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Kentucky Law Journal

Volume 97 | Issue 1 Article 7

2008

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Recommended Citation

Wilson, Sarah Sloan (2008) "Readin', 'Ritin','Rithmetic, and Responsibility: Advocating for the Development of Controlled-Choice Student-Assignment Plans after Parents Involved," *Kentucky Law Journal*: Vol. 97 : Iss. 1 , Article 7.

Available at: https://uknowledge.uky.edu/klj/vol97/iss1/7

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Readin', 'Ritin', 'Rithmetic, and Responsibility: Advocating for the Development of Controlled-Choice Student-Assignment Plans after *Parents Involved*

Sarah Sloan Wilson[1]

> We assure ourselves that . . . the fundamentals of education are to be had in the three R's—readin' and 'ritin' and 'rithmetic. To this we must add one more R and that is responsibility—responsibility to the community . . . .[2]

INTRODUCTION

COMMENTING on the politics of student assignment, an intrepid school board member once remarked, "[y]ou've got to really believe [sic] that what you're doing is the right thing to do. Otherwise, it would be intolerable. Student assignment is not pleasant."[3] In *Parents Involved in Community Schools v. Seattle School District*[4] the Supreme Court of the United

1 Bachelor of Arts in English, *summa cum laude*, 2003, University of Kentucky; Master's in Teaching, 2004, City University; Juris Doctor to be awarded May 2009, University of Kentucky College of Law. The subject of this Note was inspired by the author's teaching experience prior to entering law school. The author wishes to thank Professor Robert G. Schwemm, whose advice and insightful editorial comments on several early drafts proved invaluable. Also, the author wishes to thank her husband and family for their support.

2 President Herbert Hoover, Address Commemorating the 20th Anniversary of the Boy Scouts of America (Mar. 10, 1930), *available at* http://www.presidency.ucsb.edu/ws/?pid=22545. President Hoover continued:

> The Republic rests solely upon the willingness of everyone born into it to bear his part of the duties and obligations of citizenship [which] is as important as the ability to read and write—for that is the only patriotism in peace. The idea that the Republic was created for the benefit of the individual is a mockery that must be eradicated at the first dawn of understanding.

Id.

3 Susan Leigh Flinspach & Karen E. Banks, *Moving Beyond Race: Socioeconomic Diversity as a Race-Neutral Approach to Desegregation in the Wake County Schools*, *in* SCHOOL RESEGREGATION: MUST THE SOUTH TURN BACK? 261, 276 (John Charles Boger & Gary Orfield eds., 2005).

4 Parents Involved in Cmty. Schs. v. Seattle Sch. Dist., 127 S. Ct. 2738 (2007). The title of the opinion reflects the parties in the parallel Seattle case, in which the plaintiffs challenged

States struck down both Seattle Public Schools and Jefferson County Public Schools' (JCPS') use of individual racial classifications. In the wake of this decision, a school board member's job in a multi-racial school district seems to be just that—intolerable.

The concept of a voluntary student-assignment plan—the means by which a school district assigns students to particular schools—has continued to fracture both the Supreme Court and the American public.[5] For this reason *Parents Involved* drew national attention, as "the drama and the anger and the passion"[6] with which the Justices debated demonstrated. Justice Breyer reportedly rolled his eyes as Chief Justice Roberts announced the plurality opinion.[7] Later, while reading his dissenting opinion, Justice

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a similar voluntary student-assignment plan that used race as a tie-breaker in high-school admissions. Seattle, unlike Louisville, suspended its programs after the plaintiffs sued. *Id.* at 2751.While the Seattle Public Schools' assignment plan is beyond the scope of this Note, one distinction is instructive, namely, that the Seattle Public Schools were never de jure segregated and, thus, were never subject to court-ordered desegregation. *Id.* at 2747.

5 Frederick Douglass spoke movingly on the subject of societal segregation in his *Address to the People of the United States*, which he delivered at the Convention of Colored Men held in Louisville, Kentucky on Sept. 25, 1883:

> Though the colored man is no longer subject to be bought and sold, he is still surrounded by an adverse sentiment which fetters all his movements. In his downward course he meets with no resistance, but his course upward is resented and resisted at every step of his progress. . . . The color line meets him everywhere .... In spite of all your religion and laws he is a rejected man ... and yet he is asked to forget his color, and forget that which everybody else remembers .... [H]e is sternly met on the color line, and his claim to consideration in some way is disputed on the ground of color.

FREDERICK DOUGLASS: SELECTED SPEECHES AND WRITINGS 669, 673-74 (Philip S. Foner ed., Lawrence Hill Books 1999). Compare Douglass' statements with Justice Thomas' point of view:

> "[R]acial paternalism and its unintended consequences can be as poisonous and pernicious as any other form of discrimination." As [student-assignment plans] demonstrate, every time the government uses racial criteria to "bring the races together," someone gets excluded, and the person excluded suffers an injury solely because of his or her race .... This type of exclusion ... is precisely the sort of government action that pits the races against one another, exacerbates racial tension, and "provoke[s] resentment among those who believe that they have been wronged by the government's use of race."

Parents Involved, 127 S. Ct. at 2775 (2007) (Thomas, J., concurring) (quoting Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 241 (1995) and *Parents Involved*, 127 S. Ct. at 2815-16 (plurality opinion)).

6 Jeffrey Toobin, *Toobin: School Ruling 'A Victory for Conservatives,'* CNN, June 28, 2007, http://www.cnn.com/2007/LAW/06/28/toobin.ots/index.html.

7 Jennifer C. Kerr, *Court Term Ends with Obvious Frustration*, USA TODAY, June 28, 2007,

Breyer stated pointedly, "[i]t is not often in the law that so few have so quickly changed so much."[8] Finally, Justice Kennedy, in a reportedly unusual step, read his concurrence from the bench.[9]

Parents Involved defied clear and easy answers, as Justice Kennedy's concurrence evidenced:

> The idea that if race is the problem, race is the instrument with which to solve it cannot be accepted as an analytical leap forward. And if this is a frustrating duality of the Equal Protection Clause it simply reflects the duality of our history and our attempts to promote freedom in a world that sometimes seems set against it.[10]

In *Parents Involved* Justice Kennedy recognized that a school board may assert a compelling educational interest in diversity, but he maintained that the use of individual racial classifications must pass strict judicial scrutiny. Thus, Justice Kennedy rejected the individual racial classifications at issue, but he did not foreclose the possibility that a more carefully drafted plan, even one that employed individual racial classifications, might pass constitutional muster. Justice Kennedy, in contrast to some members of the Court, has refused to maintain that the imposition of strict scrutiny in such cases is automatically fatal.[11] Furthermore, Justice Kennedy's opinion hinted that school districts may consider race generally, and that such measures may not demand strict scrutiny.

This Note will first review the Court's Equal Protection Clause jurisprudence and examine the Court's promise to provide an equal educational opportunity to all public–school students. Second, the author

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http://www.usatoday.com/news/washington/2007-06-28-3357420803_x.htm.

8 Linda Greenhouse, *Justices, 5-4, Limit Use of Race for School Integration Plans*, NY TIMES, June 29, 2007, at A1. *See also* Joan Biskupic, *Roberts Steers Court Right Back to Reagan in Rulings Favoring Business and Curbing Race Programs and Abortion, Some See an Overdue Correction; Others Say the Justices Are Taking Nation "Backwards,"* USA TODAY, June 29, 2007, at A8 (quoting Justice Breyer, who warned, "Yesterday, the citizens of this nation could look for guidance to this court . . . concerning desegregation. Today they cannot.").

9 Bill Mears, *Divided Court Rejects School Diversity Plans*, CNN, June 28, 2007, http://www.cnn.com/2007/LAW/06/28/scotus.race/index.html.

10 *Parents Involved*, 127 S.Ct. at 2797 (2007) (Kennedy, J., concurring in part and concurring in judgment). Justice Kennedy stated the same concern during oral arguments, if perhaps a bit more informally:

> [T]he emphasis on the fact that everybody gets into a school, it seems to me is misplaced, but the question is whether or not you can get into the school that you really prefer. And that in some cases depends solely on skin color. You know, it's like saying everybody can have a meal but only people with separate skin can get the dessert.

Transcript of Oral Argument at 44-45, Parents Involved in Cmty. Schools v. Seattle School Dist., 127 S.Ct. 2738 (2007) (No. 05-908), 2006 U.S. TRANS LEXIS 71.

11 *Parents Involved*, 127 S.Ct. at 2770 (Thomas, J. concurring) (citations omitted).

will analyze the *Parents Involved* opinion. Accepting Justice Kennedy's concurrence in *Parents Involved* as persuasive authority,[12] the author will recommend the adoption of a controlled-choice plan. Although this Note will focus on the effect of Justice Kennedy's opinion on JCPS—the "28th largest public school system in the United States,"[13]—the author's recommendations will apply with equal force to other southern districts.

C.S. Lewis wrote, "[f]or every one pupil who needs to be guarded from a weak excess of sensibility there are three who need to be awakened from the slumber of cold vulgarity."[14] Consequently, "[t]he task of the modern educator is not to cut down jungles, but to irrigate deserts. The right defense against false sentiments is to inculcate just sentiments."[15] For teachers to inspire such just sentiments in the classroom, school districts like JCPS, which have historically clashed with the judicial system regarding the courts' proper role in the desegregation process, must develop practical solutions to promote integration. Controlled-choice student-assignment plans will best meet these goals.

