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## Note

### Accepting Justice Kennedy's Challenge: Reviving Race-Conscious School Assignments in the Wake of *Parents Involved*

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Imagine a different outcome in the famed 1954 desegregation case of *Brown v. Board of Education*:<sup>1</sup> “We conclude that in the field of public education the doctrine of ‘separate but equal’ is constitutional.<sup>2</sup> Imagine that *Plessy v. Ferguson*<sup>3</sup> is still good law: “we cannot say that a law which authorizes or even requires the separation of the two races . . . is unreasonable.”<sup>4</sup> Finally, imagine that African-American students score lower on reading and math tests than white students at every grade level. Now wake up. The former two statements should give you nightmares; the latter is reality.<sup>5</sup> Today, in America, school segregation is on the rise,<sup>6</sup> and the achievement gap between whites and minorities is increasing.<sup>7</sup> School systems have a choice: ignore the threat or counter racial segregation with

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1. 347 U.S. 483 (1954).
2. See *id.* at 495 (finding that the “doctrine of ‘separate but equal’ has no place” in public education).
3. 163 U.S. 537 (1896), *overruled by* 347 U.S. 483 (1954).
4. *Id.* at 550–51.
5. JONATHAN JACOBSON ET AL., U.S. DEP’T OF EDUC., EDUCATIONAL ACHIEVEMENT AND BLACK-WHITE INEQUALITY 32, 37 (2001).
6. See Jonathan Kozol, *Still Separate, Still Unequal: America’s Educational Apartheid*, HARPER’S MAG., Sept. 2005, at 41, 41 (describing the maintenance of segregated schools and the resegregation of thousands of schools across the country over the last ten years).
7. See *id.* at 54 (noting the widening achievement gap between African-American and white children since the 1990s).

race-conscious school assignment policies that conform to the Supreme Court's holding in *Parents Involved in Community Schools v. Seattle Public School District No. 1*.<sup>8</sup> This Note proposes a solution aimed at the latter alternative: school districts that value the benefits of racial diversity must adopt assignment policies that broaden the concept of diversity, avoid racial quotas, and mandate informed reviews of the progress towards educational equity.

Districts nationwide have attempted innovative and promising race-neutral solutions to the segregation problem.<sup>9</sup> The results have been almost unanimous: the best way to achieve racial integration is to implement race-conscious student assignment programs.<sup>10</sup> Despite this reality, threats of litigation and the unsustainable costs associated with mounting lawsuits plague school districts implementing such plans.<sup>11</sup> As a result, many districts have resorted to socioeconomic integration, which appears to increase student achievement, but does not free schools of racial segregation.<sup>12</sup> Others have returned to the traditional neighborhood model, which assigns students to the school nearest their home.<sup>13</sup> Still other districts have at least considered other indicators of various kinds of diversity, such as single-parent families and English-language learners.<sup>14</sup> Yet again, the results are predictable: segregation endures race-

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8. 127 S. Ct. 2738 (2007).

9. See, e.g., Richard D. Kahlenberg, *Socioeconomic School Integration*, 85 N.C. L. REV. 1545, 1551–52 (2007) (discussing various socioeconomic school-integration plans around the country).

10. See *id.* at 1555 (“By definition, there is no better way to ensure racial integration than employing race per se in student assignment.”).

11. See, e.g., Joseph Pereira, *School Integration Efforts Face Renewed Opposition*, WALL ST. J., Oct. 11, 2007, at A1 (reporting on a white parent who is considering litigation against the school district in Milton, Massachusetts after learning of the town's plan for school assignments).

12. See, e.g., INST. ON RACE & POVERTY, *THE CHOICE IS OURS: EXPANDING EDUCATIONAL OPPORTUNITY FOR ALL TWIN CITIES CHILDREN 34–41* (2006) [hereinafter *IRP REPORT*] (noting promising results in achievement gains accompanied by rising segregation in the Minneapolis public schools after implementation of a socioeconomic integration program).

13. Eboni S. Nelson, *Parents Involved & Meredith: A Prediction Regarding the (Un)Constitutionality of Race-Conscious Student Assignment Plans*, 84 DENV. U. L. REV. 293, 306–07 (2006).

14. See Paul Diller, *Integration Without Classification: Moving Toward Race-Neutrality in the Pursuit of Public Elementary and Secondary School Diversity*, 99 MICH. L. REV. 1999, 2049 (2001) (discussing demographic factors that may benefit minorities in student assignment).

neutral school assignment efforts.<sup>15</sup>

This Note details various ways to satisfy Justice Kennedy's limiting opinion in *Parents Involved* to achieve the racial integration he and at least four other justices deem both essential to our nation's moral and ethical obligations and a compelling governmental interest. Part I provides the legal background from the hopes of *Brown* in 1954 to the uncertainty of *Parents Involved* in 2007. Along this journey, an alarming social, political, and economic environment has led to extreme resegregation and a growing achievement gap among white and non-white students. Part II discusses the virtues and faults of various proposed and implemented alternatives to race-based student assignment programs. Finally, Part III urges school boards not to shy away from implementing race-conscious policies that address the concerns that led Justice Kennedy to his uneasy acceptance of the *Parents Involved* holding. By ignoring the early perception of the death of race in student assignment,<sup>16</sup> school boards across the country can avoid a debilitating shift in education policy that will further widen the achievement gap and deny millions of children an equal educational opportunity. Race is not dead, but the Court's recent blow requires a renewed commitment to achieving the compelling interest of racial diversity in K–12 public education.

#### I. THE FIFTY-YEAR DREAM: FROM *BROWN'S* PROMISE TO *PARENTS INVOLVED*

Since *Brown* was decided, the Supreme Court has struggled with its powerful mandate to end racial segregation in American schools.<sup>17</sup> In notable decisions discussed below, the Court was unwilling to accept specific racial quotas at a state medical college,<sup>18</sup> but it approved a limited policy that considered race among many factors in the admissions program of a

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15. *Cf. id.* at 2051 (noting that race-neutral factors should not be considered the best or only solution to ensuring racial diversity).

16. For an example of such a perception, see William E. Thro, *An Essay: The Roberts Court at Dawn: Clarity, Humility, and the Future of Education Law*, 222 EDUC. L. REP. 491, 496 (2007) (arguing that despite Justice Kennedy's limiting concurrence, the Court clearly declared in *Parents Involved* that direct consideration of race is impermissible for school districts).

17. See, e.g., Diller, *supra* note 14, at 2001–05 (describing the line of cases following *Brown* that attempted to define the ambiguity around school desegregation).

18. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 269, 275, 319–20 (1978).

state law school.<sup>19</sup> The mixed jurisprudence led to the divided opinion in *Parents Involved* that ended the use of race in two specific school assignment programs.<sup>20</sup> This latter decision provides the framework for all school districts that seek to counter racial segregation in the public schools.

#### A. SUPREME COURT PRECEDENT ON DESEGREGATION AND AFFIRMATIVE ACTION

*Brown* set the standard for public school desegregation by famously overruling *Plessy's* tolerance of governmental separation of the races.<sup>21</sup> The decision heralded a new era of school integration and championed diversity over racial isolation.<sup>22</sup> However, the Court has since placed significant limitations on government policies that seek to increase diversity where racial disparities are not traceable to past, intentional constitutional violations.<sup>23</sup> After describing the holding and legacy of *Brown*, this Section outlines the important distinction between de jure and de facto segregation in order to frame when a government can act to address racial segregation. Additionally, this Section examines two Supreme Court holdings in the context of affirmative action programs in higher education that define the government's ability to promote diversity solely for its educational benefits.

##### 1. *Brown's* Desegregation Inspiration

After generations of slavery and fifty-eight years of "separate but equal"<sup>24</sup> legal status, African-American children in

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19. See *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003).

20. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2768 (2007).

21. *Brown v. Bd. of Educ.*, 347 U.S. 483, 494–95 (1954).

22. See Daniel Gyebi, *A Tribute to Courage on the Fortieth Anniversary of Brown v. Board of Education*, 38 HOW. L.J. 23, 49 (1994) (describing a fundamental change in the spirit of the country after the *Brown* decision).

23. See, e.g., *Freeman v. Pitts*, 503 U.S. 467, 495–96 (1992) ("Where resegregation is a product not of state action but of private choices, it does not have constitutional implications."); *Milliken v. Bradley*, 433 U.S. 267, 279–80 (1977) (holding that desegregation remedies must be related to constitutional violations).

24. *Plessy v. Ferguson*, 163 U.S. 537, 552 (1896) (Harlan, J., dissenting), overruled by *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). Based on language used in Harlan's dissent, the holding in *Plessy* became known as the "separate but equal" doctrine.

public schools across the country had endured enough.<sup>25</sup> Representatives of schoolchildren in Kansas, South Carolina, Virginia, and Delaware challenged state constitutions and statutes that mandated segregated schools, arguing that separate educational facilities denied minority students the promise of equal educational opportunity in violation of the Equal Protection Clause of the Fourteenth Amendment.<sup>26</sup> The United States Supreme Court responded decisively and unanimously. Despite purportedly equal school facilities, the Court denounced the legal separation of children based on race.<sup>27</sup> By declaring segregated schools “inherently unequal,” the landmark Supreme Court decision in *Brown v. Board of Education* set the stage for the modern American civil rights movement and the widespread reform of American public schools.<sup>28</sup>

Over the next fifty-three years, school districts across the nation grappled with the legal mandate to dismantle state-sponsored segregation in the public schools.<sup>29</sup> Nevertheless, the legacy of *Brown* endures as a promise of desegregation, integration, and equal educational opportunity for all children.<sup>30</sup> Dr. Martin Luther King, Jr. praised the Court’s decision as one bringing “hope to millions of disinherited Negroes.”<sup>31</sup> Unfortu-

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25. See *Brown*, 347 U.S. at 486–88, 486 n.1 (describing the equal protection challenges brought in Kansas, South Carolina, Virginia, and Delaware).

26. *Id.* at 487–88.

27. *Id.* at 493–95.

28. See *id.* at 495 (“We conclude that in the field of public education the doctrine of ‘separate but equal’ has no place.”); Gerard Toussaint Robinson, *Can the Spirit of Brown Survive in the Era of School Choice?: A Legal and Policy Perspective*, 45 HOW. L.J. 281, 283 (2002) (describing *Brown* as one of the most well known and influential decisions of the twentieth century).

29. See Diller, *supra* note 14, at 1999 (describing the challenges in the aftermath of *Brown* in public education); Robinson, *supra* note 28, at 284–85 (discussing the “conflicting legacy” of *Brown* and the improbability that Americans will understand its meaning in the near future).

30. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2791 (2007) (Kennedy, J., concurring) (noting that schools can seek to achieve “*Brown*’s objective of equal educational opportunity”); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (1978) (describing *Brown* as the first in a “line of school desegregation cases”); *Green v. County Sch. Bd.*, 391 U.S. 430, 441–42 (1968) (finding that a school board’s desegregation plan insufficiently addressed the high integration commands of *Brown*).

31. See ERICA FRANKENBERG ET AL., HARVARD UNIV. CIVIL RIGHTS PROJECT, A MULTIRACIAL SOCIETY WITH SEGREGATED SCHOOLS: ARE WE LOSING THE DREAM? 7 (2003), <http://www.civilrightsproject.ucla.edu/research/reseg03/AreWeLosingtheDream.pdf> (quoting Martin Luther King, Jr., *The Burning Truth in the South*, in A TESTAMENT OF HOPE: THE ESSENTIAL WRIT-

nately, his 1968 assassination prematurely ended his struggle during the Civil Rights movement, and marked the beginning of the end of his dream of racial equality in America's public schools.<sup>32</sup>

## 2. When Segregation Has No Remedy: The Significance of De Facto v. De Jure Violations

Not all segregation violates the federal constitution.<sup>33</sup> The Supreme Court differentiates between de jure and de facto segregation according to whether the governmental action is purposeful or intentional.<sup>34</sup> In other words, if the government's purpose or intent is to create racially segregated schools, the Court describes that action as de jure.<sup>35</sup> While the Connecticut Supreme Court was able to find de facto segregation in public education to be violative of its state constitution,<sup>36</sup> the United States Supreme Court has always required a showing of de jure segregation before the state may engage in otherwise impermissible race-based decision-making.<sup>37</sup> This is true despite numerous findings that minority students in de facto racially segregated schools experience inferior educational opportunities.<sup>38</sup>

The Court has previously permitted only two compelling interests that justify racial classifications: to remedy past discrimination<sup>39</sup> and to achieve diversity in higher education.<sup>40</sup> It

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INGS AND SPEECHES OF MARTIN LUTHER KING, JR. 94, 95 (James Melvin Washington ed., 1991)).

32. *See id.* at 8 (noting the loss of momentum in the civil rights movement following Dr. King's assassination, followed by presidential and congressional efforts to hamper the promising desegregation efforts in the years following *Brown*).

33. *See Freeman v. Pitts*, 503 U.S. 467, 495–96 (1992) (finding that the government may remedy the vestiges of segregation only if there is a causal relationship to a *de jure* violation of the law).

34. *See Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 208 (“We emphasize that the differentiating factor between *de jure* segregation and so-called *de facto* segregation . . . is *purpose* or *intent* to segregate.”).

35. *Id.*

36. *Sheff v. O'Neill*, 678 A.2d 1267, 1270–71, 1280–90 (Conn. 1996).

37. *See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2761 (2007) (describing the distinction between de jure and de facto segregation as “central to our jurisprudence in this area for generations”).

38. *See Goodwin Liu, Seattle and Louisville*, 95 CAL. L. REV. 277, 290, 290 n.62 (2007) (noting the “immense” literature showing unequal educational opportunities for minority students still exist even after the end of de jure segregation).

39. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986).

has never held that these are the *only* interests that may be deemed compelling;<sup>41</sup> however, the limitation of de jure segregation has kept school desegregation efforts from reaching districts that are unable to point to past, intentional or purposeful discrimination.<sup>42</sup>

### 3. Walking the Fine Line of Constitutional Race-Based Affirmative Action

When governmental actors classify individuals for unequal treatment based on race, the Supreme Court employs a most searching standard of review known as strict scrutiny.<sup>43</sup> Government action may satisfy such detailed review,<sup>44</sup> but only in the most restricted programs.<sup>45</sup> The following two cases illustrate the narrow legal parameters of race-based programs to increase diversity in state-run institutions of higher education. The framework used to review these affirmative action programs is essential to understanding the limits of similar race-based programs in K–12 public schools.<sup>46</sup>

#### a. *Bakke Declared Racial Quotas Unconstitutional*

In an effort to increase the representation of “disadvantaged” students, the faculty of the Medical School of the University of California at Davis instituted a special admissions program that set aside sixteen out of one hundred spots in the entering class for “minority” students.<sup>47</sup> A white applicant denied admission on two separate occasions challenged the special admissions program as a violation of his equal protection

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40. *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003).

41. *See id.* (refusing to limit compelling interests in racial classifications to remedying past discrimination).

42. *See* Linda S. Greene, *From Brown to Grutter*, 36 LOY. U. CHI. L.J. 1, 10–11 (2004) (noting that the limitation of remedies for racial discrimination to de jure segregation has kept *Brown* from reaching its fullest potential).

43. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 224 (1995).

44. *See, e.g., Grutter*, 539 U.S. at 343 (upholding the use of race in public law school admissions).

45. *See Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 269–70, 319–20 (1978) (finding a public university’s medical school admissions program unconstitutional to the extent that it broadly disqualifies nonminority applicants from a specific percentage of seats in the entering class).

46. *See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2792 (2007) (Kennedy, J., concurring) (arguing that consideration of the racial makeup of public schools is permissible so long as it does so in a limited manner).

47. *Bakke*, 438 U.S. at 272–75.

rights.<sup>48</sup> A divided Supreme Court held that a state may consider race and ethnic origin in a university admissions program; however, the Court found that the special admissions program at Davis went too far.<sup>49</sup>

The *Bakke* decision contained six separate opinions with divergent viewpoints,<sup>50</sup> but public and private universities came to rely on Justice Powell's position approving a limited use of race to further the compelling interest in attaining a diverse student body.<sup>51</sup> Notably, Justice Powell repeatedly emphasized the importance of diversity in our nation's schools.<sup>52</sup> According to Justice Powell, achieving diversity requires the consideration of several factors, one of which is undoubtedly race.<sup>53</sup>

*b. Grutter Approved the Limited Use of Race in Higher Education Admissions*

In 2003, the Supreme Court again addressed whether the use of race in student admissions violates the Equal Protection Clause.<sup>54</sup> The University of Michigan Law School implemented an admissions policy that sought to enroll students with "varying backgrounds and experiences who will respect and learn from each other."<sup>55</sup> To that end, the admissions policy focused on each applicant's academic ability as well as a broad notion of diversity in order to achieve a "critical mass" of minority students.<sup>56</sup>

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48. *Id.* at 276–78.

49. *Id.* at 320.

50. *Id.* at 269, 324, 379, 387, 402, 408. Justice Powell's opinion announced the judgment of the Court. *Id.* at 269.

51. See *Grutter v. Bollinger*, 539 U.S. 306, 323 (2003) (noting that admissions programs across the country cite to Justice Powell's opinion as the "touchstone for constitutional analysis of race-conscious admissions policies").

52. *Bakke*, 438 U.S. at 313 ("[I]t is not too much to say that the 'nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples." (quoting *Keyishian v. Bd. of Regents of the Univ. of N.Y.*, 385 U.S. 589, 603 (1967))).

53. *Id.* at 315 ("The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element.").

54. *Grutter*, 539 U.S. at 311, 326–27.

55. *Id.* at 314.

56. See *id.* at 315, 316 (describing diversity as students with an ability to "enrich everyone's education," including students of different races and ethnicities).

Under the rubric of strict scrutiny,<sup>57</sup> the Supreme Court upheld the law school's policy, which differed in significant ways from the policy at issue in *Bakke*<sup>58</sup> and *Grutter*'s companion case, *Gratz v. Bollinger*.<sup>59</sup> In so doing, the Court affirmed that a public school has a compelling interest in attaining a diverse student body,<sup>60</sup> and deferred to the law school's judgment when it came to determining the kind of diversity necessary to achieve its stated goals.<sup>61</sup> The highly individualized review of each applicant ensured a narrowly tailored, yet race-conscious admissions program that withstood even the strictest judicial scrutiny.<sup>62</sup> By contrast, the Court noted that "[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative."<sup>63</sup>

Finally, the Court limited the reach of its holding to a period extending twenty-five years, noting that racial classifications cannot be of unlimited duration and still satisfy strict scrutiny.<sup>64</sup> At a minimum, periodic reviews of the classifications are necessary to ensure that they remain narrowly tailored to the state's compelling interest.<sup>65</sup>

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57. *See id.* at 326 (affirming that all government-imposed racial classifications are subject to the Court's strict-scrutiny analysis).

58. *See id.* at 329–30 (contrasting the law school's policy with that of the specified quota of minority students required under the unconstitutional program at the medical school in *Bakke*).

59. *See Gratz v. Bollinger*, 539 U.S. 244, 271–72 (2003) (distinguishing the University of Michigan's undergraduate admissions program, which automatically distributed twenty points needed for admission to certain minority applicants, with the individualized review emphasized in *Bakke*).

60. *Grutter*, 539 U.S. at 328. The Court expressed in clear terms that remedying past discrimination was not the only permissible governmental use of race. *Id.* Additionally, the Court accepted that race still matters in today's society. *Id.* at 333.

61. *See id.* at 328 (noting that the Court has a "tradition of giving a degree of deference to a university's academic decisions").

62. *See id.* at 337, 343. "To be narrowly tailored . . . an admissions program must be 'flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight.'" *Id.* at 334 (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 317 (1978)). *But see Grutter*, 539 U.S. at 388 (Kennedy, J., dissenting) (arguing that the majority failed to apply strict scrutiny to the program by accepting the University's assurances of constitutional validity of its objectives).

63. *Grutter*, 539 U.S. at 339.

64. *See id.* at 341–43.

65. *See id.* at 342.

In a dissenting opinion, Justice Kennedy announced a deep skepticism for the law school's "individual consideration" of applications, suspecting that race is indeed outcome-determinative in the admissions process.<sup>66</sup> Given the "corrosive category of race," Kennedy detailed the heavy burden the law school's consideration of race would have to meet to survive strict scrutiny.<sup>67</sup> Despite his objections to the majority's analysis, Kennedy concluded by noting his approval of the use of race in the pursuit of student diversity.<sup>68</sup>

B. SOCIAL, POLITICAL, AND ECONOMIC DEVELOPMENTS  
AFFECTING RACIAL DIVERSITY IN PUBLIC SCHOOLS

American society has changed since *Brown* labeled segregated schools "inherently unequal"<sup>69</sup> and school districts nationwide began the process of desegregation.<sup>70</sup> While American cities remain extremely segregated,<sup>71</sup> the Supreme Court has backtracked from its pro-integration decisions and presidential policies have turned away from desegregation efforts.<sup>72</sup> The result was a return to the segregated schooling that left minority schoolchildren with the "devastating"<sup>73</sup> effects of an unequal education.<sup>74</sup> This Section describes the powerful effects of modern residential segregation on school segregation, and concludes that reversing the latter must include adequate consideration of the former. Noting the failure to change patterns of residential segregation, this Section discusses the negative impact of school segregation on schoolchildren nationwide.

