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## **The Uncertain Future of School Desegregation and the Importance of Goodwill, Good Sense, and a Misguided Decision**

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# ARTICLES

## THE UNCERTAIN FUTURE OF SCHOOL DESEGREGATION AND THE IMPORTANCE OF GOODWILL, GOOD SENSE, AND A MISGUIDED DECISION

*Derek W. Black<sup>+</sup>*

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### I. INTRODUCTION

Today may be the most uncertain time we have ever experienced in school desegregation. The Court's past decisions have always provided a basis to predict the future with some reasonable certainty because desegregation was

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largely in the hands of the federal courts and government. Some decisions expanded desegregation, most contracted it, but we always knew that courts would deal with school districts in one of two ways. They would either force a district to continue desegregating within the Court's most recent parameters or they would relieve a district of its obligation because the district's circumstances no longer fell within the Court's parameters. Moreover, we could generally predict the type of districts that would fall on either side of these parameters.

Today all certainty as to desegregation is gone. Only half of the school districts that were under direct court order in the mid 1980s are still under court order,<sup>1</sup> and courts are placing only minimal requirements on those that remain under court orders.<sup>2</sup> The days of court supervision are numbered. The relative inactivity and passivity of these cases are probably best illustrated by the fact that the Court's last school desegregation case was more than a decade ago.<sup>3</sup> Before this, the Court's docket swelled with desegregation cases.<sup>4</sup> Now, after a decade of inactivity, the Court decided *Parents Involved in Community Schools v. Seattle School District No. 1*,<sup>5</sup> but for the first time failed to provide a clear path forward for desegregation.

In some respects, the future is beyond the Court's control because the case involved voluntary rather than mandatory desegregation.<sup>6</sup> *Parents Involved* highlights a reversal of fortune, where desegregation rests largely on the goodwill of school districts. With the increasingly dwindling number of mandatory desegregation cases, future desegregative efforts are becoming a matter of discretion for the vast majority of districts. Whether school districts will summon the leadership necessary to continue the pursuit of *Brown v. Board of Education's*<sup>7</sup> promise is unknown.

Prior to the decision in *Parents Involved*, however, many thought a decision striking down the voluntary efforts of Seattle and Louisville would likely

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1. Department of Justice data shows that the United States was a party to roughly half as many desegregation lawsuits in 2007 as in 1984. U.S. COMM. ON CIV. RTS., BECOMING LESS SEPARATE? SCHOOL DESEGREGATION, JUSTICE DEPARTMENT ENFORCEMENT, AND THE PURSUIT OF UNITARY STATUS, at 22–23 (2007), [http://www.usccr.gov/pubs/092707\\_BecomingLessSeparateReport.pdf](http://www.usccr.gov/pubs/092707_BecomingLessSeparateReport.pdf) [hereinafter BECOMING LESS SEPARATE].

2. Wendy Parker, *The Future of School Desegregation*, 94 NW. U. L. REV. 1157, 1160 (2000) [hereinafter Wendy Parker, *School Desegregation*] (arguing that although desegregation litigation was not dead in 2000, most surviving cases suffered from severe neglect).

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

4. For instance, in 1991 and 1992, the Court decided *Board of Education of Oklahoma City Public Schools v. Dowell*, 498 U.S. 237 (1991) and *Freeman v. Pitts*, 503 U.S. 467 (1992) in successive years. The 1960s and 70s represented the height of desegregation litigation. See Mark Chadsey, *Federal Courts and School Desegregation*, 27 T. MARSHALL L. REV. 149, 158 (2002).

5. 127 S. Ct. 2738 (2007).

6. See *id.* at 2746.

7. 347 U.S. 483 (1954).

portend the end of desegregation.<sup>8</sup> Thus, the stakes could not have been higher. In fact, although I did not believe desegregation would necessarily end, I believed that voluntary desegregation efforts were essentially the only viable signs that equitable and desegregated schools could be achieved.<sup>9</sup>

In retrospect, the cases may have been given too much credit. Civil rights advocates, including myself, are so deeply committed to the promise of *Brown* that admitting that it is now beyond our grasp is unnatural. Some of us may have been victims of our own persevering hope, believing that, if the Court would merely affirm these laudable school districts, they would be the exemplary foundation to reverse the trend of resegregation. I am disheartened to admit now that desegregation was effectively dying prior to the decision in *Parents Involved*.<sup>10</sup> No decision would have singlehandedly resurrected desegregation. This is not to say that desegregation need remain on its current course. In fact, schools, states, and courts still have the power to integrate and equalize schools.<sup>11</sup> What they too often lack is the will. Half-hearted efforts, although symbolic, are equivalent to doing nothing at all. Thus, the future of desegregation is uncertain today. Will the nation turn its back on desegregation or pursue it anew? This time we do not know because the power rests in the hands of fifty states and more than ten-thousand school districts rather than the the Supreme Court, which has long since refused to mandate effective desegregation.<sup>12</sup>

Justice Kennedy's concurring opinion in *Parents Involved* only bears significance on this matter in two respects. First, his opinion sends a message to school districts about the wisdom of pursuing desegregation. On this point, his opinion is both encouraging and discouraging. It praises the educational interest schools have in desegregation,<sup>13</sup> but it also suggests schools will have a

8. See, e.g., Goodwin Liu, *Seattle and Louisville*, 95 CAL. L. REV. 277, 277 (2007) (positing that the Court may "write . . . the final chapter of the constitutional and cultural legacy of *Brown* in public education" when it decides *Parents Involved*).

9. Brief of the Civil Rights Clinic at Howard University School of Law as Amicus Curiae in Support of Respondents at 20–21, *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738 (2007) (Nos. 05-908 & 05-915), 2006 WL 2927072.

10. Reflecting on his experiences with the NAACP Legal Defense Fund, Dennis Parker remarks that the end of desegregation has been declared numerous times, only to persevere on. Dennis D. Parker, *Are Reports of Brown's Demise Exaggerated? Perspectives of a School Desegregation Litigator*, 49 N.Y.L. SCH. L. REV. 1069, 1069 (2005). *Parents Involved*, however, involved a fundamentally different question than all previous cases because the Court has grown so conservative that the issue is no longer whether desegregation can be compelled but whether voluntary desegregation can be prohibited.

11. See, e.g., Erwin Chemerinsky, *The Segregation and Resegregation of American Public Education: The Courts' Role*, 81 N.C. L. REV. 1597, 1599–1602 (2003) (discussing the failures of desegregation, but arguing that the federal government, states, and courts have the power to desegregate schools).

12. See *id.* at 1600–01 (asserting that "[t]he resegregation of schools is largely a result of the [Supreme] Court's decisions").

13. *Parents Involved*, 127 S. Ct. at 2788.

heavy burden to carry in devising a plan that he would deem appropriately tailored to that interest.<sup>14</sup> Second, Justice Kennedy's opinion will become relevant if and when school districts summon the will to aggressively desegregate. At that point, his opinion will unfortunately constrain rather than embolden them.

The remainder of this Article primarily addresses the rationale, constraints, and effect of Justice Kennedy's opinion. This Article is divided into three parts: where we were, where we are, and where we are going. The first part explores the legal history of desegregation, the extent to which desegregation has occurred, the problems that currently beleaguer predominantly minority schools, and the precedential value of *Grutter v. Bollinger*<sup>15</sup> in addressing these problems. The second part describes and analyzes Justice Kennedy's opinion in *Parents Involved*, pointing out how it diverges from *Grutter* and confuses desegregation with diversity. This Article, however, also acknowledges that a more forgiving reading of Kennedy's opinion is plausible. Part three assesses the constraints his opinion would place on districts that choose to desegregate and the options that may be available to them.

## II. THE HOPES AND HISTORY OF DESEGREGATION: THE ROAD TO SEATTLE AND LOUISVILLE

### A. *At the End of a Long, Slow Torturing of Brown*

Since the mid- and late-1970s, the Supreme Court has consistently undermined aggressive and effective desegregation. The Court's most forceful precedents in favor of school desegregation came in 1968 and 1971 in *Green v. County School Board*<sup>16</sup> and *Swann v. Charlotte Mecklenburg Board of Education*.<sup>17</sup> But just two years after *Swann* the Court began to limit school desegregation. In *Keyes v. School District No. 1*,<sup>18</sup> the Court distinguished de facto from de jure segregation, holding that de facto segregation was of no constitutional concern and courts had no power to remedy it.<sup>19</sup> This holding forced victims of segregation to prove that segregation was the result of the school system's intentionally discriminatory acts.<sup>20</sup> Proving intentional

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14. *Id.* at 2789–91.

15. 539 U.S. 306 (2003).

16. 391 U.S. 430 (1968).

17. 402 U.S. 1 (1971).

18. 413 U.S. 189 (1973).

19. *Id.* at 208 (emphasizing that de jure segregation required a “purpose or intent to segregate”). The Court held that without the requisite intent there was no constitutional violation, and thus “no basis for judicially ordering assignment of students on a racial basis.” *Id.* at 212 (quoting *Swann*, 402 U.S. at 28).

20. *Id.* at 208 (“[W]e hold that a finding of intentionally segregative school board actions . . . creates a presumption that other segregated schooling within the system is not adventitious. It establishes, in other words, a prima facie case of unlawful segregative design on the part of school authorities . . .”).

discrimination or de jure segregation, however, can be difficult, particularly in northern school districts that never passed laws explicitly mandating segregation.<sup>21</sup> Although common sense dictates that almost all school segregation was generally a product of state action<sup>22</sup> and at least four members of the Supreme Court would agree,<sup>23</sup> plaintiffs who fail to demonstrate state action have no recourse for segregated and unequal schools.

One year after *Keyes*, the Court placed further limits on desegregation in *Milliken v. Bradley*, holding that even when a plaintiff demonstrates intentional school segregation, the remedy cannot reach beyond the school district boundaries unless the plaintiff also demonstrates that schools outside those boundaries collaborated in segregation.<sup>24</sup> Such evidence, however, is often scarce. Thus, in school districts such as Detroit, where the school district was nearly all black and most whites had moved to the suburbs, taking their tax dollars with them,<sup>25</sup> courts are powerless to provide an integrative remedy. In addition, *Milliken* signaled to whites that they could avoid desegregation and

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21. See *Parent Ass'n of Andrew Jackson High Sch. v. Ambach*, 598 F.2d 705, 712 (2d Cir. 1979) (reversing a desegregation order for the achievement of racial balance in suburban New York and stating, "our authority to order remedial action depends upon a determination that the state, by law (de jure), has discriminated on the basis of race or color in violation of federal law"); *Pride v. Cmty. Sch. Bd. of Brooklyn*, 482 F.2d 257, 265 (2d Cir. 1973) (denying injunctive relief for the parents of black and non-white students residing in public housing in a New York school district and stating that the "plaintiffs had failed to adduce evidence to support . . . either intent to discriminate or a de facto discriminatory effect"); *Brody-Jones v. Macchiarola*, 503 F. Supp. 1185, 1243 (E.D.N.Y. 1979) (holding that segregation at the middle-level of a Queens, New York, school district was the result of school assignment-based housing patterns and not actionable de facto segregation); *Spencer v. Kugler*, 326 F. Supp. 1235, 1243 (D.N.J. 1971) (granting a New Jersey school district's motion to dismiss, stating "that a federal court is precluded, by Title IV of the Civil Rights Act of 1964 and also by the unanimous opinion of the Supreme Court, from imposing upon school authorities the affirmative duty to cure racial imbalance in the situation of 'de facto' segregation described herein" (citation omitted)) *aff'd*, 404 U.S. 1027 (1972); see also Chemerinsky, *supra* note 11, at 1610 (discussing the difficulty of proving intent in northern school districts and noting that "requiring proof of a discriminatory purpose created a substantial obstacle to desegregation").

22. See *Keyes*, 413 U.S. at 227–28 (Powell, J., concurring in part and dissenting in part) (arguing that the distinction between de facto and de jure segregation was meaningless because all schools are creatures of the state and have the power to control and maintain the segregation that exists in schools).

23. Although the dissenters in *Parents Involved* do not argue that the schools *must* remedy de facto segregation, they find little meaning in the distinction in so far as the issue is whether the schools *can* remedy it. See *Parents Involved*, 127 S. Ct. at 2802 (Breyer, J., dissenting) (finding "de facto segregation . . . meaningless in the present context," with Stevens, Souter, and Ginsburg, JJ., joining).

24. *Milliken v. Bradley*, 418 U.S. 717, 744–45 (1974).

25. See Mark C. Rahdert, *Obstacles and Wrong Turns on the Road From Brown*: *Milliken v. Bradley and the Quest for Racial Diversity in Education*, 13 TEMP. POL. & CIV. RTS. L. REV. 785, 800–01 (2004).

build exclusive enclaves by simply moving across the school district line.<sup>26</sup> In that respect, *Milliken* likely exacerbated segregation.<sup>27</sup>

In more recent cases, rather than simply limiting the effect of desegregation, the Court has established principles by which to bring it to an end.<sup>28</sup> For instance, the Court held in *Freeman v. Pitts* that school districts, in most instances, will be relieved of their desegregative responsibility if they can establish that demographic changes occurred within their district during desegregation.<sup>29</sup> Relying on these holdings, lower courts increasingly granted school districts “unitary status” and lifted court orders mandating desegregation.<sup>30</sup> Those courts that have retained supervision over schools generally make minimal demands, if any at all, for desegregation.<sup>31</sup> The practical effect of the Court’s jurisprudence is borne out by the Department of Justice’s declining involvement in school desegregation. Since the 1960s, the Department of Justice has been a leading force in desegregating schools.<sup>32</sup> By 1984, it had a total of 525 active school desegregation cases.<sup>33</sup> By May 2007, however, that number had fallen to 266.<sup>34</sup>

26. See *id.*; Chemerinsky, *supra* note 11, at 1608.

27. Chemerinsky, *supra* note 11, at 1607–09 (“[I]n many areas the *Milliken* holding makes desegregation impossible.”).

28. For a brief discussion of cases beyond *Freeman v. Pitts*, see Chemerinsky, *supra* note 11, at 1615–19.

29. *Freeman v. Pitts*, 503 U.S. 467, 495–96 (1992).

30. See, e.g., *NAACP v. Duval County Sch.*, 273 F.3d 960, 971 (11th Cir. 2001) (affirming unitary status and agreeing with the district court’s finding that “the NAACP was unable to demonstrate that the continued existence of identifiably black schools . . . is a vestige of *de jure* segregation”); *Manning ex rel. Manning v. Sch. Bd. of Hillsborough County*, 244 F.3d 927, 929 (11th Cir. 2001) (reversing the district court and finding unitary status); *Reed v. Rhodes*, 179 F.3d 453, 465 (6th Cir. 1999) (“[T]he district court . . . ordered that Defendants are entitled to a declaration of unitary status . . . . We are satisfied that the district court did not err . . . .”); *Lockett v. Bd. of Educ. of Muscogee County Sch. Dist.*, 111 F.3d 839, 844 (11th Cir. 1997) (*per curiam*) (affirming the district court’s declaration of unitary status); *Hampton v. Jefferson County Bd. of Educ.*, 102 F. Supp. 2d 358, 360 (W.D. Ky. 2000) (declaring unitary status in areas found segregated in 1970–74); *Davis v. Sch. Dist. of Pontiac*, 95 F. Supp. 2d 688, 697 & n.12 (E.D. Mich. 2000) (granting private party’s motion to dissolve twenty-five year old desegregation decree).