I. THE COURT'S PROMISE

The Fourteenth Amendment of the United States Constitution provides that, "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws."[16] More than fifty years ago in *Brown v. Board of Education (Brown I)*,[17] the Court held that de jure racial segregation in public schools violated the Equal Protection Clause. The Court famously announced that "in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal."[18] The Court relied on sociological studies to support its statement

12 A concurring opinion is a "separate written opinion" that explains a concurrence, "a vote cast by a judge in favor of the judgment reached, often on grounds differing from those expressed in the opinion or opinions explaining the judgment." BLACK'S LAW DICTIONARY 309 (8th ed. 2004). In fact, as one court has noted, "[i]t has well been said that the views of the individual judges are of no concern unless such views are adopted at least by a majority of the court." State v. Goldstein, 93 So. 308, 314 (App. Ct. 1922). Although a concurrence is not binding authority, this Note accepts Justice Kennedy's concurrence in so far as it provides practical guidance for public school districts who, like JCPS, are anxious to design voluntary student-assignment plans that will *not* get struck down by a future Court.

13 Brief for the Louisville Area of Commerce, Inc. and Louisville Metro Mayor Jerry E. Abramson as Amici Curiae Supporting Respondents, Meredith v. Jefferson County Bd. of Educ., 127 S.Ct. 2738 (Oct. 10, 2006) (No. 05-915), 2006 WL 2927086, at 5.

14 C.S. LEWIS, *The Abolition of Man*, *in* THE COMPLETE C.S. LEWIS, SIGNATURE CLASSICS 465, 472 (HarperSanFransisco 2002).

15 *Id.*

16 U.S. CONST. amend. XIV, § 1, cl. 4.

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

18 *Id.* at 495. *See also* Bolling v. Sharpe, 347 U.S. 497, 500 (1954) (holding on the same day as *Brown I* that the Fifth Amendment similarly prohibited de jure racial segregation of schools

that separating children on the basis of 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."[19] Moreover, the Court strongly promoted the benefits of an integrated education, insisting that "education is perhaps the most important function of state and local governments . . . [and] the very foundation of good citizenship."[20] The Court reasoned that a student's success later in life was in large part dependent upon his or her early access to an equal educational opportunity.

Brown I did not address the question of how to formulate a remedy to desegregate school systems that had operated under laws requiring or allowing racial segregation prior to *Brown I*. The practical solution to the desegregation of such dual school systems was, thus, underwhelming. As one commentator has noted, "*Brown's* promise combined very broad goals with very narrow means."[21] Although the 1954 *Brown I* decision explained why segregated schools were inherently unequal, the remedial questions of when integration would be achieved and who would be responsible for it would continue to trouble the Court.[22] In 1955 the Court delegated the task of carrying out desegregation to local school authorities in *Brown v. Board of Education* (*Brown II*).[23] The Court felt that school authorities, rather than the Court, were best equipped to integrate schools, since "[f]ull implementation of these constitutional principles may require solution of varied local school problems."[24] Thus, local authorities were given broad authority to realize the promises of *Brown I* by acting "with all deliberate speed,"[25] a phrase which was viewed by critics as limiting.[26] In other words, "one could say that the promise of *Brown* was contradictory—to change fundamentally the basic structure of Southern society and race relations yet to do so in a way that would not seriously disturb white racists."[27] Consequently, remedying de jure segregation in the public schools would

in the District of Columbia).

19 *Brown*, 347 U.S. at 494.

20 *Id.* at 493.

21 Gary Orfield, *The Southern Dilemma: Losing* Brown, *Fearing* Plessy, *in* SCHOOL RESEGREGATION: MUST THE SOUTH TURN BACK? 1, 4 (John Charles Boger & Gary Orfield eds., 2005).

22 The remedial questions involved "how quickly desegregation must occur; what school authority responses were and were not adequate to satisfy the remedial obligation; the scope of judicial authority to formulate and enforce desegregation measures when those responses were deemed inadequate; and under what circumstances school authorities had satisfied their remedial obligations so that district courts should no longer retain jurisdiction." WILLIAM COHEN ET AL., CONSTITUTIONAL LAW CASES AND MATERIALS 732 (12th ed. 2005).

23 Brown v. Bd. of Educ., 349 U.S. 294, 299 (1955).

24 *Id.*

25 *Id.* at 301.

26 *See* Orfield, *supra* note 21, at 4.

27 *Id.*

prove to be "most difficult" to achieve.[28]

A. Brown's *Impact*

Brown met with "massive resistance"[29] in many southern school districts that, like JCPS, had operated dual systems prior to the ruling. Some districts even blatantly refused to obey desegregation orders.[30] In Louisville the federal mandate to desegregate JCPS "stirred racial acrimony and sometimes violence."[31] Still, the passage of the Civil Rights Act of 1964—an Act which "brought the power of the federal government squarely to bear on southern schools"[32]—bolstered *Brown's* impact.[33] In fact, the percentage of African-American students studying at mostly Caucasian southern schools "jumped to 33 percent, from 2 percent by the late 1960s."[34]

The Court's decisions in the late 1960s and early 1970s further strengthened the move toward integration, and individual racial classifications[35] became the district courts' remedy of choice.[36] In fact, Justice Kennedy has stated that such measures "may be the only adequate remedy after a judicial determination that a State or its instrumentality

28 Parents Involved in Cmty. Schools v. Seattle School Dist., 127 S.Ct. 2738, 2795 (2007) (Kennedy, J., concurring in part and concurring in judgment).

29 Erwin Chemerinsky, *The Segregation and Resegregation of American Public Education*, *in* SCHOOL RESEGREGATION: MUST THE SOUTH TURN BACK? 29, 32 (John Charles Boger & Gary Orfield eds., 2005).

30 *Id.*

31 Marcus Wohlsen, *Hurt Fades, Hope Survives*, COURIER-JOURNAL (Louisville, Ky.), Sept. 4, 2005, at A1.

32 Orfield, *supra* note 21, at 5.

33 Associated Press, *The March Toward Diversity in Nation's Schools, Now in Question, Spans Generations*, THE PITTSBURGH TRIBUNE REVIEW, June 29, 2007, *available at* 2007 WLNR 12313057.

34 *Id.* (citing study by the Harvard University Civil Rights Project).

35 Districts that assign students to schools solely based on students' race employ individual racial classifications. It is this "crude system" that is constitutionally permissible "only" as a "last resort to achieve a compelling interest." Parents Involved in Cmty. Schs. v. Seattle Sch. Dist., 127 S. Ct. 2738, 2792 (2007) (Kennedy, J., concurring in part and concurring in judgment).

36 Green v. County School Board, 391 U.S. 430, 441 (1968) (holding that a freedom-of-choice desegregation plan was constitutionally inadequate because it only preserved the dual system) (citations omitted). After *Green* it became clear that the federal courts had an affirmative duty to end state-sponsored segregation in the public schools when the school authorities failed to act. Such a duty was evinced through desegregation orders, like the one under which JCPS operated for over twenty-five years. *See* Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 15, 23 (1971) (reaffirming a district court's role in the desegregation process, namely, "to eliminate from the public schools all vestiges of state-imposed segregation," but refusing to extend that role to "embrace all the problems of racial prejudice, even when those problems contribute to disproportionate racial concentrations in some schools").

has violated the Equal Protection Clause."[37] Although individual racial classifications were viewed as necessary to remedy the legal wrong caused by de jure segregation, the Court made it clear that such classifications would be reviewed using strict scrutiny. In practice, judicial review of individual racial classifications to remedy the de jure violation was forgiving. Still, the Court emphasized that a district judge's authority was cabined by time limitations and the distinction between de jure and de facto segregation. In other words, individual racial classifications must be "limited in time and limited to the wrong."[38]

In 1991 in *Board of Education v. Dowell*,[39] the Court remanded to the federal district court the question of whether the time had come to terminate a desegregation order. The Court directed the lower court to inquire as to whether the school district had acted "in good faith"[40] and whether "the vestiges of de jure segregation had been eliminated as far as practicable."[41] If the district had so acted, the Court continued, then the desegregation order should be dissolved.[42] Moreover, in *Dowell*[43] the Court required that the use of individual racial classifications be targeted to remedy the legal wrong—segregation by force of law. Thus, the Court did not sanction the use of individual racial classifications to remedy the problem of societal, or de facto, segregation.[44] In 1947 the Court in *Milliken v. Bradley*[45] had dismissed the view that schools "could not be truly desegregated ... unless the racial composition of the student body of each school substantially reflected the racial composition of the population of the metropolitan area as a whole."[46] Justice Kennedy recognized this "fundamental" difference in *Parents Involved* when he noted that "school districts that ha[ve] engaged in de jure segregation ha[ve] an affirmative constitutional duty to desegregate;

37 *Parents Involved*, 127 S. Ct. at 2795 (Kennedy, J., concurring in part and concurring in judgment) (quoting City of Richmond v. Croson Co., 488 U.S. 469, 519 (1989) (Kennedy, J., concurring in part and concurring in judgment).

38 *Parents Involved*, 127 S. Ct. at 2796 (2007) (Kennedy, J., concurring in part and concurring in judgment).

