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SOCIAL MOVEMENTS AND JUDGING: AN ESSAY ON INSTITUTIONAL REFORM LITIGATION AND DESEGREGATION IN DALLAS, TEXAS

*Darren Hutchinson**

I. INTRODUCTION

I am honored to participate in this special tribute to the late Judge Barefoot Sanders. Judge Sanders had a very distinguished career as a jurist, attorney, and legislator. Judge Sanders's role in the efforts to desegregate the Dallas Independent School District[1] probably gave him the most notoriety as a judge. But Judge Sanders also issued important rulings in cases that addressed housing discrimination against developmentally disabled individuals[2] and inhumane conditions in Texas psychiatric hospitals.[3]

As an assistant attorney general in the Johnson Administration, Judge Sanders played a crucial role in the drafting and subsequent passage of the Voting Rights Act.[4] Many scholars have argued that the Voting Rights Act has done more than any other statute to remove structural barriers that prevented persons of color from participating in the political process.

Judge Sanders's body of work symbolizes a period in American history that has expired, at least for the moment. During this time period, judges—supported by social movements, public opinion, and state and local legislatures and executive officials—presided over lengthy "institutional reform litigation."[5] In these cases, judges often acted in ways that blurred the lines between judicial and executive power or national and

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1. *See* Tasby v. Moses, 265 F. Supp. 2d 757 (N.D. Tex. 2003).
2. *See* United States v. Wagner, 930 F. Supp. 1148 (N.D. Tex. 1996).
3. *See* R.A.J. v. Miller, 590 F. Supp. 1319 (N.D. Tex. 1984).
4. The Voting Rights Act is codified as 42 U.S.C. § 1973 (2006).
5. David I. Levine, *The Modification of Equitable Decrees in Institutional Reform Litigation—Commentary of the Supreme Court's Adoption of the Second Circuit's Flexible Test*, 58 BROOK. L. REV. 1239, 1239 (1993). "In institutional reform litigation, plaintiffs . . . seek long-term reform of the policies and conditions in government-operated institutions through the use of equitable decrees." *Id.*

local authority.[6] The wide scope of constitutional violations, coupled with bad faith or recalcitrance by governmental officials, necessitated a more complex and invasive judicial response.[7] For example, the *Tasby* litigation, which challenged ongoing school segregation in Dallas, began in 1970[8]—sixteen years after the Supreme Court held in *Brown v. Board of Education*[9] that racial segregation in public schools violated the Equal Protection Clause.[10] Rather than comply with *Brown*, the Dallas school district defied the Court's ruling and continued to deny students of color equal access to educational opportunities. In order to cure the multiple harms of segregation in a setting where local officials acted in bad faith long after *Brown*, Judge Sanders and many other district court judges acted as judges, negotiators, and monitors in order to create unitary school systems.[11]

Institutional reform litigation developed specifically in post-*Brown* desegregation cases.[12] But this type of litigation, which involved substantial judicial involvement in the restructuring of public institutions, also took place in the context of prison reform,[13] challenges to dangerous conditions in mental hospitals,[14] and the desegregation of public housing.[15]

A combination of politics and Supreme Court precedent (which are not necessarily distinct)[16] has severely eroded the use and legitimacy of institutional reform litigation, particularly in federal courts.[17] Consequently, many of the cases Judge Sanders decided represent the work product of a bygone era.

Institutional reform litigation helped curtail many practices by state and federal governmental actors that deprived individuals of constitu-

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6. *See* John Choon Yoo, *Who Measures the Chancellor's Foot? The Inherent Remedial Authority of the Federal Courts*, 84 CAL. L. REV. 1121, 1140-41 (1996). "Several authors have criticized the judicial management of state institutions on both federalism and separation of powers grounds." *Id.* at 1140.

7. *Id.* at 1126.

8. *See* Tasby v. Esks, 444 F.2d 124 (5th Cir. 1971).

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

10. *Id.* at 495.

11. *Id.*; *see also* Marian Wright Edelman, *Southern School Desegregation, 1954-1973: A Judicial Political Overview*, 407 ANNALS AM. ACAD. POL. & SOC. SCI. 32, 35 (1973).

12. David Zaring, *National Rulemaking Through Trial Courts: The Big Case and Institutional Reform*, 51 UCLA L. REV. 1015, 1018 (2004). "Institutional reform cases are paradigmatic exercises of judicial power in the public sphere . . . . Beginning with *Brown v. Board of Education*, hundreds of schools, and, eventually, thousands of other government institutions that were sued for constitutional and federal statutory violations came under the dominion of injunctions and consent decrees." *Id.* (citation omitted).

13. *See, e.g.*, Hutto v. Finney, 437 U.S. 678 (1978).

14. *See, e.g.*, R.A.J. v. Miller, 590 F. Supp. 1319 (N.D. Tex. 1984).

15. *See, e.g.*, Hills v. Gautreux, 425 U.S. 284 (1976).

16. Darren Lenard Hutchinson, *Majoritarian Difficulty: Affirmative Action, Sodomy, and Supreme Court Politics*, 23 LAW & INEQ. 1, 17-19 (2005) (analyzing the impact of politics and public opinion on Supreme Court jurisprudence).

17. *See* Myriam E. Gilles, *Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights*, 100 COLUM. L. REV. 1384, 1393-94 (2000). "By the mid-1970s and early 1980s . . . a number of events signaled the demise of the structural reform revolution, including the appointment of a number of conservative Justices to the Supreme Court." *Id.* (citations omitted).

tional freedoms.[18] The subsequent judicial retreat from institutional reform and the pervasiveness of social inequality, however, demonstrate the limits of a litigation-centered approach to justice.[19] Regardless of an individual judge's commitment to justice, litigation cannot substantially modify inequality unless political actors, engaged social movements, and the public support and legitimize the efforts of reform-minded judges.[20] In the absence of such factors, a court-based strategy will not produce sustained progress towards equality.[21]

This Article discusses the political and legal barriers that have surfaced to undermine the ability of courts to fashion remedies that offer justice to aggrieved individuals and to render rights-based institutional reform litigation a judicial relic. Part II examines the historical development of institutional reform litigation and examines the political factors that created the opportunity for dramatic changes in legal approaches to the issue of racial inequality. Part III examines litigation challenging segregation in Dallas public schools. It also discusses cases filed in the immediate post-*Brown* era and contrasts those cases with Judge Sanders's rulings on the subject. In addition, Part III considers social and political changes that informed Judge Sanders's rulings, placing particular emphasis on Supreme Court rulings and social movement activity that influenced and framed the battle over educational equality in Dallas. Part IV examines the political and doctrinal barriers that have led to the sharp decline of institutional reform litigation and that impede the ability of courts to offer relief to subordinate communities. Part IV also considers whether political opportunities exist for reigniting a vigorous commitment to substantive justice within the nation's courts and legislatures.

