

# The Post-Parents Involved Challenge: Confronting Extralegal Obstacles to Integration

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## INTRODUCTION

For proponents of school integration, *Parents Involved in Community Schools v. Seattle School District No. 1*<sup>1</sup> is certainly an undesirable decision, but by no means a movement-ending one. Many commentators have already begun trying to make sense of the Supreme Court's latest legal framework and to ascertain what kind of student assignment policies would likely pass constitutional muster.<sup>2</sup> This Article, however, takes a different tack. To advance the integration agenda from here, it suggests looking beyond merely testing the limits of the law or mounting further legal challenges to it. Using the decision as a starting point, this Article instead seeks to reexamine some of the assumptions, structures, and institutions that impact our educational system in an effort to understand how they interact to create and perpetuate inequity. Recognizing these relationships may allow us not only to shape

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<sup>1</sup> 127 S. Ct. 2738 (2007) [hereinafter *Parents Involved*].

<sup>2</sup> 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 (2008) (discussing the impact of *Parents Involved* on the ability of school districts to consider race in student assignments); Craig R. Heeren, "Together at the Table of Brotherhood": *Voluntary Student Assignment Plans and the Supreme Court*, 24 HARV. BLACKLETTER L.J. 133, 165–188 (2008) (using the legal framework for assessing voluntary school integration plans from *Parents Involved* to assess policies challenged in earlier cases and other strategies currently employed or available); 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 (2007) (describing the options left open for voluntary integration plans following *Parents Involved*); Eboni S. Nelson, *The Availability and Viability of Socioeconomic Integration Post-Parents Involved*, 59 S.C. L. REV. 841 (2008) (assessing the constitutionality of socioeconomic integration plans in the wake of *Parents Involved*); Alexandra Villarreal O'Rourke, *Picking Up the Pieces after PICS: Evaluating Current Efforts to Narrow the Education Gap*, 11 HARV. LATINO L. REV. 263, 264 (2008) (suggesting the use of socioeconomic-diversity plans, No Child Left Behind transfers, and charter schools in racially-isolated communities to advance educational equity); Lauren E. Winters, *Colorblind Context: Redefining Race-Conscious Policies in Primary and Secondary Education*, 86 OR. L. REV. 679, 719–29 (2007) (urging the consideration of socioeconomic factors to advance integration in the wake of *Parents Involved*).

positive and more effective integration strategies in the short run, but also, ultimately, to reimagine a system of public education that can fully realize the values of inclusion, equity, and integration.

The nature of school segregation undergoes continual change, and its causes are different today than they were forty, twenty, or even ten years ago. We argue that existing patterns of segregation can be traced, in large part, to factors that are ostensibly non-racial and non- or quasi-legal, but that work together to legitimize inequality and separateness.<sup>3</sup> Our analysis specifically focuses on how the decisions of certain institutions (the courts) interact with certain structures (district boundary lines) to legitimize the replication of residential segregation in public education, and establish and define discrete spaces in which disparate educational systems operate. It also considers how our collective understanding of the purposes of public education have evolved over time—now emphasizing excellence and autonomy over equality and citizenship—so as to shape and justify the actions of parents and the political bodies that represent them. These actions, too, in relation with the institutions and structures around them, serve to perpetuate inequality and undermine efforts to promote greater integration.<sup>4</sup>

To illustrate both how these factors collectively influence the development of school policies and undercut existing efforts to promote racial and ethnic integration, we consider the case of magnet schools. A magnet school, as initially conceived and as we use the term in this Article, is a school that seeks to achieve desegregation “voluntarily” by offering unique educational curricula or programs that attract students to enroll from outside

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<sup>3</sup> The idea that these ostensibly non-racial factors produce racially unequal results is not new. Andrew Grant-Thomas and John A. Powell, for instance, point to the now well-accepted phenomenon of “structural inequality” or “structural racism”—the institutional defaults, established structures, and social or political norms that may appear to be race-neutral, non-individual focused, and otherwise rational, but that taken together create and reinforce segregation by race and by class in and among schools and school districts. Andrew Grant-Thomas & John A. Powell, *Structural Racism and Color Lines in The United States*, in 21ST CENTURY COLOR LINES: EXPLORING THE FRONTIERS OF OUR MULTIRACIAL PRESENT AND FUTURE (Andrew Grant-Thomas & Gary Orfield eds., Temple University Press) (forthcoming 2008); see also Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1843 (1994) (describing more generally various race-neutral conditions that together contribute to and perpetuate racial segregation and inequality).

<sup>4</sup> Although Jim Ryan and Michael Heise do not necessarily connect the motivations of suburban parents to any particular conception of the goals of public education, they have pointed to the important role that these actors play in reinforcing existing patterns of racial and socioeconomic isolation. See James E. Ryan & Michael Heise, *The Political Economy of School Choice*, 111 YALE L.J. 2043, 2086–88 (2002).

of its immediate surrounding area.<sup>5</sup> The federal government purports to use essentially this same definition.<sup>6</sup> Over the past forty years, magnet schools not only have become immensely popular, but have emerged as perhaps the most frequently employed tool to promote integration.<sup>7</sup> The degree of success they enjoy in accomplishing this goal, therefore, is critical.

Refocusing the attention of advocates, educators, and researchers on these extralegal obstacles to integration, we think, is necessary after much attention has been paid to the law emerging from *Parents Involved*. In the months leading up to the ruling, some<sup>8</sup> billed the two cases consolidated in that appeal—one from Seattle, the other from metropolitan Louisville—as a judicial referendum on *Brown v. Board of Education*.<sup>9</sup> For decades, the Supreme Court had been chipping away at school desegregation, circumscribing the right by curtailing the scope of the remedy.<sup>10</sup> The

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<sup>5</sup> GARY ORFIELD, MUST WE BUS? SEGREGATED SCHOOLS AND NATIONAL POLICY 133 (1978) (describing a magnet school as a public school “that employs special educational program[s] designed to attract voluntary transfers from outside the area [surrounding the school], thus producing integration without compulsion”).

<sup>6</sup> See 20 U.S.C. § 7231a (“[T]he term ‘magnet school’ means a public elementary school, public secondary school, public elementary education center, or public secondary education center that offers a special curriculum capable of attracting substantial numbers of students of different racial backgrounds.”).

<sup>7</sup> According to U.S. Department of Education data, less than 3,000 schools were designated as magnets from 2005–06. See NAT’L CTR. FOR EDUC. STATISTICS, U.S. DEP’T OF EDUC., NUMBERS AND TYPES OF PUBLIC ELEMENTARY AND SECONDARY SCHOOLS FROM THE COMMON CORE OF DATA: SCHOOL YEAR 2005–06, tbl.2, available at [http://nces.ed.gov/pubs2007/pesschools06/tables/table\\_2.asp](http://nces.ed.gov/pubs2007/pesschools06/tables/table_2.asp). But see Mark Walsh, *Use of Race as a Concern for Magnet Schools*, EDUC. WEEK, Oct. 31, 2007 (citing the executive director of Magnet Schools for America, Robert G. Brooks, estimating about 4,000 magnet programs in the United States).

<sup>8</sup> See, e.g., Goodwin Liu, *Seattle and Louisville*, 95 CAL. L. REV. 277, 277 (2007) (predicting that in *Parents Involved*, “the Court will write perhaps the final chapter of the constitutional and cultural legacy of *Brown* in public education.”); David G. Savage, *Ever True to Brown? Two Public School Cases Raise the Legacy of the Famed Desegregation Ruling*, 92 A.B.A. J. 16, 16 (2006) (stating that in agreeing to hear *Parents Involved*, the Supreme Court will “confront the legacy of a landmark in American law”); Neil S. Siegel, *Race-conscious Student Assignment Plans: Balkanization, Integration, and Individualized Consideration*, 56 DUKE L.J. 781, 783 (2006) (stating that the Supreme Court’s decision could “determine the final legacy of *Brown v. Board of Education* in American society.”).

<sup>9</sup> 347 U.S. 483 (1954).

<sup>10</sup> Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 874–78 (1999). For a discussion of the Supreme Court’s retreat from school desegregation under the Burger and Rehnquist Courts, see Erwin Chemerinsky, *The Segregation and Resegregation of American Public Education: The Courts’ Role, in SCHOOL RESEGREGATION: MUST THE SOUTH TURN BACK?* 29–47 (John C. Boger & Gary

question for many observers was whether the Court would use *Parents Involved* to issue its final word on the subject, eviscerating what little remained of that landmark 1954 ruling.<sup>11</sup>

When the Court finally handed down its decision in June 2007, the media immediately latched onto the profound disappointment of progressives and civil rights advocates, who struggled to find a silver lining.<sup>12</sup> After all, the Court struck down both student assignment plans at issue, and the dissents accused the plurality not only of hijacking *Brown* and its legacy,<sup>13</sup> but also of threatening what little racial progress had been made.<sup>14</sup> With the dust now settled, however, some believe the immediate impact of the decision may not necessarily be as grave as originally feared,<sup>15</sup> assuming, of course, that Justice Kennedy meant it when he said that some carefully crafted uses of

Orfield eds., 2005); James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249, 260–71 (1999).

<sup>11</sup> See, e.g., Vivian B. Martin, *Equality in the Balance: Without the Ability to Use Race as a Factor in Assigning Schools, Desegregation Efforts Are Doomed*, HARTFORD COURANT, Dec. 10, 2006, at C1 (stating that if the plaintiffs prevail, *Brown* “will be seriously undermined”); Eboni S. Nelson, *Parents Involved and Meredith: A Prediction Regarding the (Un)constitutionality of Race-Conscious Student Assignment Plans*, 84 DENV. U.L. REV. 293, 295 (2006) (stating that “some think [*Parents Involved*] may prove to be the death knell of desegregation”); Warren Richey, *Back to the Supreme Court: Racial Balance in Schools*, CHRISTIAN SCI. MONITOR, Dec. 4, 2006, at 1 (quoting Theodore Shaw, president of the NAACP Legal Defense and Educational Fund, stating that *Parents Involved* is “about what is left, if anything, of *Brown v. Board of Education*,” and observing that if the plaintiffs prevailed, it would mean “a reversal of historic proportions”).

<sup>12</sup> See, e.g., Patricia J. Williams, *Mourning in America*, THE NATION, Aug. 6, 2007 (opining that *Parents Involved* “represents, for all intents and purposes, the overturning of *Brown v. Board of Education*”); see also David J. Hoff, *Decision Sparks Divided Reactions*, EDUC. WEEK, June 28, 2007, available at [http://www.edweek.org/ew/articles/2007/06/28/43scotusreax\\_web.h26.html](http://www.edweek.org/ew/articles/2007/06/28/43scotusreax_web.h26.html) (quoting statements and reactions of various stakeholders); Posting of Alex Elson to Supreme Court—School Integration, <http://scintegration.blogspot.com/2007/06/reactions-to-opinions.html> (June 28, 2007, 15:04) (same).

<sup>13</sup> *Parents Involved*, 127 S. Ct. 2738, 2798–99 (2007) (Stevens, J., dissenting) (noting the “cruel irony” of the majority’s reliance on *Brown*).

<sup>14</sup> *Id.* at 2834 (Breyer, J., dissenting).

<sup>15</sup> E.g., Jeffrey Rosen, *Can a Law Change a Society?*, N.Y. TIMES, July 1, 2007, at WK1 (suggesting that *Parents Involved*, like most court decisions, is unlikely to have a transformative effect on society); James E. Ryan, Comment, *The Supreme Court and Voluntary Integration*, 121 HARV. L. REV. 131, 132 (2007) (expressing the opinion that “this decision does not change much on the ground”).

race are permissible.<sup>16</sup> For the creative and willing, opportunities to advance integration remain on the table.<sup>17</sup>

To be sure, *Parents Involved* is as momentous as the language in (and length of) the five opinions it produced suggests, though perhaps not as much for what the Court did as what it failed to do. The case presented the Court with a clear opportunity to confront the growing racial separateness in our nation's K-12 public schools, both as a goal in and of itself, and as a first step toward meeting the challenge Justice O'Connor issued in *Grutter v. Bollinger* to eliminate the need for higher education affirmative action in twenty-five (now twenty) years.<sup>18</sup> The case also offered the Court a chance to heed *Grutter's* caution that "[c]ontext matters," and to give serious consideration to, and provide much needed guidance on, what narrow tailoring requires in the K-12 context.<sup>19</sup> Indeed, the Court could have used *Parents Involved* to set straight the doctrinal difference between K-12 voluntary school integration on the one hand—borne out of *Brown* and never before subjected to strict scrutiny constitutional review in any prior Supreme Court ruling—and affirmative action on the other—jurisprudence born out of *Regents of University of California v. Bakke*<sup>20</sup> and its progeny.<sup>21</sup> But it did none of these

<sup>16</sup> *Parents Involved*, 127 S. Ct. at 2793 (Kennedy, J., concurring).

<sup>17</sup> At a minimum, there are the options that Justice Kennedy offered, which to his mind should not even demand exacting constitutional review:

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 [more] targeted fashion; and tracking enrollments, performance, and other statistics by race. These mechanisms are race conscious but do not lead to different treatment based on a classification that tells each student he or she is to be defined by race, so it is unlikely any of them would demand strict scrutiny to be found permissible.

*Id.* at 2792. For a discussion of some of the potential race-neutral and race-conscious strategies that school authorities may pursue, see Anurima Bhargava, Erica Frankenberg & Chinh Q. Le, NAACP Legal Def. and Educ. Fund & Civil Rights Project/Proyecto Derechos Civiles, *Still Looking to the Future: Voluntary K-12 School Integration*, A MANUAL FOR PARENTS, EDUCATORS AND ADVOCATES 34–59 (2008), available at [http://www.civilrightsproject.ucla.edu/research/deseg/Still\\_Looking\\_to\\_the%20Future\\_Integration\\_Manual.pdf](http://www.civilrightsproject.ucla.edu/research/deseg/Still_Looking_to_the%20Future_Integration_Manual.pdf).

<sup>18</sup> *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003).

<sup>19</sup> *Id.* at 327.

<sup>20</sup> 438 U.S. 265 (1978).

<sup>21</sup> See, e.g., 127 S. Ct. at 2817–20 (Breyer, J., dissenting) (tracing the different lines of cases of school desegregation and affirmative action); Brief of the NAACP Legal Defense and Educational Fund, Inc. as Amicus Curiae in Support of Respondents at 19–

things. For that reason, among others, the ruling is a letdown to and setback for school integration advocates.<sup>22</sup>

Yet, as school boards and their lawyers sit down to make sense of their options post-*Parents Involved*, they are finding that for all its sound and fury, the case does not impose entirely new legal hurdles.<sup>23</sup> Indeed, most students of the Supreme Court's race jurisprudence probably could have predicted with a high degree of accuracy what the law coming out of the case would look like. Justice Kennedy, who authored the controlling opinion, expressed a discomfort with race-specific actions and measures—not unsurprising given the stances he had taken in prior race cases—but he did not forbid them entirely.<sup>24</sup> If such measures are used, strict scrutiny applies.<sup>25</sup> Under that analysis, promoting educational diversity and avoiding racial isolation at the K–12 level, in some form, are compelling interests.<sup>26</sup> Any race-specific means used must satisfy the narrow tailoring test laid out in *Grutter*,<sup>27</sup> although how closely the Court would adhere to the particular factors created

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23, *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738 (Nos. 05-908, 05-915) (tracing the distinct doctrinal lines between affirmative action and school desegregation cases); 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, 640–51 (2007); Heeren, *supra* note 2, at 143–65 (discussing, *inter alia*, the tension between the *Brown* and *Bakke* lines of precedent).

<sup>22</sup> Jim Ryan suggests that “[w]hat was lost by this decision . . . was the opportunity for the Court not simply to tolerate voluntary integration but to champion it as a way to make the promise of *Brown* a reality in the twenty-first century.” Ryan, *supra* note 15, at 156.

<sup>23</sup> See, e.g., Posting of Nicole Dixon to Supreme Court—School Integration, <http://scintegration.blogspot.com/2007/07/around-nation-districts-determined-to.html> (July 19, 2007, 23:43) (describing reactions of various efforts of school districts trying to redesign their student assignment policies after *Parents Involved*); see also Mark Walsh, *Use of Race Uncertain for Schools*, EDUC. WEEK, July 18, 2007 (same).

<sup>24</sup> 127 S. Ct. at 2791 (Kennedy, J., concurring) (stating that the plurality opinion implies “an all-too-unyielding insistence that race cannot be a factor in instances when, in my view, it may be taken into account.”). See also *id.* at 2792 (“In the real world, it is regrettable to say, [colorblindness] cannot be a universal constitutional principle.”).

<sup>25</sup> *Id.* at 2751 (plurality opinion).

<sup>26</sup> *Id.* at 2789 (Kennedy, J., concurring) (“Diversity, depending on its meaning and definition, is a compelling educational goal a school district may pursue.”). See also *id.* at 2797 (“A compelling interest exists in avoiding racial isolation, an interest that a school district, in its discretion and expertise, may choose to pursue.”).

<sup>27</sup> *Id.* at 2793 (providing that if a school system uses individual racial classifications, it must be “a more nuanced, individual evaluation of school needs and student characteristics that might include race as a component. . . . [This] approach would be informed by *Grutter*, though of course the criteria relevant to student placement would differ based on the age of the students, the needs of the parents, and the role of the schools.”).

for the higher education admissions context—some of which seem distinctly ill-suited for K–12 student assignment—remains an open question.<sup>28</sup> Disappointing as we may find the decision, it does not have to mean that *Brown* is put to bed, as some feared.

Looking ahead, therefore, the primary obstacle standing in the way of greater racial (and socioeconomic) integration in our public schools is not necessarily the law emerging from *Parents Involved*, at least not exclusively. Certainly, the decision prohibits some of the most direct means school districts may use to attack the problem and therefore makes things a great deal more challenging. But it also allows some room, albeit not much, for play in the joints, and in any event, it is what it is, for now. Rather than lament the state of the law, we believe that advancing the integration agenda requires us not only to continue fashioning carefully designed voluntary school integration policies (and have them tested in the courts), as others advocate, but also to devote more attention to the practical, extralegal hurdles that have long stood in the way of integration, constitutional uncertainties aside. After all, the law alone cannot account for the scores of school districts and communities that have essentially offered no strategy for or even intention of addressing racial, ethnic, and socioeconomic isolation in their schools, despite the growing segregation they are and have been witnessing.<sup>29</sup>

The Article proceeds as follows: Part I provides an overview of the existing patterns of school segregation, and how the nature of the segregation has changed over time. It highlights two interconnected factors largely responsible for the patterns we see: the peculiar nature of school district boundaries, and *Milliken v. Bradley*,<sup>30</sup> a key Supreme Court decision that cemented, in terms of educational realities, the meaning of those boundaries. Part II discusses the purposes of public education and their reconceptualization over the past half-century. It traces how public schooling

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<sup>28</sup> *Id.* at 2753–54 (plurality opinion).

