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# Examining the Costs of Diversity

EBONI S. NELSON†

## ABSTRACT

*Although the Supreme Court struck down the voluntary race-based student-assignment plans employed in *Parents Involved in Community Schools v. Seattle School District No. 1* and *Meredith v. Jefferson County Board of Education* as violative of the Equal Protection Clause, many school officials will seek refuge in Justice Kennedy's concurrence and continue their pursuit of racially diverse student bodies. This Article questions the wisdom of such a pursuit and urges school officials to pursue measures other than racial diversity to provide equal educational opportunities to minority students.*

*The Article begins with a discussion of the social, democratic, and educational benefits commonly attributed to racially diverse learning environments. After tracing the historical roots of the diversity rationale as employed in the education context and specifically by the school districts in the challenged cases, the Article asserts that the pursuit of racial diversity has come at a cost to the provision of equal educational opportunities to minority students. By equating diversity with educational equality, the pursuit of racial diversity has proven to be a distraction from the pursuit of equal educational opportunity. The Article argues that student body diversity is not the most effective approach for ensuring the provision of equal educational opportunities to minority students. Therefore, the Article urges school officials to reject the lure of Justice Kennedy's concurrence and instead craft and implement creative and effective initiatives that embrace and improve racially concentrated schools, rather than merely seeking to diversify them.*

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## INTRODUCTION

In June 2007, marking its most recent entry into the contentious debate concerning the use of race in government decision-making, the Supreme Court issued its eagerly awaited decision in *Parents Involved in Community Schools v. Seattle School District No. 1*.<sup>1</sup> The Court's decision, which invalidated the voluntary racial-integration plans employed by the Seattle and Louisville school districts,<sup>2</sup> evoked a wide range of responses from many commentators and scholars. Those who disagreed with the plurality opinion expressed that they were "saddened"<sup>3</sup> and "disappointed"<sup>4</sup> by the Court's decision. They characterized the decision as "a shameful step backward for civil rights,"<sup>5</sup> and lamented the passing of *Brown's* legacy.<sup>6</sup> Justice Breyer, writing for the

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1. 127 S. Ct. 2738 (2007).

2. *Id.* at 2746.

3. Charles Pope, *Reaction Within Supreme Court Among Sharpest*, SEATTLE POST-INTELLIGENCER, June 29, 2007, at A14.

4. Press Release, Am. Civil Liberties Union, ACLU Expresses Mixed Feelings About Supreme Court Decision in School Desegregation Cases (June 28, 2007), available at <http://www.aclu.org/scotus/2006term/parentsinvolvedincommunityschoolsv.seattleschooldistrictno.1meredithv.jeffersoncountyboardofeducation/30302prs20070628.html>.

5. Pope, *supra* note 3.

6. See, e.g., *Parents Involved*, 127 S. Ct. at 2797–2800 (Stevens, J., dissenting) (discussing the "cruel irony" of the plurality's reliance on *Brown* in striking down the challenged plans and characterizing the decision as disloyal and unfaithful to *Brown*); *id.* at 2800 (Breyer, J., dissenting) ("[The plurality] undermines *Brown's* promise of integrated primary and secondary education that local communities have sought to make a reality."); Charles J. Ogletree, Jr. & Susan Eaton, *From Little Rock to Seattle and Louisville: Is "All Deliberate Speed" Stuck in Reverse?*, 30 U. ARK.

dissent, concluded that the Court's decision threatens and perhaps breaks the promise of *Brown* and "is a decision that the Court and the Nation will come to regret."<sup>7</sup> Those who agreed with the decision applauded the Court for arriving at the constitutionally, educationally, and socially correct decision and for sending the message to school administrators across the country that students "should not be assigned to a school based on the color of their skin."<sup>8</sup>

Whether one agrees or disagrees with the Court's decision, the plurality opinion, as well as the concurring and dissenting opinions, will significantly contribute to the Court's equal-protection jurisprudence regarding race and education. As has been the case with the fragmented decision issued in *Regents of the University of California v. Bakke*,<sup>9</sup> judges, scholars, school administrators, and policymakers will rely on *Parents Involved* as they attempt to adjudicate, recommend, craft, and implement measures designed to achieve the educational and societal benefits that are often associated with racially diverse learning environments.<sup>10</sup>

The contemporary cornerstone of the theoretical framework underlying race-based<sup>11</sup> government decision-making in the education context<sup>12</sup> is the employment of the diversity rationale to support the

LITTLE ROCK L. REV. 279, 284 (2008) ("[Chief Justice John Roberts] trampled on hopes and aspirations of a generation working to manifest the ideal of an integrated society . . ."); James E. Ryan, *The Supreme Court and Voluntary Integration*, 121 HARV. L. REV. 131, 149–56 (2007) (discussing why school-integration advocates feel betrayed by the plurality opinion); Adam Liptak, *The Same Words, but Differing Views*, N.Y. TIMES, June 29, 2007, at A24 (detailing former *Brown* lawyers' characterization of the *Parents Involved* opinion as a misinterpretation and misunderstanding of "the true meaning of *Brown*").

7. *Parents Involved*, 127 S. Ct. at 2837 (Breyer, J., dissenting).

8. Pope, *supra* note 3.

9. 438 U.S. 265 (1978).

10. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 323 (2003) ("Public and private universities across the Nation have modeled their own admissions programs on Justice Powell's views [in *Bakke*] on permissible race-conscious policies."); *Smith v. Univ. of Wash., Law Sch.*, 233 F.3d 1188, 1200 (9th Cir. 2000) ("If the various opinions in *Bakke* mixed so many different colors that the result became rather muddy, that result was still clear enough to permit educators to rely upon the opinion that gave the decision its life and meaning . . . More importantly, we are required so to do."). For a discussion of the goals and benefits associated with racially diverse learning environments, see discussion *infra* Part I.

11. For purposes of this Article, "race-based" refers to the explicit consideration of a student's race or ethnicity such that he or she is granted a racial preference in an admissions or assignment decision. Conversely, "race-neutral" refers to those measures that attempt to assemble a diverse student body without the direct classification or consideration of a student's race or ethnicity during the admissions or assignment decision.

12. This Article analyzes the use of race in both higher-education and K–12 contexts. The phrase "race-based government decision-making" is intended to cover both contexts, as is any reference to "racial preferences." When the Article refers to "affirmative action," it is only referring to the use of racial preferences in higher education.

constitutionality of race-based admissions and assignment programs.<sup>13</sup> Although this Article focuses on the diversity rationale as the modern justification for race-based policies, the remedial use of race-based measures to eliminate present and past effects of discrimination is a profoundly significant aspect of the jurisprudence and history concerning race-based government decision-making. It is important to recognize that the debilitating effects of racial discrimination prompted the taking of affirmative governmental steps in attempts to rectify the harms imposed on an entire class of people.<sup>14</sup> Today, however, due to the difficulty and in some cases impossibility of proving present or past discrimination to defend the use of race-based policies,<sup>15</sup> many affirmative-action proponents have retreated from their reliance on remedial justifications and have, instead, embraced the “greener pastures” of the diversity rationale.<sup>16</sup>

Ever since *Bakke*, school officials interested in assembling a diverse student body have relied on the diversity rationale to constitu-

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13. Although the author recognizes that the diversity rationale is often comprised of other diversity components in addition to race, this Article only addresses the rationale as it concerns race and ethnicity. *See, e.g.*, *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2797 (2007) (Kennedy, J., concurring in part and concurring in the judgment) (“[A] district may consider it a compelling interest to achieve a diverse student population. Race may be one component of that diversity, but other demographic factors, plus special talents and needs, should also be considered.”); *Grutter*, 539 U.S. at 338–40 (finding that the University of Michigan Law School’s efforts to obtain a racially diverse student body were constitutional because they substantially weighed diversity factors besides race and they assembled a student body diverse in ways broader than race).

14. *See, e.g.*, Philip C. Aka, *The Supreme Court and Affirmative Action in Public Education, with Special Reference to the Michigan Cases*, 2006 BYU EDUC. & L.J. 1, 5 (characterizing affirmative action as “a necessary tool of remediation”); Richard Delgado & Jean Stefancic, *California’s Racial History and Constitutional Rationales for Race-Conscious Decision Making in Higher Education*, 47 UCLA L. REV. 1521, 1529–31 (2000) (discussing the contours of the remedial rationale for affirmative action).

15. Much of the difficulty in justifying affirmative-action programs on remedial grounds can be attributed to the Supreme Court’s refusal to recognize remedying so-called “societal” discrimination as a constitutionally permissible goal. *See Parents Involved*, 127 S. Ct. at 2758 (“[R]emedying past societal discrimination does not justify race-conscious government action.”); Robert S. Chang & Catherine E. Smith, *John Calmore’s America*, 86 N.C. L. REV. 739, 754 (2008) (noting the Supreme Court’s inability to redress societal discrimination).

16. Kenneth B. Nunn, *Diversity as a Dead-End*, 35 PEPP. L. REV. 705, 714 (2008); *see also* Chang & Smith, *supra* note 15, at 755 (discussing the “diversity trap” as it relates to schools’ tactical decisions to rely on the diversity rationale rather than past discrimination to justify their use of race-based admissions policies); Cynthia Estlund, *Taking Grutter to Work*, 7 GREEN BAG 2D 215, 216 (2004) (“[T]he diversity rationale . . . is decidedly not a remedial argument; it is instrumental and forward-looking. It is not about making up for the sins of the past, but about making a better future.” (emphasis omitted)); Kevin R. Johnson & Angela Onwuachi-Willig, *Cry Me a River: The Limits of “A Systemic Analysis of Affirmative Action in American Law Schools.”* 7 AFR.-AM. L. & POL’Y REP. 1, 8–9 (2005) (contending that higher-education institutions prefer to rely on a diversity rationale for affirmative action to avoid the necessary admission of historical discrimination that a remedial rationale requires).

tionally defend the use of racial preferences in admission decisions.<sup>17</sup> Twenty-five years following Justice Powell's pronouncement, affirmative-action proponents rejoiced when Justice O'Connor, writing for the majority in *Grutter v. Bollinger*, reaffirmed the pursuit of a diverse student body as a compelling interest.<sup>18</sup> Likewise, in the wake of *Parents Involved*, proponents of race-based measures will seek refuge in the protections of Justice Kennedy's concurring opinion in which he pronounces the achievement of a diverse student body and the avoidance of racial isolation as constitutionally permissible goals in the context of elementary and secondary education.<sup>19</sup> Indeed, scholars, school officials, and civil-rights advocates have already armed themselves with Justice Kennedy's concurrence as they continue the pursuit of racially diverse student bodies.<sup>20</sup> This Article questions the wisdom of such a pursuit.

As this Article will demonstrate, the origins of the diversity ratio-

17. See Jim Chen, *Diversity and Damnation*, 43 UCLA L. REV. 1839, 1859 (1996) ("Like a virus reaching 'extreme amplification,' the 'plus' factor lauded in *Bakke* has replicated itself . . . in millions of college applications . . ." (footnote omitted)); Jim Chen, *Embryonic Thoughts on Racial Identity as New Property*, 68 U. COLO. L. REV. 1123, 1127 (1997) (acknowledging that *Bakke* has been used as a guide for implementing affirmative action in higher education); cases cited *supra* note 10.

18. 539 U.S. at 325; see also Lani Guinier, *Admissions Rituals as Political Acts: Guardians at the Gates of Our Democratic Ideals*, 117 HARV. L. REV. 113, 117–18 (2003) ("The [*Grutter*] opinion is a sweet victory for those who have long championed the need to include underrepresented people of color in the educational elite."); J. Zamgba Browne, *Yes to Affirmative Action*, N.Y. AMSTERDAM NEWS, June 26, 2003, at 1 ("Civil rights groups across the nation . . . had nothing but praise for Monday's U.S. Supreme Court ruling [*Grutter*] upholding affirmative action. The NAACP called the ruling in favor of the University of Michigan Law School's affirmative action program a major victory for colleges and universities nationwide."); Tony Mauro, *Where Hopwood Failed, Grutter Succeeds: U.S. Supreme Court Upholds Race-Conscious Admissions Policy*, TEX. LAW., June 30, 2003, at 6 (recounting school officials' and civil-rights advocates' positive reactions to the *Grutter* decision).

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

20. For example, the Jefferson County Superintendent in Kentucky has unveiled a revised student assignment plan that seeks to maintain diversity and racial integration while meeting constitutional standards as set forth in Justice Kennedy's concurrence. Antoinette Konz & Chris Kenning, *Jefferson Wants Income, Race, Education as Criteria*, COURIER-J. (Louisville, Ky.), Jan. 29, 2008, at 1A; see also ARTHUR L. COLEMAN ET AL., NAT'L SCH. BDS. ASS'N & COLLEGE BD., NOT BLACK AND WHITE: MAKING SENSE OF THE UNITED STATES SUPREME COURT DECISIONS REGARDING RACE-CONSCIOUS STUDENT ASSIGNMENT PLANS 10–15 (2007), available at [http://www.collegeboard.com/prod\\_downloads/prof/not-black-white-collegeboard.pdf](http://www.collegeboard.com/prod_downloads/prof/not-black-white-collegeboard.pdf) (guiding school districts through the *Parents Involved* case); 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, 9–12 (2007) (describing Kennedy's concurrence and giving schools guidance); Emily Bazelon, *The Next Kind of Integration*, N.Y. TIMES, July 20, 2008, § 6 (Magazine), at 38 ("Around the country, school-district lawyers studied Kennedy's opinion and came to a rough consensus."); Posting of Jim Ryan to Supreme Court—School Integration, <http://scintegration.blogspot.com> (June 28, 2007, 14:19 EST) (noting that school districts can still use race-conscious measures); Posting of Nicole Dixon to Supreme Court—School Integration, <http://scintegration.blogspot.com> (June 28, 2007, 15:45 EST).

nale are established in the Supreme Court's desegregation jurisprudence.<sup>21</sup> Therefore, a discussion questioning the efficacy of employing the rationale to achieve educational equality naturally implicates questions regarding the effectiveness of integration to provide equal educational opportunities for minority students.<sup>22</sup> The integration debate has a long and well-known history during which numerous scholars and civil-rights advocates have questioned the pursuit of integration to achieve educational equality.<sup>23</sup> For example, upon reflection on his prior work to desegregate schools, former NAACP civil-rights attorney Professor Derrick Bell concluded that the employment of integrative measures has been unsuccessful in ensuring educational equality for black children.<sup>24</sup> This Article serves as a continuation of this debate; however, it shifts the inquiry from the context of court-imposed desegregation to schools' voluntary consideration of race to create and maintain racially diverse student bodies.

While this Article fully acknowledges the benefits of racial diversity in education,<sup>25</sup> it also recognizes the costs and casualties associated with the relentless pursuit of the Holy Grail that is racial diversity.<sup>26</sup> Notwithstanding the contention asserted by Professor James Ryan that "racial integration is not on the agenda of most school districts and has

21. See discussion *infra* Part II.

22. The author recognizes that although integration and diversity may share common goals, such as providing educational access and resources to minority students, they are two distinct interests that should not be conflated. For example, whereas integration is often considered to be a remedial measure designed to counteract the effects of segregation and benefit black students, diversity is often characterized, and sometimes criticized, as a forward-looking measure that seeks to benefit all students. See, e.g., *Parents Involved*, 127 S. Ct. at 2775 (Thomas, J., concurring) ("According to the dissent, integration involves 'an interest in setting right the consequences of prior conditions of segregation.'"); Estlund, *supra* note 16, at 216 (describing the diversity rationale as a forward-looking, non-remedial measure); Guinier, *supra* note 18, at 172–98 (critiquing *Grutter* for shifting the focus from integration's educational benefits for black students to diversity's benefits for whites). Interestingly, however, such conflation often occurs, which could have negative consequences for educational policies intended to provide equal educational opportunities for minority students. See, e.g., Elizabeth F. Emens, *Integrating Accommodation*, 156 U. PA. L. REV. 839, 916 (2008) ("A similar concern [about the majority's self-interest determining social policy] animates debates over the diversity rationale in the context of racial integration. When diversity is understood to benefit all students, this can drift into the view that the purpose of integration is to make classrooms more colorful for whites.").

23. See, e.g., Lia B. Epperson, *True Integration: Advancing Brown's Goal of Educational Equity in the Wake of Grutter*, 67 U. PITT. L. REV. 175, 200–09 (2005) (detailing and critiquing the NAACP's one-dimensional desegregation strategy and remedy).

24. See Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 471–72 (1976) (critiquing the integrative ideal as an effective strategy for achieving educational equality for black students).

25. See discussion *infra* Part I.

26. See Derrick Bell, *Racial Equality: Progressives' Passion for the Unattainable*, 94 VA. L. REV. 495, 498 (2008) (book review) (likening the continual pursuit of integration to a search for the Holy Grail).

not been for over twenty years,”<sup>27</sup> the creation and preservation of racially diverse student bodies clearly remain on the agenda of many school officials and civil-rights organizations such as the NAACP.<sup>28</sup> Professor Ryan, himself, admits that the pursuit of racial integration may be “merely dormant” and may be resuscitated via efforts such as interdistrict choice plans.<sup>29</sup> In light of this possibility, it is imperative that we examine the potential costs associated with the pursuit of racial diversity in our efforts to provide equal educational opportunities to the greatest number of minority students.

As demonstrated by the educational disparities currently plaguing the Seattle School District in *Parents Involved*, this Article exposes the educational inequities that persist despite schools’ efforts to create racially diverse student bodies.<sup>30</sup> While integration and diversity efforts have by no means been fruitless endeavors,<sup>31</sup> their current incarnations, which, unfortunately, focus on quantitative approaches for achieving racial representation rather than qualitative measures for improving minority students’ educational opportunities, have distracted school officials from achieving the true promise of *Brown*<sup>32</sup>—racial equality of educational opportunity.<sup>33</sup>

This Article contends that currently a disconnect exists between the theory of racial diversity and the reality of educational equality. Proponents of diversity who advocate for the use of race-based and race-neutral measures to create and preserve racially diverse student bodies have been lured into a false sense of security that such quantitative measures will adequately address the qualitative challenges that many minority

27. Ryan, *supra* note 6, at 132.

28. See Bell, *supra* note 26, at 496 (detailing civil-rights leaders’ commitment “to implement *Brown v. Board of Education*’s mandate for racial integration of public schools”).

