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Business as Usual: the Roberts Court's Continued Neglect of Adequacy and Equity Concerns in American Education

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BUSINESS AS USUAL: THE ROBERTS COURT’S CONTINUED NEGLECT OF ADEQUACY AND EQUITY CONCERNS IN AMERICAN EDUCATION

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I. INTRODUCTION

Despite the Supreme Court’s mandate to integrate schools, issued fifty-four years ago in *Brown v. Board of Education*¹ (*Brown I*), American public education is moving further away from the integrative ideal. Unfortunately, a change in the Court’s jurisprudence during the 1990s, which “authorized a return to [segregated] neighborhood schools,”² has diminished the integration gains that followed *Brown*

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1. 347 U.S. 483, 495 (1954) (holding that separate state-sponsored public schools for white and black children were “inherently unequal” and violated the Equal Protection Clause).

2. GARY ORFIELD & CHUNGMEI LEE, THE CIVIL RIGHTS PROJECT, HARVARD UNIV., *BROWN AT 50: KING’S DREAM OR PLESSY’S NIGHTMARE 2* (2004), available at <http://www.civilrightsproject.ucla.edu/research/reseg04/brown50.pdf>.

I. The result has been the resegregation of students in American public schools, with particularly deleterious consequences for black and Latino students.³

In an effort to prevent resegregation of their public schools, the Seattle, Washington and Jefferson County, Kentucky school districts voluntarily implemented controlled choice plans that factored race into school assignments when district schools became over-subscribed by students.⁴ Parents who were dissatisfied with their children's school assignments challenged the plans, and the case ultimately reached the Supreme Court.⁵ In its opinion in *Parents Involved in Community Schools v. Seattle School District No. 1* that consolidated both the Seattle and Louisville cases, the Court garnered sufficient votes to characterize the plans' use of race in school assignments as insufficiently narrowly tailored; as such, the plans violated the Equal Protection Clause of the Fourteenth Amendment.⁶ In his concurring opinion, joined by none of the other Justices, Justice Kennedy wrote that although educational equity was a compelling interest that could justify the consideration of race in school assignments, such consideration must be limited to race-conscious measures, as opposed to policies that take direct account of race.⁷

The Court's decision in *Parents Involved* presents an opportunity to reconsider the necessity of racial integration in providing adequate education for children of color. Although educational adequacy is often defined in monetary terms,⁸ this Article suggests that adequately educating minority children requires the nonmonetary input of racial integration. Moreover, the reduction of racial isolation through integration is a compelling interest that justifies school districts' consideration of race in making school assignments. Part II considers school integration and school segregation as education inputs. Additionally, Part II canvasses social science research suggesting that school segregation results in the concentration of poverty in majority-minority schools⁹ and in the denial of political and social capital present in integrated schools.¹⁰ Furthermore, Part II examines the relationship between the input of segregation and the output of lower levels of academic achievement for students in majority-minority schools. Part III briefly

3. GARY ORFIELD & CHUNGMEI LEE, THE CIVIL RIGHTS PROJECT, HARVARD UNIV., RACIAL TRANSFORMATION AND THE CHANGING NATURE OF SEGREGATION 4 (2006), available at http://www.civilrightsproject.ucla.edu/research/deseg/Racial_Transformation.pdf.

4. Brief for Respondents at 1–2, *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738 (2007) (No. 05-908), 2006 WL 2922956 [hereinafter Brief for Respondents No. 908]; Brief for Respondents at 4–5, *Parents Involved*, 127 S. Ct. 2738 (No. 05-915) 2006 WL 2944684 [hereinafter Brief for Respondents No. 915].

5. *Parents Involved*, 127 S. Ct. at 2748, 2750.

6. *Id.* at 2760–61.

7. See *id.* at 2797 (Kennedy, J., concurring in part and concurring in the judgment).

8. See, e.g., William E. Thro, *Judicial Analysis During the Third Wave of School Finance Reform: The Massachusetts Decision as a Model*, 35 B.C. L. REV. 597, 603 (1994) (noting the arguments of recent school finance reform plaintiffs that “all children are entitled to an education of at least a certain quality and . . . more money is necessary to bring the worst school districts up to the minimum level mandated by the state education clause”).

9. See DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 118–25 (1993).

10. Impoverished schools negatively affect academic achievement and limit the employment networks that are available to students. RICHARD D. KAHLBERG, ALL TOGETHER NOW: CREATING MIDDLE-CLASS SCHOOLS THROUGH PUBLIC SCHOOL CHOICE 25 (2001). Moreover, concentrations of poverty can cultivate oppositional attitudes that devalue education. MASSEY & DENTON, *supra* note 9, at 8.

outlines the facts of *Parents Involved* and summarizes the Supreme Court's opinion. Part IV revisits the Supreme Court precedents that have served as barriers to racial integration of primary and secondary schools.¹¹ These decisions reflect the Court's failure to recognize the necessity of integration in ensuring educational adequacy and its refusal to acknowledge that students enrolled in majority-minority schools ARE denied equal opportunity for education. Part IV also examines *Parents Involved* as an opinion that furthers the Supreme Court's trend of undermining *Brown I's* legacy of equity and of impeding effective and long-lasting integration of public schools. The Court's decision in *Parents Involved* is particularly problematic because the cases involved local, voluntary plans that were motivated by equity concerns and included race-neutral safeguards to prevent the misuse of race in making school assignments.¹² Part IV concludes that in striking down the plans, the Court further entrenched unequal educational opportunity for children of color, while also closing the door on one of the few remaining options available for school districts seeking to directly and efficiently integrate schools and provide adequate education for all students.

II. SEGREGATION, INTEGRATION, AND ADEQUACY

Educational adequacy is often pursued through school finance litigation, the goal of which has changed from obtaining "equalized spending" among school districts to recognizing the right of each student to an "adequate education" and the sufficient monetary resources to obtain it.¹³ These adequacy claims focus exclusively on education clauses in state constitutions, which often impose affirmative obligations on states regarding their educational duties.¹⁴

The pursuit of adequacy, however, is not limited to a financial context. Adequacy is defined as "the provision of a set of strategies, programs, curriculum, and instruction, with appropriate adjustments for special-needs students, districts, and schools, and their full financing, that is sufficient to teach students to *high* standards."¹⁵ As such, adequacy contemplates the relationship between educational

11. See, e.g., *Missouri v. Jenkins*, 515 U.S. 70, 97–98, 101 (1995) (holding that interdistrict remedies are not justified in the absence of interdistrict violations and districts need not show correction of harms caused by segregation to be declared unitary); *Freeman v. Pitts*, 503 U.S. 467, 496–97 (1992) (finding that all indicators of desegregation do not have to be met for a school district to be declared unitary); *Bd. of Educ. v. Dowell*, 498 U.S. 237, 250 (1991) (holding that a school district can be released from desegregation orders, and be declared unitary, if the board complied in "good faith" with the orders and if vestiges of discrimination have been eliminated to the "extent practicable"); *Milliken v. Bradley*, 418 U.S. 717, 752 (1974) (holding that a federal court cannot impose an interdistrict remedy on a city and its surrounding suburbs in order to integrate city schools).

12. See *supra* text accompanying note 4.

13. James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249, 260, 268–69 (1999). For an in-depth discussion of the evolution of school finance litigation, as well as the advantages and disadvantages of both educational adequacy and equity, see Peter Enrich, *Leaving Equality Behind: New Directions in School Finance Reform*, 48 VAND. L. REV. 101 (1995); Michael Heise, *State Constitutions, School Finance Litigation, and the "Third Wave": From Equity to Adequacy*, 68 TEMP. L. REV. 1151 (1995).

14. Heise, *supra* note 13, at 1162 (citing Enrich, *supra* note 13, at 109 n.35); Ryan, *supra* note 13, at 268–69.

15. ALLAN R. ODDEN & LAWRENCE O. PICUS, *SCHOOL FINANCE: A POLICY PERSPECTIVE* 69 (2d ed. 2000) (emphasis added).

inputs and educational outputs, and how the former affects academic achievement.¹⁶ Integration and segregation are both educational strategies with the potential not only to impact other educational inputs, but to affect educational outcomes as well.

A. Segregation as an Input

In 2000, 65.2% of Blacks in the United States would have had to relocate in order to achieve a residential pattern in which every neighborhood reflected the racial demographics of its region.¹⁷ Although that figure reflects a drop from 69.5% in 1990, it remains in the hypersegregated range.¹⁸ Because neighborhoods in most metropolitan areas across the country remain segregated by race and class, the nation's reliance on neighborhood schools has resulted in public schools that are also segregated by race and class.¹⁹

In the 2003–2004 school year, 73% of black students attended schools where the minority population was between 50% and 100%; 38% attended schools where between 90% and 100% of the students were minorities.²⁰ Similarly, 77% of Latinos attended schools where the minority population was between 50% and 100%, while 39% attended schools where between 90% and 100% of the students were minorities.²¹ The average black student attended a school that was 53% black²² even though Blacks constituted only 17% of public school enrollment nationwide.²³ Latinos were similarly segregated: on average, they attended schools that were 55% Latino,²⁴ despite accounting for only 19% of nationwide public school enrollment.²⁵ This hypersegregation also affected the white student population. In 2003, the average white student attended schools that were 78% white,²⁶ even though Whites only constituted only 58% of public school enrollment nationwide.²⁷

16. See William H. Clune, *Accelerated Education as a Remedy for High-Poverty Schools*, 28 U. MICH. J.L. REFORM 655, 680 (1995) (“[T]he concept of adequacy in school finance . . . recognizes the special needs of . . . those in high-poverty schools. Adequacy theory sets appropriate, high expectations of performance, and it delivers the resources and governance necessary to reach those goals.”).

17. See Edward L. Glaeser & Jacob L. Vigdor, *Racial Segregation: Promising News*, in 1 REDEFINING URBAN & SUBURBAN AMERICA, EVIDENCE FROM CENSUS 2000, 211, 220, 234 tbl.11A-3 (Bruce Katz & Robert E. Lang eds., 2003). In 2000, 44.6% of Latinos would have had to move to achieve racial integration. See James E. Ryan & Michael Heise, *The Political Economy of School Choice*, 111 YALE L.J. 2043, 2094 (2002) (citation omitted).

18. Glaeser & Vigdor, *supra* note 17, at 220. *Hypersegregation* is the term used to refer to the “extreme spatial and social segregation” experienced by racial minorities. *Overcoming Discrimination in Housing, Credit, and Urban Policy*, 25 BUFF. PUB. INT. L.J. 77, 84 n.9 (2007) (citing Douglas S. Massey & Nancy A. Denton, *Hypersegregation in U.S. Metropolitan Areas: Black and Hispanic Segregation Along Five Dimensions*, 26 DEMOGRAPHY 373 (1989)). For additional discussion on hypersegregation, see MASSEY & DENTON, *supra* note 9, at 74–78.

19. See Ryan & Heise, *supra* note 17, at 2094–96.

20. ORFIELD & LEE, *supra* note 3, at 10 tbl.3 (citations omitted).

21. *Id.* at 11 tbl.4 (citations omitted). Because they represent “small shares of the total enrollments, Asians and American Indians are less likely to be segregated with their own group except in reservation schools and some areas of low income Asian refugee communities.” *Id.* at 11.

22. *Id.* at 9 tbl.2 (citation omitted).

23. *Id.* at 8 tbl.1 (citation omitted).

24. *Id.* at 9 tbl.2.

25. *Id.* at 8 tbl.1. In the 2001–2002 school year, the average Asian student attended a school where only 22.3% of enrolled students were Asian. ORFIELD & LEE, *supra* note 2, at 17 tbl.6 (citation omitted).

26. ORFIELD & LEE, *supra* note 3, at 9 tbl.2.

27. *Id.* at 8 tbl.1.

The reliance on segregated neighborhood schools in making school assignments creates “racially identifiable black schools *and* classrooms [that] exert significant negative effects on both black and white students’ academic outcomes.”²⁸ Not only are racially identifiable minority schools more likely to have a high percentage of students living in poverty (high-poverty schools), but they are also more vulnerable to racist attitudes and behaviors that are still prevalent in our society.²⁹ The results are depressed levels of achievement, lower graduation rates, and lower levels of college matriculation for students attending majority-minority schools.³⁰

1. Concentrations of Poverty

There is a systematic link between racial segregation and segregation by socioeconomic status, as racial minorities are more likely to be poor.³¹ This link results in segregated minority schools that are almost always high-poverty schools.³² Generally, the percentage of poor students in a school increases as the percentage of minority students increases.³³ A common measure of poverty is student eligibility for free or reduced-price meals; a school is considered predominantly poor if more than 50% of students are eligible.³⁴ In the 2001–2002 school year, only 15% of intensely segregated white schools—schools with less than 10% black and Latino students—were predominantly poor.³⁵ In comparison, however, “88% of the intensely segregated minority schools . . . had concentrated poverty, with more than half of all students getting free lunches.”³⁶

Lower socioeconomic status has been commonly understood to have a generally negative impact on student achievement,³⁷ a relationship that is not surprising considering the issues with which low-income families often struggle: poor health care, inadequate housing, general instability, and lack of quality early childhood education. The effect of poverty on schoolwide student achievement

28. See Roslyn Arlin Mickelson, *The Academic Consequences of Desegregation and Segregation: Evidence from the Charlotte-Mecklenburg Schools*, 81 N.C. L. REV. 1513, 1560 (2003) (basing conclusions on observations of the effects of segregation and desegregation on students in a North Carolina school system).

29. See *id.* at 1527 (noting that one of the social consequences of desegregation is “improved racial attitudes among blacks”).

30. See *id.* (noting “higher educational and occupational attainment” and “higher grades and test scores” among Blacks who attended desegregated schools).

