr—(P000477)/ [http://perma.cc/7ZUW-HQ7B] (last visited Oct. 30, 2015).

43. *Id.*; CHARLES V. HAMILTON, ADAM CLAYTON POWELL, JR.: THE POLITICAL BIOGRAPHY OF AN AMERICAN DILEMMA 227 (1991).

44. HAMILTON, *supra* note 43, at 379. President John F. Kennedy justified enactment of Title VI with "simple justice": "Direct discrimination by Federal, State, or local governments is prohibited by the Constitution[,] [b]ut indirect discrimination, through the use of Federal funds, is just as invidious; and it should not be necessary to resort to the courts to prevent each individual violation." TITLE VI LEGAL MANUAL, *supra* note 39, at 3 (quoting H.R. MISC. DOC. NO. 88-124, 88th Cong., at 3, 12 (1st Sess. 1963)).

45. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 252 (codified as amended at 42 U.S.C. §§ 2000d–2000d-7 (2012)).

46. *Id.*

47. *See* 42 U.S.C. § 2000d-1; JEFFREY A. RAFFEL, HISTORICAL DICTIONARY OF SCHOOL SEGREGATION AND DESEGREGATION: THE AMERICAN EXPERIENCE 50 (1998). The statute specifies that:

> Compliance with any requirement adopted pursuant to this section may be affected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding

400 federal programs administered by 33 agencies[,] [n]ext to the courts, HEW became the foremost government agent for changing the nation's racial patterns."[48]

Statistics show the successful impact Title VI had immediately after it was implemented by Congress. According to studies conducted by the Southern Education Reporting Service, eleven states had only 1.17% of black students attending integrated schools during the 1963–1964 school year, ten years after *Brown*.[49] However, after passing the Civil Rights Act of 1964, "the percentage doubled, reaching 2.25."[50] By 1966, only four years later, 10.9% of black students in the southern and border states were attending integrated schools.[51] However, this growing success only lasted until the end of the 1980s; between 1988 and 2011, the percentage of black students in majority white schools dropped from 43.5% to 23.2%.[52]

From an economic standpoint, maintaining segregated public schools cost next to nothing until the legislature stepped in.[53] After Title VI was enacted, not only did the federal government have the power to revoke school funding, school districts that did not voluntarily desegregate were more likely to be sued by private citizens, which increased the price of remaining segregated.[54] School districts that were sued would have to pay

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> on the record, after opportunity for hearing, of a failure to comply with such requirement . . . .

42 U.S.C. § 2000d-1.

48. JILL QUADAGNO, ONE NATION, UNINSURED: WHY THE U.S. HAS NO NATIONAL HEALTH INSURANCE 86 (2005).

49. United States v. Jefferson Cnty. Bd. of Educ., 372 F.2d 836, 854, 903 app. B (1966) (citing enrollment data derived from S. EDUC. REPORTING SERV., A STATISTICAL SUMMARY, STATE BY STATE, OF SEGREGATION-DESEGREGATION IN THE SOUTHERN AND BORDER AREA FROM 1954 TO THE PRESENT (15th rev. 1965)).

50. *Id.* at 854.

51. *Id.* While the effects of the Civil Rights Act of 1964 were not felt in all southern states (specifically Louisiana, Alabama, and Mississippi, which still had fewer than one percent of black students attending integrated schools), only fifty-one percent of biracial school districts were still segregated. *See id.*

52. Lee, *supra* note 1.

53. Elizabeth Cascio et al., *From* Brown *to Busing*, 64 J. URB. ECON. 296, 298 (2008).

54. *Id.* In addition to the public enforcement mechanism whereby the federal government may revoke funding from discriminatory programs and activities, the Supreme Court has interpreted Title VI to also include a private right of action for individuals seeking injunctive relief and compensatory damages if the individual is a victim of *intentional* discrimination. *See* Alexander v. Sandoval, 532 U.S. 275, 279–80 (2001). No private right of action is available for disparate-impact regulations that merely have an adverse effect on persons of a protected class. *Id.* at 276, 293. However, private citizens are not completely deprived of a remedy, as the Court left open the possibility for private parties to file disparate-impact complaints through agency proceedings. *See id.* at 289 (citing 42 U.S.C. § 2000d-1 (2012)). A person who has experienced intentional discrimination "may file a complaint with the Federal agency that provides funds for the program where . . .