29. Ryan, *supra* note 6, at 149.

30. See discussion *infra* Part III.

31. See discussion *infra* Part I.

32. See DERRICK BELL, *SILENT COVENANTS: Brown v. Board of Education and the Unfulfilled Hopes for Racial Reform 119–20* (2004) (criticizing the NAACP desegregation legal strategy of pursuing racial-balance remedies after it became evident that the strategy was no longer aligned with their clients’ educational interests); Derrick Bell, *Diversity’s Distractions*, 103 COLUM. L. REV. 1622, 1622 (2003) (“For at least four reasons, the concept of diversity . . . is a serious distraction in the ongoing efforts to achieve racial justice . . . .”); Stephen L. Carter, Op-Ed., *Affirmative Distraction*, N.Y. TIMES, July 6, 2008, at L10 (arguing that affirmative action has served as a distraction from meaningful and beneficial consideration of social-justice issues concerning disadvantaged black students).

33. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2791 (2007) (Kennedy, J., concurring in part and concurring in the judgment) (“School districts can seek to reach *Brown*’s objective of equal educational opportunity.”); *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (“[I]t is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.”).



students must overcome to achieve academic success. Similar to arguments made by Professor Bell regarding integration,<sup>34</sup> this Article argues that despite the benefits of student-body diversity, it is not the most effective approach for ensuring the provision of equal educational opportunities to the greatest number of minority students. Consequently, this Article urges school officials to reject the lure of Justice Kennedy's concurrence and craft and implement creative and effective initiatives that embrace and improve racially concentrated schools, rather than merely seeking to diversify them.

Admittedly, in an ideal world, school officials would earnestly pursue both diversity and educational equality.<sup>35</sup> However, experience shows us that, in many school districts, this has not been the case<sup>36</sup> and, if one subscribes to the "interest convergence" theory as articulated by Professor Bell, will most likely not be the case in the future.<sup>37</sup> As evidenced in Seattle, school officials have pursued racial diversity while neglecting the needs of many minority students,<sup>38</sup> especially those who find themselves being educated in racially concentrated schools.<sup>39</sup> Therefore, as urged by former civil-rights attorney Judge Robert L. Carter, the time has come to "focus on the crisis in our inner-city schools which have been abandoned" and endeavor to reform them to provide equal educational opportunities to the greatest number of minority students.<sup>40</sup>

Part I of the Article begins with a discussion of the social, demo-

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34. See *supra* note 24 and accompanying text.

35. See Epperson, *supra* note 23, at 177–78 (advocating for a "two-string bow strategy" (true integration and resource equalization) for providing equal educational opportunities to minority students).

36. See discussion *infra* Part III. For a discussion of the Lynn, Massachusetts school district that did implement both diversity and equalization measures, see Epperson, *supra* note 23, at 210–11.

37. See Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980) (contending that racial equality will be achieved "only when it converges with the interests of whites" and only to the extent that it does not "threaten[] the superior societal status of middle and upper class whites"); Nunn, *supra* note 16, at 731 (arguing that the *Grutter* decision indicates the Supreme Court's desire to fashion "a diversity remedy that does not do too much; that not only does not trammel on white interests, but in fact is in service to them").

38. See discussion *infra* Part III.

39. Although there are many white students who are currently educated in predominantly white schools, this Article will explore the challenges and benefits associated with predominantly minority learning environments. See GARY ORFIELD & CHUNGMEI LEE, CIVIL RIGHTS PROJECT AT HARVARD UNIV., RACIAL TRANSFORMATION AND THE CHANGING NATURE OF SEGREGATION 9 tbl.2 (2006), available at [http://www.civilrightsproject.ucla.edu/research/deseg/Racial\\_Transformation.pdf](http://www.civilrightsproject.ucla.edu/research/deseg/Racial_Transformation.pdf) (reporting that, during the 2003–2004 school year, the average white student attended schools that were more than three quarters (seventy-eight percent) white).

40. Robert L. Carter, *Public School Desegregation: A Contemporary Analysis*, 37 ST. LOUIS U. L.J. 885, 896 (1993).

cratic, and educational benefits that are often attributed to racially diverse learning environments. Although the attainment of these benefits serves as the goal underlying the employment of the diversity rationale to create and maintain racially diverse student bodies, they are insufficient to close the achievement gap between white and minority students or to ensure educational equality.

Part II traces the historical roots of the diversity rationale as developed by the Supreme Court. Although the diversity rationale is often thought to have been announced first by Justice Powell in *Bakke*, this Part details the evolution of the rationale from the Court's desegregation jurisprudence in cases such as *Sweatt v. Painter*<sup>41</sup> and *McLaurin v. Oklahoma State Regents for Higher Education*<sup>42</sup> to its present-day embodiment in *Parents Involved*. Throughout this evolution, we see the Court's recognition of the democratic, social, and educational benefits that result from racially diverse learning environments. Unfortunately, by the Court's endorsement of integrative and diversity measures that center on racial balance and representation rather than equal educational opportunities, we also witness the creation of an educational environment that is ripe for the disconnect between diversity and educational equality to take root and flourish.

Part III assesses the harms of equating diversity and educational equality and will expose and dismantle this diversity-equality disconnect. This Part asserts that the ideal of racial diversity and the reality of equal educational opportunity have been mistakenly equated such that granting minority students access to particular schools is often thought to guarantee them educational equality. The detrimental effects that educational policies such as tracking and magnet programs have on students of color demonstrate the fallacy of this belief and the need to extend educational opportunity beyond mere access. This Part questions whether the educational benefits discussed in Part I are due to the racially diverse student bodies themselves or rather to the resources provided in such learning environments. If minority students' achievements are more related to their exposure to beneficial resources, such as highly qualified teachers, smaller class sizes, and heightened expectations for academic success, could we not replicate these resources in racially identifiable schools in an effort to achieve positive educational outcomes for a greater number of minority children?

Part IV explores why such replication, in the context of elementary and secondary education, is an endeavor of greater importance than current efforts to achieve racially diverse student bodies. As discussed in

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41. 339 U.S. 629 (1950).

42. 339 U.S. 637 (1950).

Part III, reliance on diversity efforts has not benefited the majority of minority students. When this reality is coupled with the devastating facts associated with the growing number of racially concentrated schools<sup>43</sup> and the often insurmountable challenges that pervade such learning environments, the immediate need to embrace racially identifiable schools becomes apparent. The improvement of such schools can result in educational, social, and cultural benefits not only for minority students but also for the communities in which they live. While recognizing and respecting the historic ideals of diversity, this Article seeks to move us further towards the reality of achieving educational equality for minority students.

### I. THE THREE FACETS OF DIVERSITY BENEFITS

Central to an educational institution's employment of the diversity rationale is its attempt to obtain the benefits that are often associated with racially diverse student bodies.<sup>44</sup> Although often collectively referred to as "educational benefits,"<sup>45</sup> the benefits schools hope to produce can be divided into three distinct types: social, democratic, and educational.<sup>46</sup>

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43. See generally ORFIELD & LEE, *supra* note 39 (discussing the increasing rates of resegregation for black and Latino students).

44. See Brief for Respondents at 24–30, *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738 (2007) (No. 05-908) [hereinafter Brief for *Parents Involved* Respondents] (setting forth the civic and democratic benefits produced by integrated learning environments); Brief for Respondents at 24–29, *Parents Involved*, 127 S. Ct. 2738 (No. 05-915) [hereinafter Brief for *Parents Involved* Respondents II] (detailing the social, democratic, and academic benefits derived from students attending racially diverse schools); Brief for Respondents at 14, 21–26, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241) [hereinafter Brief for *Grutter* Respondents] (discussing the Law School's compelling interest in securing educational benefits flowing from student-body diversity); Michael J. Kaufman, (*Still*) *Constitutional School Desegregation Strategies: Teaching Racial Literacy to Secondary School Students and Preferring Racially-Literate Applicants to Higher Education*, 13 MICH. J. RACE & L. 147, 166 (2007) (noting that school districts seeking to create racially diverse student bodies do so with the aim of producing the educational benefits resulting from diverse learning environments).

45. See, e.g., *Grutter*, 539 U.S. at 343 (“[T]he Equal Protection Clause does not prohibit the Law School’s narrowly tailored use of race admission decisions to further a compelling interest in obtaining the *educational benefits* that flow from a diverse student body.” (emphasis added)); Brief for *Grutter* Respondents, *supra* note 44, at 14 (setting forth the University of Michigan Law School’s compelling interest in securing educational benefits flowing from student-body diversity”); Patrick M. Garry, *How Strictly Scrutinized?: Examining the Educational Benefits the Court Relied upon in Grutter*, 35 PEPP. L. REV. 649, 652–654 (2008) (discussing diversity as a means to produce educational benefits).

46. See, e.g., *Parents Involved*, 127 S. Ct. at 2820–23 (Breyer, J., dissenting) (discussing the educational, democratic, and social elements which comprise a school’s compelling interest in achieving a racially diverse student body). Although there is a great deal of debate regarding the benefits of diversity in education, a majority of social-science researchers have concluded that students educated in racially diverse environments experience greater social, civic, and educational benefits than their counterparts who are educated in racially concentrated schools.

### A. *Social Benefits of Racial Diversity*

The reputed social or civic benefits of racial diversity generally concern the interaction between members of different races and the positive outcomes that result from such interaction. Referring to the “contact hypothesis,”<sup>47</sup> many academics and social-science researchers have concluded that levels of racial prejudice and stereotypes can be significantly reduced through interracial and intergroup contact.<sup>48</sup> Studies show that students who learn in racially diverse environments harbor fewer feelings of intergroup hostility, distrust, and fear.<sup>49</sup> From opportunities to interact with members of racial groups other than their own, these students are more likely to form friendships across racial lines<sup>50</sup> and to

*See, e.g.*, Brief of 553 Social Scientists as Amici Curiae in Support of Respondents at 2, *Parents Involved*, 127 S. Ct. 2738 (Nos. 05-908 & 05-915) (“[R]acially integrated schools provide significant benefits to students and communities . . . .”); Brief of the American Educational Research Ass’n as Amicus Curiae in Support of Respondents at 2 n.3, *Parents Involved*, 127 S. Ct. 2738 (Nos. 05-908 & 05-915) (“[T]here is substantial agreement that the best available research evidence . . . solidly supports the Respondent school districts in [*Parents Involved*].”); *id.* at 3 (“[R]acial diversity in elementary and secondary education leads to important short-term and long-term benefits for students of all racial backgrounds.”).

47. *See* GORDON W. ALLPORT, *THE NATURE OF PREJUDICE* 261–81 (25th anniversary ed. 1979) (analyzing the contact hypothesis); Tristin K. Green, *Discomfort at Work: Workplace Assimilation Demands and the Contact Hypothesis*, 86 N.C. L. REV. 379, 401–05 (2008) (summarizing the sociological research concerning the contact hypothesis); Lee Sigelman & Susan Welch, *The Contact Hypothesis Revisited: Black-White Interaction and Positive Racial Attitudes*, 71 SOC. FORCES 781, 781–83, 792–93 (1993) (detailing prior scholarship’s testing of the contact hypothesis and presenting the results of a new test).

48. *See, e.g.*, Brief of 553 Social Scientists as Amici Curiae in Support of Respondents, *supra* note 46, at 6–9; Kaufman, *supra* note 20, at 21 n.107 (providing an extensive collection of academic and sociological research demonstrating the sociological benefits of racial diversity and integration); Goodwin Liu, *Seattle and Louisville*, 95 CAL. L. REV. 277, 282–90 (2007) (discussing interracial socialization as a compelling interest to justify the consideration of race in student-assignment plans); Sigelman & Welch, *supra* note 47, at 788–90 (discussing perceptions of racial hostility); Derek Black, Comment, *The Case for the New Compelling Government Interest: Improving Educational Outcomes*, 80 N.C. L. REV. 923, 951–52 (2002) (detailing the social and civic benefits experienced by students attending racially diverse elementary and secondary schools).

49. J. Eric Oliver & Janelle Wong, *Intergroup Prejudice in Multiethnic Settings*, 47 AM. J. POL. SCI. 567, 567–69 (2003) (referencing studies finding that interracial contact lessens racial animosity); *see also* U.S. COMM’N ON CIVIL RIGHTS, *THE BENEFITS OF RACIAL AND ETHNIC DIVERSITY IN ELEMENTARY AND SECONDARY EDUCATION* 83 (2006), available at <http://www.usccr.gov/pubs/112806diversity.pdf> (reporting research findings that white students in racially diverse learning environments “exhibit more racial tolerance and less fear of their black peers over time than their counterparts in segregated environments”); Sigelman & Welch, *supra* note 47, at 788–90 (discussing the perceptions of racial hostility).

50. *See, e.g.*, Maureen T. Hallinan & Stevens S. Smith, *The Effects of Classroom Racial Composition on Students’ Interracial Friendliness*, 48 SOC. PSYCHOL. Q. 3, 13–14 (1985); Maureen T. Hallinan & Richard A. Williams, *Interracial Friendship Choices in Secondary Schools*, 54 AM. SOC. REV. 67, 77 (1989); Maureen T. Hallinan & Richard A. Williams, *The Stability of Students’ Interracial Friendships*, 52 AM. SOC. REV. 653, 661–62 (1987); Kaufman,

develop cross-racial understanding.<sup>51</sup> According to the perpetuation theory, only when students are afforded such opportunities in “sustained desegregated [environments] will they lead more integrated lives as adults.”<sup>52</sup> It is often asserted, therefore, that students educated in racially diverse learning environments are better equipped to successfully function as citizens “in our pluralistic society.”<sup>53</sup>

### B. *Democratic Benefits of Racial Diversity*

Closely related to these civic goals are the democratic benefits associated with the diversity rationale. Educational institutions that use race-based decision-making to assemble a diverse student body embrace their charge of imparting not only knowledge to their students but also the democratic values and ideals that serve as the foundation of our society.<sup>54</sup> Inherent in these values and ideals is the inclusion of every racial group in all aspects of our society, particularly those that serve as gateways to fulfillment of America’s democratic promise of “Life, Liberty

*supra* note 20, at 19–21; Rachel Moran, *Diversity and Its Discontents: The End of Affirmative Action on Boalt Hall*, 88 CAL. L. REV. 2241, 2263–64 (2000); Black, *supra* note 48, at 951.

51. See, e.g., Brief of 553 Social Scientists as Amici Curiae in Support of Respondents, *supra* note 46, at 6–7; Patricia Gurin et al., *The Benefits of Diversity in Education for Democratic Citizenship*, 60 J. SOC. ISSUES 17, 31–33 (2003).

52. U.S. COMM’N ON CIVIL RIGHTS, *supra* note 49, at 82; see also Amy Stuart Wells & Robert L. Crain, *Perpetuation Theory and the Long-Term Effects of School Desegregation*, 64 REV. EDUC. RES. 531, 534 (1994) (discussing the perpetuation theory and presenting social-science research that “strongly suggests that interracial exposure in school can indeed reduce blacks’ tendency to avoid whites”).

53. *Estes v. Metro. Branches of Dallas NAACP*, 444 U.S. 437, 451 (1980) (Powell, J., dissenting); see also *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 473 (1982) (“Attending an ethnically diverse school may help . . . [in] preparing minority children for citizenship in our pluralistic society while, we may hope, teaching members of the racial majority to live in harmony and mutual respect with children of minority heritage.” (internal quotation marks and citations omitted)) (quoting *Estes*, 444 U.S. at 451 (Powell, J., dissenting)); Brief of 553 Social Scientists as Amici Curiae in Support of Respondents, *supra* note 46, at 9 (“[P]ositive experiences in racially integrated classrooms can make it more likely that individuals will bring fewer racial stereotypes into the workplace and will work more productively with individuals of other races.”); Janet Ward Schofield, *School Desegregation and Intergroup Relations: A Review of the Literature*, 17 REV. RES. EDUC. 335, 340 (1991) (“[T]he ability to work effectively with out-group members is an important skill for both majority and minority group members in a pluralistic society striving to overcome a long history of discrimination in education and employment.”).

54. Professor James Ryan noted,

From the birth of the common school movement through early desegregation cases, schools were seen not simply as places where students learned how to read and write but also as places where they learned how to become better citizens. Indeed, for a long time, the socializing or civic mission of schools was considered by many to be just as important as the academic mission. This mission was not always accomplished, of course, but it was valued nonetheless.

Ryan, *supra* note 6, at 143 (footnotes omitted); see also Neil S. Siegel, *Race-Conscious Student Assignment Plans: Balkanization, Integration, and Individualized Consideration*, 56 DUKE L. J. 781, 819–24 (2006) (detailing the civic and democratic mission of public education).

and the pursuit of Happiness.”<sup>55</sup> Although Congress and the Supreme Court have previously recognized other institutions, such as representative government<sup>56</sup> and marriage,<sup>57</sup> as embodiments of this promise, there is, arguably, none more vital to the attainment of democratic citizenship than the institution of public education.<sup>58</sup>

As consistently acknowledged by the Supreme Court, public education serves a pivotal role in instilling and preserving the cultural and civic values that define our society.<sup>59</sup> As aptly recognized by Chief Justice Earl Warren over fifty years ago:

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 . . . It is the very foundation of good citizenship.<sup>60</sup>

For many, the historical exclusion of racial minorities from educational institutions necessitates race-based decision-making in efforts to provide minority students access to previously denied opportunities.<sup>61</sup>

55. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

56. See U.S. CONST. amend. XV, § 1 (“The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.”).

57. See *Loving v. Virginia*, 388 U.S. 1, 2 & n.1 (1967).

58. See *Grutter v. Bollinger*, 539 U.S. 306, 331–32 (2003) (“This Court has long recognized that ‘education . . . is the very foundation of good citizenship.’” (alteration in original) (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954))). As recognized in *Plyler v. Doe*:

Public education is not a “right” granted to individuals by the Constitution. But neither is it merely some governmental “benefit” indistinguishable from other forms of social welfare legislation. Both the importance of education in maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child, mark the distinction.

457 U.S. 202, 221 (1982) (citation omitted); see also Goodwin Liu, *Education, Equality, and National Citizenship*, 116 *YALE L.J.* 330, 334–35 (2006) (“[T]he Fourteenth Amendment authorizes and obligates Congress to ensure a meaningful floor of educational opportunity throughout the nation. . . . [T]his obligation . . . encompasses a legislative duty to ensure that all children have adequate educational opportunity for equal citizenship.”).