31. GARY ORFIELD & CHUNGMEI LEE, THE CIVIL RIGHTS PROJECT, HARVARD UNIV., WHY SEGREGATION MATTERS: POVERTY AND EDUCATIONAL INEQUALITY 14 (2005), available at http://www.civilrightsproject.ucla.edu/research/deseg/Why_Segreg_Matters.pdf.

32. *Id.* at 8–9.

33. Ryan & Heise, *supra* note 17, at 2096.

34. See *id.* (citing NAT’L CTR. FOR EDUC. STATISTICS, U.S. DEP’T OF EDUC., CHARACTERISTICS OF THE 100 LARGEST PUBLIC ELEMENTARY AND SECONDARY SCHOOL DISTRICTS IN THE UNITED STATES: 1999–2000, 28–29 tbl.9 (2001), available at <http://nces.ed.gov/pubs2001/2001346.pdf>).

35. ORFIELD & LEE, *supra* note 2, at 21.

36. *Id.*

37. See, e.g., KAHLBERG, *supra* note 10, at 50 (“[P]oor children come to school with about half the vocabulary of middle-class children of the same age.”); ORFIELD & LEE, *supra* note 31, at 6–7 (citing studies linking poverty to low academic achievement and noting that “poverty is strongly related to everything from the child’s physical development to the family’s ability to stay in a neighborhood long enough so that a school might have an effect on the student” (citations omitted)).

seems to be nonlinear, with a threshold at which the cumulative impact of poverty becomes much worse.³⁸ Most researchers have agreed that this occurs around the 50% mark: the greatest decreases in student achievement occur in schools in which the percentage of students eligible for reduced price meals is between 51% and 100%.³⁹ A 1997 study commissioned by the United States Department of Education showed that “[s]chool poverty depresses the scores of all students in a school where at least half of the students are eligible for subsidized lunch”; further, testing scores decreased dramatically when over 75% “of students live in low-income households.”⁴⁰ Other research has similarly concluded that students in low-poverty schools typically score between 50% and 75% higher on reading and math tests than students in high-poverty schools.⁴¹ The disadvantages of attending high-poverty schools, however, are not limited to lower test scores. The University of North Carolina reported a study performed in 1980 that analyzed data on 26,425 tenth graders and conducted follow-up interviews with the students two years later.⁴² The students who attended high-poverty schools had higher dropout and pregnancy rates than students of the same race and income who attended low-poverty schools.⁴³

Unfortunately, the compensatory measures taken by school districts do not effectively address the effects of concentrated poverty in schools. Although educators understand how to reach individual students from disadvantaged backgrounds, much less is known about how to alter educational outcomes in high-poverty schools full of disadvantaged students.⁴⁴ Furthermore, high-poverty schools suffer chronic resource shortages, as the schools often have higher costs than wealthier schools.⁴⁵ High-poverty schools typically “spend far more money on special needs such as bilingual or special education than other school districts.”⁴⁶ High-poverty schools also find it harder to attract and retain teachers, a reality that forces school districts to provide teachers with “greater economic incentives” than their wealthier counterparts.⁴⁷ Urban districts with a high percentage of poor students must also “compensate for the high mobility of students, and for students suffering from untreated health problems, hunger, family disruption, and violence.”⁴⁸ When compared to affluent suburban districts with more recent capital developments, high-poverty urban districts have higher security costs, as well as

38. KAHLBERG, *supra* note 10, at 39.

39. *Id.* at 39–40.

40. MICHAEL J. PUMA ET AL., U.S. DEP’T OF EDUC., PROSPECTS: FINAL REPORT ON STUDENT OUTCOMES 12 (1997).

41. MICHAEL J. PUMA ET AL., U.S. DEP’T OF EDUC., PROSPECTS: THE CONGRESSIONALLY MANDATED STUDY OF EDUCATIONAL GROWTH AND OPPORTUNITY—INTERIM REPORT 18 (1993).

42. UNIV. OF N.C. CTR. FOR CIVIL RIGHTS, THE SOCIOECONOMIC COMPOSITION OF THE PUBLIC SCHOOLS: A CRUCIAL CONSIDERATION IN STUDENT ASSIGNMENT POLICY 2 (2005), available at <http://www.law.unc.edu/PDFs/charlotterepor.pdf> (citing Susan E. Mayer, *How Much Does a High School’s Racial and Socioeconomic Mix Affect Graduation and Teenage Fertility Rates?*, in THE URBAN UNDERCLASS 321, 325–27 (Christopher Jencks & Paul E. Peterson eds., 1992)).

43. *Id.* (citing Mayer, *supra* note 42).

44. *Id.* at 6 (citation omitted).

45. See Molly S. McUsic, *The Future of Brown v. Board of Education: Economic Integration of the Public Schools*, 117 HARV. L. REV. 1334, 1351–52 (2004).

46. *Id.* at 1351.

47. *Id.* at 1351–52.

48. *Id.* at 1352.

higher capital costs due to older and deteriorating buildings.⁴⁹ Addressing these additional costs becomes prohibitively expensive.⁵⁰ As a result, even when high-poverty districts are given additional funding, the money spent on curriculum alone is often still less than the amount spent on curriculum in wealthier districts.⁵¹ For example, “[i]n the 1991–1992 school year, the Hartford[, Connecticut,] school district ranked highest among all districts in its region in overall district per-pupil expenditures.”⁵² After accounting for special needs education expenditures, however, “actual per-pupil spending on . . . academic programming . . . [was lower] in Hartford than the regional and state average.”⁵³

Even when funding for high-poverty schools is increased, the increases are usually ineffective in improving educational outcomes without accompanying racial and economic desegregation.⁵⁴ Arguments that there is no link between financial resources and educational outcomes have their roots in the 1966 study titled *Equality of Educational Opportunity*⁵⁵ (*Coleman Report*). Although Coleman never concluded that the financial resources of a school do not matter, the report’s findings were interpreted as indicating that schools and their resources, have “little influence on student achievement independent of family background and . . . social context.”⁵⁶ Richard Rothstein has since clarified the report’s findings, explaining that the report does not suggest that schools do not influence achievement, but rather that “the quality of schools has little influence on *the difference* in average achievement” among students.⁵⁷ Stated differently, although all students are capable of learning in school, schools are limited in their ability to impact the differences in the rate of learning among children from different social classes.⁵⁸ Moreover,

49. *Id.*

50. *Id.*

51. *See id.* at 1352, 1358.

52. *Id.* at 1358.

53. *Id.*

54. *Cf. id.* at 1359 (“When poor students are dispersed among many schools, special needs do not squeeze out the needs of average students.”).

55. JAMES S. COLEMAN ET AL., U.S. DEP’T OF HEALTH, EDUC., & WELFARE, *EQUALITY OF EDUCATIONAL OPPORTUNITY* (1966) [hereinafter *COLEMAN REPORT*] (discussing a landmark national study of the effects and equality of educational opportunity in United States public schools). The “production-function” model on which the report’s findings were based and which has also been used in subsequent studies has been criticized as inadequate when applied to the education system. Methodological flaws in the specific research underlying the *COLEMAN REPORT* have also led some researchers to characterize the report’s findings a result of flawed analysis, and an inaccurate reflection of the “underlying behavioral reality.” KERN ALEXANDER & RICHARD G. SALMON, *PUBLIC SCHOOL FINANCE* 356 fig.15.3, 360 (1995) (citation omitted). *But see* RICHARD ROTHSTEIN, *CLASS AND SCHOOLS: USING SOCIAL, ECONOMIC, AND EDUCATIONAL REFORM TO CLOSE THE BLACK-WHITE ACHIEVEMENT GAP* 14 (2004) (explaining that scholarly efforts have consistently confirmed Coleman’s findings, and that no analysis “has been able to attribute less than two-thirds of the variation in achievement . . . to the family characteristics of their students”).

56. ALEXANDER & SALMON, *supra* note 55, at 350.

57. ROTHSTEIN, *supra* note 55, at 15.

58. *Id.* Despite continuing debate as to the effect of school resources on student achievement, most studies have agreed on three points: “(a) in at least some cases, higher levels of resources *are* associated with higher education; (b) the qualities of schools that produce these effects are hard to pin down; and (c) the ways in which resources are used is more consequential for achievement than the presence or absence of resources.” Adam Gamoran & Daniel A. Long, *Equality of Educational Opportunity: A 40-Year Retrospective* 8 (Wis. Ctr. for Educ. Research, Working Paper No. 2006-9, 2006), available at http://www.wcer.wisc.edu/publications/workingPapers/Working_Paper_No_2006_09.pdf.

without accompanying efforts to dismantle racial and economic isolation, the efficacy of resource increases designed to positively affect academic outcomes are hindered.⁵⁹ A telling example comes from the Hartford, Connecticut, school system, where millions of dollars were spent over several years to fund the district at increased levels comparable to surrounding suburbs.⁶⁰ The funding failed to raise the test scores of its students to statewide and suburban averages.⁶¹ During the period of increased funding, “[f]ewer than forty percent of entering ninth-graders graduated four years later.”⁶²

2. Peer Influence

The negative effect of poverty on schoolwide achievement is partially due to the effects of peer influence. In addition to its other findings, the *Coleman Report* concluded that the socioeconomic status of one’s peers exerts a significant influence on academic performance, especially for students from disadvantaged backgrounds.⁶³ Similarly, a three year study of 20,000 students found that for a large number of adolescents, peers—and not parents—were the chief determinant of those adolescents’ investment in school and their commitment to their education.⁶⁴ There are several theories regarding the reasons students exert such a significant influence on each other.⁶⁵ One theory suggests that children engage in behavior modeled by their friends, which affects not only immediate behavior, but also the perception of what is normal for the child’s peer group.⁶⁶ Accordingly, a study of black children from low-income households headed by single mothers found that the children were more delinquent than children from middle-class two-parent households only if they lived and went to school in low income neighborhoods.⁶⁷ If they went to school in white middle-class neighborhoods, the levels of delinquency were lower and more comparable to their white peers.⁶⁸

59. Ryan, *supra* note 13, at 293.

60. See McUsic, *supra* note 45, at 1353.

61. *Id.*

62. *Id.* (citing John C. Boger, *Sheff v. O’Neill: New Empirical Evidence and a New Constitutional Strategy to Challenge “High Poverty,” Inner-City Public Schools 28–33* (Aug. 5, 1994) (unpublished manuscript, on file with the Harvard Law School Library)). Similarly, spending programs in Detroit, Little Rock, and Austin, which were designed to provide more money to high-poverty schools, also failed to improve test scores to meet state averages. *Id.*

63. COLEMAN REPORT, *supra* note 55, at 22. In contrast to more advantaged students with stronger and more stable family backgrounds, disadvantaged students spend less time under adult supervision, making them more susceptible to peer influence. KAHLENBERG, *supra* note 10, at 41. In addition, the disproportionate influence of school culture on disadvantaged students is a result of “larger reservoirs of undeveloped talent,” which are cultivated in high achieving schools. *Id.* (internal quotation marks omitted).

64. KAHLENBERG, *supra* note 10, at 48 (referring to the research of Laurence Steinberg).

65. McUsic, *supra* note 45, at 1356.

66. *Id.* at 1356–57.

67. *Id.* at 1357 (citing Faith Peebles & Rolf Loeber, *Do Individual Factors and Neighborhood Context Explain Ethnic Differences in Juvenile Delinquency?*, 10 J. QUANTITATIVE CRIMINOLOGY 141, 149–51 (1994)).

68. *Id.* (citing Peebles & Loeber, *supra* note 67).

Peer influence can be positive or negative, helping to create either a school culture of success or a school culture of underachievement.⁶⁹ Signithia Fordham and John Ogbu theorize that, in reaction to the way they are treated in economic, political, social and psychological arenas, subordinated minorities can develop an oppositional sense of collective identity that rejects “white” American values.⁷⁰ Moreover, minorities are censured by members of their community for crossing cultural boundaries by “acting white.”⁷¹ This phenomenon was replicated in their study of black public school students, where students were disparaged for “white” behavior, which included speaking standard English, studying in the library, and working diligently to get good grades.⁷²

Additional research, however, qualifies Fordham and Ogbu’s findings regarding negative peer influences on Blacks’ educational behavior. After controlling for class indicators, including parental income, mother’s education, and family structure, researchers have concluded that black and white students have comparable dropout rates, exhibit comparable levels of effort on homework, and receive comparable levels of parental involvement.⁷³ Therefore, alienation from education may have more to do with class or socioeconomic status than with race. These findings are consistent with well-documented tendencies among members of lower classes to devalue education and resist middle class values.⁷⁴

In addition, the research of economist Roland Fryer confirms the negative peer pressure endured by Blacks who “act white.”⁷⁵ Fryer concludes, however, that the acting white phenomenon is most intense in schools with less than 20% black student enrollment and nonexistent in schools with more than 80% black student enrollment.⁷⁶ Fryer notes the work of anthropologists who have observed that efforts by members of social groups to “preserve their identity . . . accelerate[] when threats to internal cohesion intensify,” particularly if the group stands to lose those successful members who “enhance the power and cohesion of the group.”⁷⁷ Applying that observation to his data, Fryer rejects the theory of oppositional culture,⁷⁸ and instead explains that a student will necessarily experience a “tradeoff” between academic success and rejection by that student’s peers when that student comes from a “traditionally low-achieving group” fearful of losing one of their

69. Russell W. Rumberger & Gregory J. Palardy, *Does Resegregation Matter?: The Impact of Social Composition on Academic Achievement in Southern High Schools*, in *SCHOOL RESEGREGATION: MUST THE SOUTH TURN BACK?* 127, 130 (John Charles Boger & Gary Orfield eds., 2005).

