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The Way Forward: Permissible and Effective Race-Conscious Strategies for Avoiding Racial Segregation in Diverse School Districts

Laura Petty

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THE WAY FORWARD: PERMISSIBLE AND EFFECTIVE RACE-CONSCIOUS STRATEGIES FOR AVOIDING RACIAL SEGREGATION IN DIVERSE SCHOOL DISTRICTS

*Laura Petty**

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INTRODUCTION

Despite the dramatic demographic shifts in the overall population in recent decades, most American children still grow up in racially and socioeconomically isolated communities and face deep divisions across measures associated with class, race, income, and educational attainment. At a time when the United States is witnessing broadening wealth stratification¹ and polarization,² schools remain a lone forum for students with different backgrounds, abilities, and perspectives to learn from each other and prepare for a life of democratic participation. A separate and unequal education system does not engender an equitable society or a robust democracy.

In the face of compelling evidence that diverse and integrated schools benefit all children,³ that school desegregation narrows the

1. Emmanuel Saez & Gabriel Zucman, *Wealth Inequality in the United States since 1913: Evidence from Capitalized Income Tax Data*, 131 Q.J. ECON. 519, 519 (2016) (“We find that wealth concentration was high in the beginning of the twentieth century, fell from 1929 to 1978, and has continuously increased since then. The top 0.1% wealth share has risen from 7% in 1978 to 22% in 2012, a level almost as high as in 1929.”).

2. *Political Polarization in the American Public*, PEW RES. CTR. (June 12, 2014), <https://www.people-press.org/2014/06/12/political-polarization-in-the-american-public/> [<https://perma.cc/3U2F-UWHG>] (“Republicans and Democrats are more divided along ideological lines — and partisan antipathy is deeper and more extensive — than at any point in the last two decades.”); see also Zaid Jilani & Jeremy Adam Smith, *What Is the True Cost of Polarization in America?*, GREATER GOOD MAG. (Mar. 4, 2019), https://greatergood.berkeley.edu/article/item/what_is_the_true_cost_of_polarization_in_america [<https://perma.cc/Y9K9-KNVF>] (linking political polarization in the United States to racially segregated schools).

3. See Eric A. Hanushek et al., *New Evidence about Brown v. Board of Education: The Complex Effects of School Racial Composition on Achievement* 28 (Nat’l Bureau of Econ. Research, Working Paper No. 8741, 2002) (finding that using an “overall estimate of the impact” of attending a desegregated school “on black performance [in Texas, and] equalizing the black distribution throughout the entire state for . . . grades 5–7” is “consistent with an increase in black seventh grade achievement of 0.19 standard deviations[,] amount[ing] to slightly more than one-quarter of the seventh grade achievement gap between blacks and whites”); AMY STUART WELLS ET AL., THE CENTURY FOUND., *HOW RACIALLY DIVERSE SCHOOLS AND CLASSROOMS CAN BENEFIT ALL STUDENTS* (2016), <https://tcf.org/content/report/how-racially-diverse-schools-and-classrooms-can-benefit-all-students/> [<https://perma.cc/9B4A-UDCW>] (“[R]esearchers have documented that students’ exposure to other students who are different from

overall achievement gap between Black and White students,⁴ and that “segregation is harmful for all students,”⁵ all the branches of the Federal Government — courts, agencies, and the legislature — have repeatedly blocked or discouraged local efforts to desegregate or integrate schools.⁶ And while segregation by race often falls along school district lines or between public and private systems,⁷ many school districts, particularly those in large metropolitan areas, remain or have become increasingly⁸ racially segregated.⁹ When segregation occurs within school districts, local leaders can choose to take action to pursue integration.

The Supreme Court’s majority-less decision in *Parents Involved in Community Schools v. Seattle School District*¹⁰ has caused confusion and debate over whether race can be used explicitly in school assignment policies aimed at increasing school diversity.¹¹ And the

themselves and the novel ideas and challenges that such exposure brings leads to improved cognitive skills, including critical thinking and problem solving.”).

4. In recognition that they are social constructs, this Note capitalizes adjectives used to describe race. However, when quoting other authors who do not capitalize those terms, this Note preserves original spelling.

5. ROSLYN ARLIN MICKELSON, THE NAT’L COAL. ON SCH. DIVERSITY, SCHOOL INTEGRATION AND K–12 OUTCOMES: AN UPDATED QUICK SYNTHESIS OF THE SOCIAL SCIENCE EVIDENCE 1 (2016), <https://www.school-diversity.org/pdf/DiversityResearchBriefNo5.pdf> [<https://perma.cc/3V4P-3UKZ>].

6. See *infra* Part I, Sections II.B, II.C.

7. See Ann Owens, *Income Segregation between School Districts and Inequality in Students’ Achievement*, 9 SOC. EDUC. 1, 17 (2018) (finding that “income segregation between districts . . . contributes to the black-white test score gap”); Aaron J. Saiger, *Local Government without Tiebout*, 41 URB. LAW. 93, 93–94 (2009).

8. See U.S. GOV’T ACCOUNTABILITY OFFICE, BETTER USE OF INFORMATION COULD HELP AGENCIES IDENTIFY DISPARITIES AND ADDRESS RACIAL DISCRIMINATION 10 (2016), <https://www.gao.gov/assets/680/676745.pdf> [<https://perma.cc/S88V-HAGB>] (“Over time, there has been a large increase in schools that are the most isolated by poverty and race.”).

