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# School Segregation, Desegregation, and Integration: What do These Terms Mean in a Post-Parents Involved in Community Schools, Racially Transitioning Society?

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# School Segregation, Desegregation, and Integration: What Do These Terms Mean in a Post-*Parents Involved in Community Schools*, Racially Transitioning Society?

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## INTRODUCTION

The racial contexts of schools have changed dramatically since the Supreme Court first began considering the issue of school segregation. "Racial contexts" is used in this article to describe the multiple dimensions of students: racial composition, comparison of school composition to district, and change in racial composition over time. School desegregation, following the *Brown v. Board of Education*[2] decision in 1954, created upheaval in communities and new situations in schools whose teachers had been trained and had gained teaching experience in one-race schools. As an example of just one of the many ways in which this altered the landscape of schools, the Emergency School Aid Act was enacted during the Nixon administration to provide funding to retrain teachers, develop curricula, and support research on successful conditions for desegregating schools.[3] Today, more than thirty-five years later, schools' racial compositions may be multiracial, may be overwhelmingly of one race, or may differ substantially from the surrounding district. In other words, schools today encompass many different racial compositions with different levels of demographic stability; they differ from the schools on which earlier desegregation research was based and from the schools that teachers themselves attended as students.

The school districts in Seattle, Washington, and Jefferson County, Kentucky (metropolitan Louisville) adopted student assignment plans to try to create racially diverse schools and eliminate racially isolated schools. A

handful of parents in both districts challenged the plans on the grounds that these policies discriminated against individual students who did not get the opportunity to attend their first choice schools.

In the plurality opinion of the U.S. Supreme Court's recent decision in *Parents Involved in Community Schools v. Seattle School District No. 1* (*PICS*), Chief Justice Roberts outlined five empirical bases on which the Seattle and Jefferson County voluntary integration student assignment plans failed to pass strict scrutiny: (1) the plans were based on racial and ethnic classifications that did not reflect the multiracial diversity of students; (2) the use of racial classifications was unnecessary because of the few students it affected; (3) the existing segregation in schools was the result of factors that were not government enforced; (4) the districts' interest in "racial integration" was pretext for efforts that were actually aimed at racially balancing schools; and (5) there was no end point for the assignment plans. In this article, I analyze the racial contexts of all schools to show how the justices' views reflect or ignore the demographic realities that school districts face. Like educational research, the courts have lagged in their understanding of the reality of today's schools. On all but one basis, Chief Justice Roberts's plurality decision did not recognize the current contexts of schools, but instead adhered to a decades-old conceptualization of segregation. As a result, the decision fails to understand the multiracial, changing nature of school racial patterns, and the restrictions the Court placed on districts in devising student assignment plans will likely only exacerbate racial isolation, which, regardless of its cause, has been shown to limit the educational opportunity of students who attend such schools.[4]

In Part I, I examine the different ways in which social scientists have conceptualized "segregation." In Part II, I examine prior judicial decisions regarding school segregation to show how our current conceptualization of "segregation" affects our determination of whether schools are actually segregated. In Part III, I examine the five assertions of Chief Justice Roberts, mentioned above, which led him to conclude that the districts'

plans were not narrowly tailored. Finally, in Part IV, I suggest how policy makers, advocates, and researchers should revise their understanding of segregation and integration given this demographic analysis.

## I. PRIOR EMPIRICAL CONCEPTUALIZATIONS OF SEGREGATION

There has been debate in the social science literature about what segregation is and how to measure it. Traditionally, both the composition of schools and the distribution of students among schools have been measures of school segregation. In 1988, Douglas Massey and Nancy Denton examined five different dimensions of residential segregation and evaluated twenty separate measures, recommending their preferred measure for each dimension.[5] For the purposes of schools, however, not all dimensions and measures discussed by Massey and Denton are substantively meaningful. Two relevant dimensions they discussed are evenness, which refers to how evenly the population is dispersed, and exposure, which denotes the likelihood that a member of one group would encounter a member of another racial group (in a neighborhood or school).[6]

Evenness has traditionally been measured in schools by the index of dissimilarity. While some have argued that the index of dissimilarity has mathematical principles that are not as helpful to segregation analysis as are other measures,[7] it was endorsed by Massey and Denton in their analysis of segregation measures to preserve its historical use in segregation literature and because of its ease of comprehension and usefulness as a comparative tool to prior studies of segregation. A drawback to using the index of dissimilarity is that it is more substantively meaningful at a localized level of analysis (e.g., within a district or metropolitan area) than at a national level. Because it concludes that a specific percentage of a certain group would have to switch schools in order for students to be perfectly distributed[8]—and it is impractical for students to switch from, for example, a school in Florida to a school in New York—this measure will not be utilized in my analysis of schools' racial contexts.

Instead, my analysis is more concerned with the daily experiences of students. One commonly used measure to evaluate students' experiences is the exposure index, which assesses the extent to which students of one group are exposed to students of another. In 1985, David James and Karl Taeuber introduced a separate conceptualization of segregation indices when they analyzed various segregation measures for a sample of ten thousand pairs of school districts.[9] They argued that because the exposure index is essentially a weighted average, it is a measure of central tendency and thus is better used to study the composition of units (such as schools) than to measure student dispersion, as the index of dissimilarity does.

One drawback to most segregation measures, including those discussed above, is that during earlier decades when these measures were being developed, segregation was thought of as a white-black issue or, to a lesser extent, white-Latino. While measures have been adopted to analyze the extent of segregation of one group from another, they do not allow for simultaneous analysis of multiple groups. More recent segregation analyses have suggested decomposable measures that allow for analysis of multiple groups.[10]

Additionally, sociological research has suggested that schools experiencing racial transition, defined here as the change in white percentage, may create a difficult learning environment for teachers and students and may lead to flight from such schools.[11] Traditional measures of segregation, however, often have assessed segregation at one point in time or compared segregation indices at different points in time to determine, at the aggregate level, whether a district's or region's schools, for example, have become more segregated.[12] Thus, this article utilizes a measure of racial transition to analyze the changing racial composition of individual schools over a ten-year period. It examines the racial context of all public schools using data from the 2005–06 National Center for Education Statistics Common Core of Data, Public School Universe (NCES Common Core of Data), an annual dataset collected by the U.S. Department

of Education.[13] In 2005–06, there were more than ninety thousand public elementary and secondary schools that enrolled students. The public school enrollment was more than 48.6 million students, of which 57% were white and 20% were Latinos (the second largest group in U.S. public schools).[14] Black students comprised 17% of all students, Asians 5%, and American Indians 1%.[15]

Building on definitions from prior school segregation research and recognizing that, with the dramatic racial change in the entire U.S. population, there are novel racial contexts for schools beyond merely "white" schools or "minority" schools, this article examines multiple measures and dimensions for describing the racial contexts and stability of the schools. Each method of measuring the racial context and stability of schools may provide information about different dimensions of racial segregation. Some measures, for example, gauge the concentration and numbers of groups in different schools; others compare the racial composition of the school with the surrounding district; and still others take into account the changing racial composition over time. Later, in Part III, I examine different categorizations of schools, both defining and examining their prevalence among all schools.

## II. PRIOR JUDICIAL DECISIONS ABOUT SCHOOL SEGREGATION

The 1954 *Brown v. Board of Education* decision addressed the segregation of black students from white students in the public schools of seventeen states and the District of Columbia.[16] In each of the cases that was consolidated into *Brown*, African American plaintiffs were trying to gain access to all-white schools in states operating schools under *Plessy v. Ferguson*'s[17] separate but equal doctrine.[18] As plaintiffs' lawyers demonstrated, separate was not equal.[19] A study released the year of the *Brown* decision documented the financial disparities between black schools and white schools in southern states.[20] Despite *Brown*'s ruling that segregated schools were unconstitutional and a few highly publicized

desegregation conflicts in districts such as Little Rock, Arkansas, there was little actual desegregation of black and white students a decade after the Supreme Court decision: only 2% of black students were in formerly all-white schools.[21]

It was not until more than a decade after *Brown* that the Supreme Court first began to give explicit instructions to lower courts as to how to desegregate.[22] In its 1968 *Green v. School Board of New Kent County* decision, the Court defined six separate indicators of desegregation: facilities, staff, faculty, extracurricular activities, transportation, and student assignments.[23] In particular, the Court required that racial identifiability be eliminated with respect to students, faculty, and extracurricular activities.[24] In 1971, in *Swann v. Charlotte-Mecklenburg*, the Court allowed districts to set racial goals for the ratio of faculties and students.[25]

The 1973 *Keyes v. School District No. 1*[26] decision, involving the school system in Denver, Colorado, was the first time the Supreme Court explicitly included Latinos in a desegregation remedy.[27] The Court held that Latinos "constitute an identifiable class for purposes of the Fourteenth Amendment."[28] In 1968, Latino students only numbered two million (of forty-three million students), just one-third the size of African American students.[29] They were largely concentrated in the Southwest, not the South, where the vast majority of segregation cases were filed.[30] In addition, this was the first time the Court held that a district had illegally segregated students even though there were no laws explicitly segregating students; instead, segregation was a result of discriminatory government practices. As a result, the Denver district was subject to remedial action just as districts had been penalized previously for *laws* requiring segregation of students.

In *Milliken v. Bradley* a year later, the Court overruled a lower court remedial plan designed to remedy segregation in Detroit public schools.[31] By the late 1960s, only 40% of students in Detroit city schools were white, and the district court's plan drew additional white students from the

overwhelmingly white suburban districts surrounding the city into the city schools as part of the desegregation remedy.[32] The Supreme Court, in a five–four opinion, ruled that the suburban districts could not be included in a court-imposed remedial plan to ameliorate segregation in Detroit unless the suburban districts had directly contributed to the de jure segregation of the Detroit school district.[33] This decision had two interrelated effects: 1) it made it very difficult to create metropolitan-wide desegregation plans, and 2) in many metropolitan areas where city schools and suburban schools were in separate districts, it made it impossible to create interracial schools because of the district boundary lines, which largely limited desegregation to increasingly minority urban cores. The Midwest and Northeast, regions in which metropolitan areas are fractured into dozens of school districts, continue to have the highest percentages of black students in racially isolated minority schools—schools in which the nonwhite percentage of students is at least 90%.[34] The *Milliken* decision also began to draw a more rigid distinction between de facto and de jure segregation, which ignored the reality that school district boundaries coincided with a deeply segregated housing market in the entire Detroit metropolitan area.

A series of three Supreme Court decisions in the 1990s shifted judicial understanding about what is required to remedy segregation. Two key components of a 1995 ruling about whether a school district had done enough to remedy de jure segregation were 1) whether the school board had complied in good faith and 2) whether segregation had been remedied to the extent practicable.[35] In contrast to the six *Green* factors, these two new standards for assessing desegregation compliance were more subjective and less rigorous. The *Swann* decision in 1971 acknowledged that the racial identifiability of schools could affect the racial identifiability of the neighborhood; the Court had also held that school districts could not use neighborhood demographics as a reason for not fully desegregating schools (for example, drawing boundary lines in ways that would ensure that schools would remain segregated).[36] Just over twenty years later, despite

social science evidence demonstrating the validity of the *Swann* court's understanding of the relationship between schools and housing, the Court held that unless the government had deliberately caused the segregated residential patterns, the schools were not required to address any racial imbalance that might exist within or among school districts.[37] In *Freeman*, the Court described residential segregation as the result of private actions,[38] disregarding any direct or indirect way in which governments or schools could affect residential patterns.

Thus, in the time since *Brown*, the Supreme Court has deliberated on a number of segregation cases, providing several clarifications as to what is meant by both segregation and desegregation. First, the Court defined six factors for desegregation in 1968 and then changed those standards in the 1990s. Next, in 1973, the Court expanded *Brown* to include nonblack minority groups. In the same decision, the Court found that de jure segregation had occurred even where there were no laws explicitly segregating students, as had been the case prior to 1954. Finally, the Court essentially barred the judicial imposition of metropolitan-wide remedial plans and further limited remediation to only segregation that was attributable to overt governmental action, even when this would result in de facto segregation.