70. Signithia Fordham & John U. Ogbu, *Black Students’ School Success: Coping with the “Burden of Acting White,”* 18 *URB. REV.* 176, 181 (1986).

71. KAHLBERG, *supra* note 10, at 52 (internal quotation marks omitted).

72. *Id.* at 190–91.

73. Philip J. Cook & Jens Ludwig, *The Burden of “Acting White”: Do Black Adolescents Disparage Academic Achievement?*, in *THE BLACK-WHITE TEST SCORE GAP* 375, 382–86 (Christopher Jencks & Meredith Phillips eds., 1998).

74. KAHLBERG, *supra* note 10, at 52.

75. Roland G. Fryer, “Acting White,” 6 *EDUC. NEXT* 53, 56 (2006) (concluding that Blacks and Latinos experience decreases in popularity among their racial group as their academic success increases, while “high-achieving whites are at the top of the popularity pyramid”).

76. See Roland G. Fryer, Jr. & Paul Torelli, *An Empirical Analysis of ‘Acting White’* 20 (Nat’l Bureau of Econ. Research, Working Paper No. 11334, 2005), <http://www.nber.org/papers/w11334.pdf>.

77. Fryer, *supra* note 75, at 58.

78. *Id.* at 59.

own.⁷⁹ This result is more likely when that low-achieving group “comes into contact with more outsiders,”⁸⁰ as is the case in integrated schools.

Both studies have implications for integrated schools. Findings that alienation from education is a function of class,⁸¹ in combination with evidence of the effects of peer influence, suggest that⁸² racial isolation should be disrupted, if only to reduce concentrations of poverty in schools and eliminate the potential for cultivating an anti-achievement culture. The increased incidence of the acting white phenomenon at integrated schools might be a compromise school districts make in the pursuit of equal access to education. If, however, integrated schools are successful in cultivating higher academic achievement for minorities, that success may be instrumental in breaking down the perception among black students that they are part of a “traditionally low-achieving group.”⁸³ This result would eliminate the fear that the academic success of one group member will threaten the cohesion of the group.

3. *Inferior Education*

Majority-minority schools also encounter educational difficulties that have less to do with the effects of socioeconomic status on the students and more to do with the limited access of majority-minority schools to educational resources and materials. Various studies have made the following findings: (1) schools are incapable of improving the life outcomes of minorities without changing inefficiencies in expenditures for “teacher experience and additional education”;⁸⁴ and (2) money is useful in producing higher test scores when it is used to attract “teachers with strong literacy skills, reduce[] class size to eighteen students per teacher, retain[] experienced teachers, and increase[] the number of teachers with advanced degrees.”⁸⁵ Teacher experience and regular licensure all have positive effects on student achievement, with greater effects on math scores than reading.⁸⁶ In North Carolina, for example, teachers with weak credentials have the same negative effect on a student’s math achievement as poorly educated parents.⁸⁷ Accordingly, the assignment of teachers with weak credentials to educationally disadvantaged students would “widen, rather than reduce, the already large

79. *Id.* at 58.

80. *Id.*

81. See discussion *supra* Part II.A.1.

82. See discussion *supra* Part II.A.1.

83. Fryer, *supra* note 75, at 58.

84. ALEXANDER & SALMON, *supra* note 55, at 361 (citing ERIC HANUSHEK, EDUCATION AND RACE: AN ANALYSIS OF THE EDUCATION PRODUCTION PROCESS (1972)).

85. *Id.* at 362 (citing Ronald F. Ferguson, *Paying for Public Education: New Evidence on How and Why Money Matters*, 28 HARV. J. ON LEGIS. 465 (1991)); see also William H. Clune, *New Answers to Hard Questions Posed by Rodriguez: Ending the Separation of School Finance and Educational Policy by Bridging the Gap Between Wrong and Remedy*, 24 CONN. L. REV. 721, 725–26 (1992) (arguing that in “well-conceived” educational programs, increased financial input does produce substantial gains in student achievement when used in conjunction with other resources, such as better teachers and well-designed curriculums).

86. Charles T. Clotfelter et al., *How and Why Do Teacher Credentials Matter for Student Achievement?* 38–39 (Nat’l Bureau of Econ. Research, Working Paper No. 12828, 2007), <http://www.nber.org/papers/w12828.pdf>.

87. *Id.* at 31.

achievement gaps associated with the socioeconomic differences that students bring to the classroom.”⁸⁸

Despite the understood relationship between teacher quality and student academic achievement, majority-minority schools are disproportionately assigned novice teachers with fewer credentials. A 2004 United States Department of Education report found that high schools with at least 75% low income students employed three times as many uncertified or out-of-field teachers in both English and science than schools with lower poverty rates.⁸⁹ In the Charlotte-Mecklenburg schools system (CMS), the higher the percentage of black students in a school, the less likely that those schools employed teachers with teaching experience or teachers with master’s degrees.⁹⁰ In 2005, the Center for the Future of Teaching and Learning, in conjunction with California State University, issued a report noting that in the 2004–2005 school year, 20% of teachers serving in California schools with minority populations between 91% and 100% were “underprepared . . . or novice teachers, compared to only [e]ven percent of teachers in schools serving few or no minority students.”⁹¹ Similarly, a 2005 study exploring the distribution of novice teachers in North Carolina revealed that black seventh graders across the state were 54% more likely to be assigned novice teachers for math and 38% more likely to be assigned to novice teachers for English than their white peers.⁹² Moreover, “[w]ithin districts, novice teachers [were] disproportionately assigned to the schools and to the classrooms within schools that disproportionately serve[d] black students.”⁹³ High-poverty and high-minority schools also report difficulties filling math and science positions.⁹⁴ In 1996, 37% of principals in high-poverty schools and over 50% of principals in high-minority schools reported difficulties finding qualified biology teachers; in contrast, only 10% of principals in wealthy schools and 15% of principals in majority-white and suburban schools reported the same problem.⁹⁵

The disproportionate assignment of novice teachers to majority-minority schools and classrooms maintains white privilege. CMS secondary school principals have admitted in interviews that although “lower track students could have a highly qualified teacher, top-track students always do.”⁹⁶ Although

88. *Id.*

89. NAT’L CTR. FOR EDUC. STATISTICS, U.S. DEP’T OF EDUC., *THE CONDITION OF EDUCATION 2004*, at 73 (2004), available at <http://nces.ed.gov/pubs2004/2004077.pdf>. Out-of-field teachers are those “who have neither a major nor certification in the subject they teach.” *Id.*

90. Mickelson, *supra* note 28, at 1547.

91. C. E. ESCH ET AL., *THE CTR. FOR THE FUTURE OF TEACHING AND LEARNING, TEACHING AND CALIFORNIA’S FUTURE: THE STATUS OF THE TEACHING PROFESSION 2005*, at 70 (2005), <http://www.hewlett.org/NR/rdonlyres/2DBD7358-5A34-4A96-ABBB-8B513F1874E9/0/CFTLStatusofTeaching2005.pdf>.

92. Charles T. Clotfelter et al., *Who Teaches Whom? Race and the Distribution of Novice Teachers*, 24 *ECON. EDUC. REV.* 377, 386 (2005).

93. *Id.* at 391.

94. See Gary Orfield, *The Growth of Segregation: African Americans, Latinos, and Unequal Education*, in *DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF BROWN V. BOARD OF EDUCATION* 53, 68–69 (Gary Orfield & Susan E. Eaton eds., 1996) (noting that predominantly white schools have fewer difficulties filling math and science positions than high-minority schools). “High-minority schools” are schools with more than 90% minority populations. See *id.* at 69.

95. *Id.* “Majority-white schools” are schools with more than 90% white populations. See *id.*

96. Mickelson, *supra* note 28, at 1547.

pedagogical reasons may exist to justify the nearly exclusive assignment of experienced teachers to higher-track students,⁹⁷ evidence of such racial tracking, without regard to ability, has been found in the CMS system.⁹⁸ Accordingly, these admissions are disturbing indications of racial discrimination that is potentially replicated nationwide.

High teacher turnover is also a problem in high-poverty, majority-minority schools.⁹⁹ For example, public schools in California “with 90% to 100% minority enrollment are six times as likely as majority-white schools to have . . . high teacher turnover.”¹⁰⁰ High turnover is problematic because it requires continual hiring and creates instability.¹⁰¹ Not only are new teachers without mentors because so many of their colleagues are similarly inexperienced, but these schools must repeat basic training for a substantial number of new teachers.¹⁰² As a result, school progress towards meeting “pedagogical needs” is impeded.¹⁰³

The inability of majority-minority, high-poverty districts to recruit and retain experienced teachers occurs largely because talented teachers have numerous career options that do not present the challenges that racially and economically isolated schools do.¹⁰⁴ Research suggests, however, that racial preference also influences teacher decisions to exit racially-identifiable schools.¹⁰⁵ A study of Texas public school teachers, undertaken from 1993 to 1996,¹⁰⁶ found that high teacher mobility is positively correlated with higher black or Latino school enrollment, even after controlling for salaries, student test scores, class size, and school poverty.¹⁰⁷ A similar study of Georgia public elementary school teachers, analyzing data from 1994 to 2001,¹⁰⁸ found that non-black teachers were more likely to exit schools with large proportions of minority students.¹⁰⁹ Specifically, the study found that an “increase in the proportion of black students in a school increases the probability that a [non-black] teacher will exit a particular school in a particular year.”¹¹⁰ Moreover, changes in salary, poverty levels, and test scores all had insignificant

97. Pressure placed on administrators by parents and teachers also influences the assignment of novice teachers. Clotfelter et al., *supra* note 92, at 391. When parents of some students have more power to influence administrators’ decisions, it is more likely that other students will be assigned novice teachers. *Id.* Similarly, the more that experienced teachers express a preference to work “with easy-to-educate students, the more likely it is that other students will end up with novice teachers.” *Id.*

98. See *infra* text accompanying notes 160–62.

99. See ORFIELD & LEE, *supra* note 31, at 17 (citations omitted).

100. Goodwin Liu, *Seattle and Louisville*, 95 CAL. L. REV. 277, 290 (2007).

101. Susanna Loeb et al., *How Teaching Conditions Predict Teacher Turnover in California Schools*, 80 PEABODY J. EDUC. 44, 48 (2005).

102. *Id.*

103. *Id.*

104. See UNIV. OF N.C. CTR. FOR CIVIL RIGHTS, *supra* note 42, at 5. Such challenges include high turnover among faculty and administrators, weaker parental support, lack of needed resources, and greater likelihood of disciplinary problems. *Id.*

105. See Eric A. Hanushek et al., *Why Public Schools Lose Teachers*, 39 J. HUM. RESOURCES 326, 350 (2004).

106. *Id.* at 334.

107. *Id.* at 333–47.

108. Benjamin Scafidi et al., *Race, Poverty, and Teacher Mobility*, 26 ECON. EDUC. REV. 145, 148 (2007).

109. *Id.* at 147, 154.

110. *Id.* at 147.

effects on exit probability.¹¹¹ To the extent that relationships existed between likelihood of teacher exit probability, student test scores, and poverty rates, the relationships were driven by the high correlation between test scores and poverty rates, and the proportion of minority students in a school.¹¹² The study concluded that although non-black teachers were more likely to exit high-poverty schools, they were more likely to leave particular types of high-poverty schools—ones with “a large proportion of minority students.”¹¹³

Increases in a school’s minority student composition also negatively affect access to material resources, including media centers and new technology.¹¹⁴ One study found that 16% of teachers in affluent schools reported a lack of materials and resources, as opposed to 59% of teachers in higher-poverty schools,¹¹⁵ which are more likely to be high-minority schools.¹¹⁶ Moreover, to the extent that high-minority or high-poverty schools offer “precollegiate” courses, insufficient student eligibility often leads to less challenging curriculums or course elimination.¹¹⁷ As a result, low-income, high-minority urban schools often “do not offer the same range and level of courses as their more affluent suburban counterparts.”¹¹⁸ By high school, the differences are most pronounced: nationwide, 34% of classes in low-minority high schools are classified as “high-ability classes,” while only 11% of the classes in majority-minority high schools are similarly classified.¹¹⁹ The differences in tracking and course offerings are only compounded by the teaching shortages with which high-minority and high-poverty schools grapple.¹²⁰

B. *The Outputs of Segregation*

The input of segregation yields patterns of low achievement among minority students attending majority-minority schools.¹²¹ A review of a study performed in the 1990s of 200,000 students in more than 3,000 public elementary schools in Texas found “a strong negative relationship between math achievement among black students and the percentage of black enrollment in a school.”¹²² Similarly, a 2004 study of Florida public schools found that segregation was related to lower

111. *Id.* at 147, 153–57.

112. *Id.* at 146–47.

113. *Id.* at 147. *But see* Loeb et al., *supra* note 101, at 45 (concluding that the influence of student racial and socioeconomic status on teacher turnover is substantially reduced once certain working conditions, including “large class sizes, facilities problems, multitrack schools and lack of textbooks,” are taken into account).

114. Mickelson, *supra* note 28, at 1547–48; *see also* Orfield, *supra* note 94, at 67–68 (finding that majority-minority schools offer curriculums that are inferior to those offered at low-minority and wealthier schools).

115. Orfield, *supra* note 94, at 69 (citation omitted).

116. ORFIELD & LEE, *supra* note 31, at 8–9, 14.

117. Orfield, *supra* note 94, at 67.

118. *Id.* at 68.

119. *Id.*

120. *See supra* text accompanying notes 99–113.

121. *See id.* at 65 (citing Peter Scheirer, *Poverty Not Bureaucracy* (Univ. of Chicago Metro. Opportunity Project, 1991)).