59. See, e.g., *Grutter*, 539 U.S. at 331 (“We have repeatedly acknowledged the overriding importance of preparing students for work and citizenship, describing education as pivotal to ‘sustaining our political and cultural heritage’ with a fundamental role in maintaining the fabric of society.” (quoting *Plyler*, 457 U.S. at 221)). As noted by Justice Brennan in his dissenting opinion in *Hazelwood School District v. Kuhlmeier*:

Public education serves vital national interests in preparing the Nation’s youth for life in our increasingly complex society and for the duties of citizenship in our democratic Republic. The public school conveys to our young the information and tools required not merely to survive in, but to contribute to, civilized society.

484 U.S. 260, 278 (1988) (Brennan, J., dissenting) (citation omitted) (citing *Brown*, 347 U.S. at 493).

60. *Brown*, 347 U.S. at 493.

61. See, e.g., *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 396 (1978) (Marshall, J.,

However, as recognized by Professor Lani Guinier, “racial diversity extends beyond the classroom to include the fundamental role of public education in a democracy.”<sup>62</sup> By seeking to accomplish “the broad democratic goal of providing upward mobility to a diverse cadre of future leaders,”<sup>63</sup> school administrators who employ the diversity rationale legitimize such persons by training and educating them in an environment that reflects the racial diversity of our society.<sup>64</sup>

### C. *Educational Benefits of Racial Diversity*

The final facet of diversity benefits concerns the positive academic outcomes experienced by students attending racially diverse schools.<sup>65</sup> Educational institutions that employ racial preferences to create and maintain racially diverse student bodies often rely on the extensive body of social-science research that has found a correlation between diversity and minority students’ academic achievement to support their efforts.<sup>66</sup> Researchers such as Dr. Gary Orfield have concluded that minority students who are educated in racially diverse learning environments experi-

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concurring in the judgment in part and dissenting in part) (“In light of the sorry history of discrimination and its devastating impact on the lives of Negroes, bringing the Negro into the mainstream of American life should be a state interest of the highest order.”).

62. Guinier, *supra* note 18, at 175.

63. *Id.*

64. *Id.*; see also *Grutter*, 539 U.S. at 332; Michelle Adams, *Shifting Sands: The Jurisprudence of Integration Past, Present, and Future*, 47 *How. L.J.* 795, 824 (2004).

65. Although this Article primarily discusses educational benefits as experienced by minority students in elementary and secondary education, it is worth noting that many scholars have characterized affirmative action’s educational benefits, as explained by the Supreme Court, as ultimately benefiting white students. See, e.g., Barbara A. Noah, *A Prescription for Racial Equality in Medicine*, 40 *CONN. L. REV.* 675, 718 (2008) (“[C]ritics have observed that ‘the whole argument over what whites will learn from the presence of a critical mass [of minority students] suggests that “diversity” is for the educational benefit of whites’ . . . .”); Nunn, *supra* note 16, at 723–25 (criticizing the diversity rationale as endorsed by the Court); Daria Roithmayr, *Tacking Left: A Radical Critique of Grutter*, 21 *CONST. COMMENT.* 191, 211–13 (2004) (concluding that the *Grutter* decision appears to be more beneficial to white interests rather than the interests of students of color); Justin Pidot, Note, *Intuition or Proof: The Social Science Justification for the Diversity Rationale in Grutter v. Bollinger and Gratz v. Bollinger*, 59 *STAN. L. REV.* 761, 795 (2006) (finding it “odd” that the Court seems to justify affirmative action “not for [its] direct educational benefits to . . . underrepresented minorities, but because of the benefits that primarily accrue to white students”). They view the Court’s diversity rationale primarily as a means to expose white students to minority students and, thereby, edify white students’ knowledge and understanding of different “cultures, ideas, and viewpoints.” Nunn, *supra* note 16, at 723–24 (quoting *Grutter*, 539 U.S. at 330). By sanctioning diversity as an exposure mechanism primarily to benefit white students, critics contend that “the [*Grutter*] decision materially and symbolically privileges white interests . . . [by] prioritiz[ing] the interests of white students in breaking down their stereotypes about minorities and in adding diverse perspectives to classroom conversations.” Roithmayr, *supra*, at 194.

66. See Brief for Parents Involved Respondents, *supra* note 44, at 27; Brief for Parents Involved Respondents II, *supra* note 44, at 28–29.

ence increased levels of academic achievement, as commonly measured by test scores.<sup>67</sup>

They also credit racially inclusive learning environments with improving students' critical-thinking skills.<sup>68</sup> Similar to the social benefits produced in integrated settings, the opportunity to interact with students of different ethnic and racial backgrounds results in exposure to "different cultural knowledge and social perspectives."<sup>69</sup> Students experiencing such interactions are more likely to engage in complex thinking as they process new information and cross-racial understandings.<sup>70</sup>

One can also look to the higher levels of educational attainment achieved by students of color who attend racially integrated schools to demonstrate the academic benefits of racial diversity. For example, as compared to their counterparts who attend racially concentrated schools, students of color who attend racially diverse schools have higher high-school-graduation rates,<sup>71</sup> higher rates of college attendance,<sup>72</sup> and higher college-graduation rates.<sup>73</sup> Proponents of diversity and integration also assert that racially diverse schools provide minority students access to intangible educational benefits ranging from scholarship and job information to new and more beneficial social networks and opportunities.<sup>74</sup>

Producing these educational benefits, as well as the social and democratic benefits discussed above, serves as the rationale for educational institutions' use of race-based measures to achieve diverse student bodies. While important and worthwhile, these benefits have not resulted in closing the achievement gap between white and minority students<sup>75</sup> or

67. See GARY ORFIELD & CHUNGMEI LEE, CIVIL RIGHTS PROJECT AT HARVARD UNIV., *Brown at 50: King's Dream or Plessy's Nightmare?* 23–24 (2004), available at <http://www.civilrightsproject.ucla.edu/research/reseg04/brown50.pdf>; Brief of 553 Social Scientists as Amici Curiae in Support of Respondents, *supra* note 46, at 7–8; Kaufman, *supra* note 20, at 21 n.107; Michael Kurlaender & John T. Yun, *Is Diversity a Compelling Educational Interest? Evidence from Louisville*, in *DIVERSITY CHALLENGED: EVIDENCE ON THE IMPACT OF AFFIRMATIVE ACTION* 111, 116 (Gary Orfield & Michael Kurlaender eds., 2001).

68. See Brief of 553 Social Scientists as Amici Curiae in Support of Respondents, *supra* note 46, at 7; Anthony Lising Antonio et al., *Effects of Racial Diversity on Complex Thinking in College Students*, 15 *PSYCHOL. SCI.* 507, 509 (2004) (finding that racial diversity may modestly improve white students' critical-thinking skills).

69. Brief of 553 Social Scientists as Amici Curiae in Support of Respondents, *supra* note 46, at 7.

70. *Id.*

71. *Id.* at 8.

72. See GARY ORFIELD, CIVIL RIGHTS PROJECT AT HARVARD UNIV., *SCHOOLS MORE SEPARATE: CONSEQUENCES OF A DECADE OF RESEGREGATION* 9 (2001), available at [http://civilrightsproject.ucla.edu/research/deseg/Schools\\_More\\_Separate.pdf](http://civilrightsproject.ucla.edu/research/deseg/Schools_More_Separate.pdf).

73. See Kaufman, *supra* note 20, at 21 n.107.

74. See Michelle Adams, *Radical Integration*, 94 *CAL. L. REV.* 261, 281–82 (2006).

75. See discussion *infra* Part III.



ensuring educational equality for minority students. Even proponents of diversity admit that the effect on minority students' academic achievement is "modest" at best.<sup>76</sup> Other researchers have concluded that diversity efforts may actually harm minority students rather than benefit them.<sup>77</sup> In light of the potential negative impact of diverse student bodies on minority students, it is vital that we question school officials' reliance on the diversity rationale to create such environments.

As the next Part will illustrate, the Supreme Court has a long history of embracing the diversity rationale. Unfortunately, by sanctioning measures that primarily centered on racial representation rather than equal educational opportunities, the Court also encouraged the creation of the disconnect that currently exists between the quantitative theory of racial diversity and the qualitative reality of educational equality.

## II. TRACING THE HISTORICAL ROOTS OF THE DIVERSITY RATIONALE

Although often considered to have first appeared in Justice Powell's opinion in *Bakke*,<sup>78</sup> the roots of the diversity rationale can be traced back nearly sixty years to the Court's desegregation and integration

76. ORFIELD & LEE, *supra* note 67, at 25; *cf.* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2773, 2776–78 (2007) (Thomas, J., concurring) (acknowledging the "fervent debate" surrounding the issue of diversity benefits and citing social-science research that concludes that diverse learning environments produce "no demonstrable educational benefits" for black students); Brief of David J. Armor, Abigail Thernstrom, and Stephan Thernstrom as Amici Curiae in Support of Petitioners at 29, *Parents Involved*, 127 S. Ct. 2738 (Nos. 05-908 & 05-915) [hereinafter Armor-Thernstrom Brief] ("[A] fair and comprehensive analysis of the research shows that there is no clear and consistent evidence of benefits for any of the educational and social outcomes [asserted to be produced by the creation of racially diverse schools] . . ."); U.S. COMM'N ON CIVIL RIGHTS, *supra* note 49, at 3 ("There is little evidence that racial and ethnic diversity in elementary and secondary schools results in significant improvements in academic performance . . . Studies of whether racial or ethnic diversity result in significant social and non-educational benefits report varied results . . ."); Robert J. Delahunty, "Constitutional Justice" or "Constitutional Peace"? *The Supreme Court and Affirmative Action*, 65 WASH. & LEE L. REV. 11, 49–50 (2008) ("The social science evidence on the supposed benefits, educational or other, of diversity is 'thin.'"); Pidot, *supra* note 65, at 769–96 (summarizing and critiquing social-science findings regarding the educational benefits of diversity).

77. See Sonia R. Jarvis, *Brown and the Afrocentric Curriculum*, 101 YALE L.J. 1285, 1286 (1992) ("[N]umerous studies have shown that while some Black children benefit from attending school with white children, others lose confidence and actually perform more poorly because of discriminatory tracking programs and teachers' negative attitudes toward black children.").

78. See Thomas P. Crocker, *Envisioning the Constitution*, 57 AM. U. L. REV. 1, 38 (2007) (citing Justice Powell as first enunciating the diversity rationale in *Bakke*); Nunn, *supra* note 16, at 710 (citing *Bakke* as the case in which the diversity rationale was first introduced); Angela Onwuachi-Willig, *The Admission of Legacy Blacks*, 60 VAND. L. REV. 1141, 1181 (2007) (characterizing the benefits of racial diversity in higher education as first being recognized by the Supreme Court in *Bakke*); Craig R. Heeren, Article, "Together at the Table of Brotherhood" *Voluntary Student Assignment Plans and the Supreme Court*, 24 HARV. BLACKLETTER L.J. 133, 158 (2008) (noting that the notion of diversity as a compelling governmental interest made its first appearance as dicta in *Bakke*).

jurisprudence. The Court's recognition of the democratic, social, and educational benefits of racially inclusive learning environments is evident in pre-*Brown* cases such as *Sweatt v. Painter*<sup>79</sup> and *McLaurin v. Oklahoma State Regents for Higher Education*.<sup>80</sup> The Court continued to rely on the benefits of racial inclusion as it sanctioned and promoted integrationist ideals in cases such as *Brown* and *Swann v. Charlotte-Mecklenburg Board of Education*.<sup>81</sup> It is upon this foundation that Justice Powell pronounced the constitutional justification now commonly referred to as the "diversity rationale."<sup>82</sup> The rationale was embraced by the Court in subsequent affirmative-action cases<sup>83</sup> and most recently invoked by justices in *Parents Involved*.<sup>84</sup> These cases not only evidence the evolution of the diversity rationale but also reveal the sowing of seeds that would eventually germinate into the diversity-equality disconnect that currently stifles the attainment of true educational equality for minority students.

#### A. *Diversity's Democratic and Social Missions as Evidenced Pre-Brown*

In cases such as *Sweatt* and *McLaurin*, which are often considered precursors to the *Brown* decision,<sup>85</sup> we see the Court's allusion to the democratic and social benefits flowing from a racially diverse student body. In *Sweatt*, the Court was asked to determine whether the University of Texas Law School (Law School) violated Sweatt's equal protection rights by rejecting his law-school application solely on the basis of his race.<sup>86</sup> The State contended that it had complied with *Plessy v. Ferguson*<sup>87</sup> by providing "substantially equal facilities" to Sweatt and other members of the black community by authorizing "the opening of a law

79. 339 U.S. 629 (1950).

80. 339 U.S. 637 (1950).

81. 402 U.S. 1 (1971).

82. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 311–12 (1978) (opinion of Powell, J.) ("[T]he attainment of a diverse student body . . . is a constitutionally permissible goal for an institution of higher education.").

83. See *Gratz v. Bollinger*, 539 U.S. 244, 271–75 (2003); *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003).

84. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2753 (2007).

85. See *Adams*, *supra* note 64, at 798–802 (discussing *McLaurin* and *Sweatt* as foundations for the "minority access" integration perspective as articulated in *Brown*); Goodwin Liu, *Affirmative Action in Higher Education: The Diversity Rationale and the Compelling Interest Test*, 33 HARV. C.R.-C.L. L. REV. 381, 386–87 (1998) (discussing the Court's recognition of racial diversity's educational value as evident in *Sweatt* and *McLaurin*).

86. *Sweatt v. Painter*, 339 U.S. 629, 631 (1950).

87. 163 U.S. 537 (1896).

school for Negroes.”<sup>88</sup> The Court rejected the State’s contention and, in so doing, acknowledged the democratic significance of affording every citizen, regardless of race, the opportunity to attend those educational institutions that serve as entryways into American society.<sup>89</sup>

In characterizing the superiority of the Law School, the Court did not confine its analysis to obvious and objectively measureable attributes such as the number of faculty members, curricular and extracurricular offerings, and breadth of library resources.<sup>90</sup> It also highlighted the Law School’s intangible qualities such as “position and influence of the alumni, standing in the community, traditions and prestige,” finding them to be of significant import in establishing the greatness of the Law School.<sup>91</sup> In acknowledging these features, the Court recognized that the goals of higher education are not confined to academic instruction.

The Court noted that, as “one of the nation’s ranking law schools,” the Law School provides its graduates access to “the most distinguished positions . . . in the public life of the State.”<sup>92</sup> For this reason, it was imperative and constitutionally mandated that the petitioner have the opportunity to obtain such access. Without it, certain segments of our society would remain closed to Heman Sweatt and countless other minority persons, which does not comport with the egalitarian values that are supposed to define us as a nation.

In finding that the Equal Protection Clause required Sweatt’s admittance into the Law School,<sup>93</sup> the Court embraced the social and democratic benefits of racial integration and “acknowledged the value of integration in *educational* terms.”<sup>94</sup> As recognized by the Court, the educational resources available in institutions of higher education extend well beyond books, professors, and facilities. They also encompass intangibles such as networking, leadership, and socialization opportunities. This notion that educational institutions provide more than academic knowledge becomes central to the diversity rationale.<sup>95</sup>

On the same day as the *Sweatt* decision, the Court issued another opinion in which it also embraced the social benefits undergirding the diversity rationale. In *McLaurin*, a black doctoral student challenged the University of Oklahoma’s segregated educational practices.<sup>96</sup> The appel-

88. *Sweatt*, 339 U.S. at 632.

89. *See id.* at 633–35.

90. *See id.* at 632–34.

91. *Id.* at 634.

92. *Id.* at 633.

93. *Id.* at 636.

94. Liu, *supra* note 85, at 387.

95. *See id.* (“[A] conception of student diversity as an educational resource clearly animates Justice Powell’s articulation of the diversity rationale in *Bakke*.”)

96. *McLaurin v. Okla. State Regents for Higher Educ.*, 339 U.S. 637, 638, 640 (1950).

ling features of the practices warrant an exact description as set forth by the Court:

[H]e was required to sit apart at a designated desk in an anteroom adjoining the classroom; to sit at a designated desk on the mezzanine floor of the library, but not to use the desks in the regular reading room; and to sit at a designated table and to eat at a different time from the other students in the school cafeteria . . . .

. . . .

In the interval between the decision of the court below and the hearing in this Court, the treatment afforded appellant was altered. For some time, the section of the classroom in which appellant sat was surrounded by a rail on which there was a sign stating, "Reserved For Colored," but these have been removed. He is now assigned to a seat in the classroom in a row specified for colored students; he is assigned to a table in the library on the main floor; and he is permitted to eat at the same time in the cafeteria as other students, although here again he is assigned to a special table.<sup>97</sup>

In finding such abominable practices unconstitutional,<sup>98</sup> the Court articulated and embraced the social and civic benefits commonly associated with racially inclusive learning environments—the opportunity to interact with and learn from students of different cultures and backgrounds.<sup>99</sup> As previously discussed, supporters of race-based government decision-making often rely on the positive social outcomes resulting from interracial interactions to justify the consideration of race in admissions and assignment decisions.<sup>100</sup> The Court in *McLaurin* specifically acknowledged these outcomes when it referred to the abatement of "individual and group predilections, prejudices and choices."<sup>101</sup>

However, as the Court mentioned (and scholars and researchers have noted), voluntary separation and isolation may take place on school campuses such that essentially no interracial interaction takes place and no social benefits are realized.<sup>102</sup> While it is true that individuals may

97. *Id.* at 640.

98. *Id.* at 642.

99. *Id.* at 641. The Court also acknowledged these benefits in *Sweatt*, noting the following:

The law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts. Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned.

*Sweatt v. Painter*, 339 U.S. 629, 634 (1950).

100. See discussion *supra* Part I.

101. *McLaurin*, 339 U.S. at 641.