31. See, e.g., *Lee v. Lee County Bd. of Educ.*, No. 3:70cv845-MHT, 2006 WL 1041994, at \*5 (M.D. Ala. Apr. 20, 2006) (articulating the terms of a consent decree by which the school district is required to comply with monitoring of its programs and activities in furtherance of desegregation); *BECOMING LESS SEPARATE*, *supra* note 1, at 12 (indicating that some schools do not even know the extent to which they are still bound by old desegregation orders); Wendy Parker, *School Desegregation*, *supra* note 2, at 1160 (“[M]ost cases suffer from extreme neglect—little activity will occur for years, if not decades, but the court-ordered remedies remain in place. The clear majority of school districts appear content with their outstanding court orders.”).

32. See *BECOMING LESS SEPARATE*, *supra* note 1, at 22 (noting that in the early 1970s the Department of Justice “reported that it was supervising 235 education cases”).

33. *Id.*

34. *Id.* at 23.

Court-ordered desegregation cannot operate in perpetuity. At some point, courts must return autonomy to local authorities. This return, however, is predicated on the elimination of racialized and unequal schools. Unfortunately, many districts have never fully accomplished this task.<sup>35</sup> In fact, the gains that were made during the first decades of desegregation have all but evaporated. Over the past decade and a half, schools across the nation have rapidly resegregated.<sup>36</sup> Many public schools are as segregated today as they were in the early 1970s, when serious desegregation began.<sup>37</sup>

For instance, when the Supreme Court authorized the lower courts to grant Oklahoma City unitary status in 1991, the average black student attended a school that was 68% minority.<sup>38</sup> By 2001, that number increased to 79%.<sup>39</sup> If ending court supervision was appropriate at the time of decision, courts cannot be blamed for resegregation that occurs after the fact. Many school districts, however, were experiencing and maintaining significant school segregation at the time the courts withdrew their supervision. For instance, in Duval County, Florida, the percentage of schools that were racially identifiable (exceeding a 75% African American student population) had ranged from 18 to 21% during the final years of court-mandated desegregation.<sup>40</sup> In 2001, the Eleventh Circuit Court of Appeals affirmed the dissolution of the desegregation decree even though twenty-six schools in the county remained racially identifiable.<sup>41</sup> More simply, thirty years of court-ordered desegregation only reduced the number of racially identifiable schools in the county by three.<sup>42</sup> Unfortunately, these school districts are but examples of a pattern rather than exceptions.<sup>43</sup>

### *B. In the Midst of Meek Desegregation Plans*

Many school districts learned the lesson of *Brown* even if they did not achieve its full promise.<sup>44</sup> In addition to Louisville and Seattle, several school districts have recognized the role of integrated schools in delivering equitable

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35. See GARY ORFIELD & CHUNGMEI LEE, *BROWN AT 50: KING'S DREAM OR PLESSY'S NIGHTMARE?* 38 tbl.20 (Civ. Rts. Proj. 2004), available at <http://www.civilrightsproject.ucla.edu/research/reseg04/brown50.pdf> (showing that in all but five cases where the court declared a district unitary between 1990 and 2002, black-white exposure has fallen in the school district).

36. See *id.* at 4.

37. *Id.* at 18-20 & tbls. 7 & 8.

38. *Id.* at 37.

39. *Id.*

40. NAACP v. Duval County Sch., 273 F.3d 960, 969 (11th Cir. 2001).

41. *Id.* at 962, 969.

42. *Id.* at 969.

43. ORFIELD & LEE, *supra* note 35, at 35-39.

44. See Derek W. Black, *Beyond Brown: Its Impact Upon American Education and Culture*, NAT'L BAR ASS'N MAG., Mar.-Apr. 2004, at 14, 15 ("Despite setbacks, disappointments and the continued existence and prevalence of racial oppression, *Brown* has succeeded in changing our nation's basic understanding of racial injustice.").



educational opportunities, and some have voluntarily implemented student assignment plans aimed at reducing segregation.<sup>45</sup> Predicting that a court would dissolve their desegregation decree were it to revisit the issue, other school districts have attempted to remain quietly beneath the attention of district courts and adverse parents.<sup>46</sup> Unfortunately, too few schools have a serious and continuing commitment to desegregation. The trend of resegregation is too widespread to be counterbalanced by the efforts of the few.

Even among most of the willing, the effort to desegregate is too meek. With the exception of school districts such as Louisville, Seattle, and Lynn, Massachusetts,<sup>47</sup> which have explicitly used race to ensure significant levels of stabilized desegregation,<sup>48</sup> most voluntarily desegregating school districts announce a commitment to desegregation, but fail to implement the aggressive practical measures necessary to achieve desegregation.<sup>49</sup> In fact, of those voluntarily desegregating districts with the most publicized plans, most do not even use race as a factor in student assignments, and the others use it only

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45. See, e.g., *Comfort v. Lynn Sch. Comm.*, 418 F.3d 1, 7 (1st Cir. 2005) (adjudicating one public school district's voluntary desegregation program); Brief of the Council of the Great City Schools as Amici Curiae in Support of Respondents at 3, *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738 (2007) (Nos. 05-908 & 05-915); see also NAACP LEGAL DEF. EDUC. FUND, INC., *LOOKING TO THE FUTURE: VOLUNTARY K-12 SCHOOL INTEGRATION; A MANUAL FOR PARENTS, EDUCATORS, AND ADVOCATES* 20-25 (2005), available at [http://www.civilrightsproject.ucla.edu/resources/manual/deseg\\_mamanu.php](http://www.civilrightsproject.ucla.edu/resources/manual/deseg_mamanu.php) [hereinafter *LOOKING TO THE FUTURE*] (discussing various voluntary desegregation strategies).

46. See *BECOMING LESS SEPARATE*, *supra* note 1, at 12; see also *Assessing the Impact of Judicial Taxation on Local Communities: Hearing Before the Subcomm. on Admin. Oversight and the Courts of the Sen. Comm. on the Judiciary*, 104th Cong. 24 (1996) (statement of Alfred A. Lindseth, outside counsel for the State of Missouri) (suggesting that some schools wish to stay under court order so that they can continue to receive supplemental funding for desegregation).

47. For a description of Lynn's plan, see *Comfort ex rel. Neumyer v. Lynn Sch. Comm.*, 283 F. Supp. 2d 328, 347-50 (D. Mass. 2003), *aff'd*, 418 F.2d 1 (1st Cir. 2005).

48. See *Parents Involved*, 127 S. Ct. at 2746-47 (discussing Seattle School District No. 1's policy of using race as an alternative "'tiebreaker' to determine who will fill the open slots at the oversubscribed school"); *id.* at 2749 (discussing the Louisville school board's assignment plan "requir[ing] all nonmagnet schools to maintain a minimum black enrollment of 15 percent, and a maximum black enrollment of 50 percent"); *Comfort*, 418 F.3d at 6 ("Students who do not wish to attend their neighborhood school may apply to transfer to another school. Approval of a transfer depends, in large part, on the requesting student's race and the racial makeup of the transferor and transferee schools.").

49. Of the case studies presented in a recent Civil Rights Project report, only two of the seven voluntarily desegregating schools were maintaining significant levels of integration. NAACP LEGAL DEF. & EDUC. FUND, INC., *STILL LOOKING TO THE FUTURE: VOLUNTARY K-12 SCHOOL INTEGRATION; A MANUAL FOR PARENTS, EDUCATORS & ADVOCATES*, 46-58 (2008) [hereinafter *STILL LOOKING TO THE FUTURE*]. However, those two districts, Wake County, North Carolina, and Berkeley, California, have unique demographic factors that are contributing to their effectiveness. Berkeley, for instance, is a relatively small school district of less than 10,000 students and has a multiracial population with no predominant ethnicity. *Id.* at 46.

minimally.<sup>50</sup> Although these approaches may stave off litigation, they can also stave off desegregation. Without race, schools lack any measure to ensure desegregation. Race-neutral plans theoretically could produce integrated schools, but by leaving so much to chance and parental prerogative, most produce very few, if any, integrated schools in practice.<sup>51</sup>

For instance, the San Francisco Unified School District relies on parental choice, geographic proximity, extreme poverty, socioeconomic status, academic achievement, and home language to assign students, but it does not consider race.<sup>52</sup> Moreover, it continues to exclude race as a factor even though segregation is otherwise out of its control.<sup>53</sup> As the United States District Court for the Northern District of California flatly put it, “the district has become increasingly resegregated” since initiating this plan.<sup>54</sup> The same can be said of Charlotte-Mecklenburg, which relies on various factors other than race,<sup>55</sup> while watching its schools drastically resegregate and academic

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50. See *id.* at 43–61 (revealing that only three out of seven of the voluntary desegregation plans use race as a factor). Cambridge Public Schools list race as a factor, but do not use it. *Id.* at 52–53. The “vast majority” of schools nationally do not use race as a factor in allocating students. James E. Ryan, *The Supreme Court and Voluntary Integration*, 121 HARV. L. REV. 131, 144–45 (2007) (“[E]ven if we accept the highest estimate—that roughly 1,000 school districts make some use of race when assigning students—that still leaves approximately 15,000 school districts that do not.”).

51. See NAT’L ACAD. OF EDUC., RACE-CONSCIOUS POLICIES FOR ASSIGNING STUDENTS TO SCHOOLS: SOCIAL SCIENCE RESEARCH AND THE SUPREME COURT CASES 3 (2007) (discussing research presented in amicus briefs in *Parents Involved* and concluding that “[t]he research cited in the briefs, however, suggests that—although assignments made on the basis of socioeconomic status are likely to marginally reduce racial isolation and may have other benefits—none of the proposed alternatives is as effective as race-conscious policies for achieving racial diversity”); Michael J. Kaufman, *PICS in Focus: A Majority of the Supreme Court Reaffirms the Constitutionality of Race-Conscious School Integration Strategies*, 35 HASTINGS CONST. L.Q. 1, 16–17 (2007) [hereinafter Kaufman, *PICS in Focus*] (citing findings from a Department of Education report that demonstrated the ineffectiveness of the race-neutral, socioeconomic-based plans from Charlotte-Mecklenburg, North Carolina, Wake County, North Carolina, San Francisco, California, Brandywine, Delaware, and La Crosse, Wisconsin); Michael J. Kaufman, *Reading, Writing, and Race: The Constitutionality of Educational Strategies Designed to Teach Racial Literacy*, 41 U. RICH. L. REV. 707, 734–36 (2007) [hereinafter Kaufman, *Reading, Writing, and Race*] (discussing several race-neutral methods and their inability to achieve meaningful desegregation); see also Christina H. Rossell, *The Convergence of Black and White Attitudes on School Desegregation Issues During the Four Decade Evolution of the Plans*, 36 WM. & MARY L. REV. 613, 628 (1995) (“In general, only minority students participate . . . because, even today, whites will not voluntarily transfer to schools in minority neighborhoods without an incentive . . .”).

52. San Francisco Unified School District, Student Assignment System, <http://portal.sfusd.edu/template/default.cfm?page=policy.placement.process> (last visited Aug. 4, 2008).

53. *S.F. NAACP v. S.F. Unified Sch. Dist.*, 413 F. Supp. 2d 1051, 1058 (N.D. Cal. 2005).

54. *Id.* at 1059.

55. STILL LOOKING TO THE FUTURE, *supra* note 49, at 50.

achievement decline.<sup>56</sup> In short, most voluntary desegregation plans serve an important symbolic purpose, and the best among them are worthy of admiration and replication, but both their individual and aggregate effect is generally small.

Yet, in schools' defense, lower courts have previously rejected various student assignment plans that rely on race.<sup>57</sup> The risk-averse nature of schools make many unwilling to push the boundaries of these prior cases. Thus, the meekness, or entire absence in some instances, of desegregation plans may be more attributable to the courts than the schools.

### C. In a Place Where Race Still Matters

Justice Kennedy wrote that "[t]he enduring hope is that race should not matter; the reality is that too often it does."<sup>58</sup> What he did not explore is why race matters, which raises the question of whether he, like too many others, simply misunderstands the current motivation for school desegregation. Desegregated schools are important not because black students sit next to white students, although significant educational and cultural benefits for both whites and blacks flow from this interracial exposure.<sup>59</sup> Rather, integrated schools ensure that minority students have access to the basic components of a quality education: good teachers, adequate school funding, and middle class peers.<sup>60</sup> Most minority students do not have consistent access to these

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56. See Roslyn Arlin Mickelson, *The Incomplete Desegregation of the Charlotte-Mecklenburg Schools and Its Consequences, 1971-2004*, in *SCHOOL RESEGREGATION: MUST THE SOUTH TURN BACK?* 87, 88, 91-93 (John Charles Boger & Gary Orfield eds., 2005).

57. See, e.g., *Tuttle v. Arlington County Sch. Bd.*, 195 F.3d 698, 707 (4th Cir. 1999) (rejecting the use of race as an additional weighing factor in a lottery assignment plan); *Wessmann v. Gittens*, 160 F.3d 790, 791-92 (1st Cir. 1998) (holding that the consideration of race in admissions at the Boston Latin School for the purposes of achieving diversity was not narrowly tailored).

58. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2791 (2007) (Kennedy, J., concurring in part and concurring in the judgment).

59. See, e.g., Derek Black, *The Case for the New Compelling Government Interest: Improving Educational Outcomes*, 80 N.C. L. REV. 923, 943-47 & nn.151-56 (2002) (discussing numerous research findings of the benefits of racial diversity in education, stating, "[t]hese benefits include better teaching and learning, improved civic values, increased employment opportunities, and higher achievement and more educational opportunities" (footnotes omitted)); Joanna R. Zahler, Note, *Lessons in Humanity: Diversity as a Compelling State Interest in Public Education*, 40 B.C. L. REV. 995, 1021-28 (1999) (discussing the positive lasting effects of attending integrated schools on both African American and Caucasian students); see also John Friedl, *Making a Compelling Case for Diversity in College Admissions*, 61 U. PITT. L. REV. 1, 30-31 (1999) (finding only anecdotal assertions supporting the contention that integrated schools have lasting beneficial effects on the students who attend them).

60. See, e.g., Myron Orfield, *Choice, Equal Protection, and Metropolitan Integration: The Hope of the Minneapolis Desegregation Settlement*, 24 LAW & INEQ. 269, 282 (2006) ("Schools of concentrated poverty offer fewer resources, weaker educational preparation, and 'substantially lower overall achievement levels.' Compounded by racial isolation, segregated schools prevent access to the social contacts and cultural familiarity 'necessary for career and educational

components.<sup>61</sup> Not only are public schools racially segregated, they are unequal. As a general matter, racially isolated minority schools are inadequate when measured by these components of quality.

Research confirms what is intuitive to the candid observer: quality teachers are one of the most, if not the most, important factors in the academic success of students.<sup>62</sup> Although many excellent teachers choose to work in predominantly minority schools, these schools have too few of these quality teachers. In terms of experience, higher degrees, and credentials, racially isolated minority schools tend to have less qualified teachers than predominantly white schools.<sup>63</sup> Similarly, compared with predominantly white schools, minority schools lack sufficient financial resources and cost more to operate.<sup>64</sup> As a result of the methods by which states finance schools and the urban areas where most minority schools are located, racially isolated minority schools inevitably have more needs than other schools.<sup>65</sup> Nevertheless, minority schools receive even less funding to meet these needs.<sup>66</sup> In 2005, for example, average state spending per pupil in high-minority schools was \$877

advancement,' especially for Black children." (footnote omitted) (quoting Jacinda Ma & Michael Kurlaender, *The Future of Race-Conscious Policies in K-12 Public Schools*, in SCHOOL RESEGREGATION: MUST THE SOUTH TURN BACK?, *supra* note 56, at 239, 248)); Sharon Elizabeth Rush, *The Heart of Equal Protection: Education and Race*, 23 N.Y.U. REV. L. & SOC. CHANGE 1, 4 (1997) (discussing how a reading of the Supreme Court's integration jurisprudence, combined with the decision in *Brown*, is evidence of the Court's acceptance of the notion that "equality [is] tied to quality").