II. JUDGES AS POLICYMAKERS: INSTITUTIONAL REFORM LITIGATION

A. The Political and Social Context that Gave Rise to Institutional Reform Litigation

The Supreme Court's initial ruling in *Brown* held that racial segregation in public schools violated the Constitution, but the Court did not offer a remedy for the plaintiffs.[22] Instead, the Court requested that the parties submit briefs on the question of appropriate remedies.[23] Once it reviewed the parties' submissions, however, the Court again declined to issue a remedy.[24] Instead, it directed the district courts to do so.[25] *Brown II*, the Court's "remedial" ruling, set the stage for judicial involvement in

18. *See* Zaring, *supra* note 12, at 1018-19.
19. *See* Gilles, *supra* note 17, at 1393-95.
20. Gerald N. Rosenberg, The Hollow Hope: Can Courts Bring About Social Change? 299 (2008).
21. *Id.*
22. Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954).
23. *Id.*
24. Brown v. Bd. of Educ. (*Brown II*), 349 U.S. 294, 299 & n.3, 300 (1955).
25. *Id.*

desegregation efforts,[26] which ultimately led to broad litigation seeking to reform public institutions such as schools, prisons, and psychiatric institutions.[27] *Brown* supported the idea of far-reaching and even unpopular federal court involvement in the administration of education in states that mandated racially segregated public schools:

> In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs. These cases call for the exercise of these traditional attributes of equity power. At stake is the personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis. *To effectuate this interest may call for elimination of a variety of obstacles in making the transition to school systems operated in accordance with the constitutional principles set forth in our May 17, 1954 decision.* Courts of equity may properly take into account the public interest in the elimination of such obstacles in a systematic and effective manner. But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them.[28]

Despite the strength of the Court's language regarding the district courts' use of equitable decrees to achieve unitary school systems, vigorous judicial enforcement of the equality principle announced in *Brown* did not begin until ten years after the ruling.[29] Many political factors explain the sluggish judicial response, including the white supremacist "massive resistance" campaign launched in southern states.[30] Governmental and private actors in the South vowed to defy *Brown* with any necessary means, including violence.[31] Racial terrorism and open defiance of court rulings mandating desegregation, however, led to enhanced public support for formal race equality measures, more intense and successful activism by proponents of civil rights, and passage of the Civil Rights Act of 1964.[32] President Eisenhower's decision to dispatch the Arkansas National Guard in order to provide physical protection for black children who sought to enroll at Little Rock Central High School in 1957, the City of Birmingham, Alabama's violent response to peaceful

26. Ann M. Gill, *The Supreme Court's Rhetoric of Legitimization, in Brown v. Board of Education* at Fifty: A Rhetorical Perspective 143, 146 (Clarke Roundtree ed., 2004).

27. *See* Zaring, *supra* note 12, at 1018-19.

28. *Brown II*, 349 U.S. at 300 (emphasis added) (citations omitted).

29. JAMES T. PATTERSON, BROWN V. BOARD OF EDUCATION: A CIVIL RIGHTS MILESTONE AND ITS TROUBLED LEGACY 91 (2001).

30. Michael J. Klarman, *Brown, Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 97-98, 107 (1994).

31. *Id.* at 129. "[T]he post-Brown racial backlash created a political environment in which southern elected officials stood to benefit at the polls by boldly defying federal authority and brutally suppressing civil rights demonstrations." *Id.*

32. *Id.* at 85 (asserting that *Brown* led to "a series of violent confrontations between white supremacist law enforcement officals [sic] and generally nonviolent demonstrators, which provoked an outcry from national television audiences, leading Congress and the President to intervene with landmark civil rights legislation").

antiracist protestors in 1963, and the passage of the Civil Rights Act of 1964 are important flashpoints in the historical timeline linking *Brown*, social movement activism, countermovement backlash, and policy innovation.[33]

B. Social Movements, Presidential Leadership, and Legal Progress

President Eisenhower was not a liberal on racial issues. In 1957, he was hesitant to support any civil rights legislation that contained provisions addressing the disenfranchisement of blacks.[34] Eisenhower also firmly stated in an interview that he could not "imagine any set of circumstances that would ever induce [him] to send Federal troops . . . into any area to enforce the orders of a federal court."[35] Furthermore, Eisenhower did not personally support integration, and he even defended Southern segregationists.[36] Eisenhower, nevertheless, feared that open defiance of the law would create domestic instability that would injure the nation's image internationally.[37] After violent crowds of whites threatened the safety of black students who were selected by a relatively moderate local government to attend Little Rock Central High School, Eisenhower decided to send in the troops.[38]

Despite Eisenhower's dramatic intervention, a district court, in *Cooper v. Aaron*, decided to delay desegregation for two and one-half years due to the public outcry and violence.[39] The Eighth Circuit Court of Appeals, however, reversed the decision, and the Supreme Court affirmed.[40] The Supreme Court issued an opinion signed by all nine justices.[41] The opinion forcefully stated that the Court's interpretation of the Constitution defeated contrary views held by Governor Faubus and other local officials.[42] The Court's firm stance in favor of the rule of law in *Cooper* resulted from a mixture of political and social factors, including backlash and massive resistance to *Brown* and other civil rights developments, renewed antiracist political activism, and the official backing of *Brown*'s validity by Eisenhower.[43]

Like Eisenhower, President Kennedy had a precarious relationship with the ideals of racial justice.[44] And while the violent standoff over

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33. *Id.* at 118-20, 129, 131-32, 141-47, 149.
34. Dwight D. Eisenhower, Waging Peace: The White House Years, 1956-1961, at 156-57 (1965).
35. *Id.* at 170.
36. *See* Mary L. Dudziak, *The Little Rock Crisis and Foreign Affairs: Race, Resistance, and the Image of American Democracy*, 70 S. Cal. L. Rev. 1641, 1679 (1997) (discussing President Eisenhower's views on race).
37. *Id.* at 1679-80.
38. *Id.* 1677-78.
39. Cooper v. Aaron, 358 U.S. 1, 4 (1958).
40. *Id.*
41. *Id.*
42. *Id.* at 18-19.
43. *See* Dudziak, *supra* note 36, at 1647, 1705-06, 1708, 1711, 1712.
44. *See* Rosenberg, *supra* note 20, at 121.

segregation in Little Rock caused Eisenhower to retreat from his earlier stance and dispatch federal troops, even more dramatic racial violence motivated Kennedy to alter his views on the appropriateness of civil rights legislation.[45]

During his campaign, Kennedy promised to sponsor legislation prohibiting racial discrimination in housing, but he delayed doing so for two years following his election.[46] Kennedy also repeatedly failed to protect black civil rights protestors from repression by southern officials, refused a request to recognize the one hundredth anniversary of the Emancipation Proclamation, stated during his first two years in office that he would not sponsor civil rights legislation, and appointed known racist Walter Williams Cox to the federal bench.[47] Kennedy needed the South to win his reelection, and his tepid stance on race issues appeased southern whites and could have potentially enhanced his prospects for a second victory.[48]