<sup>29</sup> Estimates on the number of schools that consider race in assignment to promote integration vary widely. Compare, e.g., Savage, *supra* note 8, at 16 (approximating more than 1,000 school districts that consider race), with Robert Cohen, *Setback for School Desegregation*, STAR-LEDGER, June 29, 2007, at 1 (noting that Parents Involved “could jeopardize hundreds of voluntary integration plans”), and Ryan, *supra* note 15, at 146 (counting fewer than thirty districts that have plans similar to those in effect in Seattle and Louisville” and possibly “as few as ten”). We cannot say with certainty how many schools, school districts, or regions of the country are taking integration seriously, but given the persistence of and growth in racially isolated public schools and classrooms, it is fair to say that the number is not high enough. Cf. Goodwin Liu & William L. Taylor, *School Choice to Achieve Desegregation*, 74 *FORDHAM L. REV.* 791, 792 (2005) (noting that “in many places, [desegregation] has been found difficult and not tried at all”).

<sup>30</sup> 418 U.S. 717, 748 (1974).

in the public imagination has changed—from a system designed to promote citizenship, teach tolerance and understanding, and eliminate social inequality, to one almost singularly focused on individual excellence and autonomy—and how those changes impact the actions of parents.

Part III turns to magnet schools by way of example and explains how the phenomena discussed in Parts I and II have shaped their development. We find that magnet schools (and the systems and factors that influence them) have evolved over the years in ways that have rendered them increasingly less effective at accomplishing their primary and original goal—desegregation. Part IV sets forth some implications of our analysis for magnet schools. It suggests ways in which magnet schools can be reimagined so as to become a more effective contributor to school integration. The Article concludes with the recommendation that future integration strategies refuse to accept a framework that reinforces structural inequality and challenge its values and effects on our system of public education.

One final—and important—caveat at the outset: Although we examine magnet schools in this Article with a critical eye, we do so in an effort to build them up and improve them to serve our students and communities, *not* to tear them down. None of the data or research we discuss questions the intentions or efforts of the educators who work in magnet schools or the school administrators who design, develop, implement, and maintain them. In fact, we recognize that many of these educators are working within a context as described in Parts I and II that makes their efforts at integration, along with other sometimes competing goals, quite challenging. We recognize not only that magnet schools are now a permanent fixture in the public education system, but also that they remain among the most important tools we have to combat racial and ethnic isolation, and to promote voluntary integration. We hope this Article will aid them in that task.

## I. NEW DYNAMICS OF SCHOOL SEGREGATION

The patterns and trends of school segregation have been discussed in detail elsewhere,<sup>31</sup> and we will not rehearse them at length here. However,

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<sup>31</sup> Charles T. Clotfelter, *After Brown: The Rise and Retreat of School Desegregation* (2004); Erica Frankenberg, Chungmei Lee & Gary Orfield, Civil Rights Project at Harv. Univ., *A Multiracial Society with Segregated Schools: Are We Losing the Dream?* (2003), available at <http://www.civilrightsproject.ucla.edu/research/reseg03/AreWeLosingtheDream.pdf>; Gary Orfield & Erica Frankenberg, Civil Rights Project/Proyecto Derechos Civiles, *The Last Have Become First: Rural and Small Town America Lead the Way on Desegregation* (2008), available at <http://www.civilrightsproject.ucla.edu/research/deseg/lasthavebecomefirst.pdf>; Gary Orfield & Chungmei Lee, Civil Rights Project/Proyecto Derechos Civiles, *HISTORIC REVERSALS, ACCELERATING RESEGREGATION, AND THE NEED FOR NEW INTEGRATION*



we describe them to the extent necessary to show that school segregation continues to grow, how the nature of segregation has changed, and to offer our thoughts on what accounted and accounts for the separateness.

### A. Does Segregation Exist? Defining Segregation

Use of the term “segregation” to describe conditions of racial separateness or near separateness has not been uncontroversial. Indeed, a major point of contention among the Justices in *Parents Involved* was whether, in fact, school segregation existed in metropolitan Louisville and Seattle, as both districts asserted in their briefs to the Court.<sup>32</sup> According to Chief Justice Roberts’s plurality opinion, for instance, “Seattle has never operated segregated schools—legally separate schools for students of different races—nor has it ever been subject to court-ordered desegregation.”<sup>33</sup> Justice Thomas arguably set forth an even higher requirement to define conditions as segregation. In his concurring opinion, he described it as the “deliberate operation of a school system to ‘carry out a governmental policy to separate pupils in schools solely on the basis of race.’”<sup>34</sup> In this era of colorblind policy and practice,<sup>35</sup> it is unlikely that any districts would meet this deliberate intent threshold.

On the other hand, Justice Breyer, in his lengthy dissenting opinion, cited evidence about residential housing patterns as well as school board policies that “create, maintain, and aggravate racial segregation” in Louisville’s and Seattle’s schools.<sup>36</sup> Evidence that he cited to support his conclusion included the historical context of desegregation efforts,<sup>37</sup> current statistical evidence

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*STRATEGIES* (2007), available at [http://www.civilrightsproject.ucla.edu/research/deseg/reversals\\_reseg\\_need.pdf](http://www.civilrightsproject.ucla.edu/research/deseg/reversals_reseg_need.pdf); Sean F. Reardon & John T. Yun, *Integrating Neighborhoods, Segregating Schools: The Retreat from School Desegregation in the South 1990–2000*, in *SCHOOL RESEGREGATION: MUST THE SOUTH TURN BACK?*, *supra* note 10, at 51, 51–69.

<sup>32</sup> See Brief for Respondents at 31–32, *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738 (2007) (No. 05-908); Brief for Respondents at 9, *Meredith v. Jefferson County Bd. of Educ.*, 127 S. Ct. 2738 (2007) (No. 05-915).

<sup>33</sup> 127 S. Ct. 2738 at 2747. Justice Kennedy also differentiated between the cause of segregation, and therefore the available remedies, in his concurring opinion. “Our cases recognized a fundamental difference between those school districts that had engaged in *de jure* segregation and those whose segregation was the result of other factors.” See *id.* at 2795 (Kennedy, J., concurring).

<sup>34</sup> *Id.* at 2769 (2007) (Thomas, J., concurring) (quoting *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 6 (1971)).

<sup>35</sup> See EDUARDO BONILLA-SILVA, *RACISM WITHOUT RACISTS* 1–4 (2003); MICA POLLOCK, *COLORMUTE* 2 (2004).

<sup>36</sup> 127 S. Ct. 2738 at 2802 (Breyer, J., dissenting).

<sup>37</sup> *Id.* at 2799–2809.

about the growing number of students in racially isolated schools, and detailed discussion of the specific histories of segregation in Seattle and Louisville.<sup>38</sup> So who is right?

Practically speaking, for our purposes, it does not matter what label we put on these conditions. Justices Roberts, Thomas, and Breyer are all looking at the same demographic data. While the law ascribes legal significance to the term “segregation,” social science, which focuses more on the condition and environment in which students are educated than the reason why the condition or environment exists, has used the term more descriptively. Accordingly, social scientists have long been informed by the more inclusive definition favored by Justice Breyer, without the constraint of legal niceties differentiating de jure and de facto segregation. On that basis, studies of the recent trends in school districts released from court supervision (similar to earlier studies of de jure and/or de facto segregated schools) have found: (1) segregation (which would legally be defined as de facto) has increased in districts with post-unitary status,<sup>39</sup> and (2) students’ achievement suffers in racially isolated minority schools that are created post-unitary status (as is the case with other research on the harms of racially isolated minority schools).<sup>40</sup>

Over the years, three main categories of factors have had the most dramatic effects on school racial contexts, be they segregated white, segregated minority, stably racially diverse, or racially transitioning schools: intra-district student assignment policies, such as those that were often the policies invalidated by *Brown*;<sup>41</sup> district boundary lines;<sup>42</sup> and racial transition of neighborhoods.<sup>43</sup>

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<sup>38</sup> As part of his point by point rebuttal, Justice Thomas responded to Justice Breyer’s conclusion by noting that “[a]t most, those statistics show a national trend toward classroom racial imbalance. However, racial imbalance without intentional state action to separate the races does not amount to segregation.” *Id.* at 2769 (Thomas, J., concurring). Justice Thomas’ response inaccurately interprets the statistics that Justice Breyer cited—those statistics relied on data that were not detailed enough to be able to describe racial composition at the classroom level.

<sup>39</sup> See Jennifer Jellison, Harv. Project on Sch. Desegregation, *Resegregation and Equity in Oklahoma City* (1996); Chungmei Lee, Civil Rights Project/Proyecto Derechos Civiles, *Denver Public Schools: Resegregation, Latino Style* 10 (2006), available at [http://www.civilrightsproject.ucla.edu/research/deseg/Denver\\_Reseg.pdf](http://www.civilrightsproject.ucla.edu/research/deseg/Denver_Reseg.pdf); Roslyn Arlin Mickelson, *The Academic Consequences of Desegregation and Segregation: Evidence From the Charlotte-Mecklenburg Schools*, 81 N.C. L. REV. 1513, 1543 (2003).

<sup>40</sup> R. Kenneth Godwin et. al, *Sinking Swann: Public School Choice and the Resegregation of Charlotte’s Public Schools*, 23 REV. OF POL’Y RES. 983, 994 (2006); Vivian Ikpa, *The Effects of Changes in School Characteristics Resulting from the Elimination of the Policy of Mandated Busing for Integration Upon the Academic Achievement of African-American Students*, 17 EDUC. RES. Q. 19, 23–24 (1993).

<sup>41</sup> See CLOTFELTER, *supra* note 31, at 81–93; Gary Orfield, *Unexpected Costs and Uncertain Gains of Dismantling Desegregation*, in DISMANTLING DESEGREGATION: THE

## B. *The Rise of School Segregation*

School segregation has been on the rise for nearly two decades for black students, and has continually risen for Latinos since data first began to be collected about these students in the late 1960s.<sup>44</sup> Segregation for black students in the South declined markedly in the mid- to late-1960s, after a series of judicial rulings and federal pressure combined to implement desegregation orders in many districts across the South.<sup>45</sup> By 1970, black students in the South were more desegregated than in any other region of the country. Although resegregation has been occurring for black students in all regions, it has been more rapid in the South, which recently lost its distinction as the most desegregated region.<sup>46</sup> Latinos have never been a major focus of desegregation efforts despite the fact that prior to *Brown* the Ninth Circuit held that segregating Latino students violated the Equal Protection Clause.<sup>47</sup> Latino students were concentrated in the West during the period in which there were the most active desegregation efforts (mid- to late-1960s). They have experienced intensifying segregation since the late 1960s, and today they not only are the largest minority group in the public schools but are also more segregated than black students.<sup>48</sup>

Two of the most common ways of describing the extent of school segregation are the percentage of students in racially isolated schools and interracial exposure.<sup>49</sup> The former measure describes the percentage of

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QUIET REVERSAL OF *BROWN V. BOARD OF EDUCATION* 73, 81–93 (Gary Orfield & Susan E. Eaton eds., 1996) for a discussion of effects on school racial composition that result from intra-district policies.

<sup>42</sup> E.g., GREGORY R. WEIHER, *THE FRACTURED METROPOLIS* 87–92 (1991); David Delaney, *The Boundaries of Responsibility: Interpretations of Geography in School Desegregation Cases*, in 15 *URB. GEO.* 470, 481 (Chauncy D. Harris & Brian J.L. Berry eds., 1994).

<sup>43</sup> William H. Frey, Brookings Inst., *Melting Pot Suburbs: A Census 2000 Study of Suburban Diversity* 1–15 (2001), available at <http://www.frey-demographer.org/reports/billf.pdf>.

<sup>44</sup> ORFIELD & LEE, *supra* note 31, at 13–14.

<sup>45</sup> *Id.* at 35. There were few non-black minority groups in most parts of the South at this time and in places where there were Latinos, their rights were not acknowledged. Most desegregation plans were in place in the South prior to the Supreme Court explicitly acknowledging the rights of Latinos to desegregation in 1973. *Id.* at 9.

<sup>46</sup> *Id.* at 7.

<sup>47</sup> See *Westminster Sch. Dist. of Orange County v. Mendez*, 161 F.2d 774, 777 (9th Cir. 1947).

<sup>48</sup> ORFIELD & LEE, *supra* note 31, at 13.

<sup>49</sup> Although these are the most common ways of measuring segregation, there are others. In their analysis of residential segregation measures, for example, Douglas

minority students (or, in some cases, either black or Latino students) in hypersegregated schools, defined as schools where 90% or more students are minority.<sup>50</sup> In 2005–2006, the latest year for which we have data, 38% of black students and 39% of Latino students were in hypersegregated schools.<sup>51</sup> In addition to measuring the percentage of students in racially isolated nonwhite settings, the exposure index describes the percentage of white students in the school that a “typical” student of another race attends.<sup>52</sup> Nationally, black student exposure to whites was 30%, which meant that the “typical” black student attended a school with 30% white students.<sup>53</sup>

Although segregation has traditionally been thought of as an urban phenomenon and the suburbs as affluent, white enclaves, decades of minority suburbanization has complicated this metropolitan pattern. Minority student enrollment and, subsequently, segregation are growing rapidly in many suburban districts. For example, in the nation’s largest metropolitan areas (“MSAs”), there are more Latino and Asian students in suburban public schools than there are in the central cities in these metros.<sup>54</sup> More than 30% of all Latino students and almost 40% of Asian students attend schools in the suburbs of large MSAs. Twenty-nine percent of Latino students and 25% of Asian students attend central city schools in these same MSAs.<sup>55</sup>

What is disturbing, however, are the ways in which patterns of segregation are being replicated in suburbia—the promise of schools

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Massey and Nancy Denton suggested that there were five dimensions to segregation. Douglas S. Massey & Nancy A. Denton, *The Dimensions of Residential Segregation*, 67 SOC. FORCES 281 (1988). For critiques of these measures, see Sean F. Reardon, John T. Yun & Tamela M. Eitle, *The Changing Structure of School Segregation: Measurement and Evidence of Multiracial Metropolitan-Area School Segregation, 1989–1995*, 37 DEMOGRAPHY 351 (2000). See also David R. James & Karl E. Tauber, *Measures of Segregation*, 15 SOC. METHODOLOGY 1 (1985); Sean F. Reardon & Glenn Firebaugh, *Measures of Multigroup Segregation*, 32 SOC. METHODOLOGY 33 (2002).

<sup>50</sup> See, e.g., ORFIELD & LEE, *supra* note 31. As discussed *infra* some analyses use percentage of students in 50–100% minority schools. However, as the country nears a majority minority student enrollment, this definition is less meaningful than 90–100% minority schools.

<sup>51</sup> *Id.* at 33, 35–36.

<sup>52</sup> The exposure index is a weighted average of the percentage of other race students. It can also describe the reverse situation—the percentage of students of another race that *white* students are exposed to. Finally, it can also describe the percentage of students of one’s own race/ethnicity with whom students attend school. See Massey & Denton, *supra* note 49, at 281.

<sup>53</sup> ORFIELD & LEE, *supra* note 31, at 24. For comparison, Latino exposure to whites is 27%, while white exposure to whites (also called white isolation) is 77%.

<sup>54</sup> ORFIELD & FRANKENBERG, *supra* note 31, at 4–5.

<sup>55</sup> *Id.* at 5.

integrated by class and race of earlier generations is not as available to blacks and Latinos who are now enrolling in suburban schools.<sup>56</sup> While black and Latino students in large central city schools still remain the most segregated—almost two out of every three attend 90-100% nonwhite schools<sup>57</sup>—their same-race peers in the suburban schools in these metros also experience surprisingly high levels of segregation. More than one in three black and Latino students in suburbs in the largest MSAs also attend such racially isolated minority schools.<sup>58</sup> Although black and Latino students still comprise a minority of the students in suburban schools, these statistics suggest that the racial segregation found in many large central city districts is accompanying students' migration to the suburbs.

### C. *The Changing Nature of Segregation*

Prior to *Brown*, high levels of racial segregation (which historically have been linked with differences in educational spending)<sup>59</sup> existed among students of different races within school districts.<sup>60</sup> In the decision's aftermath, therefore, it is not surprising that most school desegregation efforts have focused on remedying intra-district segregation. Prior to 1954, there were seventeen states with laws enforcing such segregation.<sup>61</sup> Segregation in the South fell dramatically in the 1960s due to desegregation plans that addressed within-district segregation. While some of the rise in segregation, particularly in the South, in recent decades can be attributed to the abandonment of such desegregation plans and the increase in racially imbalanced schools,<sup>62</sup> the importance of intra-district segregation to overall segregation levels is less significant.

Instead, recent research shows that racial composition differences across district boundary lines contribute more to segregation today than do differences within them. Charles Clotfelter, for example, estimated that 69% of segregation in metropolitan areas was due to segregation *between*

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<sup>56</sup> *Id.* at 8.

<sup>57</sup> *Id.* at 7.

<sup>58</sup> *Id.*

<sup>59</sup> HARRY ASHMORE, *THE NEGRO & THE SCHOOLS* 156 tbl.11 (1954); Juan Necochea & Cline Zulmara, *A Case Study Analysis of Within District School Funding Inequities, EQUITY & EXCELLENCE IN EDUC.*, Sept. 1996, at 69.

<sup>60</sup> See CLOTFELTER, *supra* note 31, at 13–23.

<sup>61</sup> *Id.* at 14.

<sup>62</sup> See, e.g., SCHOOL RESEGREGATION: MUST THE SOUTH TURN BACK?, *supra* note 10; Roslyn Arlin Mickelson, *Subverting Swann: First- and Second-Generation Segregation in Charlotte, North Carolina*, 38 AM. EDUC. RES. J. 215 (2001).

districts.<sup>63</sup> He concluded, "It turns out that many of the nation's large urban areas are checkered with dozens of separate school districts, and this balkanization is an important factor in the racial segregation of public schools."<sup>64</sup> In fact, Clotfelter finds that in the South, while there have been large declines in within-district segregation in metropolitan areas from 1970 to 2000, between-district segregation has doubled during that same time period.<sup>65</sup> Thus, some of the judicial efforts to eliminate within-district segregation have been offset by rising between-district segregation. Other analyses have confirmed a high percentage of segregation due to between-district differences, and that is perhaps an even stronger contributor to the segregation of Latino and white students.<sup>66</sup>

The governance structure in terms of school district formation then can have important implications for school integration. For decades, black and Latino students in the Midwest and Northeast have been among the most segregated.<sup>67</sup> One explanation for this trend is the existence of dozens of school districts within one metropolitan area. By contrast, because countywide districts contain students of different races/ethnicities, these districts are more likely to have the ability to create integrated schools than those that lack such student diversity.<sup>68</sup>

By way of example, consider Florida and New York. In 2005–2006, these two states enrolled similar numbers of students: New York had just fewer than 2.8 million students while Florida had just fewer than 2.7 million.<sup>69</sup> Yet, Florida is a state with countywide districts, so its 2.7 million students are enrolled in sixty-seven districts. New York, on the other hand, has 730 districts for a slightly larger number of students.<sup>70</sup> As a result, each Florida district has almost ten times the number of students as each New

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<sup>63</sup> CLOTFELTER, *supra* note 31, at 73 (finding that the between-district component of segregation was .225 out of total segregation among all metropolitan areas of .326. He conceptualizes total segregation as also including within-district and public/private disparities components).