## III. ANALYSIS OF *PICS* DECISION

In both Seattle and Jefferson County, the school boards had adopted policies to try to create racially diverse schools and eliminate racially isolated schools. In Seattle, the school district operated a "controlled choice" assignment system for high school students in which students and parents were allowed to rank their top three choices. There were a series of tiebreakers that came into effect if more students chose a particular school than there were seats available. The tiebreakers included preferences for siblings of current students, geography, and student's race/ethnicity to bring a school within a general racial guideline set by Seattle to ensure schools

were diverse.[39] The race/ethnicity tiebreaker was challenged by the plaintiffs and considered by the Supreme Court. In Jefferson County, there was a complex student assignment system. Students were generally assigned to schools in their "resides areas," which were drawn to try to maximize student diversity. Students could request transfers to schools, which were granted if there was available space and if the student would not cause the school he or she transfered into to stray outside the set racial guidelines (15%–50% black students were permissible).[40] According to the district, Jefferson County has been successful in achieving its goals for the plan, specifically racially integrated schools.[41] The racial classification aspect of the transfer provision was at issue in the Supreme Court's review of Jefferson County's policy.

In this section, I analyze the five statements on which the plurality in *Parents Involved in Community Schools v. Seattle School District No. 1* (*PICS*) based its conclusion that Jefferson County's and Seattle's student assignment plans did not pass strict scrutiny. For each of the five statements, I first review the discussion in the plurality opinion, as well as relevant statements in the other concurring or dissenting opinions. Next, I review empirical evidence about the nature of schools by analyzing the NCES Common Core of Data. Finally, I discuss whether the empirical evidence supports the plurality's statements.

### *A. The Plans Were Based on Racial and Ethnic Classifications that Did Not Reflect the Multiracial Diversity of Students*

#### 1. The Court's Reasoning

Both Chief Justice Roberts's plurality opinion and Justice Kennedy's concurring opinion criticized the binary racial classifications used by Seattle and Jefferson County. Seattle Public Schools employed specific guidelines to achieve racial diversity in its schools. Seattle's racial tiebreaker, which was used only when more students requested a particular school than there

was available space at that school, categorized students as either white or nonwhite to determine whether a student's enrollment at the school of his or her choice would cause that school's racial composition to fall outside of the district's guidelines.[42] Seattle is a multiracial district where four racial/ethnic groups comprise at least 10% of student enrollment. At the time the litigation challenging Seattle's student assignment plan commenced, the district was 41% white, 24% Asian, 23% black, 10% Latino, and 3% American Indian.[43]

Jefferson County's voluntary integration plan was, in many respects, similar to the plan it had implemented prior to 2000, when the district was declared unitary.[44] After being declared unitary by the federal courts, Jefferson County, wanting to maintain the racially diverse schools it had achieved while implementing its plan under court supervision, voluntarily employed a racial classification system used during its prior court-mandated desegregation plan, which, like many other southern districts, identified students as either black or nonblack.[45] Jefferson County was an overwhelmingly black-white district when its voluntarily adopted integration plan was challenged. Chief Justice Roberts noted that roughly one-third of students were black and "most of the remaining 66 percent of students [were] white."[46] It is somewhat surprising that Chief Justice Roberts describes the remaining two-thirds of Jefferson County students as "white" rather than provide a more specific description of the composition of this nonblack category, given his dislike of the use of a binary racial categorization in the design of desegregation plans.

According to Chief Justice Roberts, the districts' plans contrast with the broader notion of diversity asserted in *Grutter v. Bollinger*.[47] The University of Michigan used several components of diversity in addition to race, such as geography and socioeconomic status. Chief Justice Roberts clarified that the University of Michigan Law School's interests in *Grutter* were constitutional because "race was but a single element,"[48] while the districts' efforts in *PICS* were too race dependent.[49] In particular, Chief

Justice Roberts found that "[e]ven when it comes to race, the plans here employ only a limited notion of diversity, viewing race exclusively in white/nonwhite terms in Seattle and black/other terms in Jefferson County."[50] Chief Justice Roberts described two hypothetical racial compositions of schools, one that was 50% Asian and 50% white, which would have been considered diverse under Seattle's plan, and a school that was 30% Asian, 25% black, 25% Latino, and 20% white, which would not have been considered diverse under Seattle's plan because the white percentage differed too much from the district white percentage.[51] Chief Justice Roberts wrote, "It is hard to understand how a plan that could allow these results" could claim to have the intention of creating diverse schools.[52] Although Chief Justice Roberts's criticism of the racial categories seems aimed at both districts, there is no specific critique of the Jefferson County plan, and, as mentioned above, he does not even specify the composition of the two-thirds nonblack/other group of students in Louisville.

In his separate concurring opinion, Justice Kennedy likewise criticized Seattle for "fail[ing] to explain why, in a district composed of a diversity of races, with fewer than half of the students classified as 'white,' it has employed the crude racial categories of 'white' and 'non-white' as the basis for its assignment."[53] This reason alone was enough for Justice Kennedy to conclude that the district's plan did not meet the narrow tailoring prong of the strict scrutiny test and "threaten[ed] to defeat [the plan's] own ends."[54] In fact, Justice Kennedy asserted that the legality of the policies hinged on the use of racial labels, which he found to be unconstitutional.[55]

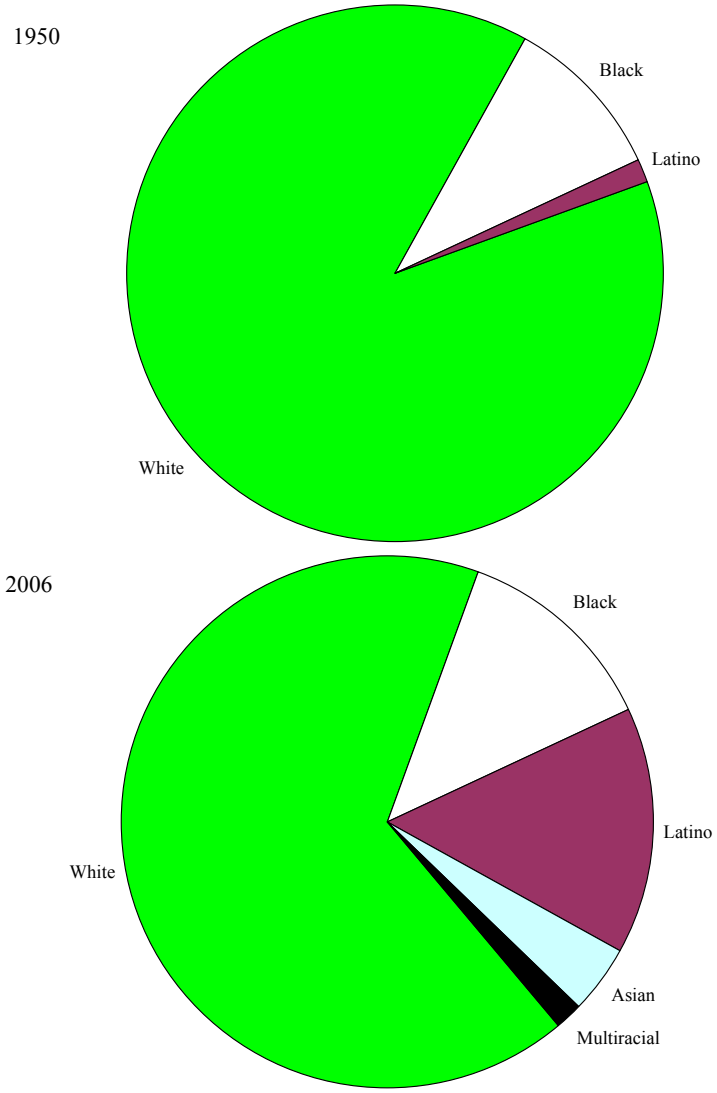
**2. Empirical Data**

Empirical data supports the plurality's contention that there is a multiracial nature to today's student enrollment, although this varies considerably by region. The country's demographics have changed dramatically since the time of the *Brown* decision. Although the ways in which the country has collected racial/ethnic data have changed somewhat

in the more than five decades since *Brown*—which makes comparisons over time inexact—it is still worth comparing figures. Non–Hispanic whites comprised nearly 90% of the entire U.S. population in 1950.[56] In the July 2006 population estimate by the U.S. Census Bureau, non–Hispanic whites were 66.4% of the population, and Latinos (of any race), who had comprised a mere 1.5% of the population in 1950, now outnumbered blacks.[57] In addition, there were two new demographic groups monitored by the U.S. Census Bureau: Asian (4.3%) and multiracial (1.6%).[58]

This trend of increasing multiracial diversity is even more apparent in public school enrollment. In 2005–06, only 57% of the public school enrollment was white and another 20% was Latino.[59] Black students were the third largest group, comprising 17% of all students. Asian students were another 5%.[60] Illustrative of this diversity, there were ten states in 2005–06 in which the majority of students were nonwhite.[61] In half of these ten states, at least three racial/ethnic groups comprised 10% or more of the enrollment.[62] In California, New Mexico, and Texas, Latino students were more populous than whites; in Mississippi, there were more black students than whites.[63]

**Figure 1: Racial composition of U.S. population, 1950 and 2006**




*Source: For 1950 data, Clotfelter, 2004, chapter 1; for 2006 data, U.S. Census Bureau, 2006*

*a) Racially Diverse Schools*

To examine how this demographic trend has affected schools, I analyzed the frequency of racially diverse schools. Racially diverse schools are defined here as schools where there are at least two or more racial groups that each constitute 10% or more of the total school enrollment. This definition perhaps errs on being too inclusive of schools, as other studies have argued that it takes 15% or 20% of a group to reach a "critical mass,"[64] so my formulation may provide a generous estimate of the frequency of diverse schools. By this measure, in 2005–06, over half of all public schools (53.1%)—or nearly fifty thousand schools—were racially diverse.

In my analysis, racially diverse schools are divided further into biracial schools, defined as schools with exactly two groups that each constitute at least 10% of school enrollment, and multiracial schools, defined as schools in which three or more groups separately make up at least 10% of enrollment. More than one-third of all schools (37.2%) were biracial. In 2005–06, 15.9% of schools were multiracial, representing 14,977 schools.

(1) Biracial

The category of biracial schools itself encompasses considerable diversity in terms of which groups of students comprise each school. While most biracial schools (87.9%) have a substantial presence of white students,[65] the percentages of schools where either black or Latino students make up at least 10% of enrollment are nearly even: 48.4% and 49.8% respectively. Less than 10% of schools have a substantial share[66] of Asian students or American Indian students. In particular, it is notable that black-white schools are not the largest group of biracial schools; instead, white-Latino schools are.

The distribution of biracial schools across geographic locations such as central cities, suburbs, towns, and rural areas roughly approximates the distribution of all schools, meaning that biracial schools are not concentrated in any particular type of location. More than 40% of schools

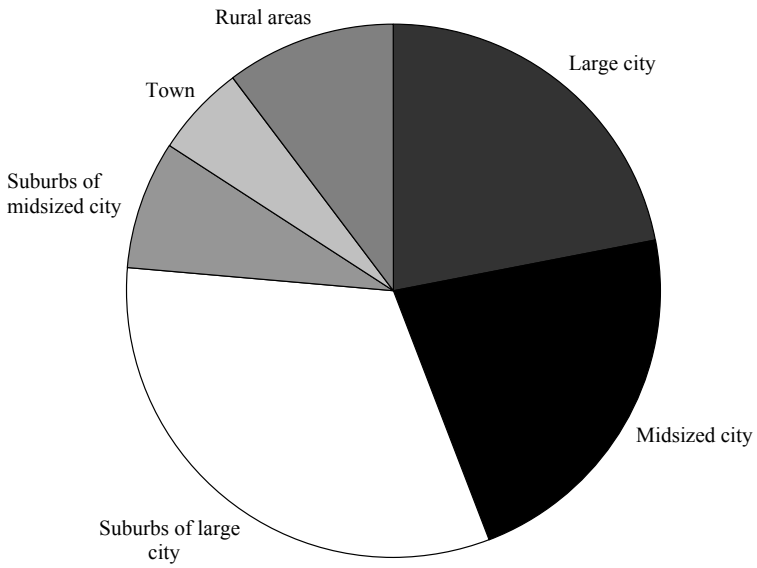
in the South and the West are biracial, while only one-quarter or less of the schools in the Northeast and Midwest are biracial.[67]

(2) Multiracial

Nearly one in six schools were multiracial in 2005–06. What racial/ethnic groups of students make up multiracial schools? There is less variety here than among biracial schools. Virtually all of the multiracial schools (96.4%) consisted of at least 10% white students. In addition, in the vast majority of multiracial schools, at least 10% of students are Latino (93.5%) or black (82.9%). The student bodies of more than one-third of multiracial schools were at least 10% Asian, and a small percentage of multiracial schools were made up of 10% or more American Indian students. Again, it is informative that the overwhelming majority of multiracial schools have substantial shares of white and Latino students. A smaller, but still large, percentage of schools was also at least 10% black. A subset of the multiracial schools had four racial/ethnic groups of students, representing 2.1% of all schools, and ten schools had 10% of students from each of the five racial/ethnic groups.