But just as the southern backlash caused Eisenhower to reverse his course on the use of troops to enforce a judicial decree, countermovement activity also led Kennedy to sponsor progressive race policies.[49] Kennedy's change in direction occurred in 1963—when Dr. Martin Luther King, Jr. and Reverend Frank Lee Shuttlesworth organized a series of marches that coincided with Lent, Good Friday, and Easter Sunday.[50] The marchers used nonviolent means to protest rigid racial segregation in Birmingham, Alabama, and the organizers scheduled the events during the religious holidays to make use of their powerful symbols of peace, sacrifice, and change.[51]

The City of Birmingham responded with a dramatic display of repression. Dr. King, Reverend Shuttlesworth, and other organizers were arrested and detained on criminal contempt grounds because they violated an unconstitutional injunction that banned the marches.[52] The marches, however, continued, and city officials continued to arrest protestors until the jails were filled with black adults and youth.[53] The most powerful brutality occurred when Public Safety Commissioner Bull Connor, a staunch segregationist, turned water cannons and attack dogs on nonviolent black protesters, including many children.[54] Ultimately, over 2,000

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45. *Id.* at 77.

46. *See* Klarman, *supra* note 30, at 139.

47. *Id.* at 139-40.

48. *See* Michael J. Klarman, *Brown v. Board of Education* and the Civil Rights Movement 203-04 (2007).

49. *See generally* David Benjamin Oppenheimer, *Kennedy, King, Shuttlesworth and Walker: The Events Leading to the Introduction of the civil Rights Act of 1964*, 29 U.S.F. L. Rev. 645 (1995) (analyzing the political events that caused President Kennedy to support the Civil Rights Act of 1964).

50. *Id.*

51. David Benjamin Oppenheimer, *Martin Luther King,* Walker v. City of Birmingham, *and the Letter from Birmingham Jail*, 26 U.C. Davis L. Rev. 791, 803-04 (1993).

52. *Id.* at 805-08.

53. *Id.* at 819.

54. *Id.* at 819-20.

black protesters were arrested.[55]

Print and television media captured Birmingham's violent response to the protests and broadcasted the events domestically and internationally, which led to widespread condemnation.[56] Public support for broad civil rights legislation spiked after the broadcast of the marches and the City's violent response.[57] Accordingly, the Kennedy Administration drafted and introduced into Congress a bill that would later become the Civil Rights Act of 1964.[58] Kennedy was assassinated before the passage of the legislation, which President Johnson eventually signed into law.[59]

One measure of the Civil Rights Act of 1964, Title VI, prohibited racial discrimination in the use of federal money and authorized the Attorney General to bring lawsuits seeking to cut off funding of noncompliant states.[60] Congress also passed the Elementary and Secondary Education Act of 1964, which provided federal assistance to states for public schools.[61] Title VI would have deprived southern states of these critical federal funds unless they ended policies of segregation. Thus, federal legislation had a dramatic impact on desegregation efforts.[62] In the first decade after the *Brown* decision, only slightly more than one percent of black children in the South attended schools with white children.[63] By 1972, this number had increased to nine percent.[64]

Some scholars have concluded that the decline in segregation following the enactment of civil rights legislation—rather than immediately after the issuance of the *Brown* decision—demonstrates the inutility of judicial enforcement of civil rights. This argument, however, ignores the courts' roles in enforcing *Brown* following the enactment of the civil rights legislation.[65] Rather than indicating *Brown*'s irrelevance, the dramatic integration of the 1970s resulted from an invigorated judiciary presiding over school desegregation cases.[66] The passage of legislation designed to deter segregation and the surge in public support for integration following the Birmingham protests created a supportive political environment for the effective judicial enforcement of *Brown*.[67] The post-1964 era of rapid integration demonstrates that a mixture of domestic and international politics, public opinion, legislation, and presidential guidance influenced

55. *Id.* at 822, 824.
56. *Id.* at 820-21.
57. *Id.*
58. *Id.* at 825.
59. *Id.* at 826.
60. *See* ROSENBERG, *supra* note 20, at 47.
61. *Id.*
62. *Id.* at 52.
63. *Id.*
64. *Id.* at 53.
65. Vincent James Strickler, *Green-Lighting Brown: A Cumulative-Process Conception of Judicial Impact*, 43 GA. L. REV. 785, 807-08 (2009).
66. Neal Devins, Review Essay, *Judicial Matters:* The Hollow Hope: Can Court Bring About Social Change? *By Gerald N. Rosenberg*, 80 CAL. L. REV. 1027, 1043 (1992).
67. *See* ROSENBERG, *supra* note 20, at 94-95.

broad societal changes in race relations and civil rights.[68] Judicial enforcement toughened as the political branches' and the public's support for civil rights measures increased.[69]

C. Judicial Developments

In the 1970s, federal courts played an enhanced, if not a primary, role in the enforcement of desegregation.[70] Taking cues from Congress, presidents, public opinion, and its own precedent, the Supreme Court decided several cases that addressed and attempted to remedy the problem of segregation in public schools. In *Swann v. Charlotte-Mecklenburg Board of Education*,[71] the Court held that, in order to integrate a local school district where virtually all of the black students attended all-black schools, the district court could utilize several tools to dismantle segregation, including creating race-conscious attendance zones, establishing racial benchmarks and goals, and mandating the flexible use of busing.[72] The Court's unanimous opinion mapped out a very liberal view of the remedial power of federal courts: "If school authorities fail in their affirmative obligations under these holdings, judicial authority may be invoked. Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies."[73]

The Court also expressed frustration with ongoing efforts to evade its rulings, mentioning specifically the "[d]eliberate resistance" and "dilatory tactics" of recalcitrant school officials.[74] Prior to *Swann*, the Court had attempted to remedy practices that school districts utilized in order to evade integration. For example, in *Green v. County School Board*, the Court invalidated a Virginia school district's "freedom of choice" plan that resulted in almost completely segregated schools.[75] Following *Brown*, the district continued its policy of explicit discrimination. The district adopted the voluntary assignment plan to avoid losing federal funding after the passage of the Civil Rights Act of 1964.[76] Despite the fact that the tiny district lacked residential segregation and only contained two public schools, it bused students along twenty-one bus routes in order to maintain its dual school system.[77]

In *Griffin v. School Board of Prince Edward County*, the Court addressed ongoing discrimination by an original party to the *Brown* litiga-

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68. *Id.* at 94-106.
69. *Id.* at 106.
70. Sheerin N.S. Haubenreich, *Sometimes You Have to Go Backwards to Go Forwards: Judicial Review and the New National Security Exception*, 8 Conn. Pub. Int. L.J. 1, 23 (2008).
71. Swann v. Charlotte-Mecklenberg Bd. of Educ., 402 U.S. 1, 25-27 (1971).
72. *Id.* at 15.
73. *Id.*
74. *Id.* at 13.
75. 391 U.S. 430, 441-42 (1968).
76. *Id.* at 433 & n.2.
77. *Id.* at 432.

tion.[78] Ten years after finding that mandated segregation violated the Constitution, the Court held that Prince Edward County violated the Constitution by closing its public schools and providing vouchers for white students to attend private schools that did not admit blacks.[79] This case demonstrated the extent to which state actors were willing to violate legal norms in order to perpetuate white supremacy.