39 Bd. of Educ. v. Dowell, 498 U.S. 237 (1991).

40 *Id.* at 249-50.

41 *Id.* at 250.

42 *Id.* Professor Chemerinsky faults the Court's reasoning: "Evidence indicated that ending the desegregation order would likely result in dramatic resegregation. Nonetheless, the Supreme Court held that after Oklahoma City's racially dual school system had become 'unitary,' a federal court's desegregation order should end, even if the action could lead to resegregation of the schools." Chemerinsky, *supra* note 29, at 38.

43 *Dowell*, 498 U.S. at 237.

44 De facto segregation occurs when "racial imbalance exists in the schools but with no showing that this was brought about by discriminatory action of state authorities." Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 17-18 (1971).

45 Milliken v. Bradley, 418 U.S. 717 (1974).

46 *Id.* at 740.

those that were de facto segregated did not."[47]

Although the Court has held that individual racial classifications are sometimes permissible—indeed, that such classifications may be the only apposite remedy in the face of de jure segregation—time constraints and the de jure-de facto distinction remained to restrict a district judge's authority.

B. The Problem of De Facto School Segregation

Just as the Court has historically struggled with its role in guiding the desegregation process, it has similarly wrestled with its role after a district has attained unitary status. A district court's role remains problematic, given *Brown I's* promise of an equal education for all students. In the South, the problem of de facto segregation is particularly daunting, for as one scholar has explained, "[t]he South has a sense of tragedy, a sense of its original sin of slavery, and the knowledge that progress is deeply mixed with reverses."[48] "A third of a century after the South's schools became the least segregated in America, the region is leading a backward slide toward renewed segregation [that is] under way more slowly in other parts of the country."[49] Newly re-segregated[50] schools often appear on the No Child Left Behind Act of 2001's official list of failing schools.[51] In fact, in the years 1990 to 2000, public-school segregation between African-American and Caucasian students[52] increased in almost every southern

47 Parents Involved in Cmty. Schs. v. Seattle Sch. Dist., 127 S.Ct. 2738, 2795 (2007) (Kennedy, J., concurring in part and concurring in judgment).

48 Orfield, *supra* note 21, at 2.

49 *Id.*

50 Judge Heyburn has faulted some courts' and commentators' use of the word "resegregation":

> The term "resegregation" is an improper and misleading description of this phenomenon. Segregation is the conscious, deliberate act of separating people by race. A return of some schools to an African-American majority because of a certain racial demography could be a vestige of the former segregation, but it is not an act of segregation itself.

Hampton v. Jefferson Cty. Bd. of Ed., 102 F.Supp.2d 358, 371 n.28 (W.D.Ky. 2000).

51 Orfield, *supra* note 21, at 3.

52 Of course, the problem of de facto segregation is not confined to two races, and "[t]he Fourteenth Amendment is not directed solely against discrimination due to a 'two-class theory'—that is, based upon difference between 'white' and Negro." COHEN, *supra* note 22, at 722 (quoting Hernandez v. Tx, 347 U.S. 475 (1954)).

state.[53] Kentucky was one of those states.[54] Conversely, data also showed that JCPS, operating under a voluntary student-assignment plan at that time, had "far lower levels of public school segregation than of residential segregation."[55] Researchers have explained that these results suggest that the district's plan was helping to produce relatively integrated schools.[56]

The statistics showing southern schools' proclivity toward renewed segregation suggest that local board members should be concerned about the effects racial isolation will have on students' education. Researchers have cited three main harms caused by racial isolation. These harms, taken together, severely limit minority students' access to a public-school education commensurate with that of their Caucasian peers. First, students attending segregated schools have less access to the resources and educational opportunities available to students attending integrated or predominantly Caucasian schools.[57] Second, segregated schools prevent minority students from taking advantage of social networks that provide the contacts necessary for professional and academic advancement.[58] Finally, evidence shows that unless schools achieve a critical mass of students from one particular racial group, minority students experience "great discomfort and insecurity."[59] In other words, minority students achieve a type of "tokenism"[60] when racial isolation is allowed to thrive. The effects of racial isolation separate minority students and prevent them from benefiting from the equal education promised to them in *Brown I*.[61] In *Milliken v. Bradley*[62] the Court noted that the problems caused by racial isolation threaten to permanently disenfranchise students: "[c]hildren who have been thus educationally and culturally set apart from the larger community will inevitably acquire habits of speech, conduct, and attitudes . . . which vary from the environment in which they must ultimately function

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53 Sean F. Reardon & John T. Yun, *Integrating Neighborhoods, Segregating Schools: The Retreat from School Desegregation in the South, 1990-2000*, *in* SCHOOL RESEGREGATION: MUST THE SOUTH TURN BACK? 51, 53 (John Charles Boger & Gary Orfield eds., 2005).

54 *See id.* at 55 fig. 2.1.

55 *Id.* at 60; *see id.* at 61 fig. 2.5.

56 *Id.* at 62.

57 Jacinta S. Ma & Michal Kurlaender, *The Future of Race-Conscious Policies in K-12 Public Schools*, *in* SCHOOL RESEGREGATION: MUST THE SOUTH TURN BACK? 249 (John Charles Boger & Gary Orfield eds., 2005).

58 *Id.*

59 *Id.*

60 *Id.* at 248-49.

61 The Supreme Court has declined to hold that education is a fundamental right under the Equal Protection Clause. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973). However, education has been recognized as a vital part of American democracy, and as *Brown I* recognized, since states have "undertaken to provide" a public education, this right "must be made available to all on equal terms." Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).

62 Milliken v. Bradley, 433 U.S. 267 (1967).

and compete."[63] Although in *Milliken* the Court dealt with racial isolation arising from de jure segregation, a similar harm results from racial isolation stemming from de facto segregation.

The Court has distinguished between de jure and de facto segregation.[64] Thus, even though the harm—racial isolation—may be the same, the legal remedy clearly is not. However, Justice Kennedy has noted that the Court's distinction is tenuous. From the victim's perspective, the injury "can hurt as much when the demeaning treatment based on race identity stems from bias masked deep within the social order as when it is imposed by law."[65] Moreover, law and society often coalesce. Laws, after all, often "arise from a culture and vice versa . . . [and] [n]either can assign to the other all responsibility for persisting injustices."[66] In the de facto context, board members and school officials—not the courts—will be responsible for ensuring that public schools remain integrated in the face of rising racial isolation.

II. *MEREDITH V. JCPS*

Once courts declared that systems like JCPS were no longer dual, Equal Protection Clause challenges to the use of individual racial classifications became more prominent.[67] The tables had been turned—now plaintiffs sued to prevent school districts from voluntarily using individual racial classifications. Such a shift has been evidenced at both the K–12 and university level.

In the university context, the Court's decision in *Grutter v. Bollinger*[68] cautioned that while the University of Michigan's law school did have a compelling interest in maintaining a diverse student body, the narrow tailoring analysis remained rigorous. The plan in *Grutter* passed strict scrutiny, although Justice Kennedy dissented on the grounds that the plan was not narrowly tailored.[69] The same day the Court extended *Grutter's* diversity holding to the undergraduate level in *Gratz v. Bollinger*.[70] The *Gratz* plan itself, however, was struck down as an unconstitutional quota.[71]

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63 *Id.* at 287.

64 *See supra* notes 38–47 and accompanying text.

65 Parents Involved in Cmty. Schs. v. Seattle Sch. Dist., 127 S. Ct. 2738, 2795 (2007) (Kennedy, J., concurring in part and concurring in judgment).

66 *Id.*

67 *See* Adarand v. Pena, 515 U.S. 200, 227 (1995) ("[A]ll racial classifications . . . must be analyzed by a reviewing court under strict scrutiny.").

68 Grutter v. Bollinger, 539 U.S. 306 (2003).

69 *Id.* at 388-89.

70 Gratz v. Bollinger, 539 U.S. 244 (2003).

71 *See id.*

Here, Justice Kennedy joined the majority.[72] Thus, although the Court upheld a law school's use of individual racial classifications in *Grutter*—and reaffirmed the diversity interest in *Gratz*—the tenor of the two cases revealed the rigor with which the Court (particularly, Justic Kennedy) would continue to review the use of individual racial classifications. Taken together, *Grutter* and *Gratz* suggest that the use of racial classifications warrants "a broader assessment of diversity, and not simply an effort to achieve racial balance."[73]

A. *JCPS's Voluntary Student-Assignment Plan*

Like many southern school districts, JCPS[74] had a history of de jure racial segregation. In 1975, under the Sixth Circuit's direction, the district court ordered JCPS to desegregate.[75] Essentially, the court mandated the use of racial guidelines to achieve desegregation. A plan to merge the African-American and Caucasian school systems was later adopted. This plan, similar to the *Swann* plan, required bussing.[76] In 1984, the district redrew its attendance lines for middle and high schools and adjusted the original 1975 racial guidelines. In 1991, the district again made "significant modifications"[77] to the plan to increase stability for students and to allow parents more choice in school selection. The revised plan assigned students to their chosen school "subject to building/program capacity, racial guidelines, and in some instances admissions criteria."[78] This plan was reviewed again in 1996, at which time the board changed the racial guidelines: each school would be required to maintain a balanced student body that included no less than 15 percent and no greater than 50 percent

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72 *Id.*

73 Parents Involved in Cmty. Schs. v. Seattle Sch. Dist., 127 S. Ct. 2738, 2753 (2007) (plurality opinion).

74 Louisville has had an interesting geographic history. For example, it has been dubbed "the gateway from the North to the South," and the "northernmost Southern city and southernmost Northern city in the United States." Brief for the Louisville Area of Commerce, *supra* note 13, at 3-4 (internal quotations omitted). As such, Louisville has suffered from racial segregation in spite of its position as a Union stronghold during the Civil War. Louisville also experienced "unrest in the 1960s over civil rights and in the 1970s over busing." *Id.* at 4 (quoting Ellen R. Stapleton, *Police Shooting Aggravates Racial Tensions in Ky.*, THE BOSTON GLOBE, Jan. 16, 2004, http://www.boston.com/news/nation/articles/2004/01/16/police_shooting_aggravates_racial_tensions_in_ky/).