for costly litigation expenses in addition to the costly activities to remain segregated.[55] Based on the numbers, it became more economically efficient to simply desegregate.[56]

Some scholars posit the "independent power of the courts" was the more likely cause of successful desegregation efforts,[57] while others take the opposite position, arguing that court action was ineffective, with very little changing until Congress enacted Title VI as part of the Civil Rights Act of 1964.[58] Other scholars take a different viewpoint, arguing the efforts of the federal court and the legislature should not be looked at individually because "[t]he fight to outlaw segregation in the 1950s and 1960s would not have been successful without Congress and the [c]ourts acting in tandem to achieve similar goals."[59]

Even the courts themselves have taken the position that Congress's enactment of Title VI, rather than judicial intervention, had the greatest impact on school desegregation efforts. In *United States v. Jefferson County Board of Education*, the Fifth Circuit majority wrote that "[t]he courts acting alone have failed" and that "[a] national effort, bringing together Congress, the executive, and the judiciary may be able to make meaningful the right of Negro children to equal educational opportunities."[60] Scholars who join the Fifth Circuit's sentiment argue that "strong judicial involvement in educational affairs is rarely a good thing," but that it should also be looked at on a case-by-case basis by taking into account the judge's individual characteristics as well as the community being impacted.[61]

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the discrimination is occurring." *Your Rights Under Title VI of the Civil Rights Act of 1964*, U.S. DEP'T OF JUSTICE, http://www.justice.gov/crt/about/cor/Pubs/TitleVIEng.pdf [http://perma.cc/3RAH-EW9E] (last visited Oct. 30, 2015).

55. Cascio *supra* note 53, at 311.

56. *Id.* at 297–98.

57. *See supra* notes 31–32 and accompanying text; *see also* Strickler, *supra* note 5, at 861–62 ("[T]he courts were an independent partner in the process of desegregation, and . . . the courts *were* capable of accomplishing much, even if Congress had *never* acted.").

58. ROSENBERG, *supra* note 33, at 67; *see also* Mark Joseph Stern, *Justice Denied: Why Do We Still Tolerate the Supreme Court?*, SLATE (Apr. 7, 2015, 10:58 AM), http://www.slate.com/articles/news_and_politics/books/2015/04/ian_millhiser_s_expos_of_the_supreme_court_injustices_reviewed.html [http://perma.cc/62NL-HX2M] ("*Brown v. Board of Education*, the greatest decision of all time, had hardly any immediate effect on segregated schools; widespread integration only occurred after Congress stepped in 10 years later with the Civil Rights Act.").

59. Zietlow, *supra* note 5, at 991.

60. United States v. Jefferson Cnty. Bd. of Educ., 372 F.2d 836, 847 (1966).

61. Parker, *supra* note 36, at 1766.

IV. THE STATE OF DESEGREGATION TODAY: LOOKING BACK

Today, civil rights advocates have turned to Title VI to force school districts to address racially charged equity issues.[62] Although *Brown* successfully removed de jure segregation—segregation enforced by law—from public schools, "it has neither eliminated *de facto* segregation (segregation in fact) nor brought about quality education for African Americans and other people of color in our public schools."[63] For example, a recent report released by the Civil Rights Project in 2014 reveals that New York had the largest number of racially segregated schools in the nation.[64] Modern segregation in schools today is largely attributed to neighborhoods becoming more and more segregated as affluent families move to locations where "school districts [have] better reputations and better resources."[65] While the country has eliminated much of the previously existing racial segregation, de facto racial segregation clearly remains a widespread issue in the American public school system over sixty years after *Brown* outlawed legally sanctioned racial discrimination.[66]

Looking back on the journey toward an integrated education system, how can one determine whether *Brown* or Title VI was more effective in opening the door for desegregation, or whether they made any difference at all when de facto segregation continues to prevail? Although *Brown* and federal legislative efforts have not been 100 percent successful in desegregating the nation's schools, it is apparent that *Brown* made a significant impact by inspiring the "northern liberals and black political activists to press ever more strongly for racial integration in the American

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62. Lesli A. Maxwell, *60 Years After* Brown*, School Diversity More Complex than Ever*, EDUC. WK. (May 14, 2014), http://www.edweek.org/ew/articles/2014/05/14/31 brown-overview.h33.html [http://perma.cc/4FLC-N2D7]. For a discussion about the remedies available for a cause of action brought under Title VI, see *supra* note 54 and accompanying text.