61. See *infra* notes 65–78 and accompanying text.

62. DAN GOLDBABER & EMILY ANTHONY, TEACHER QUALITY AND STUDENT ACHIEVEMENT, EDUC. RESOURCES INFO. CTR. 1 (ERIC Clearinghouse on Urban Educ., Urban Diversity Series No. 115, 2003) (writing that recent research shows "teacher quality is the most important educational input predicting student achievement"); STILL LOOKING TO THE FUTURE, *supra* note 49, at 20; UNC CTR. FOR CIV. RTS., THE SOCIOECONOMIC COMPOSITION OF THE PUBLIC SCHOOLS: A CRUCIAL CONSIDERATION IN STUDENT ASSIGNMENT POLICY 4 (2005), available at <http://www.law.unc.edu/civilrights/briefs/charlottereport.pdf> (discussing research on the effect good teachers have on student achievement).

63. See ERIC A. HANUSHEK ET AL., WHY PUBLIC SCHOOLS LOSE TEACHERS 12 & tbl.3 (Nat'l Bureau of Econ. Res., Working Paper No. 8599, 2001) (finding in a study of teacher transfers in Texas "strong evidence that teachers systematically favor higher achieving, non-minority, non-low income students"); STILL LOOKING TO THE FUTURE, *supra* note 49, at 21; James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249, 294 (1999).

64. Ryan, *supra* note 63, at 284.

65. See, e.g., *Abbott ex rel. Abbott v. Burke*, 693 A.2d 417, 433–37 (N.J. 1997) (discussing the unusually high costs inner city schools confront and the untenable position in which it places them given the school funding structure).

66. CARMEN G. ARROYO, THE FUNDING GAP 1 (The Educ. Trust 2008) available at <http://www2.edtrust.org/NR/rdonlyres/5AF8F288-949D-4677-82CF-5A867A8E9153/0/FundingGap2007.pdf> (listing the funding disparities between districts by race); see also Molly S. McUsic, *The Future of Brown v. Board of Education: Economic Integration of the Public Schools*, 117 HARV. L. REV. 1334, 1351–52 (discussing the higher costs minority districts face and the lower funds they have to meet them).

less than the spending in predominantly white schools.<sup>67</sup> In 2005 in New York, which has a large number of minority students, the gap was more than three times the national average at \$2,902.<sup>68</sup> Such per pupil gaps accumulate to create stark differences. For instance, in a moderately sized New York elementary school of 500 students, the predominantly minority school would have approximately 1.5 million dollars fewer than the predominantly white school.<sup>69</sup> That amount of money could potentially fund the hiring of enough teachers to cut classroom sizes nearly in half or double the salaries of many teachers.<sup>70</sup>

Finally, racially isolated minority schools tend to have high proportions of poor students.<sup>71</sup> Some would argue that this fact is more important than any other in the success or failure of schools.<sup>72</sup> Regardless of race, the concentration of poverty in schools jeopardizes students' chances for academic success. For example, students of all races who attend schools with low levels of poverty score substantially higher on standardized tests than do students who attend high-poverty schools.<sup>73</sup> In fact, one study shows that the size of the

67. ARROYO, *supra* note 66, at 7 tbl.6.

68. *See id.*

69. *See id.*

70. This assumes that the teachers average a salary of no more than \$50,000 per year and that most classrooms average between twenty-five and thirty students. *See* RESEARCH AND INFO. SERVS. DEP'T, AM. FED'N OF TEACHERS, SURVEY AND ANALYSIS OF TEACHER SALARY TRENDS 2005 3 fig.1 (2007), available at <http://www.aft.org/salary/2005/download/AFT2005SalarySurvey.pdf>; Eugene M. Lewit & Linda Schuurmann Baker, *Class Size, THE FUTURE OF CHILDREN*, Winter 1997, at 112, 117 fig.2, available at [http://www.futureofchildren.org/usr\\_doc/vol7no3ART8.pdf](http://www.futureofchildren.org/usr_doc/vol7no3ART8.pdf).

71. RICHARD D. KAHLENBERG, *A NEW WAY ON SCHOOL INTEGRATION* 7 (The Century Found. 2006) [hereinafter KAHLENBERG, *A NEW WAY ON SCHOOL INTEGRATION*].

72. *See, e.g., id.* at 6 (summarizing findings that school performance "appears more closely related to class than race"); John Charles Boger, *Education's "Perfect Storm"? Racial Resegregation, High-Stakes Testing, and School Resource Inequities: The Case of North Carolina*, 81 N.C. L. REV. 1375, 1419 (2003) (discussing findings of a report presented to Congress highlighting the achievement gap found between students in high-poverty and low-poverty schools, and noting the disproportionate number of minority students in high-poverty schools); McUsic, *supra* note 66, 1335 (2004) (arguing the best way to reach the goal of *Brown* is desegregation by economic class); Ryan, *supra* note 63, at 272–96 (discussing the concentration of minorities in center-city schools and the fact that such schools are more expensive to run and tend to be isolated by poverty); Mary Jane Lee, Note, *How Sheff Revives Brown: Reconsidering Desegregation's Role in Creating Equal Educational Opportunity*, 74 N.Y.U. L. REV. 485, 518 (1999) ("While they may disagree as to how to 'sort out the respective weights of the effects of race and class in perpetuating the . . . underclass,' it is indisputable that race and class interact." (footnote omitted)); Alan Gottlieb, *Economically Segregated Schools Hurt Poor Kids, Study Shows*, TERM PAPER (Piton Found.), May 2002 (detailing findings of Piton Foundation research, which "make[] a powerful argument for economic integration of schools").

73. UNC CTR. FOR CIV. RTS., *supra* note 62, at 2–3; *see also* JAMES S. COLEMAN, U.S. DEP'T HEALTH, EDUC. & WELFARE, *EQUALITY OF EDUCATIONAL OPPORTUNITY* 302–10 (1966) ("Attributes of other students [such as poverty] account for far more variation in the achievement of minority group children than do any attributes of school facilities . . ."); KAHLENBERG, *A*

achievement gap between high- and low-poverty schools is equivalent to two years of learning.<sup>74</sup> Similarly, another study found that schools with low levels of poverty are twenty-two times more likely to be high performing than schools with high poverty levels.<sup>75</sup> Moreover, in predicting academic success, whether one attends a school where the students are wealthy or poor is second only to whether one's personal socioeconomic status is high or low.<sup>76</sup> Regardless of individual status, students who attend low-poverty schools perform better than those who attend high-poverty schools.<sup>77</sup> Thus, as a general matter, poor students who attend middle-class schools have higher academic achievement than do middle class students who attend high-poverty schools.<sup>78</sup>

More than 75% of predominantly minority schools are also high-poverty schools.<sup>79</sup> Thus, these students attend schools where their chances of academic success are low. Reports show that only 42% of the students who attend schools composed of 90% minorities graduate on time.<sup>80</sup> From 2004 to 2005 in Baltimore City Public Schools, where nearly three-fourths of the students were poor and 98% of black students attended predominantly minority schools, the graduation rate was a beleaguering 34.6%.<sup>81</sup>

This level of racial segregation, concentration of poverty, and inequity of resources places many school districts in a dangerous position. For instance, schools' recurring failure to meet the achievement requirements of the No Child Left Behind Act threatens their very survival.<sup>82</sup> Their low achievement

NEW WAY ON SCHOOL INTEGRATION, *supra* note 71, at 6 (“[C]oncentrations of poverty . . . are much more likely to adversely affect black students . . .” (internal quotation marks omitted)); McUsic, *supra* note 66, at 1355–56 (“[P]oor students who attend middle-class or wealthy schools do much better [than those in] poor schools.”).

74. Ryan, *supra* note 63, at 285.

75. DOUGLAS N. HARRIS, ENDING THE BLAME GAME ON EDUCATIONAL INEQUITY 22 & n.32 (Ariz. St. Univ. Educ. Pol’y Stud. Lab. ed., 2006), available at <http://www.asu.edu/educ/eps/EPRU/documents/EPSC-0603-120-EPRU.pdf>.

76. KAHLENBERG, A NEW WAY ON SCHOOL INTEGRATION, *supra* note 71, at 6.

77. *Id.* at 6 (“All students . . . perform significantly better in schools with strong middle-class populations than they do in high poverty schools.”); see also UNC CTR. FOR CIV. RTS., *supra* note 62, at 1 (“[M]iddle-income students who attend high-poverty schools earn lower average test scores than do low-income students who attend middle class schools.”).

78. 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?, *supra* note 56, at 128.

79. LOOKING TO THE FUTURE, *supra* note 45, at 13. The manual also noted that “[i]n schools of extreme poverty (in which poor students constitute 90–100% of the population), 80% of the students are black and Latino.” *Id.*

80. *Id.* at 16.

81. STILL LOOKING TO THE FUTURE, *supra* note 49, at 19 tbl.3.

82. See, e.g., Diana Jean Schemo, *Failing Schools Strain to Meet U.S. Standard*, N.Y. TIMES, Oct. 16, 2007, at A1 (“For chronically failing schools . . . , the No Child Left Behind law . . . prescribes drastic measures . . . . Barring revisions in the law, [California] state officials predict that all 6,063 public schools serving poor students will be declared in need of

has also emboldened the call for the privatization of schools, the creation of more charter schools, and the extension of school vouchers.<sup>83</sup> The funding for all of these options would likely be extracted from the current public school funds rather than from increases in the overall expenditures on schools.<sup>84</sup> Of course, the greatest danger is simply to those students who attend these failing schools, as they in reality are left behind, kicked out, or streamlined into the criminal justice system.

All of this is to say that we must do more. We must do far more. The state of most minority students' educational opportunities in this country is woeful. *Brown* called us to confront a similar reality in 1954, but our commitment to addressing it has waned. Although laudable, a few highly committed school districts cannot change the overall reality. Likewise, even if the ranks of voluntarily desegregating schools were to swell, more aggressive efforts will be necessary. The methods and amounts of school funding must change. The allocation and assignment of teaching resources must change. And the widespread assignment of students to economically and racially integrated schools must occur. Plans that simply wish integration to be so will inevitably fall short. Moreover, if we do not make these reassignments, race will continue to matter far more than anyone, regardless of their position on the ideological spectrum, can tolerate.

#### *D. Before a Court Where Context and Judgment Were Supposed to Matter*

Justice O'Connor's opinion in *Grutter v. Bollinger*, in several respects, established a favorable rationale and framework by which to approach the use of race in primary and secondary public school voluntary desegregation efforts. In pertinent part, she held in *Grutter* that race could be used for non-remedial purposes.<sup>85</sup> Prior to *Grutter*, the conservative block of the Court and some lower courts had strongly intimated the contrary—that the state could only use race to remedy its own past discrimination.<sup>86</sup> Justice O'Connor, however, held

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restructuring . . . . California is not the only state overwhelmed by growing numbers of schools that cannot satisfy the law's escalating demands.”).

83. See *Zelman v. Simmons-Harris*, 536 U.S. 639, 682 n.7, 683 & n.9 (2002) (Thomas, J., concurring); see also Harry G. Hutchison, *Liberal Hegemony? School Vouchers and the Future of the Race*, 68 MO. L. REV. 559, 592 (2003) (discussing evidence that voucher programs have been educationally successful for poor African Americans); Aaron Jay Saiger, *School Choice and States' Duty to Support "Public" Schools*, 48 B.C. L. REV. 909, 923 (2007) (discussing the desegregative effects that voucher-supported, charter, and magnet schools can have).

84. See James Forman, Jr., *Do Charter Schools Threaten Public Education? Emerging Evidence from Fifteen Years of a Quasi-Market for Schooling*, 2007 U. ILL. L. REV. 839, 873–74 (discussing the uncertainty of private funding and the increasing number of charter schools seeking additional public funding rather than supplemental private funding).

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

86. See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 226 (1995) (“Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are “benign” or “remedial” and what classifications are in

that institutions of higher education could take race into account to admit a diverse student body and obtain the educational benefits that flow from it, even if the institution was not acting to remedy its own past discrimination.<sup>87</sup> Moreover, in approaching the question of whether the interest was compelling and how an institution may achieve it, she was careful to not step beyond the role of Supreme Court Justice and into the role of educator or policy-maker. She deferred to the educational judgment of the university, writing that the decision of whether to pursue diversity was a "complex educational judgment[]" in an area that lies primarily within the expertise of the university."<sup>88</sup> In short, by holding that the pursuit of diversity is a compelling interest and a judgment to which the Court should defer, Justice O'Connor established a solid precedent upon which to recognize a non-remedial compelling interest in voluntarily desegregating schools.

Proving that the means by which one achieves the compelling interest are narrowly tailored, however, has routinely been an insurmountable hurdle for defendants.<sup>89</sup> Responding to this reality, Justice O'Connor has previously

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fact motivated by illegitimate notions of racial inferiority or simple racial politics. Indeed, the purpose of strict scrutiny is to "smoke out" illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool.' . . . We adhere to that view today . . ." (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (opinion of O'Connor, J.)); *Croson*, 488 U.S. at 511 ("Because the city of Richmond has failed to identify the need for remedial action in the awarding of its public construction contracts, its treatment of its citizens on a racial basis violates the dictates of the Equal Protection Clause."); *Hopwood v. Texas*, 236 F.3d 256, 273 (5th Cir. 2000) ("The Supreme Court has conclusively established that the government can, consistent with the Constitution, use racial preferences under particular circumstances to remedy the present effects of past discrimination."); see also T. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 COLUM. L. REV. 1060, 1096 (1991) (asserting that *Croson* "limit[ed] the scope of the remedial justification for race-consciousness"); J.R. Franke, *Richmond v. Croson: The Setting Aside of Set-Asides?*, 34 ST. LOUIS U. L.J. 603, 616 (1990) ("*Croson* . . . overwhelmingly supports the conclusion that remedial race-based preferences . . . are permitted . . ."); Cedric Merlin Powell, *Hopwood: Bakke II and Skeptical Scrutiny*, 9 SETON HALL CONST. L.J. 811, 899-900 (1999) ("The Fifth Circuit expressed concern that there is no logical stopping point when race-conscious remedial measures are employed to eradicate societal discrimination.").

87. *Grutter*, 539 U.S. at 328 ("It is true that some language [in prior] opinions might be read to suggest that remedying past discrimination is the only permissible justification for race-based governmental action. But we have never held that the only governmental use of race that can survive strict scrutiny is remedying past discrimination."); *id.* at 334 ("[A]n admissions program must be 'flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight.' . . . Universities can . . . consider race or ethnicity more flexibly as a 'plus' factor in the context of individualized consideration of each and every applicant.").

88. *Id.* at 328.