122. Liu, *supra* note 100, at 292–93 (citing Eric A. Hanushek et al., *New Evidence About Brown v. Board of Education: The Complex Effects of School Racial Composition on Achievement* 20, 23 (2004), available at <http://edpro.stanford.edu/hanushek/admin/pages/files/uploads/race.pdf>).

passage rates among black students in racially isolated schools on the state standardized test, even when the study controlled for expenditures, poverty levels, teaching quality and size.¹²³

The input of segregation also results in higher dropout rates among students in majority-minority schools.¹²⁴ Despite gains made as a result of desegregation plans in the 1970s and 1980s,¹²⁵ the nationwide graduation rates for Blacks and Latinos in 2001 were approximately 50% and 53% respectively.¹²⁶ In contrast, the graduation rates for white and Asian students were approximately 75% and 77% respectively,¹²⁷ far exceeding the national average of 68%.¹²⁸ The disparity is due to differences in school promoting power¹²⁹: schools where more than half of the students come from minority backgrounds are five times more likely than majority-white schools to have weak promoting power.¹³⁰ In 2002, nearly one-third of majority-minority high schools graduated less than half of their students,¹³¹ among schools that were 90% or more white, only one in fifty schools had a similar record.¹³² Although research suggests that among various relevant factors, a district's poverty level has "the strongest independent effect on graduation rates," segregation levels exert a significant effect as well.¹³³ Accordingly, minority students attending majority-minority schools are less likely to graduate.

Finally, segregation also negatively affects college matriculation for minorities attending majority-minority schools. Data on admissions to state colleges and universities in California illustrate that the majority of Blacks and Latinos who attend the University of California (UC) system's most competitive institutions, including UC San Diego and UC Berkeley, graduated from majority-white schools.¹³⁴ When compared to students who attended majority-white or majority-

123. Kathryn M. Borman et al., *Accountability in a Postdesegregation Era: The Continuing Significance of Racial Segregation in Florida's Schools*, 41 AM. EDUC. RES. J. 605, 622 (2004). Evidence that segregation is related to lower academic achievement, even after controlling for poverty, is explained by research suggesting that "income is an inexact proxy for the many social class characteristics that differentiate blacks from whites" with comparable income levels. ROTHSTEIN, *supra* note 55, at 47. For a more detailed discussion of social class differences between Whites and minorities, and how those differences negatively impact achievement, see *id.* at 47–50.

124. See Orfield, *supra* note 94, at 66–67.

125. See Jonathan Guryan, *Desegregation and Black Dropout Rates*, 94 AM. ECON. REV. 919, 938 tbl.6, 939 (2004) (concluding that desegregation plans of the 1970s reduced high school dropout rates of Blacks by 2%–3% over the course of the decade).

126. Christopher B. Swanson, *Sketching a Portrait of Public High School Graduation: Who Graduates? Who Doesn't?*, in DROPOUTS IN AMERICA: CONFRONTING THE GRADUATION RATE CRISIS 13, 22 (Gary Orfield ed., 2004).

127. *Id.*

128. *Id.* at 23 tbl.2.

129. *Promoting power* is a measure that "compares the number of freshman at a high school to the number of seniors four years later." Robert Balfanz & Nettie E. Legters, *Locating the Dropout Crisis: Which High Schools Produce the Nation's Dropouts?*, in DROPOUTS IN AMERICA, *supra* note 126, at 57, 58–59. Although an ideal measure would compare the number of freshman to the number of graduates, data on the number of graduates at individual high schools is not available.

130. *Id.* at 62, 63 fig.2.

131. ORFIELD & LEE, *supra* note 31, at 6 (citing Balfanz & Legters, *supra* note 129, at 63 tbl.2).

132. *Id.* (citing Balfanz & Legters, *supra* note 129, at 63 tbl.2).

133. Swanson, *supra* note 126, at 30.

134. ROBERT T. TERANISHI & TARA L. PARKER, SOCIAL REPRODUCTION OF INEQUALITY: THE COMPOSITION OF FEEDER SCHOOLS TO THE UNIVERSITY OF CALIFORNIA 21–22 (2006) (on file with author).

Asian schools, students attending black or Latino schools “were less likely to apply [to], be admitted [to], or enroll in the UC system.”¹³⁵

C. *Integration as an Input*

In contrast to the negative effect of segregation on educational outcomes, enrollment in racially integrated schools has an overall positive effect on the educational outcomes of minority students. Integration has positive effects, in large part, because integrated schools are more likely to be middle class schools with specific characteristics that positively impact student academic achievement.¹³⁶ Middle class schools often benefit from high expectations and high standards promulgated by parents, teachers, and students.¹³⁷ Moreover, middle class schools usually are equipped with “ample resources,” including curricular materials, highly-qualified teachers, and small class sizes.¹³⁸ The political and social capital afforded to middle and high income parents whose children attend middle class schools also yields more accountability.¹³⁹ These characteristics stand in stark contrast to the concentrated poverty, culture of underachievement, and inferior educational resources that negatively affect educational outcomes for minorities in majority-minority schools.¹⁴⁰ Richard Kahlenberg, an advocate of class integration in schools, explains that “the best guarantee that a school will have what various individual reforms seek to achieve—high standards, qualified teachers, less crowded classes, and so on—is the presence of a critical mass of middle-class families who will ensure that these things happen.”¹⁴¹

The *Coleman Report* was one of the first studies to document the benefit of integrated schools for black children, producing evidence that black students who attended integrated schools achieved better academic outcomes than those who attended segregated schools.¹⁴² Further evidence of the benefits of integration surfaced during the 1970s and 1980s, when the gap in reading scores between black and white children was reduced by approximately half.¹⁴³ The gap in math scores decreased between 25% and 40%, and the gap in science scores decreased between 15% and 25% during the same period.¹⁴⁴ The greatest gains for achievement by black students occurred in the South, where desegregation was occurring for the first time.¹⁴⁵ Today, black students who attend integrated schools have higher test scores than black students attending segregated schools; furthermore, black students

135. Robert Teranishi et al., *Opportunity at the Crossroads: Racial Inequality, School Segregation, and Higher Education in California*, 106 TCHRS. C. REC. 2224, 2241 (2004).

136. Goodwin Liu & William L. Taylor, *School Choice to Achieve Desegregation*, 74 FORDHAM L. REV. 791, 797–99 (2005).

137. *Id.* at 798.

138. *Id.*

139. *Id.*

140. See discussion *supra* Part II.A.1–3.

141. KAHLBERG, *supra* note 10, at 4.

142. COLEMAN REPORT, *supra* note 55, at 22.

143. Marshall S. Smith & Jennifer O’Day, *Educational Equality: 1966 and Now*, in SPHERES OF JUSTICE IN EDUCATION 53, 80 (Deborah A. Versteegen & James Gordon Ward eds., 1991).

144. *Id.*

145. *Id.* at 81–82.

attending integrated schools¹⁴⁶ are “more likely to attend and graduate from college and earn higher grades” while there.¹⁴⁷

Integrated schools also maximize learning opportunities. Cognitive psychologists have found that students in diverse environments learn more than students in homogeneous settings, because diversity thwarts “automaticity” or the tendency to rely on learned thinking routines rather than engage in deep, complex thought.¹⁴⁸ According to one study, “[s]tudents in diverse classrooms . . . benefit from the experience of ‘incongruity or dissonance,’” which encourages them to gather “new information and create new thought patterns in order to make sense of their surroundings.”¹⁴⁹ The study further noted that “[t]his experience leads to enhanced intellectual stimulation and increases cognitive growth.”¹⁵⁰ Enrollment in integrated schools also ensures that minority students have equal access to experienced and credentialed teachers, because integrated schools do not encounter the same racial bias as racially identifiable majority-minority schools.¹⁵¹

There has been disagreement regarding the short term effects of integration on academic outcomes¹⁵² because the evidence that integration improves academic achievement for black students has been inconsistent.¹⁵³ Critics further argue that decreases in the racial achievement gap that occurred during the years of consistent desegregation were not a result of desegregation itself, but rather were a result of African-American “upward social mobility” over the last fifty years.¹⁵⁴ In an effort to examine the impact of school racial composition on academic outcomes, independent of social background, Professor Roslyn Arlin Mickelson used data collected from the CMS system.¹⁵⁵ Her research confirmed that racially identifiable

146. CATHERINE L. HORN & MICHAL KURLAENDER, THE CIVIL RIGHTS PROJECT, HARVARD UNIV., THE END OF KEYES: RESEGREGATION TRENDS AND ACHIEVEMENT IN DENVER PUBLIC SCHOOLS 4 (2006) (citing Robert L. Crain, *School Integration and Occupational Achievement of Negroes*, 75 AM. J. SOC. 593, 594 (1970) (arguing that “Negroes who attended integrated schools should have . . . higher occupational prestige and income”)), available at http://www.civilrightsproject.ucla.edu/research/deseg/denver-4_5_06.pdf; Janet W. Schofield, *Maximizing the Benefits of a Diverse Student Body: Lessons from School Desegregation Research*, in DIVERSITY CHALLENGED: EVIDENCE ON THE IMPACT OF AFFIRMATIVE ACTION 99 (Gary Orfield ed., 2001) [hereinafter Schofield, *Lessons from School Desegregation*]; Janet Ward Schofield, *Review of Research on School Desegregation’s Impact on Elementary and Secondary School Students*, in HANDBOOK OF RESEARCH ON MULTICULTURAL EDUCATION 597, 599, 600 (James A. Banks & Cherry A. McGee Banks eds., 1995) [hereinafter Schofield, *Review of Research*].

147. Liu & Taylor, *supra* note 136, at 797 (citing Jomills Henry Braddock II et al., *A Long-Term View of School Desegregation: Some Recent Studies of Graduates as Adults*, 66 PHI DELTA KAPPAN 259, 263 (1984)).

148. Mickelson, *supra* note 28, at 1548 (citing Expert Report of Patricia Gurin, *Gutter v. Bollinger*, 137 F. Supp. 2d 821 (E.D. Mich. 2001) (No. 97-75928), available at <http://www.vpcomm.umich.edu/admissions/legal/expert/gurintoc.html> (last visited Apr. 30, 2008)).

149. UNIV. OF N.C. CTR. FOR CIVIL RIGHTS, *supra* note 42, at 14 (quoting Expert Report of Patricia Gurin, *supra* note 148).

150. *Id.*

151. See discussion *supra* Part II.A.1–3.

152. Mickelson, *supra* note 28, at 1517.

153. *Id.* (citing DAVID J. ARMOR, FORCED JUSTICE: SCHOOL DESEGREGATION AND THE LAW 221 (1995) (“The evidence on the educational benefits of school desegregation . . . is mixed at best . . .”).

154. *Id.*

155. *Id.* at 1513. The CMS system offered a unique set of data because thirty years after the historic Supreme Court decision in *Swann v. Charlotte-Mecklenburg Board of Education* affirmed the district’s desegregation, 402 U.S. 1, 7–8, 32 (1971), the Fourth Circuit declared the system unitary in

“black schools *and* classrooms exert[ed] significant negative effects on both black and white students’ academic outcomes.”¹⁵⁶ In fact, both black and white students “who . . . experienced desegregated schools and classrooms . . . benefited academically in significant and substantive ways,”¹⁵⁷ even after controlling for individual and family background.¹⁵⁸

Moreover, Professor Mickelson suggests that previously “ambiguous conclusions regarding the academic benefits of desegregated schools” were possibly the result of research that did not consider whether “second-generation segregation,” or racial tracking, undermines the benefits of school integration.¹⁵⁹ Tracking within integrated CMS schools “maintain[ed] white privilege by placing whites disproportionately into higher tracks than their comparably able black peers,”¹⁶⁰ while disproportionately assigning black students to racially identifiable lower tracks with diminished access to superior learning opportunities.¹⁶¹ These disparities persisted even after the study controlled for prior attendance in segregated black elementary schools, prior academic achievement, gender, attitudes, peer association, academic effort, and family background.¹⁶² Potential gains available for black students as a result of desegregation can be similarly subverted nationwide. Accordingly, school districts must implement heterogeneous instructional strategies in order to realize improved academic outcomes for minority students in integrated schools. Researchers have also noted that other factors may maximize the benefits of integration; these include integration at the beginning stages of a child’s education, a “critical mass” of students from various racial groups, diverse staff, and integrated extracurricular activities.¹⁶³

Less controversial is evidence of the long term impact of school integration on students.¹⁶⁴ Integrated schooling is associated with “higher educational and occupational aspirations” for African Americans.¹⁶⁵ Longitudinal studies have examined the social, psychological, academic, and systemic obstacles that affect career attainment for African Americans reveal that black males graduating from integrated high schools attained higher job status and “earned higher incomes” than

2001, *Belk v. Charlotte-Mecklenburg Bd. of Educ.*, 269 F.3d 305, 335 (4th Cir. 2001), and immediately began to re-segregate.

156. Mickelson, *supra* note 28, at 1560.

157. *Id.*

158. *Id.* at 1539–42.

159. *Id.* at 1561.

160. *Id.* at 1560.

161. *Id.* at 1531.

162. *Id.* at 1554.

163. HORN & KURLAENDER, *supra* note 146, at 5 (citing EFFECTIVE SCHOOL DESEGREGATION: EQUALITY, QUALITY, AND FEASIBILITY (Willis D. Hawley ed., 1981)).

164. Mickelson, *supra* note 28, at 1527–28 (citations omitted) (noting that while there is disagreement regarding the short term effects of desegregation on achievement, there is general agreement on the positive long term effects of desegregation).