9. CLARA HEMPHILL & NICOLE MADER, THE NEW SCHOOL CTR. FOR N.Y.C. AFFAIRS, SEGREGATED SCHOOLS IN INTEGRATED NEIGHBORHOODS: THE CITY’S SCHOOLS ARE EVEN MORE DIVIDED THAN OUR HOUSING 2 (2016), <https://static1.squarespace.com/static/53ee4f0be4b015b9c3690d84/t/57336ad87da24f10a9e2e710/1462987481246/Segregated+Schools+In+Integrated+Neighborhoods.pdf> [<https://perma.cc/C674-LYJ3>] (finding that schools in New York City are largely racially segregated even in racially diverse neighborhoods).

10. 551 U.S. 701 (2007).

11. See Rebecca M. Abel, Note, *Drawing the Lines: Pushing Past Arlington Heights and Parents Involved in School Attendance Zone Cases*, 2012 BYU EDUC. & L.J. 369, 390 (2012) (arguing that school districts should simply “avoid a finding that race was a ‘motivating factor’ in their decision[-]making process”); cf. Craig R. Heeren, *Together at the Table of Brotherhood: Voluntary Student Assignment Plans and the Supreme Court*, 24 HARV. BLACK LETTER L.J. 133, 136 (2008) (reviewing permissible uses of race according to Justice Kennedy’s concurrence).

position of the United States Department of Education (DOE) has vacillated among changing administrations over whether Justice Kennedy's concurrence in *Parents Involved* permits the use of race in school assignment plans.¹² But more recent circuit precedent¹³ and the bold efforts of a handful of school districts¹⁴ reveal a permissible and effective way to consciously use race to avoid segregation among schools. Meanwhile, most school district leaders, left with unclear directives and the threat of legal action, have avoided using race in school assignment policies altogether.¹⁵

Upon close examination of the opinions in *Parents Involved*, Justice Kennedy's concurrence explicitly permits general recognition of race when crafting school assignment policies,¹⁶ and a majority of the justices recognized racial diversity in K–12 schools as a compelling

12. See discussion in Part II of this Note. This Note only discusses the use of race in school assignment plans when used for the purpose of increasing equity, avoiding racial isolation, and remedying past discrimination. The explicit use of race to segregate students in schools is uncontroversially unconstitutional. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (holding that “[s]eparate educational facilities are inherently unequal” and violate the Fourteenth Amendment).

13. Each circuit court decision addressing race-conscious designs of school zones since *Parents Involved* has declined to apply strict scrutiny. See *Spurlock v. Fox*, 716 F.3d 383 (6th Cir. 2013); *Doe v. Lower Merion Sch. Dist.*, 665 F.3d 524 (3d Cir. 2011); *Lewis v. Ascension Par. Sch. Bd.*, 662 F.3d 343 (5th Cir. 2011).

14. See *infra* Sections III.A.i–v.

15. Jeremy Anderson & Erica Frankenberg, *Voluntary Integration in Uncertain Times*, PHI DELTA KAPPAN (Jan. 21, 2019), <https://www.kappanonline.org/voluntary-integration-in-uncertain-times-anderson-frankenberg/> [https://perma.cc/44MV-XHAN].

This back-and-forth over what is and isn't permissible has had a chilling effect on school districts' voluntary integration plans. While some districts have forged ahead, others have given up on their plans, fearing that whatever approach they choose would run into legal challenges. And to the extent that districts continue to pursue voluntary integration at all, they now tend to default to the use of race-neutral criteria, which, we argue, has made them less effective than race-conscious policies would be in creating racially diverse schools.

Id.

After *Parents Involved*, school district leaders in Rock Hill, South Carolina began using “balance” in place of “integration” and “desegregation” in school assignment plans. See Stephen Samuel Smith, *Still Swimming against the Resegregation Tide? A Suburban Southern School District in the Aftermath of Parents Involved*, 88 N.C. L. REV. 1145, 1151 (2010).

16. See *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist.*, 551 U.S. 701, 788 (2007) (Kennedy, J., concurring) (observing that mechanisms that are race-conscious but do “not lead to different treatment based on a classification” would not trigger strict scrutiny).

state interest.¹⁷ Their recognition is critical because diverse schools, classrooms, and experiences are essential for creating an equitable education system¹⁸ and readying students for democratic participation.¹⁹ Finding fair, equitable, and legally permissible ways to consider race in school assignment policies²⁰ remains necessary to achieve racially diverse schools in pursuit of a more robust democracy.

17. See *id.* at 783 (Kennedy, J., concurring) (“Diversity, depending on its meaning and definition, is a compelling educational goal a school district may pursue.”); see also David Armor & Stephanie Duck O’Neill, *After Seattle: Social Science Research and Narrowly Tailored Desegregation Plans*, 112 TCHRS. C. REC. 1705, 1706 (2010) (pointing out that five of the nine justices recognized diversity as a compelling interest in K–12 education). The way that Supreme Court Justices have framed diversity as a compelling interest as a benefit for White students, some argue, only “reaffirms notions of racial superiority among Whites.” See Osamudia R. James, *White Like Me: The Negative Impact of the Diversity Rationale on White Identity Formation*, 89 N.Y.U. L. REV. 425, 426 (2014). Rather than framing desegregation as a civil rights issue for Black people, the rationale for diversity as a compelling government interest reinforces a sense of entitlement to traditionally White spaces. See *id.*

18. Gary Orfield, *Introduction, the Southern Dilemma: Losing Brown, Fearing Plessy*, in *SCHOOL RESEGREGATION: MUST THE SOUTH TURN BACK?* 7–8 (John Charles Boger & Gary Orfield eds., 2005) (finding that “the black-white achievement gap closed substantially during the desegregation era” and observing that “the conservative agenda of the late 1980s and the 1990s was implemented at the same time that reversals of some of these gains took place”).