<sup>64</sup> *Id.* at 59.

<sup>65</sup> *Id.* at 63.

<sup>66</sup> Reardon & Yun, *supra* note 31, at 51–69.

<sup>67</sup> ORFIELD & LEE, *supra* note 31, at 28.

<sup>68</sup> FRANKENBERG, LEE & ORFIELD, *supra* note 31, at 58–61.

<sup>69</sup> As measured by average daily attendance in state's public elementary and secondary schools. LEE HOFFMAN & JOHN SIETSEMA, NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., NUMBERS AND TYPES OF PUBLIC ELEMENTARY AND SECONDARY AGENCIES FROM THE COMMON CORE OF DATA: SCHOOL YEAR 2005–06, tbl.2, available at [http://nces.ed.gov/pubs2007/pesagencies06/tables/table\\_2.asp](http://nces.ed.gov/pubs2007/pesagencies06/tables/table_2.asp).

<sup>70</sup> *Id.*

York district educates.<sup>71</sup> In Florida, cities and their surrounding suburbs are likely to be contained within one countywide school district, whereas that is likely not the case in New York. Instead, New York City, which has a low percentage of white students, maintains a separate (though admittedly very large) urban school system that is distinct from the overwhelmingly white, affluent districts that are in close proximity—a pattern commonly found in many Northern metros.<sup>72</sup>

Accordingly, even if segregation within districts were completely eliminated—which, of course, is not often achieved—there would still be high levels of segregation, and students within metropolitan areas would have vastly different experiences in terms of the racial composition of students that attend their school. In such situations, the contrasts in composition may also create instability.

#### D. Contributing Factors

The kind of segregation discussed above existed *before* the *Parents Involved* decision and thus does not account for any increasing segregation that may result from the actions school districts take in response to that decision. So how did the patterns come about? We focus on two culprits: (1) judicial decisions regarding school segregation, particularly *Milliken*, which gave district boundaries heightened legal significance, and (2) housing patterns, which are influenced by both personal preferences and governmental policies.

As referenced earlier, the *Brown* decision in 1954 outlawed segregation laws and policies that segregated black and white students in southern districts. Segregation of schools—and other public facilities—had been assumed to be constitutional based on the 1896 *Plessy* decision, a Supreme Court decision applied by countless lower courts to justify a rigid segregation in the South.<sup>73</sup> In the 1960s, federal court decisions had a major impact on reducing the segregation of black students in the South.<sup>74</sup>

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<sup>71</sup> According to U.S. Department of Education data, Florida districts had an average of 39,761 students and New York had 3,822. *Id.* (author's calculations).

<sup>72</sup> See, e.g., CHUNGMEI LEE, CIVIL RIGHTS PROJECT AT HARV. UNIV., RACIAL SEGREGATION AND EDUCATIONAL OUTCOMES IN METROPOLITAN BOSTON 5–11 (2004), available at [http://www.civilrightsproject.ucla.edu/research/metro/Segregation\\_Educational\\_Outcomes.pdf](http://www.civilrightsproject.ucla.edu/research/metro/Segregation_Educational_Outcomes.pdf).

<sup>73</sup> Gary Orfield, *Plessy Parallels: Back to Traditional Assumptions*, in DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF *BROWN V. BOARD OF EDUCATION*, *supra* note 41, at 23, 28.

<sup>74</sup> Gary Orfield, *Conservative Activists and the Rush Toward Resegregation*, in LAW AND SOCIAL REFORM: SIX STRATEGIES FOR PROMOTING EDUCATIONAL EQUITY 39, 39–87 (Jay Heubert ed., 1999).

The impact of court decisions was less pronounced outside of the South on a widespread basis because there were fewer laws and policies about segregation, or as rigid segregation.<sup>75</sup> While there were a number of cities outside the South in which school segregation was challenged, in many instances these remedies had limited impact because they only applied to the central cities, which often had largely minority student enrollments.<sup>76</sup> Moreover, these initial cases primarily confronted segregation within districts, not between them, and thus involved remedies suited for that type of constitutional violation. In 1974, the Supreme Court was presented with a metropolitan, inter-district remedy that a lower court judge had ordered as a remedy for school segregation in the city of Detroit.<sup>77</sup>

Because Detroit was already a majority minority district, the trial judge, in fashioning the desegregation plan, included the overwhelmingly white suburbs surrounding the city as part of the remedy.<sup>78</sup> The Supreme Court, however, in a 5-4 decision,<sup>79</sup> rejected the lower court's plan. It held that absent a finding that the suburbs had contributed to the segregation in Detroit, the trial court could not implement a remedy that included the suburbs. Doing so, the majority determined, would interfere with the tradition of "local control" in public schools.<sup>80</sup> Due to the patterns of inter-district segregation described above, the *Milliken* decision has profoundly limited the ability of courts to address the major cause of current segregation.<sup>81</sup>

There were three separate dissents filed, each arguing that the majority's decision was wrong for different reasons. Justice White challenged the notion of local control by pointing out that school districts are actually agents of state government that have been delegated to carry out the *state's* responsibilities, namely that of educating its youth.<sup>82</sup> Thus, it is not inconceivable that one or more districts (e.g., suburban) would help another (e.g., Detroit) in jointly carrying out the responsibilities of the state in a manner consistent with the Constitution. Justice Douglas noted the array of

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<sup>75</sup> CLOTFELTER, *supra* note 31, at 17-21.

<sup>76</sup> *See id.* at 25.

<sup>77</sup> *Milliken v. Bradley*, 418 U.S. 717 (1974).

<sup>78</sup> Gary Orfield, *Turning Back to Segregation, in* DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF *BROWN V. BOARD OF EDUCATION*, *supra* note 41, at 1, 10-11. Today, the Detroit school district is almost entirely black and is rapidly losing enrollment. FRANKENBERG, LEE & ORFIELD, *supra* note 31, at 54-55, 57.

<sup>79</sup> 418 U.S. at 717.

<sup>80</sup> *Id.* at 741.

<sup>81</sup> Ryan & Heise, *supra* note 4, at 2046.

<sup>82</sup> 418 U.S. at 763-64 (White, J., dissenting).



metropolitan governmental initiatives to suggest that metropolitan approaches to school segregation were also feasible.<sup>83</sup> Justice Marshall attributed the backlash of the court and political leaders against the inter-district remedy to “suburban political and racial resistance.”<sup>84</sup>

The impact of *Milliken*’s intra-/inter-district distinction is neither merely academic nor inconsequential. Years after *Milliken* was decided, the Supreme Court, in *Missouri v. Jenkins*,<sup>85</sup> relied on it to strike down even intra-district remedies ordered by the district court that were designed to improve the urban schools in Kansas City and make them competitive with schools in the surrounding suburbs. In yet another 5-4 decision, the Court found that the purpose motivating these seemingly intra-district remedies exceeded the scope of the constitutional violation because they were effectively inter-district in nature. By comparing the relative attractiveness of the urban schools to the schools in the predominantly white suburbs and seeking to use magnet schools to draw non-minority populations back into the city school system, the district court had ventured into the inter-district realm to address a purely intra-district problem.<sup>86</sup> After *Jenkins*, then, the potential reach of school desegregation remedies—both formally and practically—shrank even more, placing segregation further out of reach of the courts and school districts.

Meanwhile, largely unnoticed at the time *Milliken* was decided was another important argument that could have justified the use of inter-district remedies: the contribution of governmental policies to existing city-suburban segregation. In their 1993 book *American Apartheid*,<sup>87</sup> Douglas Massey and Nancy Denton describe the systematic nature of governmental policies that constructed what they term “ghettos” that segregated African-Americans in both Northern and Southern cities in the first half of the twentieth century.<sup>88</sup> These policies included the provision of low-cost loans that encouraged suburbanization in the aftermath of World War II and made it difficult to get loans for homes that were located in areas with a higher percentage of minority residents because these investments were declared too risky.<sup>89</sup> In addition, more localized practices like restrictive covenants and block-busting tried to maintain segregation by limiting the areas in which

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<sup>83</sup> *Id.* at 758 (Douglas, J., dissenting).

<sup>84</sup> Orfield, *supra* note 78, at 12.

<sup>85</sup> 515 U.S. 70 (1995).

<sup>86</sup> *Id.* at 90–94.

<sup>87</sup> DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 42–59 (1993).

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

minorities could buy homes to a geographically contained area.<sup>90</sup> Policies at the national and local level then contributed to the segregated housing patterns existing in Detroit (and elsewhere) by 1970 that impacted the school segregation across the metropolitan area.

There has long been a connection of school segregation to residential patterns, acknowledged by Supreme Court desegregation decisions.<sup>91</sup> What has changed is the determination of whether residential patterns are a matter solely of private actions or whether they are influenced by governmental policies, including siting of schools. Professor John A. Powell has suggested that there are very real structures in our society that continue to reinforce racial inequality and protect the privilege of certain racial groups.<sup>92</sup> More recently, public policy and court decisions view residential segregation (and as a by-product, school segregation)<sup>93</sup> as a result of private actions—despite a wealth of studies demonstrating the persisting nature of housing discrimination that would seemingly undercut arguments that housing decisions are solely matters of finance and preference.<sup>94</sup>

With increasing numbers of minority students entering public schools each year, the changes in school segregation suggest new configurations of

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<sup>90</sup> *Id.*

<sup>91</sup> See *Freeman v. Pitts*, 503 U.S. 467 (1992); *Swann v. Charlotte-Mecklenburg*, 402 U.S. 1, 7 (1971). See also Diana Pearce, Ctr. for Nat'l Pol'y Rev., Cath. U. of Am. Sch. of Law, *Breaking Down Barriers: New Evidence on the Impact of Metropolitan School Desegregation on Housing Patterns* (1980), available at [http://eric.ed.gov/ERICDocs/data/ericdocs2sql/content\\_storage\\_01/0000019b/80/39/88/25.pdf](http://eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/39/88/25.pdf); Erica Frankenberg, *The Impact of School Segregation on Residential Housing Patterns: Mobile, Alabama and Charlotte, North Carolina*, in *SCHOOL RESEGREGATION: MUST THE SOUTH TURN BACK?*, *supra* note 10, at 164.

<sup>92</sup> John A. Powell & Rebecca High, *The Common Schools Democracy Requires: Expanding Membership through Inclusive Education*, in *LESSONS IN INTEGRATION: REALIZING THE PROMISE OF RACIAL DIVERSITY IN AMERICAN SCHOOLS* 265, 265–90 (Erica Frankenberg & Gary Orfield eds., 2007); Andrew Grant-Thomas & John A. Powell, *Structural Racism and Color Lines in the United States*, in *21ST CENTURY COLOR LINES: EXPLORING THE FRONTIERS OF OUR MULTIRACIAL PRESENT AND FUTURE* (Andrew Grant-Thomas & Gary Orfield eds., forthcoming).

<sup>93</sup> Importantly, new research also shows that use of public schools among wealthy and whites also declines in neighborhoods with higher percentages of minority and low-income residents. Salvatore Saporito & Deenesh Sohoni, *Mapping Educational Inequality: Concentrations of Poverty among Poor and Minority Students in Public Schools*, 85 SOC. FORCES 1227, 1246 (2007).

<sup>94</sup> *E.g.*, DAVID J. HARRIS & NANCY MCARDLE, METRO BOSTON EQUITY INITIATIVE, HARV. CIVIL RIGHTS PROJECT, *MORE THAN MONEY: THE SPATIAL MISMATCH BETWEEN WHERE HOMEOWNERS OF COLOR IN METRO BOSTON CAN AFFORD TO LIVE AND WHERE THEY ACTUALLY RESIDE* 1–31 (2004), available at [http://www.bostonfairhousing.org/More\\_than\\_Money1.pdf](http://www.bostonfairhousing.org/More_than_Money1.pdf).

the same phenomenon. Minority suburbanization complicates traditional association of segregated conditions with urban areas and, in fact has lessened the isolation of all-white suburban areas.<sup>95</sup> Meanwhile, major cities continue to be and likely will remain segregated, and these patterns have begun to spread to inner-ring suburban communities.<sup>96</sup> What has largely remained the same through all of these changes is the inextricable relationship between the metropolitan school segregation we witness and inter-district disparities and residential segregation. We next consider how the private actions of individual parents, motivated by our collective conception of the purposes and role of public education, contribute to and perpetuate these patterns of racial segregation and inequality.

## II. THE PURPOSES OF PUBLIC EDUCATION

Although there is no federally guaranteed right to public education,<sup>97</sup> public schools have been integral parts of producing citizens since the beginning of our nation. In recognition of their critical importance, the constitution of every state contains provisions relating to public education, and almost all fifty have been read to guarantee the right to an education.<sup>98</sup> This right under state constitutions has, for example, been used by litigators to advocate for more funding for schools to ensure that states fulfill their constitutional responsibility. At the same time, according to one educational historian, “[s]chools. . . occupy an awkward position at the intersection between what we hope society will become and what we think it really is, between political ideals and economic realities.”<sup>99</sup> Thus, over time what we have asked of schools and expected as outcomes of schooling has been continually redefined.

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<sup>95</sup> FREY, *supra* note 43, at 1. See also BROOKINGS INST., 1 REDEFINING URBAN AND SUBURBAN AMERICA: EVIDENCE FROM CENSUS 2000 (Bruce Katz & Robert E. Lang eds., 2003).

<sup>96</sup> See ORFIELD & FRANKENBERG, *supra* note 31, at 11; MYRON ORFIELD, BROOKINGS INST., AMERICAN METROPOLITICS: THE NEW SUBURBAN REALITY 37 (2002).

<sup>97</sup> See *San Antonio Independent Sch. Dist. vs. Rodriguez*, 411 U.S. 1, 35 (1973).

<sup>98</sup> Connie de la Vega, *The Right to Equal Education: Merely a Guiding Principle or Customary International Legal Right?*, 11 HARV. BLACKLETTER L.J. 37, 50 n.90 (1994).

<sup>99</sup> David F. Labaree, *Public Goods, Private Goods: The American Struggle Over Educational Goals*, 34 AM. EDUC. RES. J., 39, 41 (1997). John Powell makes a similar argument about schools in terms of racial integration and equity. See John A. Powell, *A New Theory of Integrated Education: True Integration*, in SCHOOL RESEGREGATION: MUST THE SOUTH TURN BACK, *supra* note 10, at 281.

### A. Public Education's Shifting Purposes

Some of the Founding Fathers viewed public schools as an instrument to helping to perpetuate a healthy democracy.<sup>100</sup> Having educated voters would make sure that the young nation would survive, although those allowed to vote—and therefore, who were viewed as needing an education—were originally limited to a select group of those residing in the U.S., namely, white, male landowners.<sup>101</sup> In the 1800s, more communities began to develop “common schools” that were supported and financed by the local community. Horace Mann, one of the educational leaders of the time, suggested that schools would serve as “the great equalizer” of the masses.<sup>102</sup> Mann was the secretary of education in Massachusetts and published annual reports on education, which also helped to advocate for the importance of public education (e.g., the benefits of an educated populace for businessmen).<sup>103</sup> During this time, education was expanded and went from private, elite education to providing opportunities for the masses by the end of the nineteenth century.<sup>104</sup>

During the late 1800s and beginning of the 1900s, in what is known as the Progressive Era, educational philosopher John Dewey expanded upon the notion of education and its relationship to democracy. Perhaps his most extensive discussion of these themes was in *Democracy and Education*, published in 1916. He explained, “a government resting upon popular suffrage cannot be successful unless those who elect and who obey their governors are educated . . . [b]ut . . . [a] democracy is more than a form of government; it is primarily a mode of associated living, of conjoint communicated experience.”<sup>105</sup> Democratically designed schools, Dewey insisted, were the only way in which to prepare children for such a robust conception of citizenship in a democratic society.

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<sup>100</sup> JOSEPH J. ELLIS, *FOUNDING BROTHERS: THE REVOLUTIONARY GENERATION* 154 (2001); George Washington, *The Farewell Address*, in *WASHINGTON'S FAREWELL ADDRESS: THE VIEW FROM THE 20TH CENTURY* 25 (Burton Ira Kaufman ed., 1969).

<sup>101</sup> DAVID TYACK & ELISABETH HANSOT, *LEARNING TOGETHER: A HISTORY OF COEDUCATION IN AMERICAN PUBLIC SCHOOLS* 16–18 (1992); JOHN L. RURY, *EDUCATION AND SOCIAL CHANGE: THEMES IN THE HISTORY OF AMERICAN SCHOOLING* 22–54 (2002).

<sup>102</sup> HORACE MANN, *TWELFTH ANNUAL REPORT OF THE SECRETARY OF THE BOARD OF EDUCATION* 59 (1848).

<sup>103</sup> HORACE MANN, *SEVENTH ANNUAL REPORT OF THE SECRETARY OF THE BOARD OF EDUCATION* 151 (1844).

<sup>104</sup> WILLIAM J. REESE, *AMERICA'S PUBLIC SCHOOLS: FROM THE COMMON SCHOOL TO "NO CHILD LEFT BEHIND"* 77 (2005) (finding that by 1900, nearly three-fourths of school-aged children attended school).

<sup>105</sup> JOHN DEWEY, *DEMOCRACY AND EDUCATION: AN INTRODUCTION TO THE PHILOSOPHY OF EDUCATION* 87 (1916).

It is clear in reading the pronouncement in *Brown* of public education's purpose and importance that the ideals Mann had articulated decades prior deeply influenced Chief Justice Warren when he opined for a unanimous Court:

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.<sup>106</sup>

Nearly two centuries after the founding of our country, the Founders' arguments about the importance of public schooling remained a significant purpose of public schools. In addition, the Court augmented the purposes of education beyond that of exercising duties of citizenship but also in terms of students' careers and even daily life. After determining the centrality of public schools for children's opportunity, the Court had little recourse but to declare that public schools must be available to all on an equitable, integrated basis.

Educational historian David Labaree has analyzed what he calls competing goals of education. In his conception of the changing purposes of education, education goals have gone through a series of changes. They were originally focused on democratic equality,<sup>107</sup> as exemplified by Horace Mann's view of education for all. Following World War I, these goals were supplanted by a focus on social efficiency. Beginning around the 1920s, public education consisted of "factory schools" that aimed to get people in their proper spot for maximum efficiency.<sup>108</sup> Schools during this era were seen as a public good and a tool for national gain. Finally, more recently, schools have been re-conceptualized again as a means to provide social mobility, an opportunity for students to move beyond where they are.<sup>109</sup> This last notion of schooling situates education as a private good with an emphasis on credentialing (as compared to learning), in contrast to conceptions of schooling as a public good under the earlier notion of the purposes of

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<sup>106</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

<sup>107</sup> Labaree, *supra* note 99, at 43.