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66. *Id.* at 389. (Kennedy, J., dissenting).

67. *Id.* at 391–94.

68. *Id.* at 395.

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

70. See FRANKENBERG ET AL., *supra* note 31, at 17–18 (describing the peak of desegregation efforts in the North and South during the 1960s and '70s that began to decline during the Nixon era).

71. See Nancy A. Denton, *The Persistence of Segregation: Links Between Residential Segregation and School Segregation*, 80 MINN. L. REV. 795, 795–96 (1996) ("To put it bluntly, neighborhood segregation . . . has been high, continues to be high, and can be expected to remain high in the foreseeable future.").

72. See Gary Orfield, *Turning Back to Segregation*, in DISMANTLING DESEGREGATION 1, 9 (Gary Orfield & Susan E. Eaton eds., 1996) (analyzing a general change in civil rights policies beginning with the Nixon administration and its Supreme Court appointments).

73. *Sheff v. O'Neill*, 678 A.2d 1267, 1270 (Conn. 1996); Nelson, *supra* note 13, at 297.

74. See Orfield, *supra* note 72, at 2 (arguing that some such Supreme Court cases amounted to "resegregation decisions [that] legitimate a deliberate return to segregation").

## 1. The Strong Connection Between Residential and School Segregation

Any study of school segregation must acknowledge its undeniable association with residential segregation.<sup>75</sup> Research demonstrates that residential segregation—particularly between African-American and white populations—is persistent and severe.<sup>76</sup> Moreover, commentators and judges agree that the underlying cause of segregated schools is the increasingly segregated housing patterns that leave urban school districts dominated by minority populations as white families continue to move beyond the grasp of intradistrict integration efforts.<sup>77</sup> This suggests that efforts to address school segregation today must take into consideration patterns of residential segregation.<sup>78</sup>

## 2. Resegregation in Public Schools and the Student Achievement Gap

As may be expected given the persistence of residential segregation, more than fifty years of efforts to integrate our nation's public schools has not prevented resegregation.<sup>79</sup> The average white, African-American and Latino student attends a school comprised of a majority of his or her respective race.<sup>80</sup> More than one-third of African-Americans and Latinos attend

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75. See Denton, *supra* note 71, at 795 (describing residential segregation and school segregation as “inextricably entwined”).

76. Denton, *supra* note 71, at 797; see DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 221, 222 tbl.8.1 (1993) (detailing trends in residential segregation in major metropolitan areas).

77. See *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 222–23 (1973) (Powell, J., concurring in part and dissenting in part) (calling residential segregation the “root cause” of school segregation); Gary Orfield, *Segregated Housing and School Resegregation*, in *DISMANTLING DESEGREGATION*, *supra* note 72, at 291, 314 (describing white suburbanization as the cause of school segregation and minority isolation in city school districts).

78. See Denton, *supra* note 71, at 818 (noting the strong interrelationship between residential and school segregation); Orfield, *supra* note 77, at 292 (arguing that attempts to desegregate schools will be counterproductive if residential segregation is not considered).

79. See Liu, *supra* note 38, at 277–78 (showing statistics of high segregation rates in public schools); Nelson, *supra* note 13, at 298 (describing the factors contributing to the resegregation of public schools since *Brown*); Gary Orfield et al., *Better Than Expected, Worse Than It Seems*, *INSIDE HIGHER ED*, July 24, 2007, <http://www.insidehighered.com/views/2007/07/24/orfield> (noting the rise of segregation in American public schools over the last two decades).

80. Liu, *supra* note 38, at 277–78.

schools where minority enrollment exceeds ninety percent.<sup>81</sup> As a result, school districts across the country have developed voluntary and court-ordered plans to combat the problem of segregation.<sup>82</sup> Often, these plans involve assigning students to particular schools with detailed consideration of the school's racial composition.<sup>83</sup>

Why should school districts care about segregated schooling? The rise in school segregation corresponds with a divergence in student achievement between white and minority students.<sup>84</sup> Schools with high proportions of minority enrollment exhibit the devastating characteristics of failing schools: high teacher turnover, unqualified teachers, insufficient academic and institutional resources, and unsafe environments.<sup>85</sup> The result has left minority students isolated in low-performing schools, and white students unprepared to face diversity in higher education and the workplace.<sup>86</sup> Moreover, American society and the courts have long recognized the immeasurable significance of integrated education beyond the obvious academic advantages.<sup>87</sup> The role of the federal courts in approving

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81. *Id.* at 278.

82. *See, e.g.*, *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2801 (2007) (Breyer, J., dissenting) (describing a “[n]ation on a path toward public school integration” through various measures).

83. *See* Orfield et al., *supra* note 79 (noting the prevalence of race-conscious assignment policies).

84. *See Parents Involved*, 127 S. Ct. at 2821 (Breyer, J., dissenting) (citing “well established” evidence confirming the correlation between racial integration and student achievement); Liu, *supra* note 38, at 290 (discussing the relationship between racial segregation and educational inequity); Gary Orfield, *The Growth of Segregation: African Americans, Latinos, and Unequal Education*, in *DISMANTLING DESEGREGATION*, *supra* note 72, at 53, 65–67 (describing achievement inequalities associated with segregated schooling). *But see Parents Involved*, 127 S. Ct. at 2777 (Thomas, J., concurring) (calling the social science tying segregation to low achievement “inconclusive”).

85. *See* Liu, *supra* note 38, at 290 (describing California public schools with ninety to one hundred percent minority enrollment).

86. *See* Orfield et al., *supra* note 79 (arguing that both white and minority students are less prepared for college after segregated secondary education).

87. *See, e.g.*, *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (detailing the virtues of public education to society beyond individual student achievement); Kevin Brown, *Equal Protection Challenges to the Use of Racial Classifications to Promote Integrated Public Elementary and Secondary Student Enrollments*, 34 AKRON L. REV. 37, 68 (2000) (describing public education as “the one governmental institution charged with the selective conveyance of ideas to the young”); Brian Gill, *School Choice and Integration*, in *GETTING CHOICE RIGHT: ENSURING EQUITY AND EFFICIENCY IN EDUCATION POLICY* 130–31 (Julian R. Betts & Tom Loveless, eds., 2005) (noting that integration of students from diverse backgrounds is “one of the traditional purposes of American public

and even mandating desegregation policies in the late 1950s and early 1960s can be attributed to the failure of race-neutral strategies to integrate the public schools.<sup>88</sup> In short, segregation solely on the basis of race harms students<sup>89</sup> and is illegal under the seminal Supreme Court decision in *Brown v. Board of Education*.<sup>90</sup>

### C. INVALIDATING A COMMONLY USED TACTIC TO INCREASE DIVERSITY IN K–12 EDUCATION

In the first case to reach the Supreme Court involving racial classifications in elementary and secondary school assignment plans, school districts in Seattle, Washington, and Jefferson County, Kentucky, defended their voluntarily adopted assignment programs that aimed to integrate their public schools.<sup>91</sup> In each program, the school district used race as a factor in achieving a desired racial composition of the student body.<sup>92</sup> The plurality held that the plans violated the Equal Protection Clause of the Fourteenth Amendment and compelled school districts across the country to stop classifying students based on race.<sup>93</sup> Each of the fractured opinions argued that only their interpretation of precedent could be faithful to *Brown*.<sup>94</sup>

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schools”); Neil S. Siegel, *Race-Conscious Student Assignment Plans: Balkanization, Integration, and Individualized Consideration*, 56 DUKE L.J. 781, 787–88 (2006) (“[I]n addition to facilitating academic achievement, public schools are charged principally with socializing students to values of assimilation, national unity, and social harmony . . .”).

88. See Diller, *supra* note 14, at 2001–02 (attributing the intervention of federal courts in post-*Brown* desegregation to the failure of “mere colorblindness” as an integration strategy).

89. See *Brown*, 347 U.S. at 494 (quoting with approval the lower courts in finding that segregation has a “detrimental effect upon the colored children”).

90. See *id.* at 495.

91. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2748–49 (2007) (describing Seattle’s use of race as an “integration tiebreaker” and Jefferson County’s use of race as a plan to “facilitate integration”). The district denied Andy Meeks, a ninth grader seeking to enroll in Seattle’s Ballard High School, his choice because of his race. *Id.* at 2748. Crystal Meredith wanted her son, Joshua McDonald, to attend school close to home when the family moved to the Jefferson County School District in August 2002. *Id.* at 2750. Meredith’s first-choice school was full, and although her second choice had space for Joshua, the district denied his assignment because it would have had an “adverse effect on desegregation compliance.” *Id.*

92. *Id.* at 2746.

93. See *id.* at 2767–68.

94. See *id.* at 2767 (describing the debate between the parties over which side is more faithful to the heritage of *Brown*); *id.* at 2800 (Stevens, J., dissent-

In the end, the Court declared unconstitutional a common tool used to achieve racial diversity in public schools.<sup>95</sup>

### 1. The Seattle Plan

Seattle sought to counteract the relationship between racially identifiable housing patterns and school assignment by implementing a racial classification in its school assignment program.<sup>96</sup> The school district employed a choice program that permitted students to choose among the district's ten high schools.<sup>97</sup> In the event that a student chose an oversubscribed school, the district resorted to a series of tiebreakers to determine the student's school assignment.<sup>98</sup> Under one of these tiebreakers, the district assigned students to their chosen school if the student would bring the school's "racial balance" in line with a predetermined goal.<sup>99</sup> To achieve racial diversity, Seattle labeled its students as "white" or "nonwhite" according to the racial group identified by the parent.<sup>100</sup> If the parent failed or refused to identify the student's race, the district affixed the label based on "visual inspection" of the parent and student.<sup>101</sup>

### 2. The Jefferson County Plan

In contrast to the Seattle school district involved in this case, Jefferson County operated under a desegregation decree until 2000.<sup>102</sup> After the district court dissolved the decree, the school district adopted a voluntary plan that required all non-magnet schools to enroll between fifteen and fifty percent African-American students.<sup>103</sup> Under this plan, space availability

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ing) (arguing that prior Court decisions were more faithful to *Brown* and that no member of the Court in 1975 would have agreed with the plurality).