19. See MICHAEL A. REBELL, *FLUNKING DEMOCRACY: SCHOOLS, COURTS, AND CIVIC PARTICIPATION* 93 (2018) (“To prepare students to function productively as civic participants in this dynamic, increasingly varied American society, schools today need not merely to tolerate diversity but also to embrace it and to provide students with knowledge, skills, experiences, and values appropriate to the task.”). Experience in desegregated classrooms also increases the likelihood of greater tolerance and better intergroup relations among adults of different racial groups and increases civic engagement. See NAT’L ACAD. EDUC., *COMM. ON SOC. SCI. RES. EVIDENCE ON RACIAL DIVERSITY IN SCHS., RACE-CONSCIOUS POLICIES FOR ASSIGNING STUDENTS TO SCHOOLS: SOCIAL SCIENCE RESEARCH AND THE SUPREME COURT CASES 2* (Robert L. Linn & Kevin G. Welner eds., 2007); WELLS ET AL., *supra* note 3 (“One meta-analysis synthesized twenty-seven studies on the effects of diversity on civic engagement and concluded that college diversity experiences are, in fact, positively related to increased civic engagement.”).

20. While some have called for relying only on socioeconomic indicators in school reassignment plans, see L. Darnell Weeden, *Income Integration as a Race-Neutral Pursuit of Equality and Diversity in Education after the Parents Involved in Community Schools Decision*, 21 U. FLA. J.L. & PUB. POL’Y 365, 380 (2010), research points to the limitations of this approach in achieving racial diversity. See Jonathan D. Glater & Alan Finder, *School Diversity Based on Income Segregates Some*, N.Y. TIMES (July 15, 2007), <https://www.nytimes.com/2007/07/15/education/15integrate.html> [<https://perma.cc/8PS8-NQUJ>]; Anderson & Frankenberg, *supra* note 15.

Because local leaders have historically exercised discretion over school assignment policies,²¹ this Note argues that even though the era of federal civil rights enforcement has waned,²² federal jurisprudence provides legally permissible opportunities for diverse school districts to implement effective policies for desegregating schools.²³ Namely, school districts can access neighborhood-level demographic data to inform race-conscious school choice or school zoning policies.

Part I of this Note provides a brief overview of the history and social science research related to school desegregation then defines terms to be relied upon. Part II outlines the *Parents Involved* holding, highlighting the points where a majority of the justices agreed. Part II also describes how the circuits and the DOE have read *Parents Involved* to apply race-conscious school assignment policies. Part III examines the policies of certain school districts that do use race explicitly and draws lessons from this strategy that other school districts should consider. This Note argues that effective race-conscious policies — like those in Berkeley, Nashville, Montclair, Tampa, and Louisville — remain legally permissible and should serve as a model for other metropolitan school districts to pursue their own voluntary efforts to combat racial segregation in schools.

I. THE USE OF RACE IN SCHOOL ASSIGNMENT: A POLICY PERSPECTIVE

This Part briefly overviews the history of race-based, government-enforced school segregation, and Civil Rights Era desegregation enforcement. Then, this Part reviews social science research related to school desegregation and describes flaws and injustices in the

21. See *Milliken v. Bradley*, 418 U.S. 717, 741–42 (1974) (“No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process.”); *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) (“By and large, public education in our Nation is committed to the control of state and local authorities.”). But see *Shelton v. Tucker*, 364 U.S. 479, 487 (1960) (“[T]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.”); *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294, 299 (1955) (“Full implementation of . . . constitutional principles may require solution of varied local school problems. School authorities have the primary responsibility for . . . solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles.”).

22. See generally Sean F. Reardon et al., *Brown Fades: The End of Court-Ordered School Desegregation and the Resegregation of American Public Schools*, 31 J. POL’Y ANALYSIS & MGMT. 876 (2012) [hereinafter Reardon et al., *Brown Fades*].

23. See *infra* Sections III.A.i–v.

implementation of school desegregation in the past. Finally, this Part distinguishes the terms used in this Note.

When the Supreme Court decided the landmark case *Brown v. Board of Education*,²⁴ schools throughout the country were segregated by race due to deliberate and explicit government policies.²⁵ This was true in places — largely but not only in the South — that segregated children according to their racial classification. In cities in the North, school officials more commonly segregated students by drawing school zones in accordance with segregated housing patterns.²⁶

Although *Brown* famously declared that “[s]eparate educational facilities are inherently unequal,”²⁷ federal courts did not begin actively enforcing the holding until the 1960s.²⁸ Part of this was attributable to *Brown II*²⁹ vague and contradictory directive that court enforcement should move ahead “with all deliberate speed,”³⁰ and to the federal government’s general reticence to enforce desegregation before the passage of the Civil Rights Act of 1964.³¹

24. 347 U.S. 483 (1954).

25. During the 1954–1955 school year, 0.001% of Black elementary or secondary school children in the South attended school with White children. GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 50 (2d ed. 2008) (reporting percentages of Black students attending school with White students in the South between 1954 and 1973).

26. This was often well-documented. For example, the Seattle School Board had a long history of creating school boundaries based on race. *See infra* note 94.