Although the Supreme Court delayed justice in the *Brown* decision, the Court began to toughen its approach to integration after Congress and the President joined the effort to desegregate the nation's schools and after public opinion for integration increased. Accordingly, the Court started to mandate that lower courts choose between a number of flexible yet expansive remedies designed to achieve unitary school systems.[80] The federal courts' increased involvement in the administration of public schools served as the launching pad for institutional reform litigation. In addition to cases involving desegregation, the courts also presided over cases challenging abuses in state-run mental hospitals, prisons, and public housing. The development of this expansive litigation provoked controversy and criticism contending that courts were incompetent to make decisions concerning the subject matter of the litigation. Nevertheless, this litigation model lasted for almost two decades before an increasingly conservative federal judiciary retreated from institutional reform.

III. THE *TASBY* LITIGATION IN HISTORICAL CONTEXT

A. Pre-*Tasby* Cases

The *Tasby* litigation, which challenged racial segregation in the Dallas school system, began in 1970. But litigation seeking to end racial segregation in the Dallas public schools began in 1955 with a series of cases leading up to *Tasby*. A review of some of the cases preceding *Tasby* reveals the commitment of white governmental officials, as well as some federal judges, to racially segregated schools and white supremacy.

Black plaintiffs initially challenged segregation in Dallas public schools in the 1955 case, *Bell v. Rippy*.[81] The *Bell* court's ruling never cited *Brown*, but construed *Bolling v. Sharpe* as holding that "all attempted separation of the races in the United States is illegal and unconstitutional."[82] Despite its broad reading of *Bolling*, the court refused to find that racial segregation in the Dallas public school system violated the Constitution. Instead, the court seemed to apply the repudiated "separate but equal" standard and dismissed the complaint.[83] Furthermore,

78. Griffin v. Sch. Bd. of Prince Edward County, 377 U.S. 218, 221 (1964).
79. *Id.* at 222-23, 234.
80. *See, e.g.*, *Green*, 391 U.S. at 442 n.6.
81. Bell v. Rippy, 133 F. Supp. 811 (N.D. Tex. 1955).
82. *Id.* at 812.
83. *Id.* "All of the law as declared by the various courts, appellate and trial, in the United States, are agreed upon the proposition that when similar and convenient free

even though *Brown II* directed lower courts to use equitable remedies to fashion relief for desegregation plaintiffs, *Bell* held that the district court need not issue relief that "the Supreme Court itself decided not to determine."[84]

Borders v. Rippey[85] was a second case that challenged Dallas public school segregation. In *Borders*, the district court acknowledged the Supreme Court's ruling in *Brown*, but nevertheless considered whether "the white and black school children of Dallas [can] be presently and hastily integrated by force without frustration and injury to their educational opportunities."[86] The opinion, authored by Judge Thomas Davidson, contained language that reflected the dense racist attitudes that existed pervasively in the South during this time period.

For example, the opinion stated that "[i]ntegration has not helped either race," that "[i]t has retarded the development of every land where it has occurred," and that "patience" would bring about a better result than integration by "force."[87] The opinion also approvingly cited the Supreme Court's ruling in *Plessy v. Ferguson*[88]—which *Brown* overruled in the educational context—and, making arguments similar to those in *Plessy*, held that integration must occur by the "consent of the parties affected."[89] The ruling also mirrored and exceeded *Plessy* by portraying both slavery[90] and Jim Crow as benevolent institutions, agreeable to both blacks and whites .[91] Judge Davidson also declared that "the races here at Dallas have been given equal opportunities for more than 60 years," a patently false observation that contradicted *Brown*.[92] Finally, Judge Davidson fearfully predicted that integration of young children throughout their educational lives would lead inevitably to racial "amalgamation," which made this proposition "the most objectionable of all features of integration."[93]

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schools are furnished to both white and colored that there then exists no reasonable ground for requiring desegregation." *Id.*

84. Brown v. Bd. of Educ. (*Brown II*), 349 U.S. 294, 300-01 (1955); *Bell*, 133 F. Supp. at 812.

85. Borders v. Rippey, 184 F. Supp. 402 (N.D. Tex. 1960).

86. *Id.* at 403.

87. *Id.* at 404.

88. *Id.* at 408.

89. *Id.* at 417.

90. *Id.* at 405-06 (contrasting "horrific" conditions on slave ships run by "Arab slave traders" and slave plantations where blacks allegedly enjoyed "the wide open space . . . with open air, food and kindness"); *id.* at 407 ("The Negro when treated kindly is one of the most loyal of all races. But there came an interruption. He was summoned up to the big house and told he was now free . . . . But these strong black people wept at the feet of their mistress, not because they were free but because they were parting from some one [sic] they loved.").

91. *See id.* at 403 ("The City of Dallas has had exceptionally good relations between the two races and the question largely is how much haste can be exercised in applying integration by force.").

92. *Id.* at 415.

93. *Id.*

Given his views about race, it should not have surprised either party to the *Borders* litigation that Judge Davidson refused to order the school district to implement any specific measures that would integrate Dallas public schools. Judge Davidson even frowned upon the defendant's sluggish proposal to integrate one grade per year until the district achieved full integration after twelve years of incremental change.[94] Judge Davidson rejected this plan because he believed it would lead to interracial marriages.[95]

The district submitted an amended plan, which ensured the continuation of a segregated school system for Dallas.[96] The amended plan stated that the defendant believed "a great many of the parents and children in the District [were] vigorously opposed to wholesale and complete integration," that the defendant would survey parents and students to determine whether they favored integrated schools, and that the district would attempt to "give all concerned what they prefer[red]."[97] The amended plan also stated that "sweeping integration" would lead to "violence" with all of the negative consequences that occurred in "Little Rock" and, consequently, that the district would pursue "[v]oluntary acceptance and cooperation."[98]

Judge Davidson accepted the district's plan after announcing the court's impotence to do anything other than to reiterate the "mandate calling for integration"; beyond this, Judge Davidson held that "school management [would] be left *entirely to the school authorities*."[99] Judge Davidson's opinion gave Dallas every incentive to maintain segregated schools because it indicated that the court would not interfere with the school district's decisions with respect to pupil assignment:

> A white school board may not refuse a colored child the right to enroll among pupils of the white race, but our judgment is that the courts will not interfere with the arrangements of the schools so long as there is due respect for the orders of integration. And the court *will not direct the school board as to what school the child may attend if the board thinks that an allocation would be helpful to the school system and even to the child himself in certain cases.*[100]

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94. *Id.*

95. *Id.* (arguing that "in 12 years adult pupils will be channeled together" and that "your children will marry whomever they associate with").