63. BROOKS, *supra* note 16, at 30.

64. *See* JOHN KUCSERA WITH GARY ORFIELD, THE CIVIL RIGHTS PROJECT, NEW YORK STATE'S EXTREME SCHOOL SEGREGATION: INEQUALITY, INACTION AND A DAMAGED FUTURE, at vi (2014), http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/ny-norflet-report-placeholder/Kucsera-New-York-Extreme-Segregation-2014.pdf [http://perma.cc/XR54-2Y3V]. While some states, such as Connecticut, continue to make strides toward the goal of dismantling segregated educational systems through the creation of magnet schools and voluntary transfer programs, "the rest of the Northeast, and the country as a whole, are turning backward, toward deepening racial separation and inequality." Press Release, The Civil Rights Project, UCLA Report Finds Connecticut's Schools Growing More Integrated; Programs Are a "Lighthouse for the Region" (Apr. 9, 2015), http://civilrightsproject.ucla.edu/news/press-releases/2015-press-releases/ucla-report-finds-connecticut2019s-schools-growing-more-integrated-programs-are-a-201clighthouse-for-the-region201dv [http://perma.cc/PUK3-TVLC].

65. Lee, *supra* note 1.

66. *See* BROOKS ET AL., *supra* note 16, at 30.

South and the Border States" as well as giving Congress and state legislatures constitutional encouragement and cover to attack de facto segregation using legislative efforts.[67]

While both scholars and the courts alike have taken opposing views as to which was most significant, it remains that *Brown* served as the gateway for Congress's passage of the Civil Rights Act of 1964. However, a comparison of *Brown* to the Civil Rights Act of 1964 illustrates that it deserves as much celebration as *Brown* because "courts alone are not as effective as courts working in tandem with the political branches."[68] Clearly, "constitutional change wrought by *Brown* and the 1964 Civil Rights Act was effective because the Court and Congress acted together during that era to achieve similar goals."[69]

Both sides of the scholarly debate present convincing arguments regarding the overall impact of the desegregation efforts made by the courts and the legislature. However, a strong argument exists that it was not one or the other acting independently, but rather that we should not consider the efforts of each side mutually exclusive from the other. Without the power of both the post-*Brown* courts and Congress working together to desegregate the American school system, segregated education might well have been the American reality today.

V. CONCLUSION

It is ironic that *Brown* has received such high praises for its role in ending segregated public education when, sixty years later, many public schools in the United States remain largely de facto segregated. However, we cannot discount the impact the federal courts, working in tandem with the legislature, have made on society as a whole. Together with Congress's carrot-and-stick approach to desegregation using the power of the national government's purse to revoke federal funds for noncompliance, both sides together became the catalyst for change in the public school system. *Brown* and Title VI stood for more than just the right to an integrated education—together, they stood for change in the socio-political climate surrounding civil rights and for an end to racial discrimination in American society. Since *Brown*, Congress has passed several laws prohibiting racial

67. Loevy, *supra* note 25, at 19.
68. Zietlow, *supra* note 5, at 1007.
69. *Id.* at 994.

discrimination in a variety of areas, such as employment,[70] voting,[71] and housing,[72] to vindicate the policy of formal equal opportunity. Although the historical debate between proponents of *Brown* and Title VI may never end, regardless if desegregation occurs in the "judicial or an administrative context, the constitutional duty is the same: public schools . . . formerly segregated by law must be desegregated in fact."[73]

70. 42 U.S.C. § 2000e-2 (2012).
71. 52 U.S.C. § 10101 (Supp. II 2014).
72. 42 U.S.C. § 3604 (2012).
73. James R. Dunn, *Title VI, the Guidelines and School Desegregation in the South*, 53 VA. L. REV. 42, 88 (1967).