89. See, e.g., *Adarand*, 515 U.S. at 237-38 (remanding the case for determination of whether the federal set-aside for disadvantaged businesses could pass strict scrutiny); *Croson*, 488 U.S. at 508 (holding that the city's set-aside for minority contractors could not pass strict scrutiny); *Wessmann v. Gittens*, 160 F.3d 790, 791-92 (1st Cir 1998) (holding that the



defended the Court's strict scrutiny standards from "the notion that strict scrutiny is 'strict in theory, but fatal in fact.'"<sup>90</sup> In *Grutter*, she dispelled the notion in practice in addition to word. She began by emphasizing that "[c]ontext matters."<sup>91</sup> Thus, what narrow tailoring might require in one context may not be required in another. For instance, the diversity factors that are applicable in higher education may not be equally applicable in primary and secondary schools if they do not entail the same competitive, merit-based application process.<sup>92</sup> Moreover, because narrow tailoring is so demanding, an appreciation of nuance and relevant differences is paramount.

Yet, regardless of context, narrow tailoring does require the consideration of whether race-neutral alternatives are available to achieve the compelling interest.<sup>93</sup> The problem is that inquiries into race-neutral alternatives can be inherently speculative and susceptible to personal preferences and biases. Some sort of race-neutral alternative is almost always available, but the alternatives are not always as effective as race-conscious methods. Moreover, the alternatives may be more burdensome. When this is the case, the subjective value that judges place on the compelling interest becomes important as they are forced to decide the extent to which they are willing to sacrifice effectiveness and impose burdens on the defendant. The matter becomes even more acute when the court lacks evidence regarding the effectiveness of the race-neutral alternatives. A judge might simply conceive of her own alternatives or entertain the plaintiffs' suggested alternatives without any real basis for knowing they will be practical or effective.

As to this problem, Justice O'Connor again proceeded paradigmatically. Recognizing the extent to which the state's interest was in fact compelling and thus not to be toyed with lightly, she wrote that "[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative."<sup>94</sup> Rather, it only requires "serious, good faith consideration of workable race-neutral

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consideration of race in admissions at the Boston Latin School for the purposes of achieving diversity was not narrowly tailored).

90. *Adarand*, 515 U.S. at 237 (Marshall, J., concurring in the judgment) (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980)); see also *Grutter*, 539 U.S. at 326 ("Strict scrutiny is not 'strict in theory, but fatal in fact.'") (quoting *Adarand*, 515 U.S. at 237)).

91. *Grutter*, 539 U.S. at 327.

92. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 426 F.3d 1162, 1193 (9th Cir. 2005) (Kozinski, J., concurring in the result) (writing that application of the Supreme Court's diversity factors to K-12 integration plans is like trying to pound "square pegs" into "round holes"); Deborah N. Archer, *Moving Beyond Strict Scrutiny: The Need for a More Nuanced Standard of Equal Protection Analysis for K Through 12 Integration Programs*, 9 U. PA. J. CONST. L. 629, 651-55 (2007) (explaining why strict scrutiny analysis should not apply to K-12 integration programs given the different context); Liu, *supra* note 8, at 300-01 ("By contrast, K-12 school assignment . . . does not involve merit-based competition.").

93. See *Croson*, 488 U.S. at 507 (citing *United States v. Paradise*, 480 U.S. 149, 171 (1987)).

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

alternatives.”<sup>95</sup> Workable does not merely mean conceivable. In her view, workable means that the alternative would “serve the [compelling] interest ‘about as well’”<sup>96</sup> and would actually achieve “the compelling interest sought.”<sup>97</sup> Justice O’Connor further held that a race-neutral alternative is not required if that alternative, although able to achieve the compelling interest, would concurrently undermine some other significant, legitimate interest of the defendant.<sup>98</sup>

For instance, the district court in *Grutter* determined that the University of Michigan Law School could have achieved a diverse student body by simply admitting qualified applicants through a lottery.<sup>99</sup> Under some circumstances, a lottery would admit more minority students than the current admissions policy without even considering race.<sup>100</sup> The problem, however, is that a lottery would also eliminate the consideration of diversity factors other than race, the individualized consideration of applications, and—most important to an elite law school—the ability to screen for academic excellence. Consequently, a lottery system could lower the overall academic credentials of the school’s admitted students.<sup>101</sup> Justice O’Connor indicated that narrow tailoring did not require the University of Michigan Law School to make this type of sacrifice.<sup>102</sup> In short, “[n]arrow tailoring does not . . . require a university to choose between maintaining a reputation for excellence or fulfilling a commitment to provide educational opportunities to members of all racial groups.”<sup>103</sup>

Application of the above principles in a manner consistent with Justice O’Connor’s opinion in *Grutter*, would portend well for schools that wish to reduce racial segregation. In fact, given the segregative crisis and its attendant inequality and inadequacies in primary and secondary schools, the compelling

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95. *Id.*

96. *Id.* (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280 n.6 (1986)).

97. *Id.*

98. *See id.* at 340.

99. *Id.*

100. For instance, at a school attempting to raise its average LSAT score and deciding to only admit students with LSAT scores above 160, even if race were a factor in admissions, the number of minorities would be limited based on the disproportionately small percentage of minorities who score above 160 on the LSAT. *See* SUSAN P. DALESSANDRO ET AL., LAW SCH. ADMISSION COUNCIL, LSAT PERFORMANCE WITH REGIONAL, GENDER, AND RACIAL/ETHNIC BREAKDOWNS: 1993–1994 THROUGH 1999–2000 TESTING YEARS 16, fig.14 (2000), available at <http://www.lsacnet.org/research/LSAT-performance-regional-gender-racial-ethnic-breakdowns-1993-1994-through-1999-2000.pdf>. If that same school implemented a lottery among all qualified applicants (those with LSATs above 150 for instance), a larger number of minorities would be admitted based on their more proportional representation in that range. Thus, in this scenario, a race-blind lottery system would admit more minorities than the race-conscious system that sought only the highest scoring students.

101. *Grutter*, 539 U.S. at 340.

102. *See id.* (describing the suggestion that the school lower standards as a “drastic remedy”).

103. *Id.* at 339.

interest in desegregating public schools would presumably exceed the interest in obtaining the added benefits of diversity in an elite law school.<sup>104</sup> Moreover, to the extent that primary and secondary schools pursue racial desegregation or the elimination of racial isolation, and not general diversity, race is the most effective means by which to achieve those interests. If the interests were in fact compelling, it would be inconsistent to demand that a school use flimsier, less effective means to achieve them. Under Justice O'Connor's rationale in *Grutter*, narrow tailoring would not require a school to use a race-neutral alternative that, even if effective, would force a school to choose between achieving desegregation and maintaining a central aspect of the school system, such as neighborhood schools or the ability to choose where to send one's children.

### III. KENNEDY'S VISION OF DESEGREGATION: TURNING THE WORLD UPSIDE DOWN?

The question of how *Parents Involved* may have modified *Grutter* is purely a legal one, but how *Parents Involved* will affect the future of voluntary desegregation is a practical function of where school districts (or at least the most ambitious school districts) are trying to take their schools. Justice Kennedy's opinion provides guideposts, but only the unilateral impetus of school districts makes his opinion relevant. Thus, schools, rather than Justice Kennedy, will determine the future of desegregation. Moreover, his opinion contains enough ambiguity that schools can, to the extent they are willing to pursue earnest desegregation, test or expand its bounds. Nevertheless, Justice Kennedy's opinion does impose significant constraints on school districts that take a serious approach to desegregation.

The basic holding in *Parents Involved* is that, although schools have a compelling interest in avoiding racial isolation or seeking diversity, their use of race is restricted to two methods. First, they can use race in a general way: through the selection of school sites, the redrawing of attendance zones, and through other policies that do not rely on individual classifications of students by race.<sup>105</sup> Second, if race is to be used regarding individual students, it can

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104. See *Comfort v. Lynn Sch. Comm.*, 418 F.3d 1, 15–16 (1st Cir. 2005) (“Lynn’s asserted interests bear a strong familial resemblance to those that the *Grutter* Court found compelling. There is no reason to believe that these interests . . . are substantially stronger in the context of higher education . . . . In fact, there is significant evidence in the record that the benefits of a racially diverse school are more compelling at younger ages.”).

105. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2792 (2007) (Kennedy, J., concurring in part and concurring in the judgment) (“School boards may pursue the goal of bringing together students of diverse backgrounds and races through other means, including 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.”).

only be one of multiple factors.<sup>106</sup> Moreover, Justice Kennedy sees this use of race as being for the pursuit of diversity.<sup>107</sup> Thus, the schools must make nuanced decisions analogous to those authorized in *Grutter*.<sup>108</sup> As Justice Kennedy wrote in the context of primary and secondary schools, “[r]ace may be one component of . . . diversity, but other demographic factors, plus special talents and needs, should also be considered.”<sup>109</sup>

Beyond these very basic statements, however, Justice Kennedy’s opinion fails to provide schools with any substantive guidance as to exactly how they might desegregate without violating strict scrutiny. The opinion speaks with a certain level of clarity as to what schools cannot do, but is unclear as to what they can do.<sup>110</sup> It simply posits the general options listed above without really examining whether these options might, in practice, produce desegregation or make the pursuit of desegregation so burdensome that it is unsustainable. Thus, the opinion does not contemplate the likelihood that these hypothetical options will prove ineffective.

#### A. Moving Away from *Grutter*’s Approach

Justice Kennedy’s opinion, although asserting its consistency with *Grutter*, actually moves the Court’s jurisprudence away from the principles established in *Grutter*. First, although Justice O’Connor emphasizes in *Grutter* that “[c]ontext matters” and relevant differences must be taken into account,<sup>111</sup> Justice Kennedy’s opinion in *Parents Involved* is largely oblivious to this point. He fails to account for, in any meaningful way, the differences between K-12 public school districts and institutions of higher education, namely that (1) these public schools do not assign students based on academic merit while institutions of higher education do, (2) individualized consideration is the hallmark of higher education admissions, but generally irrelevant in primary and secondary school assignments, and (3) all students under these plans are assigned to a quality elementary or secondary school, whereas no provision is made for students denied admission to an institution of higher education.<sup>112</sup> Ignoring these differences, Justice Kennedy’s narrow-tailoring analysis approaches the case as though the schools were pursuing diversity rather than

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106. *Id.* at 2793 (“[T]he small number of assignments affected [by the use of express racial classifications] suggests that the schools could have achieved their stated ends through . . . a more nuanced, individual evaluation of school needs and student characteristics that might include race as a component.”).

107. *See id.* at 2792–93.

108. *Id.* at 2793.

109. *Id.* at 2797.

110. STILL LOOKING TO THE FUTURE, *supra* note 49, at 3.

111. *Grutter v. Bollinger*, 539 U.S. 306, 327 (2003).

112. *See Parents Involved*, 127 S. Ct. at 2794 (Kennedy, J., concurring in part and concurring in the judgment).

avoiding racial isolation and making it possible to provide equitable educational opportunities.<sup>113</sup> Thus, in his analysis, context does not matter.

Second, Justice Kennedy's opinion requires schools to make the type of sacrifice that Justice O'Connor indicated was unnecessary in *Grutter*.<sup>114</sup> The student assignment plans in *Parents Involved* were choice plans that allowed students (and by extension, parents) to rank schools by preference and, consequently, allowed parents to exercise control over where their children attended school.<sup>115</sup> Only when a school became oversubscribed did race become a factor in assignments.<sup>116</sup> Thus, the school districts did not simply assign students to schools based on race. Rather, the plans primarily accommodated parental choice, including the choice to send children to their neighborhood school.<sup>117</sup> Moreover, the availability of student and parental choice may be the most important factor in the success of such desegregation plans. The element of choice has made voluntary desegregation plans popular and allowed them to succeed whereas community resistance has caused many mandatory desegregation plans to fail.<sup>118</sup> In short, choice is at the very heart and mission of the assignment plans in *Parents Involved*.

Justice Kennedy's opinion, however, effectively asks the schools to choose between maintaining choice and pursuing desegregation. Justice Kennedy intimates that, if schools want to use race in anything other than a very general way, it must be in the pursuit of diversity and include the consideration of multiple other factors.<sup>119</sup> Although schools could certainly increase diversity on a number of criteria by employing such a plan, there is little guarantee that

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113. See *infra* notes 150–55 and accompanying text.

114. Compare *Parents Involved*, 127 S. Ct. at 2793 (Kennedy, J., concurring in part and concurring in the judgment) (stating that the “schools could have achieved their stated ends through different means”), with *Grutter*, 539 U.S. at 339 (indicating that a university does not have “to choose between” maintaining academic excellence and increasing diversity).

115. *Parents Involved*, 127 S. Ct. at 2746–47 (plurality opinion).

116. *Id.* at 2747.

117. *Id.* at 2747–50 (discussing Seattle's use of race as the second of three tiebreakers when assigning students to schools, and Jefferson County's use of race when a student listed a racially imbalanced school as his preference and that student's race would contribute to the school's racial imbalance).

118. See Lia B. Epperson, *True Integration: Advancing Brown's Goal of Educational Equity in the Wake of Grutter*, 67 U. PITT. L. REV. 175, 179–81, 193 (2005) (discussing southern resistance to state-imposed desegregation after *Brown* and how voluntary desegregation plans are able to avoid the problems of state imposed mandatory plans); see also RICHARD D. KAHLENBERG, *RESCUING BROWN V. BOARD OF EDUCATION: PROFILES OF TWELVE SCHOOL DISTRICTS PURSUING SOCIOECONOMIC SCHOOL INTEGRATION* 5 (The Century Found. 2007), available at <http://www.tcf.org/publications/education/districtprofiles.pdf>. [hereinafter KAHLENBERG, *RESCUING BROWN*] (indicating most successful districts rely on choice in assigning students); Ryan, *supra* note 63, at 309–13 (discussing the potential for integration plans to be successful).

119. *Parents Involved*, 127 S. Ct. at 2792 (Kennedy, J., concurring in part and concurring in the judgment); *Grutter v. Bollinger*, 539 U.S. 306, 387 (2003) (Kennedy, J., dissenting).

significant, if any, desegregation would also occur. Justice Kennedy's opinion does not address this outcome, presumably because schools also have the option of using race in a general way to redraw attendance zones and enact other similar measures.<sup>120</sup> Such options have produced desegregation in the past, but they require school districts to take away parental choice.<sup>121</sup> Under such plans, parents must send their children to the school that the district designates for them, including ones outside their neighborhoods to which they may object.<sup>122</sup> Parents in the past have resisted mandatory assignment plans.<sup>123</sup> If experience is any indicator, compulsory school assignment plans would obliterate the widespread support for desegregation and make voluntary desegregation short-lived.<sup>124</sup> Nevertheless, Justice Kennedy's opinion ignores the significance of this double-bind and asked schools to make choices that *Grutter* would not.

Placing schools in this position after affirmatively recognizing that they have a compelling interest suggests a bias or ambivalence toward the case. If diversity or desegregation were important enough to be compelling, one would not necessarily expect a court to make the interest so difficult to attain. However, the explanation is likely two-fold. First, Justice Kennedy is simply suspicious of these plans and, second, he thinks he knows best how to solve these and other problems. His suspicion of race-conscious plans in general is

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

121. See, e.g., *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 27–28 (1971) (affirming the reassignment of students to different schools through altered attendance zones); *Liddell v. Bd. of Educ. of St. Louis*, 667 F.2d 643, 650 (8th Cir. 1981) (affirming a mandatory desegregation plan that required reassignment of students); *Carr v. Montgomery County Bd. of Educ.*, 377 F. Supp. 1123 (M.D. Ala. 1974) (allowing the reassignment of 9,000 students via busing), *aff'd* 511 F.2d 1374 (5th Cir. 1975).