96. *Id.* at 417-18.

97. *Id.*

98. *Id.* at 418.

99. *Id.* (emphasis added).

100. *Id.* (emphasis added). The court offers the following hypothetical scenario as an example that would qualify as a legitimate basis for reassigning a pupil:

> [I]f an overgrown Negro boy in an integrated school should be by premature growth inclined to sex and should write verses on the blackboard of an obscene character designedly for the white girls to read or should make improper approaches to them so as to provoke trouble in the school, he should be assigned to a school where the situation is different.

Id. at 420.

Ultimately, the Fifth Circuit reversed Judge Davidson's ruling and directed him to accept the incremental, twelve-year plan that the district had originally proposed.[101]

B. THE *TASBY* LITIGATION: JUDGE WILLIAM TAYLOR

Judge William Taylor presided over the *Tasby* litigation,[102] which began in 1970.[103] Judge Taylor's first ruling in the case signaled a different—but grossly inadequate—direction in the adjudication of desegregation claims. Judge Taylor's opinion began with passionate language that expressed outrage over the continuation of segregation seventeen years after *Brown condemned it*.[104] The opinion also detailed the undeniable efforts by the school district to maintain segregation. At the time of the ruling, most of the schools remained racially segregated, and only a few students attended school in an integrated environment.[105]

Despite the tone of Judge Taylor's opinion, the court failed to enjoin segregation. Instead, the court ordered the school district to "integrate" elementary schools by "television" or "satellite"—an early version of distance learning that would pair "white" and "black" schools to achieve a shared learning experience without the expense of physical integration.[106] Judge Taylor explicitly stated that he opposed busing students for the purpose of "mixing bodies."[107] The court also ordered the district to implement a voluntary "majority-to-minority" school transfer policy for high schools.[108] In order to promote the program, the court ordered the district to offer participating students a "four-day school week" attendance option, which would have lowered the volume of education and created a situation where students would have unequal educational opportunities in the same school.[109] The court also held that Latinos did not suffer de jure segregation, but nevertheless held that a potential plan to integrate high schools would include Latinos.[110]

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101. Boson v. Rippy, 285 F.2d 43, 46-47 (5th Cir. 1960).
102. *See* Tasby v. Estes, 444 F.2d 124 (5th Cir. 1971).
103. Tasby v. Estes, 342 F. Supp. 945, 945 (N.D. Tex. 1971).
104. *Id.* at 947. According to Judge Taylor:

> It is difficult to believe in this day and time that anyone anywhere would be surprised, shocked or amazed at this case or at the pendency of this law suit. It would be difficult for me to believe that anyone anywhere would be surprised, shocked or amazed by what I am about to rule in this case at this time.

Id.

105. *Id.* The opinion stated that:

> [I]n the Dallas Independent School District 70 schools are 90% or more white . . . 40 schools are 90% or more black, and [there are] 49 schools with 90% or more minority, 91% of black students in 90% or more of the minority schools [and] 3% of the black students attend schools in which the majority is white . . . ."

Id.

106. *Id.* at 952.
107. *Id.* at 948.
108. *Id.* at 953.
109. *Id.*
110. *Id.* at 948.

The Fifth Circuit reversed the distance learning component of the ruling and the high school voluntary transfer option.[111] It agreed, however, with the district court's holding that Latinos had not suffered de jure segregation, and held that the district must include Latinos in a remedial plan in order to prevent or compound their racial isolation.[112]

A second ruling by Judge Taylor expressed a growing sense of cynicism and frustration with respect to the case. The opinion described "legal characters" in the "desegregation drama,"[113] and it included a personal appeal by Judge Taylor to the "business leaders of Dallas" to help him solve the crisis, which "was not a job for the Court alone."[114]

By 1976, the year of Taylor's second ruling, the population of the Dallas public schools had changed dramatically: the district was no longer "predominantly Anglo"[115] due largely to very rapid white flight.[116] Despite the changing demographics, the city had made "significant strides" towards desegregation.[117] Judge Taylor approved a plan that created several attendance zones or "subdistricts," which were racially diverse and which could provide integrated education using the "neighborhood schools" concept. The plan, however, excluded South Oak Cliff—which would have been ninety-eight percent black and two percent Latino under the court's order.[118] The court reasoned that due to "factors of time and distance," South Oak Cliff would remain almost exclusively black.[119] The court, however, suggested that renovating the facilities in the area could make South Oak Cliff attractive to whites.[120]

The Fifth Circuit remanded portions of the order, including the subdistrict plan. The appeals court found that the plan would leave too many single-race schools intact—especially in the East Oak Cliff and Seagoville areas.[121] The appeals court thus remanded the case once again for the district court to justify the maintenance of every "one-race school" that the plan would keep intact.[122]

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111. Tasby v. Estes, 517 F.2d 92, 103-04 (5th Cir. 1975).
112. *Id.* at 106-07.
113. Tasby v. Estes, 412 F. Supp. 1192, 1193-94 (N.D. Tex. 1976).
114. *Id.* at 1194.
115. *Id.* at 1197 (discussing the racial composition of the school district).
116. *Id.* (finding that the district had lost 40.9% of white students since 1971—the year the district court held that the Dallas public schools were unlawfully segregated).
117. *Id.*
118. *Id.* at 1204.
119. *Id.*
120. *Id.* "With the renovation of some of the facilities in this area, this subdistrict could be a model for the district and the nation, and attract Anglos to it on the basis of its superior programs and facilities." *Id.*
121. Tasby v. Estes, 572 F.2d 1010, 1014-15 (5th Cir. 1978). The appeals court describes the Oak Cliff subdistricts as "East Oak Cliff," while the district court used the label "South Oak Cliff." Either way, the area would have remained completely nonwhite.
122. *Id.* at 1018. The court also affirmed a separate lower court order, which rejected plaintiffs' motion to add the Highland Park Independent School District (HPISD) as a defendant. The HPISD had explicitly discriminated against nonwhites until 1958, and after that time, it used a discriminatory transfer policy that allowed nondistrict whites, but not nondistrict blacks, to attend school in the area. At the time of the ruling, the schools were one hundred percent white. *Id.* at 1015-16.