95. See Orfield et al., *supra* note 79 (calling racial-diversity guidelines one of "the most common methods of creating integrated schools in districts without court orders to desegregate").

96. *Parents Involved*, 127 S. Ct. at 2747. The courts never found the school district to have operated segregated schools in violation of *Brown*. *Id.*

97. *Id.* at 2746–47; Liu, *supra* note 38, at 278.

98. *Parents Involved*, 127 S. Ct. at 2747.

99. *Id.*

100. *Id.* at 2746; see Nelson, *supra* note 13, at 314 (showing the goal of the Seattle plan was to "create racially diverse schools and to prevent racial imbalance").

101. Brief of Amici Curiae Drs. Murphy, Rossell & Walberg in Support of Petitioners at 23, *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738 (2007) (No. 05-908).

102. *Parents Involved*, 127 S. Ct. at 2749.

103. *Id.*

and the racial guidelines determined by the district were the basis for school assignment and transfer requests.<sup>104</sup> To achieve its desired level of diversity, the school district labeled students as “black” or “other.”<sup>105</sup>

### 3. The Plurality Opinion

Chief Justice Roberts’ plurality opinion declared it self-evident that the plans at issue were subject to strict scrutiny.<sup>106</sup> Under strict scrutiny, the Court recognizes two compelling interests to justify the narrowly tailored use of racial classifications in the educational context: remedying past intentional discrimination, and diversity in higher education.<sup>107</sup> With respect to the first interest, it is essential that the public school previously employed de jure segregation.<sup>108</sup> Here, it was undisputed that Seattle never intentionally operated a segregated public school,<sup>109</sup> and once Jefferson County escaped the desegregation decree, there was no longer de jure segregation.<sup>110</sup> The second interest comes from *Grutter*, which viewed institutions of higher education as having unique characteristics distinguishing them from diversity interests in other contexts, including elementary and secondary education.<sup>111</sup>

Despite finding no compelling interests, the plurality addressed the narrow tailoring aspect of its strict scrutiny standard.<sup>112</sup> Here, the Court again found the school assignment plans to lack constitutional justification.<sup>113</sup> Specifically, the Court chastised the plans for being demographically rather

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104. *Id.* at 2749–50.

105. *Id.* at 2746.

106. *See id.* at 2751–52.

107. *Id.* at 2752–53.

108. *See id.* at 2752 (“[T]he Constitution is not violated by racial imbalance in the schools, without more.” (quoting *Milliken v. Bradley*, 433 U.S. 267 (1977))).

109. *Id.* at 2747.

110. *Id.* at 2752.

111. *See id.* at 2753 (finding the diversity interest in *Grutter* to be both specific to higher education and the distinctively broad-based result of a “highly individualized, holistic review” of each applicant). The school districts attempted to raise a third potential compelling interest—“the educational and broader socialization benefits” of diverse schools—but the Court characterized this interest as simple racial diversity and not the broader diversity that was recognized in *Grutter*. *Id.* at 2755.

112. *Id.*

113. *Id.*

than pedagogically driven.<sup>114</sup> In other words, the school districts inflexibly tied their racial guidelines to the racial composition of the district as a whole and then argued that the achievement of the guidelines was a compelling educational interest. Had the districts related their racial guidelines to studies showing maximum student achievement at those levels of racial diversity, the Court suggested the situation may have been different.<sup>115</sup>

#### 4. Justice Kennedy's "Controlling" Concurrence

In a decisive concurrence<sup>116</sup> that guaranteed the plurality its five votes, Justice Kennedy limited the reach of the Court's holding. According to Kennedy, a school district may pursue diversity as a compelling educational goal.<sup>117</sup> The problem with the plans at issue stems from the inappropriately broad means employed to achieve this goal.<sup>118</sup> In short, Kennedy believed the school districts' rigid distinction between races failed to meet the heavy burden of crafting a narrowly tailored solution to the compelling interest of educational diversity.<sup>119</sup> With that said, after insisting that state and local authorities are not required to accept the status quo of racial isolation,<sup>120</sup> Kennedy concluded by encouraging school districts not to shy away from the "important work of bringing together students of different racial, ethnic, and economic backgrounds."<sup>121</sup> Only in this way would the country be able to realize its obligation to provide equal educational opportunity for all.<sup>122</sup>

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114. *Id.*

115. *See id.* at 2755–56 (acknowledging the assertion of educational benefits of racial diversity but faulting the districts for not tailoring the plans to achieving those benefits).

116. *See* Orfield et al., *supra* note 79 (describing Justice Kennedy's concurrence as "controlling" because along with the dissenters, at least five justices found a compelling interest in promoting diversity in elementary and secondary schools).

117. *Parents Involved*, 127 S. Ct. at 2789 (Kennedy, J., concurring).

118. *Id.* at 2789–91.

119. *Id.* at 2797. In the future, Kennedy observed, school districts should consider a flexible evaluation of each student's ability to contribute to the diversity of the school similar to the approach taken in *Grutter*. *Id.* at 2793. Kennedy argued that the Constitution sometimes requires inefficient means to achieve a desired result, especially where, as here, the easy solution poses the dangerous risk of labeling individuals according to a blunt conception of race. *Id.* at 2796–97.

120. *Id.* at 2791–92.

121. *Id.* at 2797.

122. *Id.*

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## II. ALTERNATIVES TO RACE-BASED ASSIGNMENT PLANS FAIL STUDENTS

If the school-assignment tactic of race-based classification currently employed by hundreds of districts<sup>123</sup> is unavailable, districts that value diverse educational environments will choose between the undesirable alternatives of employing race-neutral means to achieve racial diversity.<sup>124</sup> Numerous proposals have emerged, each with an inventive, arguably circuitous, and dead-end track towards the same goal that race-based programs address directly. This Section primarily addresses two such proposals: the increasingly popular socioeconomic school integration plans, and the traditional neighborhood, geography-based assignments. However, not all integration strategies are mutually exclusive, and multiple, concurrent approaches to attaining racial diversity warrant exploration. Accordingly, this Section also discusses various strategies that may be partial solutions to the race-neutral integration puzzle. This Section concludes that all such race-neutral strategies insufficiently counter the dangerous rise in school segregation.

### A. THE PERSISTENCE OF RACIAL SEGREGATION UNDER CLASS-BASED SOLUTIONS

One of the most frequently discussed and implemented plans to achieve racial integration in K–12 public schools through race-neutral means is socioeconomic school integration.<sup>125</sup> These proposals seek to assign students on the basis of their families' economic status so that all schools are composed of predominantly middle-class families.<sup>126</sup> Some proponents believe that eliminating high-poverty schools will ensure high levels of student achievement given the numerous pedagogical

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123. See Linda Shaw, *Will Income Be the Next Tiebreaker for Schools?*, SEATTLE TIMES, June 29, 2007, at A1 (describing the *Parents Involved* decision's potential impact on hundreds of school systems around the country).

124. See Diller, *supra* note 14, at 2051 (“[I]t is questionable whether [non-racial demographic characteristics] can ensure the same level of minority representation as a system that relies on racial classifications.”); Kahlenberg, *supra* note 9, at 1555 (“By definition, there is no better way to ensure racial integration than employing race per se in student assignment.”).

125. See, e.g., Kahlenberg, *supra* note 9, at 1551 (describing a recent rise in the national awareness of socioeconomic school-integration policies).

126. See RICHARD D. KAHLBERG, ALL TOGETHER NOW: CREATING MIDDLE-CLASS SCHOOLS THROUGH PUBLIC SCHOOL CHOICE 2 (Brookings Institution Press 2001) (calling for a fundamental change in school assignment policies with the goal of having all schools be “middle-class schools”).

advantages enjoyed by students in middle-class schools.<sup>127</sup> Scholars have further argued that economic diversity actually contributes more to student achievement than racial diversity, and that seeking economic diversity will improve both the school's racial profile and its level of student learning.<sup>128</sup> Others argue that assigning students to particular schools on the basis of their families' economic status will naturally achieve a beneficial level of racial diversity in addition to potential achievement gains.<sup>129</sup> No matter the reasoning, approximately forty American school districts already employ economic factors in their assignment processes today, and that number is likely to grow given the numerous arguments in support of socioeconomic school integration.<sup>130</sup>

The arguments for socioeconomic integration plans are likely to gain traction among wary school districts in the wake of *Parents Involved*.<sup>131</sup> Rather than face the inevitable litigation encouraged by the high standard of strict scrutiny that racial classifications confront, socioeconomic school integration presents an arguably easier legal solution by using poverty as a proxy for race.<sup>132</sup> Ideally, class-based preferences divide school

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127. See, e.g., Kahlenberg, *supra* note 9, at 1549 (citing statistics showing greater achievement by low-income students in middle-class schools than middle-class students in high-poverty schools, and attributing this difference in part to the high standards, quality teachers, active parents, and safe environments more common in middle-class schools).

128. See, e.g., John Charles Boger, *Education's "Perfect Storm"? Racial Resegregation, High-Stakes Testing, and School Resource Inequities: The Case of North Carolina*, 81 N.C. L. REV. 1375, 1416–21 (2003) (describing evidence showing that socioeconomic status has a stronger relationship to student achievement than racial composition does); Kahlenberg, *supra* note 9, at 1558 (arguing that socioeconomic integration is "more effective than racial integration at improving academic achievement of poorer students").

129. See Kathleen M. Sullivan, *After Affirmative Action*, 59 OHIO ST. L.J. 1039, 1042 (1998) (noting that some support for socioeconomic diversity relates to the belief that class-based preferences automatically give rise to racial diversity given the disproportionate percentage of minorities that are poor).

130. See Kahlenberg, *supra* note 9, at 1551 (discussing various socioeconomic school-integration plans around the country).

131. See *id.* at 1554 (arguing for socioeconomic school integration in order to avoid the "tough standard of 'strict scrutiny'" that racial classifications face).