102. See *id.*; Deana K. Chuang, *Power, Merit, and the Imitations of the Black and White Binary in the Affirmative Action Debate: The Case of Asian Americans at Whitney High School*, 8 *ASIAN L.J.* 31, 62, 65–69 (2001) (discussing racial groups' self-segregation on a high-school

very well erect barriers that preclude potentially beneficial interracial contact, *McLaurin*, in its recognition of the societal benefits of diversity, forbids the State from doing so.<sup>103</sup>

### B. *Integration To Achieve Diversity's Democratic and Educational Goals*

After acknowledging the democratic and civic benefits of racial diversity in the context of higher education, the Supreme Court began to champion these benefits in the context of elementary and secondary education. In *Brown*, the Court specifically referenced the democratic and social benefits of racially diverse learning environments as recognized in *Sweatt* and *McLaurin* and concluded that “such considerations apply with added force to children in grade and high schools.”<sup>104</sup> The Court discussed the civic role of education in “awakening the child to cultural values” and acknowledged education as “the very foundation of good citizenship.”<sup>105</sup> It also observed the detrimental effects the denial of educational opportunities can have on a child and concluded that the state has the responsibility of providing equal educational opportunities to all students, regardless of race.<sup>106</sup>

In holding that “[s]eparate educational facilities are inherently unequal,”<sup>107</sup> the Court did not rely on the tangible features of the schools in question. In fact, it remarked that the lower courts had found that the black and white schools either had been equalized or were in the process of being equalized.<sup>108</sup> Instead, the Court based its decision on the intan-

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campus); Moran, *supra* note 50, at 2304–05, 2320–21 (discussing voluntary racial segregation at Boalt Hall, Harvard Law, and Michigan Law); Sharon E. Rush, *Beyond Admissions: Racial Equality in Law Schools*, 48 FLA. L. REV. 373, 379 (1996) (detailing incidences of self-imposed racial segregation within a law-school community); Stephan Thernstrom & Abigail Thernstrom, *Reflections on The Shape of the River*, 46 UCLA L. REV. 1583, 1607–08 (1999) (book review) (discussing self-segregation on college campuses).

103. See *McLaurin*, 339 U.S. at 641–42 (“The removal of the state restrictions will not necessarily abate individual and group predilections, prejudices and choices. But at the very least, the state will not be depriving appellant of the opportunity to secure acceptance by his fellow students on his own merits.”).

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

105. *Id.* at 493; see also Adams, *supra* note 64, at 802–03 (discussing *Brown*’s view of educational equality as “democracy-enhancing”).

106. See *Brown*, 347 U.S. at 493.

107. *Id.* at 495.

108. See *id.* at 492. Many scholars have criticized Justice Warren for including such findings in the opinion. See, e.g., Neil Gotanda, *Reflections on Korematsu, Brown and White Innocence*, 13 TEMP. POL. & CIV. RTS. L. REV. 663, 671 (2004) (“Warren skirts discussion of the past six decades of unequal segregated facilities.”); Anna Williams Shavers, *Katrina’s Children: Revealing the Broken Promise of Education*, 31 T. MARSHALL L. REV. 499, 513 (2006) (characterizing the adoption as “the faulty assumption made by the Court”); *id.* (“Segregated schools were not being equalized.”); Mary Jane Lee, Note, *How Sheff Revives Brown: Reconsidering Desegregation’s Role in Creating Equal Educational Opportunity*, 74 N.Y.U. L.

gible benefits associated with racially integrated learning environments.

The social benefits that serve as a basis for the diversity rationale are evident in the Court's discussion of the harms associated with legally sanctioned segregation.<sup>109</sup> The Court recognized that integrating the school system, thereby allowing students of different races to learn and play together, would be instrumental in eradicating the feelings of white superiority and black inferiority that state-imposed segregation had previously denoted. The Court also concerned itself with the academic benefits of diversity by noting the detrimental effects segregation can have on black students' motivation to learn and educational development.<sup>110</sup> By granting black students access to schools that had been previously closed to them, the hope was that they would experience not only increased academic achievement but also greater social and democratic benefits that are thought to accompany diverse educational environments.<sup>111</sup>

As evident in its desegregation jurisprudence, the Court continued to adhere to this "minority access" model of integration<sup>112</sup> in its attempt to provide equal educational opportunities for minority students. In so doing, however, it unfortunately laid the groundwork that has led to the present disconnect between racial diversity and educational equality, which mistakenly equates quantitative racial representation and the provision of equal educational opportunities.<sup>113</sup>

Following *Brown*, the Court's "desegregative" remedies, in large part, centered on implementing integrative measures to eliminate racially segregated schools.<sup>114</sup> Take, for instance, the Court's decision in *Swann v. Charlotte-Mecklenburg Board of Education*. In this case, the Court furthered the social goals of diversity and integration by approving the school district's civic mission to "prepare students to live in a pluralistic society."<sup>115</sup>

However, the Court also embraced racial balance as the means by which to achieve this goal.<sup>116</sup> By endorsing integrative measures such as

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REV. 485, 491 n.26 (1999) (describing the equalization of black and white schools as "wishful thinking").

109. See *Brown*, 347 U.S. at 494.

110. See *id.*

111. See James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249, 258 (1999) ("The goal of the desegregation strategy was thus not only to achieve integration for the sake of racial mixing but also to improve the educational opportunities of African-American students.")

112. Adams, *supra* note 64, at 798-802 (discussing the "minority access" perspective of integration).

113. See discussion *infra* Part III.

114. See Epperson, *supra* note 23, at 201-05.

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

116. See *id.*; Christine Rossell, *The Desegregation Efficiency of Magnet Schools*, 38 URB. AFF.

busing,<sup>117</sup> without requiring additional remedial measures, such as facility, teacher quality, and curricular equalization, to improve the quality of education afforded to black students,<sup>118</sup> the Court facilitated the emergence of educational policies that mistakenly rely on racial ratios and minority representation as the primary means to achieve educational equality.<sup>119</sup> School officials that employ such policies often concentrate on the racial makeup of their institutions while neglecting the broader unequal educational opportunities being provided to minority students.<sup>120</sup> One such educational policy is the use of racial preferences in higher-education admissions.

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REV. 697, 700 (2003) (“Since the 1970s, the courts have focused on racial balance as the measure of desegregation.”).

117. See Heeren, *supra* note 78, at 149 (discussing the Court’s endorsement of measures such as busing and magnet programs as evidencing the importance of school integration).

118. Admittedly, the Supreme Court did eventually sanction measures, such as counseling and career-guidance programs, remedial reading programs, in-service training for teachers and administrators, and new testing programs, that were designed to improve the quality of education being afforded to minority students. See, e.g., *Milliken v. Bradley*, 433 U.S. 267, 275–76, 279 (1977). However, such measures were never *required* by the Court and were actually later disallowed by the Court. See *Missouri v. Jenkins*, 515 U.S. 70, 89–100 (1995); BELL, *supra* note 32, at 20–28 (proposing an alternative *Brown* opinion wherein the Supreme Court would have mandated, among other things, equalization of school resources, facilities, and teacher qualifications); Epperson, *supra* note 23, at 205 (recommending “true integration” remedies such as “curricular innovations, professional training, and non-academic opportunities designed to increase meaningful cross-racial interaction among students and teachers”).

119. See BELL, *supra* note 32, at 189 (“The principle of gaining equal educational opportunity for black children was and is right. But our difficulties came when we viewed racial balance and busing as the only means of achieving that goal.”); Sanjay Bhatt, *Decades of Effort Fail To Close Gap in Student Achievement*, SEATTLE TIMES, May 9, 2004, at A1 (“Obviously, busing didn’t do it . . . . It did not improve systematically . . . academic outcomes for children of color.” (second alteration in original)); Rebekah Denn, *Racial Disparities Are Nothing New: Past Failures To Wipe Out Discipline Gap Fuel Skepticism Over Current Efforts*, SEATTLE POST-INTELLIGENCER, Mar. 15, 2002, at F4 (discussing school officials’ current thoughts regarding a 1986 school-board report that was aimed at eliminating academic and discipline disparities between Seattle’s black and white students). But see Kevin Brown, *Has the Supreme Court Allowed the Cure for De Jure Segregation To Replicate the Disease?*, 78 CORNELL L. REV. 1, 36 (1992) (“[D]esegregation is, no doubt, thought to address concerns that go far beyond the mere racial composition of public elementary and secondary schools.”).

120. For example, one author states,

Under *Brown*, desegregation cases . . . focused on balancing . . . students of different races[ ] among schools in a given district. . . . Today . . . the ultimate goal of *Brown*—the creation of public schools that prepare all children to succeed in life—can perhaps best be served not by seeking to create racially balanced schools, but by seeking to eliminate racial disparities in academic achievement.

Dora W. Klein, *Beyond Brown v. Board of Education: The Need To Remedy the Achievement Gap*, 31 J.L. & EDUC. 431, 436–37 (2002) (footnote omitted). Similarly, Derrick Bell noted that “racial balance measures have often altered the racial appearance of dual school systems without eliminating racial discrimination.” Bell, *supra* note 37, at 531.

### C. *Obtaining Social and Academic Benefits via Affirmative Action*

As the evolution of the diversity rationale returned to the higher-education context, the Court further embraced the social, democratic, and academic benefits of diverse learning environments. In Justice Powell's articulation of the diversity rationale in *Bakke*, he referenced the social benefits that are obtained when students from various racial and cultural backgrounds have the opportunity to interact with and learn from one another. Their perceptions of themselves and others are altered, often resulting in improved cross-racial understanding and personal development.<sup>121</sup> According to Justice Powell, assembling a diverse student body also enriched students' academic experiences by enhancing their understanding of the services they would provide to communities.<sup>122</sup>

Similar benefits were recognized by Justice O'Connor in *Grutter*. In upholding the University of Michigan Law School's race-based admissions policy, Justice O'Connor reasoned that racially inclusive learning environments produced substantial educational benefits ranging from the cultivation of cross-racial awareness and appreciation to the preparation of students to work and live in a pluralistic, multicultural society.<sup>123</sup> Perhaps the most profound aspects of the *Grutter* opinion were Justice O'Connor's pronouncements regarding the democratic benefits of diversity. She acknowledged the importance of "[e]nsuring that public institutions are open and available to all segments of American society, including people of all races and ethnicities,"<sup>124</sup> and that members of every race and ethnicity be afforded opportunities to become leaders in our society.<sup>125</sup>

While the truth and relevance of these statements are undeniable, the fact that they are based on the minority-access principle of educational opportunity severely limits their likelihood of being fully realized. Undoubtedly, the use of racial preferences will ensure an institution's desired racial makeup. Indeed, it has provided many students of color access to higher-education opportunities.<sup>126</sup> However, racial admissions

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121. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 n.48 (1978).

122. See *id.* at 314.

123. See *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003).

124. *Id.* at 331–32 (alteration in original).

125. *Id.* at 332.

126. See Brief Amici Curiae of Veterans of the Southern Civil Rights Movement and Family Members of Murdered Civil Rights Activists in Support of Respondents at 8, *Grutter*, 539 U.S. 306 (No. 02-241) (noting that the use of racial preferences in higher education has helped the number of black college graduates to increase from less than five percent in 1960 to approximately 7.5% in 2000 and the number of black law students to increase 6.4% between 1960 and 1996); Gary Orfield & Dean Whitley, *Diversity and Legal Education: Student Experiences in Leading Law Schools*, in *DIVERSITY CHALLENGED: EVIDENCE ON THE IMPACT OF AFFIRMATIVE*



preferences do nothing *prior to* the admissions decision to provide students of color beneficial resources, such as mentorship, guidance, and encouragement concerning their academic pursuits, or to assist them in their pursuit of academic success. Nor do they help to ensure that students of color are provided the necessary resources and assistance to ensure their academic success once admitted.<sup>127</sup> Obviously, an institution's use of racial preferences does not prevent it from also providing beneficial resources such as those mentioned above. However, the benefits of employing affirmative action to achieve racial representation begin and end at the university door. Without moving beyond mere representation, there is no guarantee that the benefits of diversity will actually be realized or that minority students will be provided equal educational opportunities either before or after they are admitted.<sup>128</sup> The same is also true in the context of elementary and secondary education.

#### D. *Coming Full Circle in Parents Involved*

In *Parents Involved*, we see the latest iteration of school officials' employment of the diversity rationale to create and maintain racially diverse student bodies by providing minority students access to educational institutions.<sup>129</sup> To achieve the educational benefits of diversity in elementary and secondary schools, the school districts in Seattle and Louisville employed racial tiebreakers and guidelines when making their student-assignment decisions.<sup>130</sup> Although the plurality found that the plans were not narrowly tailored and, thus, did not directly address the constitutionality of the school districts' goals,<sup>131</sup> Justice Kennedy as well as the four dissenting justices found that the goals of the plans were constitutionally permissible.<sup>132</sup>

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ACTION, *supra* note 67, at 143, 144 (crediting affirmative-action measures with an 11.4% and 5.8% increase in the number of black and Hispanic students enrolling in college immediately after graduation from high school between the years of 1972 and 1996).

127. For a more detailed critique of affirmative action as a tool to ensure equal educational opportunities for minority students, see Eboni S. Nelson, *What Price Grutter? We May Have Won the Battle, but Are We Losing the War?*, 32 J.C. & U.L. 1 (2005).

128. See Roithmayr, *supra* note 65, at 208–11 (discussing the lock-in model of enduring racial inequality and concluding that the use of racial preferences in higher education “does little” for minority communities and fails to reduce racial educational disparities as evidenced by GPAs and standardized test scores).

129. See Brief for *Parents Involved* Respondents, *supra* note 44, at 33–34; Brief for *Parents Involved* Respondents II, *supra* note 44, at 16–20.

130. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2747, 2755 (2007); Brief for *Parents Involved* Respondents, *supra* note 44, at 6, 24–30; Brief for *Parents Involved* Respondents II, *supra* note 44, at 4, 24–29.

131. See *Parents Involved*, 127 S. Ct. at 2755 (plurality opinion).

132. See *id.* at 2797 (Kennedy, J., concurring in part and concurring in the judgment); *id.* at 2835 (Breyer, J., dissenting).

In his dissenting opinion, Justice Breyer included a lengthy discussion of the multifaceted compelling interest in achieving the social, democratic, and academic benefits associated with racially diverse schools. He cited the increases in students' academic performance and in their interracial friendliness and understanding.<sup>133</sup> He also noted the importance of instilling the civic values that define our democracy into the hearts and minds of children.<sup>134</sup> While the pursuit of these benefits is indeed laudable and worthwhile, one must question whether merely providing minority students access to certain educational institutions is enough to ensure that these benefits will be realized and that students of color will be provided equal educational opportunities once they have been admitted.

Relying on the precedents as established in *Swann* and *Grutter*, the school districts in *Parents Involved* used race-based measures to attain minority representation in their student bodies.<sup>135</sup> Underlying the use of such measures was the belief that such representation would produce the desired educational benefits.<sup>136</sup> However, as noted by Justice Thomas in his concurring opinion, “[s]imply putting students together under the same roof does not necessarily mean that the students will learn together or even interact.”<sup>137</sup> As further contended by scholars, such as Derrick Bell, racial diversity and integration do not guarantee educational equality for minority students.<sup>138</sup> Despite this reality, many school officials, activists, and scholars continue to advocate for the employment of race-

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133. *See id.* at 2820–22.

134. *See id.* at 2821–23.

135. *See id.* at 2755 (plurality opinion) (“In design and operation, the plans are directed only to racial balance, pure and simple, an objective this Court has repeatedly condemned as illegitimate.”).

136. *See id.* at 2756 (noting Jefferson County’s expert’s contention that “having ‘at least [twenty] percent’ minority group representation” is important to achieving the school district’s diversity goals); Brief for *Parents Involved* Respondents, *supra* note 44, at 36 (“For Seattle, ‘racial balance’ is clearly not an end in itself but rather a measure of the extent to which the educational goals the plan was designed to foster are likely to be achieved.”); *cf. Grutter v. Bollinger*, 539 U.S. 306, 355 (2003) (Thomas, J., concurring in part and dissenting in part) (“The Law School . . . apparently believes that only a racially mixed student body can lead to the educational benefits it seeks.”).

137. *Parents Involved*, 127 S. Ct. at 2780 (Thomas, J., concurring).

138. *See Bell, supra* note 24, at 478 (“In essence arguments [for school desegregation] are that blacks must gain access to white schools because ‘equal educational opportunity’ means integrated schools, and because only school integration will make certain that black children will receive the same education as white children.”); Wendy Brown-Scott, *Race Consciousness in Higher Education: Does “Sound Educational Policy” Support the Continued Existence of Historically Black Colleges?*, 43 *EMORY L.J.* 1, 42 (1994) (“The belief that integration has accomplished equality between the races is a myth.”). *See generally* Alex M. Johnson, Jr., *Bid Whist, Tonk, and United States v. Fordice: Why Integrationism Fails African-Americans Again*, 81 *CAL. L. REV.* 1401 (1993) (criticizing integration as a tool to ensure equality and progress for African Americans).

based and race-conscious educational policies in the relentless pursuit of racial diversity, even if such a pursuit proves harmful to the very students they are trying to benefit.<sup>139</sup>

### III. ASSESSING THE HARMFUL EFFECTS OF EQUATING DIVERSITY WITH EDUCATIONAL EQUALITY

In both the K–12 and higher-education contexts, adherence to racial preferences in order to achieve diversity goals represents the status quo when it comes to providing educational opportunities to minority students—a status quo that has relied upon racial integration and minority representation to fulfill the promise of *Brown*. While such reliance has indeed provided educational access for many minority students,<sup>140</sup> it has not been tremendously successful in providing equal educational opportunities for the vast majority of minority students.<sup>141</sup> As noted by Charles Ogletree with regard to affirmative action, the use of race-based admissions measures is “geared toward an attempt to remedy educational inequality that occurs too late to do any good to the majority of the population”<sup>142</sup> and has done little to change the existence of two Americas, “separated by race, income, and opportunity.”<sup>143</sup>

Despite educational institutions’ continuous reliance on race-based admissions and assignment plans, disparities continue to persist in minority students’ academic achievement as measured by standardized-

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139. See Robin D. Barnes, *Black America and School Choice: Charting a New Course*, 106 *YALE L.J.* 2375, 2386–87 (1997) (discussing the detrimental harms black America has suffered at the hands of desegregation); Bell, *supra* note 24, at 488 (“Whether based on racial balance precedents or compensatory education theories, remedies that fail to attack all policies of racial subordination almost guarantee that the basic evil of segregated schools will survive and flourish, even in those systems where racially balanced schools can be achieved.”); Jarvis, *supra* note 77, at 1286 (discussing harms associated with racially diverse learning environments).

140. See *supra* note 126 and accompanying text.

141. See CHARLES J. OGLETREE, JR., *ALL DELIBERATE SPEED* 292 (2004) (“[A] substantial segment of the black community did not receive the benefits of integration or affirmative action.”); Bell, *supra* note 24, at 489–92 (discussing the contention that the integrative strategy for achieving educational equality primarily benefited an elite group of middle-class African Americans who had access to and means by which to influence the litigation strategies of civil-rights groups); Roithmayr, *supra* note 65, at 208 (concluding that traditional affirmative-action programs “will produce very little material gain for most people of color”). *But see* Adams, *supra* note 74, at 287 (“[T]he assertion that integration has only (and can only) benefit economically well-off blacks is unfounded.”).