C. Enter Judge Sanders

Judge Taylor recused himself from the case upon a motion filed by the NAACP.[123] The case was then reassigned to Judge Sanders.[124] By the time Judge Sanders took over the case, the number of interested parties had ballooned, but many others had dropped out along the way. A new group, the Black Coalition,[125] joined the case months before Judge Sanders's first ruling. Judge Sanders's explanation for allowing the party to intervene demonstrated an appreciation for the complexity of the litigation and a willingness to accept challenging positions, which none of the prior rulings on this issue exhibited. Judge Sanders stated that he granted the request to intervene in the litigation because he wanted a complexity of black opinion represented in the litigation:

> The testimony offered by the large number of witnesses who testified in [sic] behalf of the Black Coalition has convinced the Court that there is considerable difference of opinion among sizeable segments of the minority citizenry of Dallas over the type of relief that should be ordered in this case. The Court is in no position, based on the testimony offered thus far, to determine which of the parties speaks for the greater number of Dallas blacks and Hispanics. It is doubtful that such a thing can be accurately measured or surveyed, but even if it were capable of proof, this is a finding that need not be made. What is clear from the testimony is that no one party to this suit can lay claim any longer to speaking on behalf of the entire minority population as a sacrosanct "class."[126]

To support his position, Judge Sanders cited the work of Derrick Bell, a leading progressive scholar on racial justice and a lawyer for desegregation plaintiffs.[127] Bell had long argued that many black plaintiffs actually preferred improvements in the quality of education, rather than integration as such.[128] According to Bell, middle- and upper-class blacks coopted the educational equality movement and abandoned the concept of substantive justice advocated by poor plaintiffs.[129] Although Bell probably goes too far in treating integration and substantive justice as distinct concepts,[130] his article highlights a very relevant conflict over the efficacy

123. Tasby v. Wright, 520 F. Supp. 683, 688 (N.D. Tex. 1981).

124. *Id.*

125. *Id.* at 690. The Black Coalition included "the Dallas Black Chamber of Commerce, Dallas Council of Black Parents and Citizens, Dallas Black Business and Professional Women, Dallas Committee of 100, Pylon Salesmanship Club, National Council of Negro Women (Dallas Section), Dallas Ministerial Alliance, East Oak Cliff Citizens, and the Dallas Urban League." *Id.* at 690 n.10.

126. *Id.* at 690.

127. *Id.* (citing Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 Yale L.J. 470, 507-08 (1976)).

128. *See generally* Bell, *supra* note 127.

129. *See id.* at 491-92.

130. "Separate but equal" was a legal fiction, and even today, most racially isolated schools (especially in concentrated poverty neighborhoods) are unequally funded and underperforming. *See* Gary Orfield, The Civil Rights Project, Reviving the Goal of an Integrated Society: A 21st Century Challenge 6 (2009), *available at* http://www.civilrightsproject.ucla.edu/research/deseg/reviving_the_goal-Mlk_2009.pdf. The Su-

or appropriateness of formal, rather than substantive, equality. Judge Sanders granted the Black Coalition intervenor status to permit the group to advocate equality premised upon the delivery of equal education to black students, regardless of a school's racial composition.[131]

The Black Coalition strenuously objected to the busing of very young children outside of neighborhood schools.[132] Judge Sanders ultimately concluded that busing students from kindergarten to third grade was infeasible due to the demographics and size of the city.[133] He was "impressed" by testimony regarding the inadequacy of busing from the perspective of some blacks. Many blacks believed that busing was too draining for children, did not allow parents to invest time and energy in "community" schools, and would place children in non-nurturing or hostile environments.[134] Many black parents testified that they preferred remedial measures that addressed the quality of education and that corrected the injuries caused by years of segregation and discrimination.[135]

Judge Sanders's consideration of the interest of black parents in maintaining racial isolation is rare for a desegregation ruling. This aspect of the decision embraces the complexity of racial meanings that several critical race theorists have advocated.[136] Rather than always implying an improper motive, race consciousness can serve egalitarian interests.[137]

But Judge Sanders also focused on substantive equality for a very practical reason: the demographics of the Dallas school district changed dramatically in the ten years following the first court ruling that found the district had maintained unlawful segregation. The number of white students attending district schools had plunged over 60% between 1971 and 1981.[138] In 1971, the student population in Dallas public schools was 58.2% white, 33.4% black, and 8.4% Latino.[139] In 1981, the population had changed enormously and was 29.5% white, 49.61% black, and 19.4%

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preme Court has also long held that courts could order substantive improvements to schools in order to address the effects of segregation. *See, e.g.*, Miliken v. Bradley, 433 U.S. 267, 282 (1977).

131. Tasby v. Wright, 520 F. Supp. 683, 689-90 (N.D. Tex. 1981). Judge Sanders observes that:

> The Black Coalition represents a substantial body of blacks who are opposed to any escalation in the use of racial balance remedies to cure the effects of school segregation. The Coalition prefers remedies designed to improve educational quality and to eliminate the disparity in academic achievement that can be attributed to past segregation, as alternatives to remedies that require pupil reassignments to non-contiguous attendance zones and mandatory transportation.

Id. at 690.

132. Tasby v. Wright, 520 F. Supp. 683, 736 (N.D. Tex. 1981).

133. *Id.* at 732.

134. *Id.* at 733.

135. *Id.*

136. *See generally* Darren Lenard Hutchinson, *Progressive Race Blindness?: Individual Identity, Group Politics, and Reform*, 49 UCLA L. REV. 1455 (2002).

137. *Id.* at 1457.

138. Tasby v. Wright, 520 F. Supp. 683, 693 (N.D. Tex. 1981).

139. *Id.*

Latino.[140] The local suburbs experienced enormous sprawl, and many whites left the city.[141] The changing demographics, the vast size of the district, the existence of racially segregated neighborhoods, and conservative Supreme Court jurisprudence made an integrated education infeasible for many students in Dallas, absent extreme amounts of time transporting students.[142]

In light of these circumstances, Judge Sanders focused on improving the quality of education for students in racially isolated areas. In particular, he ordered the defendant to study the feasibility of improvements to schools in East Oak Cliff.[143] In order to maximize integration, however, Judge Sanders also ordered the parties to consider adjustments to attendance zones for contiguous subdistricts, where integration could take place without massive busing of students.[144] The court's final judgment was extensive and provided for: the creation of magnet schools, curricular improvements to remedy the vestiges of segregation, the busing of students in grades four through eight (over the objection of some black parents), the consolidation of schools in order to facilitate integration in contiguous school zones, developing monitoring procedures in order to evaluate racial composition and student performance, renovating facilities in East Oak Cliff, promoting racial goals for the composition of administrative personnel and teachers, and improving participation in the "majority-to-minority" transfer program.[145]

After Judge Sanders replaced Judge Taylor, the desegregation efforts changed dramatically. But Judge Sanders's rulings occurred within a broader context, in which the Supreme Court, Congress, and the President had already taken positions supporting desegregation. Locally, the changing demographics of Dallas also created opportunities for substantive justice. The population of blacks and Latinos in Dallas increased dramatically between 1954 and 1981.[146] And with the passage of the Voting Rights Act and the judicial invalidation of racially discriminatory practices in Texas, such as the "white primaries," blacks and Latinos were achieving a modicum of political and economic power locally and nationally.[147] Older judges who essentially followed *Plessy* and refused to enjoin segregation had died, and new appointments reversed the old caselaw. The Fifth Circuit received tremendous praise for its decisions protecting the equal protection rights of persons of color in the cradle of Jim Crow.[148] Despite all of the changes that permitted Judge Sanders to