Perhaps not surprisingly, the vast majority (84.3%) of multiracial schools are located in the central cities and suburbs of medium and large metropolitan areas, with about half located in central cities (see fig. 2). One-third of multiracial schools are in suburban regions of the largest metropolitan areas, suggesting that larger metropolitan areas may be more likely to have substantial percentages of at least three racial/ethnic groups.

**Figure 2: Location of multiracial schools, 2005–06**




*Source: NCES Common Core of Data, Public School Universe 2005-06; author's calculations.*

Like biracial schools, multiracial schools are also more likely to be found in certain regions of the country. More than one in five schools in the West are multiracial, while more than one in six schools in the Northeast and South are multiracial. By contrast, less than 10% of schools in the Midwest and Border regions are multiracial.

### 3. The Court's Reasoning Versus the Empirical Data

This analysis demonstrates the accuracy of the Chief Justice's contention that the definitions of segregation and desegregation are more complex than they were fifty years ago. These findings indicate a new demographic reality beyond the traditional model of racially diverse schools, which were

usually black-white or, in some areas of the Southwest, Latino-white. In 2005–06, nearly one in six schools had a considerable share of students from at least three racial groups. This reflects rising immigration, the large number of young Latino children in particular, and the dispersion of minority families. In addition, these trends may portend important new educational consequences as a substantial number of schools grapple with educating three or more groups of students and incorporating their backgrounds, cultures, and any particular educational needs into the schools' learning environments.

At the same time, while there is growing racial diversity, these data suggest that multiracial schools are clustered in certain regions and types of communities. Two-thirds are located in the South and the West. An even larger fraction of multiracial schools are in medium and large metropolitan areas. Thus, while Chief Justice Roberts's critique of Seattle—whose demographics are richly diverse—does reflect the changing racial contexts of schools, the geographic spread of multiracial schools is still limited. His critique, therefore, may not be fairly applied across all school districts, such as Jefferson County, where there are only two racial/ethnic groups of students that comprise a considerable percentage of the enrollment. Yet, as the nonblack minority growth has exploded since the time of *Brown*, it is likely that districts like metropolitan Louisville will likely soon experience the multiracial nature of student enrollment. Districts will need to carefully consider what this means for student assignment plans and how they conceive of racially diverse schools, which should include a multiracial conceptualization of diversity.

*B. The Use of Individual Racial Classification Is Unnecessary Because It Affects Few Students*

**1. The Court's Reasoning**

In addition to expressing displeasure about the binary nature of the racial classifications used in the two districts' plans, both the plurality and Justice Kennedy's concurring opinions suggest that the use of individual racial classifications in Seattle's and Jefferson County's student assignment policies is unnecessary in part because so few students in each district were affected by this component of the plans.[68] Jefferson County estimated that its racial guidelines (such as the policy that each school should have between 15% and 50% black students) affected 3% of student assignments.[69] The percentage of affected students by this part of Jefferson County's policy is low because most of the student assignments were made through families' choices of schools within noncontinguous residential areas that were designed to naturally create racially diverse schools.[70] Seattle's racial tiebreaker affected just over three hundred high school students in 2000–01, and the vast majority of students received their first choice school when the district employed the plan.[71]

The plurality's critique of the race-conscious aspect of each district's plan was nuanced. Chief Justice Roberts wrote, "While we do not suggest that *greater* use of race would be preferable, the minimal impact of the districts' racial classifications on school enrollment casts doubt on the necessity of using racial classifications."[72] Comparing the application of the individual, race-conscious aspects of the student assignment plans to that used by the University of Michigan Law School[73]—which was upheld in *Grutter*—the plurality questioned whether such racial classifications have a meaningful difference in achieving their asserted interests.[74] As discussed above, the plurality was hostile to the use of a white-nonwhite or black-other racial classification, and, given the relatively small number of students

affected, the justices concluded that such "an extreme approach" was not necessary.[75]

Justice Kennedy also noted in his concurring opinion that while there may be some instances in which there is no alternative to considering students' individual racial classifications in order to achieve integration,[76] that was not the case in either of the districts here because of the low number of students that were affected by the use of individual racial classification.[77] He concluded that "the small number of assignments affected suggests that the schools could have achieved their stated ends through different means."[78]

In his dissenting opinion, Justice Breyer argued that the relatively small numbers of students affected by the race-conscious aspects of the student assignment policies in each district should be evidence that the plans were narrowly tailored and used race to a lesser extent than other factors such as choice—an ideal, Justice Breyer wrote, supported in *Grutter*.[79] Contrary to the plurality, he asserted that "[n]othing in the extensive history of desegregation efforts over the past 50 years gives the districts, or this Court, any reason to believe that another method is possible to accomplish these goals."[80] Noting the traditional deference given by the Court to local school boards, he suggested that, because of the long history of desegregation efforts in both districts, the Court should defer to them to determine whether they need to employ race-conscious aspects to create racially diverse schools.[81]

**2. Empirical Data**

To evaluate the plurality's claim that individual racial classifications are unnecessary, it is important to assess the extent to which schools are both racially integrated and stable learning environments, which is the ultimate goal of these assignment plans. That is, how common are schools that are both integrated and stable? "Stably integrated schools" are defined here as schools that are both diverse, where the white percentage is between 25%

and 90%, and stable, where the white percentage change was between zero and twelve percentage points from 1995 to 2005 (in shaded area in table 1). Racially diverse schools that do not fit this definition, either because the white percentage grew during the decade analyzed or because the white percentage declined at a rate more than twice the overall change, are schools that I refer to as "unstably diverse schools."

Demographers have noted that stably integrated neighborhoods are rare, although they were on the rise during the 1980s and are more likely to occur when the neighborhoods are located farther from areas of black concentration in the metropolitan area.[82] In areas where there are many small districts in close proximity to one another, demographic patterns can cause entire school districts to rapidly transition in a short amount of time as the racial compositions of neighborhoods become more diverse. In other cases, racially diverse neighborhoods that adjoin both white suburban areas and minority urban areas can be destabilized by school assignment plans that send white students from the diverse neighborhoods to urban schools and their minority neighbors to suburban schools.

Like neighborhoods and districts, schools that appear to be diverse at a given point in time may, in fact, be schools that are going through racial transition from being segregated white schools to predominantly or segregated minority schools. Thus, it stands to reason that the teaching and learning environments in schools that are stably diverse, as compared to those that are temporarily diverse (that is, unstably diverse) may be qualitatively different.

**Table 1: Stably diverse schools**

| Changes in White Percentage, 1995–2005 | | Percentage of White Students | | | | | Total |
|---|---|---|---|---|---|---|---|
| | | 0–25% | 25–50% | 50–75% | 75–90% | 90–100% | |
| <0% | Count | 2,393 | 871 | 1,916 | 2,061 | 6,459 | 13,700 |
| | % of Total | 3.2 | 1.2 | 2.6 | 2.8 | 8.7 | 18.5 |
| 0–6% | Count | 4,576 | 1,059 | 2,313 | 4,827 | 15,602 | 28,377 |
| | % of Total | 6.2 | 1.4 | 3.1 | 6.5 | 21.0 | 38.2 |
| 6–12% | Count | 2,404 | 1,623 | 3,271 | 5,300 | 939 | 13,537 |
| | % of Total | 3.2 | 2.2 | 4.4 | 7.1 | 1.3 | 18.2 |
| 12–18% | Count | 1,851 | 1,670 | 2,921 | 1,474 | 0 | 7,916 |
| | % of Total | 2.5 | 2.3 | 3.9 | 2.0 | 0.0 | 10.7 |
| >18% | Count | 3,641 | 3,893 | 2,956 | 173 | 0 | 10,663 |
| | % of Total | 4.9 | 5.2 | 4 | 0.2 | 0.0 | 14.4 |
| Total | Count | 14,865 | 9,116 | 13,377 | 13,835 | 23,000 | 74,193 |

*Source: NCES Common Core of Data, Public School Universe 1995–96, 2005–06; author's calculations.*

Based on my analysis of NCES Common Core of Data, one in four schools (24.8%) was stably integrated, which accounts for more than eighteen thousand schools.[83] Despite the smaller racial composition range for diverse schools here than for biracial schools (10%–90% white), there was a significant percentage of stably diverse schools. In fact, there were two almost equivalent trends: the percentage of unstably diverse schools (24.2%) represents almost as many as stably diverse schools over the same time period. This indicates that half of diverse schools may only be temporarily diverse because they are undergoing substantial racial transition—either becoming whiter or having a decline of white students at a rate that is at least twice that of the entire student enrollments—unless policies can be designed to help stabilize student enrollment within or across districts. Though there was a large number of transitioning diverse schools, the thousands of stably integrated schools indicate a need to understand how these schools function and to prepare teachers for such environments where diversity is likely to be long lasting. Additionally, examining district policies where such schools occur may help build an understanding about how to create stably diverse schools in other communities.

While there were a large number of stably integrated schools, this accounted for only one out of every four schools in the United States in 2005–06, and there were almost as many diverse schools experiencing racial transition during this time period. Further, these schools were more likely to be located in suburban areas of large and midsized metropolitan areas: 41% of all stably integrated schools were located in these areas. By contrast, stably integrated schools were disproportionately less likely to be found in large central cities: only 5% of stably integrated schools were in these cities. This is perhaps due to the fact that either many urban districts have few white students remaining, and thus would not be considered "diverse," or there is often family mobility in and out of cities, or both. Additionally, because stably integrated schools are more likely to be in

suburban areas, it also suggests that the multiracial schools discussed above, of which 44% were located in central cities, may not be stably diverse and may transition to racially isolated schools—schools in which the white or nonwhite percentage of students is at least 90%.

**3. The Court's Reasoning Versus the Empirical Data**

Justice Breyer began his dissent by noting that there had been remarkable progress in racial integration as a result of prior judicially mandated and voluntary local efforts to try to desegregate formerly segregated schools.[84] He then described, at length, the desegregation efforts of both Seattle and Jefferson County to underscore the types of dedicated, continuous efforts needed to create the level of integration that each had been able to achieve and to emphasize his belief that the Court should not derail such efforts by placing the limitations on school districts' efforts that the plurality endorsed.[85] His point is more widely validated when examining the prevalence of stably integrated schools in the United States: school districts that have been able to create diverse schools are struggling to maintain that diversity.

While it is impossible to evaluate from these data to what extent racial classifications are being used by districts, it *is* possible to conclude that the remarkable progress in racial integration is imperiled by the extensive racial instability of diverse schools (nearly one-quarter of all schools) or racial isolation (nearly one-half of schools) in the public schools. In addition to the racially transitioning diverse schools, it is also worth noting that, as will be discussed in the next section, a higher percentage of schools is stably racially isolated than stably diverse.

Given these trends, perhaps it would be understandable for the justices to chide the districts for not designing policies that affected more students, but it certainly does not seem like race-conscious policies are *not* needed. In fact, to criticize the minimal use of racial classifications in the plans—plans that were designed in part to comply with the Court's precedents—is

disingenuous and overlooks how few stably diverse schools have been able to be created through voluntarily adopted or court-ordered policies. In addition, since these districts are trying to maximize stability and racial integration, it seems from these data that districts need a wide variety of tools and flexibility to respond to both dimensions of schools' racial contexts. From this analysis, the plurality's rationale for declaring the racial classification of students unnecessary disregards the relatively small percentage of schools that are actually stably integrated.

### *C. Existing School Segregation Is Not the Result of Government-Enforced Action*

#### 1. The Court's Analysis

One of the major disagreements between the plurality opinion and Justice Breyer's dissent was whether the school districts should be able to design plans to address existing patterns of segregation that may not be directly caused by government-enforced actions. Chief Justice Roberts's definition of segregation was clear quite early in the plurality decision. In describing the Seattle school district at the beginning of the opinion, he wrote, "Seattle has never operated segregated schools—legally separate schools for students of different races—nor has it ever been subject to court-ordered desegregation."[86] This very narrowly defines school segregation as being mandated by law and disentangles a legal definition of segregation from empirical definitions, which might be based on racial composition rather than government action.