27. *Brown*, 347 U.S. at 495.

28. Following *Brown II*, the Supreme Court did not speak on the issue again until *Green v. County School Board*, 391 U.S. 430 (1968). JUSTIN DRIVER, *THE SCHOOLHOUSE GATE; PUBLIC EDUCATION, THE SUPREME COURT, AND THE BATTLE FOR THE AMERICAN MIND* 263 (2018).

29. *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294 (1955).

30. *Id.* at 301; *see also* DRIVER, *supra* note 28, at 256 (“Observers assert that this phrasing is and the opinion generally represented the height of cowardice, betraying black schoolchildren by remanding the case to lower courts and refusing to grant immediate relief.”).

31. *See* ROSENBERG, *supra* note 25, at 47 (“The 1964 act . . . had a major impact on school desegregation.”); *see also* ERICA FRANKENBERG ET AL., *THE CIVIL RIGHTS PROJECT, HARMING OUR COMMON FUTURE: AMERICA’S SEGREGATED SCHOOLS 65 YEARS AFTER BROWN* 4 (2019) (“[T]he passage of the 1964 Civil Rights Act as well as a series of Supreme Court decisions in the 1960s and early 1970s produced momentum towards increased desegregation for Black students that lasted until the late 1980s.”). Critically, the “Northern and Western” drafters of the bill, “drew a sharp distinction between segregation by law in the South and so-called ‘racial imbalance’ in the North.” JEANNE THEOHARIS, *A MORE BEAUTIFUL AND TERRIBLE HISTORY: THE USES AND MISUSES OF CIVIL RIGHTS HISTORY* 46 (2018). From this compromise, the Civil Rights Act provides that “[d]esegregation” means the assignment of students to public schools . . . without regard to race . . . but . . . not . . . the assignment of students . . . to overcome racial balance.” The Civil Rights Act of 1964, 42 U.S.C. § 2000c(b) (1964).

Following the Supreme Court's decision in *Green v. County School Board*, which established an "affirmative duty" on school districts to desegregate their schools by any means,³² federal courts began to aggressively enforce *Brown's* holding.³³ But enforcement was generally limited to the South because of a distinction that the Court drew between what it called de facto and de jure segregation.³⁴ This distinction limited remedies to school districts that the Court determined had previously had school assignment policies explicitly based on students' individual races, as opposed to policies that targeted communities or exploited existing housing segregation.³⁵

Keyes v. School District No. 1,³⁶ arguably the apogee of the Supreme Court's assertive role in school desegregation enforcement, extended court-ordered desegregation to regions outside the Southeast. As Justice Powell declared in his concurrence:

The focus of the school desegregation problem has now shifted from the South to the country as a whole. Unwilling and footdragging as the process was in most places, substantial progress toward achieving integration has been made in Southern States. No comparable progress has been made in many nonsouthern cities with large minority populations primarily because of the de facto/de jure distinction nurtured by the courts and accepted complacently by

32. 391 U.S. at 437, 439 ("The obligation of the district courts . . . is to assess the effectiveness of a proposed plan in achieving desegregation It is incumbent upon the school board to establish that its proposed plan promises meaningful and immediate progress toward disestablishing state-imposed segregation."). *Green* made clear that "the time for 'all deliberate speed' had elapsed." DRIVER, *supra* note 28, at 263.

33. See James Ryan, *The Real Lessons of School Desegregation*, in FROM SCHOOLHOUSE TO COURTHOUSE: THE JUDICIARY'S ROLE IN AMERICAN EDUCATION 73, 77 (Joshua M. Dunn & Martin R. West eds., 2009).

34. This distinction has been traced to a compromise written into the Civil Rights Act of 1964, which distinguished "segregation" from "racial imbalance." 42 U.S.C. § 2000c(b); see Erica Frankenberg & Kendra Taylor, *De Facto Segregation: Tracing a Legal Basis for Contemporary Inequality*, 47 J.L. & EDUC. 189, 193 (2018); see also Robert L. Carter, *De Facto School Segregation: An Examination of the Legal and Constitutional Questions Presented*, 16 CASE W. RES. L. REV. 502, 504 (1965) (arguing that the "de facto" label, generally applied in the North, allowed those school districts to escape desegregation); Richard Rothstein, *Modern Segregation*, ECON. POL'Y INST. (Mar. 6, 2014), <https://www.epi.org/publication/modern-segregation/> [https://perma.cc/4WCZ-H224] (listing a host of examples of government actions to segregate communities by race, which the courts consider to be "de facto"). After the Supreme Court upheld an extensive desegregation plan in Charlotte, Carolina, the editorial board of the *Clarion-Ledger*, a Jackson, Mississippi newspaper, commented that "many Southern families seeking segregated public schools for their children might find it necessary to emigrate North." DRIVER, *supra* note 28, at 270.