165. HORN & KURLAENDER, *supra* note 146, at 4 (citing ROBERT L. CRAIN & CAROL SACHS WIESMAN, DISCRIMINATION, PERSONALITY, AND ACHIEVEMENT 176 (1972); JOMILLS HENRY BRADDOCK II & JAMES M. MCPARTLAND, JOHNS HOPKINS UNIV., CTR. FOR SOCIAL ORG. OF SCH., MORE EVIDENCE ON SOCIAL-PSYCHOLOGICAL PROCESSES THAT PERPETUATE MINORITY SEGREGATION: THE RELATIONSHIP OF SCHOOL DESEGREGATION AND EMPLOYMENT SEGREGATION (1983); Schofield, *Review of Research*, *supra* note 146, at 605; Schofield, *Lessons from School Desegregation*, *supra* note 146, at 99–100; William T. Trent, *Outcomes of School Desegregation: Findings from Longitudinal Research*, 66 J. NEGRO EDUC. 255, 257 (1997)).

their peers in segregated schools.¹⁶⁶ In addition, integration “positively influences [b]lack males’ occupational aspirations, [even after] controlling for family and individual characteristics.”¹⁶⁷ Black and white students who graduate from integrated schools are also more likely to “attend college, work, and live in desegregated settings,”¹⁶⁸ thus dismantling the residential segregation that leads to segregated schools in the first place.

Research also suggests that minorities benefit psychologically from integrated settings. A study of sixth grade students’ perceptions of safety and vulnerability found that African-American and Latino students in ethnically diverse classrooms felt safer and less lonely, while also experiencing less peer harassment and developing better self-esteem.¹⁶⁹ Increased ethnic diversity in middle schools was also associated with lower levels of feelings of vulnerability.¹⁷⁰ Authors of the study theorized that equalized power differentials between students of different backgrounds in ethnically diverse schools may help decrease perceptions of vulnerability.¹⁷¹ Other researchers have also theorized that desegregated schools convey specific messages that shape minority expectations. Disadvantaged students “tend to have an external locus of control”¹⁷² or a tendency to “assume that nothing they will do can affect [their] environment.”¹⁷³ In contrast, advantaged students tend to have an internal locus of control, or a belief that their “environment will respond if they are able enough to affect it.”¹⁷⁴ Analysis of the *Coleman Report* suggests that locus of control is one of the best predictors of student achievement among minority students.¹⁷⁵ Integrated schooling conveys a message to minority students that “many things are now possible,” and yields increases in the internality of control, particularly for black students.¹⁷⁶ Increased internality of control generally encourages “purposive, achievement-related behavior,”¹⁷⁷ which can result in higher achievement by minorities.¹⁷⁸

Finally, integration also positively influences “attitudinal and civic outcomes”¹⁷⁹ in ways that are important for an increasingly diverse society. Students who attend integrated schools report greater levels of comfort with

166. *Id.* at 5 (citing Crain, *supra* note 146, at 599).

167. *Id.* (citing Marvin P. Dawkins, *Black Students’ Occupational Expectations: A National Study of the Impact of School Desegregation*, 18 URB. EDUC. 98, 110 (1983)).

168. Liu & Taylor, *supra* note 136, at 797 (citations omitted).

169. Jaana Juvonen et al., *Ethnic Diversity and Perceptions of Safety in Urban Middle Schools*, 17 PSYCHOL. SCI. 393, 396 (2006).

170. *Id.* at 398.

171. *Id.* The authors also theorized that students with fewer classmates of the same ethnicity may be more likely to attribute harassment to the individual prejudices of others, while students with “many same-ethnicity classmates” may be “more likely to blame themselves for their victimization.” *Id.*

172. Rita E. Mahard & Robert L. Crain, *Research on Minority Achievement in Desegregated Schools*, in *THE CONSEQUENCES OF SCHOOL DESEGREGATION* 103, 122 (Christine H. Rossell & Willis D. Hawley eds., 1983).

173. *Id.* (quoting COLEMAN REPORT, *supra* note 55, at 321) (internal quotation marks omitted).

174. *Id.* (quoting COLEMAN REPORT, *supra* note 55, at 321) (internal quotation marks omitted).

175. *Id.* (citing COLEMAN REPORT, *supra* note 55, at 321).

176. *Id.*

177. *Id.*

178. *Id.* at 122–23.

179. HORN & KURLAENDER, *supra* note 146, at 5.

members of racial groups other than their own,¹⁸⁰ and white students attending integrated schools “exhibit more racial tolerance and less fear” of their black peers than white students attending segregated schools.¹⁸¹ The Harvard Civil Rights Project has conducted several surveys of high school students in integrated schools to document student experiences with racial and ethnic diversity.¹⁸² Seniors in Cambridge, Massachusetts, high schools reported an increased ability to understand diverse points of view and an enhanced desire to associate with people of with different backgrounds.¹⁸³ One student reported learning how to be respectful of other groups while remaining committed to one’s own beliefs and heritage.¹⁸⁴

Integration is not a panacea. Even integrated, middle class schools are limited in their ability to impact the educational outcomes of disadvantaged students: “If students come to school in unequal circumstances, they will . . . leave school with unequal skills and abilities . . .”¹⁸⁵ Accordingly, efforts to eliminate disparities in educational outcomes must include large scale reforms that address the societal problems that disproportionately affect the disadvantaged, including the income gap, the lack of affordable housing, and inadequate health care.¹⁸⁶ Nevertheless, disadvantaged students in middle class schools are more likely to attain higher academic achievement, even considering the limited ability of schools to compensate for social background. For example, a 1986 national assessment concluded that disadvantaged students are twice as likely to fall into the bottom quartile of achievement when attending a high poverty school as disadvantaged students attending a low-poverty school.¹⁸⁷ Therefore, exposing minority students to the social and political capital of middle class schools, as well as to the culture of achievement more likely to be prevalent therein, is a positive first step in maximizing the opportunity for academic success among minority students.

D. A Compelling and Attainable Interest

Although integration has been resisted at times, many white and minority parents have described their children’s experiences with integration in positive

180. *Id.* (citations omitted).

181. *Id.* (citing Janet Ward Schofield, *Uncharted Territory: Speculations on Some Positive Effects of Desegregation on White Students*, 13 URB. REV. 227, 234–36 (1981)).

182. See, e.g., MICHAL KURLAENDER & JOHN T. YUN, THE CIVIL RIGHTS PROJECT, HARVARD UNIV., THE IMPACT OF RACIAL AND ETHNIC DIVERSITY ON EDUCATIONAL OUTCOMES: CAMBRIDGE, MA SCHOOL DISTRICT (2002) [hereinafter KURLAENDER & YUN, CAMBRIDGE], available at http://www.civilrightsproject.ucla.edu/research/diversity/cambridge_diversity.pdf (examining the “racial and ethnic” attitudes and experiences of high school seniors in an integrated school environment in Cambridge, Massachusetts); MICHAL KURLAENDER & JOHN T. YUN, THE CIVIL RIGHTS PROJECT, HARVARD UNIV., THE IMPACT OF RACIAL AND ETHNIC DIVERSITY ON EDUCATIONAL OUTCOMES: LYNN, MA SCHOOL DISTRICT (2002) [hereinafter KURLAENDER & YUN, LYNN], available at <http://www.civilrightsproject.ucla.edu/research/diversity/LynnReport.pdf> (examining the attitudes of high school juniors regarding race and ethnicity in an integrated school environment in Lynn, Massachusetts).

183. KURLAENDER & YUN, CAMBRIDGE, *supra* note 182, at 2.

184. *Id.* at 6.

185. ROTHSTEIN, *supra* note 55, at 129.

186. *Id.* at 130.

187. KAHLBERG, *supra* note 10, at 26.

terms.¹⁸⁸ Little evidence exists to suggest that the integration of majority-white schools has any negative effect on white students,¹⁸⁹ which has prompted even opponents of forced integration to concede that “virtually all studies of desegregation and achievement have found little or no change in achievement or other educational outcomes for white students.”¹⁹⁰ In addition, Americans of all backgrounds continue to express “their belief in the importance of . . . integrated education.”¹⁹¹ In Boston, where one of America’s most bitter conflicts over school desegregation took place,¹⁹² a large majority of the city’s residents still want more done to integrate schools.¹⁹³ Moreover, assertions that integration has never been successfully achieved, and thus cannot be successfully accomplished in the future, are unfounded. In 2004, the vast majority of black students in the Southern and Border States attended schools far more integrated than they were before *Brown I*, even after accounting for recent regression in integration progress.¹⁹⁴ In addition, models for sustainable integration do exist. Forty-eight years after *Brown I*, three of the four school districts implicated in the case had maintained substantial levels of integration.¹⁹⁵ In particular, the Wilmington, Delaware, school district was one of the nation’s most integrated school districts in the 1980s, the 1990s, and through the 2001–2002 school year.¹⁹⁶

The Supreme Court has characterized education as “perhaps the most important function of state and local governments”¹⁹⁷ and has described public schools as “a most vital civic institution for the preservation of a democratic system of government.”¹⁹⁸ Furthermore, the Court has also repeatedly recognized the role that education plays in “preparing [students] for later professional training”¹⁹⁹ and in providing “the basic tools by which individuals might lead economically productive lives to the benefit of us all.”²⁰⁰ School districts that take seriously their obligation to prepare all children for citizenship should consider integration a necessary input for providing minority children with adequate education that can result in higher academic achievement. Enrollment by minority students in majority-minority

188. ORFIELD & LEE, *supra* note 3, at 5.

189. ORFIELD & LEE, *supra* note 31, at 42.

190. ARMOR, *supra* note 153, at 71; *see also* KAHLENBERG, *supra* note 10, at 39 (concluding that “white test performance is unaffected by desegregation” (internal quotation marks omitted)).

191. ORFIELD & LEE, *supra* note 3, at 5 (citing Karla Scoon Reid, *Survey Probes Views on Race*, EDUC. WK., May 2004, at 14–16).

192. *See generally* J. ANTHONY LUKAS, COMMON GROUND: A TURBULENT DECADE IN THE LIVES OF THREE AMERICAN FAMILIES (1985) (describing the battle over desegregation in Boston).

193. ORFIELD & LEE, *supra* note 3, at 5.

194. ORFIELD & LEE, *supra* note 2, at 20.

195. *Id.* at 13.

196. *Id.* at 13. For further discussion of sustainable models of integration, *see* Ryan & Heise, *supra* note 17, at 2124–28 (identifying school choice as a viable option in integrating schools and suggesting incentives and strategies to make school choice programs more effective).

197. *Brown v. Bd. of Educ. (Brown I)*, 347 U.S. 483, 493 (1954).

198. *Plyler v. Doe*, 457 U.S. 202, 221 (1982) (quoting *Sch. Dist. v. Schempp*, 374 U.S. 203, 230 (1963) (Brennan, J., concurring)) (internal quotation marks omitted).

199. *Brown I*, 347 U.S. at 493; *see also* *Grutter v. Bollinger*, 539 U.S. 306, 331 (2003) (“We have repeatedly acknowledged the overriding importance of preparing students for work and citizenship, describing education as pivotal to ‘sustaining our political and cultural heritage’ with a fundamental role in maintaining the fabric of society. . . . This Court has long recognized that [education] . . . ‘is the very foundation of good citizenship.’” (quoting *Plyler*, 457 U.S. at 221; *Brown I*, 347 U.S. at 493)).

200. *Plyler*, 457 U.S. at 221.

schools has a significant negative impact on academic achievement, high school graduation rates, and educational and occupational aspirations, making school districts' desire to dismantle racially isolated public schools a compelling interest.

III. SEATTLE AND LOUISVILLE STEP UP TO THE PLATE

Despite the wealth of social science research that continually confirms the negative impact of segregation on minority students, public schools across the country have been resegregating at an alarming rate. Between 1964 and 1970, when civil rights enforcement was at its greatest and the Supreme Court was providing clear guidance on what was expected of school districts,²⁰¹ the percentage of black students enrolled in majority-white schools in the South increased from 2.3% to 33.1%.²⁰² The percentage continued to increase until reaching a peak of approximately 44% in 1988.²⁰³ Since the early 1990s, however, the percentage of black students enrolled in majority-white schools has steadily declined, reaching approximately 30% in 2001, a figure lower than percentages attained during the 1970s.²⁰⁴

Other regions of the country reflect similar patterns. In 1968, the percentage of black students in the Border States attending schools with between 50% and 100% black enrollment was 71.6%.²⁰⁵ That figure dropped to 59.3% in 1991 but crept back up to 67.9% by 2001.²⁰⁶ In schools in the Midwest, the percentage of black students attending the same type of schools was 77.3% but dropped to 69.7% by 1991, only to rise to 72.9% in 2001.²⁰⁷ Figures for schools in the West started at 72.2% in 1968, and fell to 67.1% in 1988, only to rise to 75.8% in 2001.²⁰⁸ In the Northeast, where significant levels of integration never occurred, the percentage rose from 66.8% in 1968 to 78.4% in 2001.²⁰⁹ Even more troubling, in 1968, 77.8% of black students were enrolled in schools in the South that were between 90% and 100% minority.²¹⁰ That figure dropped drastically to 24% in 1988, only to rise to 31% by 2001.²¹¹ Latinos, for whom attempts at integration have never been genuinely pursued,²¹² are also experiencing increases in segregation.²¹³ The percentage of Latino students enrolled in majority-minority schools in the West has almost doubled from approximately 42% in 1968 to almost 80% in 2001.²¹⁴ The percentage of Latino students enrolled in majority-minority schools more than

201. See *infra* notes 251–53 and accompanying text.

202. ORFIELD & LEE, *supra* note 2, at 19 tbl.7.

203. *Id.* at 18, 19 tbl.7.

204. *Id.*

205. *Id.* at 20 tbl.8.