132. See GARY ORFIELD & CHUNGMEI LEE, RACIAL TRANSFORMATION AND THE CHANGING NATURE OF SEGREGATION 30 (2006), [http://www.civilrightsproject.ucla.edu/research/deseg/Racial\\_Transformation.pdf](http://www.civilrightsproject.ucla.edu/research/deseg/Racial_Transformation.pdf) (describing data that show a vast difference between minority and white students who come from low-income families). *But see* RICHARD D. KAHLENBERG, RESCUING BROWN V. BOARD OF EDUCATION: PROFILES OF TWELVE SCHOOL DISTRICTS PURSUING SOCIOECONOMIC SCHOOL INTEGRATION 11 (2007), <http://www.tcf>

districts across racial lines.<sup>133</sup> Since the Supreme Court employs the more lenient rational basis standard when the government regulates on the basis of economic status,<sup>134</sup> the feasibility of socioeconomic school integration is likely to attract more adherents.

The results of efforts to diversify based on socioeconomic class have not been without successes and failures.<sup>135</sup> The following sections analyze the impact of school assignment plans that consider socioeconomic factors in Minneapolis, Minnesota; Wake County, North Carolina; and Cambridge, Massachusetts.

### 1. Minnesota's "The Choice Is Yours" Program

Alleging that de facto racial and economic segregation violated the Minnesota Constitution, the Minneapolis NAACP chapter sued the state in 1995 seeking to integrate Minneapolis public schools with those in the nearby suburbs.<sup>136</sup> Several years later, the parties settled the lawsuit and agreed, among other provisions, to establish The Choice Is Yours (CIY) program with the aim of furthering the socioeconomic integration of the Minneapolis and surrounding suburban school systems.<sup>137</sup> With that goal in mind, the State agreed to provide access for low-income Minneapolis students to attend suburban schools.<sup>138</sup>

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.org/publications/education/districtprofiles.pdf (arguing income was not a proxy for race in Wake County, North Carolina, but rather race was a proxy for income).

133. See KAHLENBERG, *supra* note 132, at 11 (presenting the argument that class-based preferences may achieve greater racial diversity than other policies).

134. See, e.g., *United States v. Carolene Products Co.*, 304 U.S. 144, 152 (1938) (upholding regulation on the shipment of filled milk as "regulation affecting ordinary commercial transactions" . . . "rest[ing] on some rational basis").

135. See Diller, *supra* note 14, at 2049 (finding "the record of success . . . mixed" when it comes to using race-neutral classifications to achieve integration).

136. See Myron Orfield, *Choice, Equal Protection, and Metropolitan Integration: The Hope of the Minneapolis Desegregation Settlement*, 24 LAW & IN-EQ. 269, 313 (2006) (describing the two cases, later consolidated, against the state of Minnesota).

137. Kahlenberg, *supra* note 9, at 1586–87.

138. See Orfield, *supra* note 136, at 314 (describing the "three key programs" of the settlement agreement). Minnesota's existing interdistrict transfer law permitted school children to transfer outside of their home district, but families were required to pay for the transportation costs. *Id.* at 315.

CIY has been a success on many levels. First, the number of students participating has tripled from 558 in the 2001–2002 school year to 1,680 in the 2005–2006 school year.<sup>139</sup> These rising numbers may indicate that families see CIY as a better alternative to the status quo. Second, and perhaps most important, a recent report commissioned by the Minnesota Department of Education showed appreciable gains in student achievement among participating students at the program's inception.<sup>140</sup> Student academic achievement is obviously a significant component of public education, but other goals such as cultivating good citizens and preparing children for the workforce are equally important.<sup>141</sup> Third, a majority of the participating students in the first three years of the program came from schools in the most racially isolated areas of Minneapolis.<sup>142</sup>

However, the failures of CIY are equally notable. Most significantly, CIY has failed to racially integrate either the Minneapolis or nearby suburban school systems. In fact, segregation in those districts has significantly increased.<sup>143</sup> Moreover,

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139. IRP REPORT, *supra* note 12, at 42.

140. ASPEN ASSOCS., MINNESOTA VOLUNTARY PUBLIC SCHOOL CHOICE 2004–2005, EVALUATION REPORT (2006); *see also* Kahlenberg, *supra* note 9, at 1587 (describing the ASPEN report's findings of significant gains in reading and math). *But see* ASPEN ASSOCS., MINNESOTA VOLUNTARY PUBLIC SCHOOL CHOICE 2006–2007, EVALUATION REPORT (2008) [hereinafter ASPEN ASSOCS. (2008)] (reporting that, for the most part, students participating in the program performed as well as those who were eligible but chose not to participate).

141. *See, e.g.*, *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (detailing the virtues of public education to society beyond individual student achievement); *Brown*, *supra* note 87, at 68 (describing public education as “the one governmental institution charged with the selective conveyance of ideas to the young”); Gill, *supra* note 87, at 130–31 (noting that integration of students from diverse backgrounds is “one of the traditional purposes of American public schools”); Siegel, *supra* note 87, at 787–88 (“[I]n addition to facilitating academic achievement, public schools are charged principally with socializing students to values of assimilation, national unity, and social harmony . . .”).

142. *See* Orfield, *supra* note 136, at 315–16 (discussing the ASPEN study's showing of 52% of CIY participants coming from zip codes in north Minneapolis).

143. *See* IRP REPORT, *supra* note 12, at 36 (“The result [of the settlement agreement] is more, not less, segregation in the Minneapolis Public Schools—and rapidly increasing segregation in a number of suburban districts.”). The percentage of Minneapolis public schools with a population of 81–100% non-white students has increased from 35% of schools just before the settlement to 46% of schools in the 2002–2003 school year. *Id.* at 36 tbl.4-1. The IRP Report considers the program “promising” but not broad enough in its early stages to adequately cure the segregation and achievement challenges of the Minneapolis Public Schools. *Id.* at 36.

the demonstrated increases in achievement of CIY participants are potentially misleading given the sparse data available on the relative achievement of students remaining in Minneapolis public schools.<sup>144</sup> At best, these results warrant further study of a broader data set to determine the correlation, if any, between the increases in achievement and socioeconomic integration. Finally, to the extent CIY does improve public education in Minneapolis and the surrounding suburbs, the program is limited to a small fraction of students<sup>145</sup> in an increasingly segregated school system.<sup>146</sup>

## 2. Wake County, North Carolina

On January 10, 2000, the School Board of the Wake County Public School System adopted a socioeconomic integration plan to replace a program that aimed for a minority population between fifteen and forty-five percent in each school of the 120,000 student system.<sup>147</sup> Wake County had a long history of race-based, voluntary school desegregation.<sup>148</sup> However, since the Fourth Circuit recently found the use of race in student assignment to be unconstitutional, Wake County attempted to

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144. See Orfield, *supra* note 136, at 317 (commenting on the lack of comparative data available on achievement changes between CIY students and Minneapolis public school students); see also ASPEN ASSOCS. (2008), *supra* note 140.

145. While there were only 1489 enrolled students in CIY at the start of the 2004–2005 school year, the Minneapolis school system served over 39,000 students. IRP REPORT, *supra* note 12, at 42 tbl.4-5; MINNEAPOLIS PUBLIC SCHOOLS, PERIOD ENROLLMENT REPORT 4 (2005), available at [http://studentaccounting.mpls.k12.mn.us/sites/c1e62c01-fc16-4ce9-ae5b-4c1d51297a8b/uploads/PE\\_Oct\\_1.pdf](http://studentaccounting.mpls.k12.mn.us/sites/c1e62c01-fc16-4ce9-ae5b-4c1d51297a8b/uploads/PE_Oct_1.pdf); see also Jean Hopfensperger, *Minnesota Ahead of Curve on Integration*, MINNEAPOLIS STAR TRIB., July 8, 2007, at 1B (quoting Myron Orfield, director of the University of Minnesota's Institute on Race and Poverty, saying that the bad news about Minnesota's integration efforts is that the data are inconclusive and "only a very small percentage of kids are involved in them").

146. See David Peterson, *State's Schools Rank Second in Racial Change*, MINNEAPOLIS STAR TRIB., Aug. 31, 2007, at 1B ("We went from nine schools in the metro area being mostly minority in 1992, to more than 100 ten years later." (quoting Myron Orfield)).

147. Susan Leigh Flinspach & Karen E. Banks, *Moving Beyond Race: Socioeconomic Diversity as a Race-Neutral Approach to Desegregation in the Wake County Schools*, in SCHOOL RESEGREGATION: MUST THE SOUTH TURN BACK? 261, 261 (John Charles Boger & Gary Orfield eds., 2005); KAHLBERG, *supra* note 132, at 10–12.

148. See Flinspach & Banks, *supra* note 147, at 261 (noting the county's history of desegregation efforts and describing previous school-integration programs as "[school] board initiated rather than court ordered").

avoid litigation by adopting a race-neutral program.<sup>149</sup> Under the new plan, the county set a goal that all schools maintain a student population of no more than forty-percent free-or reduced-price-lunch-eligible students and no more than twenty-five percent reading below grade level.<sup>150</sup>

The effects of the Wake County socioeconomic integration program appear promising. Many of the magnet schools—which opened in low-income areas in Raleigh under previous race-based integration programs—exhibit extremely high popularity.<sup>151</sup> Among all high schools in the district, Wake County students perform better on standardized tests and graduation rates than other districts in North Carolina that do not attempt to integrate based on economic class.<sup>152</sup> These higher achievement rates are consistent across race and socioeconomic status.<sup>153</sup>

However, like the CIY plan in Minnesota, Wake County's efforts have failed to increase racial diversity.<sup>154</sup> After years of dedicated, voluntary policies aimed at racial integration, the district's leaders have abandoned official efforts to achieve any sort of racial diversity.<sup>155</sup> The results are predictable: the percentage of desegregated schools has dropped or remained stagnant since the implementation of the new socioeconomic "integration" program in 2000.<sup>156</sup> Despite achievement levels that

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149. See Eisenberg *ex rel.* Eisenberg v. Montgomery County Pub. Sch., 197 F.3d 123, 124 (4th Cir. 1999) (holding that the school system's transfer policy that may deny a student's request to transfer on the basis of race violated equal protection); KAHLBERG, *supra* note 132, at 10 (linking the Fourth Circuit decision with Wake County officials' consideration of a race-neutral policy).

150. KAHLBERG, *supra* note 132, at 11–12.

151. See Kahlenberg, *supra* note 9, at 1552–53 (describing the use of magnet schools in Wake County and noting that several are oversubscribed, causing denials of more than half the applications in 2004–05).

152. See KAHLBERG, *supra* note 132, at 13 (listing the results of the 2006 High School End of Course Exams and the 2002–03 on-time graduation rates).

153. See *id.* (showing that both low-income and minority students as well as middle-class and white students in Wake County outscored their peers in several other North Carolina districts).