Justice Kennedy concurred with the distinction in the plurality opinion:

> Our cases recognized a fundamental difference between those school districts that had engaged in *de jure* segregation and those whose segregation was the result of other factors. . . . The distinctions between *de jure* and *de facto* segregation extended to the remedies available to governmental units in addition to the courts.[87]

Yet, Justice Kennedy also acknowledged that "[f]rom the standpoint of the victim, it is true, an injury stemming from racial prejudice 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."[88] Justice Kennedy ultimately concluded, however, that the cases here involved only de facto segregation.

In contrast, Justice Breyer bluntly stated in his dissenting opinion, "The histories [of Seattle's and Jefferson County's desegregation efforts] also make clear the futility of looking simply to whether earlier school segregation was *de jure* or *de facto* in order to draw firm lines separating the constitutionally permissible from the constitutionally forbidden use of 'race-conscious' criteria."[89] He argued that distinguishing between the two types of segregation was meaningless because a district at one time may have had laws segregating students, or there may have been de jure discrimination even in the absence of laws explicitly mandating segregation, but such districts were never subjected to court oversight because they voluntarily complied with *Brown*.[90] In such a situation, Justice Breyer argued, it is impossible to determine whether existing patterns of segregation are a result of de jure discrimination.[91] Further—and perhaps as a result of this view of segregation[92]—Justice Breyer found that there were educational benefits[93] of attending racially diverse schools compared to attending segregated schools.[94]

The plurality opinion, however, dismissed Justice Breyer's argument about the complexity of determining the type of segregation. Chief Justice Roberts wrote:

> The dissent elides this distinction between *de jure* and *de facto* segregation, casually intimates that Seattle's school attendance patterns reflect illegal segregation, and fails to credit the judicial determination—under the most rigorous standard—that Jefferson County had eliminated the vestiges of prior segregation. The dissent thus alters in fundamental ways not only the facts presented here but the established law.[95]

**2. Empirical Data**

Generally, most discussions of "segregated" schools in social science literature refer to what is defined here as racially isolated, meaning the student body is 90%–100% white or nonwhite, and do not contemplate whether or not the racial composition is a result of government-enforced discrimination. Most of the research about the harms of segregated schools has focused on schools defined here as racially isolated nonwhite schools. Thus, before evaluating the claims by the justices, I will first examine the prevalence of racially isolated schools. Here, racially isolated schools are defined as those in which the white or nonwhite percentage of students is at least 90%. These schools can be classified as 1) racially isolated nonwhite schools, in which 90%–100% of students are of color, and 2) racially isolated white schools, in which 90%–100% of students are white.

*a) Racially Isolated White Schools*

Most analyses of segregation, particularly earlier studies, neglect to analyze the isolation of white students, focusing instead on the isolation of black students or, to a lesser extent, Latino students. Professor Gary Orfield, a well-known expert on the issue of K–12 segregation, and his colleagues at the Civil Rights Project (now at the University of California, Los Angeles, formerly at Harvard University) have often noted that white students, when measured using the exposure index, are the most isolated students of any racial/ethnic group.[96] White isolation is consequential not only because of the lack of interracial exposure for white students but also because it limits the exposure for students of other races *to* white students by concentrating white students in schools with other white students.

Reflecting the enduring high levels of white student isolation, in 2005–06, 28.7% of all public schools were racially isolated white schools. This encompassed almost twenty-seven thousand schools in 2005–06. Of note, however, is the fact that the number of such schools has declined in recent

years: there were more than thirty-four thousand racially isolated schools a decade earlier.

Only 3.3% of racially isolated white schools are located in central cities while 27% are located in the suburbs of metropolitan areas.[97] In particular, there are only sixty-four racially isolated white schools in all large cities across the country.[98] More than 58% of racially isolated white schools are in rural areas, and an additional one-ninth of these schools is in small towns. In other words, an overwhelming majority of racially isolated white schools are in areas with low population density, which are areas where the population is likely homogeneous. It would be difficult to integrate these schools regardless of a district's student assignment plan.

*b) Racially Isolated Nonwhite Schools*

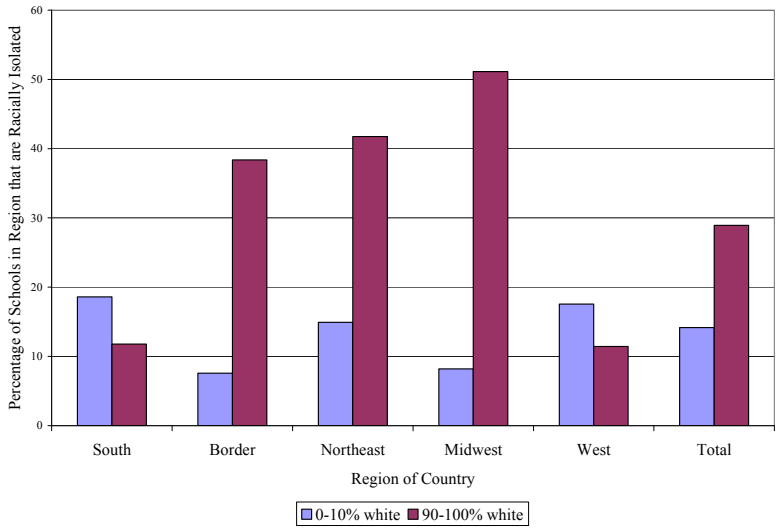
On the other end of the spectrum from racially isolated white schools, 14.5% of schools were racially isolated nonwhite schools, or schools that were at least 90% nonwhite. There were three thousand more racially isolated nonwhite schools in 2005 than in 1995. Approximately half of racially isolated nonwhite schools are either 90%–100% black (4.2% of all schools) or 90%–100% Latino schools (2.7% of all schools). Interestingly, despite the higher number of Latino students among the entire public school enrollment, there are more schools whose enrollment is at least 90% black. Less than 1% of all schools were either 90% American Indian or Asian. Almost 7% of schools did not have any one racial group that comprised at least 90% of students, but the nonwhite population combined to comprise at least 90% of enrollment.

Nearly two-thirds of racially isolated minority schools are located in large metropolitan areas (both city and suburban areas), with almost half (46%) of these schools located in central cities. An additional 15.6% of racially isolated minority schools are located in midsized central cities, and one-tenth of such schools are in rural areas. Significantly, more than half of all schools in large metropolitan areas are racially isolated minority schools.

The South and the West—the two regions with a majority of nonwhite students—are also the two regions of the country in which there are more racially isolated nonwhite schools than racially isolated white schools; this is the reverse of the trend nationally, where there are twice as many racially isolated white schools (see fig. 3). The Midwest in particular has a high concentration of racially isolated white schools; over half of all schools in the region have a student body that is at least 90% white. This suggests that issues of racial isolation differ substantially among regions.

At the same time, in 2005 there were almost twice as many racially isolated white schools as racially isolated nonwhite schools. Yet, with one-tenth of racially isolated nonwhite schools and almost three-fifths of racially isolated white schools located in rural areas, there are actually about one thousand more racially isolated nonwhite schools than racially isolated white schools in nonrural areas. Further, over 43% of all schools were racially isolated in 2005–06, accounting for more than forty thousand schools, demonstrating that despite the trend of increasing multiracial diversity of schools, there was little exposure of whites to nonwhites or vice versa in many schools.

**Figure 3: Percentage of racially isolated white and nonwhite schools by region, 2005–06**




*Source: NCES Common Core of Data, 2005–06; author's calculations.*

*c) Stably Segregated Schools*

As discussed in the previous section, it is important to examine the stability or transition of schools' racial compositions in addition to the racial compositions themselves. For racially isolated schools, an added dimension of segregation would be *stable* segregation over a period of time. While Justice Kennedy's controlling opinion held that districts had a compelling reason to want to avoid racially isolated schools, to fully understand districts' ability to design policies to address racial isolation, it is important to examine the extent to which schools are mired in racial isolation and not just racially isolated at one point in time. Thus, this analysis examines stably segregated schools, which are defined here as schools that were

racially isolated in both 1995 and 2005. There are seventy-four thousand schools for which data exists from both 1995 and 2005.

Of schools with data from both 1995 and 2005, nearly 30% were stably segregated white schools, or 22,377 schools. Of the racially isolated white schools in 2005, almost all of them (97%) were segregated white schools a decade prior, indicating the persistence of white isolation. In other words, virtually all of the racially isolated schools were also stably segregated white schools.

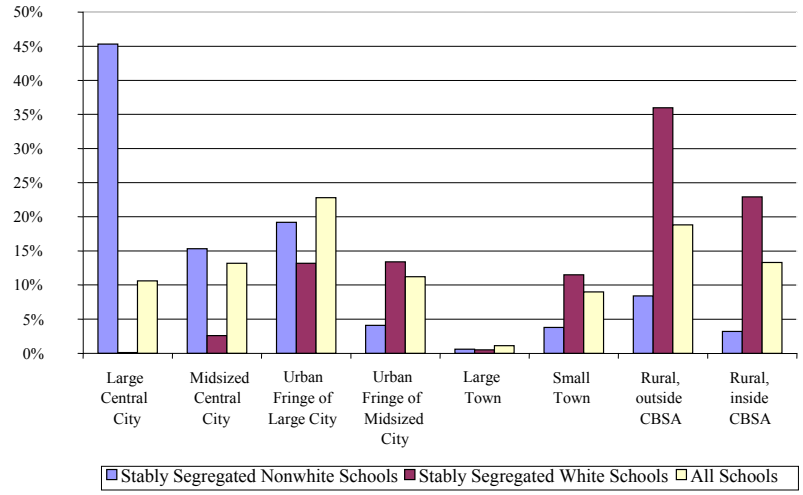
While almost all schools that were racially isolated white in 2005 were similarly isolated a decade prior, data also reveal that slightly more than one in four schools (26.2%) that were racially isolated white in 1995 were *not* racially isolated white in 2005, reflecting a decline in the number of schools with white isolation of students. Six schools even transitioned from 90%–100% white in 1995 to 0%–10% white by 2005. While this only accounts for 0.008% of all schools for which there is racial/ethnic data at both points in time, it does demonstrate that a few schools have gone through dramatic racial transformation in a decade.

Just under one-tenth of all schools (9.8%) were racially isolated nonwhite schools in both 1995 and 2005. Thus, slightly more than 7,400 schools were stably segregated nonwhite schools. In contrast to the trend of racially isolated white schools, virtually all schools that were racially isolated nonwhite schools in 1995 remained so a decade later. Approximately two-thirds of racially isolated nonwhite schools (68%) in 2005 were also racially isolated nonwhite schools in 1995, indicating that approximately one-third of racially isolated nonwhite schools in 2005 had become so in the last decade.

Stably segregated nonwhite schools are concentrated in central cities, particularly in the largest cities (see fig. 4, far left). More than 45% of stably segregated nonwhite schools are in large central cities, with an additional 15% in midsized cities, even though large city schools account for only one-tenth of all schools. Less than 3% of stably segregated white

schools are in either large or midsized central cities. Stably segregated white schools, by contrast, are concentrated in rural areas: nearly 60% are found in rural areas, while only one-ninth of stably segregated *nonwhite* schools are in rural areas. An additional one-quarter of stably segregated white schools are located in suburban areas.

**Figure 4: Location of stably segregated nonwhite and white schools, 2005–06**




*Source: NCES Common Core of Data, Public School Universe 1995–96, 2005–06; author's calculations.*

Taken together, stably segregated schools outnumber stably diverse schools by more than ten thousand. In fact, nearly 40% of all schools are stably segregated. When compared with the fact that only 24.4% of schools are stably integrated, this again demonstrates entrenched segregation in a large number of schools. Given the research showing the educational harms of racial isolation,[99] it is understandable why Seattle, for example, would

devise a student assignment plan to try to eliminate such entrenched segregation.[100]

**3. The Court's Reasoning Versus the Empirical Data**

Considering empirical trends with findings about racial isolation from social science research makes the Chief Justice's narrow view of segregation troubling. The evidence discussed above supports Justice Breyer's contention that racially isolated schools are widespread.[101] It also shows that there are many schools that have *remained* racially isolated for at least a decade, even during a period of substantial racial transition. Although my analysis does not examine the causes of the racial patterns discussed, social science literature has made clear that there are educational disadvantages of racially isolated schools. The harms of racially isolated nonwhite schools are more pronounced for students who attend them—lower high school and college graduation rates, for example[102]—than for students who attend racially isolated white schools, but students attending both types of schools are denied the opportunity to attend racially diverse schools and the benefits associated with attending such schools.