75 *Parents Involved*, 127 S. Ct. at 2749 (plurality opinion).

76 *See generally* Suzy Post, *Ruling Is 'a Massive Step Backwards,'* COURIER-JOURNAL (Louisville, Ky.), June 29, 2007, at A11. Written by the only surviving plaintiff from the original 1974 desegregation lawsuit, Post discusses the effect of segregation on the allocation of school resources as well as the community's reaction to the desegregation plan.

77 Joint Appendix at 90, Parents Involved in Cmty. Schs. v. Seattle Sch. Dist., 127 S. Ct. 2738 (2007), 2006 WL 2568816.

78 *Id.*

African-American students (15-50 percent racial guidelines).[79]

In 1998, a group of plaintiffs challenged the district's use of the 15-50 percent racial guidelines in assigning students to Central High Magnet Career Academy (Central). The case involved private litigants suing to remove a desegregation degree "against the will of a school board."[80] As noted by presiding U.S. District Judge John G. Heyburn, the posture of the case was remarkable: "Usually, it is the school board trying to shed its obligations under a desegregation order .... This case manifests ... the confusion and frustration attending our nation's long project of remedying the effects of racial segregation."[81] In 2000, Judge Heyburn dissolved the 1975 desegregation decree, holding that both the *Dowell* criteria for dissolving a desegregation decree had been met.[82] Throughout the opinion, Judge Heyburn was careful to distinguish his role in the process as "stak[ing] out the constitutional parameters within which the Board is free to exercise its discretion—wisely, foolishly, cautiously, bravely, astutely, as the case may be."[83] He rejected the implication that his ruling would irreparably harm the community or the quality of education in JCPS, writing that "[t]his suggestion makes too much of this moment and gives too little credit to those who care about education in this community."[84] After the ruling, JCPS officially became a unitary, or integrated, school system.

In dissolving the decree, Judge Heyburn maintained that the district could continue to use race in assigning students; however, he cautioned that any use of race must be narrowly tailored to further a compelling government interest, since the district's 15-50 percent racial guidelines were no longer "shielded from normal constitutional scrutiny"[85] by the order. Thus, although the district was ordered immediately to stop using race to assign students "in an unconstitutional manner"[86] to Central, the ruling compelled no change vis-à-vis JCPS's regular schools. In response, the board approved the voluntary school-assignment plan at issue in *Parents Involved*. The plan, which grouped elementary schools into clusters "to

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79 *Id.* at 90-91.

80 Hampton v. Jefferson County. Bd. of Educ., 102 F. Supp. 2d 358, 359 (W.D. Ky. 2000).

81 *Id.*

82 *Id.* at 360. Judge Heyburn recognized the achievement gap problem:

> For understandable reasons, there is great concern about the achievement gap nationwide .... It seems likely that numerous external factors-including high poverty incidence, lower levels of parental education, higher incidence of families without two active parents, frequent moves, and less access to quality pre-school education-produce the disparity.

Id. at 365-66.

83 *Id.* at 376.

84 *Id.*

85 *Id.* at 377.

86 *Id.* at 381.

facilitate integration,"[87] maintained the 15-50 percent racial guidelines. Moreover, students would be assigned to "the school which serves the area in which they reside"[88] unless "the school ha[d] reached building/program capacity and/or the extremes of the racial guidelines."[89] The constitutional problem, which the Supreme Court would squarely address in *Parents Involved*, arose where two otherwise similarly situated students—one Caucasian and one African American—sought assignment at a school that had reached the extremes of the 15-50 percent racial guidelines. Which student would be assigned to the school of his or her choice, and, perhaps more importantly, why and how?

JCPS continued to use its student-assignment plan to assign students to elementary and middle schools, and this choice met with community-wide approval according to a 2001 survey.[90] However, it was not long before JCPS was again faced with a challenge to its student-assignment plan—this time the plaintiffs targeted the district's use of race to assign students to its "regular schools."[91] In 2002, David McFarland filed a lawsuit claiming that his two sons were prevented from enrolling in the schools of their choice because they were Caucasian. This lawsuit was later joined by other plaintiffs, including Crystal Meredith, who claimed her son was subject to similar allegedly unconstitutional treatment. Meredith's request for an injunction was denied by Judge Heyburn. In 2004, Judge Heyburn held that the district had a compelling interest in increasing diversity and that the plan's use of race in its voluntary student-assignment plan was sufficiently narrowly tailored to satisfy the Equal Protection Clause.[92] This decision was subsequently affirmed by the Sixth Circuit.[93] On these facts, the Supreme Court granted certiorari to resolve the question of whether JCPS's voluntary student-assignment plan violated the Equal Protection Clause.[94]

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87 Joint Appendix, at 98, Parents Involved in Cmty. Schs. v. Seattle Sch. Dist., 127 S. Ct., 2738 (2007), 2006 WL 25 68816.

88 *Id.*

89 *Id.*

90 In 2001 more than 80 percent of parents approved of the JCPS plan. *See* Chris Kenning, *5-4 Ruling Limits Use of Race by District*, COURIER-JOURNAL (Louisville, Ky.), June 29, 2007 at K1. The author questions whether community support for any student-assignment plan matters. Given the public's resistance to integration, particularly bussing in the late 1970s, *see supra* note 31 and accompanying text, community support for a voluntary student-assignment plan is a dubious mark of distinction at best. At worst, public support for a plan should not be viewed as a referendum on a district's progress (or lack thereof) toward achieving diverse student bodies.

91 Hampton v. Jefferson County Bd. of Educ., 102 F.Supp.2d 358, 381 (W.D. Ky. 2000).

92 McFarland v. Jefferson County Public Schs., 330 F.Supp.2d 834, 837 (W.D. Ky. 2004).

93 McFarland v. Jefferson County Public Schs., 416 F.3d 513 (6th Cir. 2005) (*per curiam*).

94 Parents Involved in Cmty. Schs. v. Seattle Sch. Dist., 127 S. Ct. 2738, 2788 (2007) (Thomas, J., concurring).

A full discussion of each *Parents Involved* opinion is beyond the scope of this Note; however, a few words on each will be instructive. In the plurality opinion, four justices recognized two compelling interests—remedying the effects of past de jure discrimination and achieving diversity in higher education—but struck the Louisville plan down after concluding that neither interest was present on the facts.[95] Justice Thomas concurred.[96] The four dissenting justices, who disagreed in almost every way with the plurality, recognized the diversity interest at the K-12 level. In two separate dissents, the justices minimized the distinction between de jure and de facto segregation and concluded that the individual racial classifications at issue were constitutional.[97]

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95 *Id.* at 2753.

96 Justice Thomas writes movingly:

> Contrary to the dissent's arguments, resegregation is not occurring in Seattle or Louisville; these school boards have no present interest in remedying past segregation; and these race-based student-assignment programs do not serve any compelling state interest. Accordingly, the plans are unconstitutional. Disfavoring a colorblind interpretation of the Constitution, the dissent would give school boards a free hand to make decisions on the basis of race . . . . And foreshadowing today's dissent, the segregationists most heavily relied upon judicial precedent. The similarities between the dissent's arguments and the segregationists' arguments do not stop there. Like the dissent, the segregationists repeatedly cautioned the Court to consider practicalities and not to embrace too theoretical a view of the Fourteenth Amendment. And just as the dissent argues that the need for these programs will lessen over time, the segregationists claimed that reliance on segregation was lessening and might eventually end. *What was wrong in 1954 cannot be right today.*

Id. at 2768, 2785-86 (Thomas, J., concurring) (emphasis added).

97 Justice Breyer's dissent is particularly strongly worded:

> [T]he last halfcentury has witnessed great strides toward racial equality, but we have not yet realized the promise of *Brown*. To invalidate the plans under review is to threaten the promise of *Brown*. The plurality's position, I fear, would break that promise. This is a decision that the Court and the Nation will come to regret.