122. See, e.g., Michael Besso, Sheff v. O'Neill: *The Connecticut Supreme Court at the Bar of Politics*, 22 QUINNIPIAC L. REV. 165, 187–88 (2003) (comparing the successful school attendance zoning plans enacted in Connecticut by Stamford and New Haven with Bridgeport, which failed because of protests).

123. See, e.g., Regan Garner, Essay, *A School Without a Name: Desegregation of Eastside High School 1970–1987*, 16 U. FLA. J.L. & PUB. POL'Y 233, 235 (2005) (“[M]andatory busing and the redrawing of attendance zones . . . were rejected by the mostly white middle-class families who were unwilling to abandon their neighborhood schools for what they considered to be academically inferior institutions.”).

124. See KAHLBERG, RESCUING BROWN, *supra* note 118, at 5 (predicting that any compulsory reassignment will likely “face opposition from some middle-class parents who believe that with their home selection, they have ‘purchased’ the right to send their children to economically homogeneous neighborhood public schools”); see also Zahler, *supra* note 59, at 1028–29 (“Virtually all research on school desegregation and white flight indicates that school desegregation significantly accelerates white flight in most school districts in the year of implementation if the desegregation plan involves mandatory school reassignments.”); Davison M. Douglas, *The End of Busing?*, 95 MICH. L. REV. 1715, 1725 (1995) (reviewing GARY ORFIELD ET AL., *DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF BROWN V. BOARD OF EDUCATION* (1996)) (discussing research indicating that although most Americans favored desegregation, they were against school reassignments that required busing).

best demonstrated by his dissent in *Grutter*. There, Justice Kennedy offered no express indication that he objects in principle to diversity or racially related goals, but he suggested that he thought Michigan was lying about why they were using race and how they were using it.<sup>125</sup> He saw Michigan's plan as nothing less than an attempt to "allow[] racial minorities to have their special circumstances considered in order to improve their educational opportunities."<sup>126</sup> In his opinion, the university's asserted interest in diversity "'is merely the current rationale of convenience for a policy that they prefer to justify on other grounds.'"<sup>127</sup> Although the law school testified to the contrary, he was convinced that the school was consulting its daily reports of admissions for no reason "save for race itself."<sup>128</sup> Contrary to Justice O'Connor,<sup>129</sup> he concluded that race was not used as "one modest factor among many others to achieve diversity."<sup>130</sup> Instead, he thought it was the "predominant factor."<sup>131</sup>

A similar suspicion, although not as pronounced, is evident below the surface of Justice Kennedy's analysis in *Parents Involved*. As previously discussed, he prefaces his analysis by emphasizing that the schools shoulder the burden of justifying their use of race.<sup>132</sup> Moreover, he asserted that a less forgiving review of the record suggests that not only did the schools fail to present evidence to justify their plans, the school districts had affirmatively used race in an inappropriate manner.<sup>133</sup> However, insofar as the school districts are attempting to desegregate rather than pursue diversity, Justice Kennedy's assumption of impropriety may be born more out of skewed perception than any real basis in fact.

Justice Kennedy does not simply rest on his suspicion; he proceeds to insert his judgment for that of the schools. He admits that "[f]ifty years of experience since *Brown v. Board of Education* should teach us that the problem [of school segregation] defies so easy a solution."<sup>134</sup> Yet, his decision effectively purports to know how to create such a solution.<sup>135</sup> If the deficiency in the case was merely a failure to explore race-neutral alternatives, he could have remanded the case to the trial court to determine the availability and effectiveness of any potential alternatives. Instead, he supposes that the

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125. See *Grutter v. Bollinger*, 539 U.S. 306, 389–91 (2003) (Kennedy, J., dissenting).

126. *Id.* at 395.

127. *Id.* at 393 (quoting Peter H. Schuck, *Affirmative Action: Past, Present, and Future*, 20 YALE L. & POL'Y REV. 1, 34 (2002)).

128. *Grutter*, 539 U.S. at 391–92 (Kennedy, J., dissenting).

129. See *id.* at 334 (majority opinion).

130. *Id.* at 393 (Kennedy, J., dissenting).

131. *Id.*

132. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2789 (2007) (Kennedy, J., concurring in part and concurring in the judgment).

133. *Id.* at 2790.

134. *Id.* at 2791 (citation omitted).

135. See *id.* at 2792 (noting various means of achieving diversity in schools).

schools can desegregate through diversity programs or other policies that do not involve individual racial classifications.<sup>136</sup> But Justice Kennedy has no basis in fact for believing these policies will work.<sup>137</sup> That he encourages schools to collaborate with experts to design plans almost belies the fact that he is merely assuming workable alternatives exist.<sup>138</sup> Moreover, making this assumption is an affront to schools that presumably would have had to have been either unaware of these alternatives or incorrectly dismissed them. In short, Justice Kennedy assumes that he knows best: general or race-neutral plans will work if schools just work harder.

### B. The Purpose of Desegregation

The constraints in Justice Kennedy's opinion are also a product of a fundamental misunderstanding as to the very nature and purpose of school desegregation. Schools theoretically might take race into account for various purposes. They might seek to avoid racially isolated schools and the associated negative educational impacts, to increase school safety, to improve parental support of schools, to help reduce residential segregation, to create stability within the school system, or to obtain the citizenship, educational, and interracial benefits of diversity.<sup>139</sup> Not perceiving any distinction between these interests, some courts have attempted to reduce or combine these various interests into a single one, which they label as an interest in diversity or in the educational benefits of diversity.<sup>140</sup> The First Circuit Court of Appeals, for instance, asserted that the educational benefits of diversity are but the corollary, or flip-side, of avoiding the harmful effects of racial isolation.<sup>141</sup>

Although these interests are closely related, it does not follow that they are the same or can easily be couched under a single umbrella.<sup>142</sup> Likewise, it is

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136. See *id.*

137. See *id.* (noting that schools "are free to devise race-conscious measures to address the problem in a general way").

138. See *id.* at 2797.

139. See STILL LOOKING TO THE FUTURE, *supra* note 49, at 28 (listing the other compelling interests that might motivate a school system to voluntarily desegregate). The school district in *Comfort v. Lynn* had several motivations for its voluntary desegregation plan. See *Comfort ex rel. Neumyer v. Lynn Sch. Comm.*, 283 F. Supp. 2d 328, 375 (D. Mass. 2003), *aff'd* 418 F.3d 1 (1st Cir. 2005). The school district articulated its compelling interests as fostering "racial and ethnic diversity, increasing educational opportunities for all students, improving the quality of education[,] ensuring student safety, . . . reducing minority isolation," and providing an education to all students that satisfies federal and state constitutional requirements. *Id.* To solidify these benefits, the school system also incorporated a diversity curriculum in its schools. *Id.* at 349.

140. See, e.g., *Comfort v. Lynn Sch. Comm.*, 418 F.3d 1, 14 (1st Cir. 2005) ("Although there are some differences between these interests, we conclude that they are essentially two sides of the same coin. . . . We therefore restate the interests at stake here as obtaining the educational benefits of a racially diverse student body.").

141. *Id.*

142. See Liu, *supra* note 8, at 282 (indicating that it is "clear there are two general goals that can be distinguished").



not entirely accurate to categorize all efforts that increase student body diversity as engaging in voluntary desegregation. Some schools surely wish to pursue diversity, but other schools, if not most, that use race in assigning students need to change the demographic characteristics of their individual schools because it is the best hope they have of providing equitable and adequate educational opportunities for their minority students.

As discussed above, racially isolated minority schools pose barriers to academic success, many of which are the very product of their racial and socioeconomic isolation, not their lack of exposure to diversity.<sup>143</sup> School systems that realize, care about, and have the demographic capacity to change this isolation pursue voluntary desegregation because it is the best method to alleviate these barriers and further a modicum of equality with their schools. Although various schools have achieved academic success notwithstanding these barriers,<sup>144</sup> their success is not consistently replicable and is rarely sustained over the long term.<sup>145</sup> Desegregation is simply their best option.

Of course various benefits, including those that flow from diversity exposure, will accompany this desegregation, but those benefits are distinct from avoiding the harmful effects of racial isolation and achieving equity.<sup>146</sup> In essence, voluntary desegregation is primarily about school districts keeping their heads above water as opposed to drowning. Moreover, by keeping their heads above water, they have a fair chance at swimming to shores of success. The other benefits, such as diversity, are what one might call added benefits that only have significance once a school district has made it to shore. This analogy is appropriate because the lingering, tragic reality in our schools is that so long as schools can be identified as white or black, resources, preferences, and quality teachers will gravitate toward white schools and many parents will seek to avoid, if not run from, black schools.<sup>147</sup> Thus, breaking this inequity

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

144. See, e.g., Marcelle S. Fischler, *Battling Stereotypes with High Test Scores*, N.Y. TIMES (Long Island ed.), Feb. 20, 2005, at sec.14, p.1 (noting the success of Elmont Memorial High School, a predominantly minority high school).

145. See Michael Dobbs, *Progress Made in City's Schools, but More to Go*, WASH. POST, May 13, 2004 at A1 (noting that maintaining diversity and success is often complicated by various factors); Alan Green et al., *Reflecting on the Gap: What can the Implementation of an Urban School Counseling Project Teach Us about the Achievement Gap?*, 2 E-J. OF TEACHING & LEARNING IN DIVERSE SETTINGS (2004), <http://www.subr.edu/coeducation/ejournal/Green%20et%20al.%20Article.htm> (indicating the difficulty in replicating various remedial strategies).

146. Liu, *supra* note 8, at 282–99 (identifying that preventing racial isolation and educational equity are each compelling interests).

147. See, e.g., Joe R. Feagin & Bernice McNair Barnett, *Success and Failure: How Systemic Racism Trumped the Brown v. Board of Education Decision*, 2004 U. ILL. L. REV. 1099, 1110 (“From the beginning, black parents and community leaders sought desegregation primarily to secure greater access to educational and related socioeconomic resources. . . . The assumption has always been that *better school resources* come in racially desegregated schools . . . . In general, these assumptions have been correct.”); Christopher Jencks & Meredith Phillips, *The Black-White Test Score Gap: Why It Persists and What Can Be Done*, THE BROOKINGS

requires breaking this racial paradigm.<sup>148</sup> Diversity curricula and interracial contact can break this paradigm slowly over time by diminishing the relevance of race,<sup>149</sup> but the most effective way to break it for today's children, and in a way that offers equitable school opportunities, is to eliminate racially identifiable schools by desegregating the student bodies. Race-conscious student assignments do this.

### C. Confusing Desegregation with Diversity

Justice Kennedy's opinion in *Parents Involved*, however, misses the fundamental point of desegregation, and thus fails to distinguish it from diversity. This mistake is the lynchpin of an opinion that ultimately creates new barriers for school systems that can ill afford them. Justice Kennedy does not conceptualize the schools' interest as an interest in alleviating the sometimes-devastating effects of racially isolated schools. Instead, he primarily conceptualizes the case as being about the pursuit of diversity and its educational benefits. The very first sentence of his opinion belies this point:

The Nation's schools strive to teach that our strength comes from people of different races, creeds, and cultures uniting in the commitment to the freedom of all. In these cases two school districts in different parts of the country seek to teach that principle by having

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INSTITUTION, Mar. 13, 2008, available at [http://www.brookings.edu/articles/1998spring\\_education\\_jencks.aspx](http://www.brookings.edu/articles/1998spring_education_jencks.aspx) ("Predominantly white schools seem to attract more skilled teachers than black schools . . ."); Jay Mathews, *Top Teachers Rare in Poor Schools*, WASH. POST, Sept. 10, 2002, at A5 (discussing the dearth of high quality teachers in low income schools).

148. See Liu, *supra* note 8, at 294. As Liu writes, "besides affecting student achievement when all else is equal from school to school, school racial composition explains why all else is not equal from school to school." *Id.*

149. See *id.* at 289 ("A school in Louisville that is two-thirds black and one-third white may offer a suitable environment for interracial contact that dispels stereotypes and teaches children of different races to treat each other with respect. But the socialization goals of school integration go beyond cultivating harmony in interpersonal relations. A critical part of what it means to be educated for citizenship in a multiracial society is to understand racial dynamics as a *social* not merely interpersonal phenomenon, shaped not only by individual attitudes and prejudices but also by the demographic structure of the surrounding community."); Molly Townes O'Brien, *Brown on the Ground: A Journey of Faith in Schooling*, 35 U. TOL. L. REV. 813, 836 (2004) ("The peer-effect and networking effect of interracial contact would produce interracial ties and affinities that were not part of the program of values being formally or informally conveyed by the teachers and the school structure. These peer and networking effects may have profoundly transformative effects on individual children."); John A. Powell, *The Tensions Between Integration and School Reform*, 28 HASTINGS CONST. L.Q. 655, 685 (2001) ("The Institute on Race and Poverty conducted a qualitative study that demonstrates many more benefits of an integrated environment than achievement, such as school enjoyment, increased understanding among students, improved student teacher relationships, greater interracial understanding, increased interracial interaction later in life, and better preparation for a diverse work world.").

classrooms that reflect the racial makeup of the surrounding community.<sup>150</sup>

Thus, from the outset, he positions the case as being about diversity and multicultural values.

Only on the last page of his opinion does Justice Kennedy acknowledge, although only in word, that diversity and avoiding racial isolation are two distinct compelling interests.<sup>151</sup> This minor acknowledgment, however, is far outweighed by the remaining entirety of the opinion that obfuscates the existence of any interest other than that of diversity. In particular, his narrow-tailoring analysis addresses the schools' plans solely from the perspective of diversity as a compelling interest.<sup>152</sup> He also indicates race is only one component of diversity and schools must engage in an individualized review that takes into account how each student might contribute to a school's overall diversity.<sup>153</sup> Furthermore, he explicitly writes that this consideration of "student characteristics" should "be informed by *Grutter*," where the educational benefits of diversity, rather than desegregation, were the goal.<sup>154</sup> Thus, the glaring gap in his opinion is the absence of a discussion of why any factor other than race would be relevant to student assignments when the explicit goal is the elimination of racial isolation—not the attainment of the educational benefits of diversity. As for schools that wish to eliminate racial isolation, the most his opinion facially concedes is that they can desegregate by using race in a general way, so long as it does not involve individual racial classifications.<sup>155</sup>

Justice Kennedy's strategic use of the Court's past desegregation cases suggests that his focus on diversity as a compelling interest, to the exclusion of racial isolation, may not be inadvertent.<sup>156</sup> Rather than merely misinterpreting precedent, Justice Kennedy uses the Court's desegregation precedent in a manner that imports his ideological notions into that precedent: that race should only be used in the rarest of occasions and in the most minimal of ways. In any event, his opinion misrepresents school desegregation precedent by

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150. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2788 (2007) (Kennedy, J., concurring in part and concurring in the judgment).

151. *Id.* at 2797.

152. *Id.* at 2789.

153. *Id.* at 2792–94, 2797.

154. *Id.* at 2793; *Grutter v. Bollinger*, 539 U.S. 306, 315 (2002).

155. *Parents Involved*, 127 S. Ct. at 2792 ("If school authorities are concerned that the student-body compositions of certain schools interfere with the objective of offering an equal educational opportunity to all of their students, they are free to devise race-conscious measures to address the problem in a general way and without treating each student in different fashion solely on the basis of a systematic, individual typing by race.").