Since research has demonstrated that the disadvantages of segregated minority schools cumulate over the years for students,[103] this trend—that nearly four in ten schools have been racially isolated over the last decade—indicates that it may be difficult for many districts to fulfill their mission of preparing all students, which may be a reason to design policies to try to eliminate such segregation. In addition, we see that the extent of racial isolation differs considerably by the geographic location of the school, and that patterns of racial isolation differ by region. As a result, school boards may be struggling with different kinds of racial isolation, isolation which has proven quite durable, depending on the location of the district's schools.

The plurality opinion's narrow conceptualization of segregation ignores the persistent racial isolation in the nation's schools, which research has shown limits students' life opportunities such as graduation from high

school, college matriculation and completion, and employment.[104] Not acknowledging this empirical reality distorts the plurality's understanding of the racial contexts with which districts across the country are grappling. In failing to acknowledge this empirical reality, the plurality ties school districts' hands in their efforts to integrate their schools and educate their students. Again, this analysis cannot speak to the distinction between the causes of the racial patterns (de facto vs. de jure segregation), but it does demonstrate the pervasiveness of racially isolated schools. While these patterns may not *require* districts to remedy them, it is unfortunate—given the social science evidence about the harms of racially isolated schools—that the plurality did not find that school districts could at least voluntarily design plans, including race-conscious plans, on their own initiative to try to eliminate such schools.

*D. Districts' Interest in Racial Diversity Is a Pretext for Racial Balancing*

**1. The Court's Reasoning**

Supreme Court precedent has consistently ruled that the goal of achieving racial balance in a governmental context is unconstitutional.[105] As Chief Justice Roberts explained this precedent, to allow such a goal would result in people being treated by the government solely as members of certain groups and not as individuals.[106] In the instance of race, he suggested that this would make it impossible to rid the country of racial distinctions.[107]

In the plurality opinion, Chief Justice Roberts repeatedly alleged that the school districts' asserted interest in creating racially diverse schools and avoiding racially isolated schools was a way the school districts tried to obscure the fact that they were actually trying to achieve racial balance:

> The principle that racial balancing is not permitted is one of substance, not semantics. Racial balancing is not transformed from "patently unconstitutional" to a compelling state interest simply by relabeling it "racial diversity." While the school districts use various verbal formulations to describe the interest

> they seek to promote—racial diversity, avoidance of racial isolation, racial integration—they offer no definition of the interest that suggests it differs from racial balance. . . .
>
> Jefferson County phrases its interest as "racial integration," but integration certainly does not require the sort of racial proportionality reflected in its plan.[108]

Yet the Court said in *Grutter* that "context matters when reviewing race-based governmental action under the Equal Protection Clause."[109] And it could be argued from an empirical view that racial demographics were an important part of the context for the different governmental bodies (in this case, the school boards) to determine if and to what extent race-based actions were needed in these two districts—contexts that varied substantially from each other. For example, Justice Kennedy noted, "Due to a variety of factors—some influenced by government, some not—neighborhoods in our communities do not reflect the diversity of our Nation as a whole."[110] While both districts have to operate in contexts of residential segregation, they have different demographic mixes. If integration is regarded as the perfectly even distribution of students among different units (schools),[111] the demographic differences mean that the optimal goal of student racial composition will differ between the districts. As a result of the number of students of different races/ethnicities, it would be theoretically impossible for the two school boards to try to attain the same goal of integrated schools because they could not have identical distributions of students.[112]

Chief Justice Roberts also faulted the districts for not proving that their numerical goals were directly tied to the educational benefits that the districts asserted would result from integrated schools:

> Indeed, in its brief Seattle simply assumes that the educational benefits track the racial breakdown of the district. ("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"). When asked for "a range of

> percentage that would be diverse," however, Seattle's expert said it was important to have "sufficient numbers so as to avoid students feeling any kind of specter of exceptionality."[113]

The educational and psychological research on this issue, however, shows that the numbers of students required to provide a "critical mass" to avoid the "specter of exceptionality" differ.[114] Psychological research also suggests that how such interracial schools are structured is important to realize the benefits of racially diverse student bodies.[115]

**2. Empirical Data**

Decades ago, racial identifiability of schools became one important indicator of the extent of desegregation in many southern schools under court-ordered desegregation plans. Racially identifiable schools are schools in which the white percentage of students *in the school* differs substantially from the white proportion of the school's entire *district*.[116] This served as an indicator of desegregation, not only because it considered whether or not schools were segregated in comparison to the district-wide racial context, but also because federal courts believed that the perception of a school as "black" or "white" affected whether students would attend that school,[117] which would, in turn, threaten whether a school was equal to others in terms of resources allocated and quality of learning. An amicus brief submitted in the *PICS* case summarized Supreme Court precedent on this topic:

> [E]ven once school systems had eliminated "whites only" or "blacks only" schools . . . , the Court remained concerned with whether the school was racially identifiable. . . . [T]he Court has likewise seen "[racially identifiable] black" schools lead to black districts, from which whites have fled for the same reasons.[118]

In my analysis of racial identifiability, schools with a white percentage that is at least ten percentage points greater than the district's white percentage are defined as racially identifiable white schools, while schools with a white percentage that is more than ten percentage points *less* than the

district's white percentage are considered racially identifiable nonwhite schools.

By this definition, more than one-quarter of all public schools in 2005–06 were racially identifiable. Roughly equivalent percentages of school were nonwhite identifiable (13.4%) and white identifiable (12.8%). Combined, these racially identifiable schools account for more than twenty-four thousand schools across the country. Among schools not classified as rural (63,362 schools)—schools that tend to be the only option for students of a given age in a community, which would make these schools unlikely to be racially identifiable—16.9% of schools were nonwhite identifiable. An additional 14.1% of schools were white identifiable. Thus, in communities likely to have more than one school for students at a given level or age, almost one-third of the schools differ substantially from their surrounding districts.

The highest percentage (26.4%) of racially identifiable nonwhite schools was in midsized cities or cities in metropolitan areas with fewer than 250,000 residents; an additional 22.9% of schools in large cities were also classified as nonwhite identifiable. Racially identifiable nonwhite schools are disproportionately located in cities: even though only one-quarter of schools are located in large or midsized cities, 46.3% of all nonwhite identifiable schools were in central cities. A lower percentage of identifiable white schools were located in large or midsized cities, 35.1%. An equal percentage of schools are in suburban areas.

Virtually all of the states with the highest percentages of racially identifiable schools—Louisiana, North Carolina, Florida, Maryland, Nevada, South Carolina—are in the South or border regions, perhaps a reflection both of the large, countywide public school systems that are found in many parts of the South and the growing racial resegregation in the region.[119] In fact, nearly 40% of all schools in the South are racially identifiable: 21% are racially identifiable nonwhite and 18% are racially

identifiable white. The other region with the largest percentages of racially identifiable schools is the West.

**3. The Court's Reasoning Versus the Empirical Data**

Social science evidence has supported the idea that if schools are "identifiable" or "unbalanced," they are likely to become more so over time. Due to a tendency by most individuals to avoid intergroup contact, either consciously or unconsciously, under a school assignment system that gives parents choices about where their children attend school, racially identifiable schools will likely become increasingly identifiable because of implicit stereotypes.[120] Sometimes the decisions about where to send students to school, particularly among middle-class white parents, may even contradict evidence about whether the school is academically rigorous or a good fit for the children.[121] According to the American Psychological Association, "given the choice between two schools of equal quality, parents may not *perceive* the schools as equal. They are therefore likely to choose the school whose student body appears more familiar to them."[122]

Additionally, there is a difference between considering diversity in the context of higher education—where the concept of critical mass was an important justification for the University of Michigan's policies[123]—and in the context of public school systems. In the latter, the assignment of one student will affect not only the racial composition at the school that he or she attends but also, indirectly, all other schools of the same grade level because that student is *not* assigned there. In the higher education context, universities are only concerned with the admissions at their own institutions. Thus, a school district could approve the transfer of a student in an effort to bring both the sending and receiving schools closer to the hoped-for racial composition. In contrast, if the University of Michigan were to deny admission to a student, it would have no direct effect on any other college or university because it is a discrete institution. Accordingly, the systemic, relational nature of student assignment in school districts

differs from the individual admissions processes at universities. K–12 school districts are charged with ensuring that *all* schools are relatively equal and able to educate students who attend each.[124]

This discussion is not meant to imply that Seattle, Louisville, or any other district with a voluntary integration plan has achieving "racial balance" as its sole aim. The evidence here shows that racially identifiable (or racially imbalanced) schools exist to a substantial extent, particularly in the South, despite the focus on eliminating such schools in prior decades. The plurality's decision departs from prior judicial decisions and social science evidence about the importance of accounting for a district's racial context in considering whether there is a concerning pattern of racially identifiable schools. Considering the racial composition of a school is not the only dimension of school segregation; one can also compare a school's racial composition to the entire district, particularly for schools in large districts. My analysis shows that one in four schools is racially identifiable. By declaring that an attempt to address this dimension of segregation is unconstitutional, the Court ignores how the racial perception of a school may affect the school's reputation, which may lead to further segregation as parents, as a result, make educational choices.

*E. No Logical End Point to Districts' Plans*

**1. The Court's Reasoning**

One of the reasons that there has been judicial skepticism about the term "racial balancing" is the concern that there will be "no logical stopping point."[125] Because both the Jefferson County and Seattle plans were constructed in a way that was reflective of the districts' overall racial compositions, the fear, according to the plurality, is that "[a]s the districts' demographics shift, so too will their definition of racial diversity."[126] But this is only natural. If a district sees its measure of diversity as tied to the overall racial composition of the district, as this composition shifts, so too

will its ideal of diversity. In fact, it would become more difficult to keep schools in compliance with racial integration plans if districts did not consider the changing demographic contexts.

In *Grutter*, the Court identified several aspects of the narrow tailoring requirement in the area of higher education. Though the university context differs considerably from the K–12 public school district context, lower courts nevertheless decided to adapt the narrow tailoring questions from *Grutter* in considering the legality of voluntary integration plans in K–12 schools. One of these queries, which was adopted by the Court of Appeals for the First Circuit in evaluating the Lynn, Massachusetts, voluntary integration plan in 2005, included whether the university (or district in this case) had reviewed or periodically would review the plan to determine whether race should still be part of the plan and, if so, whether it could be limited in any way.[127] Lynn successfully met the narrow tailoring requirement by demonstrating that its plan was responsive to changes in the district.[128]

In discussing the benefits of racially diverse schools, Justice Breyer noted in his *PICS* dissent that one result of policies that create diverse schools might be to lessen or eliminate the need for such policies. Citing social science research demonstrating that communities with desegregated schools had encouraged intergroup contact and, consequently, more integrated neighborhoods, he concluded, "[t]hese effects . . . foresee a time when there is less need to use race-conscious criteria."[129] In some districts that have had substantially integrated schools, this perpetuating effect of desegregation may create racial change in neighborhoods that were formerly homogeneous. Thus, while the plurality suggested that taking account of racial changes may create a plan than has no ending point, Justice Breyer countered by suggesting that the changes may ultimately create a district that has no need for race-conscious policies.

**2. Empirical Data**

As mentioned earlier, there has been major racial transition among the entire population and the public school enrollment—a trend that has also occurred in both Seattle and Louisville. Given the dynamic nature of school enrollment, this is another dimension of racial composition worth investigating. Unlike most measures described previously, racial transition is not a fixed measure of school racial composition at one point in time, but instead is a variable that measures the stability or instability of a school's racial composition over a period of time. A school experiencing racial transition may have a racial composition that appears diverse at a given point in time, but this may only be temporary. If, for example, there is a rapid loss of white students, this may create a strained racial atmosphere in the school.