154. See *id.* (noting that the socioeconomic policy is achieving desegregation at a rate lower than under the race-based program).

155. See Flinspach & Banks, *supra* note 147, at 273, 275 (stating that despite an alleged desire to maintain diversity, the "commitment to desegregated schools has disappeared" and school officials have ceased to monitor racial enrollments).

156. See *id.* at 275 (reporting a drop in the number of desegregated schools in the first year of the new Wake County integration program from 64.6% to 60.0%, and an increase back to 63.3% the following year).

surpass those of several other districts, Wake County is unable to present evidence that its school assignment plan improves the overall quality of education for its students.

### 3. Cambridge, Massachusetts

In 2002, after twenty years of voluntary race-based desegregation, Cambridge, Massachusetts, eliminated references to race in its school assignment policies and instituted a plan focused on socioeconomic status as the primary criterion for educational diversity.<sup>157</sup> The goal of the Cambridge plan was for all schools to have similar proportions of students eligible for free or reduced-price lunch.<sup>158</sup> The school board phased the plan into Cambridge's existing "Controlled Choice" program, which allows parents to rank their top choices among all the district's schools, each of which has a unique pedagogical philosophy.<sup>159</sup> Cambridge designed Controlled Choice to avoid the desegregation problems facing its neighbors in Boston by promoting a racial balance in the student population of each school.<sup>160</sup> The district's new socioeconomic integration focus drastically altered that original intent.<sup>161</sup>

Early results of Cambridge's policy are mixed. On the one hand, proponents of socioeconomic integration cite data showing high levels of student achievement among Cambridge students as compared to students across Massachusetts.<sup>162</sup> On the other hand, Cambridge appears to be racially re-segregating, which led the Cambridge school superintendent to conclude that socioeconomic diversity alone is an insufficient goal of a

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157. Tracy Jan, *An Imbalance Grows in Cambridge Schools*, BOSTON GLOBE, July 23, 2007, at A1; see Edward B. Fiske, *Controlled Choice in Cambridge, Massachusetts*, in DIVIDED WE FAIL: COMING TOGETHER THROUGH PUBLIC SCHOOL CHOICE 193 (Century Found. Task Force on the Common Sch. ed., 2002) (noting specifically that school officials will no longer even discuss race when talking about Controlled Choice).

158. Kahlenberg, *supra* note 9, at 1553.

159. *Id.*

160. KAHLBERG, *supra* note 132, at 28.

161. See *id.* (noting the change in focus of the program from race to family income).

162. See *id.* at 33 (citing data of the Massachusetts Comprehensive Assessment System for Grade 3 Reading in the 2005–06 school year where low-income third graders scored a 75.8 compared to 71.3 for low-income third graders statewide). Of course, this information does not show that the socioeconomic integration policy has caused student achievement to *improve* in Cambridge. Rather, snapshot samples of select indicators show that Cambridge students fair slightly better than students statewide. *Id.*

school system.<sup>163</sup> More time may be necessary to accurately relate the new policy with student achievement and racial diversity, but the current trends are not unequivocally positive.

#### B. RELIANCE ON HOUSING PATTERNS THROUGH THE NEIGHBORHOOD MODEL

A second race-neutral assignment possibility—the neighborhood model—has perhaps the broadest appeal for obvious reasons: it is easiest to send students to the school nearest their home.<sup>164</sup> Additionally, it avoids the need to bus students to far-away districts that has been so controversial.<sup>165</sup> Of course, the neighborhood model by its very nature fails to address any aspect of diversity beyond what naturally exists in our communities. Nor does it attempt to correlate school demographics with student achievement, an association that social scientists have demonstrated for decades.<sup>166</sup> Rather, the neighborhood model permits housing patterns to dictate the make-up of public schools.<sup>167</sup> With the rise in housing segregation in America, the neighborhood model is a recipe for failure.<sup>168</sup> Nevertheless, the neighborhood model is the favorite of many parents<sup>169</sup> and opponents of forced school integration.<sup>170</sup>

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163. See Jan, *supra* note 157 (reporting an increase in racial imbalance and quoting the Cambridge superintendent as saying socioeconomic status “is imperfect”).

164. See *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 28 (1971) (“All things being equal, . . . it might well be desirable to assign pupils to schools nearest their homes.”).

165. See Patrick James McQuillan & Kerry Suzanne Englert, *The Return to Neighborhood Schools, Concentrated Poverty, and Educational Opportunity: An Agenda for Reform*, 28 HASTINGS CONST. L.Q. 739, 743 (2001) (relating the appeal of neighborhood schools with the perceived drawbacks of busing); Susan Olzak et al., *School Desegregation, Interracial Exposure, and Antibusing Activity in Contemporary Urban America*, 100 AM. J. SOC. 196, 217 (1994) (describing the antibusing protests between 1970 and 1990 including meetings, picketing, boycotts, and riots).

166. See, e.g., Brief of 553 Social Scientists as Amici Curiae in Support of Respondents at 2, *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738 (2007) (Nos. 05-908, 05-915) [hereinafter 553 Social Scientists] (arguing that the body of research since *Brown* shows that the racial demographics of schools are linked to educational benefits).

167. See Nelson, *supra* note 13, at 307 (noting that residential segregation will lead to school segregation in communities that adopt the neighborhood model).

168. See Orfield, *supra* note 77, at 291 (noting that every community studied in his book faces a “continuous expansion of residential segregation”).

169. See, e.g., Pereira, *supra* note 11 (analyzing a school-integration dispute that pits white parents against school officials and minority parents); *cf.*

For those who consider racial diversity a compelling governmental interest, the neighborhood model may be an appropriate solution only if school district boundaries give adequate concern for the racial divisions prevalent in many American communities.<sup>171</sup> Thus, drawing boundaries to maximize diversity through a process known as “redistricting” is occasionally championed as a way around the race dilemma,<sup>172</sup> and even supported by Justice Kennedy.<sup>173</sup> However, redistricting struggles to overcome the phenomenon of “white flight”<sup>174</sup> and remains a judicially unstable proposition.<sup>175</sup>

Even with feasible and constitutional redistricting tools available, the neighborhood model is a proven failure when it comes to student achievement. Geography-based school assignment plans such as the neighborhood model increase segregation, which directly relates to lower student achievement.<sup>176</sup> Research on school systems that use the neighborhood

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Jacqueline Reis, *State's Educators Revisit Deseg Issue: Recent Supreme Court Ruling Limits Alternatives*, TELEGRAM & GAZETTE (Worcester, Massachusetts), Jul. 18, 2007, at B1 (quoting Worcester, Massachusetts Superintendent James A. Caradonio as claiming that redistricting may be “as divisive for some people as forced busing (in Boston) was”).

170. See, e.g., *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2775, 2778 (2007) (Thomas, J., concurring) (arguing that the “essential elements” of integration are not compelling, and that the relationship between forced integration and achievement is “tenuous”).

171. See *id.* at 2972 (Kennedy, J., concurring) (suggesting the consideration of neighborhood demographics in drawing school attendance zones as one permissible solution to achieving integration). See generally Boger, *supra* note 128, at 1402 (characterizing seventy-four American metropolitan areas as “hypersegregated,” and another 160 as “partially segregated”); Orfield, *supra* note 77, (describing the “continuous expansion of residential segregation” across America).

172. See, e.g., Diller, *supra* note 14, at 2048 n.253 (arguing that redistricting in order to accomplish integrated schooling would not be subject to the same level of scrutiny as other race-based classifications).

173. See *Parents Involved*, 127 S. Ct. at 2792 (Kennedy, J., concurring) (suggesting that school districts may consider the racial demographics of attendance zones when drawing boundaries).

174. See Orfield, *supra* note 77, at 314–18 (discussing desegregation problems of white suburbanization that can lead to school systems composed of virtually all minorities).

175. See Chapin Cimino, Comment, *Class-Based Preferences in Affirmative Action Programs After Miller v. Johnson: A Race-Neutral Option, or Subterfuge?*, 62 U. CHI. L. REV. 1289, 1297–301 (1997) (arguing that the Supreme Court’s redistricting cases preclude race-neutral affirmative action policies in education); cf. *Shaw v. Reno*, 509 U.S. 630, 647–48 (1993) (describing the Court’s discomfort with racial gerrymandering in the context of voter reapportionment).

176. See 553 Social Scientists, *supra* note 166, at 13, app. at 47 n.153.

model after completing desegregation mandates confirm this fact. In Charlotte-Mecklenburg, for example, the school district attained “unitary” status following court-ordered desegregation, returned to the neighborhood model, and quickly exhibited declines in student achievement.<sup>177</sup> Denver and San Francisco have reported similar results.<sup>178</sup> In short, the neighborhood model cannot achieve the dream of educational equity.<sup>179</sup>

### C. THE KITCHEN SINK APPROACH: A DISTRICT’S PIECEMEAL RACE-NEUTRAL EFFORT

As no single race-neutral solution comprehensively addresses a race-based problem, some commentators and school districts attack the integration dilemma with a combination of proposals.<sup>180</sup> In 1999, the San Francisco Unified School District instituted a student assignment policy that eliminated race-based classifications in favor of a variety of race-neutral factors including socioeconomic status, geographic proximity, and academic achievement, among many others.<sup>181</sup> Unfortunately, the results have not been successful: San Francisco schools considered “highly diverse” based on the new factors were found to be the least racially diverse schools in the district.<sup>182</sup> Moreover, previously attained levels of integration declined, and schools that resegregated scored the lowest on state standardized tests.<sup>183</sup> At San Francisco’s Lowell High, which gave bonus points to students coming from single-parent families, proportional enrollment of white and Chinese students increased.<sup>184</sup>

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177. *See id.* at 14.

178. *See id.* app. at 52–54 (describing the immediate adverse changes in diversity and achievement following the Denver School District’s discarding of its use of race in student assignment and the “unsuccessful” attempt of San Francisco to adopt race-neutral factors in the place of its use of race in assignment); *see also* McQuillan & Englert, *supra* note 165, at 750–51 (summarizing data that show significant disparities in numerous achievement indicators between students in segregated schools following Denver’s return to the neighborhood model).

179. *See* Nelson, *supra* note 13, at 310 (arguing that continued adherence to the neighborhood model will prohibit minority students from receiving the same quality of education as their nonminority peers).

180. *See, e.g.*, Diller, *supra* note 14, at 2049–50 (discussing several race-neutral factors that may contribute to racial diversity, including some factors implemented or considered in various American cities).

181. 553 Social Scientists, *supra* note 166, app. at 53.