35. See *Milliken v. Bradley*, 418 U.S. 717, 755 (1974).

36. 413 U.S. 189 (1973).

many of the same voices which denounced the evils of segregated schools in the South. But if our national concern is for those who attend such schools, rather than for perpetuating a legalism rooted in history rather than present reality, we must recognize that the evil of operating separate schools is no less in Denver than in Atlanta.³⁷

In 1988, after two decades of race-conscious enforcement of *Brown*'s holding, American schools were more desegregated than at any other point in history,³⁸ largely because of federal enforcement in the South.³⁹ Despite its limited enforcement power, the height of school desegregation in the United States corresponded with the narrowest overall Black-White achievement gap in our nation's history⁴⁰ — not because Black students need to be seated next to White students to achieve higher average test scores, rather because no one has been able to create a system to scale that equitably distributes resources to children of color in segregated schools.⁴¹

37. See *id.* at 218–19 (Powell, J., concurring in part and dissenting in part) (internal footnotes omitted).

38. See generally GARY ORFIELD ET AL., THE CIVIL RIGHTS PROJECT/PROYECTO DERECHOS CIVILES, *BROWN AT 62: SCHOOL SEGREGATION BY RACE, POVERTY, AND STATE 3* (2016) (“The year 1988 was the high point of desegregation for black students in terms of the share of students in majority white schools.”); Reynolds Farley, *Racial Integration in the Public Schools, 1967 to 1972: Assessing the Effects of Governmental Policies*, 8 SOC. FOCUS 3 (1975) (“The Civil Rights Act of 1964 and a variety of encompassing federal court decisions in the late 1960s challenged and overturned the dual school system in the South and many segregationist practices in the North.”).

39. See RUCKER C. JOHNSON, CHILDREN OF THE DREAM: WHY SCHOOL INTEGRATION WORKS 56 (2019) (depicting school desegregation court order dates in the “South” and “non-South”).

40. See *id.* at 60 (conducting a series of data analysis and finding, among other things, “a striking increase in educational attainment for black children that grows as the number of years of exposure to school desegregation increases” and concluding that “integration, when implemented in a holistic fashion, has the power to break the cycle of poverty and can benefit all groups, regardless of race and ethnicity”); Orfield, *supra* note 18, at 7 (“The black-white achievement gap closed substantially during the desegregation era (1964 through the late 1980s), particularly in the South, although the gaps have grown wider during the recent resegregation period.”); David Card & Jesse Rothstein, *Racial Segregation and the Black-White Test Score Gap* 34 (Nat'l Bureau of Econ. Research, Working Paper No. 12078, 2006) (finding that racial segregation in schools explained 25% of the overall gap between SAT scores of Black and White students, even within school districts).

41. See *Event: Separate and Unequal: How School Investment and Integration Matter* (Nov. 21, 2019), YOUTUBE, <https://www.youtube.com/watch?v=TRdDP-UGBH0> [<https://perma.cc/P7U7-WDS5>] [hereinafter *Separate and Unequal*] (Sean F. Reardon explaining why school integration is the only hope for achieving equity in education); see also JOHNSON, *supra* note 39, at 84 (displaying spending disparities between rich and poor school districts, by state). In fact, large scale expanded funding to socioeconomically disadvantaged communities have seen marked gains in student achievement. See JOHNSON, *supra* note 39, at 127 (“[T]he magnitude of the effects of the New Jersey finance reforms was large enough to close about 20 percent of the

School desegregation is alone among education reforms for its track record reducing inequality in educational and student outcomes at a large scale.⁴² As Sean F. Reardon, the author of a 2019 study comparing the effects of school segregation on racial disparities in academic achievement, observed:

It doesn't seem that we have any knowledge about how to create high-quality schools at scale under conditions of concentrated poverty . . . [a]nd if we can't do that, then we have to do something about segregation. Otherwise we're consigning Black and Hispanic and low-income students to schools that we don't know how to make as good as other schools. The implication is that you have got to address segregation.⁴³

Reardon and his co-authors analyzed every school district in the country and failed to identify “a single . . . district . . . where Black and Hispanic students were learning apart from White students and performing well with test scores that weren't lagging behind those of White students.” And “[i]n the cases where achievement gaps were

achievement gap between high- and low-income districts.”). Typically, however, school funding formulas across the country benefit wealthier communities, *see How Do School Funding Formulas Work?*, URB. INST. (Nov. 29, 2017), <https://apps.urban.org/features/funding-formulas/> [<https://perma.cc/LFJ3-ZJ93>] (explaining how the most common school funding model among states, based on local property taxes, allows “property-wealthy districts [to] spend more per student than . . . property-poor districts”), as does local PTA fundraising. *See* Suzanne Cope, *The Power of a Wealthy PTA: Thanks to Parents' Donations, Some Public Schools Can Afford Shiny Extras like Coding Classes, Camping Trips, and Classroom iPads*, ATLANTIC (Nov. 5, 2019), <https://www.theatlantic.com/education/archive/2019/11/pta-fundraising-schools/601435> [<https://perma.cc/TSP4-MTRW>].

42. *See supra* note 40 and accompanying text. That is not to say that smaller scale efforts have not been effective or that effectiveness does not vary among schools in high-poverty communities — it certainly does. *See* Sean F. Reardon, *Educational Opportunity in Early and Middle Childhood: Variation by Place and Age 3* (Stanford Ctr. for Educ. Policy Analysis, Working Paper No. 17-12, 2018), <https://cepa.stanford.edu/sites/default/files/wp17-12-v201803.pdf> [<https://perma.cc/84A6-4CN4>] (finding that the “role of schooling . . . in shaping educational opportunity . . . varies across school districts”).