There are several reasons, drawn from segregation literature, to define racial transition by the change in white percentage. First, an analysis of 217 metropolitan areas found that 80% of segregation in public schools was due to segregation between white students and minority students, while the other 20% resulted from segregation among different minority groups.[130] Second, similar to the discussion about racially identifiable schools, the percentage of white students in a school provides signals to parents making choices about where to send their children to school[131] and may also influence teachers in choosing where to work. Third, social science research has demonstrated that schools with low percentages of white students tend to disadvantage the students who attend them.[132]

Despite these salient points, there is little known about what meaning different rates of racial transition have. My analysis matches the racial composition data for schools in 1995–96 and 2005–06 to study the change in white percentage over time. There is racial/ethnic data for both points in time for more than seventy-four thousand schools, which accounts for approximately 80% of all schools that enrolled students in 2005–06.[133]

The average school white-percentage change (or racial transition) was 7.5%, although the median change was 4.5%. This change varied by the grade level of the school. The two measures of central tendency, mean and median, show that high schools are less prone to racial transition than primary (elementary) and middle schools—or perhaps this reflects a wave of younger, nonwhite students who have not yet made it to the higher grades (table 2). The difference between these groups of schools in the means of white-percentage change from 1995 to 2005 is statistically significant.[134]

**Table 2: Change in white percentages of students in schools from 1995–2006**

| School Level | Mean | N | Std. Deviation | Median |
|---|---|---|---|---|
| Primary School | 8.21 | 44,055 | 11.23 | 5.02 |
| Middle School | 7.7 | 12,609 | 9.57 | 5.02 |
| High School | 5.41 | 14,565 | 8.73 | 3.03 |
| Other | 5.33 | 2,968 | 11.93 | 2.92 |
| Total | 7.46 | 74,197 | 10.6 | 4.46 |

*Source: NCES Common Core of Data, Public School Universe 2005–06; author's calculations.*

According to the NCES Common Core Data, the white percentage of the entire public school enrollment in 1995 was 63.3%; in 2005 it was 57.1% white. This was an average annual 0.6 percentage point decline of white students during this ten-year span. Using this average annual white percentage decline, I constructed three categories of white-percentage change from 1995 to 2005: 1) schools whose white percentage increased from 1995 to 2005 are categorized as "negative" because the percentage change of nonwhite students was negative; 2) schools where the white percentage declined at a rate two to three times more than the average rate of racial transition over this time, or schools where white percentage

declined 12%–18%, are categorized as "moderate"; and 3) schools in which the decline of white percentage was more than three times the average rate during the decade, or schools where the white percentage decreased more than 18% over the decade, are categorized as "rapid." These three categories will be used for racially transitioning schools in the analysis going forward. Additionally, two other categories represent slow racial change: "below average" and "slow."

Table 3 demonstrates the frequency of all five categories among all public schools reporting racial/ethnic student data in 1995 and 2005. Interestingly, nearly one-fifth of these schools were negative, experiencing an increase in white percentage from 1995 to 2005 despite the overall trend towards a lower percentage of white students. However, only 2.9% of schools had an increase in white share of 6% or more during the decade, suggesting that most schools with a higher white percentage of students in 2005 than in 1995 had only a small increase.[135] The largest category of schools was that with a below average rate of racial change, or had a decline in white percentage from 0% to 6% from 1995 to 2005. Almost two-fifths of schools fell into this category. One of seven schools experienced rapid racial transition, where the white share declined 18% or more over ten years. An additional 11% of schools experienced moderate racial change. Thus, one-quarter of all schools experienced at least moderate racial change over the decade analyzed, indicating a sizeable loss of white students during this time.

**Table 3: Frequency of racial transition categories**

| White Percentage Change | | Number of Schools | Percent |
|---|---|---|---|
| Negative | < 0% | 13,700 | 18.5 |
| Below Average | 0-6% | 28,377 | 38.2 |
| Slow | 6–12% | 13,537 | 18.2 |
| Moderate | 12–18% | 7,916 | 10.7 |
| Rapid | > 18% | 10,663 | 14.4 |
| Total | | 74,193 | 100 |

*Source: NCES Common Core of Data, Public School Universe 2005–06; author's calculations.*

*a) Further Exploration of Racial Transition*

In addition to assessing the racial transition of all schools, it is important to examine schools that are at least somewhat diverse, which would be indicative of communities where a modicum of diversity might be possible (as opposed to isolated areas that might be racially homogeneous and thus impervious to racial change). Among schools that, in 1995, were at least 5% nonwhite, a higher proportion experienced rapid (19.6%) or moderate (14%) change. Both of these categories had a higher frequency of schools among this subset of schools—schools that were at least 5% nonwhite—than among all schools, as seen in table 3, suggesting that using all schools may underestimate racial change. A similar percentage of schools experienced negative racial change (17.8%) or had a higher white percentage in 2005 than in 1995. In other words, there was a lower percentage of schools that had relatively little racial change when considering schools that had at least a small percentage of nonwhite students in 1995.

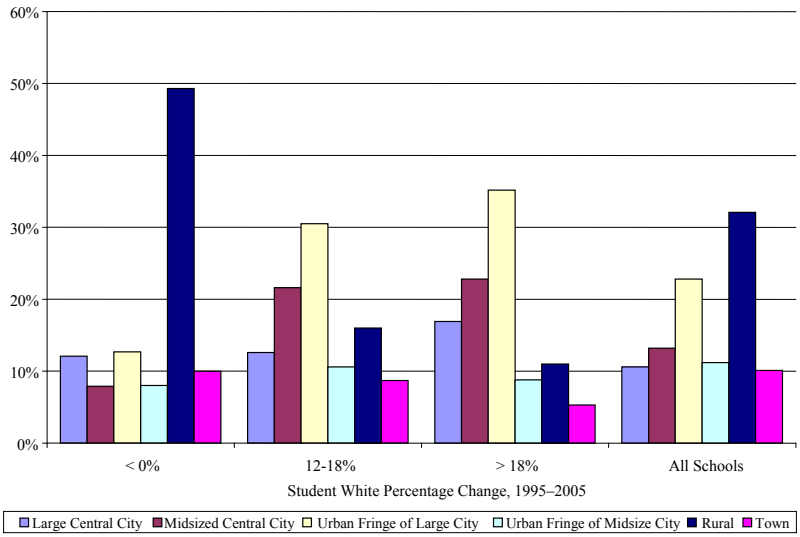
One of the drawbacks of considering the racial change of the entire school is that it might mask demographic changes that are occurring more rapidly in the earlier grades in that school (as seen in table 2, where elementary schools had the largest average racial change), either as a result

of policy changes or a demographic shift.[136] To investigate whether racial transition was masked by using the entire enrollment change, I also examined racial change from 1998 to 2005 for first, sixth, and ninth grades, which are customarily the lowest grade levels for elementary, middle, and high schools, respectively. Examining first, sixth, and ninth grade racial change separately, a higher percentage of schools were classified as rapidly changing than when measured by the overall percentage of enrollment. This indicates that the use of the latter metric, the overall percentage of enrollment, may understate the extent of the occurrence of racial transition.[137]

*b) Location*

Schools experiencing rapid racial change are disproportionately located in central cities or suburban areas in large metropolitan areas. Nearly three-quarters of all schools that are experiencing a rapid decline in the percentage of white students are located in central cities and large suburban areas. Schools in these locations only account for 46.6% of all public schools, which suggests that there is an over-representation of rapidly changing schools in central cities and suburbs in large metropolitan areas. Interestingly, while over one-third of all schools experiencing rapid racial transition were in the suburban areas of large metropolitan areas, only 8.8% were in the suburban areas of midsized metropolitan areas, suggesting that suburban schools in larger metropolitan areas might be more susceptible to racial change than those in smaller ones, where the central city of the metropolitan region is less than 250,000 residents. By contrast, almost half of schools that experienced an increase in white percentage over the decade analyzed are located in rural areas (see fig. 5, far left), although rural schools only account for just over 30% of all public schools.

**Figure 5: Racial transition of schools, 1995–2005, by location of school**




*Source: NCES Common Core of Data, Public School Universe 1995-96, 2005-06; author's calculations.*

### 3. The Court's Reasoning Versus the Empirical Data

Taken together, these data indicate that a substantial share of schools is going through racial transition, even when analyzed using a more conservative measure of racial transition—the white-percentage change of the entire school enrollment. Racial transition is happening faster in younger grades and in cities. At the same time, while the overall student enrollment has a declining white percentage, a large share of schools in rural areas in particular had an *increase* in white percentage over the decade analyzed here.

Why should this matter? While the plurality implicitly acknowledged that changing racial contexts might cause districts to adjust their conceptions of racial integration, it viewed this negatively. If districts had not shifted their definition of diversity from that of the *Brown* era,

desegregation would still be thought of as integrating a small group of black students into an overwhelmingly white school. The demographics discussed earlier indicate that is not the current reality in most parts of the country, and the plurality, in fact, criticized the districts for not having a multiracial conception of diversity.[138] There are a large number of schools experiencing significant changes, either enrolling many more white students (nearly one in five schools) or many fewer white students (nearly one in four schools) over the last decade. Contrary to the plurality's opinion, taking racial transition into account is an important dimension of schools' racial contexts.

The rapid changes described here may also indicate that there are schools in which district assignment policies have been unsuccessful in creating racial stability. Because the *PICS* decision limits the options districts have in crafting such policies, these trends may accelerate in coming years as demographic changes continue. Allowing districts to have flexible, changing conceptualizations of racial diversity may help minimize rapid racial transition.

## IV. DISCUSSION: IMPLICATIONS OF ANALYSIS FOR SCHOOL DISTRICTS IN POST-*PICS* WORLD

What can school districts do in a post-*PICS* world with such a variety of school racial contexts? First, this analysis suggests developing a more intricate understanding of the forces that result in school segregation. Simply looking at racial composition alone is unlikely to uncover the demographic forces within larger districts or over time that may make diverse schools only temporarily diverse, for example. Given the stability of segregated minority schools, there is a need for developing policies that stem racial transition in schools that are maintaining some degree of diversity. In some districts that have a dearth of white students or students of color, district leaders should consider partnering with neighboring districts in a regional approach toward school assignment. Particularly in

the Northeast and Midwest, there is a plethora of small districts that are located in close proximity to one another—these schools are often homogeneous because the school district is homogeneous. Making district boundary lines more permeable for voluntary or cooperative student assignment policies could enhance the opportunities for integration within metropolitan areas.

Second, these multiple racial contexts portend important implications for the educational dimensions of schools. Much of the literature on implementing school desegregation was from a time when desegregation meant mixing black students into formerly all-white schools. As we have seen from this analysis, that simply is not the case in many regions of the country, particularly in metropolitan regions. School leaders should realize that multiracial schools may need to adapt to the presence of three or more groups in ways that biracial schools may not. The perception of schools as racially identifiable may affect myriad decisions in terms of whether students and teachers choose certain schools; it might even affect resource allocation decisions in an unconscious manner. While there are more restricting limits on student assignment policies, there are still many race-neutral as well as race-conscious decisions that districts can make to try to alter patterns of family choice of schools and to encourage choices that will lead to further integration. These efforts, however, cannot happen without conscious attention and dedication of resources—studies of resegregating districts suggest that the costs of not allocating attention and resources before resegregation sets in may be even higher.

Third, as noted, there are a variety of school racial contexts that differ in their frequency across geographies. Thus, unfortunately, there is no single solution for what districts can do.[139] To ensure that a new plan does not further exacerbate existing school or residential segregation or cause flight from the district, careful consideration should be given to the district's demographics. Identifying districts with similar demographics and student assignment plans might aid the consideration of alternatives in a post-*PICS*

era. Additionally, documenting why alternative plans are chosen and the efficacy of plans once implemented is crucial for three reasons: 1) evidence could make the case to the public as to why a plan is necessary since public support is crucial to any voluntary plan; 2) evidence will provide needed information to other similar districts struggling to ascertain what options might be most successful for them; and 3) evidence could be important in meeting the narrow tailoring inquiry should a plan be challenged legally.

Yet we should not lose sight of the larger reasons why such additional efforts—which might seem initially more demanding and fraught with uncertainty—are worth it. There have been decades of struggles in communities across the nation to achieve equal educational opportunity for students of all races/ethnicities. Social science evidence continues to confirm the critical importance of racially diverse schools for students of all backgrounds and the considerable harms for students who attend racially isolated minority schools. In an increasingly diverse society, the costs of segregation to the future of our communities, and indeed to our nation, are great. Districts are faced with the dilemma of increasingly complex racial contexts of schools at a time when designing policies to address the contexts is more challenging then ever. Until a different legal and/or policy climate on these issues emerges—a climate that will provide assistance to districts in understanding changing demographics and the related educational dimensions of such changes—creativity, collaboration, and hard work are needed in localities around the country to prepare our future citizens for their place in our multiracial society.