142. OGLETREE, *supra* note 141, at 256.

143. *Id.* at 251.

test scores,<sup>144</sup> high-school dropout and graduation rates,<sup>145</sup> college-matriculation rates,<sup>146</sup> and post-graduate degrees.<sup>147</sup> In 2005, African American and Hispanic students combined to account for only 23.5% of the total number of students enrolled in a degree-granting institution.<sup>148</sup> And, while the percentage of black and Hispanic adults with bachelor's degrees or higher increased 12.8% and 6.5%, respectively, between the years of 1971 and 2007, the white-black gap regarding this measure increased 3.8%, and the Hispanic-white gap increased approximately 10.1%.<sup>149</sup> Despite many years of pursuing racial diversity in elementary, secondary, and higher education, racial minorities are increasingly underrepresented in postsecondary education and continue to lag behind their white counterparts.<sup>150</sup> Simply employing racial preferences to create diverse student bodies will not remedy these disparities.

If we, as a society, are to fulfill our moral obligations to provide truly equal educational opportunities to all students regardless of race, we must immediately do three things: first, recognize the disconnect that

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144. See Curt A. Levey, *Racial Preferences in Admissions: Myths, Harms, and Alternatives*, 66 ALB. L. REV. 489, 502 (2003) (discussing racial disparities in minority and nonminority students' standardized test scores); Keith R. Walsh, Book Note, *Color-Blind Racism in Grutter and Gratz*, 24 B.C. THIRD WORLD L.J. 443, 450–51 (2004) (discussing disparities between blacks and whites regarding their performance on standardized tests).

145. In 2006, the high-school-dropout rates for African Americans and Hispanics ages sixteen to twenty-four were eleven percent and twenty-two percent, respectively, compared to six percent for their white counterparts. National Center for Educational Statistics—Status Dropout Rates of 16- Through 24-Year-Olds, <http://nces.ed.gov/programs/coe/2008/section3/table.asp?tableID=900> (last visited Dec. 17, 2008). In 2007, fewer blacks than whites ages twenty-five to twenty-nine had completed high school (eighty-eight percent versus ninety-four percent). See National Center for Educational Statistics—Percentage of 25- to 29-Year-Olds Who Completed High School, <http://nces.ed.gov/programs/coe/2008/section3/table.asp?tableID=905> (last visited Dec. 17, 2008).

146. In 2007, only fifty percent of African Americans between the ages of twenty-five and twenty-nine had completed at least some college as compared to sixty-six percent of whites. National Center for Educational Statistics—Percentages of 25- to 29-Year-Olds Who Completed at Least Some College, <http://nces.ed.gov/programs/coe/2008/section3/table.asp?tableID=906> (last visited Dec. 17, 2008); see also A. Mechele Dickerson, *Race Matters in Bankruptcy*, 61 WASH. & LEE L. REV. 1725, 1769–70 (2004) (discussing the difference in degrees earned by minorities and whites).

147. In 2007, thirty-six percent of whites between the ages of twenty-five and twenty-nine had obtained a bachelor's degree or higher, while only twenty percent of blacks had achieved the same educational success. National Center for Educational Statistics—Percentage of 25- to 29-Year-Olds With a Bachelor's Degree or Higher, <http://nces.ed.gov/programs/coe/2008/section3/table.asp?tableID=907> (last visited Dec. 17, 2008).

148. See National Center for Educational Statistics—Fast Facts, <http://nces.ed.gov/fastfacts/display.asp?id=98> (last visited Dec. 17, 2008).

149. See National Center for Educational Statistics—Percentage of 25- to 29-Year-Olds With a Bachelor's Degree or Higher, *supra* note 147.

150. See Shavar D. Jeffries, *The Structural Inadequacy of Public Schools for Stigmatized Minorities: The Need for Institutional Remedies*, 34 HASTINGS CONST. L.Q. 1, 16–17 (2006) (discussing various academic measures that demonstrate public schools' failure to effectively educate minority students).

currently exists between the theory of racial diversity and the reality of educational equality; second, temper our reliance on race-based and race-neutral measures that are primarily designed to achieve quantitative goals of racial representation; and, third, develop and implement reforms that effectively address the qualitative educational challenges confronting many minority students.

### A. *Dismantling the Diversity-Equality Disconnect*

Today, many minority students must overcome great challenges to achieve academic success. Such challenges range from lack of guidance and encouragement regarding educational goals<sup>151</sup> to overcrowded classrooms, less qualified teachers, and lack of parental involvement.<sup>152</sup> Many minority students, whether educated in diverse or non-diverse environments, have low aspirations regarding their academic careers.<sup>153</sup> For those minority students who possess high aspirations, many are una-

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151. See NAACP LEGAL DEF. & EDUC. FUND, INC., *CLOSING THE GAP: MOVING FROM RHETORIC TO REALITY IN OPENING DOORS TO HIGHER EDUCATION FOR AFRICAN-AMERICAN STUDENTS* 5 (2005), available at [http://www.naacpldf.org/content/pdf/gap/Closing\\_the\\_Gap\\_-\\_Moving\\_from\\_Rhetoric\\_to\\_Reality.pdf](http://www.naacpldf.org/content/pdf/gap/Closing_the_Gap_-_Moving_from_Rhetoric_to_Reality.pdf) (“[W]hereas the national average ratio of students to guidance counselors is 490:1, the ratio can be 1056:1 or higher in schools serving large numbers of minority and low-income students.”); John Brittain & Callie Kozlak, *Racial Disparities in Educational Opportunities in the United States*, 6 SEATTLE J. FOR SOC. JUST. 591, 607 (2008) (“[S]chools with a high concentration of poor and minority students lack access to guidance counselors . . . . Therefore, low-income and minority students often find themselves ill-prepared or ineligible for postsecondary education.”); Luke Charles Harris & Uma Narayan, *Affirmative Action and the Myth of Preferential Treatment: A Transformative Critique of the Terms of the Affirmative Action Debate*, 11 HARV. BLACKLETTER L.J. 1, 19–20 (1994) (“Guidance counselors steer . . . minority students away from ‘hard’ subjects such as mathematics and science, which are often paths to high-paying jobs.”).

152. See ORFIELD & LEE, *supra* note 67, at 21–22 (“Children in [minority] schools tend . . . to have only one parent, . . . to attend classes taught by less experienced or unqualified teachers, to have friends and classmates with lower levels of achievement, to be in schools with fewer demanding pre-collegiate courses and more remedial courses, and to have higher teacher turnover.”); JOHN WIRT ET AL., U.S. DEP’T OF EDUC., *THE CONDITION OF EDUCATION 2004*, at 73 fig. (2004), available at <http://www.nces.ed.gov/pubs2004/2004077.pdf> (finding that high-poverty schools employed three times as many uncertified or out-of-field teachers in English and science than low-poverty schools); Clarence Johnson & William Allan Kritsonis, *The National Dilemma of African American Students: Disparities in Mathematics Achievement and Instruction*, 20 NAT’L F. APPLIED EDUC. RES. J. 1, 1 (2006); Martha Minow, *School Finance: Does Money Matter?*, 28 HARV. J. ON LEGIS. 395, 399 (1991) (“[D]isparities appear in teacher/pupil ratios, the distribution of teachers with master’s degrees, and availability of computers and other resources.”); Ryan, *supra* note 111, at 285 (“[S]tudents [from lower socioeconomic backgrounds] suffer more from . . . lack of parental involvement and a nurturing, stimulating home environment.”).

153. For example, in 2003–2004, only 28.4% of Hispanic twelfth-graders expected to complete college and earn a Bachelor’s degree, as compared to 35.1% of their white colleagues. National Center for Educational Statistics—Percentage of 12th-Graders Who Expect To Attain Various Levels of Education, <http://nces.ed.gov/programs/coe/2006/section3/table.asp?tableID=477> (last visited Dec. 17, 2008).

ware of the necessary steps they must take to achieve their goals.<sup>154</sup> In addition, many minority students must “confront peers who devalue education,” which has the potential to negatively impact their academic achievement.<sup>155</sup> Traditional race-based admissions and assignment programs, which narrowly focus on quantitative measures of racial representation,<sup>156</sup> fail to adequately address these and other impediments to the provision of equal educational opportunities to minority students.<sup>157</sup> Despite this inadequacy, efforts to create and maintain racially diverse student bodies continue to be pursued.<sup>158</sup> Such pursuits demonstrate the disconnect currently existing between the theory of racial diversity and the reality of educational equality.

As facilitated by the Supreme Court’s prior sanctioning of admissions and assignment measures that center on racial representation rather

154. See Susan Auerbach, “Why Do They Give the Good Classes to Some and Not to Others?”: *Latino Parent Narratives of Struggle in a College Access Program*, 104 *TCHRS. C. REC.* 1369, 1379–85 (2002) (examining how minority parents did not know how to prepare their children for college); Brittain & Kozlak, *supra* note 151, at 607–08 (“Minority parents traditionally have fewer resources for challenging a history of discriminatory tracking, and thus even high-achieving minority students often find themselves ineligible for direct enrollment in a university.”); Rosemary C. Salomone, *Feminist Voices in the Debate over Single-Sex Schooling: Finding Common Ground*, 11 *MICH. J. GENDER & L.* 63, 77 (2004) (“While many [disadvantaged minority girls] appreciate the value of education and express lofty goals, overwhelming personal and social circumstances frequently derail their plans.”).

155. Leroy D. Clark, *The Future Civil Rights Agenda: Speculation on Litigation, Legislation, and Organization*, 38 *CATH. U. L. REV.* 795, 806 (1989); see also Eleanor Brown, *Black Like Me? “Gangsta” Culture, Clarence Thomas, and Afrocentric Academies*, 75 *N.Y.U. L. REV.* 308, 335–36 (2000) (discussing negative consequences resulting from the devaluation of academic achievement by gang-affiliated black youth); Kim Forde-Mazrui, *Taking Conservatives Seriously: A Moral Justification for Affirmative Action and Reparations*, 92 *CAL. L. REV.* 683, 728 (2004) (discussing the “emergence of an ‘oppositional culture’” in disadvantaged African American communities, which “tends to devalue academic achievement”); Osamudia R. James, *Business as Usual: The Roberts Court’s Continued Neglect of Adequacy and Equity Concerns in American Education*, 59 *S.C. L. REV.* 793, 800–02 (2008) (discussing the positive and negative impact of peer influence and its ability to help create a school culture of success or underachievement).

156. See discussion *infra* Part III.B.

157. See Klein, *supra* note 120, at 456–57 (“Most desegregation cases decided under *Brown* . . . are incapable of addressing the disparities that exist between the academic achievement of black and white students.”); Orlando Patterson, *On the Provenance of Diversity*, 23 *YALE L. & POL’Y REV.* 51, 61 (2005) (“The focus has shifted from addressing the very special problems of African Americans to the promotion of a feel-good, but largely empty, goal of ethnic diversity.”); Mauro, *supra* note 18 (“Racial preferences in post-secondary education make us think that we are solving that [racism] problem when in fact it is growing. For that reason, [Grutter] is a tragedy for all Americans . . .”).

158. See, e.g., Tamar Lewin, *Across U.S., a New Look at School Integration Efforts*, *N.Y. TIMES*, June 29, 2007, at A25 (detailing schools’ plans contemplating measures ranging from consideration of socioeconomic status to school site selection in their efforts to achieve racially diverse student bodies); Corrine Yu, *Supreme Court Hands Down Major Decision on School Integration*, *C.R. MONITOR*, Winter 2007, at 19, 20 (noting civil-rights advocates’ intentions to proceed with integration and desegregation efforts following the Supreme Court’s ruling in *Parents Involved*).

than true racial equality,<sup>159</sup> the ideal of assembling a racially diverse student body has been mistakenly equated with the ultimate goal of ensuring equal educational opportunities for minority students.<sup>160</sup> This has resulted in the former often being thought of as both a prerequisite for and guarantor of the latter.<sup>161</sup> The employment of educational policies, such as tracking and magnet programs, in schools with racially diverse student bodies evidences the fallacy inherent in such beliefs. As the following discussion will show, simply because a school is diverse on its face does not mean that it is also diverse in practice or that it is providing equal educational opportunities to students of color. More than racial diversity is needed in these so-called “diverse learning environments” to ensure that the educational needs of all students are being met.<sup>162</sup>

### 1. “TRACKING” TOWARD INEQUITIES

Within racially diverse schools, students are often segregated by race due to the implementation of various instructional practices. Such intra-school separation is often referred to as “second-generation segregation.”<sup>163</sup> As noted by Professor Roslyn Arlin Mickelson, schools began to employ practices such as “[a]bility grouping, curricular tracking, special education, and gifted programs” in their efforts to subvert desegregation.<sup>164</sup> Although purported to achieve educational benefits by assigning students to “tracks or curriculum levels according to the school’s assessment of each student’s ability to learn,”<sup>165</sup> such programs

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159. See *supra* notes 118–20 and accompanying text.

160. See, e.g., Robert L. Carter, *Reexamining Brown Twenty-Five Years Later: Looking Backward into the Future*, 14 HARV. C.R.-C.L. L. REV. 615, 617 (1979) (“[T]he basic postulate of our strategy and theory in *Brown* was that the elimination of enforced, segregated education would necessarily result in equal education.”).

161. See BELL, *supra* note 32, at 4 (questioning the wisdom of civil-rights lawyers to pursue racial balance as “the guarantee of effective schooling”); Brown, *supra* note 119, at 37 (noting that “mere physical integration in public elementary and secondary schools is not the remedy” for “the harm resulting from de jure segregation”); Jeffries, *supra* note 150, at 18–19 (criticizing the implicit theoretical underpinning of integration “that the mere presence of White students would substantially enhance [minority] student performance”).

162. See GARY ORFIELD & JOHN T. YUN, CIVIL RIGHTS PROJECT AT HARVARD UNIV., RESEGREGATION IN AMERICAN SCHOOLS 3 (1999), available at [http://www.civilrightsproject.ucla.edu/research/deseg/Resegregation\\_American\\_Schools99.pdf](http://www.civilrightsproject.ucla.edu/research/deseg/Resegregation_American_Schools99.pdf) (“Desegregation does not assure that students will receive the better opportunities in [racially integrated] schools—that depends on how the interracial school is run—but it does usually put minority students in schools which have better opportunities and better prepared peer groups.”).

163. Roslyn Arlin Mickelson, *Segregation and the SAT*, 67 OHIO ST. L.J. 157, 168 (2006).

164. *Id.* at 169; see also *Hobson v. Hansen*, 269 F. Supp. 401, 442–43 (D.D.C. 1967) (detailing the origin of the track system in Washington, D.C. public schools and noting that it was first introduced in 1956, just two years after the school district was ordered to desegregate).

165. *Hobson*, 269 F. Supp. at 442.

were historically used to intentionally segregate black and white students, and they continue to have a segregative effect today.<sup>166</sup>

Social-science research reveals that tracking and other similar measures often lead to a disproportionate number of minority and low-income students being “assigned to lower ability groups, non-college-bound tracks, and to special education programs.”<sup>167</sup> Despite this detrimental outcome, the use of such practices is a widespread and common occurrence in our education system.<sup>168</sup> One need only look to the Seattle School District in *Parents Involved* to demonstrate the disparate impact of such policies.

Take, for instance, Garfield High School, one of Seattle’s most sought-after high schools,<sup>169</sup> which also happens to be one of its most racially diverse. On its face, Garfield reflects the epitome of the integrationist ideal, so much so that it had been previously praised as “a model for integration success.”<sup>170</sup> In 2000, the student population was “47 percent white, 35 percent black, 13 percent Asian, 4 percent Latino, and 1 percent Native American.”<sup>171</sup> Despite this “achievement,” it is very clear that most minority members of this diverse student body were not receiving equal educational opportunities. Consider the following statistics from the 1999–2000 school year:

[Seventy-three] percent of students in the advanced classes at Garfield [were] white, while 19 percent [were] Asian and only 4 percent [were] black (Latinos and Native Americans together make up 4 percent of Advanced Placement classes). On the other end of the scale, 62 percent of all African American students at the school [were] on

166. *Id.* at 442-46; see also Mickelson, *supra* note 163, at 169-71.

167. Mickelson, *supra* note 163, at 169. For example, in 1987, although black students comprised thirty-nine percent of the Charlotte-Mecklenburg School District, which was the subject of the influential *Swann* desegregation case, “they accounted for only 10.4% of those taking the highest level academic classes.” *Id.* at 171.

168. See *id.* at 169 n.45.

169. See Declaration of Harry J.F. Korrell Regarding Attachments to Plaintiff’s Memorandum Supporting Its Motion for Partial Summary Judgment on the State Law Claim and Opposing Defendant’s Motion Therefor at 29, *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 137 F. Supp. 2d 1224 (W.D. Wash. 2001) (No. C00-1205R), *rev’d*, 377 F.3d 949 (9th Cir. 2004), *rev’d en banc*, 426 F.3d 1162 (9th Cir. 2005), *rev’d*, 127 S. Ct. 2738 (2007) [hereinafter Korrell Declaration] (on file with author) (including Seattle school superintendent’s deposition testimony wherein he states, “By lots of student indicators, people would say it’s a fantastic school and we’ve got people dying to going [sic] to Garfield”).

170. Allie Holly-Gottlieb, *A Tale of Two Schools: At Garfield High School, the Education You Get Depends on Your Color*, STRANGER, Apr. 27, 2000, <http://www.thestranger.com/seattle/Content?oid=3774>.

171. *Id.* Today, the ethnic makeup of Garfield consists of forty-three percent white, twenty-seven percent African American, twenty-four percent Asian American, five percent Latino, and one percent Native American. Seattle Times—Garfield High School Guide, [http://community.seattletimes.nwsourc.com/schoolguide/profile.php?results=search&building\\_id=2306&search=school\\_name&school\\_name=garfield](http://community.seattletimes.nwsourc.com/schoolguide/profile.php?results=search&building_id=2306&search=school_name&school_name=garfield) (last visited Dec. 17, 2008).



the “D and E list” (which is, itself, made up of mostly black students), meaning they [were] in danger of flunking out.<sup>172</sup>

Whether facilitated through tracking, ability grouping or some other segregative practice,<sup>173</sup> the vast majority of students of color in many Seattle schools are not afforded access to equal educational opportunities, despite their “inclusion” in a racially diverse student body. A recently issued report concerning the Seattle Public Schools’ Accelerated Progress Program confirms this disturbing reality.<sup>174</sup>

The report, issued in 2007 by an outside review panel, detailed significant racial and socioeconomic gaps in the number of students participating in the program. Of the 1300 students involved in the program, seventy percent of them are white, even though white students make up only forty percent of the overall student population.<sup>175</sup> In addition, “only 5 percent of students in the Accelerated program are eligible for free or reduced lunch, while nearly 40 percent of the overall district student body qualifies [for such assistance].”<sup>176</sup> Not only are students of color underrepresented in the program, but some of those who do participate in the program report being subjected to racist comments from teachers and others involved in the program.<sup>177</sup>

As admitted by parents and school and district administrators, many minority students in Seattle are not being provided equal educational opportunities.<sup>178</sup> In the case of Garfield, “the school is so focused on . . . kids who have the greatest potential to go on to college” that it, in large part, neglects the academic needs of many minority students.<sup>179</sup> Sadly,

172. Holly-Gottlieb, *supra* note 170.

173. *See id.* (discussing the school district’s policy of placing certain students “on the fast learning track as early as grade school”).