<sup>108</sup> *Id.* at 48.

<sup>109</sup> *Id.* at 50.

education. The public, under this scenario, are “consumers” and schools can be thought of as operating within a market, competing to provide what consumers are demanding.<sup>110</sup>

In 1983, a much-publicized report, *A Nation at Risk: The Imperative For Education Reform*, was issued by the National Commission on Education Excellence. The commission was appointed by President Reagan’s secretary of education in 1981 to study the quality of U.S. public schools. The report began with an urgent call to action:

Our Nation is at risk. Our once unchallenged preeminence in commerce, industry, science, and technological innovation is being overtaken by competitors throughout the world. . . . [T]he educational foundations of our society are presently being eroded by a rising tide of mediocrity that threatens our very future as a Nation and a people.<sup>111</sup>

The commission’s recommendations to meet this threat included expanding and strengthening course requirements for high school graduation; higher expectations and admissions requirements for colleges and universities; and more time devoted to learning (e.g., more homework, longer school days, and expanding the school year). To accomplish these more rigorous goals, the commission also advocated for improved preparation of teachers, compensation to reward teachers, and leadership (including financial support) of these goals by community leaders and citizens. These recommendations focused on the individual excellence of every student in academic skills, *not* preparation for being a citizen in a democratic society<sup>112</sup> and *not* educational equity. If anything, the increased graduation and college matriculation requirements likely limited access for “the masses” to attaining a high school diploma and post-secondary education. Instead, the 1983 report ushered in a wave of educational reform, seeking to implement more demanding educational requirements to improve excellence without as urgent a focus on how these reforms impacted educational equity.<sup>113</sup>

In sum, we believe that this nation has witnessed a steady re-conceptualization of public education over the past one hundred years. Originally conceived of as a system of “common schools” that teach civics

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<sup>110</sup> *Id.* at 51.

<sup>111</sup> NAT’L COMM’N ON EXCELLENCE IN EDUC., *A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM* 5 (1983).

<sup>112</sup> Yet at the same time, the report made a brief reference to the importance of education for a democratic society like the U.S. *Id.* at 6.

<sup>113</sup> The Goals 2000, which set goals for students in fourth, eighth, and twelfth grades by the year 2000, subsequently reflected this focus by naming as one of the goals the ability to be ready for employment to aid the nation’s economy. NAT’L EDUC. GOALS PANEL, *THE NATIONAL EDUCATION GOALS REPORT* 44 (1991).

and citizenship and that are supposed to erase inequality, many now perceive that public schools serve essentially as college prep schools and centers of elite, merit-based learning that “separate the wheat from the chaff,” and as a means for *private* advancement. This shift has occurred regardless of the needs that the country may have for its public schools and those who attend them. As Richard Rothstein and Rebecca Jacobsen argue, the shift from equality to excellence is not necessarily or entirely a bad thing. But they ask whether the elite have redefined education to focus on rather narrow goals to the detriment of the people, or certain groups of the general, non-elite population.<sup>114</sup>

While the 1983 report was the beginning of a still continuing wave of increasing requirements for high school graduation and entrance to college, particularly selective colleges, the importance of high school and college diplomas has become increasingly acute in our economy.<sup>115</sup> Economic studies find a positive return to wages for each additional year of school, ranging up to 16% per additional year.<sup>116</sup> There has been a growing requirement of education credentials for jobs requiring essentially the same skills, which also results in more demand for diplomas. At the same time,

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<sup>114</sup> Richard Rothstein & Rebecca Jacobsen, *The Goals of Education*, 88 PHI DELTA KAPPAN 264, 264 (2006). Private schools, regardless of whether they are religiously affiliated, attract a higher percentage of white students. Betsy Levin, *Race and School Choice*, in *SCHOOL CHOICE AND SOCIAL CONTROVERSY: POLITICS, POLICY, AND LAW* 266 (Stephen D. Sugarman & Frank R. Kemerer eds., 1999). Part of Mann’s argument was that the increasing use of public schools would spread out the supply of capital and ensure that there was not the formation of a perpetual underclass. See MANN, *supra* note 103. In 1997–98, 64% of public school students were white, while 78% of private school students were. SEAN F. REARDON & JOHN T. YUN, CIVIL RIGHTS PROJECT, HARV. UNIV., PRIVATE SCHOOL RACIAL ENROLLMENTS AND SEGREGATION 3 (2002).

Further, in 1998–2000, more than 18% of students in families with annual income over \$75,000 attended private schools, which is almost twice the rate at which private schools are used by all families, 10.7%. *Id.* at 18. This disproportionate use of private schools creates segregation between the public and private school sectors and means that the private school enrollment is wealthier and whiter than the public schools’. See also CLOTFELTER, *supra* note 31, at 101.

<sup>115</sup> This again is worth stressing and is in contradiction of the goal of democratic equality where all citizens have a “common” education.

<sup>116</sup> Orley Ashenfelter & Alan Krueger, *Estimates of the Economic Return to Schooling from a New Sample of Twins*, 84 AM. ECON. REV. 1157, 1157 (1994); Lawrence F. Katz & Kevin M. Murphy, *Changes in Relative Wages, 1963–1987: Supply and Demand Factors*, 107 Q.J. OF ECON. 35, 41 (1992) (finding a rising return to wages for college education during the 1980s). Further, obtaining a college degree, as opposed to attending college for an equivalent number of years without receiving a degree, also increases earnings. David A. Jaeger & Marianne E. Page, *Degrees Matter: New Evidence on Sheepskin Effects in the Returns to Education*, 78 REV. OF ECON. & STATISTICS 733, 738–39 (1996).

wages for less-educated males in particular have declined in terms of real wages since the 1970s because of lower demand for such workers.<sup>117</sup> Thus, the irony of these trends is that the growth in thinking about education as a private good and the heightened requirements for graduation shift the focus away from access and mobility for all—as Dewey advocated—and likely make it more difficult to attain diplomas at a time when such educational credentials are more important than ever before. While it is true that education still provides mobility for some, Mann’s idea of schools equalizing opportunity (economic or democratic) for the masses seems remote.

### B. *Families’ Responses to Shifting Purposes*

With the growing emphasis on education and the public schools as a private good and the associated stratification of opportunity for those with higher and more prestigious educational credentials, the conception of how the purpose of public schools has changed manifests itself in several key ways. Prominent among them are: (1) how significantly the perceived quality of public schools impacts parents’ housing decisions; and (2) the sense of entitlement to educational choice. Both trends subvert the apparent meritocratic nature that schools are assumed to possess.

#### 1. “Buying” Public Schools

Residential patterns have long defined the enrollment of public schools; school boards often assigned students to schools based on their residence.<sup>118</sup> In the 1800s, common schools were supported by local communities. Traditionally, a school’s composition was affected by whoever lived in the near proximity to the school. As early as 1971, however, the Supreme Court acknowledged that the converse relationship also existed.<sup>119</sup> Fueled by parents’ perceptions of school quality (and racial demographics), parents with the means to do so essentially bought public schools with their feet and pocketbooks. As Justice Blackmun wrote in his concurrence in *Freeman v. Pitts*, “This interactive effect between schools and housing choices may

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<sup>117</sup> Sheldon H. Danziger, *Fighting Poverty Revisited: What Did Researchers Know 40 Years Ago? What Do We Know Today?*, 25 FOCUS 3, 6 (2007).

<sup>118</sup> See, e.g., *Bazemore v. Friday*, 478 U.S. 385, 408 (1986) (White, J., concurring) (“[S]chool boards customarily . . . designate the school that particular students may attend.”); *Moses v. Washington Parish Sch. Bd.*, 276 F. Supp. 834, 848 (E.D. La. 1967) (“In the days before the impact of the *Brown* decision began to be felt, pupils were assigned to the school (corresponding, of course, to the color of the pupils’ skin) nearest their homes; once the school zones and maps had been drawn up, nothing remained to be done but to inform the community of the structure of the zone boundaries.”).

<sup>119</sup> *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 21 (1971).



occur because many families are concerned about the racial composition of a prospective school and will make residential decisions accordingly."<sup>120</sup>

An early study by Diana Pearce in 1980 examined the way in which school composition affected residential patterns in paired cities.<sup>121</sup> She found that cities with more thorough desegregation had greater declines in residential segregation, due to the way in which school racial composition drove family buying decisions.<sup>122</sup> As one example, she surveyed real estate advertisements in these cities, and found that they mentioned schools in white enclaves as signaling devices to home seekers. Meanwhile, in more integrated areas, schools were not as emphasized because schools were relatively equal in racial composition (and possibly, perceived quality).<sup>123</sup>

Today, it is difficult to imagine a prospective home purchaser with school-age children who is not motivated in some part by the quality (or more typically, the perceived quality) of the public school associated with the neighborhood in consideration. Recent research suggests, however, not only that the idea of buying enrollment in a school has become second nature, but also that perceptions of school quality are often tainted by race and class. Here we draw from the social science literature that relates home purchases and property values to perceived quality of education and the relationship of those property values to transportation policies.<sup>124</sup> One study, undertaken by Jennifer Jellison Holme in an effort to illuminate how the "unofficial" choice market works, explores how parents who can afford to buy homes (who, in her study, are also often white) in areas known "for the schools" approach school choice.<sup>125</sup> Holme finds that parental decision-making about schools is influenced by ideology through parental networks that are race- and class-based, not information about a school's academic quality or fit for their children with the school, as is often assumed.<sup>126</sup> She concludes that "school choice policies alone will not level the playing field for lower-status parents, as choice advocates often suggest."<sup>127</sup>

Further, economics literature suggests that perceptions of schools could even impact the value of housing, making it harder for those with fewer

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<sup>120</sup> *Freeman v. Pitts*, 503 U.S. 467, 513 (1992).

<sup>121</sup> PEARCE, *supra* note 91.

<sup>122</sup> *Id.* at 40–41.

<sup>123</sup> *Id.* at 13–18.

<sup>124</sup> *See, e.g.*, Ryan & Heise, *supra* note 4, at 2045–46.

<sup>125</sup> Jennifer Jellison Holme, *Buying Homes, Buying Schools: School Choice and the Social Construction of School Quality*, 72 HARV. EDUC. REV. 177, 177 (2002).

<sup>126</sup> *Id.* at 202.

<sup>127</sup> *Id.*; *see generally* THOMAS SHAPIRO, *THE HIDDEN COST OF BEING AFRICAN-AMERICAN: HOW WEALTH PERPETUATES INEQUALITY* (2004).

resources to “buy” schools in more highly desired areas while further reifying the economic value of buying schools. Real estate agents often talk about “location, location, location” in searching for homes, meaning that prospective home owners should consider the surrounding community in making home buying decisions. One major aspect of any community is its public schools, which may have a significant effect on the cost of housing in a given area.<sup>128</sup> In a study of Charlotte-Mecklenburg, a large countywide district in the South that has adopted a number of adjustments to its extensive school desegregation plan, Thomas Kane and his colleagues found that changes to a desegregation plan did have some impact on housing prices.<sup>129</sup> In particular, when changes altered the characteristics of students in schools there was a large effect on housing prices, although it took several years for this to appear.<sup>130</sup> These findings suggest that perhaps perceptions have a great deal to do with the changes, and therefore the residential sorting that takes place indirectly impacts the price of housing.<sup>131</sup>

The American Psychological Association (APA) filed an amicus curiae brief in support of the school districts in *Parents Involved*. Citing dozens of psychological studies, the brief described the ways in which intergroup contact (e.g., attending integrated schools) was beneficial to students, particularly at early ages, including through the prevention of stereotypes.<sup>132</sup> However, given the segregation still existing in schools and society that limits extensive intergroup contact across racial lines, APA concluded that “this tendency to avoid intergroup contact means that parents often will not make the kinds of choices that will afford their children substantial opportunity to interact with children of other races.”<sup>133</sup> Avoidance here could mean moving to other neighborhoods or districts to determine the composition of a child’s school or the choices parents make in choosing schools depending on their school choice options within the district. Regardless, parents’ perceptions coupled with tendencies born of their own

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<sup>128</sup> See, e.g., Thomas J. Kane, Douglas O. Steiger & Stephanie K. Reigg, *School Quality, Neighborhoods and Housing Prices*, 8 AM. L. & ECON. REV. 183, 184 (2006).

<sup>129</sup> *Id.*

<sup>130</sup> Thomas J. Kane, Douglas O. Steiger & Stephanie K. Reigg, *School Quality, Neighborhoods and Housing Prices: The Impacts of School Desegregation* 30 (Nat’l Bureau of Econ. Res. Working Paper No. 11347, 2005).

<sup>131</sup> Kane, Steiger & Reigg, *supra* note 128, at 209.

<sup>132</sup> Brief for Amici Curiae American Psychological Ass’n & Washington State Psychological Ass’n in Support of Respondents at 19–20, *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738 (2007) (Nos. 05-908, 05-915).

<sup>133</sup> *Id.* at 22.

segregated experiences led to increasing inequality.<sup>134</sup> Given the persisting income and wealth inequalities by race in the United States, even though there is nothing explicitly racial about this notion (e.g., buying a house near a school one wants to send his or her children to), the idea of buying schools will exacerbate differences by race and class in public schools, which were originally designed as ways to educate *all*.

## 2. Entitlement to School Choice

Along with the notion of “buying” schools and a focus on the individualistic meritocracy of schools is the growth of educational choice. There is not and never has been a right afforded to students to attend a public school of their choice.<sup>135</sup> However, with the shift in public schools toward the promotion of individual excellence rather than equality, social efficiency, and preparation for citizenship, there has been a concurrent rise in the premise of the importance of giving families autonomy and choice in where to send their children to school. Milton Friedman, beginning in the 1950s, is often mentioned as the original theorist about educational choice.<sup>136</sup> The motivation behind choice in these early days had little to do with advancing desegregation and indeed was often understood as a means of avoiding it.

In the 1960s, for instance, in response to federal court decisions finally demanding compliance with the *Brown* decision, many southern districts implemented policies called “freedom of choice.” Under such plans, whites or blacks were “free” to choose to attend schools where the majority of students were of another race if there was room. Such plans did very little in actuality to create more than token interracial mixing in schools because of the burdens they placed on blacks (i.e., to gain admission and to get transportation to schools where they would comprise a small numerical minority in comparison to the other students, teachers, and staff, many of whom might be hostile to their presence).<sup>137</sup> Because of the unsurprising lack

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<sup>134</sup> Jeffrey R. Henig, *The Local Dynamics of Choice: Ethnic Preferences and Institutional Responses*, in WHO CHOOSES? WHO LOSES?: CULTURE, INSTITUTIONS, AND THE EFFECTS OF SCHOOL CHOICE 95, 105 (Bruce Fuller et al. eds., 1996). Notably, Henig found that both whites and minorities make choices to prevent isolation for their children though for many reasons, the residential choices of blacks in aggregate are more constrained than for whites. *Id.* at 109.

<sup>135</sup> *Johnson v. Chicago Bd. of Educ.*, 604 F.2d 504, 515 (7th Cir. 1979) (students do not have a constitutional right to attend a particular school); *Comfort v. Lynn Sch. Comm.*, 263 F. Supp. 2d 209, 257–58 (D. Mass. 2004) (“Nothing compels a school district to allow parents to choose their child’s school. There is no entitlement to attendance at a particular school.”).

<sup>136</sup> See MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 85–107 (1962).

<sup>137</sup> Orfield & Eaton, *DISMANTLING DESEGREGATION*, *supra* note 41 at 7.

of substantial desegregation that resulted from such plans, the Supreme Court declared that freedom of choice plans were not enough to meet districts' burden under *Brown*.<sup>138</sup>

As we discuss in greater detail in Part III, more limited forms of choice, such as magnet schools, were later championed specifically as a means of promoting desegregation. In these incarnations, choice was offered not as an end in and of itself, but solely as a means of achieving the end. Despite the explicit desegregation purpose of these more limited forms of choice, and invalidation of the unrestricted kind of plans addressed in *Green*, support for unfettered educational choice—even at the cost of greater racial segregation—has not waned, and its growth and importance can be seen in the kind of arguments and concerns raised in *Parents Involved*. Indeed, a motivating factor for the plaintiffs who sued metropolitan Louisville and Seattle was the denial of their educational choice for their children due to the districts' voluntary integration policy that managed school preferences choices made by parents to ensure that schools stayed within certain racial/ethnic composition ranges.<sup>139</sup>

This argument was articulated particularly strongly by the Seattle petitioners. During oral arguments before the Supreme Court, their attorney asserted both a right to the provision of public education as well as a right to select *which* school individual students are allowed to attend to receive the benefit of public education.<sup>140</sup> Justice Souter questioned whether petitioners really meant to assert that the primary benefit being claimed was that to an education, to which the benefit of educational choice was secondary, but plaintiffs' counsel would only admit to both being important benefits they sought to protect.<sup>141</sup> The district's lawyer, under later questioning, suggested

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<sup>138</sup> *Green v. Cty. Sch. Bd.*, 391 U.S. 430, 441 (1968).

<sup>139</sup> In Seattle, the assignment policies challenged were a series of tiebreakers that were triggered if, under the controlled choice plan, any high school was oversubscribed. If so, the district gave preferences for siblings of current students, geography, and student's race/ethnicity. In particular, the district strove to keep schools within a general racial guideline to prevent racially isolated schools. Brief for Respondents at 5–6, *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738 (2007) (No. 05-908).

In Louisville, there was a more complex student assignment system that utilized managed choice (using “resides areas” to try to maximize diversity by structuring attendance zones), magnet schools, and transfers. There are two criteria for approving transfers: 1) if there is space available at the receiving schools and 2) if the transfer will not cause the sending or receiving school to stray beyond the guideline of 15–50% black students at each school. Brief for Respondents at 4–9, *Meredith v. Jefferson Cty. Bd. of Educ.*, 127 S. Ct. 2738 (2007) (No. 05-915).

<sup>140</sup> Transcript of Oral Argument at 11, *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738 (2007) (No. 05-908).

<sup>141</sup> *Id.*

the district's aim was to allow choice to the extent possible while also maintaining other educational aims, namely prevention of racial isolation.<sup>142</sup> He stressed, in response to the Chief Justice's question about students being denied their school of choice, that while the implementation of the district's integration policy did deny some students their first choice school, "this is not like being denied admission to a state's flagship university."<sup>143</sup> In fact, he even asserted that allowing choice was being responsive to the local community's wishes, even though it undermined—to some extent—the ability to mitigate racial isolation at some district schools.<sup>144</sup>

In addition to the growth of choice among public schools, there are also educational choice options outside the traditional system of public schools and districts. Four are briefly discussed here: charter schools,<sup>145</sup> open enrollment policies, private schools,<sup>146</sup> and home schooling. Private school usage remained relatively constant during the 1990s, comprising 9–10% of all students; the vast majority of private school students were in church-affiliated schools.<sup>147</sup> Home schooled students numbered approximately 850,000 by 1999, comprising 1.7% of school-aged students.<sup>148</sup> White

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<sup>142</sup> *Id.* at 40.