## V. CONCLUSION

There are a number of points to emphasize from the foregoing analysis. First, racial isolation remains high, particularly the isolation of white students. At the same time, there are thousands of schools across the country going through substantial racial change. While there is a large number of schools that are stably racially diverse—many of which are

located in suburban areas—when a dimension of transition is incorporated into this analysis of school racial composition, it is evident that there is also tremendous instability, particularly among diverse schools. Cities are likely to have rapidly changing schools, and city schools that are stable are overwhelmingly nonwhite. Stubborn pockets of segregation remain: even though white isolation is declining, it still remains high. Further, isolation of nonwhite students is growing: there were more than three thousand additional segregated minority schools in 2005 than there were ten years earlier.

Why is this important? Courts have traditionally deferred to local school authorities to devise their own educational policies because these authorities understand and can adapt to the varied local racial contexts discussed in this article, which differ by community type and region. Only in rare exceptions have courts stepped in, most notably in the area of student assignments following *Brown*—though even then, it took more than a decade of resistance by many school districts before the Court demanded more than token integration to comply with *Brown.* Justice Breyer started his impassioned dissent by criticizing the plurality opinion for going against this traditional deference to localities:

> [I]t distorts precedent, it misapplies the relevant constitutional principles, it announces legal rules that will obstruct efforts by state and local governments to deal effectively with the growing resegregation of public schools, it threatens to substitute for present calm a disruptive round of race-related litigation, and it undermines *Brown*'s promise of integrated primary and secondary education that local communities have sought to make a reality.[140]

This article has outlined different ways in which the racial composition of students in schools can be examined: by composition alone, in comparison to the surrounding school district, or by the racial change (or lack of change) that has occurred in schools' racial composition over time. As public school enrollment has become more racially diverse, the racial

contexts of schools have become more complex. Yet at a time of unprecedented complexity, school districts are being limited in the tools they can use to address segregation and racial change.

There are five bases for the plurality opinion's conclusions discussed in this article, many of which Justice Kennedy also agreed with in his concurring opinion. All but one of these five statements do not reflect the contemporary, racially changing nature of schools but nonetheless lead the five justices to declare that Seattle's and Jefferson County's plans were unconstitutional. As discussed in Part III, the Court's conceptualization of segregation, desegregation, and integration—along with what is required or permitted by the Constitution with regard to each of these terms—is continually being refined. This analysis suggests that on most aspects delineated here, further adaptation of the law is needed to better reflect the empirical reality of public schools at the beginning of the twenty-first century.

This discussion—and the Court's decision—have demonstrated that how we think of the terms "segregation" or "integration" needs to change as student enrollment becomes more diverse. Social science research and demographic analysis demonstrates that there are multiple dimensions of school racial contexts to consider. First, in many areas of the country, segregation or integration is not a binary issue but rather one that involves three or more groups: nearly one in six schools were multiracial in 2005–06. In terms of assigning students to schools and, more importantly, educating these students, it is important to recognize this diverse composition. Second, as resegregation takes hold, particularly in the South, nearly one in four schools is "racially identifiable," meaning that the racial composition of the schools differ substantially from the surrounding districts. Social science evidence suggests that racially identifiable white or nonwhite schools may become even more racially identifiable over time because of how the community, teachers, parents, and prospective students perceive the schools. Finally, incorporating a measure of racial transition into

analyses of segregation may create a more accurate portrayal of the racial context of a school. While just over half of all schools were racially diverse, only about half of those schools were stably diverse, suggesting that the other diverse schools may soon become racially isolated. Additionally, the large extent of stably segregated white and nonwhite schools demonstrates durable segregation in nearly 40% of all public schools.

As districts and policymakers grapple with the Supreme Court's limitations, recognizing the multiple dimensions of school racial contexts in this post-*PICS* environment would help attend to composition, racial transition, and identifiability of schools—all of which impact the success of student assignment plans. While it is too premature to know what the implications of the Court's ruling will be, these limitations may only further increase the number of schools that are racially identifiable, racially isolated, and rapidly changing. Analyses of segregation must become more refined to reflect the multidimensionality of school segregation. If districts and researchers adopt a more nuanced, sophisticated understanding of segregation, perhaps future court decisions will more accurately reflect the racial contexts of schools and will allow districts the tools they need as they strive to enhance the learning opportunities and eliminate isolation and inequality for all students for a diverse world.

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[2] Brown v. Bd. of Educ. of Topeka, 347 U.S. 483 (1954).

[3] *See* Emergency School Aid Act of 1972, 20 U.S.C. §§ 1601–1609 (repealed 1978).

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

[5] *See* Douglas S. Massey & Nancy A. Denton, *The Dimensions of Residential Segregation*, 67 SOC. FORCES 281, 281–315 (1988).

[6] *Id.*

[7] *See* David R. James & Karl E. Tauber, *Measures of Segregation*, 15 SOC. METHODOLOGY 1, 1–32 (1985).
[8] Massey & Denton, *supra* note 5.
[9] James & Tauber, *supra* note 7.
[10] *See generally* Sean F. Reardon, John T. Yun & Tamela M. Eitle, *The Changing Structure of School Segregation: Measurement and Evidence of Multiracial Metropolitan-Area School Segregation*, *1989-1995*, 37 DEMOGRAPHY 351, 351–64 (2000); *see also* Sean F. Reardon & Glenn Firebaugh, *Measures of Multigroup Segregation*, 32 SOC. METHODOLOGY 33, 33–67 (2002).
[11] *See, e.g.*, Edward W. Morris, *From "Middle Class" to "Trailer Trash:" Teachers' Perceptions of White Students in a Predominately Minority School*, 78 SOC. OF EDUC. 99, 99–121 (2005); *see also* Catherine Freeman, Benjamin Scafidi & David Sjoquist, *Racial Segregation in Georgia Public Schools, 1994-2001: Trends, Causes, and Impact on Teacher Quality*, *in* SCHOOL RESEGREGATION: MUST THE SOUTH TURN BACK? (John C. Boger & Gary Orfield eds., 2005).
[12] *See* GARY ORFIELD & CHUNGMEI LEE, THE CIVIL RIGHTS PROJECT, UCLA, HISTORIC REVERSALS, ACCELERATING RESEGREGATION, AND THE NEED FOR NEW INTEGRATION STRATEGIES (2007), *available at* http://www.civilrightsproject.ucla.edu/research/deseg/reversals_reseg_need.pdf; *see also* CHARLES T. CLOTFELTER, AFTER BROWN: THE RISE AND RETREAT OF SCHOOL DESEGREGATION 1–3 (2004).
[13] *See* NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEPT. OF EDUC. & INST. OF EDUC. SCIENCES [hereinafter NCES], http://nces.ed.gov (last visited Mar. 11, 2008).
[14] ORFIELD & LEE, *supra* note 12, at 16.
[15] *Id.*
[16] Clotfelter suggests that a review of a number of studies of northern districts suggests substantial segregation there at the time of the *Brown* decision, but not complete nor legally mandated segregation like that in the South. CLOTFELTER, *supra* note 12, at 13–43.
[17] Plessy v. Ferguson, 163 U.S. 537 (1896).
[18] Brown v. Bd. of Educ. of Topeka, 347 U.S. 483 (1954).
[19] *Id.* at 495.
[20] *See* HARRY ASHMORE, THE NEGRO AND THE SCHOOLS (1954).
[21] *See* ORFIELD & LEE, *supra* note 12, at 13.
[22] Green v. County Sch. Bd. of New Kent County, 391 U.S. 430 (1968).
[23] *Id.* at 435.
[24] *Id.*
[25] Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 22–31 (1971).
[26] Keyes v. Sch. Dist. No. 1, Denver, Colo., 413 U.S. 189 (1973).
[27] In 1947, a California district court held that segregating Latino students violated the Equal Protection Clause. *See* Mendez v. Westminster Sch. Dist. of Orange County, 161 F.2d 774 (9th Cir. 1947).
[28] *Keyes*, 413 U.S. at 197. For perspective, the U.S. Census Bureau did not add a question about Hispanic origin until 1980. In other words, the identification of a Hispanic or Latino group has been a recent development in terms of measuring its size, its educational circumstances, and explicitly granting group members legal rights in the

way that African Americans have been identified (although, like Latinos, who is a member of such a group has also changed over time). *See* Melissa Nobles, *Racial Categorization and Censuses*, *in* CENSUS AND IDENTITY: THE POLITICS OF RACE, ETHNICITY, AND LANGUAGE IN NATIONAL CENSUSES 58 (David I. Kertzer & Dominique Arel eds., 2005).

[29] ORFIELD & LEE, *supra* note 12, at 15.

[30] *See* CLOTFELTER, *supra* note 12.

[31] Milliken v. Bradley, 418 U.S. 717 (1974).

[32] *Id.*

[33] *Id.*

[34] *See* ORFIELD & LEE, *supra* note 12.

[35] Missouri v. Jenkins, 515 U.S. 70, 71 (1995).

[36] Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 25–32 (1971).

[37] Freeman v. Pitts, 503 U.S. 467, 493–95 (1992).

[38] *Id.* at 503.

[39] Brief for Respondents, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738 (2007) (No. 05-908), 2006 WL 2922956, at *5–11 [hereinafter Brief for *PICS* Respondents].

[40] Brief for Respondents, Meredith v. Jefferson County Bd. of Educ., 127 S. Ct. 2738 (2007) (No. 05-915), 2006 WL 2944684, at *4–9 [hereinafter Brief for *Meredith* Respondents].

[41] *Id.* at *4.

[42] Brief for *PICS* Respondents, *supra* note 39, at *6.

[43] Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1 (*PICS*), 127 S. Ct. 2738, 2747 (2007).

[44] "Unitary status" is a court determination that a school district, which once operated a dual, de jure segregated system of schools, has eliminated all school segregation and its effects, and is operating a desegregated, unitary school system. *See* GARY ORFIELD & SUSAN E. EATON, DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF BROWN V. BOARD OF EDUCATION 3 (1997).

[45] Brief for *Meredith* Respondents, *supra* note 40, at *5.

[46] In 2001–02, when the voluntary plan was being implemented, the nonblack composition included 0.1% American Indian, 1.3% Asian, 1.8% Latino, and 62.5% white. As a result, 95% of the nonblack students were white (calculations by author using NCES core data). *See* NCES, *supra* note 13; *see also PICS*, 127 S. Ct. at 2749.

[47] *PICS*, 127 S. Ct. at 2763–64 (citing Grutter v. Bollinger, 539 U.S. 306 (2003)).

[48] *PICS*, 127 S. Ct. at 2763.

[49] *Id.* at 2763–64.

[50] *Id.* at 2754.

[51] *Id.*

[52] *Id.*

[53] *Id.* at 2790–91 (Kennedy, J., concurring).

[54] *Id.* at 2791.

[55] Justice Kennedy, like Chief Justice Roberts, does not address the racial classifications used by Jefferson County, but does fault them for not clearly and uniformly applying the classifications. *Id.* at 2789.
[56] CLOTFELTER, *supra* note 12, at 33.
[57] Calculations by author. *See generally* U.S. CENSUS BUREAU, ANNUAL ESTIMATES OF THE POPULATION BY SEX, RACE, AND HISPANIC OR LATINO ORIGIN FOR THE UNITED STATES: APRIL 1, 2000, TO JULY 1, 2007 (2008), *available at* http://www.census.gov/popest/national/asrh/NC-EST2007-srh.html.
[58] *Id.*
[59] ORFIELD & LEE, *supra* note 12, at 16.
[60] *Id.*
[61] *Id.* at 17.
[62] *Id.* at 17–18.
[63] *Id.*
[64] On the other hand, there have been studies that look at schools with at least 5% of another group. "Critical mass" refers to the minimum number or percentage of students needed to ensure that the group in the minority is not tokenized. RICHARD FRY, PEW HISPANIC CTR., THE CHANGING RACIAL AND ETHNIC COMPOSITION OF U.S. PUBLIC SCHOOLS (2007), *available at* http://pewhispanic.org/files/reports/79.pdf.
[65] In all discussions of students in this article, I use the racial/ethnic categories taken from the NCES definitions. "White" refers to non–Hispanic white students and "black" refers to non–Hispanic black students. Although this does not reflect the growing percentage of multiracial students, for example, these categories have been consistent across time and states, which allows for greater comparison. *See* NCES, *supra* note 13. By the 2010–11 school year, school districts are required to change the way in which they report racial/ethnic data to the Department of Education, classifying students into seven categories instead of the current five categories being used, which will make it difficult to compare trends to earlier years. *See* Final Guidance on Maintaining, Collecting, and Reporting Racial and Ethnic Data to the U.S. Department of Education, 72 Fed. Reg. 59266-02, 59278 (Oct. 19, 2007).
[66] "Substantial share" here means at least 10% of the student body.
[67] Following Orfield's definitions, the region definitions are as follows. **South:** Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Texas, and Virginia. **Border:** Delaware, Kentucky, Maryland, Missouri, Oklahoma, and West Virginia. **Northeast:** Connecticut, Maine, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, and Vermont. **Midwest:** Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Nebraska, North Dakota, Ohio, South Dakota, and Wisconsin. **West:** Arizona, California, Colorado, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming. Alaska and Hawaii are excluded here because of their unique ethnic compositions. *See* GARY ORFIELD & CHUNGMEI LEE, THE CIVIL RIGHTS PROJECT, HARVARD UNIVERSITY, RACIAL TRANSFORMATION AND THE CHANGING NATURE OF SEGREGATION 7 (2006), *available at* http://www.civilrightsproject.ucla.edu/research/deseg/Racial_Transformation.pdf.