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.*

212. ORFIELD & LEE, *supra* note 3, at 4.

213. *Id.* The increase is due, in part, to rapid growth in the Latino population in the Southwest and Florida. ORFIELD & LEE, *supra* note 2, at 16. Increases in enrollment by 50% or more have made it such that even if Latinos were enrolled in equal numbers in public schools, there would still have been an increase in segregation. *Id.*

214. *Id.* at 21 tbl.9.

tripled from nearly 12% to approximately 37% during the same period.²¹⁵ It is in this context that the Seattle, Washington, and Louisville, Kentucky, school districts adopted controlled choice plans.

A. The School District Plans

Fortunate enough to have sufficient minority populations to integrate and no history of court ordered desegregation, the school board in Seattle took its first steps to integrate the public schools in the late 1970s.²¹⁶ The plan that was ultimately challenged in the Supreme Court was a controlled choice plan, effective beginning in the ninth grade, that asked parents to rank the city's high schools by enrollment preference.²¹⁷ Parents' choices determined school assignments unless and until a school became oversubscribed, at which point a series of "tiebreakers" was employed.²¹⁸ The first tiebreaker favored students who had siblings already attending the school.²¹⁹ The second tiebreaker favored students who lived closest to the school.²²⁰ When schools were oversubscribed by white or minority students, the second tiebreaker was subject to an "integration tiebreaker."²²¹

In contrast to Seattle, the Jefferson County School District in Louisville had a history of court ordered desegregation.²²² Located in metropolitan Louisville, the district includes white suburbs where most of the district's white students attend school.²²³ After achieving unitary status in 2000,²²⁴ the district adopted the voluntary student assignment plan that was ultimately challenged in the Supreme Court. The plan first created racially integrated "resides" areas that included clusters of schools within geographic attendance areas.²²⁵ The district asked parents to rank resides schools, magnet schools, and optional programs by enrollment preference; the district assigned students to a resides school if parents did not choose.²²⁶ Students at all grade levels could apply for a transfer to any nonmagnet school in the district if dissatisfied with their initial placement.²²⁷ Elementary school

215. *Id.*

216. Liu, *supra* note 100, at 313. Initial plans divided the district into zones that paired predominantly white and minority elementary schools together and then "linked mandatory high school assignments to elementary school assignments." *Id.* In response to resistance to the mandatory busing required by the plan, the district adopted a controlled-choice plan in 1988, which asked parents "to rank choices within a cluster of schools that met desegregation guidelines." *Id.*

217. Brief for Respondents No. 908, *supra* note 4, at 5–6.

218. *Id.* at 6.

219. *Id.*

220. *Id.*

221. *Id.*

222. See Liu, *supra* note 100, at 314. Throughout the 1970s and 1980s, the district implemented court-ordered busing, school closings, "gerrymandered attendance zones," magnet schools, school pairings, and clustering to achieve integration. *Id.* The district adopted a controlled choice plan in 1984 to "enhance stability," "expand choice," and decrease the use of race in school assignments. *Id.* at 314–15.

223. Brief for Respondents No. 915, *supra* note 4, at 4.

224. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2752 (2007) (citing *Hampton v. Jefferson County Bd. of Educ.*, 102 F. Supp. 2d 358, 360 (W.D. Ky. 2000)).

225. Brief for Respondents No. 915, *supra* note 4, at 5.

226. *Id.* at 6.

227. *Id.* at 7.

transfer requests were granted or denied based on various factors, including family hardship, school capacity, program offerings, and race.²²⁸

B. *The Court's Opinion in Parents Involved in Community Schools*

On June 28, 2007, the Supreme Court issued a sharply divided opinion in *Parents Involved* in which it struck down the voluntary integration plans adopted by Seattle and Louisville.²²⁹ A majority of the Justices, including Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, and Alito subjected the plans to strict scrutiny²³⁰ and found the school districts did not have a compelling interest that justified using race to remedy the effects of past intentional discrimination; Seattle was never subjected to court ordered desegregation, and the Louisville school district had been released from desegregation orders in 2000 when it achieved unitary status.²³¹ The use of race to address the compelling interest of viewpoint diversity was also inapplicable, as these plans did not involve higher education admissions decisions.²³²

The same majority also noted that the assignment of students by race was an “extreme approach” which could only be justified by absolute necessity²³³ and that the limited impact of the plans on student assignment indicated that integration could have been effectively achieved in other ways.²³⁴ Moreover, the districts had not shown that they considered methods besides “explicit racial classifications” to achieve integration goals.²³⁵ Thus, under the Court’s strict scrutiny analysis, the plans were not sufficiently narrowly tailored to the goal of achieving integration.²³⁶

Four of the Justices, including Chief Justice Roberts and Justices Scalia, Thomas, and Alito, declined to even consider whether there was a compelling interest in using integration to address equity concerns.²³⁷ Even if equal educational opportunity was a compelling interest, the controlled choice plans were insufficiently narrowly tailored to serve that interest.²³⁸ This plurality of Justices found that instead of basing the plans’ integration goals on “pedagogic” theories about the levels of integration necessary to attain certain educational benefits,²³⁹ the

228. *See id.* at 7 (“Transfer applications are typically based on day care arrangements, medical criteria, family hardship, student adjustment problems, and program offerings.”); *see also* *McFarland v. Jefferson County Pub. Sch.*, 330 F. Supp. 2d 834, 844–45 (W.D. Ky. 2004) (noting that transfers were granted based on “racial guidelines and program capacity”), *aff’d sub nom. McFarland ex. rel. McFarland v. Jefferson County Pub. Sch.*, 416 F.3d 513 (6th Cir. 2005), *rev’d sub nom. Parents Involved*, 127 S. Ct. 2738.

229. *Parents Involved*, 127 S. Ct. at 2767–68 (plurality opinion).

230. *Id.* at 2751–52 (majority opinion).

231. *Id.* at 2752 (citing *Hampton v. Jefferson County Bd. of Educ.*, 102 F. Supp. 2d 358, 360 (W.D. Ky. 2000)).

232. *See Grutter v. Bollinger*, 539 U.S. 306, 343–44 (2003) (upholding the consideration of race in college and university admissions as long as race is just one of many factors considered in the effort to create a diverse student body).

233. *Parents Involved*, 127 S. Ct. at 2760–61.

234. *Id.* at 2759–60.

235. *Id.* at 2760–61.

236. *Id.* at 2755 (plurality opinion).

237. *Id.* at 2755.

238. *Id.* at 2755–56.

239. *Id.* at 2755.

school districts had based the plans' goal of integration on the "racial demographics" of the districts.²⁴⁰ Such a design has been considered racial balancing and patently illegitimate.²⁴¹

Justice Kennedy filed a separate concurring opinion,²⁴² in which he characterized the plurality's opinion as too "dismissive of the legitimate [governmental] interest" in ensuring equal educational opportunity.²⁴³ Nevertheless, he found that individual racial classifications could only be used if they are a "last resort to achieve a compelling interest."²⁴⁴ If districts become concerned that the racial composition of their schools interferes with equal educational opportunity, "absent some extraordinary showing not present" in *Parents Involved*,²⁴⁵ districts may only utilize race-conscious measures that take into account the inequality of opportunity but avoid assignment of students by race.²⁴⁶

IV. THE ROBERTS COURT, THE FOURTEENTH AMENDMENT, AND EQUITY

Although disappointing, the Court's opinion in *Parents Involved* is hardly surprising. The opinion and the approach of the plurality Justices is only the latest in a long line of Supreme Court opinions that have interpreted equal protection doctrine in a way that impedes, rather than advances, equality.

A. *The Desegregation Cases*

The attitude of recalcitrance with which the South met the Supreme Court's call for desegregation of public schools in *Brown I*²⁴⁷ changed when Congress passed Title VI of the Civil Rights Act of 1964,²⁴⁸ giving teeth to integration mandates by prohibiting receipt of federal funds by any public institution engaged in

240. *Id.*

241. *Id.* at 2757–59.

242. *Id.* at 2788 (Kennedy, J., concurring in part and concurring in judgment).

243. *Id.* at 2791.

244. *Id.* at 2792.

245. *Id.* at 2796.

246. *Id.* at 2791–92. Such acceptable measures include "strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race." *Id.* at 2792.

247. 347 U.S. 483 (1954). When ruling on remedies in *Brown v. Board of Education (Brown II)*, 349 U.S. 294 (1955), the Court ordered states to desegregate and transition to a system of integrated public schools with "all deliberate speed." *Id.* at 301. The Court's failure to define either the term *desegregate* or the phrase *all deliberate speed* resulted in a vague enforcement order which could not overcome resistance from Southern political leaders willing to close public schools in order to prevent integration. ORFIELD & LEE, *supra* note 2, at 11–12. In response to desegregation orders directly issued to Prince Edward County, Virginia, in *Brown I*, for example, the county closed all public schools and gave white families publicly funded vouchers to attend private schools. *Id.* at 12. Between 1959 and 1964, there were no public schools in the county until the Supreme Court forced their reopenings in *Griffin v. County School Board*, 377 U.S. 218 (1964), as "virtually all-black institutions." ORFIELD & LEE, *supra* note 2, at 12.

248. Pub. L. No. 88-352, 78 Stat. 252 (codified as amended at 42 U.S.C. § 2000d (2000)).

discriminatory practices.²⁴⁹ In addition, as the Court's impatience grew,²⁵⁰ it finally began providing substantive guidance on desegregation by directly charging school districts with the duty to create unitary school systems,²⁵¹ providing specific goals for which districts should strive,²⁵² and sanctioning the use of specific tools, including busing and remedial alteration of school attendance zones, to achieve integration.²⁵³ By the early 1970s, the South was more desegregated than any other region in the country.²⁵⁴

A shift in the Supreme Court's jurisprudence during the 1970s, however, began to undermine integration advances. In *Keyes v. School District No. 1*,²⁵⁵ the Court refused to find that de facto segregation would amount to an equal protection violation,²⁵⁶ thereby overturning the district court's finding that the Denver, Colorado, school district was liable for maintaining unequal educational opportunity for minorities, regardless of whether the segregation was caused by covert discriminatory policies or overt laws openly mandating segregation.²⁵⁷ In failing to recognize the equal protection violation inherent in even de facto segregation, the Court's decision in *Keyes* created a practically insurmountable obstacle to obtaining judicial remedies to address government sponsored segregation in the North where explicit discriminatory practices were often difficult to prove.²⁵⁸

249. 42 U.S.C. § 2000d.

250. *See, e.g., Alexander v. Holmes County Bd. of Educ.*, 396 U.S. 19, 20 (1969) (per curiam) (“[O]peration of segregated schools under a standard of allowing ‘all deliberate speed’ for desegregation is no longer constitutionally permissible. Under explicit holdings of this Court the obligation of every school district is to terminate dual school systems at once and to operate now and hereafter only unitary schools.”); *Griffin*, 377 U.S. at 229 (noting that “[t]here has been entirely too much deliberation and not enough speed” in striking down the Prince Edward County School Board’s reaction to desegregation orders issued in *Brown I*); *Goss v. Bd. of Educ.*, 373 U.S. 683, 686–87 (1963) (noting that a school choice plan that allowed students in the minority at their assigned school to transfer to schools where they were in the majority was working toward the “perpetuation of segregation”); *Cooper v. Aaron*, 358 U.S. 1, 12, 16 (1958) (asserting that “constitutional rights . . . are not to be sacrificed or yielded to . . . violence and disorder,” in response to the actions of the school board in Little Rock, Arkansas, that sought to delay a court-approved desegregation program because of its extreme racial hostility toward desegregation).

251. *Green v. County Sch. Bd.*, 391 U.S. 430, 437–438 (1968). A unitary school system is a system that is not racially identifiable based on students, “faculty, staff, transportation, extracurricular activities, and facilities.” *Id.* at 435. These six factors have become the most commonly used guidelines for determining whether a school district is unitary. *See, e.g., Freeman v. Pitts*, 503 U.S. 467, 473 (1992) (referring to the *Green* factors to determine if the DeKalb County School System was unitary).

252. *See, e.g., Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 25 (1971) (characterizing mathematical ratios reflecting the racial composition of entire school systems as merely “starting points” in setting desegregation goals).

253. *Id.* at 27–31.

254. Gary Orfield, *Turning Back to Segregation*, in *DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF BROWN V. BOARD OF EDUCATION*, *supra* note 94, at 1, 8.

255. 413 U.S. 189 (1973).

256. *See id.* at 209–14. As was typical in the North, segregation in the Denver school district was the product of covert discriminatory policies. Erwin Chemerinsky, *The Segregation and Resegregation of American Public Education: The Court’s Role*, in *SCHOOL RESEGREGATION: MUST THE SOUTH TURN BACK?*, *supra* note 69, at 29, 35.

257. *Keyes*, 413 U.S. at 193–94.

258. Chemerinsky, *supra* note 256, at 35–36.

The Court's jurisprudence continued to shift in *Milliken v. Bradley*,²⁵⁹ where the Court relied on its preference for local control of schools to justify its refusal to order an interdistrict desegregation remedy in the absence of an interdistrict equal protection violation.²⁶⁰ Accordingly, a district court could not order fifty-three suburban school districts to participate in the integration of Detroit schools,²⁶¹ even though it was otherwise impossible to integrate one of Detroit's majority black school districts, itself the product of de jure segregation policies.²⁶² *Milliken* was the first case to rationalize a segregated result and "overrule[] a desegregation decree" where a constitutional violation in the form of state-sponsored segregation had been found by the lower courts.²⁶³

The Court's next series of education cases continued to undermine integration efforts. In *Board of Education v. Dowell*,²⁶⁴ the Court endorsed the termination of desegregation orders once school districts became unitary, even if the termination would lead to resegregation of district schools.²⁶⁵ The Court went further in *Freeman v. Pitts*²⁶⁶ one year later when it gave federal courts the authority "to relinquish supervision and control of school districts in incremental stages,"²⁶⁷ even if other desegregation orders for the same system remained in place.²⁶⁸ As a result, students in affected districts never attended fully integrated school systems, especially if resegregation occurred as orders were lifted piecemeal.