<sup>143</sup> *Id.* at 45

<sup>144</sup> *Id.* at 40.

<sup>145</sup> These are considered public schools but often—though not always—are separate from existing school districts and provide additional educational choice options. There are also district-run pilot schools in a few districts, which are similar to charter schools.

<sup>146</sup> There has been some support for government-funded vouchers for use in private schools to increase this as an educational choice option. The use of government funding for private schools, which may be religious in nature, was challenged in a 2002 case before the Supreme Court, which upheld the voucher program. *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

Despite the championing of this option by politicians before and since the decision, there has been little growth of the use of vouchers for public school choice. See Allyson Klein, *Candidates' K-12 Views Take Shape*, EDUC. WEEK, July 30, 2008, at 1 (describing Senator John McCain's advocacy of expanding vouchers as part of his educational platform); Allyson Klein & David J. Hoff, *Bush Calls for NCLB Renewal, 'Pell Grants for Kids'*, EDUC. WEEK, Jan. 29, 2008 [http://www.edweek.org/ew/articles/2008/01/29/21bush\\_web.h27.html](http://www.edweek.org/ew/articles/2008/01/29/21bush_web.h27.html) (discussing President George W. Bush's State of the Union address in January 2008 that proposed a \$300 million program to fund vouchers to increase school choice). In recent years, only two-fifths of Americans support vouchers, according to a recent poll. See William J. Bushaw & Alec M. Gallup, *Americans Speak Out—Are Educators and Policy Makers Listening?*, 90 PHI DELTA KAPPAN 9, 11 (2008).

<sup>147</sup> See *supra* note 112 for discussion of private school enrollment.

<sup>148</sup> STACEY BIELICK & CHRISTOPHER CHAPMAN, NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., TRENDS IN THE USE OF SCHOOL CHOICE: 1993 TO 1999: STATISTICAL ANALYSIS REPORT 21 (May 2003), available at <http://nces.ed.gov/pubs2003/2003031.pdf>.

students disproportionately comprise both private school and home schooled students in comparison to all school-aged children.<sup>149</sup>

The group of schools referred to as “charter schools” varies widely, as each state can decide whether to allow charter schools (forty states have passed legislation authorizing charter schools), as well as conditions for chartering schools. In 2003–2004, there were approximately 625,000 students in charter schools, which had a disproportionately high percentage of black students.<sup>150</sup> An example of the rapid growth of charter schools is the proliferation of charter schools in New Orleans after Hurricane Katrina, and the rhetoric of a market-based schooling system responding best in place of a traditional school system.

Charter schools were initially designed as a way to allow for educational innovation as specified by an agreed-upon charter that might allow the school flexibility in complying with certain state laws. Significantly, while charter schools are schools of choice, many are not bound by racial/ethnic provisions that were often part of controlled choice or magnet school plans, which evidence suggests is important for creating integration.<sup>151</sup> Charter schools are monitored as to whether they fulfill their charter, and in some states there are requirements for racial/ethnic balance written into state charter school laws. Yet, there is little evidence that such provisions have actually been enforced in the way that academic performance or financial problems may lead a state to shut down charter schools.<sup>152</sup> Charter schools are theoretically able to draw students from across boundary lines, and thus represent potential opportunities for more integrated schools than other non-charter public schools, which usually only draw students from within their boundaries. However, analyses continue to find that charter schools are in many cases more segregated than other public schools.<sup>153</sup>

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<sup>149</sup> *Id.* at 23.

<sup>150</sup> NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., CHARACTERISTICS OF SCHOOLS, DISTRICTS, TEACHERS, PRINCIPALS, AND SCHOOL LIBRARIES IN THE UNITED STATES: 2003–04: SCHOOLS AND STAFFING SURVEY tbls.1, 2 (rev. 2007), available at <http://nces.ed.gov/pubs2006/2006313.pdf>.

<sup>151</sup> PUBLIC POL'Y INST. OF CAL., DOES SCHOOL CHOICE WORK? EFFECTS ON STUDENT INTEGRATION AND ACHIEVEMENT 99–100 (Julian R. Betts et al. eds., 2006); Salvatore Saporito & Deenesh Sohoni, *Coloring Outside the Lines: Racial Segregation in Public Schools and their Attendance Boundaries*, 79 SOC. OF EDUC. 81 (2006).

<sup>152</sup> Erica Frankenberg & Chungmei Lee, *Charter Schools and Race: A Lost Opportunity for Integrated Education*, EDUC. POL'Y ANALYSIS ARCHIVES, July 2003, at 7.

<sup>153</sup> Casey D. Cobb & Gene V. Glass, *Ethnic Segregation in Arizona Charter Schools*, EDUC. POL'Y ANALYSIS ARCHIVES, Jan. 1999; Frankenberg & Lee, *supra* note 152, at 7–8.

A small percentage of students also exercise choice through open enrollment programs, which allow students to attend schools in other districts than the one in which they live. These programs have grown rapidly and now exist in virtually every state,<sup>154</sup> and tend not to limit enrollment options based on any desegregation objectives.<sup>155</sup> Participation in open enrollment programs is limited, however, for several reasons. They typically do not provide transportation and may not require that parents be informed of this schooling option. Moreover, in most states, districts either are not required to participate at all or are required to participate only if they have available space.<sup>156</sup> Although we are not aware of any comprehensive data maintained on the impact of these programs on the racial composition of schools, because open enrollment programs are not designed to facilitate desegregation or even to encourage inter-district transfers beyond offering them as another public school choice alternative, it is unlikely that they would have a positive impact on that score.<sup>157</sup>

Having described some of the public structures and private actions that undermine the values of integration and equality in our public education system, below, we look at how those factors have impacted one particular form of school choice, an educational innovation that was designed to advance desegregation: magnet schools.

### III. THE EVOLUTION OF MAGNET SCHOOLS

The evolution of magnet schools over the past forty years provides us with a unique lens through which we can observe how the shifting purpose of public education (discussed in Part II) interacts with some of its structural features (Part I) to undermine the ability of magnet schools to do what many hope—and some expect—that they can do. As reliance on other

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<sup>154</sup> Jennifer Jellison Holme & Amy Stuart Wells, *School Choice Beyond District Borders: Lessons for the Reauthorization of NCLB from Interdistrict Desegregation and Open Enrollment Plans*, in IMPROVING ON NO CHILD LEFT BEHIND: GETTING EDUCATION REFORM BACK ON TRACK, at 139, 156 (Richard Kahlenberg ed., 2008) (finding a large growth in the late 1990s and early 2000s in the number of states having such programs and that nearly half a million students participated).

<sup>155</sup> These plans differ from inter-district *desegregation* plans struck down in *Milliken* in that they are mostly voluntary, and even mandatory plans have exceptions for space availability. Ryan & Heise, *supra* note 4, at 2067.

<sup>156</sup> In fact, in some states a majority of districts have decided not to participate. *Id.* at 2067.

<sup>157</sup> In fact, Jennifer Jellison Holme and Amy Stuart Wells argue that a review of research on open enrollment programs suggest that these programs increase inequality by allowing relatively advantaged students in low-performing, urban districts to transfer to higher-performing suburban districts. See Holme & Wells *supra* note 154, at 156.

desegregation strategies has gradually diminished, magnet schools have emerged as the principal means upon which school systems—particularly larger, urban school systems—now rely to advance *Brown's* vision of equal, integrated public education.<sup>158</sup> Indeed, some of those who opposed the student assignment plans challenged in *Parents Involved* placed a great deal of faith in magnet schools (and race-neutral ones at that) to achieve the same or similar results in promoting integration and reducing racial and ethnic isolation.<sup>159</sup> Yet, this hope may be misplaced.

Despite their origins as vehicles for desegregation, magnet schools over time have become increasingly *less* effective at accomplishing this central objective. Why? We suggest that the steady erosion of their desegregative purpose, limitations on the means of accomplishing this purpose, substantial demographic changes, and the absence of appropriate funding incentives have all contributed to magnet schools' limited success in promoting racial and ethnic integration.<sup>160</sup> At the same time, the proliferation of magnet schools has played an important role in popularizing the broader notion of choice in public schooling, resulting in a significant growth of *non-magnet* specialty and alternative schools, as well as open enrollment programs. Having no desegregative purpose whatsoever, these other forms of public school choice, if left unchecked, have the potential of facilitating further stratification of students by race and class.

### A. *The Origins of Magnet Schools*

The magnet school concept bears strong relation to the long-standing tradition of district-wide public specialty schools, such as San Francisco's Lowell High School, the Boston Latin School, and Chicago's Lane Tech,

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<sup>158</sup> During the 1999–2000 school year, there were an estimated 2.5 million students enrolled in about 3,026 magnet schools intended to promote desegregation. PETER TICE ET AL., NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., TRENDS IN THE USE OF SCHOOL CHOICE: 1993 TO 2003: STATISTICAL ANALYSIS REPORT 5 (Nov. 2006), available at <http://nces.ed.gov/pubs2007/2007045.pdf>. According to Congress, “[m]agnet schools are a significant part of the Nation’s effort to achieve voluntary desegregation in our Nation’s schools.” 20 U.S.C. § 7231(a)(1) (2007).

<sup>159</sup> See, e.g., Brief for the United States as Amicus Curiae Supporting Petitioner at 25, *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2783 (2007) (No. 05-908); Brief Amicus Curiae of Pacific Legal Foundation et al. in Support of Petitioner at 24–25, *Parents Involved in Cmty Schs. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2783 (2007) (No. 05-908).

<sup>160</sup> An important fallout from *Missouri v Jenkins*, 515 U.S. 70 (1995), may have also been the chilling effect it had on desegregation plans involving the development or improvement of urban magnet schools, which were designed, in part, to draw white students from surrounding suburbs inter-district integration. See *supra* notes 85–86 and accompanying text.



some of which have existed since the turn of the century.<sup>161</sup> Specialty schools, like magnet schools, offer unique educational programs, curricula, or other resources to draw students through voluntary enrollment, rather than from a traditional attendance zone.<sup>162</sup> What makes a magnet school different from the typical specialty school, however, is its explicit desegregative purpose.<sup>163</sup> In other words, a magnet school attracts students from outside of its surrounding neighborhoods not just so that students can take advantage of some unique educational opportunity, but also to advance so-called “voluntary” desegregation—desegregation achieved through parental choice rather than “mandatory” assignment.<sup>164</sup> (Note that “voluntary” in this context describes the parents’ decision to send their children to magnet schools, not the school district’s decision to pursue desegregation in the absence of a court order to do so.) Historically, school districts situated magnet schools in predominantly minority neighborhoods or facilities, and then advertised the unique curricula or programs they offered in order to draw white students to enroll from outside of the schools’ immediate area (hence, acting as a “magnet” to these out-of-zone students).<sup>165</sup>

In the years following the *Brown* decision, large numbers of white parents passionately resisted desegregation; violence, civil unrest, and highly publicized protests ensued.<sup>166</sup> Conservative leaders encouraged these vocal groups, who grew more strident following the Supreme Court’s rejection of “freedom of choice” plans in 1968<sup>167</sup> and the approval of busing as a desegregation remedy in 1971.<sup>168</sup> In the wake of the latter ruling, cash-strapped school districts were in urgent need of funding to establish and implement broad-reaching desegregation plans, which typically involved

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<sup>161</sup> See LAURI STEEL & ROGER LEVINE, U.S. DEP’T OF EDUC., EDUCATIONAL INNOVATIONS IN MULTIRACIAL CONTEXTS: THE GROWTH OF MAGNET SCHOOLS IN AMERICAN EDUCATION ii, 1, 5 (1994); OFFICE OF INNOVATION AND IMPROVEMENT, U.S. DEP’T OF EDUC., CREATING SUCCESSFUL MAGNET SCHOOLS PROGRAMS 1 (2004).

<sup>162</sup> STEEL & LEVINE, *supra* note 161, at 5.

<sup>163</sup> *Id.* at 86.

<sup>164</sup> *Id.* at 5.

<sup>165</sup> Voluntary transfer opportunities are also afforded to minority children to transfer to predominantly white schools, although magnet programs are often not required in that context.

<sup>166</sup> RICHARD KLUGER, SIMPLE JUSTICE 751–79 (1977); J. HARVIE WILKINSON III, FROM *BROWN* TO *BAKKE* 61–120 (1979); see also MICHAEL KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 441–42 (2004); HOWARD SCHUMAN ET AL., RACIAL ATTITUDES IN AMERICA: TRENDS AND INTERPRETATIONS (rev. ed. 1997).

<sup>167</sup> *Green v. Cty. Sch. Bd.*, 391 U.S. 430, 441 (1968).

<sup>168</sup> *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 30 (1971).

substantial mandatory student reassignments. Accordingly, President Richard M. Nixon proposed and Congress passed the Emergency School Aid Act (“ESAA”) in 1972 as a means of providing federal aid to assist those school districts.<sup>169</sup> That legislation provided federal aid to support court-ordered desegregation efforts and to “encourage the voluntary elimination, reduction, or prevention of minority-group isolation.”<sup>170</sup>

Meanwhile, beginning in the late 1960s, a few pioneering districts began to experiment with the first true magnet schools (distinguished from specialty schools) as a way to encourage voluntary desegregation.<sup>171</sup> These initial magnets met success, and within a few years, other districts, ever conscious of the anti-busing zeitgeist of the times,<sup>172</sup> began to view magnet schools as a more viable and less disruptive alternative to traditional busing plans. By the mid-1970s, several district courts charged with overseeing school desegregation joined in, approving plans that relied more heavily on choice (i.e., magnet schools and majority-to-minority, or “M-to-M,” transfers), rather than mandatory rezoning and transportation, to achieve desegregation<sup>173</sup>—a strategy that the Supreme Court approved by not disapproving.<sup>174</sup>

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<sup>169</sup> See, e.g., Orfield, *supra* note 78, at 14.

<sup>170</sup> Pub. L. No. 92-318, §§ 701-720, 86 Stat. 354 (1972) (codified at 20 U.S.C. § 1601(b)(2) (1972)).

<sup>171</sup> McCarver Elementary, the country’s first magnet school, was opened in 1968 in Tacoma, Washington. The following year, the Boston School Committee opened its first magnet school, William Monroe Trotter School. See Christine H. Rossell, *Magnet Schools: No Longer Famous but Still Intact*, EDUC. NEXT, Spring 2005, at 44–45; Donald Waldrip, *A Brief History of Magnet Schools*, <https://www.magnet.edu/modules/content/index.php?id=36> (last visited Nov. 19, 2008). But see JAMES H. LOWRY & ASSOCS. & ABT ASSOCS., INC., U.S. DEP’T OF EDUC., SURVEY OF MAGNET SCHOOLS: ANALYZING A MODEL FOR QUALITY INTEGRATED EDUCATION 75 (1983) [hereinafter SURVEY OF MAGNET SCHOOLS] (noting that “magnet schools evolved between 1965 and 1975 . . .”).

<sup>172</sup> Indeed, even as ESAA authorized the expenditure of federal dollars for desegregation activities, it expressly prohibited the use of its funds for transportation costs. Pub. L. No. 92-318, §§ 801–02, 86 Stat. 37 (1972) (codified at 20 U.S.C. § 1601(b)(2) (1972)).

<sup>173</sup> See, e.g., *Ross v. Houston Indep. Sch. Dist.*, No. 10444, 1977 U.S. Dist. LEXIS 15566, at \*56 (S.D. Tex. June 6, 1977) (referencing a desegregation plan relying heavily on magnet schools ordered by the court on July 11, 1975); see also STEEL & LEVINE, *supra* note 161, at 4 (referencing two 1976 district court orders governing desegregation in Milwaukee and Buffalo, which also relied primarily on voluntary desegregation transfers).

<sup>174</sup> *Morgan v. Kerrigan*, 421 U.S. 963 (1975) (denial of certification on appeal from a lower court ruling that permitted use of a magnet school program).

Politically, one might understand the emergence of magnet schools as a compromise offered by conservatives and reluctantly accepted by liberals. From the right, magnet schools were buoyed not only by cultural conservatives who fervently opposed what they termed “forced busing,” but also by libertarians and free market advocates who had long argued for vouchers and other forms of school choice.<sup>175</sup> This latter group saw magnet schools as a way to get its foot through the door and promote its school choice agenda to a sympathetic audience.<sup>176</sup> On the left, civil rights advocates desired (and continued to demand) more affirmative, broad-sweeping desegregation remedies, but they also realized that magnet schools offered some racial integration, even if they were unlikely to achieve the same levels that mandatory plans could.<sup>177</sup> Put simply, just as magnet schools were an unfulfilling means to an end for liberals seeking integration, they were also only a means to another end for conservatives, namely the spread of school choice.

Despite gaining popularity through the early 1970s, the magnet school movement faced another obstacle: such schools were not cheap to develop or implement, and localities were reluctant to raise taxes or divert resources to support them.<sup>178</sup> In 1976, Congress addressed the problem by amending ESAA to establish a federal grant program that would support school districts engaged in the planning, design, and operation of magnet schools that furthered ESAA’s desegregation goals.<sup>179</sup> At that point, ESAA was already authorizing substantial grants to school districts to assist them in complying with desegregation orders or voluntarily eliminating racial isolation in their schools;<sup>180</sup> it made sense, therefore, to allow those grants to be used for magnet schools, too—which in any event were more politically palatable

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<sup>175</sup> See AMY STUART WELLS, *TIME TO CHOOSE: AMERICA AT THE CROSSROADS OF SCHOOL CHOICE POLICY* 76 (1993) (noting the irony in the use of school choice in facilitating desegregation, given that many of those alternative schools were originally used “to {avoid} forced busing for integration.”) (internal citation and quotation omitted).

<sup>176</sup> *Id.* at 74–75. See also Robert C. Bulman & David L. Kiro, *The Shifting Politics of School Choice*, in *SCHOOL CHOICE AND SOCIAL CONTROVERSY: POLITICS, POLICY, AND LAW*, *supra* note 114, at 39–41.

<sup>177</sup> See, e.g., *SURVEY OF MAGNET SCHOOLS*, *supra* note 171, at 76 (noting that “[m]agnets on some occasions help to defeat the aims of desegregation, yet offer a compromise between extreme segregation and full racial equality”).

<sup>178</sup> JEFFREY R. HENIG, *RETHINKING SCHOOL CHOICE: LIMITS OF THE MARKET METAPHOR* 109 (1994).

<sup>179</sup> Extension and Revision of the Emergency School Aid Act, Pub. L. No. 94-482, § 321 (adding 20 U.S.C. §§ 1606(a)(13)–(15) (1976)).

<sup>180</sup> 20 U.S.C. § 1603 (1976) (repealed 1978).

than more traditional desegregation activities—as another way to achieve ESAA’s statutory goals.