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140. *Id.*
141. *Id.* at 692.
142. *Id.* at 699-702, 724-44. This was especially true of students in East Oak Cliff.
143. *Id.* at 747-51.
144. *Id.* at 736.
145. Tasby v. Wright, 542 F. Supp. 134, 138-51 (N.D. Tex. 1981).
146. *Tasby*, 520 F. Supp. at 692-92.
147. DARLENE CLARK HINE, STEVEN F. LAWSON & MERLINE PITRE, BLACK VICTORY: THE RISE AND FALL OF THE WHITE PRIMARY IN TEXAS 254-56 (2003).
148. SANDRA DAY O'CONNOR, THE MAJESTY OF THE LAW: REFLECTIONS OF A SUPREME COURT JUSTICE 78 (2003).

take a tougher stance on segregation, however, other national developments surrounding the legality of remedies for educational inequality would constrain Judge Sanders and other reform-minded judges. These factors continue to evolve and to impede the attainment of substantive equality.

IV. THE END OF INSTITUTIONAL REFORM LITIGATION AND THE RETURN OF SEGREGATION

A. RETREAT FROM DESEGREGATION

Even before Judge Sanders took over the *Tasby* litigation in 1981, national changes in law and politics restricted what he could have done to promote educational equality. Democrats and liberals paid dearly for sponsoring the Civil Rights Act of 1964. The South experienced a dramatic political realignment, shifting away from the Democratic Party and towards the Republican Party.[149] Over time, the Republican Party modified its political platform to embrace socially conservative agendas, including conservative policies on race. Since 1964, no Democrat has won a majority of white votes cast in a presidential election, and Bill Clinton has been the only two-term Democrat since Harry Truman. The Republican dominance in national politics and the party's shift to social conservatism led to the appointment of many conservative judges, who have reshaped civil rights doctrine.

Although antiracist social movements, judges, and political actors defeated "massive resistance," Supreme Court jurisprudence has implemented and responded to a conservative view of equality that immunizes racial isolation and unequal funding of public schools from judicial invalidation.[150] Several cases contribute to the current "separate" and "unequal" status of equal protection jurisprudence. First, the Supreme Court held in *Milliken v. Bradley* that courts cannot consider metropolitan remedies unless suburban districts engaged in discrimination as well.[151] This ruling ensured racial isolation in large cities that are populated largely by blacks and Latinos with predominately white suburban areas.

The Court has also held that, in order to prove an equal protection violation, plaintiffs must show that the defendant acted with "discriminatory intent."[152] Applying this rule, the Court has typically considered statistical patterns of racial and gender discrimination that result from race- or gender-neutral laws or policies as nonprobative of intent.[153] Although the earlier desegregation jurisprudence often construed race-neutral poli-

149. Susan Milligan, *South May be Shifting in Democrats' Direction*, BOSTON GLOBE, Oct. 31, 2008, *available at* http://www.boston.com/news/nation/articles/2008/10/31/south_may_be_shifting_in_democrats_direction/?page=full.

150. Darren Lenard Hutchinson, *Racial Exhaustion*, 86 WASH. U. L.R. 917, 950-54 (2009).

151. 418 U.S. 717, 744-45 (1975).

152. *See* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265 (1977).

153. *See, e.g.*, *Milliken*, 418 U.S. at 744-45.

cies as state-sponsored methods of evading integration, the current caselaw attributes racial isolation in schools to unproblematic neighborhood segregation or class inequality.[154]

Furthermore, the Court has held that vast disparities in school funding within a state or district do not violate the Equal Protection Clause.[155] In *San Antonio Independent School District v. Rodriguez*, the Court pointed to local control to justify its refusal to invalidate school-funding policies that favor students in wealthier districts over students in poorer districts.[156] More recently, in *Missouri v. Jenkins*, the Court rebuked a district court for ordering expansive substantive improvements to schools that endured decades of unlawful segregation.[157] The Court disagreed with the lower court's use of scholastic performance in white suburban schools as a mere "benchmark" for assessing whether the negative impact of segregation had been remedied.[158] The Court held that this amounted to an impermissible inter-district remedy prohibited by *Milliken*.[159]

When victims of unequal education turn to legislatures (rather than courts) for assistance and attain redress for prior and ongoing harm, courts often examine the remedies with skepticism. The Court, for example, has severely limited the use of race by state actors to remedy past and present discrimination. State actors cannot employ race-based measures to remedy "societal discrimination,"[160] even if that discrimination impedes the ability of persons of color to access important social resources.[161] And while the Court has been more permissive towards policies that use race to "diversify" higher education, it has not allowed similar approaches in primary and secondary schools.[162] In *Parents Involved in Community Schools v. Seattle School District*, for example, the Court invalidated voluntary municipal plans implemented to prevent and remedy racial isolation in Seattle, Washington, and Louisville, Kentucky.[163] A plurality consisting of Chief Justice Roberts and Justices Scalia, Thomas, and Alito held that the policies could not support the diversity interest affirmed in *Grutter*.[164] A majority, consisting of the plurality joined by Justice Kennedy, held that the policies were not narrowly tailored.[165] The plurality dismissed the problems of racial isolation in schools, stating that resegregation is not segregation—which meant that

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154. *Id.* at 737-41.
155. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 54-55 (1973).
156. *Id.* at 49-54.
157. Missouri v. Jenkins, 515 U.S. 70, 98-100 (1995).
158. *Id.* at 75-76, 90-93.
159. *Id.* at 93-94.
160. *See, e.g.*, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 718-35 (2007) (Roberts, C.J., writing in part for the majority and in part for the plurality); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 498-508 (1989).
161. *See generally Parents Involved in Cmty. Sch.*, 551 U.S. 701.
162. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 327-33 (2003).
163. *Parents Involved in Cmty. Sch.*, 551 U.S. at 702-03.
164. *Id.* at 722-33 (plurality opinion).
165. *Id.* at 733-35 (majority opinion).

states do not have a compelling interest in remedying its effects.[166] According to the plurality, because the school districts did not formally or implicitly mandate segregated attendance, nongovernmental factors, such as class and residential segregation must cause racial isolation.[167] Accordingly, the cities could not use race-specific policies to prevent racially isolated schools.[168]

B. Contemporary Situation: Resegregation and Poverty Schools

1. *Resegregation*

Although the *Parents Involved* plurality dismissed the relevance of racially isolated schools, a recent report published by the Civil Rights Project at UCLA[169] details the dramatic impact of resegregation in the nation's public schools. Due to the vast amount of litigation and civil rights enforcement directed towards southern states, this region has become the most integrated part of the country.[170] Currently, however, the South is moving rapidly towards resegregation.[171] Shifting demographics in school districts, conservative court precedent, and a lack of political commitment to integration have greatly contributed to resegregation.[172]