Id. at 2837 (Breyer, J., dissenting). Justice Stevens, who joined Justice Breyer's dissent "in its entirety," wrote separately to discuss the "cruel irony" in Chief Justice Roberts' reliance on *Brown*:

> The first sentence in the concluding paragraph of [Chief Justice Roberts'] opinion states: "Before *Brown*, schoolchildren were told where they could and could not go to school based on the color of their skin." This sentence reminds me of Anatole France's observation: "[T]he majestic equality of the la[w], forbid[s] rich and poor alike to sleep under bridges, to beg in the streets, and to steal their bread." The Chief Justice

Thus, it was Justice Kennedy who ultimately cast the deciding vote to strike down Louisville's 15-50 percent racial guidelines. Justice Kennedy's concurrence provides school boards with three useful propositions. First, the diversity interest is compelling as applied to the public–school setting. Second, the strict scrutiny test does not completely foreclose a school district from using race to assign students, provided that the diversity interest is supported by a carefully researched, supported, and documented plan. Third, race-conscious measures do not demand strict scrutiny.

Some tension between the Court's strict-scrutiny precedent and the rising problem of racial isolation in public schools was evident in Justice Kennedy's opinion:

> The Nation's schools strive to teach that our strength comes from people of different races, creeds, and cultures uniting in commitment to the freedom of all. [JCPS] seek[s] to teach that principle by having classrooms that reflect the racial makeup of the surrounding community. That the [district] consider[s] these plans to be necessary should remind us our highest aspirations are yet unfulfilled. But the solutions mandated by these school districts must themselves be lawful. To make race matter now so that it might not matter later may entrench the very prejudices we seek to overcome.[98]

Perhaps due in part to this tension, some critics have claimed that Justice Kennedy's concurrence "'actually creates more confusion,'"[99] and that his opinion makes uncertain "'when and how much race can be used.'"[100]

While Justice Kennedy thus neatly summarized the importance of diversity in public schools, the task of complying with his opinion will fall to local board members, who must now determine how to maintain diverse schools without running afoul of *Parents Involved.* Before looking for a practical solution to student assignment, board members must first understand the constitutional parameters set forth in Justice Kennedy's concurrence. Most importantly, board members must recognize the constitutional problems inherent in the JCPS plan.

> fails to note that it was only black schoolchildren who were so ordered; indeed, the history books do not tell stories of white children struggling to attend black schools. In this and other ways, the Chief Justice rewrites the history of one of this Court's most important decisions.

Id. at 2797-98 (Stevens, J., dissenting) (citations omitted).

98 *Parents Involved,* 127 S.Ct. at 2788 (Kennedy, J., concurring in part and concurring in judgment).

99 Andrew Wolfson, *Some Find 'Sunshine' Amid Rain,* COURIER-JOURNAL (Louisville, Ky.), June 29, 2007, at K6 (quoting Hans Bader of the Competitive Enterprise Institute).

100 *Id.*

B. No Easy Solution

Public schools have a compelling interest in encouraging a diverse student body. However, according to Justice Kennedy's concurrence, this interest is not informed by the Court's recent affirmative action decisions, *Gratz* and *Grutter*.[101] In fact, Justice Kennedy distinguished *Gratz* and *Grutter* as being supported by First Amendment interests not present at the public-school level.[102] While *Grutter* and *Gratz* may not inform the diversity interest at the public-school level, Justice Kennedy insisted that a compelling interest did exist nonetheless.[103] Specifically, he suggested that if the problem of racial isolation is a real threat, public-school officials may combat it by encouraging a diverse student body.[104] He stated that public schools have an interest in avoiding racial isolation, because public schools "do not reflect the diversity of our Nation as a whole."[105] In other words, in Justice Kennedy's interpretation, the problems caused by racial isolation posed a substantial threat to *Brown I's* promise of an equal educational opportunity.

Justice Kennedy questioned the plurality's dismissal of the public schools' legitimate interest in achieving an equal educational opportunity for all students:[106]

> Today we enjoy a society that is remarkable in its openness and opportunity. Yet our tradition is to go beyond the recent achievements, however significant, and to recognize and confront the flaws and injustices that remain. This is especially true when we seek assurance that the opportunity is not denied on account of race. The enduring hope is that race should not matter; the reality is that too often it does.[107]

Moreover, Justice Kennedy worried that the plurality's stance might be interpreted to bar school officials from combating racial isolation, a reading which, in his opinion, would be "profoundly mistaken."[108] He even made his disagreement with the plurality's confident tone explicit when he questioned the plurality's belief that "'[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race.'"[109] The

101 *Parents Involved*, 127 S. Ct. at 2793-94 (Kennedy, J., concurring in part and concurring in judgment).

102 *Id.* at 2794.

103 *Id.* at 2789.

104 *Id.* at 2797.

105 *Id.*

106 *Id.* at 2791.

107 *Id.*

108 *Id.*

109 *Id.* (quoting plurality opinion).

dangers posed by racial isolation[110] "def[ied] so easy a solution."[111]

C. Problems with the Plan

While JCPS did assert a compelling educational interest in diversity, the district's use of individual racial classifications failed to pass strict scrutiny.[112] Broadly speaking, Justice Kennedy was unable to establish a "thorough understanding"[113] of how the JCPS plan worked. His concurrence reaffirmed that a district that desires to use race in its voluntary student-assignment plan must support its plan with evidence of specific and documented research that supports a quantifiable need to use race. In addition, a district's adoption of a plan must be the result of a meticulous drafting process. Finally, in its implementation a district must remain both clear and impartial. The JCPS plan failed on all three levels.

The district did not provide the Court with clear statistical evidence to support the necessity of its use of individual racial classifications. Justice Kennedy sought to elicit proof of the district's quantifiable need to use the classifications during oral arguments. In response, the district offered two pieces of evidence to support its use of individual racial classifications: hypothetical scenarios and community surveys that demonstrated parental support for the plan. According to the district, the hypothetical scenarios showed "substantial resegregation"[114] absent the racial classifications. However, when requested to produce the scenarios, or research supporting their validity, JCPS was forced to admit that the scenarios were "not in the record."[115] The community surveys were also of questionable evidentiary worth, since it was not clear whether the definition of "community" meant parents whose children were actually enrolled in JCPS's public schools.[116]

In addition to a paucity of statistical evidence, the district failed to investigate race-neutral alternatives before adopting the individual racial classifications at issue. Here Justice Kennedy concurred with the plurality's discussion of workable race-neutral alternatives. Thus, a majority of the Court agreed that the district's failure to investigate race-neutral means proved fatal to JCPS's case. Justice Kennedy also noted the fact that

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110 *See supra* notes 48-66 and accompanying text.

111 *Parents Involved*, 127 S.Ct. at 2791 (Kennedy, J., concurring in part and concurring in judgment).

112 *See id.* at 2789. *Compare with* Justice Thomas' contemplation of strict scrutiny: race-based government decision making "is categorically prohibited unless narrowly tailored to serve a compelling interest. This exacting scrutiny 'has proven automatically fatal' in most cases." *Id.* at 2770 (Thomas, J., concurring) (internal citations omitted).

113 *Id.* at 2789 (Kennedy, J. concurring in part and concurring in judgment).

114 Transcript of Oral Argument at 39, Parents Involved in Cmty. Schs. v. Seattle Sch. Dist., 127 S. Ct. 2738 (2007) (No. 05-915), 2006 US TRANS LEXIS 72.

115 *Id.* at 40.

116 *See id.* at 43-44; *see supra* note 90 and accompanying text.

only a limited number of student assignments depended on the racial classifications, a fact which he believed suggested that the plan was not necessary.[117] In fact, after being informed that race was the "dispositive factor" [118] in no more than 2–to–3 percent of students' applications during oral arguments, Justice Kennedy simply asked, "why do[es] [the district] need it?"[119]

The plan must also be precisely written. In briefing and arguing the case, the district failed to "make clear . . . who ma[de] the decisions; what if any oversight [wa]s employed; the precise circumstances in which an assignment decision will or will not be made on the basis of race; or how it [wa]s determined which of two similarly situated children will be subjected to a given race-based decision."[120] Kennedy noted "the *blanket* mandate that '[s]chools shall work cooperatively with each other and with central office to ensure that enrollment at all schools [in question] [are] within the racial guidelines annually and to encourage that the enrollment at all schools progresses toward the midpoint of the guidelines'"[121] as further evidence of the sprawling nature of the plan. Such language, Kennedy wrote, is too "broad and imprecise"[122] to withstand strict scrutiny. The plan did not make clear how assignments were made. It failed to provide enough guidance for school administrators to assign individual students to particular schools, and it neglected to advise administrators on how race should be employed in that determination.

Third, and perhaps most damaging for the district, the facts of the case did not support the conclusion that the district fairly implemented the plan. For example, Joshua McDonald, Crystal Meredith's son, was denied the requested transfer for his kindergarten enrollment even though JCPS maintained, and the student-assignment plan similarly stated, that the guidelines did not apply to kindergarteners.[123] Justice Kennedy expressed frustration with what he felt was the district's failure to specifically

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117 *Parents Involved*, 127 S. Ct. at 2792-93 (Kennedy, J., concurring in part and concurring in judgment).

118 Transcript of Oral Argument at 42, Parents Involved in Cmty. Schs. v. Seattle Sch. Dist., 127 S. Ct. 2738 (No. 05-915), 2006 US TRANS LEXIS 72.

119 *Id.*

120 *Parents Involved*, 127 S.Ct. at 2790 (Kennedy, J., concurring in part and concurring in judgment).

121 *Id.* (quoting Joint Appendix at 96-97, Parents Involved in Cmty. Schs. v. Seattle Sch. Dist., 127 S. Ct. 2738 (2007), 2006 WL 2568816) (emphasis added).