43. Sean F. Reardon et al., *Is Separate Still Unequal? New Evidence on School Segregation and Racial Academic Achievement Gaps* (Stanford Ctr. for Educ. Policy Analysis, Working Paper No. 19-06, 2019) [hereinafter Reardon et al., *Is Separate Still Unequal?*]; *see also* Jill Barshay, *An Analysis of Achievement Gaps in Every School in America Shows That Poverty Is the Biggest Hurdle*, HECHINGER REP. (Sept. 23, 2019), <https://hechingerreport.org/an-analysis-of-achievement-gaps-in-every-school-in-america-shows-that-being-poor-is-the-biggest-hurdle/> [<https://perma.cc/5J3S-UVTT>] (providing an overview of a new study finding school poverty rates to be the strongest predictor in student achievement).

small, such as Detroit, achievement was low for both Black and White students.”⁴⁴

However, statistical desegregation — the focus of Civil Rights Era enforcement — alone is not a panacea,⁴⁵ and *Brown* was not about raising test scores. *Brown* was about “giving Black children access to majority culture, so they could negotiate it more confidently.”⁴⁶ Recent research indicates that aside from benefitting the academic and professional outcomes of students — including White students⁴⁷ — racially diverse schools foster cultural competencies and civic engagement.⁴⁸ Racially diverse schools are also associated with “higher educational and occupational attainment across all ethnic groups, better intergroup relations, greater likelihood of living and working in an integrated environment, lower likelihood of involvement with the criminal justice system, espousal of democratic values, and greater proclivity for aspects of civic engagement.”⁴⁹ Moreover, integrated schools reflect a truly democratic society, where students are given the chance to interact with a community that reflects the community they live in, “helping them forge a sense of shared purpose.”⁵⁰

Despite leading to overall gains in academic achievement for Black students, Civil Rights Era school desegregation came with many costs: chiefly, that the burden was borne by Black students, families, and teachers.⁵¹ When courts ordered school districts to desegregate, it was

44. See Barshay, *supra* note 43, at 3.

45. See AMANDA E. LEWIS & JOHN B. DIAMOND, *DESPITE THE BEST INTENTIONS: HOW RACIAL INEQUALITY THRIVES IN GOOD SCHOOLS* 168 (2015) (explaining how structural inequalities and perceptions of race affect students of different races in racially diverse schools, often to the detriment of Black and Latinx students).

46. JONATHAN KOZOL, *THE SHAME OF THE NATION: THE RESTORATION OF APARTHEID SCHOOLING IN AMERICA* 229 (2005).

47. Roslyn Arlin Mickelson et al., *Integrated Schooling, Life Course Outcomes, and Social Cohesion in Multiethnic Democratic Societies*, 36 *REV. RES. EDUC.* 197, 208 (2012) (“[I]ntegrated education is positively related to k–12 school performance, cross-racial friendships, acceptance of cultural differences, and declines in racial fears and prejudice.”).

48. See REBELL, *supra* note 19.

49. See JOHNSON, *supra* note 39, at 60.

50. MARTHA MINOW, *IN BROWN’S WAKE: LEGACIES OF AMERICA’S EDUCATIONAL LANDMARK* 150 (2010).

51. See ANSLEY T. ERICKSON, *MAKING THE UNEQUAL METROPOLIS: SCHOOL DESEGREGATION AND ITS LIMITS* 18 (2016) (in enforcing desegregation, “local school and municipal officials alongside federal officials and judges repeatedly made choices about desegregation that privileged suburban usually white schools and communities and undermined urban, usually black schools and communities”); see also *id.* at 19–20

often Black schools that were closed, Black students who had to travel to other neighborhoods, Black teachers who were laid off, and Black people who had to face overt hostility and unsafe conditions attending school with White people.⁵² Many school desegregation plans required that White students make up the majority of school populations.⁵³ Some Black students felt that this struggle was “worth it” because of the quality of schooling and resources it brought, but others felt segregation imposed too high a cost to Black communities.⁵⁴ Faced with unjust implementation and excluded from decision-making processes, some Black communities have fought against school desegregation policies.⁵⁵

Because of this complicated history, it is important to note at the onset that research and discussions of school segregation, integration, and diversity frequently conflate the histories and experiences of different racial groups, particularly those of color.⁵⁶ And it is critical to recognize that the history of school segregation and inequitable education across racial lines has always been rooted in White supremacy and segregating all people of color.⁵⁷ While *Brown* targeted the segregation of Black students, other non-White students —

(pointing out that “narratives about desegregation paid far more attention to white resistance . . . than to questions of equality in the experience of desegregation”).

52. See, e.g., Jennifer R. Woodward, *How Busing Burdened Blacks: Critical Race Theory and Busing for Desegregation in Nashville-Davidson County*, 80 J. NEGRO EDUC. 22, 24 (2011). One prominent exception to this norm was Charlotte, North Carolina, where “relatively few whites fled the public schools” and, “in some cases, [would] put[] their own children on buses to attend a historically black high school.” AMY STUART WELLS ET AL., BOTH SIDES NOW: THE STORY OF SCHOOL DESEGREGATION’S GRADUATES 264 (2009).

53. Jefferson County, Kentucky’s plan, at issue in *Parents Involved*, required this. SARAH GARLAND, DIVIDED WE FAIL: THE STORY OF AN AFRICAN AMERICAN COMMUNITY THAT ENDED THE ERA OF SCHOOL DESEGREGATION x (2013).

54. See ERICKSON, *supra* note 51, at 294.

55. See, e.g., GARLAND, *supra* note 53, at xii (arguing that “dissatisfaction with the way desegregation was implemented . . . toppled it”).

56. For instance, most research on the effects of school segregation and desegregation track only the effects on Black children. See, e.g., Owens, *supra* note 7.