For a number of years, ESAA grants were the primary source of external money for districts pursuing desegregation, and a fair portion of this funding went to the creation of magnet schools.<sup>181</sup> In 1981, however, few were surprised when President Ronald Reagan, a supporter of school choice and staunch opponent of mandatory desegregation,<sup>182</sup> essentially eliminated funding for ESAA activities, including the magnet school program, in his initial budget cuts and governmental reorganization.<sup>183</sup> Congress, with Reagan’s support, restored funding for magnet schools in 1984 with the passage of the Magnet Schools Assistance Program (“MSAP”).<sup>184</sup> Like its predecessor, MSAP provided financial assistance to school districts to eliminate racial isolation through the creation of magnet schools promoting voluntary integration.<sup>185</sup> The Reagan administration also used its executive enforcement powers to shape the landscape of school desegregation and advance its school choice agenda. Reagan’s Department of Justice sought an end to scores of court-ordered desegregation plans that relied on mandatory student assignment, while simultaneously championing the creation of countless magnet schools across the nation in their wake.<sup>186</sup>

Federal funding, the imprimatur of Congress, government lawyers under the Reagan administration, and the acceptance by and endorsement of federal courts overseeing desegregation plans all played significant roles in the massive explosion of magnet schools. In 1976, the first year ESAA magnet school grants were made available, fourteen school districts applied for them;

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<sup>181</sup> Private individuals and foundations and state and local governments also provided some initial funding in some districts, “but federal money has been the biggest factor” in the expansion of magnet schools. HENIG, *supra* note 178, at 110; STEEL & LEVINE, *supra* note 161, at iii.

<sup>182</sup> See, e.g., RICHARD A. PRIDE, *THE POLITICAL USE OF RACIAL NARRATIVES: SCHOOL DESEGREGATION IN MOBILE, ALABAMA: 1954–1997*, at 220 (2002) (quoting the Republican Party platform as denouncing “forced busing of school children to achieve arbitrary racial quotas.”).

<sup>183</sup> See WELLS, *supra* note 175, at 77.

<sup>184</sup> Pub. L. No. 98-377, § 703, 98 Stat. 1299 (1984) (originally codified at 20 U.S.C. § 4051 (1984) (repealed 1988)).

<sup>185</sup> Congress reauthorized MSAP in 1994. See *Improving America’s Schools Act of 1994*, Pub. L. No. 103-382, § 5101, 108 Stat. 3691 (1994) (codified at 20 U.S.C. § 7202. (1994) (omitted 2002)). MSAP was later reauthorized as a part of the *No Child Left Behind Act of 2001*, Pub. L. No. 107-110, § 1, 115 Stat. 1425 (codified at 20 U.S.C. § 7231 (Supp. 2002)).

<sup>186</sup> Orfield, *supra* note 78, at 16–17.

four years later, over a hundred had submitted applications.<sup>187</sup> The popularity of magnet schools continued to grow at a remarkable rate throughout the 1980s, at first primarily in school districts subject to desegregation orders, but later, even in those that were not under any affirmative obligation to desegregate.<sup>188</sup> A study surveying the 275 largest urban districts, plus an additional seventy-five districts that had applied for ESAA magnet grants between 1976 and 1982, showed that 138 had magnet schools, even though less than half of those districts were recipients of federal funding to maintain them.<sup>189</sup> Between 1982 and 1992, the number of magnet schools more than doubled to 2,433, and the number of students they served in magnet programs more than tripled, to 1.2 million.<sup>190</sup> By the turn of the century, there were more than three thousand magnet schools with explicit desegregation standards educating about 2.5 million students.<sup>191</sup>

### B. Magnet Schools' Effectiveness at Desegregating

Although federal funding has provided support to only a portion of magnet schools there is little doubt that MSAP and its predecessor have played a key role in the growth of the magnet school movement. Since the federal government's initial foray into magnet schools, the U.S. Department of Education ("DOE") has commissioned at least three comprehensive evaluations to determine the effectiveness of its grant program. The first report, issued in 1983 and surveying the results of ESAA grants in a representative sample of forty-five magnet schools and fifteen districts, reported fairly encouraging results.<sup>192</sup> Even as it recognized that some school districts were not effectively using ESAA magnet school grants to promote

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<sup>187</sup> Rolf K. Blank, *Educational Effects of Magnet High Schools*, in 2 CHOICE AND CONTROL IN AMERICAN EDUCATION: THE PRACTICE OF CHOICE, DECENTRALIZATION AND SCHOOL RESTRUCTURING 77, 79 (William H. Clune & John F. Witte eds., 1990).

<sup>188</sup> See Gary Orfield, *Prologue: Lessons Forgotten* to LESSONS IN INTEGRATION 3 (Erica Frankenberg & Gary Orfield eds., 2007) (noting that federal funding was "so enthusiastically sought" that some districts were willing to engage in desegregation beyond that which was constitutionally required in order to get it).

<sup>189</sup> SURVEY OF MAGNET SCHOOLS, *supra* note 171, at 10–11.

<sup>190</sup> STEEL & LEVINE, *supra* note 161, at 49–50.

<sup>191</sup> TICE ET AL., *supra* note 158, at 5.

<sup>192</sup> SURVEY OF MAGNET SCHOOLS, *supra* note 171, at 12–16, 18. According to the report, this study was the first comprehensive study of its kind. *Id.* at 1 ("Although much has been written on the topic of magnet schools, this is the first national study of the effects and degree of success of this model across a representative sample of urban districts that operate magnet programs.").

desegregation,<sup>193</sup> the report found that more than two-thirds of the magnet schools evaluated were “fully desegregated,” with the remaining one-third not quite so, but still enrolling “a substantial mix of students by racial/ethnic subgroups.”<sup>194</sup> Notably, the report observed that those school districts with the more successful magnets “[took] pains to see that their magnets [were] racially and ethnically balanced,” and “with few exceptions,” grantees viewed the schools’ ability to draw a racially and ethnically diverse group of students as “a critical standard for gauging the worth of magnets.”<sup>195</sup> The report also examined the impact of magnet programs on desegregation across all the schools in a district, finding that those school systems relying heavily on magnets or employing magnets in conjunction with other desegregation strategies were more likely to attain “high levels of systemwide school desegregation.”<sup>196</sup>

Thirteen years later and well after magnet schools had emerged as the nation’s principal desegregation strategy, a 1996 DOE report, analyzing data from MSAP grantees in the 1989 and 1991 fiscal year cycles, offered a more lukewarm assessment of the program’s success in meeting its desegregation goals.<sup>197</sup> First, and perhaps most disturbingly, the report found that only 396 of the 1068 schools in the 119 districts receiving MSAP grants it analyzed, or 37%, explicitly identified objectives consistent with one of the three statutory desegregation goals (i.e., reducing, eliminating, or preventing minority

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<sup>193</sup> *Id.* at 91–95.

<sup>194</sup> *Id.* at 78–79. The study defined “fully desegregated school system” as “one that has redistributed students, staff, and resources, as well as modified its programs, so as to eliminate sources of unequal treatment.” *Id.* at 78 (emphasis omitted). This definition led the researchers of this study to employ a measure that they called the “Magnet Desegregation Sum Score,” which assigned school districts a score from 0 to 100 based on “the extent of racial/ethnic mix, voluntariness of student enrollment, extent of faculty racial/ethnic mix, and quality of integration within the school.” *Id.* at 78–79, IV-5, app. IV, exhibit 1.

<sup>195</sup> *Id.* at 79.

<sup>196</sup> *Id.* at 81–83.

<sup>197</sup> The Department of Education commissioned the report in the mid-1990s, around the same time Congress voted to modify and reauthorize MSAP. One of the reports studied the growth of magnet schools and their role in desegregation nationwide, STEEL & LEVINE, *supra* note 161, and the other examined the success of MSAP grantees in achieving the program’s statutory objectives. LAURI STEELE & MARIAN EATON, U.S. DEPT’ OF EDUC., REDUCING, ELIMINATING, AND PREVENTING MINORITY ISOLATION IN AMERICAN SCHOOLS: THE IMPACT OF THE MAGNET SCHOOLS ASSISTANCE PROGRAM 8–9 (1996). Another report studied the growth of magnet schools and their role in desegregation nationwide. STEEL & LEVINE, *supra* note 161, at 8 (noting that “[t]he last major survey of magnet schools occurred in the early 1980s”) (citing SURVEY OF MAGNET SCHOOLS, *supra* note 171).

isolation).<sup>198</sup> Even when the researchers included magnet schools for which a desegregation goal could be *inferred*, they found that only 615 of the 1068 schools, or 58%, had identifiable desegregation objectives.<sup>199</sup> In other words, the report's authors were not able to identify a desegregative purpose for some 42% of federally funded magnet schools.

Of the 615 magnet schools for which some desegregation goal was explicit or could be inferred, 47% (292 schools) managed to meet their objective by the end of the two-year grant cycle.<sup>200</sup> Another 17% (107 schools) demonstrated some progress toward meeting their objective, but failed to satisfy it completely.<sup>201</sup> In other words, a full 35%, or 216 of the 615 magnet schools that identified a statutory desegregation objective failed to achieve any positive result whatsoever; indeed, in many cases, they witnessed a higher level of minority isolation at the end of the grant period than existed at the beginning. Among those magnet schools that sought to reduce racial isolation or projected increases in racial isolation, the average change in minority enrollment was actually a *net increase* in isolation of 1.5%.<sup>202</sup>

The DOE's most recent evaluation, released in 2003 analyzing data from the 1998 to 2001 grant cycle, painted no rosier a picture of the effectiveness of magnet school grant recipients in assisting the desegregation of public schools—either the individual magnet schools targeted for assistance or the entire school district. That study conceded that MSAP grantees “overall

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<sup>198</sup> STEELE & EATON, *supra* note 197, at 21.

<sup>199</sup> *Id.* Steele and Eaton offered several reasons why desegregation objectives many not have been known for about 42% of the magnet schools receiving MSAP funding, such as the district's pursuit of other goals outlined in a court-ordered desegregation plan, the insufficiency of available documentation, the use of schools to promote district-wide desegregation rather than addressing minority isolation in the target school. *Id.* at 23.

<sup>200</sup> *Id.* at 32–33. Magnet schools seeking to prevent minority isolation—i.e., trying to prevent the proportion of minority students in the school from reaching or exceeding 50%—were the most successful (73%), while schools seeking to reduce or eliminate minority isolation were significantly less likely to achieve their goals (44% and 33%, respectively). *Id.*

<sup>201</sup> *Id.* at 32.

<sup>202</sup> *Id.* at 36. Even looking only at the schools that succeeded in meeting their objective of reducing isolation (i.e., eliminating from consideration any schools that witnessed an increase in isolation), the amount of reduction was modest, averaging 5.9%. *Id.* at 35. While this is a relatively short period of time, given increased funding to establish a magnet school(s) or improve magnets in ways designed to promote desegregation, it is somewhat surprising that there would not be at least some positive effect even if the two-year period would make likely that any improvements in racial isolation would be modest.

made only modest progress in reducing minority group isolation,”<sup>203</sup> with just over half the schools (57%) having “made progress” toward preventing, eliminating, or reducing minority group isolation, adjusting for the districts’ changing racial demographics.<sup>204</sup> (Unlike the 1996 report, the 2003 report did not clearly separate out the subset of schools that actually met their goals from those that simply made progress toward the goals.) Meanwhile, 43% of the almost three hundred schools receiving funding remained constant or experienced an *increase* of racial isolation over the three-year time period.<sup>205</sup> Just one out of six schools had a decrease in minority student isolation of more than 5%, and a mere one in twenty successfully prevented or eliminated minority group isolation.<sup>206</sup>

Observing some methodological limitations of the most recent of these evaluations in its amicus brief in *Parents Involved*, the American Civil Liberties Union (ACLU) further examined the claims of magnet schools’ effectiveness using data from the most recent grant cycle then available.<sup>207</sup> Its analysis focused on 333 schools that were recipients of MSAP grants in the 2001 to 2003 period. Of the 124 schools that the ACLU found to be “racially segregated” at the beginning of the grant cycle (defined as schools with populations deviating from the district-wide proportion of minority students by more than 15%), almost twice as many schools saw an *increase* in the degree of segregation (forty) as those that were no longer segregated (twenty-two) by the end of grant cycle.<sup>208</sup> An additional eighteen schools that

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<sup>203</sup> The regulations then in effect defined minority group isolation as the condition present when minority children constitute more than 50% of a school’s enrollment. BRUCE CHRISTENSON, ET AL., U.S. DEP’T OF EDUC., EVALUATION OF THE MAGNET SCHOOLS ASSISTANCE PROGRAM, 1998 GRANTEEES IV-1 (2003) (citing 34 C.F.R. § 280.4).

<sup>204</sup> *Id.* at xii. It appears that the 2003 report was the first one to take account of district racial trends in assessing whether progress was made toward the desegregation objectives identified. Without adjusting for district trends, only 39% of schools made progress in reducing, preventing, or eliminating racial isolation. *Id.* at IV-5 n.7. Rather than explicitly taking account of district trends, the 1998 report, by comparison, distinguished between districts seeking to reduce racial isolation and districts seeking to reduce projected increases in racial isolation. Under this evaluation, a school pursuing the latter objective could have met its goal even if the degree of minority isolation increased, as long as the increase was less than the overall increase in the district. STEELE & EATON, *supra* note 197, at 34–36.

<sup>205</sup> CHRISTENSON ET AL., *supra* note 203, at IV-5.

<sup>206</sup> *Id.* at IV-6. Nine out of 10 grantees sought to reduce minority group isolation; the remaining one in 10 sought to prevent or eliminate it.

<sup>207</sup> Brief Amicus Curiae of the American Civil Liberties Union et al. in Support of Respondents, *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1* at 21–23, 127 S. Ct. 2738 (2007) (Nos. 05-908, 05-915) (discussing limitations and available data).

<sup>208</sup> *Id.* at 23.



were not defined as racially segregated at the beginning of the period were found to have student ratios by race deviating 15% or more from the district at the end of the period.<sup>209</sup> Among the ninety-two schools that the ACLU deemed to be “hyper-segregated” (defined as schools where 90% or more students were nonwhite) at the beginning of the grant cycle, the ACLU found that eighty-one of them remained so at the end, with fifty-five of those schools actually becoming more isolated over the course of the grant period.<sup>210</sup> Moreover, an additional eighteen schools that were not hyper-segregated at the beginning of the period became so by the end.<sup>211</sup> In other words, *more* schools were hyper-segregated at the end of the grant period than prior to receiving MSAP funds.

Using these more sophisticated measures of segregation, the ACLU brief also sought to determine the effectiveness of magnet schools in assisting racial integration at the district level; while integrated magnet schools is a worthwhile—and, as seen, not widely attained—goal, if these schools *were* diverse at the expense of other district schools, it would limit their effectiveness in helping districts achieve their goal of reducing or preventing racial isolation. The ACLU found that in twenty-seven of the fifty-seven districts for which sufficient data were available, there was an increase of students in racially imbalanced schools during the three years of the MSAP grant.<sup>212</sup> Thirty-five of the fifty-seven districts receiving funds witnessed an increase in the number of students attending hyper-segregated schools over the course of the grant cycle; ten of these districts experienced an increase of *at least ten percentage points*.<sup>213</sup>

By the DOE’s own assessment, therefore, magnet schools, despite their ubiquity and popularity, have at best had a modest and declining impact on desegregation. The ACLU’s analyses confirm that the pattern of decreasing effectiveness continues through the most recent MSAP grant period. In fact, by either desegregation measure—the reduction of isolation in the individual grantee schools, or the reduction of isolation in all of the schools of a grantee district—in the most recent cycle for which we have data, recipients of MSAP funding are experiencing only very limited success, and much less success than they did when the federal magnet program was first introduced.

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<sup>209</sup> *Id.* at 22–23.

<sup>210</sup> *Id.*

<sup>211</sup> *Id.* at 23.

<sup>212</sup> *Id.* at 25.

<sup>213</sup> Brief Amicus Curiae of the American Civil Liberties Union et al. in Support of Respondents, *supra* note 207, at 25.

### C. *Shifting Purposes, Changing Landscapes, and School Choice*

We posit that there are several reasons why the federal government's magnet school strategy has largely failed to produce its desired results, and that understanding the structural framework in which magnet schools operate and the way in which elites have reshaped—and the public has reacted to—the shifting purposes of “common schools” helps us see how and where things went awry.

#### 1. *Shifting Purposes*

First and foremost, the federal government over the years has diluted the desegregative purpose of magnet schools, demanding with each reauthorization and modification of its grant program that these schools pursue numerous other educational reform objectives roughly aligned with the shifting purposes of public education. These new goals are at best tangentially related, and sometimes entirely unrelated, to the original desegregation goal. Tracing the mission creep that overtook the federal magnet program demonstrates how, in trying to expand the statute to provide for everything, it has come to stand for little if anything.

Recall that Congress' first foray into magnet school funding took place when it amended ESAA to authorize grants to open magnet schools. At that time, grantees were required to advance ESAA's statutory objectives, which were clear and unambiguous: to reduce, eliminate, or prevent racial isolation, and to promote equity.<sup>214</sup> As the 1983 DOE study observed, the focus on the desegregation objective in these years affected the emergence of magnet programs in two significant ways. First, the magnet school concept was immediately and closely associated with desegregation.<sup>215</sup> And second, because magnet schools were but one aspect of ESAA's financial support,

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<sup>214</sup> Board of Educ. v. Harris, 444 U.S. 130, 144 (1979); 20 U.S.C. § 1601(a) (1972) (stating the Congressional finding that school districts required additional funding to support “the process of eliminating or preventing minority group isolation and improving the quality of education for all children”). Notably, both Congress and President Richard M. Nixon made clear that they supported the elimination of minority group isolation regardless of whether the conditions of segregation were de jure or de facto. 20 U.S.C. §§ 1601-02 (1972); 86 Stat. 354 (1972); S. REP. NO. 92-61 at 6-7 (1971); Richard M. Nixon, Special Message to the Congress Proposing the Emergency School Aid Act of 1970 (May 21, 1970) (outlining objectives and proposed structure for ESAA), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=2509>.

<sup>215</sup> SURVEY OF MAGNET SCHOOLS, *supra* note 171, at 7 (noting that the program's regulations required that magnet schools have a minimum numerical impact on the degree of minority group isolation). See also HENIG, *supra* note 170, at 110 (observing that ESAA funding was “the biggest factor” in the expansion of magnet schools).

they were usually assessed in light of their effectiveness in advancing the desegregation objective, rather than with regard to other educational goals unrelated to the statutory purpose.<sup>216</sup> In other words, magnet school grantees were free to design schools focused on desegregation and not burdened with expectations beyond those imposed by the ESAA.