122 *Parents Involved*, 127 S.Ct. at 2790 (Kennedy, J., concurring in part and concurring in judgment).

123 *Id.* at 2789 (quoting Brief for Respondents at 4). *See also* Joint Appendix at 97, Parents Involved in Cmty. Schs. v. Seattle Sch. Dist., 127 S. Ct. 2738 (2007), 2006 WL 2568816 ("All elementary students (K-5) shall be assigned to the school which serves the area in which they reside . . . unless the school has reached building/program capacity and/or the extremes of the racial guidelines.).

chronicle just how the decision to deny Joshua McDonald his requested kindergarten transfer was made.[124] Thus, according to Justice Kennedy, one of the chief ills of JCPS's case was its failure to make clear to the Court just how and why Joshua's request was denied. As a result of *ad hoc* implementation, the district was unable to sustain its burden to show that the racial classifications at issue were narrowly tailored to the district's compelling interest in achieving diversity.[125]

Notably, Justice Kennedy did not foreclose the use of race in voluntary student-assignment plans. While his concurrence opined that school districts like JCPS should work toward diversity and resist racial isolation in schools, his approach maintained that the implementation of such noble goals must pass strict judicial scrutiny. Justice Kennedy condemned the JCPS plan in part because it provided for "different treatment"[126] of individual students solely on the basis of race. Such methods "tell[] each student he or she is to be defined by race."[127] This individual classification offended the Equal Protection Clause, and was thus permissible in only the most "extraordinary"[128] of circumstances not present on the facts. Thus, post-*Parents Involved*, courts will rigorously scrutinize voluntary student-assignment plans that classify students by race. Consequently, a district must unremittingly research, draft, and implement a voluntary student-assignment plan that uses race as a factor, or risk a *Parents Involved* result.

Measures that consider race generally are different. Under Justice Kennedy's approach, such measures may not be subjected to strict scrutiny, but just when and how much a district can employ such measures is not clear.[129] Justice Kennedy did not illustrate how such measures might be incorporated into an actual student-assignment plan. He stated that districts may take race into account when choosing where to build new schools, drawing attendance zones, allocating resources, recruiting students and faculty, and tracking enrollments, performance, and other statistics. Such measures, of course, are only permissible if they do not explicitly assign children based on their race.[130] Of course, the line between permissible and non-permissible use of race is a thin one; thus, board members must carefully scrutinize any use of race post-*Parents Involved.*

124 *See, e.g., Parents Involved,* 127 S.Ct. at 2790 (Kennedy, J. concurring in part and concurring in judgment).

125 *See id.* at 2789.

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

127 *Id.*

128 *Id.* at 2796.

129 *See id.* at 2796-97.

130 *See id.* at 2792.

D. Moving Forward in the Spirit of Justice Kennedy's Opinion

Following the Supreme Court's decision in *Parents Involved*, the case was remanded to Judge Heyburn in Louisville, Kentucky. School officials spoke optimistically about the ruling, refusing to view it as "a gloom-and-doom day" for the district.[131] Just one day after the Court filed its ruling, Louisville officials made it clear that Justice Kennedy's concurrence would guide them as they sought to comply with the decision, stating confidently that "race-conscious measures can be used by a school district."[132]

As for immediate compliance with the decision, JCPS informed its principals that they may no longer take race into account when deciding whether to accept or deny entrance to students.[133] The district continued to deny entrance to particular students based on other factors, such as space or a student's grades, attendance, or behavior.[134] In a hearing Judge Heyburn approved each of these changes and stated that he would review allegations that the district had violated the Supreme Court's decision on a "case-by-case basis."[135] Judge Heyburn also interpreted the Court's decision to allow the district to have time to reformulate a revised student-assignment plan.[136] The district then began to develop a revised student-assignment plan, which will be implemented for the 2009-2010 school year.[137]

The Court's decision did force the district to halt one other practice, namely the district's use of different attendance zones for African-American and Caucasian students at three traditional magnet elementary schools. In August 2007, Judge Heyburn, holding that JCPS's use of separate attendance zone for African-American and Caucasian magnet students was impermissible in light of *Parents Involved*, ordered the district to redraw its attendance zones for the 2008-2009 year.[138]

JCPS later announced its six guiding principles: diversity, quality, choice,

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131 Nancy C. Rodriguez, *Plaintiffs: Act Now: District: Not Yet*, COURIER-JOURNAL (Louisville, Ky.), June 29, 2007, at K1.

132 *Id.*

133 *See* Chris Kenning, *School Race Guidelines Jettisoned*, COURIER-JOURNAL (Louisville, Ky.), July 20, 2007, at A1.

134 *Id.* In this article, the author notes that some members of the community are suspicious of whether "school officials are really denying transfers because they have no room, or because they are 'still playing the race game.'" The district denies that officials are using race, pointing to the fact that many schools are now outside the previous racial guidelines. *Id.*

135 Chris Kenning, *Schools' Course Since Race Ruling OK'd*, COURIER-JOURNAL (Louisville, Ky.), Aug. 3, 2007, at A1.

136 *See* Mem. Op. & Order, Meredith v. Jefferson Bd. of Educ., No. 3:02-CV-620-H, 2007 U.S. Dist. LEXIS 64473, at *4-5 (W.D. Ky. Aug. 30, 2007).

137 Kenning, *supra* note 133.

138 Meredith v. Jefferson Bd. of Educ., No. 3:02-CV-620-H, 2007 U.S. Dist. LEXIS 64473, at *7 (W.D. Ky. Aug. 30, 2007). *See also* Chris Kenning, *Separate Attendance Zones Voided*, COURIER-JOURNAL (Louisville, Ky.), Aug. 29, 2007, at A1.

predictability, stability, and equity.[139] The specifics of the actual student-assignment plan, however, "must still be worked out."[140] The board has stated that it plans to compare the plans used by various other districts to achieve a long-term solution.[141] An interim plan that "uses geography to ensure that elementary schools draw 15 percent to 50 percent of their enrollment from areas with minority populations of at least 45 percent"[142] was adopted for the 2008-2009 school year. The plan, which would only apply to students either new to the district or who have moved, was almost immediately challenged as violating *Parents Involved*, but Judge Heyburn rejected the challenge.[143]

As for a permanent solution, officials have proposed two plans to fulfill the district's diversity goals. The first plan draws contiguous attendance lines, while the second relies on non-contiguous lines. Both plans maintain the 15-50 percent guidelines; however, these guidelines are no longer based solely on race. In addition to race, the guidelines seek to achieve diversity by reviewing income and educational attainment. The district plans to designate two geographical areas (Area A and Area B) and assign 15 percent to 50 percent of all students at each school from Area A, which will be composed of students and families who fall below the county's median educational attainment and median household income. In addition, Area A's population will be composed of above 47.9 percent minorities, the district having broadened its definition of minority to include all minorities—not just African Americans.[144] The board recently approved the contiguous plan for JCPS' elementary schools, and this plan will be implemented in 2009.[145]

III. RECOMMENDATIONS

Since a unitary school system can no longer rely on the Court's more accommodating de jure segregation jurisprudence, schools like JCPS find

139 Fax from Sheldon Berman, Superintendent, Jefferson County Public Schs., to all Jefferson County Public Sch. Elementary Principals (Sept. 8, 2008) (on file with author).

140 Antoinette Konz, *Schools Adopt Guidelines for Assignment Plan*, COURIER-JOURNAL (Louisville, Ky.), Sept. 11, 2007, at A1.

141 *Id.*

142 Antoinette Konz, *Judge Refuses to Reject School Integration Plan*, COURIER-JOURNAL (Louisville, Ky.), Mar. 12, 2008, at B1.

143 *Id.* Ted Gordon, the plaintiffs' attorney in *Parents Involved*, filed a motion asking Judge Heyburn to review the interim plan. *Id.* Mr. Gordon's motion was denied because, in the words of Judge Heyburn, the plan is not "a obvious, clear-cut violation" of *Parents Involved*. *Id.*

144 Amanda Webb, *JCPS Narrows Student-Assignment Options*, BUS. FIRST LOUISVILLE, Jan. 28, 2008, http://louisville.bizjournals.com/louisville/stories/2008/01/28/daily6.html?page=2.

145 Antoinette Konz, *School Board OKs Assignment Plan: Change to Begin in Fall of 2009*, COURIER-JOURNAL (Louisville, Ky.), May 29, 2004, at A1.

themselves in an "intolerable"[146] position. When faced with evidence of growing racial isolation, board members must (a) seek solutions that realize *Brown I's* promise of an equal education, and (b) combat racial isolation without classifying students solely based on their race. Parts I and II of this Note focused on the legal definition of segregation and desegregation, which the Supreme Court has limited to intentional state-sponsored behavior.[147] Given the evidence of racial isolation discussed in Part I,[148] JCPS students will attend schools that enroll a disproportionate number of any one racial group unless board members act decisively. Moreover, such de facto segregation will not be legally recognized as harmful after *Parents Involved.* This reality is troubling, especially considering *Brown I's* emphasis on the harm that occurs when students are separated on the basis of race. De facto segregated students suffer from "feeling[s] of inferiority"[149] whether the district intended to separate them or not.[150] The fact that the Court has barred districts from assigning students based solely on their race after unitary status has been declared should not dissuade board members from achieving an equal and excellent education for all students.