57. See, e.g., *Gong Lum v. Rice*, 275 U.S. 78, 93 (1927) (upholding a Mississippi school district’s refusal to allow a Chinese-American student to attend “Whites only” school, accepting the Mississippi Supreme Court’s reasoning that Whites only schools were intended to keep White students away from all other “colored” races).

including Latinx⁵⁸ and Asian⁵⁹ students — also share a long history of government segregation into inferior schools and fighting against those policies. However, anti-Black racism — in this field and others — has always been unique.⁶⁰ Therefore, while research and policy related to Civil Rights Era desegregation often focused only on White and Black students, modern conceptions of school integration include and account for all notions of race and difference.

Across time, fields, and perspectives, academics and practitioners employ a variety of terms to address distinct solutions to the problem of school segregation. This Note will employ certain terms in the following ways. First, “segregated” refers to schools that are composed of nearly all people of color or nearly all White.⁶¹ “Desegregation” refers to the “broad legal, administrative, and social processes that followed *Brown*, not a specific outcome” — in other words, deliberate steps to remedy past segregation by assigning students from different races to attend school together.⁶² “Integration” has a distinct meaning, requiring active measures to make desegregated schools equitable. The definition created by the student-led group, IntegrateNYC, includes five separate prongs: (1) race and enrollment; (2) resources;

58. See, e.g., *Westminster Sch. Dist. v. Mendez*, 161 F.2d 774, 781 (9th Cir. 1947) (holding that the segregation of Mexican-American students violated the Equal Protection Clause). For a history of the “very common” practice “of separate and inferior ‘Mexican schools’” in California, see Thomas A. Saenz, *Mendez and the Legacy of Brown: A Latino Civil Rights Lawyer’s Assessment*, 6 AFR.-AM. L. & POL’Y REP. 194, 194 (2004). In New York City in 1964, more than 460,000 Black and Puerto Rican public school students boycotted school demanding that the school board “create a plan for desegregation” — it was the “largest civil rights demonstration in the history of the United States.” MATTHEW F. DELMONT, *WHY BUSING FAILED: RACE, MEDIA, AND THE NATIONAL RESISTANCE TO SCHOOL DESEGREGATION* 24 (2016).

59. See *Gong Lum*, 275 U.S. at 87; Joyce Kuo, *Excluded, Segregated and Forgotten: A Historical View of the Discrimination of Chinese Americans in Public Schools*, 5 ASIAN L.J. 181, 189 (1998) (chronicling the California Supreme Court’s extension of the “separate but equal doctrine” to Chinese-American students).

60. For an explanation of why the use of these terms is imperfect and incomplete, and therefore important to clarify, see NORM FRUCHTER, *URBAN SCHOOLS PUBLIC WILL: MAKING EDUCATION WORK FOR ALL OUR CHILDREN* 4 (2007). See also Nikole Hannah-Jones, *Our Democracy’s Founding Ideals Were False When They Were Written. Black Americans Have Fought to Make Them True*, N.Y. TIMES MAG. (Aug. 14, 2019), <https://www.nytimes.com/interactive/2019/08/14/magazine/black-history-american-democracy.html> [https://perma.cc/JP2N-XN9M] (chronicling the unique racism and oppression that Black Americans have faced since 1619); Ahmed Olayinka Sule, *Racism Harms Black People Most. It’s Time to Recognise ‘Anti-Blackness’*, GUARDIAN (Aug. 9, 2019), <https://www.theguardian.com/commentisfree/2019/aug/09/black-people-racism-anti-blackness-discrimination-minorities> [https://perma.cc/CS7S-V7XF].

61. See ERICKSON, *supra* note 51, at 21.

62. *Id.* at 20–21.

(3) relationships; (4) restorative justice; and (5) representation of school faculty.⁶³ “Racial diversity” is broader, describing an environment of people from different races without implying that it is a result of remedies or that it involves deliberate power sharing.

Thus, modern integration advocates argue that desegregation can create the conditions necessary for the positive outcomes often associated with integration, but desegregated schools often are not integrated.⁶⁴ For instance, in some schools, White students are tracked disproportionately into different academic programs within schools, or Black students are assigned at higher rates to vocational programs.⁶⁵

Because research on outcomes associated with desegregation often does not provide enough evidence that learning environments are truly integrated, some analysts have chosen the term “racial diversity” to refer to spaces that cannot be more specifically categorized. Others have chosen to use “statistical desegregation” to describe schools that — by enrollment — are not segregated by race but have not necessarily achieved integration.⁶⁶ Because this Note focuses on student enrollment by race, it uses the terms “racial diversity” and “statistical desegregation” rather than “integration,” with the understanding that statistical desegregation or racial diversity in student enrollment are a primary hurdle on the path to achieve integrated schools.

II. JURISPRUDENTIAL LIMITS TO RACE-CONSCIOUS POLICIES

This Part first reviews the history of Supreme Court jurisprudence that led to *Parents Involved*. Next, it analyzes the opinions of the Supreme Court Justices in *Parents Involved* and clarifies its holding. This Part concludes by discussing the ramifications for school district leaders who want to avoid racial segregation.

*Milliken v. Bradley*⁶⁷ launched the Supreme Court’s gradual reduction of federal courts’ enforcement power in school

63. *Real Integration*, INTEGRATENYC, <https://www.integratenyc.org/realintegration> [https://perma.cc/7TBG-R9SS] (last visited Dec. 18, 2019).