Three years later, the trend continued when the Court issued its opinion in *Missouri v. Jenkins*.²⁶⁹ While under federal court desegregation orders and prevented under *Milliken* from obtaining an integration remedy that would involve the suburbs, the Kansas City, Missouri, School District (KCMSD) used compensatory funds for a program designed to attract white students from the suburbs, as well as qualified teachers.²⁷⁰ The school district spent over \$1 billion to convert the city's public schools into high quality magnet schools and to increase teacher salaries across the district.²⁷¹ Furthermore, the district court ordered the state of Missouri to continue a quality education program until student achievement scores within the district reached national standards.²⁷² The plan led to considerable

259. 418 U.S. 717 (1974).

260. *Id.* at 744-47.

261. *Id.* at 745.

262. *Id.* at 734-35.

263. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 16-19, at 1495 (2d ed. 1988).

264. 498 U.S. 237 (1991).

265. *Id.* at 249-50. In determining whether unitary status had been achieved, district courts were to consider whether the school board "complied in good faith" with desegregation orders, *id.* at 249, and "whether the vestiges of past discrimination had been eliminated to the extent practicable," *id.* at 250. The latter could be determined by reference to the six factors outlined in *Green. Id.* (quoting *Green v. County Sch. Bd.*, 391 U.S. 430, 435 (1968)).

266. 503 U.S. 467 (1992).

267. *Id.* at 490.

268. *Id.* at 490-91.

269. 515 U.S. 70 (1995).

270. *Id.* at 76-78.

271. *Id.* at 77-79; see also Alison Morantz, *Money and Choice in Kansas City: Major Investments with Modest Returns*, in *DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF BROWN V. BOARD OF EDUCATION*, *supra* note 94, at 241, 251 (noting that the total cost of the desegregation plan in *Jenkins* was approximately \$1.15 billion).

272. *Jenkins*, 515 U.S. at 100.

gains in integration. In 1983, twenty-five schools in the district had a minority enrollment of greater than 90%.²⁷³ One decade later, no KCMSD elementary school student attended such a school, and the percentage of middle and high school students attending schools with such a rate of minority enrollment had declined from approximately 45% to 22%.²⁷⁴

The Supreme Court in *Jenkins* acknowledged the district court's finding of a "system-wide *reduction* in achievement" due to segregation²⁷⁵ but noted that the district court failed to identify the "incremental effect" of segregation on minority achievement.²⁷⁶ Accordingly, the school district could be declared unitary, even if disparities in academic performance remained, as long as the school district had complied with desegregation orders.²⁷⁷ The Court also ruled that the district court could not, as part of a desegregation order, mandate government expenditures for a plan that solicited even voluntary interdistrict integration in the absence of an interdistrict violation.²⁷⁸ Finally, the Court emphasized the need for a quick return to local control of the school system.²⁷⁹ Without a court order guaranteeing state funding to the schools, white enrollment in KCMSD schools fell by 8% in September 1995, "the largest yearly drop in a decade."²⁸⁰ *Dowell, Freeman, and Jenkins* have been cited not only for collectively reversing *Brown I*, but also for prompting the major resegregation patterns the country is experiencing today.²⁸¹

B. *The Roberts Court Continues the Trend*

All five cases discussed above illustrate the Court's disturbing tendency to embrace formal antidiscrimination measures, while ignoring the practical realities of desegregation efforts and abandoning efforts to achieve genuine equity. By embracing a false distinction between de jure and de facto segregation in *Keyes*,²⁸² the Court demonstrated that it operates in an imaginary world, where school segregation is the result of a smoking gun document taped to the schoolhouse door that bans all minorities from attendance. In the real world, however, segregation is often the result of a myriad of local, state, and federal policies, including discriminatory residential policies, historical adherence to neighborhood schools, and race-conscious decisions by school boards, which, although difficult to prove, are sometimes motivated by racial animus. Moreover, decisions that produce genuinely unintended racial consequences, however innocent the intentions may be, can often reflect unconscious bias traceable to the legacy of racial oppression with which our country has struggled since its inception.

273. Chemerinsky, *supra* note 256, at 39.

274. *Id.* (citations omitted).

275. *Jenkins*, 515 U.S. at 101 (quoting *Jenkins v. Missouri*, 639 F. Supp. 19, 24 (W.D. Mo. 1985)) (internal quotation marks omitted).

276. *Id.*

277. *Id.* at 101–02; see also Chemerinsky, *supra* note 256, at 40 ("Disparity in test scores is not a basis for continued federal court involvement."); Morantz, *supra* note 271, at 261 ("[T]he Court ruled that it was inappropriate to require that test scores rise before unitary status is granted.").

278. *Jenkins*, 515 U.S. at 97–99.

279. *Id.* at 102.

280. Morantz, *supra* note 271, at 262.

281. Orfield, *supra* note 254, at 1.

282. *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 209–14 (1973).

Even more importantly, if the Fourteenth Amendment is to be applied in ways that advance equity, then there must be a recognition that the equal protection violation is not the actual act or policy of segregation, but rather the inequality in educational opportunity that results from the segregation. The harm that results from that inequality is identical, whether produced by de jure or de facto segregation, or by government action or inaction.²⁸³ In all cases, minority children suffer most of that harm, which violates the spirit of the Equal Protection Clause.

Milliken continued the Court's inclination to pursue formal antidiscrimination doctrine at the expense of substantive antidiscrimination measures. By preventing an interdistrict remedy absent an interdistrict violation,²⁸⁴ the Court limited available rights and remedies based on the jurisdictional impact of the wrong. Although consistent with traditional doctrines of remedy, such an approach is disingenuous in the context of school desegregation because it forecloses the possibility of achieving genuine integration, especially in metropolitan regions in the North and the West where urban areas have a heavy minority population and school district boundaries are "coterminous with municipal boundaries."²⁸⁵ As a result, state governments responsible for de jure segregation in their cities, and potentially for actions that drove or incentivized Whites to leave the city, are absolved of their crimes, even when a state is authorized to fashion an appropriate remedy for all public schools in the state.

In allowing the termination of desegregation orders, even if it would result in resegregation, the Court in *Dowell* and *Freeman* transformed desegregation orders from tools used to create lasting equity into temporary punishments for historical wrongs. To make amends, school districts need only comply with court orders for a period of time. In *Jenkins*, the Court explicitly severed the tie between adherence to the equal protection doctrine and substantive equity. By dismissing proof of remaining inequity in educational outcomes,²⁸⁶ the Court prioritized mere technical compliance with integration orders and a quick return to local control over actual equal educational opportunity for minority children.

And so the trend continues with the Roberts Court's opinion in *Parents Involved*.²⁸⁷ As discussed earlier, adequacy and the resulting equality in educational opportunity is best achieved by eliminating racial isolation in public schools.²⁸⁸ This task does not require individual assessment of each student's contribution to the goal of diversity, but rather the even distribution of students by race. To be sure, cultivating viewpoint diversity and meaningful exchanges are important goals of integration. The primary goal of integration as an adequacy input, however, is not that black children attend school with students of different backgrounds, world

283. The Court recognized in *Plyler v. Doe* that "denial of education to some isolated group of children poses an affront to one of the goals of the Equal Protection Clause: the abolition of governmental barriers presenting unreasonable obstacles to advancement on the basis of individual merit." 457 U.S. 202, 221–22 (1982). Although *Plyler* addressed purposeful government action to deny education, the passive failure of districts to dismantle racially isolated schools that essentially deny the opportunity of equal education to minority children is arguably just as offensive to the goals of the Equal Protection Clause.

284. *Milliken v. Bradley*, 418 U.S. 717, 744–47 (1974).

285. *Ryan*, *supra* note 13, at 261.

286. *Missouri v. Jenkins*, 515 U.S. 70, 101 (1995).

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

288. *See* discussion *supra* Part II.C.

views, or talents, with each student being individually screened to assess unique contributions to diversity. Rather, the primary goal is to ensure that black children no longer attend racially isolated schools that concentrate poverty, aggregate negative peer influences, and fail to attract or retain high quality teachers due to racial bias.

The plurality of Justices in *Parents Involved*, however, focused almost exclusively on the technical aspects of strict scrutiny analysis rather than thoughtfully considering the actual effects of racial isolation on educational outcomes and the extent to which racial isolation impedes equitable treatment of all students in a school district. The plurality worked backwards, citing an insufficiently narrowly tailored remedy as a reason to avoid recognizing a compelling interest in reducing racial isolation.²⁸⁹ A school district's attempt to integrate K-12 public schools, however, is responsive to an obligation to provide equal educational opportunities to *all* students and provide *all* students with an adequate education. Recognition of this compelling interest was appropriate and necessary, even if the plurality ultimately concluded that the plans were not narrowly tailored.

For all the attention paid to narrow tailoring analysis, however, the Court nevertheless failed to sensibly consider the practicalities of addressing racial isolation when it disingenuously deemed the controlled choice programs insufficiently tailored. The plurality suggested that the plans' racial guidelines should have been based on "pedagogic" theories regarding the levels of integration necessary to secure achievement.²⁹⁰ The plans' integration guidelines, however, were based on just that. As an abundance of research suggests, dismantling racial isolation and creating integrated schools more likely to be middle class schools addresses the concentration of poverty, culture of underachievement, and racial bias that negatively impact academic outcomes in racially and economically isolated schools.²⁹¹ Both the Seattle and Louisville plans were effective at using racial guidelines to eliminate or limit the number of majority-minority schools.²⁹² Moreover, in light of the Court's previous decisions barring interdistrict remedies,²⁹³ the best any district with high black or Latino populations can hope to achieve is congruence between district wide demographics and enrollment patterns. Finally, because the plans worked to minimize the use of race in accordance with strict scrutiny guidelines, the Court could have legitimately considered the plans narrowly tailored.²⁹⁴

289. *Parents Involved*, 127 S. Ct. at 2755–56 (plurality opinion).

290. *Id.* at 2755.

291. *See supra* text accompanying notes 136–40.

292. *See* Brief for Respondents No. 908, *supra* note 4, at 10; Brief for Respondents No. 915, *supra* note 4, at 4–5.

293. *See, e.g.*, *Milliken v. Bradley*, 418 U.S. 717, 754 (1974) (finding that the district court exceeded its authority in mandating a remedy that would affect school districts outside the school system that had not violated desegregation orders).

294. Both plans used race-neutral factors in their efforts to integrate schools, relying first on parent and student choice. The Seattle plan, for example, considered sibling attendance and proximity to the school when making assignments and used race only when necessary to prevent resegregation. Brief for Respondents No. 908, *supra* note 4, at 6. Instead of adherence to strict racial guidelines, both plans used broad racial ranges to minimize consideration of race and avoid school assignments that merely mimicked district-wide racial demographics. *See id.* at 10; Brief for Respondents No. 915, *supra*

Although considered by integration advocates to be the one bright spot in the Court's decision,²⁹⁵ Justice Kennedy's concurrence is marked by a limited understanding of the practical limitations of integration efforts. Although Kennedy correctly identified a compelling interest in reducing racial isolation,²⁹⁶ he declined to find an actual equal protection violation that would warrant the assignment of students by race.²⁹⁷ Accordingly, the de facto segregation that produced racial isolation could be addressed voluntarily only by race-conscious programs. Again, a member of the Court was looking for an unlikely smoking gun instead of taking a more realistic approach and assessing more subtle social practices perpetuated by school districts that ignore race in school assignments and thereby entrench inequality. Justice Kennedy's opinion moved even further away from reality when he suggested race-conscious integration policies like "strategic site selection of new schools," gerrymandered attendance zones, and funding for special programs,²⁹⁸ ideas that have been tried and rejected by school districts for lack of community support.²⁹⁹ The creation of attendance zones, for example, requires involuntary busing, which has repeatedly caused opposition and discontent throughout the history of desegregation.³⁰⁰ Busing is also expensive, and often disproportionately borne by African-American students.³⁰¹ The creation of new schools, particularly in urban districts already struggling because of scarce resources, is feasible only if schools are built in a region's less desirable areas,³⁰² thus defeating the initial goal of attracting white middle class students. Furthermore, despite the creation of

note 4, at 4–5. These features ensured that the plans were as narrowly tailored as possible, as the districts considered race only as a last resort in a limited number of cases. As noted by the dissent, the use of race in these plans was more narrowly tailored than the use of race in the admissions plan upheld in *Grutter v. Bollinger*, 539 U.S. 306, 315–16 (2003), where race was considered in a large number of students' merit-based applications. *Parents Involved*, 127 S. Ct. at 2825 (Breyer, J., dissenting). Although the districts plans' use of race meant that, at some point, race became determinative, it is impractical and disingenuous to prohibit *any* consideration of race after having identified racial isolation as a barrier to equal educational opportunity.

295. Professor Charles Ogletree applauded Justice Kennedy's concurrence noting, "The hidden story in the decision today is that Justice Kennedy refused to follow the lead of the other four [J]ustices in eviscerating the legacy of *Brown* [I]." Adam Liptak, *The Same Words, but Differing Views*, N.Y. TIMES, June 29, 2007, at A24. Similarly, Theodore M. Shaw, president of the NAACP Legal Defense and Educational Fund, highlighted Justice Kennedy's break from the plurality, stating that "[i]n some ways, considering what we anticipated, it's not as bad as it could have been." Robert Barnes, *Divided Court Limits Use of Race by School Districts*, WASH. POST, June 29, 2007, at A1.