182. *Id.* app. at 53–54.

183. *Id.*

184. *See* Diller, *supra* note 14, at 2051.

Given the importance of the battle, there will always be new proposals for improving public education. Race-neutral solutions to a race-based problem have failed to address school segregation and ignore the threat faced by millions of school-children. As Justice Kennedy has suggested, the Constitution must not turn its back on resegregation, and school districts must not be compelled to accept racial isolation.<sup>185</sup>

### III. A CONSTITUTIONAL RACE-CONSCIOUS STUDENT ASSIGNMENT PLAN

The law must not force school districts to choose between either defending race-conscious assignment plans from the foreseeable onslaught of costly litigation bolstered by *Parents Involved* or using race-neutral alternatives that do not achieve integration, and thus student achievement. Despite the early reaction of the media and scholarly commentators, and the strong language of the plurality and Justice Thomas,<sup>186</sup> the Supreme Court has not destroyed all race-based solutions to achieving the compelling interest of racial diversity in K–12 public education. In fact, at least five justices support local school officials who desire to reverse the resegregation trend by using race-based criteria.<sup>187</sup> Rather than backtracking into the failed race-neutral models, school districts should continue to use race in school assignment according to Justice Kennedy's opinion in *Parents Involved*, in which he encouraged districts to pursue narrowly tailored means to the important goal of diversity.<sup>188</sup>

The solution is within reach of all American school districts. Race-based solutions can adequately conform to the plurality's objections. This Part details the limitations of the holding in *Parents Involved*, specifically addressing the principal concerns that swayed the plurality and led Justice Kennedy to

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185. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2791 (2007) (Kennedy, J., concurring) (deriding the plurality's apparent dismissal of the problem of de facto segregation and rejecting the idea that local school officials must accept the status quo).

186. See, e.g., *id.* at 2768 (plurality opinion) (declaring the way to end racial discrimination is to end racial discrimination); *id.* (Thomas, J., concurring) (comparing the arguments of the dissenters to those of segregationists in the 1950s).

187. See *id.* at 2835 (Breyer, J., dissenting) (pointing out that five justices agree that local school officials have a compelling interest in racial diversity).

188. *Id.* at 2792 (Kennedy, J., concurring) (reinforcing that diversity is a compelling interest and suggesting that school boards pursue such a goal).

his reluctant disapproval of the specific Seattle and Louisville plans.<sup>189</sup> The legal framework outlined in *Parents Involved* translates into real policies that will shape the lives of millions of American schoolchildren. This Part reinforces the goal of integration and argues that school districts need not fear the public's initial misinterpretation of the expected impact of *Parents Involved*. Additionally, this Part includes examples of race-neutral programs that may contribute not only to race-conscious assignment policies, but also to the solution. School districts following the guidelines detailed below can adopt the narrowly tailored means to enact powerful integration strategies so that all children will one day enjoy educational equity.

A. OVERCOMING THE PRINCIPAL OBJECTIONS OF THE PLURALITY IN *PARENTS INVOLVED*

Chief Justice Roberts' plurality opinion is likely to be remembered most for its catchy, tautological conclusion: "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."<sup>190</sup> Its support, however, does not rest on such an uncontestable truism. The Chief Justice—and the three justices who joined his opinion—gained the crucial vote of Justice Kennedy by focusing on three main weaknesses of the individual plans implemented in Seattle and Louisville.<sup>191</sup> These weaknesses are specific to the Seattle and Louisville plans, and not to race-based classifications in other models of K–12 student assignment.<sup>192</sup> Addressing these concerns will significantly restrict the impact of the plurality's holding, and consequently conform to the constitutional parameters of the limiting concurrence and the five justices who continue to realize the value of integrated education.<sup>193</sup>

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189. *See id.* at 2791 (describing an inability to support the plurality's "profoundly mistaken" apparent conclusion that school authorities must accept racial isolation).

190. *Id.* at 2768 (plurality opinion).

191. *See id.* at 2788–91 (Kennedy, J., concurring) (concurring with the plurality to the extent that it holds that the specific plans at issue fail to meet the heavy burden of strict scrutiny).

192. *See id.* at 2789 (clarifying that school districts may use race-based classifications but only when they are narrowly tailored to the compelling interest in avoiding racial isolation).

193. *See id.* at 2835 (Breyer, J., dissenting) (noting that a majority of justices believe local school officials have a compelling interest in achieving racial diversity).

It is worthwhile to mention that a school assignment program may be constitutionally sound even if it does not address all three of the plurality's main concerns. It may have been the unique combination of all three flaws that struck the fatal blow to the plans in the eyes of Justice Kennedy. For the sake of being comprehensive, however, this Note assumes that the Court would require that all three of the below-mentioned concerns be satisfied.

### 1. School Districts Must Broaden Their Notion of Racial Diversity

Cognizant of America's troubled history with racial classifications, the plurality and Justice Kennedy took particular exception to Seattle and Louisville's "binary conception of race."<sup>194</sup> In other words, five justices were not able to accept a racial classification that groups individuals as "white/nonwhite" or "black/other."<sup>195</sup> Fortunately, this problem is easily resolved: school systems should identify *all* races in their assignment programs. There should be more than two options when a child notes his or her race on enrollment documents. School officials should give adequate allowance to the value of multiple races. Compiling this simple data is no more burdensome than compiling white/nonwhite or black/other data, and it is presently legally mandated by the Civil Rights Act of 1964.<sup>196</sup> In fact, the United States Department of Education has been collecting enrollment data as it relates to race in public elementary and secondary schools since 1968.<sup>197</sup> It may well be that in certain districts all nonwhite students receive a preference in practice, but such a result is less objectionable if the students are given accurate consideration for their specific race.<sup>198</sup>

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194. *Id.* at 2760 (plurality opinion).

195. *See id.* at 2790–91 (Kennedy, J., concurring) (agreeing with the plurality in faulting the district's "blunt distinction" between racial identifiers).

196. *See* Civil Rights Act of 1964, Pub. L. No. 88-352, tit. VI, §§ 601–02, 78 Stat. 252 (codified as amended at 42 U.S.C. § 2000d-1 (2006)) (prohibiting discrimination in federally assisted programs and requiring each federal department to issue rules, regulations, or orders consistent with the objectives of the Act); Compliance Information, 34 C.F.R. § 100.6(b) (2007) (requiring recipients of federal financial assistance to make racial and ethnic data available to the Department of Education for purposes of compliance with Title VI of the Civil Rights Act of 1964).

197. Office for Civil Rights, U.S. Department of Education, About OCR and Surveys, <http://vistademo.beyond2020.com/ocr2004rv30/wdswho.html> (last visited Mar. 9, 2009).

198. *Cf. Parents Involved*, 127 S. Ct. at 2760 (criticizing classifications that

## 2. Racial Proportionality Has No Place in an Educational Setting

Seattle and Louisville assigned their diversity goals for each school according to the racial make-up of the school district as a whole.<sup>199</sup> This decision, according to the plurality, proves that the respective school boards were not interested in attaining any educational benefits of racial diversity by implementing their assignment programs.<sup>200</sup> As a result, the plans failed the narrow-tailoring prong of the Court's strict scrutiny analysis.<sup>201</sup>

Again, this lapse is easy to correct. If the plans are pedagogically—as opposed to demographically—driven, they would be tailored to the school's asserted compelling interest of achieving racial diversity. Therefore, school systems must abandon the use of strict district-wide percentages of minority enrollment that drove the invalidated plans at issue. In place of these arguably irrational percentages, the school board may cite any number of studies that support the proposition that students achieve greater academic gains in diverse educational settings.<sup>202</sup> If necessary, and dependent on budgetary constraints, school districts may wish to commission their own pedagogical studies to identify the level of diversity most beneficial to their students.

## 3. Racial Classifications Must Be of Limited Duration

By tying their racial guidelines to the school systems' demographics, Seattle and Louisville created problematic racial classifications because the plans had “no logical stopping point.”<sup>203</sup> The Supreme Court has held that race-conscious policies must serve as temporary solutions terminable as soon as

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differentiate only between white/nonwhite or black/other as “binary” and “crude”); *id.* at 2792 (Kennedy, J., concurring) (same).

199. *Id.* at 2755–56 (plurality opinion).

200. *See id.*

201. *See id.*

202. Numerous studies are readily available to confirm that racial diversity is beneficial in public education. *See, e.g., id.* at 2821 (Breyer, J., dissenting) (citing “well established” evidence confirming the correlation between racial integration and student achievement); Liu, *supra* note 38, at 290 (discussing the relationship between racial segregation and educational inequity); Orfield, *supra* note 84, at 65–67 (describing the “achievement inequalities” associated with segregated schooling).

203. *Parents Involved*, 127 S. Ct. at 2758 (quoting *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 498 (1989)).

practicable.<sup>204</sup> The Court conceded, however, that self-administered “sunset provisions” or periodic reviews of the temporarily constitutional action would satisfy strict scrutiny.<sup>205</sup> Neither Seattle nor Louisville was able to satisfactorily define a point at which the racial impositions would no longer be necessary.<sup>206</sup> In fact, on their face, the plans appeared to the plurality to be granted infinite duration—as the school systems’ demographics changed, so too would the racial guidelines that determined the qualities of the assignment programs.<sup>207</sup> This characteristic gave the plurality yet another reason to object to an unnecessarily broad means to achieving a worthy end.<sup>208</sup>

However, infinite duration is not an essential component of any race-conscious school assignment program. This quality may well have been an unintentional consequence or simple oversight of assignment plans. School officials have no reason to favor racial preferences in an otherwise diverse system. It is not plausible that Seattle or Louisville would continue to expend valuable resources on the implementation of a race-conscious assignment policy if their schools ceased to suffer from the vestiges of segregation. Indeed, Seattle conducted annual reviews of its integration tiebreaker, adopting appropriate changes along the way and a statement justifying the continued use of its diversity rationale.<sup>209</sup> In 2000, the school board even concluded that the integration tiebreaker would no longer apply if the racial composition of the affected schools returned to an acceptable level.<sup>210</sup> This apparently was not enough to satisfy the plurality, especially given the breadth of the plan as initially adopted.

School officials have multiple options available to conform to the plurality’s demands. First, a race-conscious assignment policy with a definite ending date—twenty-five years, for example—may be an obvious starting point. Having already ac-

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204. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 342 (2003) (upholding a race-conscious higher education affirmative action policy as it was “limited in time”); *Croson*, 488 U.S. at 510 (requiring that a race-conscious minority contractor set-aside program be no more than a “deviation from the norm of equal treatment of all racial and ethnic groups” and “a temporary matter”).