Public-school board members faced with evidence of increased racial isolation in their district may choose to meet this threat by implementing a controlled-choice plan. A controlled-choice plan relies on "simultaneous[]"[151] implementation of three components: personal choice, diversity, and school improvement.[152] Each component must be present for the plan to succeed. Thus, the plan will fail if board members focus on choice and diversity to the exclusion of school improvement. In addition, all three components must be implemented at the same time: focusing on diversity or choice before school improvement will not achieve the benefits of a controlled-choice plan.[153]

A. *Reflections on Responsibility*

Before examining the specifics of a controlled-choice plan, it should be noted that the importance of integration at the primary and secondary levels cannot be overstated. According to the U.S. Census Bureau, 63

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146 Flinspach & Banks, *supra* note 3, at 276.

147 *See generally supra* notes 16-145 and accompanying text.

148 *See generally supra* notes 48-66 and accompanying text.

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

150 John A. Powell, *A New Theory of Integrated Education, in* SCHOOL RESEGREGATION: MUST THE SOUTH TURN BACK? 282 (John Charles Boger & Gary Orfield eds., 2005).

151 CHARLES V. WILLIE, RALPH EDWARDS, & MICHAEL ALVES, STUDENT DIVERSITY, CHOICE, AND STUDENT IMPROVEMENT 23 (2002).

152 *Id.* at 22.

153 *Id.* at 23.

percent of Americans have not obtained a college degree.[154] Thus, for the majority of Americans, educational experiences end at the primary and secondary level. Research suggests that while adults "may find it difficult to abandon racial stereotypes already formed . . . children who interact regularly with persons of other races are less likely to fall into patterns of stereotypical thinking."[155] Thus, whether students will attend college or not, their beliefs about race are formed early, and for this reason diversity is a lesson "best taught early in life."[156]

The fight over the importance of affirmative action at the university level is, for this reason, misplaced. Integration at the primary and secondary level is fundamental for the development of more diverse post-secondary student bodies, because universities and colleges "rely on lower-level schools to prepare students of all races and ethnic backgrounds for the demands of higher education."[157] If "race-conscious admission policies in colleges and universities are to become obsolete, local [board members] should be granted the latitude to promote student diversity in elementary and secondary schools now."[158] Promoting diversity at the elementary and secondary level will result in a "broader array of applicants who are equipped to face the demands of higher education."[159]

In addition, public-school board members have a responsibility to ensure that students do not attend de facto segregated schools. In the words of John Dewey, a nineteenth-century American philosopher and educator, public schools should "balance the various elements in the social environment, and . . . see to it that each individual gets an opportunity to escape from the limitations of the social group in which he was born, and . . . come into living contact with a broader environment."[160] Since Justice Kennedy eschewed the use of individual racial classifications except as a "last resort,"[161] board members must reconcile this view with the real problems of administering, financing, and implementing any student-assignment plan. Here, board members should focus on the concept of

154 U.S. Census Bureau, Educational Attainment in the United States: 2003 1 (June 2004), *available at* www.census.gov/prod/2004pubs/p20-550.pdf.

155 Brief for The American Psychological Ass'n. & the Washington State Psychological Ass'n. as Amici Curiae Supporting Respondents, Parents Involved in Cmty. Schools v. Seattle School Dist., 127 S. Ct. 2738 (2006) (Nos. 05-908, 05-915), 2006 WL 2927084.

156 Brief of American Council on Education and 19 Other Higher Education Organizations as Amici Curiae Supporting Respondents, Parents Involved in Cmty. Schools v. Seattle School Dist., 127 S.Ct. 2738 (Oct. 10, 2006) (Nos. 05-908, 05-915), 2006 WL 2882689.

157 *Id.*

158 *Id.* at 17.

159 *Id.* at 17-18.

160 Powell, *supra* note 150, at 283 (quoting JOHN DEWEY, DEMOCRACY AND EDUCATION 20 (1916)).

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

controlled choice. By developing a controlled-choice plan, a district can confidently implement a plan without fear of either increased racial isolation or heightened judicial scrutiny.

B. Controlled Choice

"[W]hat the best and wisest parent wants for his own child, that must the community want for all its children."[162] Personal choice is essential to a district's goal of providing an equal and excellent education to each of its students. Due in part to the problem of housing segregation in America, a district that eschews choice in favor of a neighborhood school system will not be able to provide such benefits to its students, because de facto school segregation is magnified in those districts that use a location-based assignment plan.

When students have no choice but to attend their neighborhood's school, two problems emerge. First, neighborhood schools are more likely to be de facto segregated, because the statistical data demonstrates that America's neighborhoods are still highly segregated. For example, "[t]he average white person in metropolitan American lives in a neighborhood that is 80 percent white and only 7 percent black," while "[a] typical black individual lives in a neighborhood that is only 33 percent white and as much as 51 percent black."[163] The effect of such housing segregation on schools is startling. In 2002-2003, 71 percent of all African-American public–school students and 73 percent of Latino public–school students attended high-poverty schools, in contrast to the mere 28 percent of Caucasian public–school students who attended such schools.[164] In Louisville, the national trend is even more concentrated: "African-Americans constitute less than 19 percent of the metropolitan area's population, but more than 50 percent of the population in five council districts and less than 5 percent in five other districts."[165] While a more extensive discussion of the effect of housing segregation on public–school segregation is beyond the scope of this Note,[166] the import

162 WILLIE ET AL., *supra* note 151, at 21 (citing John Dewey, 1900).

163 Brief for Housing Scholars and Research & Advocacy Organizations in Support of Respondents as Amici Curiae Supporting Respondents, Parents Involved in Cmty. Schools v. Seattle School Dist., 127 S.Ct. 2738 (Oct. 10, 2006) (Nos. 05-908, 05-915), 2006 WL 2927078.

164 *Id.* at 5.

165 *Id.* at 7 (citing METRO HOUS. COAL., STATE OF METROPOLITAN HOUSING REPORT 9 (2005)).

166 For an excellent discussion of the intersection between housing patterns and school integration, *see generally* Brief for Housing Scholars and Research and Advocacy Organizations, *supra* note 163 (discussing "steering," where real estate agents direct minority homebuyers to predominantly minority neighborhoods, and vice versa, and citing the following statement by an agent: "[area] is different from here .... I'm not allowed to steer you, but there are some areas that you wouldn't want to live in"). *See also* BRICK BY BRICK: A CIVIL RIGHTS STORY (Kavanagh Productions 2007), which documents the fallout from *United States v. Yonkers*, a case

of the statistical evidence suggests that "meaningful integration"[167] of the public schools is unlikely to occur under a neighborhood school system.

Second, neighborhood schools are, at best, a temporary fix, because the racial and socio-economic composition of each neighborhood is in constant flux. It is not impossible to create a diverse school using a neighborhood system. However, it is highly unlikely. Even the most diverse neighborhood could become de facto segregated in a short period of time. In other words, there is no guarantee that shifting economic or social conditions will not prompt a change in the racial or socio-economic structure of even the most diverse of neighborhoods. For example, between March 1999 and March 2000 about 43.4 million Americans moved, and over one-half of these moves were intra-county moves.[168] Consequently, a district that implements a neighborhood school plan has two options: to change its plan constantly to meet the needs of shifting neighborhoods, or to do nothing and risk de facto segregated schools. Based on the current housing patterns in America,[169] this risk is likely to become (if it is not already) a reality in most districts. Personal choice offers a sensible and reliable solution to this problem: students' choice rather than their physical location will guide assignment.

Given the statistical data, a plan that assigns students based solely on location will not produce a diverse student body in Louisville or anywhere else. Moreover, neighborhoods, which are constantly changing, do not offer board members a reliable compass for determining the composition of schools. Ideally, relying on student choice alone would result in school populations that represent the district as a whole. In reality, however, absent any district controls on choice, a personal-choice plan would be chaotic, because it would encourage a "first come, first served" mentality. Such a plan would also be unfair, because students with more involved parents would be able to "gra[b] all of the goodies, *i.e.*, educational opportunities,

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that spawned years of litigation challenging educational and neighborhood discrimination. This one-hour documentary "follows three families in Yonkers, New York, in the middle of a confrontation about the politics and law of racial discrimination in housing and schools that challenges and changes their hometown." About the Film, http://www.brick-by-brick.com/about.html (last visited Aug. 2, 2008). *Brick By Brick* notes the close ties between segregation and housing discrimination: "[t]he neighborhood school system reflected the city's sharp racial divide." Since "[w]here you live defines what schools you'll have access to," the fact that "White people in east Yonkers didn't want Blacks and Hispanics living in their neighborhoods and going to their schools" made integration in the public schools extremely difficult. BRICK BY BRICK: A CIVIL RIGHTS STORY (Kavanagh Productions 2007).

167 Brief for Housing Scholars and Research & Advocacy Organizations, *supra* note 163, at 10.

168 U.S. Census Bureau, Geographic Mobility: Population Characteristics, http://www.census.gov/prod/2001pubs/p20-538.pdf (last visited July 14, 2008).