174. *See* Paul Nyhan, *Poor Students of Color Less Likely To Be in Seattle’s Gifted Program: Gap Reflects Perceptions of Elitism, Racism*, SEATTLE POST-INTELLIGENCER, Dec. 3, 2007, at A1. The program, which serves as a feeder into the Advanced Placement high-school courses, “serves the needs of students who are academically highly gifted” by “provid[ing] a rigorous, accelerated curriculum in reading and mathematics.” Seattle Public Schools—Advanced Learning Accelerated Progress Program, [http://www.seattleschools.org/area/advlearning/program\\_app.htm](http://www.seattleschools.org/area/advlearning/program_app.htm) (last visited Dec. 17, 2008).

175. *See* Nyhan, *supra* note 174.

176. *Id.*

177. *Id.*

178. To its credit, the Seattle School District has initiated reforms in attempts to address the underrepresentation of minority and poor students in its Accelerated Progress Program. Such reforms include increasing outreach to parents of students who receive free or reduced lunch or who are bilingual to inform them about the program. Seattle Public Schools—Under-Representation, <http://www.seattleschools.org/area/advlearning/underrepresentation.htm> (last visited Dec. 17, 2008). The reforms also include providing such students additional testing opportunities to qualify for the program. *Id.* Many of the reforms were to have been implemented for the 2005-2006 testing cycle. *Id.*; thus, it will be interesting to see their impact, if any, on the disparities revealed in the 2007 report.

179. Holly-Gottlieb, *supra* note 170 (quoting Peller Phillips, who helped run an intervention

this is the reality in many school districts throughout the country—one that cannot be altered simply by creating and maintaining racially diverse student bodies.

As we have seen, even if a school is racially balanced, measures such as tracking operate “to ensure that white educational privileges remain largely intact.”<sup>180</sup> As noted by Judge Carter,

Even ostensibly integrated schools channel their resources into predominantly white “honors” classes, while blacks are tracked into unchallenging lower level programs. Black children are more likely to be placed into low ability or special education classes early on in their education. These decisions essentially seal the fate of many black children for a lifetime.<sup>181</sup>

This had led many to conclude, as did the Charlotte-Mecklenburg associate superintendent, that our schools “don’t teach black children.”<sup>182</sup> If we are to remedy this dire circumstance, we must recognize and reject the fallacy inherent in the belief that racial diversity alone will result in educational equality for minority students. As demonstrated by tracking and as further confirmed by school’s reliance on magnet programs to achieve diverse student bodies, it simply will not.

## 2. EXPOSING THE MAGNET PROGRAM MIRAGE

The disconnect between the theory of racial diversity and the reality of educational opportunity also manifests itself when school officials attempt to use race-neutral measures such as magnet schools and programs<sup>183</sup> to diversify their student bodies. Originally created to promote integration and diversity,<sup>184</sup> such programs seek to attract white, middle-

program designed to assist Garfield’s failing students and discussing the lack of resources and funding to assist minority students who are encountering academic challenges).

180. Mickelson, *supra* note 163, at 170.

181. Carter, *supra* note 40, at 889.

182. Mickelson, *supra* note 163, at 171.

183. There is a distinction between “full-site” magnet programs, whereby the entire school operates as a magnet school, and “partial-site” or “program-within-a-school” magnet programs, “where the magnet program is ‘an enclave in a larger regular school.’” Kimberly C. West, Note, *A Desegregation Tool That Backfired: Magnet School and Classroom Segregation*, 103 *YALE L.J.* 2567, 2569 (1994) (quoting CHRISTINE H. ROSSELL, *THE CARROT OR THE STICK FOR SCHOOL DESEGREGATION POLICY* 55 (1990)); see also Rossell, *supra* note 116, at 715 (discussing magnet programs’ structures). This Article’s discussion of magnet programs primarily centers on partial-site programs.

184. See *Crawford v. Huntington Beach Union High Sch. Dist.*, 121 Cal. Rptr. 2d 96, 104 (Cal. Ct. App. 2002) (“Magnet schools have the advantage of encouraging voluntary movement of students within a school district in a pattern that aids desegregation on a voluntary basis . . . .” (alteration in original) (quoting *Missouri v. Jenkins*, 515 U.S. 70, 92 (1995))); Brown, *supra* note 119, at 39 n.157 (discussing the utilization of magnet schools to further desegregation efforts); Liu, *supra* note 48, at 314 (discussing Jefferson County’s use of magnet schools to achieve racial integration post-*Brown*). Even Congress, with its passing of the Magnet Schools Assistance Act,

and upper-class students to otherwise high-minority, low-income schools.<sup>185</sup> They do so by offering specialized and thematic academic courses of study.<sup>186</sup> Like busing, such programs have increased the levels of racial and economic diversity at several schools throughout the country.<sup>187</sup> However, the aesthetically pleasing student body often masks the racial inequities that persist in such “diverse” learning environments.

In reality, the classrooms in which students are educated are often not racially diverse at all.<sup>188</sup> Many students who participate in magnet programs are white, middle- and high-class imports from neighboring suburbs,<sup>189</sup> thereby facilitating the creation of a “school within a

has endorsed the use of magnet programs to promote racial integration. See 20 U.S.C. § 7231(b)(1) (2006).

185. See Richard D. Kahlenberg, *Socioeconomic School Integration*, 85 N.C. L. REV. 1545, 1552 (2007) (noting that almost all of the magnet schools in Wake County, North Carolina are located in high-poverty neighborhoods); *id.* at 1567 (discussing the success of school districts in Wake County and Hartford, Connecticut in using magnet schools to attract “white, middle class suburban students” to urban schools); Michael J. Kaufman, *Reading, Writing, and Race: The Constitutionality of Educational Strategies Designed To Teach Racial Literacy*, 41 U. RICH. L. REV. 707, 735-736 (2007) (discussing the use of dual language immersion magnet programs to encourage white students to attend schools with high Hispanic or Latino student populations).

186. See Kahlenberg, *supra* note 185, at 1552 (describing Wake County’s magnet programs as having “special arts and music programs, foreign language options, and the like”); West, *supra* note 183, at 2569 (describing magnet programs as providing specialized instruction in areas such as “science, mathematics, and performing arts”).

187. See, e.g., Brown, *supra* note 119, at 39 & n.157; Kahlenberg, *supra* note 185, at 1567; Ryan, *supra* note 111, at 312; Christopher E. Adams, Comment, *Is Economic Integration the Fourth Wave in School Finance Litigation?*, 56 EMORY L.J. 1613, 1637 (2007). But see RICHARD D. KAHLBERG, ALL TOGETHER NOW: CREATING MIDDLE-CLASS SCHOOLS THROUGH PUBLIC SCHOOL CHOICE 126 (2001) (noting that magnet programs in Prince George’s County and Kansas City have been unsuccessful in achieving significant racial and economic diversity); Kaufman, *supra* note 20, at 15 (noting that magnet programs “have had only modest success in achieving racial integration”); Adams, *supra*, at 1651 (“[S]ome magnets have failed to enroll significant numbers of middle-class students.”). For a discussion of magnet programs’ impact on racial integration in schools that received Magnet School Assistance Program grants, see Brief Amicus Curiae of the American Civil Liberties Union et al. in Support of Respondents at 17–26, *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738 (2007) (Nos. 05-908 & 05-915).

188. As noted by Kimberly West,

A partial-site magnet achieves overall building desegregation by attracting enough white transfer students to balance the number of neighborhood minority students already attending the school. Yet, partial-site magnet schools are particularly prone to segregating students within the school because the white transfer students rarely take classes with the minority nontransfer students because the two groups follow separate curriculum tracks.

West, *supra* note 183, at 2569-70.

189. See KAHLBERG, *supra* note 187, at 128-29 (discussing the underrepresentation of disadvantaged and low-income students in magnet programs); Lior Jacob Strahilevitz, *Exclusionary Amenities in Residential Communities*, 92 VA. L. REV. 437, 484 (2006) (“[F]ew children from poor neighborhoods have the credentials to gain admission to selective magnets.”); West, *supra* note 183, at 2576 (“The influx of transfer magnet students and the introduction of a

school,” which is similar to the educational disparities precipitated by practices such as tracking and ability grouping. While the white students flourish within the hallowed walls of the magnet program, many of their black and brown counterparts are consigned to overcrowded classrooms where they are taught by lesser-qualified teachers.<sup>190</sup>

Not only are magnet-program students afforded better teachers, but they also receive greater educational resources, such as money for equipment and supplies. As noted by Richard Kahlenberg, “On average, magnet schools spend 10-12 percent more for each pupil than other schools, and some magnets spend as much as double the average amount.”<sup>191</sup> In schools where the majority of participants in the magnet program are white students, such expenditures only exacerbate the educational inequities that hinder many disadvantaged, minority students’ academic success.

Magnet schools were created with the sole purpose of racial representation and balance.<sup>192</sup> While they may be effective in achieving this narrow goal,<sup>193</sup> they perpetuate unequal education by draining resources that could be used to improve the quality of education provided in racially concentrated schools.<sup>194</sup> Yes, the student body within a magnet school may be diverse; however, the educational opportunities within the school are often not equal. While school officials concentrate efforts and resources in the magnet program, minority children continue to be afforded a substandard education.<sup>195</sup>

Such segregated “diverse” learning environments also harm minority students by placing on them a badge of inferiority that *Brown* and its

series of courses attended primarily by the transfer students resulted in less overall classroom integration.”).

190. See KAHLENBERG, *supra* note 187, at 129-30 (discussing magnet programs’ ability to siphon the most qualified teachers).

191. *Id.* at 128.

192. See James E. Ryan & Michael Heise, *The Political Economy of School Choice*, 111 YALE L.J. 2043, 2070 (2002).

193. See *supra* note 185 and accompanying text.

194. See Barnes, *supra* note 139, at 2402 (“[M]onies [for magnet programs] are often poured into city schools in order to desegregate a learning environment, even when those same funds might be better spent simply raising the quality of the education for urban children.”); Kimberly Jade Norwood, *Blackthink’s™ Acting White Stigma in Education and How It Fosters Academic Paralysis in Black Youth*, 50 HOW. L.J. 711, 747 n.143 (2007) (“[M]agnet programs . . . perpetuate segregation and unequal education in our schools.” (quoting E-mail from Sherrilyn Ifill, Professor, Univ. of Md. Sch. of Law to Kimberly Jade Norwood, Professor, Wash. Univ. (Jan. 21, 2007))).

195. See Paul Gewirtz, *Choice in the Transition: School Desegregation and the Corrective Ideal*, 86 COLUM. L. REV. 728, 765 n.121 (1986) (“A related cost of using a choice system that relies heavily on magnet schools is that it can ‘skim’ both a class of pupils and financial resources into the more selective schools, with resulting educational harms and unfairness to those left behind.”).

progeny were intended to remove.<sup>196</sup> By using admissions criteria, testing, and tracking to separate minority students from the often white participants in the magnet program, schools “suggest to white and minority students alike that the separation of races is an indication of superior white ability, social importance, or academic potential.”<sup>197</sup> If an asserted social benefit underlying the diversity rationale is the correction or elimination of such views,<sup>198</sup> one must question whether using race-neutral measures such as magnet programs to achieve diverse student bodies may actually foster such views rather than reduce them.

### B. “No Education Without Representation” – Diversity by the Numbers

As demonstrated by magnet programs, race-based and race-neutral measures designed to achieve racial representation are often not successful in ensuring equal educational opportunities for minority students. Nevertheless, school officials, civil-rights activists, and scholars continue to rely on the diversity rationale to advocate for the use of such measures.<sup>199</sup>

Although it may be difficult to clearly define the term “diversity rationale,”<sup>200</sup> it most commonly refers to the pursuit of “educational and societal benefits that flow from an educational institution’s ‘enroll[ment

196. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954) (“To separate [children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”).

197. West, *supra* note 183, at 2578.

198. See discussion *supra* Part I.A.

199. See *supra* note 20 and accompanying text.

200. As Justice Breyer notes in his *Parents Involved* dissent,

The principal interest advanced in these cases to justify the use of race-based criteria goes by various names. Sometimes a court refers to it as an interest in achieving racial “diversity.” Other times a court, like the plurality here, refers to it as an interest in racial “balancing.” I have used more general terms to signify that interest, describing it, for example, as an interest in promoting or preserving greater racial “integration” of public schools. By this term, I mean the school districts’ interest in eliminating school-by-school racial isolation and increasing the degree to which racial mixture characterizes each of the district’s schools and each individual student’s public school experience.

*Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2820 (2007) (Breyer, J., dissenting); see also *Grutter v. Bollinger*, 539 U.S. 306, 350 (Thomas, J., concurring in part and dissenting in part) (characterizing the diversity rationale as “a faddish slogan of the cognoscenti”); *id.* at 354 n.3 (characterizing the diversity rationale as “more a fashionable catchphrase than it is a useful term”); *PARENTS INVOLVED IN CMTY. SCH. V. SEATTLE SCHOOL DIST. NO. 1*, 377 F.3d 949, 962 (9th Cir. 2004) (“[T]he diversity rationale had often been criticized as ‘amorphous,’ ‘abstract,’ ‘malleable,’ and ‘ill-defined’ . . . .”), *rev’d en banc*, 426 F.3d 1162 (9th Cir. 2005), *rev’d*, 127 S. Ct. 2738.

of] a critical mass of minority students.’”<sup>201</sup> In *Grutter*, school administrators employed race-based admissions preferences to achieve these benefits.<sup>202</sup> In *Parents Involved*, the school districts utilized racial classifications, tiebreakers, and guidelines in their efforts to eliminate racial isolation and achieve racial integration.<sup>203</sup> These cases demonstrate a core tenet of the diversity rationale as presently employed—the pursuit of racial representation.<sup>204</sup> Unfortunately, such quantitative pursuits have distracted school officials from addressing more pressing qualitative obstacles that hinder the academic achievements of many students of color.<sup>205</sup>

Take, for instance, the diversity efforts as employed by the Seattle School District in *Parents Involved*. In their efforts to create and maintain racially diverse schools, school officials employed an “integration tiebreaker” when assigning students to oversubscribed schools.<sup>206</sup> The racial tiebreaker worked in favor of a student whose race would positively contribute to the racial diversity of a particular school and bring the school’s racial composition to within ten percentage points of the district’s overall white/nonwhite racial composition.<sup>207</sup> The district’s

201. *Parents Involved*, 377 F.3d at 963 (alteration in original) (quoting *Grutter*, 539 U.S. at 330).

202. See *Grutter*, 539 U.S. at 315-16.

203. See *Parents Involved*, 127 S. Ct. at 2747, 2755.

204. See *id.* at 2755 (“In Jefferson County, . . . the district seeks black enrollment of no less than 15 or more than 50 percent . . .”); *Grutter*, 539 U.S. at 318-19 (discussing University of Michigan Law School’s goal of enrolling “a critical mass of underrepresented minority students,” as defined by “‘meaningful numbers’ or ‘meaningful representation’” so that “underrepresented minority students do not feel isolated or like spokespersons for their race”); Nunn, *supra* note 16, at 725 (arguing that “the racial balance of an institution matters” in achieving the social benefits of diversity); Ryan, *supra* note 6, at 145 (“[M]eaningful integration requires a nontrivial number of students from different racial or ethnic backgrounds.”). One could argue that the school districts in *Parents Involved* were not simply seeking racial representation, but rather were attempting to avoid the documented negative educational outcomes traditionally associated with racially isolated schools. See discussion *infra* Part IV. I can concede that they were trying to do both; however, in trying to avoid the negative consequences traditionally associated with racially identifiable schools, school administrators would need to do more than simply integrate them. See discussion *supra* Part III.A.

205. See *Grutter*, 539 U.S. at 372 (Thomas, J., concurring in part and dissenting in part) (accusing University of Michigan Law School of being primarily concerned with achieving an aesthetically pleasing racially diverse student body rather than “address[ing] the real problems facing ‘underrepresented minorities’”); Bell, *supra* note 32, at 1625, 1631-32 (discussing the acceptance of the diversity rationale as a distraction from addressing racial and economic barriers that impede blacks’ and Hispanics’ educational achievement); Nunn, *supra* note 16, at 726 (concluding that the diversity rationale is not effective in remedying historical racial inequities that continue to hinder minority students’ education).

206. The oversubscribed schools were those that had too few available spaces to accommodate all the students who wanted to attend. See Brief for *Parents Involved* Respondents, *supra* note 44, at 1. For the 2000-2001 academic year, five schools were oversubscribed: Ballard, Franklin, Garfield, Nathan Hale, and Roosevelt. See *Parents Involved*, 127 S. Ct. at 2747.

207. See *Parents Involved*, 127 S. Ct. at 2747.

numerical diversity goal went well beyond the arguably flexible and unquantifiable “critical mass” that the University of Michigan Law School in *Grutter* sought to obtain.<sup>208</sup> Unlike the University of Michigan Law School, which permissibly paid “[s]ome attention to numbers,”<sup>209</sup> the Seattle School District mechanically sought to attain a fixed percentage of forty percent white and sixty percent nonwhite students plus or minus ten percent.<sup>210</sup> According to the plurality, such rigid pursuits not only amounted to impermissible racial balancing, but also had not been shown to be necessary to produce the desired educational benefits.<sup>211</sup>

Interestingly, although not surprisingly, three of the five oversubscribed schools were located in the predominantly white northern section of Seattle and had predominantly white student bodies.<sup>212</sup> Although the school district contended that the oversubscribed schools “offered a similar array of educational and extracurricular programs,”<sup>213</sup> this does not speak to the educational disparities that existed and continue to exist between the predominantly white oversubscribed schools and their predominantly minority undersubscribed counterparts—disparities that, in part, led to the oversubscription problem that the racial tiebreakers were intended to address.<sup>214</sup> As noted by Judge Bea in his dissenting opinion:

[I]n the 2000-01 school year, 82% of the students selected one of the oversubscribed schools . . . as their first choice, while only 18% picked one of the undersubscribed schools as their first choice. Clearly, the students’ and their parents’ “market” appraise some of the schools as providing a better education than the others. . . .