296. *Parents Involved*, 127 S. Ct. at 2797 (Kennedy, J., concurring in part and concurring in the judgment) ("A compelling interest exists in avoiding racial isolation, an interest that a school district, in its discretion and expertise, may choose to pursue.").

297. *Id.* at 2796.

298. *Id.* at 2792.

299. The Seattle School District pursued its controlled choice plans because earlier plans, which involved mandatory busing and gerrymandered attendance zones, triggered white flight and community dissatisfaction. See Liu, *supra* note 100, at 313.

300. See, e.g., Margaret L. Andersen, *From Brown to Grutter: The Diverse Beneficiaries of Brown v. Board of Education*, 2004 U. ILL. L. REV. 1073, 1084–85 (2004) (describing the various forms of "direct and indirect opposition to integration"); Leland B. Ware, *Educational Equity and Brown v. Board of Education: Fifty Years of School Desegregation in Delaware*, 47 HOW. L.J. 299, 316–17 (2004) (noting the efforts of one county in Delaware to delay integration of its schools).

301. Claire Smrekar, Commentary, *A Practical End to Racial Diversity in Schools*, TCHRS. C. REC., July 16, 2007, at 1, <http://www.tcrecord.org/PrintContent.asp?ContentId=14549>.

302. *Id.*

magnet schools and other special programs, parents overwhelmingly choose to send their children to neighborhood schools,³⁰³ a trend that undermines the success of special programming and underscores the need for controlled choice programs to counter this trend.

Justice Kennedy's suggestion that school districts employ individualized review to create diverse schools³⁰⁴ highlights how removed the Court is from its understanding of the realities of American public education. School districts with large populations would have to individually assess tens of thousands of students and assign them to one of sometimes over one hundred schools.³⁰⁵ School districts have neither the time nor the resources to devote to such a Herculean task. In addition, there are few factors, other than race, by which a school district can evaluate diversity in an elementary school-age child who has not yet had the opportunity to develop talents, special skills, or particular world views. As noted by Michael Casserly, Executive Director of the Council for the Great City Schools, "[T]he strategies that [Justice Kennedy] outlined have limited viability."³⁰⁶ A better understanding of the limited efficacy of race-conscious measures might have prevented Justice Kennedy from joining the majority in characterizing the district plans as unnecessary and therefore insufficiently narrowly tailored.³⁰⁷ Despite the Court's opinion to the contrary, the plans developed in Seattle and Louisville were realistic, practical, and effective.

The Court's decision in *Parents Involved* is particularly problematic because of the nature of the programs it struck down. Both the Seattle and Louisville plans were *voluntary* plans that specifically sought to address the equity concerns³⁰⁸ outlined in this Article.³⁰⁹ As voluntary programs, the plans represented the educational judgments of locally elected officials made in response to their constituents.³¹⁰ As controlled choice programs, the plans yielded increased parental input, support, and satisfaction.³¹¹ Moreover, unlike the significant effort required of the federal courts as they struggled with the implementation and remedial aftermath of *Brown I* and its progeny,³¹² this case did not present issues that would

303. *Id.*

304. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2793 (2007) (Kennedy, J., concurring in part and concurring in the judgment).

305. Smrekar, *supra* note 301.

306. Barnes, *supra* note 295, at A1 (internal quotation marks omitted).

307. *See Parents Involved*, 127 S. Ct. at 2792 (Kennedy, J., concurring in part and concurring in judgment).

308. *See* Brief for Respondents No. 908, *supra* note 4, at 28–31; Brief for the Respondents No. 915, *supra* note 4, at 27–29.

309. *See* discussion *supra* Part II.A.1–3.

310. Brief for Respondents No. 915, *supra* note 4, at 29–33. The school board in Louisville, for example, regularly polled "students, graduates, parents, and the community at large" to monitor the public's attitudes about the district. *Id.* at 9. Results indicated strong support for a plan that provided choice about student assignment while at the same time maintained racially integrated schools. *Id.*

311. Both school districts adopted their controlled choice plans, partly, to reduce burdensome mandatory assignment plans which required busing and to increase parental participation. *Id.* at 22–24; *see also* Brief for Respondents No. 908, *supra* note 4, at 4–6.

312. *See* Heise, *supra* note 13, at 1156 (describing the Court's hesitancy in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), to abrogate the national school finance system in light of the judicial effort spent on school desegregation issues); Michael Heise, *The Story of San Antonio Independent School Dist. v. Rodriguez: School Finance, Local Control, and Constitutional Limits* 14–15 (Cornell Law Sch. Legal Studies Research Paper Series, Paper No. 76,

create a drain on judicial resources. Rather, the plans presented the Court with the opportunity to endorse local control of education policy, which the Court has advocated in the past.³¹³ These controlled choice plans presented genuine opportunities to promote equity. Insistent on addressing the Fourteenth Amendment in overly formalistic terms, however, the Court missed the opportunity to further the Amendment's purpose and uphold government policies designed to cultivate equality.

Although the Court characterized its decision as an effort to stop racial discrimination,³¹⁴ its decision actually furthers discrimination by preventing school districts from addressing the educational input of segregation, which arguably has the most significant impact on the quality of education for minorities. By denying school districts the opportunity to consider race in making school assignments, the Court acquiesced in denying equal educational opportunity between students attending white or integrated schools and those attending majority-minority schools, while also impeding district efforts to provide minority students with equal access to popular and highly desired schools. In Seattle, for example, the majority of the city's oversubscribed schools were located in predominantly white areas.³¹⁵ Accordingly, school assignment plans based solely on geography and parental selection "disproportionately exclude[d] non-white students from [the] schools of [their parents'] choice."³¹⁶ The Court tempered this outcome in reaffirming its faithfulness to the distinction between de jure and de facto segregation³¹⁷ and its presumption against upholding racial classifications,³¹⁸ all in an effort to give meaning to the Fourteenth Amendment's Equal Protection Clause. The paradox, however, is that the Court impedes the very equality it purports to advance.

V. CONCLUSION

Approximately 1,000 out of 15,000 school systems in the United States currently employ plans that consider race when making school assignments.³¹⁹ Accordingly, the impact of *Parents Involved* is likely to be significant. School-

2007), <http://lsr.nellco.org/cgi/viewcontent.cgi?article=1075&context=cornell/lsrc> (citing the Court's concerns about federalism, unintended consequences, and practicality as reasons for its refusal to "restructure . . . the nation's school finance system").

313. *See, e.g.*, *Missouri v. Jenkins*, 515 U.S. 70, 138 (1995) (Thomas, J., concurring) ("Usurpation of the traditionally local control over education not only takes the judiciary beyond its proper sphere, it also deprives the States and their elected officials of their constitutional powers."); *Freeman v. Pitts*, 503 U.S. 467, 490 (1992) ("[L]ocal autonomy of school districts is a vital national tradition." (quoting *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 410 (1977) (internal quotation marks omitted))).

314. "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race." *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2768 (2007) (plurality opinion).

315. Brief for Respondents No. 908, *supra* note 4, at 1–2.

316. *Id.* at 33.

317. *Parents Involved*, 127 S. Ct. at 2761 (plurality opinion).

318. *Id.* at 2751 (majority opinion) (citations omitted).

319. Amit R. Paley & Brigid Schulte, *Court Ruling Likely to Further Segregate Schools, Educators Say*, WASH. POST, June 30, 2007, at A4.

assignment litigation has already begun,³²⁰ validating Justice Breyer's prediction that the majority decision threatened to disrupt the "present calm" with "race related litigation."³²¹ In addition to spurring litigation, the Court's decision has created yet another obstacle to the genuine and lasting integration that is necessary for the adequate education of all children. In light of social science data that elucidates the negative impact of segregation on minority students' educational outcomes,³²² the Court's decision has also rejected *Brown I*'s legacy of equal educational opportunity for minority students.³²³

In the wake of *Parents Involved*, socioeconomic integration has received renewed attention as a race-neutral plan that the Court would approve.³²⁴ Because racial minorities are disproportionately poor, socioeconomic plans do have the potential to address both the racial and economic isolation of majority-minority schools. School district success in implementing these plans, however, depends on effective plan designs and poverty rates low enough to facilitate the creation of middle class schools. The latter makes the programs' success less likely in high-poverty urban districts unless the plans also incorporate the suburbs. For example, in North Carolina, the Wake County Public School System, which has a districtwide poverty rate of only 24%, has successfully created middle class schools³²⁵ that have improved student achievement.³²⁶ In contrast, the Charlotte-Mecklenburg Schools system implemented a transfer policy that allowed low

320. Less than one month after the Court's decision, a couple in Madison, Wisconsin, sought a court order to allow their child to transfer to a different school in the district. Andy Hall, *Parents Ask Court for Change of Schools: They Want Their Daughter to Attend Kindergarten near the School Where Mom Is a Teacher*, WIS. ST. J., July 28, 2007, at B1. The request was denied previously under Wisconsin's Chapter 220 Integration Program because the transfer would have increased racial imbalance in the originating school. *Id.*

321. *Parents Involved*, 127 S. Ct. at 2800 (Breyer, J., dissenting).

322. See discussion *supra* Part II.A–B.

323. *Id.* at 2800–01. Nor are the case's original litigators blind to the warping of *Brown I*'s legacy. In establishing support for the Court's position, Justice Roberts quoted one of the lawyers in *Brown I*, Robert L. Carter: "[N]o state has any authority under the [E]qual [P]rotection [C]lause of the Fourteenth Amendment to use race as a factor in affording educational opportunities among its citizens." *Id.* at 2767–68 (plurality opinion) (citation omitted) (internal quotation marks omitted). Roberts characterized the statements as unambiguous. *Id.* at 2768. Now-federal-district-court-judge, the Honorable Robert L. Carter, in reacting to the Court's opinion in *Parents Involved*, challenged this interpretation, explaining that because race was only used to deny equal opportunity to Blacks in the 1950s, Roberts's current use of the statement to strike down integration programs "stand[s] that argument on its head." Liptak, *supra* note 295 (internal quotation marks omitted). Similarly, Jack Greenberg, who worked for the plaintiffs in *Brown I*, characterized Roberts's interpretation as "preposterous" because *Brown I* was concerned with the marginalization of Blacks. *Id.* (internal quotation marks omitted).

324. See, e.g., Jonathan D. Glater & Alan Finder, *School Diversity Based on Income Segregates Some*, N.Y. TIMES, July 15, 2007, at A24 (describing the programs in various cities in California, North Carolina, and Massachusetts that have implemented school assignment plans that use class, instead of race, to integrate the cities' schools); Smrekar, *supra* note 301 (analyzing the feasibility of integration by class).

325. 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?, *supra* note 69, at 261, 270–76. The district assigns students so that schools have no more than 40% low income students and no more than 25% low-achieving students. *Id.* at 270.

326. The percentage of black students in grades three through eight who scored at grade level on state reading tests rose from 40% in 1995 to 82% in 2006. Glater & Finder, *supra* note 324.

income students to transfer to middle class schools if they attended a “high-poverty, low-performing school”;³²⁷ limits on seat availability, however, impeded the plan’s success.³²⁸ Moreover, socioeconomic integration plans do not necessarily create racially and ethnically diverse schools.³²⁹ Seattle’s school board realized this when it considered substituting poverty for race in its plan.³³⁰ As a result, socioeconomic integration cannot provide the important “attitudinal and civic”³³¹ benefits associated with racial integration, nor will it insulate racially identifiable majority-minority schools from racial bias.

Alternatives, however, are limited, and scholars may be correct in suggesting that it is time to support race-neutral plans that are not subject to the Court’s review,³³² particularly because significant changes to the composition of the Roberts’ Court in the near future are unlikely. The Roberts Court has maintained the Supreme Court’s problematic education jurisprudence in ignoring the necessity of integration as an input for adequate education of black and Latino children, obstructing all practical efforts to achieve integration and turning a blind eye to the racial inequalities perpetuated by its decisions. Unfortunately, for the Court in recent years, this is business as usual.

327. *Id.*

328. *Id.*

329. *See id.*

330. Brief for Respondents No. 908, *supra* note 4, at 41. The school board rejected “economic disadvantage” as a proxy for race, noting that “low-income white students in the north end [of the city] could fill all of the over-subscribed north end schools, and eliminate any opportunity for non-white students in the south end to attend those schools.” *Id.* The same problem has surfaced in San Francisco, where public schools are resegregating by race and ethnicity despite socioeconomic integration. *See* Glater & Finder, *supra* note 324. School officials there have noted two issues that have resulted in resegregation: (1) continued application by students to neighborhood schools that “do not recruit enough students from outside their area”; and (2) the low income status of public school students overall, “whatever their race or ethnicity.” *Id.*

331. HORN & KURLAENDER, *supra* note 146, at 5.

332. *See, e.g.*, Eboni S. Nelson, Parents Involved & Meredith: *A Prediction Regarding the (Un)Constitutionality of Race-Conscious Student Assignment Plans*, 84 DENV. U. L. REV. 293, 326–28 (2006) (advocating that school officials, in light of the Court’s desegregation jurisprudence, should consider race-neutral methods to attain diversity in schools); Derrick Bell, *Desegregation’s Demise*, CHRON. HIGHER EDUC. (Wash., D.C.), July 13, 2007, at B11 (urging civil rights groups to “recognize and support” afterschool and supplementary programs that are successfully eliciting academic success from previously low-achieving students “not as a surrender of their integration goals, but as an acknowledgment that flexibility is needed in fulfilling the schooling needs of black and Latino children in today’s conservative political landscape”).