156. *See id.* at 2791–94.

implying that the Court's school desegregation and strict scrutiny jurisprudence are part of a single coherent body of law.<sup>157</sup>

School desegregation cases have previously been distinct from strict scrutiny cases.<sup>158</sup> None of the Court's past school desegregation cases have approached the mandate of school desegregation from the perspective of whether a compelling interest existed to justify the use of race-conscious remedies, nor did the cases concern themselves with narrow tailoring. Those types of concerns are the exclusive domain of strict scrutiny. In fact, the primary concerns the Court has expressed in its desegregation cases are inapposite to those of strict scrutiny. The Court's initial concern in desegregation cases was that schools were not acting aggressively enough to desegregate immediately.<sup>159</sup> In fact, part of that concern was over the schools' ineffective race-neutral desegregation plans.<sup>160</sup> The only aspect of desegregation that bears any resemblance to strict scrutiny or narrow tailoring is the Court guarding against the possibility that lower courts might overreach in their authority to compel desegregation and order an overbroad remedy.<sup>161</sup> This concern, however, was not one-sided. The Court was likewise clear that lower courts must not allow schools to shirk their desegregation duty through under-inclusive remedies.<sup>162</sup> Although the Court was concerned with a tailoring of sorts there, the concern is a general one of the institutional authority and responsibility of courts, not any specific concern as to race-conscious remedies. Moreover, this is a concern in regard to the courts, not the school districts.

For instance, in *Swann v. Charlotte-Mecklenburg*, the Court wrote that "the nature of the violation determines the scope of the remedy."<sup>163</sup> The lower court had ordered the school district to adopt what some might consider aggressive desegregation methods.<sup>164</sup> The issue before the Court was the

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157. In all fairness, Justice Kennedy is not alone in *Parents Involved* in attempting to situate school desegregation cases and remedies within the context and jurisprudence of strict scrutiny. The plurality took the same position. *See id.* at 2764.

158. Archer, *supra* note 92, at 639–40.

159. *See, e.g.,* Green v. County Sch. Bd., 391 U.S. 430, 437–38 (1968) ("School boards such as the respondent then operating state-compelled dual systems were nevertheless clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch.").

160. *See id.* at 441–42 (finding that the race-neutral "freedom of choice" assignment plan had done next to nothing to desegregate the schools).

161. *See, e.g.,* Freeman v. Pitts, 503 U.S. 467, 489–92 (1992) (discussing the scope and limits of district court powers in ordering desegregation); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971) (cautioning that "judicial authority does not put judges automatically in the shoes of school authorities").

162. *See Green*, 391 U.S. at 439 (discussing the district courts' responsibilities in school desegregation).

163. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971).

164. *See id.* at 8–10 (recounting the plan the district court ordered). The Court noted:

extent to which courts could place such requirements on schools.<sup>165</sup> The Court held that desegregation orders could be broad and include things as burdensome as mandatory busing and redrawing attendance zones.<sup>166</sup> In *Swann*, these aggressive remedies were appropriate because the segregation had been so harmful and extensive.<sup>167</sup> This concern with congruity, however, is again solely in respect to the power of the courts.

When the Court has directed its attention toward a school district's power to desegregate, the Court's concern with limitations or narrow tailoring has not been evident. To the contrary, the Court's only comments as to a school's power indicate that the school's power significantly exceeds that of the courts:

School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities; absent a finding of a constitutional violation, however, that would not be within the authority of a federal court.<sup>168</sup>

For some of those same reasons, when addressing a ballot initiative that attempted to prohibit integrative busing in the state of Washington, the Court held that the power to address segregation in the schools was within the proper power of the local school board and could not be abrogated.<sup>169</sup> Moreover, the Court expressed no concern that the school district was attempting to remedy de facto segregation. The distinction between de facto and de jure segregation is only meaningful insofar as a court seeks to mandate desegregation,<sup>170</sup> with

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"Like the board plan, the Finger plan does as much by rezoning school attendance lines as can reasonably be accomplished. However, unlike the board plan, it does not stop there. It goes further and desegregates all the rest of the elementary schools by the technique of grouping two or three outlying schools with one black inner city school; by transporting black students from grades one through four to the outlying white schools; and by transporting white students from the fifth and sixth grades from the outlying white schools to the inner city black school."

Under the Finger plan, nine inner-city Negro schools were grouped in this manner with 24 suburban white schools.

*Id.* at 9–10 (quoting the district court).

165. *Id.* at 5.

166. *Id.* at 30.

167. *See id.* at 11, 14, 16; *see also* Rogers M. Smith, *Black and White After Brown: Constructions of Race in Modern Supreme Court Decisions*, 5 U. PA. J. CONST. L. 709, 724 (2003) (identifying *Swann* as one of the Court's "most aggressive desegregation decisions").

168. *Swann*, 402 U.S. at 16.

169. *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 474 (1982).

170. *See Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 196 (1973) ("The District Court used those figures to signify educationally inferior schools, and there is no suggestion in the record that those same figures were or would be used to define a 'segregated' school in the de jure context"); *see*

the concern again being in regard to the court's authority, not a school's. In short, the Court's desegregation jurisprudence has never been concerned with school districts taking aggressive race-conscious measures to desegregate because their actions were obviously taken in the best of faith and for the best of reasons.

Although Justice Kennedy's opinion at one point rightly conceded that the "primary function" of the "distinction between *de jure* and *de facto* segregation . . . in school cases was to delimit the powers of the Judiciary," the opinion immediately asserts that the principle still "serves as a limit on the exercise of a power" by desegregating schools.<sup>171</sup> As to the second point, however, his sole citation is to affirmative action cases, not school desegregation cases.<sup>172</sup> To obscure this gap in precedent, he attempts to present *Wygant v. Jackson Board of Education*<sup>173</sup> as an example of the Court distinguishing between *de facto* and *de jure* segregation,<sup>174</sup> and affirmatively prohibiting a school's consideration of race because it was attempting to remedy *de facto* rather than *de jure* segregation.<sup>175</sup>

Justice Kennedy is correct that the case did not involve *de jure* segregation. Had *de jure* segregation been present, the case would not have even been before the Court, as the race-conscious remedy would have clearly been appropriate. What Justice Kennedy papered over is the fact that the school district was not attempting to remedy *de facto* segregation either. Instead, the school had implemented what amounted to an affirmative action plan to retain more minority teachers during a period of teacher lay offs.<sup>176</sup> Thus, strict scrutiny applied and the school was obliged to justify the policy with a

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also Kevin Brown, *The Road Not Taken in Brown: Recognizing the Dual Harm of Segregation*, 90 VA. L. REV. 1579, 1586–87 (2004) ("The state action requirement of the Equal Protection Clause created a need to draw a distinction between *de jure* segregation and *de facto* segregation."); Donald E. Lively, *Desegregation and the Supreme Court: The Fatal Attraction of Brown*, 20 HASTINGS CONST. L.Q. 649, 675 (1993) ("To the extent stigmatization is a function of racial separation, no real difference exists with respect to whether segregation is characterized as *de jure* or *de facto*.").

171. *Parents Involved in Cmty Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2795–96 (2007) (Kennedy, J., concurring in part and concurring in the judgment).

172. *See id.* at 2796 (citing *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978)).

173. 476 U.S. 267 (1986).

174. *Parents Involved*, 127 S. Ct. at 2795 (Kennedy, J., concurring in part and concurring in the judgment).

175. *See id.* (using *Wygant* as an example of the distinction between *de jure* and *de facto* segregation and suggesting that the school's actions were prohibited because it was attempting to remedy *de facto* segregation rather than *de jure*).

176. *See Wygant*, 476 U.S. at 270. The school board and the teachers union in this case agreed to a lay-off provision in their collective bargaining agreement that provided that in the event of teacher layoffs the school district would retain teachers by seniority, but that in no event would the school lay off a greater percentage of minority teachers than were employed at the time of the layoffs. *Id.*

compelling interest.<sup>177</sup> The school, however, did not respond that it was desegregating or that this was part of an effort to desegregate. Rather, it argued that it had a compelling interest in creating minority role models.<sup>178</sup> If this were a desegregation case, the context and analysis would have been entirely different. Thus, Justice Kennedy's opinion lacks any solid precedent to support his notion that the Court has limited schools' efforts to redress de facto segregation.

Justice Kennedy's opinion, nevertheless, attempts to transform school desegregation cases and their distinction between de jure and de facto segregation into a jurisprudence that was guided by the principles of strict scrutiny. In doing so, he misrepresents the nature of segregation, the harm that occurred, and the efforts to address it. In a section of his opinion devoted exclusively to desegregation jurisprudence, he indicated he would address two points: "the difference between *de jure* and *de facto* segregation [and] the presumptive invalidity of a State's use of racial classifications."<sup>179</sup> He then asserted that the presumptive invalidity of racial classifications could only be overcome if schools used desegregation to rectify de jure segregation.<sup>180</sup> He further characterizes traditional desegregative measures as a "resort to extraordinary measures including individual student and teacher assignment to schools based on race."<sup>181</sup> In his estimation, these race-conscious measures were only used because the schools "had no choice."<sup>182</sup>

These appraisals of desegregation are flawed on significant accounts. First, race classifications were the status quo at the time of *Brown* and during the ensuing years.<sup>183</sup> To the extent any question was raised as to their use it was not one of presumptive invalidity, but whether they were used to integrate or segregate.<sup>184</sup> It is disingenuous to suggest that, when schools used racial classifications or other race-conscious measures to undo the evil and continued existence of segregation, courts had to be mindful to ensure schools did not misuse race. Quite plainly, the courts' task was nothing more or less than the elimination of racialized and segregated schools,<sup>185</sup> which required the consideration of race. But race-conscious desegregation is far from the equivalent of classifying students for the purpose of segregating them and

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177. See *id.* at 279–80.

178. *Id.* at 274.

179. *Parents Involved*, 127 S. Ct. at 2794 (Kennedy, J., concurring in part and concurring in the judgment).

180. See *id.* at 2795.

181. *Id.*

182. *Id.*

183. See Ian F. Haney López, "A Nation of Minorities": Race, Ethnicity, and Reactionary Colorblindness, 59 STAN. L. REV. 985, 997–1001 (2007) (describing the "status quo of stark racial hierarchy" along with theories seeking to justify racism in the first half of the nineteenth century).

184. See *id.* at 1001–03.

185. See *Green v. County Sch. Bd.*, 391 U.S. 430, 435–36 (1968).

granting preference and privilege to one race of students over another. One simply cannot equate the use of race to fulfill "a moral and ethical obligation . . . to creat[e] an integrated society that ensures equal opportunity for all of its children"<sup>186</sup> with the "separat[ion of African Americans] from others of similar age and qualifications solely because of their race" so as to "generate[] a feeling of inferiority."<sup>187</sup>

Second, race-based remedies in school desegregation were not extraordinary at all. Rather, the original act of segregating students by law was an extraordinary act that demanded a specific, responsive remedy, not as a matter of last resort, but as a basic necessity of equity.<sup>188</sup> For that reason, courts and schools used these measures frequently and without misgivings. Race-based remedies were the routine tool of desegregation.<sup>189</sup> Justice Kennedy writes that the "allocation of benefits and burdens through individual racial classifications was found *sometimes* permissible in the context of remedies for *de jure* wrong,"<sup>190</sup> but this statement reflects an attempt to revise precedent in a manner consistent with Justice Kennedy's personal distaste for racial classifications. It simply lacks any basis in the Court's desegregation jurisprudence. In short, to suggest these desegregative actions were or should be a last resort, and are somehow evils that would have otherwise been avoided, casts aspersions toward what may be the most important work the courts and schools have ever undertaken in the service, not the confrontation, of equal protection. Desegregation does not equal race discrimination or race preference, nor does it now or ever in the past implicate strict scrutiny.

#### D. A More Forgiving Interpretation

Notwithstanding the preceding critique, an alternative reading of Justice Kennedy's opinion is plausible. One could read the opinion more narrowly and interpret it as merely responding to the particular evidence before the Court rather than an opinion that establishes principles that constrain all school districts. From the outset, Justice Kennedy's opinion indicates that the government bears the burden of justifying its use of individual race classifications.<sup>191</sup> Justice Kennedy finds that the schools established a

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186. *Parents Involved*, 127 S. Ct. at 2797 (Kennedy, J., concurring in part and concurring in the judgment).

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

188. *Green*, 391 U.S. at 437–38 (writing that "[t]he constitutional rights of Negro school children articulated in *Brown I* permit no less than" commanding schools "to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch.").

189. See, e.g., *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 25 (1971) (finding that the use of racial ratios is the "starting point" in assessing the effectiveness of desegregation plans and making decisions about where to reassign students).

190. *Parents Involved*, 127 S. Ct. at 2796 (Kennedy, J., concurring in part and concurring in the judgment) (first emphasis added).

191. *Id.* at 2789.



compelling interest, but he finds they failed to carry their burden as to narrow tailoring.<sup>192</sup> He does not, however, hold that this burden could not have been carried.<sup>193</sup> Given different evidence, some other school might be able to justify the use of race in assignment plans similar to Louisville and Seattle's.

Justice Kennedy's narrow-tailoring analysis focused on whether race-neutral alternatives were available. He found that the schools simply failed to demonstrate that they had pursued these alternatives and that they were ineffective.<sup>194</sup> In fact, he went so far as to say that "a less forgiving reading of the record would suggest" that Louisville used race in an "*ad hoc* manner."<sup>195</sup> As the school districts failed to demonstrate otherwise, he posited other race-neutral methods were available to the schools.<sup>196</sup> However, if another school district demonstrated that it had exhausted race-neutral alternatives and determined that a race-conscious plan similar to Seattle or Louisville's was the only workable option for obtaining desegregated schools, Justice Kennedy's opinion would not prohibit the plan. From this perspective, his opinion was not a repudiation of race-conscious plans per se, but merely a repudiation of the failure to justify the plans.

In addition, Justice Kennedy rejects the far more conservative approach of the plurality. He refuses to be the fifth vote on specific principles that are significant if for no other reason than for their rhetorical value. On these principles, he lends some modest hope for the future of desegregation. He writes: "The enduring hope is that race should not matter; the reality is that too often it does. . . . The plurality's postulate that '[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race' is not sufficient to decide these cases."<sup>197</sup> He further concludes that although we must aspire for "'[o]ur Constitution [to be] color-blind,' . . . [i]n the real world, it is regrettable to say, it cannot be a universal constitutional principle."<sup>198</sup>

For those reasons, he is unwilling to hamstring schools to the extent that the plurality would. He permits the schools to use race in a diversity based approach and in a general way that does not classify individuals.<sup>199</sup> By contrast, the plurality argues that these school districts cannot use race at all, because in the absence of a duty to remedy past intentional segregation, their

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192. See *id.* at 2789–90.

193. See *id.* at 2790.

194. See *id.* at 2790, 2792.

195. *Id.* at 2790.

196. *Id.* at 2792 (He suggests that race-neutral measures could include "strategic site selection of new schools; drawing attendance zones with [attention to] demographics; allocating resources for special programs; [and] recruiting students and faculty . . .").

197. *Id.* at 2791 (alteration in original) (citation omitted).

198. *Id.* at 2791–92 (first alteration in original).