With each subsequent iteration of or amendment to the federal magnet school program, however, new objectives were added. The first version of MSAP, passed in 1984, resumed magnet school funding with essentially the same primary goal of reducing, eliminating, or preventing minority group isolation.<sup>217</sup> But the statutory objectives had been tweaked to include a second goal related to strengthening students' "knowledge of academic subjects" and "marketable vocational skills."<sup>218</sup> The insertion of this additional objective came, of course, in the immediate aftermath of the Nation at Risk report, which had declared that the country's preeminence was in the balance, and had prescribed a host of increased expectations for students.

Ten years later, Congress reauthorized MSAP through the passage of the Improving America's Schools Act.<sup>219</sup> In so doing, it maintained the two earlier goals and expanded the program's purposes again, this time to include two additional objectives for a total of four. One of the new objectives related to achieving district-wide "systemic reform," and the other to developing and designing "innovative educational methods and practices."<sup>220</sup> As the number of objectives increased, so did obligations of the grantee school districts to plan for and meet them, drawing attention further away from the primary desegregation goal. The subsequent DOE evaluation, for

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<sup>216</sup> SURVEY OF MAGNET SCHOOLS, *supra* note 171, at 7–8.

<sup>217</sup> Pub. L. No. 80377, § 703(2), 98 Stat. 1299 (1984).

<sup>218</sup> Pub. L. No. 980377, § 703(3), (4), 98 Stat. 1299 (1984) (the "elimination, reduction, or prevention of minority group isolation in elementary and secondary schools with substantial portions of minority group students," and "courses of instruction within magnet schools that will substantially strengthen the knowledge of academic subjects and the grasp of tangible and marketable vocational skills of students attending such schools.").

<sup>219</sup> Pub. L. No. 103-382, § 101, 108 Stat. 3691 (1984) (codified at 20 U.S.C. § 7301 *et seq.* (1994)) (primary purpose of magnet schools still desegregation through voluntary means, but additional goal of improving the educational program and quality).

<sup>220</sup> 20 U.S.C. § 7202(2)–(3) (1994) ("the development and implementation of magnet school projects that will assist [school districts] in achieving systemic reforms and providing all students the opportunity to meet challenging State content standards and challenging State student performance standards," and "the development and design of innovative educational methods and practices.")

instance, assessed MSAP's effectiveness in accomplishing each of these four goals separately.<sup>221</sup>

The Bush administration ushered in another set of changes. In 2001, Congress folded MSAP into the framework of the No Child Left Behind Act ("NCLB").<sup>222</sup> MSAP retained the four objectives from its earlier reauthorization (with minor alterations), but yet another two goals found their way into the legislation. Both of these new objectives seemingly related to the overall themes of NCLB and called to mind the same kind of educational reform items championed by the Bush administration. The first sought to improve the "capacity" of school districts so that they can continue operating the schools "at a high performance level" after funding terminates.<sup>223</sup> The second was aimed at ensuring "equitable access to high quality education" that would enable magnet school students to "succeed academically and continue with postsecondary education or productive employment."<sup>224</sup> Thus, MSAP grant-seekers in recent years have been obligated to show how their magnet school plans are capable of advancing no less than six educational objectives. It is understandable how the goal of reducing or preventing racial isolation might get lost in the shuffle.

The addition of the most recent statutory objectives was followed by regulatory changes that, while subtle, were similarly not inconsequential in further diluting the federal government's support of magnet schools for desegregation aims, and perhaps not unintentional. In 2004, the Bush administration modified MSAP's implementing regulations to impose, among other things, new requirements of grant-seekers consistent with NCLB relating to teacher qualifications and to improving the academic achievement of students.<sup>225</sup> Three years later, it made further changes that

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<sup>221</sup> See generally CHRISTENSON ET AL., *supra* note 203 (evaluating 1998 MSAP grantees on all four objectives).

<sup>222</sup> Pub. L. No. 107-110, 115 Stat. 1425 (codified at 20 U.S.C. § 7231 (2001)).

<sup>223</sup> 20 U.S.C. § 7231(b) (2001).

<sup>224</sup> 20 U.S.C. § 7231(b)(5)-(6) (2001). While the desegregation objective remains a primary goal of the magnet schools grant program, the Department of Education's materials curiously suggest that prospective grantees must also satisfy the statutory goal of advancing systemic reforms and helping students to meet achievement standards. OFFICE OF COMMUNICATIONS AND OUTREACH, U.S. DEPT' OF EDUC., GUIDE TO U.S. DEPARTMENT OF EDUCATION PROGRAMS 236 (2007), available at <http://www.ed.gov/programs/gtep/gtep.pdf> (stating that "projects also must support the development and implementation of magnet schools that assist in the achievement of systemic reforms and provide all students with the opportunity to meet challenging academic content and achievement standards").

<sup>225</sup> 69 Fed. Reg. 4995 (Feb. 2, 2004); 34 C.F.R. § 280.20(b)(2) (2007) (requiring assurances from prospective grantees related to highly qualified teachers); 34 C.F.R.

allowed the DOE use of a broader array of selection criteria for awarding and denying grants, importing objectives and goals from other regulations outside of MSAP;<sup>226</sup> the changes also eliminated the decades old DOE mandatory practice of evaluating MSAP applications by assigning known point values for proposals that address MSAP's express aims.<sup>227</sup> As a result, the DOE's most recent regulations now not only include expanded non-desegregation obligations for grantees, but also increase the DOE's flexibility to reduce emphasis on the desegregation-related factors in assessing applications for funding.

One might say, therefore, that magnet schools over the years have served as a vessel into which the federal government has placed a variety of educational hopes, from the weighty and serious to the catchy and faddish: desegregation, curricular innovation, academic improvement, standards-based education, core learning, systemic reform, capacity-building, and so forth. Some of these objectives coincide with shifts in the public understanding of the purpose of public schools we identified earlier. We do not reject out-of-hand the value of pursuing any or all of these objectives *per se*, although some seem to run counter to a conception of public education as the great equalizer. But we do think they contribute to goal diffusion, and it is easy to see how the original expectation that magnet schools play a critical role in promoting desegregation may have gotten lost over time. Moreover, it is not surprising that MSAP grantees may have had a difficult time trying to meet all of these objectives, while still keeping their eyes on the desegregation component.

## 2. *Changing Landscapes*

A second category of reasons why magnet schools have not been more effective fits under the heading of "missed opportunities": as the dynamics of school segregation and the barriers to integration have changed over the years, MSAP's incentives have not kept up, thus making them decreasingly relevant in identifying what problems they seek to address and providing effective solutions for them.

For instance, as we know, perhaps the most important factor contributing to racial and ethnic separateness in our nation's public schools today is the

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§ 280.20(i)(4)(i) (2007) (requiring description from prospective grantees on how assistance will be used to improve student achievement).

<sup>226</sup> 72 Fed. Reg. 10,605 (Mar. 9, 2007); 34 C.F.R. § 280.30 (2007) (including selection criteria from outside of the MSAP regulations).

<sup>227</sup> 72 Fed. Reg. 10,605 (Mar. 9, 2007); 34 C.F.R. § 280.31 (2007) (allowing the Secretary of Education to evaluate applications without applying mandatory point values from the selection criteria).

dramatic change in the nature of the segregation. Given the rise in significance of school district boundaries, these shifting racial demographics take on new meaning and have also contributed to the decreasing effectiveness of magnet schools, which still predominantly focus on intra- rather than inter-district segregation. As we noted earlier, the vast majority of the school segregation that exists today can be found between and among school districts, not within them.<sup>228</sup> Indeed, both of the more recent DOE magnet school reports observed this trend, and how changing demographics have limited the ability of intra-district magnet schools to meet their desegregation goals.<sup>229</sup> Yet, while one can almost count all of the nation's well-known inter-district desegregation programs on two hands,<sup>230</sup> neither Congress nor any presidential administration has offered a regulatory or statutory proposal that would address segregation across school district boundaries, and there are currently no incentives whatsoever in MSAP to encourage school districts seeking or receiving federal funding to pursue inter-district strategies. It is unsurprising, then, that the periodic DOE evaluations fail even to discuss whether the magnet schools studied serve students outside of the system in which they operate. There is, in fact, little evidence to rebut the impression that they do not.<sup>231</sup>

Nor has the federal government made any substantial changes to MSAP's desegregation measure, which focuses on the prevention, elimination, or reduction of racial isolation, either to acknowledge the equally valid objective of promoting integration, or to reflect racial trends that suggest the existing definition of racial isolation alone may no longer be an adequate yardstick. Over the years, researchers have emphasized the affirmative goal of promoting racial and ethnic integration in conjunction

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<sup>228</sup> See *supra* Parts I.B.–C.

<sup>229</sup> For example, the 2003 report observed that only a small proportion of grantee schools sought to prevent or eliminate minority group isolation because three-quarters of them were located in districts where minority students constituted more than 50% of the public school population, and two-thirds were located in districts where the minority students constituted more than 60%. CHRISTENSON ET AL., *supra* note 203, at VII-3. The 1996 report found similar conditions in grantee districts for the 1989 and 1991 cycles. See STEELE & EATON, *supra* note 197, at 14 (noting that nearly two-thirds of grantee schools were in districts with aggregate minority populations of greater than fifty percent, with the average minority enrollment across all grantee districts at 58%).

<sup>230</sup> See, e.g., Ryan & Heise, *supra* note 4, at 2070–71 (citing Boston and Springfield, Massachusetts, Hartford, Rochester, Milwaukee, and St. Louis as the most prominent inter-district programs); see also Holme & Wells, *supra* note 154.

<sup>231</sup> CHRISTENSON ET AL., *supra* note 203, at II-1–II-15 (describing the characteristics of MSAP-supported schools and programs, but failing to make any mention of whether the schools operate inter- or intra-district).

with the parallel goal of reducing minority group isolation.<sup>232</sup> Indeed, MSAP itself recognizes that the government has an interest in “seeking to foster meaningful interaction among students of different racial and ethnic backgrounds, beginning at the earliest stage of . . . students’ education.”<sup>233</sup> Yet, MSAP’s regulations continue to use only a fixed definition of minority group isolation—defined as the condition in which minority group children constitute more than 50% of the enrollment of a school, regardless of the demographics of the surrounding area<sup>234</sup>—to award grants and evaluate its grantee schools. To be sure, conditions of “isolation” (and “hyper-segregation,” which MSAP does not consider) can have a detrimental impact on one’s educational opportunity. But with great demographic variety among regions, and when ten states in the union have a majority nonwhite student enrollment, not all school districts can pursue goals related only to racial isolation, nor should they. And others may try to pursue the dual goals of reducing isolation and promoting integration simultaneously. It no longer makes sense—if ever it did—for MSAP to continue using only one fixed number to measure the need and progress of every school district, nor to ignore cross-district segregation.<sup>235</sup>

Ultimately, using magnet schools as a de-coupling strategy to loosen the connection between residence and public school enrollment is only a short-term solution to the larger problem of racial, ethnic, and economic separateness.<sup>236</sup> As we have already noted, decades of research and academic

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<sup>232</sup> See generally Brief of 553 Social Scientists as Amici Curiae in Support of Respondents, *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738 (2007) (Nos. 05-908, 05-915). This affirmative stance about the importance of integration has stemmed from more recent research describing the benefits of racially integrated students of all races/ethnicities. *Id.* See also Susan Eaton, *Diversity’s Quiet Rebirth*, EDUC. WEEK, Aug. 18, 2008, <http://www.edweek.org/ew/articles/2008/08/18/01eaton-com.html> (discussing various districts where leaders have continued to pursue the goal of diversity after the *Parents Involved* decision).

<sup>233</sup> 20 U.S.C. § 7231(a)(4)(A) (1984). *But see* 20 U.S.C. § 7231(b)(1) (1984) (stating the relevant purpose of the statute as providing financial assistance to school districts for “the elimination, reduction, and prevention of minority group isolation in elementary schools and secondary schools with substantial proportions of minority students . . .”).

<sup>234</sup> 34 C.F.R. § 280.4(b)(4) (2007).

<sup>235</sup> CHRISTENSON ET AL., *supra* note 203, at xviii (“As the proportion of minorities in schools generally continues to rise, there would seem to be a diminishing opportunity for schools to prevent or eliminate [minority group isolation] as it is currently defined without adversely impacting other schools in the district.”); STEELE & EATON, *supra* note 197, at vii–viii.

<sup>236</sup> The magnet school concept can be viewed as a de-coupling strategy because it implicitly assumes a certain degree of residential segregation that requires the reliance on parental choice (rather than attendance zones) to desegregate.

inquiry have studied the strong connections between school segregation and residential segregation. No matter how much school or housing strategies may attempt to challenge the notion that students attend schools associated with the location of the homes in which they live, the two are inextricably linked. Yet, no iteration of MSAP has yet to draw the necessary connections that would unite or integrate MSAP with housing policies in any meaningful way, or specifically, that use the cache and attractiveness of magnet schools as a carrot to encourage greater residential integration. This failure, too, undermines the ability of magnet schools to more effectively stem the flight of middle-class whites from less affluent, minority districts and neighborhoods.

### 3. *Magnet Schools and School Choice*

While the magnet school program in recent years has funded many schools that have turned out not to be particularly effective tools of desegregation, it has been widely successful in introducing Americans to public school choice more broadly speaking. The federal government can take much of the responsibility for this shift: instead of seeking to address any of the shortcomings in MSAP cited above, the trend over the years has been simply to loosen the definition and the mission of magnet schools. As a result, the once clear line between magnet schools on the one hand, and specialty or alternative schools on the other, has been blurred. In other words, perhaps the most damning effect of the magnet school experiment is not that it made disappointingly modest contributions to desegregation writ large, but rather that magnet schools served as the school choice movement's proverbial camel's nose under the tent.

As early as 1994, a DOE report observed that the growth and popularity of magnet schools had the side effect of aiding in the wider acceptance of "non magnet specialty schools and programs of choice," which allowed parents to choose the schools their children attended based on distinctive educational offerings, but which did not have desegregation as a specific goal.<sup>237</sup> The report found that while over one thousand school districts offered one or more non-magnet specialty schools, nearly five times as many districts as offered magnet schools.<sup>238</sup> According to the most recent estimates, when specialty schools lacking any explicit desegregation purpose are also included, the number of students enrolled in magnet schools, broadly defined, almost doubles—to over 5,500 schools educating 4.5 million.<sup>239</sup> As one commentator described it nearly fifteen years ago, although magnet

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<sup>237</sup> STEEL & LEVINE, *supra* note 161, at 85.

<sup>238</sup> *Id.* at 86.

<sup>239</sup> TICE ET AL., *supra* note 158, at 5.



schools were conceived as an integration strategy, they have “emerged through a gradual and pragmatic process of administrative adjustment and the growing recognition of choice as a politically useful tool for achieving other goals of educational reform.”<sup>240</sup>

Yet, ironically, despite the role it has played to advance the school choice movement at the cost of desegregation, the government promoted magnet schools to the Supreme Court in *Parents Involved* as desegregation’s savior. The Solicitor General went so far as to pay lip service to magnet schools as a primary desegregation strategy, even as the Bush administration has placed limitations on them that undermine their effectiveness. The government’s brief argued on the one hand that magnet schools can facilitate desegregation effectively—a point, as we have shown, belied by the DOE’s own evaluations—but, on the other hand, asserted that they need not, cannot, and, at least under the current administration, have not considered race in pursuing that goal.<sup>241</sup> Of course, it was this very inability to consider race that the 2003 DOE report offered as a reason why many schools were not able to meet their desegregation goals.<sup>242</sup>

For many Americans today, there is no longer any meaningful distinction between magnet and specialty schools, or any other school choice mechanism for that matter.<sup>243</sup> With little keeping magnet schools focused on desegregation, they have revealed themselves over time as but one part of the larger school choice milieu that includes not just non-magnet specialty schools, but also private schools, charter schools, NCLB transfers, open enrollment options, and voucher programs (few if any of which have

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<sup>240</sup> HENIG, *supra* note 178, at 101.

<sup>241</sup> See Brief for the United States as Amicus Curiae Supporting Petitioners, *supra* note 159, at 25–26; OFFICE OF INNOVATION AND IMPROVEMENT, *supra* note 161.

<sup>242</sup> CHRISTENSON ET AL., *supra* note 203, at IV-11 (citing “[l]imitations placed on the use of race as a factor in selection of students” for magnet schools as one reason why the schools were unable to meet their objectives). Further, the report relays the discussion of one magnet director on the difficulty of achieving desegregation with the prohibition of considering race when assigning students to schools even despite the ability to consider other options such as free/reduced lunch eligibility or test score. *Id.* at VI-12–VI-13.

<sup>243</sup> Christine Rossell observes that even the website of the nation’s leading magnet schools group, Magnet Schools of America, “now makes a classic choice-based argument on behalf of magnet schools—that being allowed to choose a school will result in improved satisfaction that translates into better achievement” rather than the traditional desegregation argument. Rossell, *supra* note 171, at 47. To be fair, the organization’s homepage does speak to some of the other benefits to school choice as well. See Magnet Schools of America, Welcome, <http://www.magnet.edu/> (last visited Nov. 26, 2008) (“Magnet Schools of America provides leadership for innovative instructional programs that promote equity, diversity, and academic excellence for all students in public school choice programs.”)

desegregation as an explicit goal)—rather than the desegregative alternative to it. This is true both as a practical matter (many magnet schools are no longer particularly successful at desegregating) and as a matter of policy (desegregation is no longer a primary reason offered to justify choice). Under the Bush administration's DOE, MSAP stands undistinguished among a host of other school choice options, grouped under the umbrella of the Office of Innovation and Improvement, which manages grant programs and provides services that support school choice generally.<sup>244</sup> Accordingly, whereas desegregation was once the priority of magnet schools and choice a means of achieving it, the relationship has now turned on its head: choice is an end in and of itself, and desegregation is a by-product that may sometimes—but not usually—result.

#### IV. IMPLICATIONS: CONFRONTING EXTRA-LEGAL OBSTACLES TO MORE EFFECTIVE MAGNET SCHOOLS

Using the framework that we offered earlier in this Article, we traced a certain narrative of the federal government's participation in the evolution of magnet schools, writ large, over the past forty years. This narrative suggests that MSAP has been transformed in many ways that undermine its original mission and has resulted in the proliferation of a desegregation tool that turned out, in many instances, not to be particularly effective at desegregating. But this framework offers more than just a critical lens through which we see where things went awry in the pursuit of racial integration and equity, irrespective of the development of the law on voluntary school integration. It also allows us to see the kind of steps that can be taken in order to change course and make magnet schools more effective tools to promote integration and reduce racial and ethnic isolation.

First, Congress should begin by restoring MSAP's original purpose of reducing racial and ethnic isolation and modernizing it to include promoting integration as the statute's true and highest priorities.<sup>245</sup> Five Justices in

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<sup>244</sup> See U.S. Dep't of Educ., Choices for Parents, <http://www.ed.gov/nclb/choice/index.html> (last visited Nov. 19, 2008). Consider, for instance, that the DOE under the Bush administration now maintains a website dedicated to school choice, see BuildingChoice.org, Welcome to BuildingChoice.org, <http://www.buildingchoice.org> (last visited Nov. 19, 2008). Among other things, the website provides access to an array of government publications related to different choice options, of which magnet schools is but one. See BuildingChoice.org, Innovation Guides from Office of Innovation and Improvement, [http://www.buildingchoice.org/cs/bc/print/bc\\_docs/ig.htm](http://www.buildingchoice.org/cs/bc/print/bc_docs/ig.htm) (last visited Nov. 19, 2008).