205. *Grutter*, 539 U.S. at 342.

206. *Parents Involved*, 127 S. Ct. at 2758.

207. See *id.*

208. See *id.*

209. Brief for Respondents at 7–8, *Parents Involved*, 127 S. Ct. 2738 (No. 05-908).

210. *Id.* at 11.

cepted a twenty-five year window for a policy with a similar goal of racial diversity at the University of Michigan Law School, the Court would be hard-pressed to object to such a limiting provision here.<sup>211</sup>

As a second option, school officials may wish to mandate periodic reviews, as suggested by Justice O'Connor in *Grutter*<sup>212</sup> and performed by the Seattle school district although apparently too late to overcome the plan's "fatal flaw[s]."<sup>213</sup> For example, such a policy may explicitly state: "Race-conscious school assignments shall immediately cease upon compliance with the clearly identified goal as realized upon a review to be conducted without exception on an annual basis. Failure to conduct an annual review shall be acceptance of the achievement of this policy's objectives." Such reviews provide clearly defined temporal parameters that would assure the plurality that the policy will end as soon as the district achieves its compelling interest.

A third alternative that would simultaneously alleviate concerns of the policy's relationship to racial balancing is to require the school board to cease the race-conscious assignment policy after reaching a certain measure of student achievement. For example, the policy may automatically terminate when eighty percent of students are at or above grade level standards in reading and math, or some other academic measurement that the individual district deems appropriate. The beneficial measurement does not even need a specific definition as long as

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211. See *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003) (providing the law school twenty-five years in which to use racial preferences to achieve its compelling interest). The fact that *Grutter* concerned an admissions program in higher education should be irrelevant to the concern of tailoring a solution of limited duration. Chief Justice Roberts's insistence that *Grutter* was "unique to institutions of higher education" referred specifically to the issue of whether diversity in elementary and secondary schools was a compelling governmental interest. See *Parents Involved*, 127 S. Ct. at 2754.

212. See *Grutter*, 539 U.S. at 342 ("[T]he durational requirement can be met by . . . periodic reviews to determine whether racial preferences are still necessary.").

213. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., No. 1*, 426 F.3d 1162, 1192 (9th Cir. 2005), *rev'd*, 127 S. Ct. 2738 (2007) (holding that Seattle's plan meets the durational requirements of *Grutter* because of the district's annual reviews). Chief Justice Roberts does not mention Seattle's annual reviews, but nevertheless declares the plan to have "no logical stopping point" because of its tie to demographics. *Parents Involved*, 127 S. Ct. at 2758. The "fatal flaw," according to Chief Justice Roberts, is the plan's propensity to seek an impermissible racial balance. *Id.* at 2757.

the district considers it a “meaningful number.”<sup>214</sup> If the schools resegregate and student achievement drops, the districts should be free to reinstate the race-conscious measures.

Such a goal has inherent ties to pedagogical standards, which is a priority for the Court.<sup>215</sup> It also addresses the primary reason for desegregation in the first place—segregated schools deny racial minorities an equal education. Of course, eighty percent of students learning on grade level will be difficult, if not impossible, to reach in a segregated environment.<sup>216</sup> Therefore, there is little worry that such a program will ever deny students the important purposes of public education *other than* student achievement.<sup>217</sup> In short, if eighty percent of students are receiving the education they demand and deserve, the schools are likely to be racially integrated and thus achieving their objectives.

#### B. FACTORS IN ADDITION TO RACE-CONSCIOUS POLICIES THAT BENEFIT DIVERSITY AND AFFORD INDIVIDUALIZED CONSIDERATION

Race-neutral alternatives to the common goal of integration are unlikely to improve the racial diversity of our public schools if race is not at least a concurrent factor.<sup>218</sup> However, race-neutral considerations do have the potential to contribute to the overall solution of achieving beneficial racial diversity in K–12 public education.<sup>219</sup> From the outset, the implementation of race-neutral diversity factors demonstrates an assignment policy’s individualized consideration of students that the Court

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214. See *Parents Involved*, 127 S. Ct. at 2757 (citing *Grutter*’s approval of a school’s goal to achieve an undefined “meaningful number” of minority students necessary to achieve beneficial diversity).

215. See *id.* at 2755 (finding both plans to be flawed because they were tied to racial demographics as opposed to pedagogic concepts that maximize educational benefits).

216. See, e.g., Orfield, *supra* note 84, at 65 (describing segregation and low achievement as “systematically connected”).

217. See, e.g., *supra* note 87 and accompanying text.

218. See 553 *Social Scientists*, *supra* note 166, app. at 41–54 (reporting numerous studies showing the ineffectiveness of race-neutral policies in achieving racial integration); *supra* note 10 and accompanying text.

219. See, e.g., Kahlenberg, *supra* note 9, at 1555 (arguing that race-neutral policies such as socioeconomic integration “can produce a substantial racial dividend”); Nelson, *supra* note 13, at 328 (encouraging school districts to implement race-neutral policies as the first step in addressing racial segregation and educational inequity).

has previously found to be so vital.<sup>220</sup> Numerous possibilities are available to school officials.<sup>221</sup> Some may be prohibitively burdensome on scarce school resources,<sup>222</sup> while others may require simple data collection that is likely to be readily available on existing school enrollment applications. The following alternatives have been proposed or implemented with high hopes for success.

### 1. Magnet Schools

Magnet schools typically offer distinct curricula organized around a special theme such as arts or music programs.<sup>223</sup> Districts design these schools to attract students from within the school district who would normally choose or be assigned to a neighborhood school.<sup>224</sup> In many districts, white students are enticed back to segregated schools in low-income communities by the opening or increased funding of attractive magnet schools.<sup>225</sup> Instead of transferring high-poverty students to middle class suburbs, districts may draw students in the opposite direction. A district that actively supports magnet schools can show that it seeks to achieve racial diversity through race-neutral means with pedagogical intentions. This is a laudable objective to even the plurality in *Parents Involved*.<sup>226</sup>

### 2. Texas's Ten-Percent Plan

Texas and Florida implemented policies that reserve space in state universities for students in the top percentage of their

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220. See, e.g., *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 319–20 (1978) (describing the “fatal flaw” of a race-based affirmative action program to be the failure to make individualized decisions); *Grutter v. Bollinger*, 539 U.S. 306, 337 (2003) (approving the university’s policy affording an “individualized consideration to applicants of all races”).

221. See *supra* Part II.

222. See Diller, *supra* note 14, at 2017–18 (“Using this sort of admissions process, however, is likely to be cost-prohibitive and administratively infeasible for a public school, requiring a very large investment of time and resources into reviewing applicants’ files.”).

223. Kahlenberg, *supra* note 9, at 1552; Kimberly C. West, Note, *A Desegregation Tool That Backfired: Magnet Schools and Classroom Segregation*, 103 YALE L.J. 2567, 2568 (1994).

224. See West, *supra* note 223, at 2568 (“A ‘magnet school’ is designed to attract students away from their neighborhood schools much as magnets attract metal objects.”).

225. Wilbur C. Rich, *Putting Black Kids Into a Trick Bag: Anatomizing the Inner-City Public School Reform*, 8 MICH. J. RACE & L. 159, 173 (2002).

226. See *supra* note 114 and accompanying text.

high school class.<sup>227</sup> Proponents encourage similar strategies at the junior and high school level, whereby a certain percentage of seats in selective or otherwise attractive public schools would be reserved for the top students (regardless of race) coming from feeder schools.<sup>228</sup> In order to maximize the impact on diversity, districts may hold those reserved spots only for the top students in highly segregated schools.<sup>229</sup> For example, consider a high-achieving, predominantly white high school in a highly segregated district. By holding positions in this school for the top ten percent of all students at a junior high school that happens to be ninety percent minority, the district can take advantage of its own segregation without the need to classify students based on race. Accordingly, this plan is race-neutral, but it may achieve race dividends in certain districts that are able to draw on currently segregated schools. Indeed, Texas and Florida report early success at increasing minority enrollment in their respective state university systems.<sup>230</sup>

### 3. Preference to English Language Learners and Single Parent Families

San Francisco unsuccessfully tried giving preference to students coming from single parent families;<sup>231</sup> however, such a policy may be feasible in certain communities, and it should not be ruled out as one of many possible factors that may contribute to a broad conception of diversity. English language proficiency is also likely to be a strong predictor of race, and has been attempted in Arlington, Virginia, and considered in San Francisco.<sup>232</sup> Of course, this solution does not focus on the African-American community; however, it may provide another signal that the school district implementing such a policy is not seeking to favor a single race and instead looks to achieve broader diversity.

These and other innovative race-neutral factors serve two purposes. First and foremost, they help to pacify the plurality's criticism of race-conscious student assignment policies by ex-

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227. Diller, *supra* note 14, at 2052.

228. *Id.* at 2053.

229. *See id.*

230. *Id.* at 2052–53.

231. *Id.* at 2051 (describing a policy tried at San Francisco's Lowell High aimed at increasing racial diversity that resulted in increasing white and Chinese enrollment at the expense of black and Latino applicants).

232. *Id.* at 2049–50 n.255.

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pressing a clear intent to address the problem of discrimination on the basis of race by avoiding discrimination on the basis of race. Second, certain race-neutral factors have the potential to benefit diversity in certain communities. Of course, in the end it remains the case that the best way to address the race-based problem is through race-based remedies. This fact cannot be overlooked.

#### CONCLUSION

After the promise of *Brown* gave Dr. King and millions of Americans hope for a better tomorrow, America finds itself in a familiar predicament: public education is increasingly segregated, leaving millions of children behind and our future in jeopardy. The plurality opinion in *Parents Involved* denies the attempts by two school districts to increase racial diversity and student achievement. Fortunately, Justice Kennedy's concurrence significantly limits this opinion and reaffirms the compelling government interest in achieving racial diversity in the public schools. As thousands of school boards across America ponder the impact of *Parents Involved*, districts should openly accept Justice Kennedy's challenge to reach for the dream of diversity in our public schools by using the only means known to work: race-conscious student assignment policies. By broadening the concept of diversity beyond a simple dichotomous standard, defining diversity so as to maximize student benefits, and adopting parameters for temporal limitations, race-conscious policies can satisfy the Supreme Court and our moral and ethical obligations to our children. Segregation doesn't have to be on the rise. Minorities don't have to be left behind. Race is not dead, and the promise of *Brown* can survive.