199. *Id.* at 2792.

current actions are no more than racial balancing in an attempt to “remedy[] past societal discrimination.”<sup>200</sup> Justice Kennedy responds that:

School districts can seek to reach *Brown*’s objective of equal educational opportunity. The plurality opinion is at least open to the interpretation that the Constitution requires school districts to ignore the problem of *de facto* resegregation in schooling. I cannot endorse that conclusion. To the extent the plurality opinion suggests the Constitution mandates that state and local school authorities must accept the status quo of racial isolation in schools, it is, in my view, profoundly mistaken.<sup>201</sup>

Thus, although Justice Kennedy would subject these schools’ race-conscious desegregation remedies to strict scrutiny, he would permit these remedies under some circumstances, while the plurality would permit none.<sup>202</sup> Moreover, if schools only use race in a general way that does not classify individual students, he would not even subject them to strict scrutiny.<sup>203</sup>

Unfortunately, this narrow reading of Justice Kennedy’s opinion is still constrained by the other parts of his opinion that mischaracterize desegregation precedent and impose a diversity-based analysis on voluntary desegregation. His encouraging comments are largely just that. They may rhetorically soften

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200. *Id.* at 2758–59 (plurality opinion). The plurality argues:

Jefferson County phrases its interest as “racial integration,” but integration certainly does not require the sort of racial proportionality reflected in its plan. Even in the context of mandatory desegregation, we have stressed that racial proportionality is not required and here Jefferson County has already been found to have eliminated the vestiges of its prior segregated school system.

*Id.* at 2759 (citations omitted).

201. *Id.* at 2791 (Kennedy, J., concurring in part and concurring in the judgment).

202. *See id.* at 2764 (plurality opinion) (indicating that all race-conscious plans are subject to strict scrutiny). Whether to apply strict scrutiny to “benign” uses of race has been a central issue for decades. *See, e.g.,* *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 234–35 (1995) (focusing on the neutrality of equal protection and rejecting the notion that affirmative action permitted more leeway); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493–95 (1989) (opinion of O’Connor, J.) (“[T]he standard of review under the Equal Protection Clause is not dependant on the race of those burdened or benefited by a particular classification.”); *id.* at 536–39 (Marshall, J., dissenting) (articulating the need to provide the government leeway in remedying past discrimination and inequality). The Court, however, has applied strict scrutiny in every instance. *See, e.g.,* *Grutter v. Bollinger*, 539 U.S. 306, 326–27 (2003) (applying strict scrutiny to the University of Michigan Law School admissions program); *Gratz v. Bollinger*, 539 U.S. 244, 270–72 (2003) (applying strict scrutiny to the University of Michigan undergraduate admissions program); *Adarand*, 515 U.S. at 204–05 (concluding the Court of Appeals erred in failing to apply strict scrutiny); *Shaw v. Reno*, 509 U.S. 630, 653 (1993) (remanding for determination of whether a voting redistricting plan satisfies strict scrutiny); *Croson*, 488 U.S. at 492–94 (applying strict scrutiny to Richmond’s minority business plan).

203. *Parents Involved*, 127 S. Ct. at 2792 (Kennedy, J., concurring in part and concurring in the judgment) (“These mechanisms are race conscious but do not lead to different treatment based on a classification that tells each student he or she is likely to be defined by race, so it is unlikely any of them would demand strict scrutiny to be found permissible.”).

the blow of his holding, but they do little to change the significant constraints that the holding places on schools. Leading commentators will take such a view of the opinion<sup>204</sup> and, most important, risk-averse schools are sure to follow by staying well within any conceivable constraints.

#### IV. LOOKING FORWARD: IMPACT AND RELEVANCE

The actual practical impact of *Parents Involved* remains to be seen, but to the extent most districts are not pursuing desegregation with aggressive plans, the immediate effect of the opinion may be minimal. A recent publication by the Civil Rights Project finds, “many of the policies and strategies that school districts commonly use to promote school diversity were not directly addressed or confronted by the Court.”<sup>205</sup> Implicit in this assessment is that these school districts’ plans either do not use race at all or use it so minimally that it poses neither constitutional concerns, nor achieves significant desegregation. With that said, the opinion limits any school that would adopt a more aggressive plan. Thus, the Court’s decision will discourage schools from considering such plans. In this respect, the effects of the decision are symbolically devastating and could hasten the end of meaningful desegregation.

##### A. Plans that Use Race in a General Way

On its face, Justice Kennedy’s opinion purports to provide school districts with options other than those chosen by Seattle and Louisville to achieve desegregation, but in reality, these options are unlikely to yield much, if any, desegregation. He asserts that schools, rather than using race to individually classify students, can desegregate by using race in a general way.<sup>206</sup> He suggests that “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” could be appropriate methods.<sup>207</sup> He, however, ignores the problems associated with these methods. Unfortunately, various data and examples reveal that desegregating schools is far from that simple or easy. Justice Breyer sums up our past experience, writing in dissent: “Nothing in the extensive history of desegregation efforts over the past 50 years gives the districts, or this Court, any reason to believe that [these] method[s] can]

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204. See, e.g., Leslie Yalof Garfield, *The Glass Half Full: Envisioning the Future of Race Preference Policies*, 63 N.Y.U. ANN. SURV. AM. L. 385, 385–86 (2008) (finding Justice Breyer’s dissenting opinion in *Parents Involved* “not well founded” and positing that “Justice Kennedy’s opinion could swing the Court to a position that is favorable to those who believe race-preference policies are paramount to achieving a society free from segregation”).

205. STILL LOOKING TO THE FUTURE, *supra* note 49, at 23.

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

207. *Id.*

accomplish” desegregation.<sup>208</sup> In reviewing all the evidence in the record, amicus briefs, and legal history, there is not a single “example or model . . . of a desegregation plan that is likely to achieve [the schools’] objectives and also makes less use of race-conscious criteria than [their] plans.”<sup>209</sup>

For instance, “as to ‘strategic site selection,’ Seattle has built one new high school in the last 44 years (and that specialized school serves only 300 students).”<sup>210</sup> Seattle’s experience is not unique, but rather common in most school districts.<sup>211</sup> Thus, although theoretically an option, site selection is generally an unavailable tool. Simply redrawing attendance zones is an available option to schools districts, but the efficacy of redrawing zones is low. Most school districts have segregated schools largely because they have segregated residential neighborhoods,<sup>212</sup> not because the attendance zones themselves segregate students. Thus, shifting attendance zone lines would produce minimal effects and result in most students still attending segregated schools in their segregated neighborhoods. It is true that a single school could draw students from various neighborhoods by using multiple attendance zones.<sup>213</sup> However, logistics would pose significant problems because poor minority neighborhoods are often spatially distanced from white and more affluent neighborhoods.<sup>214</sup> Consequently, this type of attendance zone drawing would require both busing and the mandatory assignment of students to schools other than those in their neighborhoods. Putting issues of race entirely aside, those two issues alone—busing and mandatory non-neighborhood schools—have provoked some of the fiercest resistance seen in regard to school desegregation.<sup>215</sup> To put it mildly, “decisions about where to assign

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208. *Id.* at 2828 (Breyer, J., dissenting).

209. *Id.* at 2827 (internal quotation marks omitted).

210. *Id.* at 2828.

211. STILL LOOKING TO THE FUTURE, *supra* note 49, at 36 (“[T]he opportunity to site a new school is relatively rare.”).

212. See generally Paul M. Ong & Jordan Rickles, *The Continued Nexus Between School and Residential Segregation*, 15 BERKELEY LA RAZA L.J. 51, 57–59 (2004) (indicating that neighborhood segregation and school segregation are closely related). However, Reardon and Yun point out that some school assignment practices have nonetheless exacerbated school desegregation beyond what residential segregation would normally produce. See Sean F. Reardon & John T. Yun, *Integrating Neighborhoods, Segregating Schools: The Retreat from School Desegregation in the South, 1990–2000*, 81 N.C. L. REV. 1563, 1575–81 (2003).

213. See, e.g., *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 9 (1971) (discussing a plan that used “satellite” zones” to draw students from all over the district); Wendy Parker, *The Supreme Court and Public Law Remedies: A Tale of Two Kansas Cities*, 50 HASTINGS L.J. 475, 492 n.67 (1999) (explaining the clustering and pairing of schools as a desegregative tool).

214. DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 84–93 (1993) (describing geographic isolation between blacks and whites).

215. See, e.g., *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 462 (1982) (discussing a state wide ballot initiative to ban school busing); 20 U.S.C. § 1755 (2000) (“[N]o court of the

students and how best to adjust attendance boundaries are often political and sensitive ones, and encouraging racial diversity can be but one of many goals that school officials keep in mind as they balance competing interests.”<sup>216</sup>

For purposes of this Article, it suffices to say that Justice Kennedy’s other suggestions are likewise ineffective means of desegregation.<sup>217</sup> Tracking data, recruiting students and teachers, and offering special programs require nothing of parents and very little of school districts. Rather, they simply leave the future of desegregation to what is the equivalent of a pure laissez-faire market, which in the past has permitted (if not tacitly encouraged), increased segregation.<sup>218</sup> In short, Justice Kennedy’s suggestion that schools can use general policies that simply consider race underestimates reality.

### *B. Plans that Consider the Race of Individuals and/or Factors that Correlate with It*

As indicated above, Justice Kennedy holds that if primary and secondary schools classify individual students by race, “[r]ace may be one component of . . . diversity, but other demographic factors, plus special talents and needs, should also be considered.”<sup>219</sup> A plan that relies on a multifactor consideration of diversity, however, is not likely to produce significant desegregation because its design and purpose would be to produce diversity rather than desegregation. If race is but one factor and the other factors do not correlate with race, the plan would have no means to control for segregation. In all fairness, it would have some effect on desegregation, but diversity simply is not equivalent to racial desegregation. Achieving one does achieve the other. To the extent it does, it is a side effect. Thus, although Justice Kennedy’s opinion does provide for the limited use of race in achieving diversity, it is no more likely to produce desegregation than any of the previously discussed suggestions.

With that said, a multifactor assignment policy that pursues desegregation in terms of race, socioeconomic status, and geographic isolation, rather than diversity, might have some chance of success. I suggest those as goals because

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United States shall order the implementation of any plan to remedy a finding of de jure segregation which involves the transportation of students, unless the court first finds that all alternative remedies are inadequate.”).

216. STILL LOOKING TO THE FUTURE, *supra* note 49, at 36.

217. See, e.g., *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2728, 2828–29 (2007) (Breyer, J., dissenting) (discussing the failure of special programs, targeted recruiting, and tracking data to produce desegregation in Seattle and Louisville).

218. See Daniel R. Gordon, *One Hundred Years After Plessy: The Failure of Democracy and the Potentials for Elitist and Neutral Anti-Democracy*, 40 N.Y.L. SCH. L. REV. 641, 666–67 (1996) (“The *Brown* Court found that African-American children were treated unequally even when provided similar school houses and curricula. To reach this conclusion the *Brown* Court turned away from the . . . laissez faire thinking underlying *Plessy*.”).

219. *Parents Involved*, 127 S. Ct. at 2797 (Kennedy, J., concurring in part and concurring in the judgment).

they, more than diversity, bear significant relevance to the schools' goal of equalizing educational opportunities. Moreover, the goal of racial desegregation is closely tied to these others insofar as racially segregated minority schools generally suffer from concentrated poverty and geographic isolation. By broadening desegregation beyond race to include socioeconomic status and geographic desegregation, a school district could also respond to the claim that race classifications alone were the basis for assignments.

A multifactor plan that relied on race, socioeconomic status, parental education, and residential segregation could theoretically produce both racial and socioeconomic desegregation. Most important in responding to Justice Kennedy's concerns, such a plan would produce a different type of desegregation than we have previously seen. Racial groups would not automatically be lumped together and their race alone would not be decisive in placements. For instance, a plan that relied on choice would not give all minorities a preference when seeking assignment to a predominantly white school, nor would it give all whites a preference when seeking admission to a predominantly black school. Rather, among those seeking admission to a predominantly white or middle class school, such a plan might only give preference to minorities from the particular demographic group that needs the alternative assignment the most: those trapped in racially isolated, poverty-stricken, and low-performing schools.

Some schools have experimented with what they call diversity indexes, which factor in socioeconomic status, parental income, the geographic area in which one lives (giving particular weight to those who live in segregated neighborhoods according to census tract data), achievement at one's prior or current school, parental education, housing status, and household structure or a combination of the above.<sup>220</sup> One could use these factors in any number of ways, but the confluence of these particular factors might allow schools to produce more than just modest levels of desegregation. Moreover, to the extent such a policy places significant weight on residence in a racially and economically isolated neighborhood rather than an individual's race, it would be race-neutral toward individuals. For instance, in assignment to a high income or predominantly white school, both whites and minorities who live in

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220. See, e.g., KAHLENBERG, A NEW WAY ON SCHOOL INTEGRATION, *supra* note 71, at 2–3 (summarizing the integration plans of various school districts that use these factors); S.F. UNIFIED SCH. DIST., EDUCATION PLACEMENT, <http://portal.sfusd.edu/template/default.cfm?page=policy.placement.process> (last visited Aug. 4, 2008). Berkeley, California, implemented a plan that factors in race/ethnicity, parental education level, and parental income level. BERKELEY UNIFIED SCH. DIST., BUSD STUDENT ASSIGNMENT PLAN/POLICY, <http://www.berkeley.net/index.php?page=student-assignment-plan> (last visited Aug. 4, 2008) [hereinafter BUSD PLAN]. The school district assigns each of these factors a value, which it uses to calculate a diversity composite. *Id.* This composite, however, is not based on an individual student's race, parental income, or education. See *id.* Rather, the student is assigned a diversity composite based on the overall characteristics of the neighborhood in which they live, based on race, education and income. *Id.* Thus, every child in a neighborhood would have the same score. See *id.*

a racially isolated minority neighborhood would be favored over other students, including racial minorities who are affluent or live in affluent neighborhoods. A plan operating in this manner would respond to Justice Kennedy's concern about the objectives and results of desegregation being purely racial.<sup>221</sup> The program would promote both racial and socioeconomic integration and prevent race from becoming the sole or predominate factor.

The drawback of such policies is that they are relatively sophisticated to devise and administer and, consequently, can be expensive.<sup>222</sup> Schools that realize the value of, and absolute need for, racially desegregated schools surely would wonder why they need to jump through hoops, create what some would call "proxies" for race,<sup>223</sup> and expend resources to obtain what the Court recognizes to be a compelling interest. That is not to say that some schools will not operate such a desegregation plan despite the burden,<sup>224</sup> but to recognize that many may be discouraged rather than encouraged.

221. *Parents Involved*, 127 S. Ct. at 2797 (Kennedy, J., concurring in part and concurring in the judgment) (expressing concern that race would be used as a "bargaining chip in the political process").

222. See, e.g., BUSD PLAN, *supra* note 220. The cost of creating and administering Berkeley's plan is not immediately apparent, but its complexity is clear from the school's following explanation of how it creates a diversity composite:

The three diversity factors detailed above [race, income, education level] are then combined to yield an integer "classification" category limited to values 1, 2 and 3 . . . . Because each diversity factor varies in the manner in which it is measured, it must be linearly transformed from these disparate outcome spaces to a common outcome space (a decimal value between 1.0 and 3.9). The three diversity factors are then "mapped" using the following equation:

"Composite Diversity Average" =

.33 x (2. + (Parent Income Level - 34000)/(70000 - 34000)) +

.33 x (2. + (Parent Education Level - 3.4)/(4.1 - 3.4)) +

.33 x (2. + (70 - Percent Students of Color)/(67-30))

Each diversity category (1, 2 or 3) is derived from this "weighted average" by applying two thresholds or "break points" to the decimal value. The breakpoints were determined after multiple experiments and careful considerations. The breakpoints were chosen to divide the city's K-5 population into three proportions.