<sup>245</sup> The current statute recognizes both of these goals in some form. 20 U.S.C. § 7231(b)(1) (2008) (listing "the elimination, reduction, prevention of minority group

*Parents Involved* recognized these interests as compelling for public schools; if MSAP is to be the primary tool on which the federal government intends to rely to advance these two objectives, as the current administration has argued it is, then it should send a clear and unambiguous message to that effect. This change to MSAP would be more than a cosmetic or symbolic one: if Congress and the DOE were to take it seriously, the renewed and transparent emphasis on these twin goals would guide the DOE in assessing and awarding grants, structuring the program's implementing regulations, developing best practices, providing technical assistance, and evaluating grantees' success.

At the same time, prioritizing integration and the reduction of racial isolation does not have to mean that all of MSAP's current statutory purposes would disappear entirely. Some of them may be rightfully subsumed by the statute's primary goals. For instance, to be successful integrative tools, magnet schools must be unique and attractive enough to draw students who would want to attend them; school districts would still have to develop and design innovative educational curricula and programs that distinguish their magnets from the school to which the students would otherwise be assigned. Restoring the original goals need not be, therefore, a wholesale philosophical change. Magnet schools would still fundamentally be magnet schools: combining choice, unique educational themes, and diversity. Instead, it simply prioritizes the goals of the program and ends the backsliding and watering down of its mission.

Second, informed by a renewed emphasis on MSAP's original goals, Congress should modernize the program in light of the demographic changes that have taken place since the federal government first began supporting magnet schools. In recent years, thousands of public schools have become more racially diverse, the number of hyper-segregated minority schools has continued to grow,<sup>246</sup> and school segregation has shifted from being primarily an intra-district phenomenon to being an inter-district one as well.<sup>247</sup> So too must federal magnet school policy adjust to these changes in order to be and remain effective. Most importantly, MSAP should place heavier emphasis on incentivizing and funding *regional* magnet schools that

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isolation" as the first purpose); 20 U.S.C. § 7231(a)(4)(A) (2008) (stating Congress's finding that "[i]t is in the best interests of the United States" to support school districts "seeking to foster meaningful interaction among students of different racial and ethnic backgrounds, beginning at the earliest stages of such students' education").

<sup>246</sup> ORFIELD & LEE, *supra* note 31. See also BHARGAVA, FRANKENBERG & LE, *supra* note 17.

<sup>247</sup> CLOTFELTER, *supra* note 31.

span across district lines.<sup>248</sup> One might envision, for instance, the creation of a separate pool to consider grant applicants who offer some minimum percentage of seats in proposed magnets to students from neighboring districts. Other options might include awarding additional points (and/or money) to multiple-district applicants willing to work together and submit regional plans, or requiring that all grantees assess the feasibility of expanding their magnet programs beyond the school district in which they operate. What we argue for here is not specific proposals but both a recognition that they are more likely than traditional intra-district magnets to produce integrative results, and a willingness to engage in the very kind of creativity and experimentation that the grant program is intended to encourage.

Related, the federal magnet schools program should be revised to reflect the shifting racial demographics, which would necessitate making technical changes to the statute and its regulations in order to operationalize the program's mission. For instance, Congress and the DOE should adopt new metrics for measuring and evaluating integration and racial isolation that make sense. Rather than using a definition of minority isolation fixed at 50%, the federal government should use a more flexible standard that allows and encourages school districts to pursue either the reduction of racial isolation or the promotion of racial integration, or both, depending on the circumstances of the particular district. The current definition seems particularly unfit for our nation's demographics, given the increasing diversification of the public school population, which will soon be 50% minority. A revised definition should also be flexible enough both to recognize gradations of segregative conditions (both white and non-white), and to take account of district-wide or region-wide demographics.

Third, given the inextricable link between schools and housing, Congress should explore ways to integrate the federal magnet school program with federal and local efforts to promote housing integration. Magnet schools represent, ultimately, only a partial and medium-term solution to school segregation that is linked to residential segregation. They attempt to reduce isolation and promote integration by de-coupling schools from housing, but the impact of a magnet school on school segregation is neither complete nor fully effective. While a magnet school may expand the geographic area from which students may be drawn, it does not completely de-couple schools from housing because its geographic reach cannot be unlimited, nor can attendance

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<sup>248</sup> Insofar as we can tell, the DOE does presently provide information about inter-district choice, but does not appear to describe any specific program incentives for grantees to create inter-district magnets. See BuildingChoice.org, Hot Topic: Interdistrict Choice, [http://www.buildingchoice.org/cs/bc/print/bc\\_docs/hot\\_interdistrict.htm](http://www.buildingchoice.org/cs/bc/print/bc_docs/hot_interdistrict.htm) (last visited Nov. 19, 2008).

be guaranteed. Magnet schools are also not a fully effective strategy for decoupling because, as sweeping as the movement may have become, magnet schools still only represent a fraction of all public schools; most public school students still attend non-magnet schools, and that will likely continue to be the case well into the future.<sup>249</sup> Accordingly, like a traditional public school with an attendance zone, the long-term success of magnet schools in promoting integration and reducing isolation is tied to the community they serve. Making sure that we address segregation in housing and in schools remains important.<sup>250</sup>

Yet, presently, neither MSAP nor its implementing regulations makes any reference to housing. Nor do they provide any incentives, financial or otherwise, for grantee school districts to work alongside housing developers or authorities toward both short and long term solutions. This need not be the case. One could easily imagine that a magnet school or set of magnet schools could be a central element of an urban revitalization plan, play a role in attracting residents to a mixed income housing development, or be integrated into a regional schools-and-housing strategy involving multiple school districts and municipalities. To the extent possible, therefore, Congress should provide ways for the magnet schools it funds to assist in the integration of the communities they serve. Similar to our earlier suggestions about inter-district magnet schools, Congress could use grants to incentivize cooperation between school districts and local housing authorities, planners, and developers. This could take the form of awarding additional points (and/or money) to applicants whose magnet schools are a part a larger, urban or housing policy plan, or requiring grantees to propose how magnet schools

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<sup>249</sup> Research finds that where an entire area has integrated schools, there can be concurrent declines in residential segregation. See PEARCE, *supra* note 91; Frankenberg, *supra* note 91, at 164–84. However, magnet schools are not likely to create this widespread, complete integration because of their limited numbers in most districts.

<sup>250</sup> Brief of the Caucus for Structural Equity as Amicus Curiae Supporting Respondents at 26–27, *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738 (2007) (Nos. 05-908, 05-915); Brief of Amici Curiae Housing Scholars & Research & Advocacy Organizations in Support of Respondents at 18–30, *Parents Involved*, 127 S. Ct. 2738 (Nos. 05-908, 05-915) (arguing that school integration was not likely to naturally occur because of segregated housing markets but that school integration policies were compelling governmental interests because of their support for residential integration); Nancy A. Denton, *The Persistence of Segregation: Links Between Residential Segregation and School Segregation*, in IN PURSUIT OF A DREAM DEFERRED: LINKING HOUSING AND EDUCATION POLICY 89, 89–120 (John A. Powell, Gavin Kearney & Vina Kay eds., 2001); INST. ON RACE & POVERTY, MINORITY SUBURBANIZATION, STABLE INTEGRATION, AND ECONOMIC OPPORTUNITY IN FIFTEEN METROPOLITAN REGIONS (2006); Gary Orfield, *Metropolitan School Desegregation: Impacts on Metropolitan Society*, in IN PURSUIT OF A DREAM DEFERRED: LINKING HOUSING AND EDUCATION POLICY, *supra*, at 121, 121–58.

can be used as a segue into long-term strategic planning for integrated communities. Just as the regional approach to magnet schools makes more sense given today's racial context, so too has regionalism captured some urban policy planners as a way of addressing residential segregation.<sup>251</sup> There is no reason why advocates in both areas should not work hand in hand, and in fact, there are quite a few reasons why they *should* work together. The federal government can encourage and better facilitate that collaboration with the carrot of federal funding.

Finally, in taking these steps to re-prioritize the magnet school program's original purpose, Congress can use its power of the purse to redefine school choice and its importance and value vis-à-vis other educational goals. The history of the federal government's role in the proliferation of magnet schools has a positive lesson: that the federal government did—and can still—have a very real impact on the way public education evolves and is consumed.<sup>252</sup> As it restores integration at the center of MSAP's objectives, therefore, Congress should sharply increase its magnet school funding, which has remained stagnant for decades with little or no change, unadjusted for inflation.<sup>253</sup> In fact, in order to avoid undermining its MSAP goals, Congress should either add additional integration/desegregation priorities to its other choice programs or increase its magnet school funding so much as to dwarf by comparison funding for all other federal school choice programs that do not promote integration or equity.

Taking these steps would have the effect of reintroducing parental choice not as an end in and of itself but as a means to an end: to achieve integration and reduce racial isolation. Indeed, Congress could go further to influence school authorities by withholding or simply eliminating funding for those grantees who operate choice plans at the cost of further racial and economic stratification, not just among MSAP funding recipients but for grantees of any of the DOE's other relevant programs.<sup>254</sup> The DOE, too, can play a role

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<sup>251</sup> Myron Orfield, *Choice, Equal Protection, and Metropolitan Integration: The Hope of the Minneapolis Desegregation Settlement*, 24 LAW AND INEQ. 269 (2006).

<sup>252</sup> See *supra* Part III.A. Perhaps magnet schools would have taken off even without the amendments to ESAA that funded them, and the subsequent funding provided through MSAP. But there can be no doubt that that support significantly aided in the popularization of magnets.

<sup>253</sup> See Rossell, *supra* note 171, at 48 (funding amounts from 1984 to 2004, with funding in last ten years of period hovering at about \$108 million). See also Press Release, U.S. Dep't of Educ., Department Awards \$100 Million in Magnet School Grants (Sept. 27, 2007), available at <http://www.ed.gov/news/pressreleases/2007/09/09272007.html> (announcing 2007 grants totaling about \$100 million).

<sup>254</sup> On a related note, despite the presence of racial/ethnic guidelines in many states' charter school laws, there is scant evidence that these provisions have been enforced. See

in this redefinition: rather than putting magnet schools under the umbrella of school choice, the DOE should turn the relationship on its head, placing school choice, in the form of magnet schools, under the umbrella of integration and equity.<sup>255</sup> Given the financial and moral influence that the federal government wields, these changes may significantly shift the school choice landscape and begin to shift integration and equity back to the center of the debate on public education reform.

### CONCLUSION

As a nation we have fallen well short of the goal of complete desegregation, much less racial integration and equity. In fact, America's public schools have been *resegregating* for nearly two decades. Although some districts over the years have voluntarily taken it upon themselves to combat this trend and to try to maintain diverse schools, while other districts' assignment policies are guided by remedial desegregation plans, in the aggregate, these efforts have had a relatively limited impact. Both before and now after *Parents Involved* was decided, legal limitations on the ability of school districts to consider race in assigning students can shoulder some, but not all of the blame for this. So if it is not only (or primarily) law, then what else stands in the way of more meaningful school integration?

This Article sought to answer this question. It used the Supreme Court's recent decision as an opportunity to reexamine the architecture of our public education system writ large, and explore the broader extralegal framework in which efforts to promote integration thus far have been made. Justice Roberts, writing for the plurality, gave virtually no consideration to the circumstances that led to the "racial imbalance" in the public schools of Seattle and metropolitan Louisville, observing only it was not the direct result of "state action."<sup>256</sup> Because the *de jure/de facto* distinction is

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Frankenberg & Lee, *supra* note 152. In fact, available research finds that charter schools are deeply segregated. *Id.* See also Cobb & Glass, *supra* note 153. In addition to reviewing financial and academic requirements as part of the charter renewal process, states should also hold schools responsible for the racial/ethnic guidelines in their legislation.

<sup>255</sup> Goodwin Liu and William Taylor have suggested a similar approach redefining the goals of school choice. Liu & Taylor, *supra* note 29. Focusing on vouchers and charter schools, *id.* at 808–12, they argue that public school choice, "when carefully designed and properly implemented, can play an important role in advancing the goal of equality stated in *Brown* over fifty years ago." *Id.* at 796.

<sup>256</sup> *Parents Involved*, 127 S. Ct. 2738, 2755 n.12 (2007) (noting that Jefferson County had eliminated the vestiges of segregation in 2000); *id.* at 2761 (noting the distinction between "segregation by state action and racial imbalance caused by other factors"). As noted above in Part I.A, Justice Breyer writing for the four dissenting

dispositive in an Equal Protection analysis, the relationship between school segregation and the factors that contribute to it is, as a matter of law, largely irrelevant.<sup>257</sup> But from the perspective of those interested in creating greater integration, nothing could be further from the truth.

As we have shown, exploring the broader context of public schools allows us to understand how the organizational structures relating to our system of public education interacts with other non-legal factors to effectuate greater exclusion and separateness. Indeed, there are a host of policies, which, when considering together their impact, have a legacy of structuring the persistent segregation that some school boards have sought to address through the adoption of voluntary integration policies. In particular, we have seen the way in which district boundary lines—originally created as agents to help the state carry out its duty of educating its students—now are almost impermeable due to legal and extralegal barriers that structure student populations and segregate within metropolitan areas. We have also seen how private actions reflecting our collective conception of the role of public education underscore and feed into the overall system's isolation-reinforcing nature. The way in which we view public schools has shifted as competing purposes of education gain prominence and as the notion of schools as a place to learn values of equity and integration and to prepare for democratic citizenship by learning to understand others in a "common" school for all has receded. Not surprisingly, schools are perceived as a private rather than public good, a means to individual success and a commodity to be purchased by those with resources and knowledge.

Two related and perhaps straightforward lessons emerge from this inquiry. First, we must develop integration strategies that recognize the critical role that these previously under-examined structures, institutions, practices, and actions play in creating and reinforcing separateness. Structural inequality may seem hardwired in our system of public education, but it is not. Boundary lines, for example, are not impermeable barriers to further integration. In fact, they may be ideal sites for building new schools that bring students together from both sides of the lines. Effectively furthering integration requires not just accepting and working in the margins of existing assumptions about public education, how it operates and its relationship within the context of other societal factors such as residential choices, but also challenging and reimagining these assumptions with first principles in mind. Tweaking student assignment methods as some school

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Justices paid considerable attention to the histories of the districts, including non-educational policies that, in his view, contributed to the existing residential segregation patterns that the districts were trying to address with the adoption of voluntary integration policies. *Id.* at 2800–09 (Breyer, J., dissenting).

<sup>257</sup> *Id.* at 2761 (plurality opinion) (citing *Milliken v. Bradley*, 433 U.S. 267, 280 n.14 (1977); *Freeman v. Pitts*, 503 U.S. 467, 495–96 (1992)).



districts have already done, and defending these policies in court when necessary, only partly addresses the obstacles to integration.

Second, if we are to achieve meaningful change either within the courts or outside of them, we must collectively work to restore the original purpose of common schools Horace Mann once envisioned: public education as the great equalizer. This requires moving equity and integration back in the picture and situating them on par with excellence; importantly, it also requires recognizing the precedence of these values over unfettered parental choice for choice's sake. Putting equity and integration at the center of our matrix of educational goals not only gives advocates, parents, educators, and community leaders who support these values the ability to advance voluntary school integration more effectively and explicitly, but, relatedly, creates a broader foundation of public support necessary to champion and sustain policies seeking to create diverse, equitable schools. Even if *Parents Involved* had been decided the other way, and school boards were free to adopt voluntary integration policies, there is no guarantee that they would catch on like wildfire as a political matter, or that such policies would be effective as a practical matter. The private decisions that each parent makes about where to live, which school board members to elect, where to send their children to school, and what to teach them plays an equally important role in defining the character of the educational system as do the system and structure surrounding them.

Peering through the lens of structural inequality and seeing the myriad actors that it reveals can be overwhelming for those seeking a simple solution. The task of reimagining a more inclusive and equal public education system, however, does not require throwing away everything we know and starting from scratch. While re-examining existing structures to understand how they support and perpetuate inequality, it is also possible to work within existing structures to make meaningful yet realistic positive change. Consider the federal government's role in developing magnet schools. While magnet schools alone are unlikely to provide full integration and equity for all students, given their origins and ubiquity, they can and should play a large role in shaping the direction of public schools. In the example of magnet schools, we discussed the political choices and obligations of the federal government, but not all change must take place at that level of government; indeed, most does not. The same challenges are present at the state, regional, and local levels, and the same kind of creative thinking to get around the obstacles there is required. Notably, none of the actions we proposed with regard to magnet schools require legal action, nor do they depend on any one interpretation of *Parents Involved*.

Undoubtedly, the Supreme Court has made advancing *Brown's* vision of integrated public schools more challenging, but it lacked five votes to deem that vision unworthy of pursuit in the absence of a court order requiring

affirmative steps to be taken.<sup>258</sup> On the contrary, Justice Kennedy explicitly cautioned that “[t]he decision . . . should not prevent school districts from continuing the important work of bringing together students from different racial, ethnic, and economic backgrounds.”<sup>259</sup> He then went on, of course, to express a hope that “the creativity of experts, parents, administrators, and other concerned citizens” could be applied “to achieve the compelling interests they face without resorting to widespread governmental allocation of benefits and burdens on the basis of racial classifications.”<sup>260</sup>

It is possible that time will prove Justice Kennedy wrong, and that school districts taking on this “important work” will find it necessary to use race in some narrow, constitutionally permissible way in order provide meaningful integration. But the “creativity” he summons to get us to that point requires, at a minimum, that we go beyond just doing more of the same. To be effective, whatever new strategies we seek to pursue must confront not just the policies, institutions, and structures that currently cause and perpetuate inequality and segregation, but also how we as a society think about education, and legally how we think of and make the case for policies big and small that aim for inclusion and equity.

The law emerging from *Parents Involved* need not foreclose educational equity and integration; with the right mindset and approach, it can spurn greater innovation and effort. The Court having spoken without one clear voice, it is up to the people to determine the ultimate lesson and legacy of *Brown*.

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<sup>258</sup> To be fair, both sides of the debate claimed the mantle of *Brown*. However, the plurality found that it only stood for the proposition that race should never be considered in assigning students to public schools, *id.* at 2768, whereas the dissent believed that *Brown* stood for the proposition that conditions of segregation were harmful, and that even in the absence of a court order, race may be considered in assigning students in order to avoid those conditions or to promote integration. *Id.* at 2810 (Breyer, J., dissenting).

<sup>259</sup> *Id.* at 2797 (Kennedy, J., concurring).

<sup>260</sup> *Id.*