It is common sense that some public schools are better than others. Parents often move into areas offering better school districts

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208. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 426 F.3d 1162, 1214 (9th Cir. 2005) (Bea, J., dissenting) (“The District’s preferred ratio could not be further from the definition of a ‘critical mass.’”), *rev’d*, 127 S. Ct. 2738; Siegel, *supra* note 54, at 800 (“[I]f the Law School had defined critical mass as, say, a 40 or 50 percent minority student population, the Court almost certainly would have invalidated its program.”).

209. *Grutter*, 539 U.S. at 336 (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 323 (1978) (opinion of Powell, J.)).

210. See *Parents Involved*, 127 S. Ct. at 2755-56 (plurality opinion).

211. See *id.*; see also Brief Amicus Curiae of Pacific Legal Foundation et al. in Support of Petitioner at 23, *Parents Involved*, 127 S. Ct. 2738 (No. 05-908) [hereinafter Pacific Legal Foundation *Parents Involved* Brief] (“The plan . . . demands nothing more than proportional representation by pigmentation to achieve the school district’s preferred racial mix of students. This racial balancing is constitutionally forbidden.”).

212. They were the following: Ballard, Roosevelt, and Nathan Hale. See Brief for *Parents Involved* Respondents, *supra* note 44, at 6-7.

213. *Id.* at 6.

214. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 426 F.3d 1162, 1169 (9th Cir. 2005) (en banc) (noting that the Seattle “high schools vary widely in desirability”), *rev’d*, 127 S. Ct. 2738.

. . . . It may be that soothing, if self-interested, bureaucratic voices sing a lullaby of equal educational quality in the District's schools. But the facts show that parents and children have voted with their feet in choosing some schools rather than others. The verdict of that "market" makes a hash out of such assurances by the District.<sup>215</sup>

The educational disparities between the predominantly white and minority schools in Seattle are evidenced by measures ranging from curricular offerings to facilities to quality of leadership.<sup>216</sup> One can also look to students' performance on standardized tests to demonstrate the effects of such disparities. As noted by Seattle writer and mom Linda Thomas,

The public high schools where students have the highest test scores are Roosevelt, Nathan Hale and Ballard, all in North Seattle. On average, 66 percent of their 10th-graders passed the math, reading, writing and science portions of the WASL [Washington Assessment of Student Learning]. The lowest scores are in South Seattle schools, with a passing average of 28 percent at Cleveland, Franklin and Chief Sealth.<sup>217</sup>

In addition, the number of students taking the Scholastic Assessment Test (SAT) and their performance on the test vary greatly between the oversubscribed and undersubscribed schools. In 2000, the percentage of seniors taking the SAT at Ballard, Nathan Hale, and Roosevelt were forty-six percent, forty-eight percent, and seventy-seven percent, respectively, as compared to an average twenty-seven percent for the five undersubscribed schools.<sup>218</sup> Students at the three oversubscribed schools earned an average SAT score of 1048, while the average score of the students at the undersubscribed schools was 929.<sup>219</sup> Further disparities can be seen in the students' high-school-graduation rates. Students attending the aforementioned oversubscribed schools graduate high school at a rate nearly twenty-five percent higher than students attending

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215. *Id.* at 1211 (Bea, J., dissenting) (citation omitted); see also Linda Thomas, *North Mom, South Mom: Part One—In Search of Equitable Education for All Kids*, SEATTLE'S CHILD MAG., Mar. 28, 2008, <http://www.seattleschild.com/article/20080328/SCM02/301450785> (discussing two Seattle moms' characterizations of the white, northern schools as "privileged" and the minority, southern schools as "troubled").

216. See *Parents Involved*, 426 F.3d at 1169 n.5 (detailing the academic improvements instituted at Nathan Hale High School, which led to an increase in the school's white-student enrollment).

217. Thomas, *supra* note 215. For statistics highlighting racial disparities in academic achievement as measured by performance on the WASL throughout the state of Washington, see Washington State Commission on African Affairs—2006 WASL Scores, <http://www.caa.wa.gov/education/2006WASLScoreTables.shtml> (last visited Dec. 17, 2008).

218. See Korrell Declaration, *supra* note 169, at 70.

219. See *id.*



the undersubscribed schools.<sup>220</sup> These disparities demonstrate the reality that is too often associated with the pursuit of racial diversity and integration—the lucky few who are admitted into the oversubscribed schools have access to greater educational resources and opportunities, while the educational needs of the minority students who are left behind in racially concentrated schools largely go unmet.<sup>221</sup>

This is not to say, however, that racial diversity has produced no positive educational outcomes for minority students. Indeed, the opposite is true.<sup>222</sup> As previously discussed, there is a substantial body of social-science research that supports the conclusion that minority students enjoy greater academic success when educated in racially diverse environments.<sup>223</sup> That said, there are also studies that assert that diversity and integration efforts have “no demonstrable educational benefits” and may actually harm minority students.<sup>224</sup> Even if one agrees with the vast body of research that details the academic benefits of racially diverse learning environments, it is unclear from this research whether the positive educational outcomes are caused by the racial makeup of the school itself or rather by the resources and opportunities available in those environments.<sup>225</sup>

As commonly recognized in the realm of social-science research, correlation does not imply causation. Although there may be a positive association between two variables such that when one increases the

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220. See Seattle Times School Guide, <http://community.seattletimes.nwsources.com/schoolguide/compare.php> (select grade levels “9” to “12,” district “Seattle,” and “Public”; then click on “Search”) (last visited Dec. 17, 2008).

221. Educational policies such as the transfer option under the No Child Left Behind Act of 2001 (NCLB) also perpetuate this unfortunate outcome. Under NCLB, parents have the right to remove their child from a school that has been designated as in need for “improvement” and enroll them in another, presumably higher achieving, public school. See 20 U.S.C. § 6316(b)(1) (2006). While such transfer options are beneficial for the small number of parents and students who take advantage of them, the often minority children whose parents do not exercise their transfer option continue to languish in underperforming schools. See Danielle Holley-Walker, *The Importance of Negotiated Rulemaking to the No Child Left Behind Act*, 85 NEB. L. REV. 1015, 1029 & n.77 (2007) (noting that from 2002-2004, only two to three percent of students eligible to request a transfer actually did so). However, as noted by Professor James Ryan, “if one believes that urban schools are unlikely to overcome the obstacles created by concentrated poverty and racial isolation, the only alternative is to break apart those schools and allow students the opportunity to go elsewhere,” which the NCLB transfer option certainly attempts to do. Ryan, *supra* note 111, at 312.

222. See Epperson, *supra* note 23, at 197–98 (detailing the positive effects that racial integration has had on minority students’ academic achievement).

223. See discussion *supra* Part I.C.

224. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2776 (2007) (Thomas, J., concurring); see also sources cited *supra* note 139.

225. See *Parents Involved*, 127 S. Ct. at 2776 & n.11 (Thomas, J., concurring) (detailing social scientists’ inability to establish a causal connection between minority students’ academic achievements and diverse learning environments).

other is also likely to increase, one cannot infer from this association that one variable *causes* the other.<sup>226</sup> In applying these principles to the variables of racial diversity and academic achievement, it may very well be the case that there exists a positive correlation between diversity and minority students' academic performance; however, one cannot assume that this relationship is causal such that racial diversity, itself, will be successful in improving minority students' educational outcomes.<sup>227</sup> The positive relationship may very well be caused by other contributing variables such as "peer influence, role modeling, instructional quality, and educational expectations."<sup>228</sup>

If racial diversity does not improve minority students' academic performance,<sup>229</sup> then racial diversity is not a prerequisite for the provision of equal educational opportunities to students of color.<sup>230</sup> If the positive academic outcomes experienced by minority students in diverse learning environments are more related to the beneficial resources available in those environments rather than the racial composition of the student body, could we not replicate those resources in racially identifiable schools to improve the educational outcomes for a greater number of minority students?<sup>231</sup> The next Part explains why such replication is an

226. See WILLIAM M.K. TROCHIM, *THE RESEARCH METHODS KNOWLEDGE BASE* 6 (2d ed. 2001).

227. See Jeffries, *supra* note 150, at 18–19 (doubting the ability of integration itself to improve minority students' academic performance); Brian N. Lizotte, Note, *The Diversity Rationale: Unprovable, Uncompelling*, 11 MICH. J. RACE & L. 625, 654–55 (2006) (discussing the logical impossibility of inferring that diversity causes academic achievement from correlation in research).

228. Maureen T. Hallinan, *Diversity Effects on Student Outcomes: Social Science Evidence*, 59 OHIO ST. L.J. 733, 744 (1998).

229. See *id.* ("[T]he main reason white and minority students perform better academically in majority white schools is likely that these schools provide greater opportunities to learn. In other words, it is not desegregation per se that improves achievement, but rather the learning advantages some desegregated schools provide.").

230. See BELL, *supra* note 32, at 115 (noting the proposition made by civil-rights advocate Robert L. Carter that if "equal educational opportunity can be achieved without integration . . . *Brown* has been satisfied").

231. As noted by one of Derrick Bell's former students,

We must not let white people and bootstrapping black people use the presence of the "talented tenth" to condemn the less fortunate nine-tenths. Rather, we must scrutinize the opportunities, encouragement, family structure, and academic rigor afforded the talented tenth in order to replicate it through public and private initiatives with the goal of achieving a talented nine-tenths (or even ten-tenths)!

Derrick Bell et al., *Racial Reflections: Dialogues in the Direction of Liberation*, 37 UCLA L. REV. 1037, 1071 (1990); see also Preston C. Green, III et al., *Race-Conscious Funding Strategies and School Finance Litigation*, 16 B.U. PUB. INT. L.J. 39, 42 (2006) ("[E]xperimental research suggests that educational spending designed to decrease class size and improve the quality of teachers might reduce the racial achievement gap."); Bhatt, *supra* note 119 (reporting some black parents' preference to have qualitative resources such as "a rigorous curriculum, timely advice on foundational courses and proportionate, fair discipline" rather than integration).

endeavor of greater importance than current efforts to achieve racially diverse student bodies.

#### IV. THE CASE FOR EMBRACING MINORITY CONCENTRATED SCHOOLS

If we are to provide equal educational opportunities to the greatest number of minority students, we must fervently address their educational issues *where they are*<sup>232</sup> instead of constantly, and some would argue futilely,<sup>233</sup> diverting time, resources, and efforts to policies aimed at creating and maintaining racially diverse student bodies.<sup>234</sup> As noted by Judge Carter:

Although integration is a very important goal that I refuse to give up on, the Supreme Court has forced us into a corner. It is no longer possible to wait for integration. We must focus on the crisis in our inner-city schools which have been abandoned. What is desperately needed is decent schools that will provide the means for a toehold on the ladder to mainstream employment. We need to develop legal and social programs to rescue poor African-Americans from the pit of human debris and waste to which society has consigned them.<sup>235</sup>

The stark realities concerning the escalating number of racially isolated schools and the complex challenges that are present in such schools necessitate such immediate strategic shifts. Embracing and improving racially concentrated schools will benefit not only those students who

232. See Bell, *supra* note 37, at 532 (“A preferable method [for providing equal educational opportunities to minority students] may entail the improvement of presently desegregated schools as well as *the creation or preservation of model black schools.*” (emphasis added)).

233. See, e.g., ROY L. BROOKS, *INTEGRATION OR SEPARATION?* 25 (1996) (“The Department of Education reports that school integration has not had a salutary impact on African Americans’ scholastic achievement.”); MARTIN PATCHEN, *BLACK-WHITE CONTACT IN SCHOOLS* 342–43 (1982) (“Black students who attended predominately white classes in grade school . . . did not do better academically in high school than those who attended mostly black grade school classes.”); Derrick Bell, *Racism as the Ultimate Deception*, 86 N.C. L. REV. 621, 630 (2008) (“[B]etter schooling, not integrated schools, was what the black parents we represented [in school desegregation litigation] needed and wanted.”); Bhatt, *supra* note 119 (“Decades after the *Brown* ruling, the dismal achievement of minority students in Seattle and elsewhere also raises serious doubts about how much [desegregating] schools alone can accomplish.”); Jerome E. Morris, Editorial, *U.S. Allows Racial Gap in Education?*, ATLANTA J.-CONST., July 24, 2007, at 11A (“[D]esegregation plans will not significantly influence the educational achievement of black children because all school types (whether predominantly white, black, or racially mixed) are failing to academically prepare the majority of black children.”).

234. See, e.g., Pacific Legal Foundation *Parents Involved* Brief, *supra* note 211, at 27 (estimating “that up to \$60 million of state and local funds [were] spent each year on voluntary desegregation programs” in California prior to the passing of Proposition 209 and arguing that the funds would have been better spent had they been used to fund “other public school programs, such as outreach programs for K–12 students considering colleges”); *id.* at 27–29 (detailing the implementation of innovative educational improvement programs that have led to increases in minority students’ levels of academic achievement).

235. Carter, *supra* note 40, at 896.

attend such schools, but also potentially the communities in which they live.

### A. Reality Check

Scholars such as John Boger and Leland Ware have documented the extreme levels of residential and socioeconomic segregation that exist throughout our country.<sup>236</sup> When this reality is coupled with school administrators' adherence to the neighborhood-school concept<sup>237</sup> while making student assignment decisions, it is not surprising that racially identifiable schools result.<sup>238</sup> "[A]lmost three-fourths of black and Latino students attend schools that are predominantly minority."<sup>239</sup> African-American and Latino students account for 2.3 million of the 2.4 million students who attend schools with a 99 to 100% minority-student population.<sup>240</sup> Such racially identifiable schools also have extremely high rates of student poverty.<sup>241</sup>

The difficult challenges that plague such learning environments are well documented. They include lack of financial resources,<sup>242</sup> fewer college preparatory courses,<sup>243</sup> less experienced and qualified teachers,<sup>244</sup> and deteriorating school facilities.<sup>245</sup> Students attending high-poverty

236. See John Charles Boger, *Education's "Perfect Storm"? Racial Resegregation, High Stakes Testing, and School Resource Inequalities: The Case of North Carolina*, 81 N.C. L. REV. 1375, 1402–03 (2003); Leland Ware, *Race and Urban Space: Hypersegregated Housing Patterns and the Failure of School Desegregation*, 9 WIDENER L. SYMP. J. 55, 65–70 (2002).

237. The neighborhood-school concept refers to the assignment of students to schools that are in close proximity to their homes. For a discussion of the advantages and disadvantages of such school assignments, see Eboni S. Nelson, *Parents Involved & Meredith: A Prediction Regarding the (Un)Constitutionality of Race-Conscious Student Assignment Plans*, 84 DENV. U. L. REV. 293, 306–10 (2006).

238. See James, *supra* note 155, at 797 ("The reliance on segregated neighborhood schools in making school assignments creates 'racially identifiable black schools and classrooms [that] exert significant negative effects on both black and white students' academic outcomes.'" (alteration in original) (quoting Roslyn Arlin Mickelson, *The Academic Consequences of Desegregation and Segregation: Evidence from the Charlotte-Mecklenburg Schools*, 81 N.C. L. REV. 1513, 1560 (2003))); Ware, *supra* note 236, at 56 ("[S]tudent populations often mirror the racial make-up of the surrounding residents.").

239. ERICA FRANKENBERG ET AL., CIVIL RIGHTS PROJECT AT HARVARD UNIV., A MULTIRACIAL SOCIETY WITH SEGREGATED SCHOOLS: ARE WE LOSING THE DREAM? 28 (2003), available at <http://www.civilrightsproject.ucla.edu/research/resseg03/AreWeLosingtheDream.pdf>.

240. See *id.*

241. See ORFIELD & LEE, *supra* note 67, at 21 ("[S]tudents in highly segregated neighborhood schools are many times more likely to be in schools of concentrated poverty."); ORFIELD & YUN, *supra* note 162, at 16–17 (detailing the relationship between segregation by race and concentrated poverty); Ryan, *supra* note 111, at 273 ("In 87% of schools that are over 90% minority (African-American and Hispanic), over half of the students come from families living in poverty.").

242. E.g., ORFIELD & LEE, *supra* note 67, at 22; James, *supra* note 155, at 805.

243. E.g., ORFIELD & LEE, *supra* note 67, at 21; ORFIELD & YUN, *supra* note 162, at 3.

244. E.g., ORFIELD & LEE, *supra* note 67, at 21; James, *supra* note 155, at 802–05.

245. E.g., ORFIELD & LEE, *supra* note 67, at 22.

minority schools must also overcome lowered teacher expectations,<sup>246</sup> negative peer influences,<sup>247</sup> and less parental involvement<sup>248</sup> to achieve academic success.

When contemplating strategies to address these and similar challenges to minority students' educational achievement, one cannot ignore the educational gains made by African American students during the height of the desegregation era.<sup>249</sup> During this time, the number of African American students attaining high-school diplomas and GEDs increased, as did their performance on reading, math, and science standardized tests.<sup>250</sup> Despite these increases, however, significant educational gaps remain between minority students and their white counterparts. Whether due to the Supreme Court's shift in its desegregation jurisprudence or the continuous stratification of our communities and neighborhoods, the continual pursuit of racial diversity is no longer (assuming it ever was)<sup>251</sup> the most effective approach to providing equal educational opportunities to minority students.

In many urban communities, in which a great number of students of color are educated, racial integration is no longer a viable option. As noted by Professor James Ryan, "[R]acial integration is an implausible if not impossible goal in thousands of school districts that are predominantly or exclusively white or predominantly or exclusively minority."<sup>252</sup> The creation of racially diverse student bodies is also hindered by community opposition to integration efforts. In school districts across the country, parents vocally and fervently oppose student assignment and school-boundary proposals that attempt to diversify schools, both in terms of race and socioeconomic status.<sup>253</sup> The often white, suburban parental constituencies lobby their elected-school-board members to prevent their children from attending the "bad" schools and to prevent the "bad" kids from attending their "good" schools.<sup>254</sup> While school-board members acquiesce to the parents' wants, the needs of the often black and brown children who are languishing in the "bad" schools go unmet.