*Id.*

223. In fact, an administrative complaint was filed against Wake County with the Office of Civil Rights, alleging that the county was using poverty as a proxy for race. The Office for Civil Rights rejected the complaint finding poverty was not a proxy and that the school had a legitimate educational reason for its policy. KAHLLENBERG, RESCUING BROWN, *supra* note 118, at 13 (citing Letter from U.S. Dep't of Educ. Office of Civil Rights, S. Div., to William R. McNeal, Superintendent, Wake County Pub. Sch. Sys., Aug. 29, 2003 (re OCR Complaint Nos. 11-02-1044, 11-02-1104, and 11-02-1111)).

224. In fact, the Supreme Court decision has not dissuaded Louisville from its efforts. See Antoinette Konz & Chris Kenning, *Jefferson Wants Income, Race, Education, as Criteria*, COURIER-JOURNAL (Louisville, Ky.), Jan. 29, 2008, at A1. The school board recently heard a proposal as to how it could still maintain integrated schools. *Id.* The plan would rely on race, income, and family education levels as factors in assignments. *Id.* The school superintendent explained that, "[u]nder the proposal, all schools—elementary, middle and high—must enroll at least 15 percent and no more than 50 percent of their students from neighborhoods that have

Second, simplifying the plans does not appear to be an option. For instance, some might suppose that a school district could simply assign students based on socioeconomic status and that these assignments would produce both racial and socioeconomic status desegregation. Wake County, North Carolina, is the most prominent example of such a plan. Wake County currently employs a school assignment plan that relies on neighborhood socioeconomic status.<sup>225</sup> That plan is maintaining a relatively high level of racial desegregation.<sup>226</sup> With that said, racial segregation has still increased beyond the levels present under Wake County's previous race-based assignment plan.<sup>227</sup> Thus, the notion that socioeconomic status is as effective as race in desegregating schools is flawed.

Nevertheless, the Wake County plan has been successful and research shows that it has produced positive academic results for the system.<sup>228</sup> Unfortunately, Wake County may be unique. First, the assignment plan requires mandatory assignments to maintain the levels of desegregation. Researchers and commentators posit that the community's unusual tolerance for mandatory assignments stem from its positive history with court-ordered desegregation.<sup>229</sup> This tolerance, however, is far less likely in other localities. Second, the demographics of Wake County are unique. Namely, race and socioeconomic status have a significantly stronger correlation there than in other areas.<sup>230</sup> Moreover, residential segregation there highly correlates with socioeconomic status, making it much easier to assign students based on block tracts from census data than it would be elsewhere.<sup>231</sup> Outside of Wake County, research has suggested that socioeconomic status alone, although producing socioeconomic integration, would only produce modest levels of racial desegregation.<sup>232</sup>

The point here is simply that socioeconomic factors and race cannot be separated if a system intends to produce racial desegregation. A system can

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income and education levels below the district average and higher-than-average numbers of minorities." *Id.*

225. STILL LOOKING TO THE FUTURE, *supra* note 49, at 48 (indicating that socioeconomic status is calculated by the poverty level in "small geographic units called 'nodes'").

226. *See id.* at 49 ("[There is] a slight decline in racial diversity under the current plan, but [the schools] remain relatively racially diverse.").

227. *See id.* at 49, 91–92.

228. *See id.* at 49, 92–93.

229. *See* Brief of 553 Social Scientists as Amici Curiae in Support of Respondents app. at 49–50, *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738 (2007) (Nos. 05-908 & 05-915), 2006 WL 2927079 [hereinafter Brief of 553 Social Scientists].

230. *See id.* at app. 49.

231. *See id.*

232. *See* Sean F. Reardon, John T. Yun & Michael Kurlaender, *Implications of Income-Based School Assignment Policies for Racial School Segregation*, 28 EDUC. EVALUATION & POL'Y ANALYSIS 49, 50 (2006), available at <http://epa.sagepub.com/cgi/reprint/28/1/49> ("[I]t is not clear how much racial desegregation can be attained using solely income-based school assignment policies . . .").



produce socioeconomic desegregation by making socioeconomic status the sole or predominant factor as surely as a system can produce race desegregation with race alone, but, as a general matter, both cannot be done unless race is also a factor.<sup>233</sup> This point is important because those who would tout race-neutral alternatives and demand that districts abandon all uses of race simply fail to show that these alternatives can produce effective racial desegregation. Both the briefs of the plaintiffs and of the United States (which supported the plaintiffs) fail to point to one example where race-neutral alternatives alone have produced a desegregated school system.<sup>234</sup> Again, as Justice Breyer found, not even a lesser reliance on race than that used in the instant cases, much less a race-neutral approach, has ever proven effective:

Having looked at dozens of *amicus* briefs, public reports, news stories, and the records in many of this Court's prior cases, which together span 50 years of desegregation history in school districts across the Nation, I have discovered many examples of districts that sought 'integration through explicitly race-conscious methods, including mandatory busing. Yet, I have found *no* example or model that would permit this Court to say to Seattle and to Louisville: "Here is an instance of a desegregation plan that is likely to achieve your objectives and also makes less use of race-conscious criteria than your plans." And, if the plurality cannot suggest such a model—and it cannot—then it seeks to impose a "narrow tailoring" requirement that in practice would never be met.<sup>235</sup>

While it is true that socioeconomic status alone will not produce effective and sustainable desegregation, the critique of socioeconomic plans may be too harsh. Given a Supreme Court predisposed to rule against Louisville and Seattle, there were important strategic considerations for not ceding anything in regard to effectiveness of socioeconomic desegregation. Pure socioeconomic plans simply lack the effectiveness of race-conscious plans by a significant margin, but the Court may have disregarded this nuance, as it did others. At this point, however, a continued critique that places race and socioeconomic plans at odds, instead of developing the manner in which they and other factors might be combined to overcome the barriers posed by *Parents Involved*, may do more harm than good.

First, many of the structural factors that limit the effectiveness of socioeconomic plans also limit race desegregation plans. Thus, the critique is more appropriately directed toward the structural limitations themselves. For

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233. See *id.* at 50, 67.

234. See Petitioner's Brief at 14–19, *Parents Involved*, 127 S. Ct. 2738 (No. 05-908), 2006 WL 2452374 (offering only general suggestions, such as neighborhood assignments or lottery systems as race-neutral options); Brief for the United States as Amicus Curiae Supporting Petitioner at 23–27, *Parents Involved*, 127 S. Ct. 2738 (No. 05-908), 2006 WL 2415458 (citing plans but not results).

235. *Parents Involved*, 127 S. Ct. at 2827.

instance, some have pointed out that the desegregative effectiveness of most socioeconomic plans is limited because the most severe racial segregation exists between school districts, not within individual school districts.<sup>236</sup> However, this kind of interdistrict segregation is a barrier to desegregation regardless of whether a plan relies on race or socioeconomic status.<sup>237</sup> Without interdistrict transfers that cross residential patterns of segregation, desegregation is inherently limited. Similarly, some point out that effective socioeconomic plans would require districts to assign and bus students to schools distant from their neighborhood. Again, the same thing can be said of effective racial desegregation. Whether race or socioeconomic status is the factor, schools and parents have resisted this measure.

Second, most critiques of socioeconomic plans are based on the poor results that many of the current plans have produced.<sup>238</sup> It is true that most of the plans have produced poor results if the results are compared to race-conscious plans. However, this comparison may be a comparison of apples and oranges. Race plans are obviously superior to socioeconomic plans in terms of racial desegregation, and supporters of socioeconomic plans do not argue otherwise.<sup>239</sup> Their point is presumably that socioeconomic plans can increase integration levels above the levels that would otherwise exist.

Moreover, even to the extent the results of these socioeconomic plans are poor, the failure is not a failure of socioeconomic plans per se. Instead, the failure is largely a result of the refusal to pursue aggressive socioeconomic plans. As discussed earlier, most of these plans are meek, and that meekness, even with the consideration of race, would be insufficient to reduce the current trends of resegregation.<sup>240</sup> San Francisco, for instance, relies on socioeconomic status and other non-racial factors when schools are oversubscribed.<sup>241</sup> But the driving forces of the school assignment are geographic proximity and parental choice, not socioeconomic status or other factors.<sup>242</sup> With no constraints on choice and proximity, the odds are severely against desegregation.<sup>243</sup> In addition, the system does not require equitable distribution of students, thus allowing students to opt for popular schools while

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236. Ryan, *supra* note 63, at 276.

237. Reardon, Yun & Kurlaender, *supra* note 232, at 67.

238. See, e.g., Brief of 553 Social Scientists, *supra* note 229, at app. 50–54 (noting the decrease in racial integration in various school districts in recent decades).

239. But see KAHLENBERG, A NEW WAY ON SCHOOL INTEGRATION, *supra* note 71, at 1–2 (asserting that “socioeconomic school integration does a better job of raising academic achievement than racial integration; it is not a ‘clumsier, proxy device’ to produce racial diversity but rather is the single most powerful driver of academic achievement in schools.” (footnote omitted)).

240. See *supra* Part II.B.

241. Reardon, Yun & Kurlaender, *supra* note 232, at 53; S.F. UNIFIED SCH. DIST., *supra* note 220.

242. See S.F. UNIFIED SCH. DIST., *supra* note 220.

243. See Reardon, Yun & Kurlaender, *supra* note 232, at 53.

unpopular minority schools have numerous vacancies.<sup>244</sup> Given the San Francisco system's past experiences with desegregation, it should be no surprise that this plan has done nothing to stem resegregation. Again, the failure here is not one of socioeconomic plans per se; it is a failure of the school district to be aggressive.

The leading study on socioeconomic plans, to which most others cite as demonstrating the ineffectiveness of socioeconomic plans, actually implies or concedes several of the above points to some extent.<sup>245</sup> The conclusion of the study is that socioeconomic plans do not guarantee racial desegregation.<sup>246</sup> First, this conclusion rules out the *guarantee* of desegregation; it does not rule out desegregation or suggest resegregation. Second, the nuances of the study suggest that one should not paint with broad brush strokes when speaking of socioeconomic plans. The study points out that there are numerous variations in how one might define socioeconomic integration, how one might pursue it, and the demographics with which a school district will be working.<sup>247</sup> All of these variations affect the potential for racial desegregation.<sup>248</sup> Some variations would render the plans entirely ineffective and others would produce significant desegregation.<sup>249</sup> Most important, the study examines the effectiveness of plans that rely solely on socioeconomic status, but indicates that incorporating additional factors could produce higher levels of racial desegregation because "multiple factors are better than a single factor to the extent that the multiple factors are collectively more highly correlated with race than income alone."<sup>250</sup> This caveat is important because, with the exception of Wake County, most other schools incorporate factors beyond socioeconomic status, presumably for this very reason.

Unfortunately, no matter how many factors a plan considers or how strongly those factors correlate with race, the plans cannot produce significant desegregation unless they aggressively use these factors. Schools cannot capitulate entirely to neighborhood schools and parental choice, nor can they use socioeconomic, race, and other factors sparingly when making assignments. Arguing that schools can do more, however, is not to suggest that Justice Kennedy was correct. These multifactor plans are still ineffective and cumbersome in comparison to race-based plans. And most important, to the extent racially segregated schools present an educational crisis, school districts need guarantees—not reasonable chances—of desegregation. The

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244. *Id.*

245. *Id.* at 67 (recognizing that interdistrict segregation and transportation is a problem for both socioeconomic and race plans).

246. *Id.* at 67.

247. *See id.*

248. *See id.*

249. *Id.*

250. *Id.* at 68.

research is clear that simplistic race-neutral plans do not offer this.<sup>251</sup> Only the most complicated, cumbersome, and thus, costly plans can produce significant desegregation. However, even these plans would likely require schools to sacrifice hallmarks of their plans, such as parental choice, which *Grutter* indicates is not required.<sup>252</sup>

## V. CONCLUSION

The death of school desegregation has been asserted prematurely too many times for this Article to conclude that adversity alone, regardless of its extent, will dissuade those who have always worked tirelessly to bring *Brown*'s promise to fruition.<sup>253</sup> They were not dissuaded when the Court held that separate is equal,<sup>254</sup> that courts lack the authority to order interdistrict metropolitan desegregation,<sup>255</sup> or that demographic shifts are a basis to end desegregation orders.<sup>256</sup> Nor were they dissuaded when the Court curtailed the educational improvements that could be ordered in all-black school districts.<sup>257</sup> Thus, constraints on how a district can voluntarily desegregate will do no more than any of these other decisions to dampen the spirits of those who understand the importance of desegregation.

With each of these decisions, however, the Court sends a message. Prior to *Parents Involved*, the message the Court was often sending was that it was time to return authority to school districts and end mandatory desegregation.<sup>258</sup> The result was that district courts began doing just that.<sup>259</sup> The message the Court sends in *Parents Involved* is mixed at best: desegregation is important, but not important enough for the Court to be flexible rather than constraining. How school districts will react to this message is unknown. For the first time,

251. See generally *id.*; see also Brief of 553 Social Scientists, *supra* note 229, at 13, app. 41–45 (indicating that school choice and geographic assignments “tend to . . . lead to greater segregation”).

252. See KAHLENBERG, *RESCUING BROWN*, *supra* note 118, at 27–28 (describing criticism of a redistricting plan that sought to give parents more of a choice in where their children went to school).

253. Compare Derrick A. Bell, Jr., *The Unintended Lessons in Brown v. Board of Education*, 49 N.Y.L. SCH. L. REV. 1053, 1053 (2005) (“The *Brown* decision, as far as the law is concerned, is truly dead and beyond resuscitation.”), and Kevin Brown, *After the Desegregation Era: The Legal Dilemma Posed by Race and Education*, 37 ST. LOUIS U. L.J. 897, 898–99 (1993) (noting the end of an era of court-ordered desegregation), with Dennis D. Parker, *supra* note 10, at 1069 (responding to the question of whether *Brown*'s legacy has met its demise), and Wendy Parker, *School Desegregation*, *supra* note 2, at 1159–60 (cautioning against concluding *Brown* is dead).

254. *Plessy v. Ferguson*, 163 U.S. 537, 551–52 (1896).

255. *Milliken v. Bradley*, 418 U.S. 717, 752 (1974).

256. *Freeman v. Pitts*, 503 U.S. 467, 471 (1992).

257. *Missouri v. Jenkins*, 515 U.S. 70, 94–100 (1995).

258. See Erwin Chemerinsky, *Separate and Unequal: American Public Education Today*, 52 AM. U. L. REV. 1461, 1465–67 (2003) (discussing a line of cases that came together to “give a clear signal to lower courts: the time has come to end desegregation orders”).

259. See *id.* at 1467.

civil rights attorneys may be powerless to use the legal system's authority to compel schools to act. Thus, the future of desegregation rests on the goodwill and good sense of school districts.

Fortunately, *Brown* has taught most of us enough to know that desegregated schools make good sense and it has changed most of us enough that we can rely on the goodwill of many schools.<sup>260</sup> This goodwill may not immediately manifest itself, but insofar as our schools are in crisis, goodwill beckons them to respond. Trying days are inevitably ahead in crafting plans that can both produce effective desegregation and meet the rigors of *Parents Involved*, but goodwill and good sense can prevail over bad decisions.

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260. See Derek W. Black, *Turning Stones of Hope into Boulders of Resistance: The First and Last Task of Social Justice Curriculum, Scholarship and Practice*, 86 N.C. L. REV. 673, 710–22 (2008).