[68] Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1 (*PICS*), 127 S. Ct. 2738, 2792–93 (2007).
[69] Brief for *Meredith* Respondents, *supra* note 40, at *4, *5, *7.
[70] *Id.* at *8.
[71] *PICS*, 127 S. Ct. at 2806.
[72] *Id.* at 2760.
[73] Grutter v. Bollinger, 539 U.S. 306, 334–40 (2003) (explaining that the plan used by the Michigan Law School considered race a "plus factor" when holistically considering an applicant's other features for admission (e.g., college GPA, LSAT scores, etc.)).
[74] *PICS*, 127 S. Ct. at 2760.
[75] *See id.* Related, the plurality faults the districts for not considering race-neutral alternatives to the race-conscious aspects of their policies.
[76] He described this situation as one where "individual racial classifications employed in this manner may be considered legitimate only if they are a last resort." *Id.* at 2792 (Kennedy, J., concurring in part and concurring in judgment).
[77] *Id.* at 2792–93.
[78] *Id.* at 2793.
[79] *Id.* at 2825–30 (Breyer, J., dissenting).
[80] *Id.* at 2828.
[81] *Id.* at 2824–28.
[82] THE GEOGRAPHY OF OPPORTUNITY: RACE AND HOUSING CHOICE IN METROPOLITAN AMERICA 23, 45–80 (Xavier de Souza Briggs ed., 2005).
[83] As will be discussed in a later section, using the white percentage change of the entire school may overstate the stability of schools.
[84] *PICS*, 127 S. Ct. at 2801–02 (2007) (Breyer, J., dissenting).
[85] *Id.* at 2801–11.
[86] *Id.* at 2747 (plurality opinion).
[87] *Id.* at 2795 (Kennedy, J., concurring in part and concurring in judgment).
[88] *Id.*
[89] *Id.* at 2810 (Breyer, J., dissenting).
[90] *Id.*
[91] Breyer also noted that in the case of Louisville it was inconceivable that a desegregation plan that would be legal one day would become illegal the next day following a declaration of unitary status. *Id.* at 2811.
[92] For example, he gave deference to districts' assertions of compelling interests in creating diverse schools because he recognized the de facto segregation these districts' policies were trying to address. For a further discussion, see Erica Frankenberg & Liliana M. Garces, *The Use of Social Science Evidence in* Parents Involved *and* Meredith*: Implications for Researchers and Schools*, U. LOUISVILLE L. J. (forthcoming).
[93] Justice Breyer identified three categories of benefits for students: remedial, educational, and democratic. *PICS*, 127 S. Ct. at 2820–22 (Breyer, J., dissenting).
[94] *Id.* at 2820–24.
[95] *Id.* at 2761 (plurality opinion) (internal citations omitted).

[96] For example, white student isolation in public schools in 2005–06 was 77%, while the isolation of Latino students was 55%, and 52% for black students. *See* ORFIELD & LEE, *supra* note 12, at 24.
[97] Geographic location of schools comes from the NCES Common Core of Data's locale code, which categorizes each school: central city (larger than 250,000 residents); midsized central city (smaller than 250,000); urban fringe of large central city; urban fringe of midsized city; large town (larger than 25,000); small town (between 2,500 and 25,000); and rural areas. *See* NCES, *supra* note 13.
[98] Although not an explicit focus here, it is worth noting the overlay of poverty composition here. Out of the nearly 100,000 schools in the United States in 2005–06, more than one in four were schools that were racially isolated white schools. Of these, there were only sixty-four schools in large cities and only *five* schools in large cities and with a majority of poor students. In other words, there are virtually no poor white urban schools, which stands in stark contrast to the prevalence of poor nonwhite urban schools in many of our country's large cities. *Id.*
[99] There is a wealth of social science literature demonstrating a variety of benefits for students of all races—academic, social, psychological—who attend racially diverse schools, particularly if such schools are structured in ways to maximize this racial diversity. *See generally* LESSONS IN INTEGRATION: REALIZING THE PROMISE OF RACIAL DIVERSITY IN AMERICA'S SCHOOLS (Erica Frankenberg & Gary Orfield eds., 2007); Brief of 553 Social Scientists as Amici Curiae in Support of Respondents, *supra* note 4.
[100] Yet, since Seattle's racial diversity tiebreakers only came into effect when schools were oversubscribed, this meant segregated schools that were not chosen by many students were not likely to have much student diversity.
[101] Justice Kennedy also implicitly acknowledged the existence of racial isolation in addition to finding that districts had a compelling reason to avoid isolation. He began his concurring opinion by writing, "In these cases two school districts in different parts of the country seek to teach that principle by having classrooms that reflect the racial makeup of the surrounding community. That the school districts consider these plans to be necessary should remind us our highest aspirations are yet unfulfilled." Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1 (*PICS*), 127 S. Ct. 2738, 2788 (2007).
[102] *See generally* Brief of 553 Social Scientists as Amici Curiae in Support of Respondents, *supra* note 4, at *28–40.
[103] Roslyn Arlin Mickelson, *Subverting Swann: First- and Second-Generation Segregation in the Charlotte-Mecklenburg Schools*, 38 AM. EDUC. RES. J., Summer 2001, at 215–252. Research has not examined whether stably segregated white schools may have cumulative effects on the outcomes of students who attend such schools.
[104] Brief of 553 Social Scientists as Amici Curiae in Support of Respondents, *supra* note 4, at *15 n.20–25, 37–40.
[105] *PICS*, 127 S. Ct. at 2757 (citing Freeman v. Pitts, 503 U.S. 467, 494 (1992)); *see also* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 507 (1989); *see also* Grutter v. Bollinger, 539 U.S. 306, 330 (2003).
[106] *PICS*, 127 S. Ct. at 2757 (citing Miller v. Johnson, 515 U.S. 900 (1995)).
[107] *Id.* at 2758 (quoting City of Richmond, 488 U.S. at 495).
[108] *Id.* at 2758–59.

[109] Grutter, 539 U.S. at 326.
[110] *PICS*, 127 S. Ct. at 2797.
[111] This distribution of students is often measured by the index of dissimilarity. As discussed above, because of the impracticability of interpreting this at a national level, that measure is not used here.
[112] *See PICS*, 127 S. Ct. at 2827 (Breyer, J., dissenting).
[113] *Id.* at 2756 (majority opinion).
[114] *See* NAT'L ACADEMY OF EDUC., RACE-CONSCIOUS POLICIES FOR ASSIGNING STUDENTS TO SCHOOLS: SOCIAL SCIENCE RESEARCH AND THE SUPREME COURT CASES 37–39 (Robert L. Linn & Kevin G. Welner eds., 2007).
[115] *Id.*
[116] Some analyses use a difference of ten percentage points from the systemwide composition to define a racially identifiable school; others use five or fifteen percentage points.
[117] Brief of the Civil Rights Clinic at Howard University School of Law as Amicus Curiae in Support of Respondents, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738 (2007) (Nos. 05-908, 05-915), 2006 WL 2927072, at *15.
[118] *Id.*
[119] ORFIELD & LEE, *supra* note 12, at 33. *See generally* SCHOOL RESEGREGATION: MUST THE SOUTH TURN BACK? (John C. Boger & Gary Orfield eds., 2005).
[120] *See generally* Samuel L. Gaertner & John F. Dovidio, *The Aversive Form of Racism*, *in* PREJUDICE, DISCRIMINATION, AND RACISM 61–89 (John F. Dovidio & Samuel L. Gaertner eds., 1986); *see also* Jeffrey R. Henig, *The Local Dynamics of Choice: Ethnic Preferences and Institutional Responses*, *in* WHO CHOOSES? WHO LOSES?: CULTURE, INSTITUTIONS, AND THE EFFECTS OF SCHOOL CHOICE 95–117 (Bruce Fuller et al. eds., 1996).
[121] *See generally* Jennifer Jellison Holme, *Buying Homes, Buying Schools: School Choice and the Social Construction of School Quality*, 72 HARV. EDUC. REV. 177, 177–205 (2002).
[122] Brief for Amici Curiae the American Psychological Ass'n and the Washington State Psychological Ass'n in Support of Respondents, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738 (2007) (Nos. 05-908, 05-915), 2006 WL 2927084 at *26.
[123] "In *Grutter*, the number of minority students the school sought to admit was an undefined 'meaningful number' necessary to achieve a genuinely diverse student body." Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1 (*PICS*), 127 S. Ct. 2738, 2757 (citing Grutter v. Bollinger, 539 U.S. 306, 316, 335–36 (2003)).
[124] Another major difference, of course, is that universities are not required to accept students who apply while public school districts are required to provide education for all students in a community who wish to attend.
[125] *PICS*, 127 S. Ct. at 2758 (citing City of Richmond v. J. A. Croson Co., 488 U.S. 469 (1989).
[126] *Id.* at 2758.
[127] Comfort v. Lynn Sch. Comm., 418 F.3d 1, 1 (1st Cir. 2005).

[128] *Id.* at 19–23; *see also* Richard Cole, *Fostering an Inclusive, Multiracial Democracy*, *in* LESSONS IN INTEGRATION: REALIZING THE PROMISE OF RACIAL DIVERSITY IN AMERICA'S SCHOOLS 253–54 (Erica Frankenberg & Gary Orfield eds., 2007).
[129] *PICS*, 127 S. Ct. at 2822.
[130] Reardon, Yun & Eitle, *supra* note 10.
[131] Holme, *supra* note 121. *See generally* Salvatore Saporito, *Private Choices, Public Consequences: Magnet School Choice and Segregation by Race and Poverty*, 50 SOC. PROBLEMS 181, 181–203 (2003).
[132] Mickelson, *supra* note 103; Eric A. Hanushek, John F. Kain & Steven G. Rivkin, *New Evidence about* Brown v. Board of Education*: The Complex Effects of School Racial Composition on Achievement* (Nat'l Bureau of Econ. Research, Working Paper, 2006).
[133] There were 1,361 schools in 1995 that did not match existing schools a decade later. The average white percentage in these schools in 1995–96 was 58%, while the average of schools that had matched data was 70.5%. There were 19,879 schools in 2005–06 that did not have matched data (Idaho did not provide the racial/ethnic composition for schools in 1995–96). These schools had an average white percentage of 52.7%, which is lower than the average for matched schools of 57.1%.
[134] The chance that this relationship would occur randomly is less than .001%.
[135] Despite the fact that most increases in the percentages of white students were small, it is again worth emphasizing that these schools' demographic shifts were counter to the larger demographic shifts among the entire U.S. public school enrollment during that time.
[136] During oral arguments, Justice Breyer questioned the Seattle petitioners' counsel as to why he was providing enrollment data from the entire school instead of the ninth grade only. Transcript of Oral Argument, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738 (2007) (No. 05-908), 2006 WL 3486958, at *51–52. Seattle School District's counsel argued that examining the changing enrollment at the ninth grade over time was the clearest way to see the changes between using a race-neutral and a race-conscious student assignment policy. *Supra*, at *38–39.
[137] The categories of racial transition, however, have moderately strong correlations with one another. In particular, there is a positive, moderately strong correlation of the category measuring racial change of the entire school enrollment from 1995 to 2005 with each of the change variables measuring first, sixth, and ninth grade white percentage from 1998 to 2005 (r = .644, .649, and .608, respectively).
[138] Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1 (*PICS*), 127 S. Ct. 2738, 2754 (2007).
[139] Further, there may be legal distinctions as well: whether a district is currently under a remedial order due to prior de jure segregation policies.
[140] *PICS*, 127 S. Ct. at 2800 (Breyer, J., dissenting).