169 *See supra* notes 163-67 and accompanying text.

before others are able to access them."[170]

A controlled-choice plan, on the other hand, encourages diverse student bodies, because it creates a balance between freedom and constraint. A controlled-choice plan allows students to select and rank the schools they wish to attend. Individual choice is then moderated through a district's enrollment guidelines. Permitting students to choose their schools "is a way of freeing them from their group constraints,"[171] such as race, socioeconomic status, or residential location. On the other hand, constraint—enforced through the use of enrollment guidelines—prevents one group from accessing better educational opportunities than another.[172]

C. Diversity

The second integral component to the controlled-choice plan is diversity. To implement a controlled-choice plan, a district must develop its own guidelines based on needs unique to its community. As discussed in Part III.B., such guidelines balance the choices that students have, by preventing one group from accessing better educational opportunities than another.

Race-neutral guidelines will fail to create a diverse student body. Thus, although such guidelines are arguably a safer option after *Parents Involved*, guidelines that eschew race entirely do not achieve the same effects as districts that opt for race-conscious ones. For example, board members in Wake County, North Carolina implemented a race-neutral student-assignment plan. There, the district used two guideline criteria—student-achievement factors and family income.[173] The Wake County plan set a ceiling of 25 percent for low-achieving students and a ceiling of 40 percent for lower-income children in each school.[174] Critics of the Wake County plan have noted that "the plan provides a ceiling but not a floor for the struggling students."[175] In other words, the practical result was that all-Caucasian schools could meet the Wake County criteria, thus vitiating the district's goal of diversity. Indeed, Wake County "has experienced a slight decline in its racially balanced schools under [its] integration plan"[176] in spite

170 WILLIE ET. AL, *supra* note 151, at 22.

171 *Id.*

172 *Id.*

173 *See* Flinspach & Banks, *supra* note 3, at 261.

174 *Id.* at 270-71.

175 John Charles Boger, Brown *and the American South: Fateful Choices, in* SCHOOL RESEGREGATION: MUST THE SOUTH TURN BACK? 304, 321 (John Charles Boger & Gary Orfield eds., 2005).

176 The Integration Report (Apr. 17, 2008), http://theintegrationreport.wordpress.com/2008/04.

of the "high correlation between poverty and race in [the district]."[177]

JCPC's plan to revise its original 15-50 percent guidelines is, on the other hand, race conscious. First, the district has broadened its definition of diversity to include all minorities, not just African Americans. Also, the new guidelines consider a variety of factors, including race, income, and educational attainment. These revised guidelines, which comply with Justice Kennedy's opinion because they consider race generally alongside other factors, create a balance between individual choice and fairness to all students, regardless of their race or socioeconomic status. Students can rank the schools they wish to attend, and if their first choice (School X) has exceeded the enrollment guidelines, students will be assigned to their second choice (School Y). So long as the decision to assign a particular student to School Y instead of School X is not based "explicitly" [178] on that student's race, such guidelines will be permissible under *Parents Involved.*

Diversity is an integral component to the controlled-choice plan, because it creates more integrated schools. Race neutral guidelines, like the Wake County plan, will not solve the problem of growing racial isolation in many districts. Moreover, the consideration of race, alongside other factors, is permissible under *Parents Involved.* Individual choice tempered by race–conscious enrollment guidelines allows each student to have access to an equal educational opportunity. The controlled-choice plan establishes a balance between integration and personal choice, and it is this balance that gives rise to diverse student bodies.

D. School Improvement

The least discussed and most crucial component of the controlled-choice plan is school improvement. As demonstrated by the case law and JCPS's recent publication of its new contiguous student-assignment plan, public debate centers (almost exclusively) on *how* to assign students. In fact, the bulk of this Note focuses on the means by which board members can and cannot assign students post-*Parents Involved.* However, for a student-assignment plan to succeed—to provide each student with an equal and excellent education—each school itself must be competent and moving toward excellence. Assigning students in a constitutional manner to poorly performing schools will not solve the problem. Thus, the goal should be not simply to assign students to a school, but to assign *each* student to a *good* school of his or her choice.

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177 *Id. See also* BRICK BY BRICK, *supra* note 166. In Yonkers, statistical data showed that the median income for African Americans and Caucasians was roughly equivalent. Thus, the city's segregated neighborhoods and schools resulted, not from a simple disparity in income, but something more—race. *Id.*

178 Parents Involved in Cmty. Schs. v. Seattle Sch. Dist., 127 S. Ct. 2738, 2792 (2007). (Kennedy, J., concurring in part and concurring in judgment).

Many proponents of choice plans espouse an "economic ideology of survival of the fittest."[179] As scholars have noted, this ideology fails to realize that education is not made more valuable when it is scarce, as is the case in a traditional supply-and-demand theory. Rather, "the more [good schools there are] the better."[180] For this reason, a controlled-choice plan focuses on improving the least-chosen schools. The struggling schools are easily identified, since they are the schools that are least-chosen by students. In other words, the plan acts as a kind of "referendum"[181] on an individual school's progress.

Once the least-chosen schools are determined, the process of school improvement can begin. The means by which a school can improve are varied (and deserving of greater discussion than this Note can provide), but researchers have acknowledged "five basic characteristics of effective schools"[182]: "strong leadership by the principal, especially in instructional matters[;] high expectations by teachers for student achievement[;] an emphasis on teaching basic skills[;] a safe and orderly school environment [and] frequent and systematic evaluation of student progress."[183] Whatever specific plan a district adopts for school improvement, the goal should be to "upgrade and make more attractive least-chosen schools."[184] As schools improve, students will have a broader range of schools from which to choose. Eventually, every school will become an attractive school to a diverse body of students. Arguably, this process will take many years, and it will be costly. However, board members must commit to the difficult task of improving the least-chosen schools, or a controlled-choice plan will fail.

The benefits of a strong, diverse public-school system far outweigh the costs, as John Dewey noted in his work, *My Pedagogic Creed*:

> I believe that [school] is . . . a social necessity because the home is the form of social life in which the child has been nurtured and in connection with which he has had his moral training. It is the business of the school to deepen and extend his sense of the values bound up in his home life.
>
> I believe that much of present education fails because it neglects this fundamental principle of the school as a form of community life. It conceives the school as a place where certain information is to be given, where certain lessons are to be learned, or where certain habits are to be formed. The value

179 WILLIE ET. AL., *supra* note 151, at 24.

180 *Id.*

181 *Id.* at 23.

182 *Id.* at 88.

183 *Id.* at 88. *See generally* WILLIE ET. AL., *supra* note 151, for a more in-depth discussion of the ways schools can improve.

184 *Id.* at 23.

> of these is conceived as lying largely in the remote future; the child must do these things for the sake of something else he is to do; they are mere preparation. As a result they do not become a part of the life experience of the child and so are not truly educative.
>
> I believe that the moral education centers upon this conception of the school as a mode of social life, *that the best and deepest moral training is precisely that which one gets through having to enter into proper relations with others in a unity of work and thought.* The present educational systems, so far as they destroy or neglect this unity, render it difficult or impossible to get any genuine, regular moral training.[185]

Written in 1897, these words should buoy the spirits of public-school board members who, like John Dewey, have recognized the high social value of providing an equal and excellent education to all students, regardless of the practical difficulties involved in student assignment.[186]

CONCLUSION

Public schools "constitute the greatest part of most students' educational experience."[187] While "the role of education in a democracy is not to "reproduce family, community, class, and racial hierarchies," the goal of public educators should be to "reduce these social constraints in favor of equal opportunity and democracy."[188] In the words of Dr. Martin Luther King Jr., "[a]s America pursues the important task of respecting the letter of the law, i.e., compliance with desegregation decisions, she must be equally concerned with the spirit of the law, i.e. commitment to the democratic dream of integration."[189]

Justice Kennedy's concurrence in *Parents Involved* illustrates that the problem of racial isolation in JCPS (and across America) defies a trouble-free solution. Just what type of voluntary student-assignment plan Justice Kennedy would approve is still unclear. While each district's voluntary student-assignment plan is unique, a controlled-choice plan is an effective means to attack the problem of racial isolation. No voluntary student assignment plan is perfect, and a controlled-choice plan will take time, money, and hard work to develop. However, such a plan will best achieve a publi-school district's goal to achieve an equal and excellent education opportunity for each of its students, while at the same time ensuring

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185 John Dewey, *My Pedagogic Creed*, 54 SCH. J, 77, 77-80 (1897) (emphasis added), *also available at* the Informal Education Archives, http://www.infed.org/archives/e-texts/e-dew-pc.htm.

186 *See generally*, BRICK BY BRICK, *supra* note 166.

187 Powell, *supra* note 150, at 284.

188 *Id.* at 281.

189 *Id.* at 297.

compliance with Justice Kennedy's concurrence in *Parents Involved*.

Student assignment will continue to play a fundamental role in American education, given both the Supreme Court's desegregation jurisprudence and the pressing problem of racial isolation in America's public schools. Thus, to educate students in the "three R's—readin' and 'ritin' and 'rithmetic..."[190]—board members should seek a controlled-choice solution to the sometimes "intolerable"[191] problem of voluntary student-assignment. Given the difficult reality of implementing any voluntary student-assignment program, a controlled-choice plan is a responsible way to assign students post-*Parents Involved*.

190 President Herbert Hoover, Address Commemorating the 20th Anniversary of the Boy Scouts of America (Mar. 10, 1930), http://www.presidency.ucsb.edu/ws/?pid=22545.

191 Flinspach & Banks, *supra* note 3.