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246. See Ryan, *supra* note 111, at 289.

247. See *id.* at 287-89.

248. See Norwood, *supra* note 194, at 730; Ryan, *supra* note 111, at 285.

249. Many scholars consider this time to have occurred between the years of 1970 and 1990. See, e.g., Epperson, *supra* note 23, at 197. Beginning in 1991, the Supreme Court began to issue opinions that are often considered to have stalled the progress of desegregation. See Ware, *supra* note 236, at 63-65 (discussing THE NEGATIVE IMPACT OF THE "RESEGREGATION TRILOGY" CASES ON INTEGRATION EFFORTS).

250. See Epperson, *supra* note 23, at 197-98.

251. See Bell, *supra* note 24, at 471-72 (critiquing the integrative ideal as an effective strategy for achieving educational equality for minority students).

252. Ryan, *supra* note 6, at 145.

253. See Nelson, *supra* note 237, at 309-10.

254. See *id.*

In addition, within those school districts in which racial diversity can be achieved, it often comes at the expense of ensuring educational equality for minority students. As shown by the previous discussion regarding tracking,<sup>255</sup> magnet programs,<sup>256</sup> and race-based student-assignment plans,<sup>257</sup> the needs of many minority students largely go unmet as school officials attempt to assemble aesthetically pleasing student bodies with little regard for the unequal educational opportunities that are provided within such environments.<sup>258</sup>

Admittedly, there are tremendous challenges and difficulties associated with improving racially identifiable schools, especially those that are also characterized as low income or high poverty.<sup>259</sup> Such schools are often unable to recruit and retain the most qualified teachers.<sup>260</sup> In addition, students attending such schools often have greater academic and non-academic needs, which require greater resources.<sup>261</sup> Despite these challenges, there have been success stories,<sup>262</sup> which evidence the educational benefits that can flow from racially identifiable schools.

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255. See discussion *supra* Part III.A.i.

256. See discussion *supra* Part III.A.ii.

257. See discussion *supra* Part III.B.

258. See Frank Kemerer, Book Review, 200 EDUC. LAW REP. 507, 521 (2005) (quoting a black Topeka High School student as stating, "It's really like two schools, like they used to have here. I mean, if you look at the honors classes here, they're almost all white, and if you look at what kids get suspended or expelled, they're mostly black. That's real").

259. See Kahlenberg, *supra* note 185, at 1548 n.6 (citing a study characterizing "high-poverty" schools as those "having at least 50% of students eligible for free and reduced-price lunch").

260. See James, *supra* note 155, at 803; Kahlenberg, *supra* note 185, at 1550.

261. See Ryan, *supra* note 111, at 284–86 (discussing the higher costs associated with educating students in minority and poverty concentrated schools). There is some debate in the literature regarding the effectiveness of increased funding to improve the educational outcomes of disadvantaged students. Compare Daniel S. Greenspahn, *A Constitutional Right To Learn: The Uncertain Allure of Making a Federal Case Out of Education*, 59 S.C. L. REV. 755, 767 (2008) (concluding that providing "greater educational resources to schools with disadvantaged students will boost student performance"), with Ryan, *supra* note 111, at 289–93 (detailing the inefficacy of increased expenditures to significantly improve outcomes).

262. See, e.g., *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2777 (2007) (Thomas, J., concurring) (discussing social-science evidence of black achievement in minority concentrated schools); BEATRIZ CHU CLEWELL ET AL., *GOOD SCHOOLS IN POOR NEIGHBORHOODS: DEFYING DEMOGRAPHICS, ACHIEVING SUCCESS* 43–57, 85–108 (2007) (reporting findings from a three-year study detailing the positive educational outcomes achieved by schools serving minority, low-income students); CRAIG D. JERALD, EDUC. TRUST, *DISPELLING THE MYTH REVISITED: PRELIMINARY FINDINGS FROM A NATIONWIDE ANALYSIS OF "HIGH FLYING" SCHOOLS* 6–7 (2001), available at <http://www2.edtrust.org/NR/rdonlyres/A56988EB-28DE-4876-934A-EE63E20BACEE/0/DTMreport.pdf> (reporting that over a thousand high-poverty and high-minority schools are "high-flying" as indicated by students' performance on standardized tests). *But see* Kahlenberg, *supra* note 185, at 1548 ("[M]ost of these 'successes' turn out to be unreplicable or to be flukes . . .").

### B. *Reaping the Benefits of Effective Minority Schools*

Perhaps two of the most tragic and unintended consequences of desegregation were the closing of black-neighborhood schools and the expunging of African American educators from school systems throughout the South.<sup>263</sup> Not only did black students lose positive and influential role models, but black communities also lost institutions that had historically played an essential role in sustaining their neighborhoods.<sup>264</sup> As argued by former Topeka, Kansas school superintendent Robert McFrazier, “[T]he closing of black neighborhood schools—with their traditions, yearbooks, mottoes, fight songs and halls of fame—ripped the centerpiece out of those communities.”<sup>265</sup> Unfortunately, these centerpieces have yet to be restored, which is why the embracement and improvement of racially identifiable schools are necessary endeavors.<sup>266</sup>

The embracement and improvement of minority-concentrated schools are also vital to counteracting the message of inherent inferiority that the closing of black schools conveyed not only to the black community but also to the country. As argued by scholars such as Wendy Brown-Scott, “[T]he belief that Black people are inferior to white people underlies the call for integration and causes integration to take on its subordinating quality.”<sup>267</sup> This belief led to the abandonment of black-neighborhood schools and the emergence of the myth that black students need to be educated alongside white students to achieve academic success.<sup>268</sup>

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263. See Epperson, *supra* note 23, at 206–07 (“According to one report, by 1972, more than 41,600 African-American educators in the southern states had been displaced or lost their jobs. More than half of all black public school administrators were demoted or dismissed.” (footnote omitted)); Molly Townes O’Brien, *Brown on the Ground: A Journey of Faith in Schooling*, 35 U. Tol. L. Rev. 813, 815 (2004) (“In some areas, black neighborhood schools were razed and black children were dispersed to formerly all-white schools. Hundreds of black teachers and administrators lost their jobs, as white authorities were unwilling to place them in charge of racially integrated classrooms and schools.” (footnote omitted)).

264. See BELL, *supra* note 32, at 100 (lamenting that he was “[s]adly unaware of the value of a black school in a small community”); *id.* at 168–69 (discussing the central role of black schools in their communities).

265. David E. Thigpen, *An Elusive Dream in the Promised Land*, TIME, May 10, 2004, at 32, 32.

266. See BELL, *supra* note 32, at 168–69 (“A community is only as good as the school that is in it.”).

267. Brown-Scott, *supra* note 138, at 44; see also *Missouri v. Jenkins*, 515 U.S. 70, 114 (1995) (Thomas, J., concurring) (“[T]he theory that black students suffer an unspecified psychological harm from segregation that retards their mental and educational development . . . rests on an assumption of black inferiority.”); Brown, *supra* note 119, at 68 (“Unquestioning admiration of *Brown I* and its progeny blinds us to the underlying acceptance of African-American inferiority embodied in the remedies for de jure segregation.”).

268. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2776–78 (2007) (Thomas, J., concurring) (presenting sociological research to contradict the assertion that integration is essential to black achievement).

As argued by Professor Brown-Scott in the context of higher education, it is imperative that we preserve black educational institutions.<sup>269</sup> The same is true in the context of elementary and secondary education. To do so not only rejects the assumption “that anything that is predominantly black must be inferior”<sup>270</sup> but also instills pride, cultural values, and high academic expectations in minority students and communities.<sup>271</sup>

Admittedly, one could argue, as did the U.S. Commission on Civil Rights in 1963, that “[s]chools segregated in fact teach only subject matter and fail to fulfill one of the traditional goals of public education; they fail to prepare youth to function in a multiracial society as participating citizens.”<sup>272</sup> I would assert, however, that effective minority schools succeed in teaching much more than reading, writing, and arithmetic. First and foremost, they teach minority children to have high expectations for academic achievement. In many highly effective minority schools,<sup>273</sup> the students are met at the schoolhouse door by principals, teachers, and administrators who have high expectations for their students’ academic success.<sup>274</sup> Such expectations help to “create and reinforce a culture of achievement” that permeates the schools and contributes to minority students’ educational success.<sup>275</sup> As noted about an Oakland, California

269. See Brown-Scott, *supra* note 138, at 10–12.

270. *Jenkins*, 515 U.S. at 114 (Thomas, J., concurring); see also Wendy Parker, *Desegregating Teachers*, 86 WASH. U. L. REV. 1, 5 (2008) (“[M]inority communities have often embraced school segregation, largely for integration’s failure to deliver quality and its assumption that all-minority schools are bad.”).

271. See Brown-Scott, *supra* note 138, at 11–12.

272. Bhatt, *supra* note 119.

273. Researchers Beatrice Chu Clewell, Patricia B. Campbell, and Lesley Perlman define “highly effective” schools as those “where students score[ ] high on standardized tests.” CLEWELL ET AL., *supra* note 262, at 12. The five characteristics that distinguish highly effective minority and low-income schools from the typical, underperforming schools are as follows: principal leadership; high teacher quality; high parent involvement and satisfaction; good student discipline and school climate; and high expectations for students. See *id.* at 147–53. School districts should endeavor to replicate these beneficial resources in racially identifiable schools to improve minority students’ educational outcomes.

274. See *id.* at 152–53 (reporting findings that teachers’ expectations for students are higher in highly effective schools than they are in typical, underperforming schools).

275. About KIPP: The Five Pillars, <http://www.kipp.org/01/fivepillars.cfm> (last visited Dec. 17, 2008). The Knowledge is Power Program (KIPP) is a network of sixty-six charter schools throughout the country that primarily serve minority and low-income student populations. See KIPP: Knowledge is Power Program, <http://www.kipp.org> (last visited Dec. 17, 2008). Recently, the New York Times described KIPP as “the best-known and arguably the most successful network of charter schools in the country.” Paul Tough, *A Teachable Moment*, N.Y. TIMES, Aug. 17, 2008, § 6 (Magazine), at 30. KIPP has been successful in achieving positive educational outcomes for its students by adhering to five core principles. The first principle is high expectations. About KIPP: The Five Pillars, *supra*. As described by KIPP:

KIPP schools have clearly defined and measurable high expectations for academic achievement and conduct that make no excuses based on the students’ backgrounds.



charter school that serves a predominantly American Indian student population, “College is *assumed*.”<sup>276</sup> Considering the sociological research showing the positive impact of high expectations on students’ achievement,<sup>277</sup> creating model minority schools that adhere to a culture of achievement and are staffed with teachers and principals who possess high expectations for their students could help to improve minority students’ educational outcomes.

Effective racially identifiable schools also succeed in teaching students cultural values and skills that are necessary for them to overcome subcultures within their communities that can potentially impede their academic achievement.<sup>278</sup> As recognized by Professor Bell in the context of independent black schools,<sup>279</sup>

These schools are designed to respond to the social ills disproportionately visited upon blacks—discrimination, joblessness, poverty, and crime, to name a few—by fostering a sense of cultural pride, providing students with positive black role models, and teaching the particular skills black children need to survive using pedagogical models that will attract and hold their interest.<sup>280</sup>

By recruiting and employing highly qualified teachers to teach minority students “noncognitive skills” such as cooperativeness and self-discipline, effective minority schools can develop a school culture that combats the culture of poverty and the streets.<sup>281</sup> Such efforts can help to improve minority students’ educational outcomes.<sup>282</sup>

By embracing and reinvesting in minority neighborhood schools, we would also be embracing and improving minority communities. The

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Students, parents, teachers, and staff create and reinforce a culture of achievement and support through a range of formal and informal rewards and consequences for academic performance and behavior.

*Id.*

276. George F. Will, Op-Ed., *Where Paternalism Makes the Grade*, WASH. POST, Aug. 21, 2008, at A15.

277. See CLEWELL ET AL., *supra* note 262, at 152–53; cf. Carter, *supra* note 40, at 889 (attributing African-Americans’ low educational achievement in part to “the structured expectation in our schools that black children will fail”).

278. For a discussion of the “oppositional culture” that exists within some minority communities and its negative impact on minority student achievement, see *supra* note 155 and accompanying text and Salomone, *supra* note 154, at 77.

279. See BELL, *supra* note 32, at 166 (referring to “independent schools” as those “black schools or academies . . . geared specifically toward the needs and experiences of the mainly black children they serve”).

280. *Id.* at 168.

281. See Will, *supra* note 276.

282. See, e.g., KIPP REPORT CARD 2007, at 2, 5 (2007), available at <https://reportcard.kipp.org> (follow “download” link) (reporting that, in 2007, sixty-seven percent and sixty-three percent of KIPP fifth-grade classes outperformed their local districts on reading/English language arts and mathematics state exams, respectively and reporting that, in 2007, over eighty percent of students who completed the eighth grade at KIPP’s original academies are matriculating to college).

reestablishment of good schools as minority communities' centerpieces would evidence our society's commitment to communities of color—a commitment that has been missing for far too long. Such commitment is necessary to awaken minority children's hearts and minds to the promise of achievement.

One could argue that my proposal to embrace and improve racially identifiable schools rather than diversify them would result in foregoing benefits that are commonly attributed to racial diversity.<sup>283</sup> However, as previously discussed, the vast majority of minority students attend schools that are not racially diverse.<sup>284</sup> Therefore, those students are not currently experiencing or receiving the purported benefits associated with racially diverse learning environments. In addition, those minority students who do attend racially diverse schools often find themselves segregated from their white colleagues whether by choice or by institutional practices.<sup>285</sup> Consequently, the unfortunate reality is that, for most minority students, there simply are no diversity benefits to forgo by shifting the focus away from the diversification of racially identifiable schools and towards their improvement. Embracing and improving such schools can produce academic benefits, as well as social and democratic benefits, as they prepare minority students to be productive members of our society and also the future leaders of their communities.<sup>286</sup>

### CONCLUSION

In the wake of the Supreme Court's decision in *Parents Involved*, school officials, scholars, and civil-rights advocates immediately began discussing constitutional ways by which to create and maintain racially integrated schools.<sup>287</sup> They immediately clasped onto Justice Kennedy's

283. See discussion *supra* Part I.

284. See *supra* notes 238–40 and accompanying text.

285. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2780 (2007) (Thomas, J., concurring) (recognizing the reality that interracial contact by students in racially diverse schools is hindered by institutional ability grouping and students' self-separation).

286. See Brown-Scott, *supra* note 138, at 10 (acknowledging one of the benefits of historically black educational institutions as “the promotion of democracy, citizenship, and leadership skills”). In their efforts to provide greater educational opportunities to minority students, school officials may find it beneficial to examine single-gender and charter schools for “best practices” and creative approaches to overhauling racially identified schools. See, e.g., OFFICE OF INNOVATION & IMPROVEMENT, U.S. DEP'T OF EDUC., INNOVATIONS IN EDUCATION: SUCCESSFUL CHARTER SCHOOLS 1–4 (2004), available at <http://www.ed.gov/admins/comm/choice/charter/report.pdf> (detailing the positive educational outcomes produced by eight effective charter schools); Salomone, *supra* note 154, at 74–77 (discussing the benefits of single-sex schooling).

287. See ANURIMA BHARGAVA ET AL., NAACP LEGAL DEF. & EDUC. FUND, INC. & CIVIL RIGHTS PROJECT/PROYECTO DERECHOS CIVILES, STILL LOOKING TO THE FUTURE: VOLUNTARY K–12 SCHOOL INTEGRATION 3 (2008), available at [http://www.civilrightsproject.ucla.edu/research/deseg/Still\\_Looking\\_to\\_the\\_Future\\_Integration\\_Manual.pdf](http://www.civilrightsproject.ucla.edu/research/deseg/Still_Looking_to_the_Future_Integration_Manual.pdf) (describing the manual as “designed to provide as much information as we now have, following the Court's ruling [in

presumably constitutional laundry list of integrative measures as their guide to pursue racial diversity.<sup>288</sup> Interestingly, although, again, not surprisingly, conspicuously absent from many of these reported discussions were suggestions and strategies that could actually *improve* the educational resources and opportunities afforded to minority students. Instead, as evidenced below, recommendations mostly centered on the same type of ineffective integrative measures, such as busing and magnet programs, that succeeded in achieving racial representation but failed to ensure true educational equality.

When asked the practical impact of having the race policy [in *Parents Involved*] struck down, Raj Manhas, the [Seattle] district superintendent, said, “In reality, none.”

Mr. Manhas said the district already was taking steps to encourage racial diversity through other means, including placing highly sought after International Baccalaureate and dual-language programs in locations where they are likely to draw a diverse student body.<sup>289</sup>

This response demonstrates the costly and detrimental perpetuation of the diversity-equality disconnect post-*Parents Involved* whereby school districts continue to implement measures to ensure racial representation, despite the likelihood that such measures will not lead to equal educational opportunities for the greatest number of minority students. We, the stewards of our children’s future, cannot afford to allow this disconnect to persist. We must set aside our integrative ideals and approach the arduous task of providing equal educational opportunities to minority students with a renewed realism—a realism that not only recognizes the shortcomings of the diversity rationale but also responds to this recognition by shifting efforts away from the pursuit of diversity and towards the attainment of educational equality, especially for those minority students who find themselves being educated in racially con-

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*Parents Involved*], on what you—parents, students, community activists, school board members, administrators, and attorneys—can and should do to promote diversity and avoid racial isolation in your schools” (emphasis added)); Ogletree & Eaton, *supra* note 6, at 293 (noting the “many school districts that are rapidly diversifying” in response to *Parents Involved*); David Foate, Note, *Do Federal Courts Really Want Parents Involved? Using No Child Left Behind To Fight Potential Re-Segregation*, 20 NAT’L BLACK L.J. 163, 175 (2007) (“[W]hat remedy do parents have if de facto re-segregation occurs in their children’s schools, as school districts formulate new assignment plans in response to *Parents Involved*?”); *supra* note 20 and accompanying text.

288. Specifically, Justice Kennedy endorsed the following race-conscious measures: “strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race.” *Parents Involved*, 127 S. Ct. at 2792 (Kennedy, J., concurring in part and concurring in the judgment).

289. Lewin, *supra* note 158.

centrated schools. Obviously, there are tremendous challenges associated with embracing and improving racially isolated schools,<sup>290</sup> but until we commit to making that our goal, we will never truly take meaningful steps to achieve it.

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290. See *supra* notes 259–61 and accompanying text.