Although high percentages of students of all races attend racially isolated schools, "majority-minority schools" are more likely to be "poverty schools."[173] These schools are generally underfunded, underperforming, and unstable with respect to continuity of staff; they also typically suffer from criminal activity, which further harms the educational process.[174] Supreme Court jurisprudence, however, makes it difficult to combat this problem through litigation or legislation.[175]

Although conservative jurisprudence facilitates the denial of equal educational opportunity, in terms of political geography, the liberal versus conservative dichotomy evaporates. Many of the most racially isolated poverty schools exist in the nation's "bluest" states. According to the Civil Rights Project, the ten states with the lowest percentages of black students attending schools with white students are New York, Illinois, California, Maryland, Michigan, New Jersey, Mississippi, Texas, Georgia, and Tennessee.[176] In terms of black students attending highly segregated

166. *Id.* at 727-31, 736-45 (plurality opinion).
167. *Id.* at 731-32.
168. *Id.* at 731-33.
169. *See generally* Orfield, *supra* note 130.
170. *Id.* at 8.
171. *Id.*
172. *Id.* at 6-8.
173. *Id.* at 15-16.
174. *Id.* at 6.
175. *Id.* at 28-29, 31-32.
176. Gary Orfield & Chungmei Lee, The Civil Rights Project, Historic Reversals, Accelerating Resegregation, and the Need for New Integration Strategies 29 (2007), *available at* http://www.civilrightsproject.ucla.edu/research/deseg/reversals_reseg_need.pdf.

schools (90%-100% minority students), the list is almost identical: New York, Illinois, Michigan, Maryland, New Jersey, Pennsylvania, Alabama, Mississippi, Tennessee, and Missouri.[177]

With respect to Latino students' exposure to white students, the ten most segregated systems are located in California, New York, Texas, New Mexico, Illinois, New Jersey, Rhode Island, Arizona, Maryland, and Florida.[178] The states with the highest percentages of Latino students attending highly segregated schools (90%-100% minority) are New York, Texas, California, Illinois, New Jersey, Arizona, Rhode Island, New Mexico, Maryland, and Florida.[179]

In 1979, California voters amended the state constitution to prohibit state courts from ordering busing or student reassignment unless a federal court would do so under the same circumstances.[180] The amendment, called Proposition 1, effectively toughened the legal standard for remedying racial isolation in the state's public schools because at the time, California law, unlike federal law, prohibited both intentional and de facto racial segregation in public schools.[181] The movement to pass Proposition 1 began while a state judge contemplated issuing a busing order to cure segregation in the Los Angeles metropolitan area.[182] The amendment made the proposed remedy illegal under state law.[183] Today, California has one of the most racially segregated school systems in the country.

2. Funding Inequality

In the 1978 case *San Antonio Independent School District v. Rodriguez*, the Supreme Court held that funding inequality across school districts does not violate the Equal Protection Clause.[184] Funding inequality results because, in most states, property taxes finance school expenditures. Wealthier districts with higher property values can generate greater tax revenue and allocate substantially more money for their education budgets.[185] Although poor white persons suffer from this problem as well, persons of color more often live in "concentrated poverty" neighborhoods than poor whites. Accordingly, funding inequality, though problematic across racial groups, has a distinct racial effect.

The Federal Education Budget Project of the New America Founda-

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177. *Id.*

178. *Id.* at 32.

179. *Id.*

180. Peggy Caldwell, *Court Considers Racial Intent of Two States' Anti-Busing Laws*, EDUCATION WEEK, Mar. 31, 1982, http://www.edweek.org/ew/articles/1982/03/21/02190046.h01.html.

181. *Id.*

182. *Id.*

183. *Id.*

184. 411 U.S. 1, 42-55 (1973).

185. *Id.* at 6-16.

tion has compiled data on funding inequality within each state.[186] This research reveals that, in addition to having the most racially segregated school systems, the "blue" states also have the highest levels of school funding disparities in the nation.[187] According to the Federal Education Budget Project Report, the "South is the most equitable region" with respect to school funding.[188] Specifically, the ten states with the most evenly funded school districts are Hawaii, West Virginia, Florida, Iowa, Washington, Delaware, North Carolina, Texas, Wisconsin, and Louisiana.[189] By contrast, the most inequitable states (from bad to worst) are Idaho, Pennsylvania, New York, Vermont, Wyoming, Missouri, Massachusetts, Virginia, Montana, and Illinois.

3. *Possible Resurgence in Desegregation Efforts?*

The forgoing statistics indicate that the problem of educational inequality is complex. Southern states are experiencing rapid resegregation, while northern states house many of the most racially isolated poverty schools.[190] The type of social movement activity and judicial and political leadership that gave rise to the vast changes in the 1960s has not become part of current national policy debates.[191] To the extent that either major political party discusses economic justice, the conversation is framed around the "middle class," rather than poor people. Furthermore, most of the national discourse on education has focused on reforming or simply criticizing "No Child Left Behind," rather than addressing financial inequality.[192]

The public has neglected race issues as well. President Obama's election victory has caused many commentators to question the ongoing relevance of race. Obama campaigned as a "post-racial" candidate, and he has not made race a serious part of his executive agenda.[193] Unless social movement actors push for racial and economic justice, the legal landscape for educational inequality will likely remain the same.

V. CONCLUSION

Judge Sanders did what no other judge before him would do: he ordered the Dallas Independent School District to make substantive changes to its attendance policies in order to dismantle segregation.[194]

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186. New America Foundation, Federal Education Budget Project http://febp.newamerica.net (last visited Aug. 29, 2009).

187. New America Foundation, Federal Education Budget Project, Per-Pupil Expenditure 2006, http://febp.newamerica.net/k12/rankings (last visited Aug. 29, 2009).

188. New America Foundation, Federal Education Budget Project, School Finance Equity (2006), http://febp.newamerica.net/k12/rankings/schofiineq06 (last visited Aug. 29, 2009).

189. *Id.*

190. ORFIELD & LEE, *supra* note 176, at 14, 16.

191. *Id.* at 8, 13-14.

192. *Id.* at 18-22.

193. *Id.* at 5-10.

194. Tasby v. Wright, 542 F. Supp. 134, 138-51 (N.D. Tex. 1982).

The broad policy changes regarding educational inequality resulted from interaction between courts, social movements, presidents, Congress, local politicians, and voters. Judge Sanders's highly detailed opinions on racial segregation hearken back to a lost judicial moment, when courts connected with communities, social movements, and state actors in order to reform unlawful institutional practices. This particular aspect of Judge Sanders's work ranks as one of his most important contributions as a judge.