64. See Katarina Wong, *Racing on Two Different Tracks: Using Substantive Due Process to Challenge Tracking in Schools*, 13 DUKE J. CONST. L. & PUB. POL’Y 163, 171 (2018) (tracing the long history of dividing students by “ability,” and thus race, within schools).

65. See ERICKSON, *supra* note 51, at 17 (pointing out that during the “desegregation years,” when Nashville created large new high schools aimed at drawing White and Black students, “some educators tracked Black students into vocational and lower-skill courses”).

66. See, e.g., *id.* at 2.

67. 418 U.S. 717 (1974).

desegregation.⁶⁸ The *Milliken* Court refused to recognize evidence that racially segregated residential patterns “were in significant measure caused by governmental activity” — including the Federal Housing Administration’s and Department of Veterans Affairs’ advocacy for the maintenance of “harmonious neighborhoods”⁶⁹ — instead concluding that racial segregation in Detroit and its suburbs was a result of “unknown and perhaps unknowable factors such as immigration, birth rates, economic changes, or cumulative acts of private racial fears.”⁷⁰

In limiting segregation remedies to school districts with histories of what it called “invidious discrimination,”⁷¹ the *Milliken* Court endorsed a distinction between so-called de facto and de jure segregation.⁷² And in *Washington v. Davis*, the Court further

68. See Nikole Hannah-Jones, *Choosing a School for My Daughter in a Segregated City*, N.Y. TIMES MAG. (June 9, 2016), <https://www.nytimes.com/2016/06/12/magazine/choosing-a-school-for-my-daughter-in-a-segregated-city.html> [<https://perma.cc/3Y5S-CG9X>] (“Nixon was elected president . . . with the help of a coalition of white voters who opposed integration in housing and schools. He appointed four conservative justices to the Supreme Court and set the stage for a profound legal shift. Since . . . *Milliken* . . . a series of major Supreme Court rulings on school desegregation have limited the reach of *Brown*.”); *supra* note 25 and accompanying text; see also DELMONT, *supra* note 58, at 17 (“In addition to the Nixon administration’s skillful use of media to communicate opposition to ‘busing,’ the president reined in the lawyers and officials . . . on the frontline of enforcing (or not enforcing) school desegregation policies. Nixon also worked to bend the judiciary to his views on school desegregation and ‘busing,’ appointing a record number of federal judges and four Supreme Court justices . . . [who] were in the majority in *Milliken*.”).

69. See RICHARD ROTHSTEIN, *THE COLOR OF LAW* xiii (2017) (highlighting that the district court judge recognized the evidence presented demonstrated the government’s critical role in segregating Detroit and its suburbs). District Judge Stephen J. Roth observed:

[T]he choice of a residence is a relatively infrequent affair. For many years FHA and VA openly advised and advocated the maintenance of ‘harmonious’ neighborhoods, i.e., racially and economically harmonious. The conditions created continue. While it would be unfair to charge the present defendants with what other governmental officers or agencies have done, it can be said that the actions or the failure to act by the responsible school authorities, both city and state, were linked to that of these other governmental units. When we speak of governmental action, we should not view the different agencies as a collection of unrelated units.

Bradley v. Milliken, 338 F. Supp. 582, 587 (E.D. Mich. 1971).

70. *Milliken*, 418 U.S. at 722 n.2. *Contra Bradley*, 338 F. Supp. at 587.

71. *But see* ROTHSTEIN, *supra* note 69, at xi (arguing that “[m]ost segregation does fall into the category of open and explicit government-sponsored segregation); George B. Daniels & Rachel Pereira, *May It Please the Court: Federal Courts and School Desegregation Post-Parents Involved*, 17 U. PA. J. CONST. L. 625, 646 n.97 (2015).

72. *Milliken*, 418 U.S. at 755 (1974).

remarked that the existence of “both predominantly Black and predominantly White schools in a community is not alone violative of the Equal Protection Clause.”⁷³ In other cases, the Court further walked back its power to enforce school desegregation, particularly in regions where laws had not explicitly designated schools for different races.⁷⁴

In the early 1990s, the Court next reduced its enforcement power over school districts under court-ordered desegregation, allowing districts to be relieved from such oversight through “good faith” efforts⁷⁵ by determining that the school district has abandoned the “dual” status of “intentional segregation of students by race” and “has been brought into compliance with the command of the Constitution.”⁷⁶ Thus, even if, “as a factual matter, all district schools [did not] contain a racially diverse mix of students,”⁷⁷ designations of “unitary status” relieved school districts from an affirmative “duty to remedy imbalance that is caused by demographic factors.”⁷⁸ Importantly, courts’ widespread relief of districts’ “duty to remedy”

73. 426 U.S. 229, 240 (1976).

74. *See Missouri v. Jenkins*, 515 U.S. 70, 99–102 (1995) (holding that the district court abused its discretion in imposing a tax increase to boost a magnet school program’s attractiveness and discourage “white flight”); *Pasadena Bd. of Educ. v. Spangler*, 427 U.S. 424, 436–37 (1976) (holding that the district court had exceeded its remedial authority in requiring annual readjustment of school attendance zones when changes in the racial makeup of the schools were caused by demographic shifts “not attributed to any segregative acts”). Although these decisions severely limited federal claims against school segregation, some advocates have recently begun to revisit similar claims in state court. *See* Plaintiffs’ Brief in Support of Their Motion for Partial Summary Judgment at 3, *Latino Action Network v. New Jersey*, No. MER-L-001076-18 (Super. Ct. N.J. filed May 17, 2018) (“Defendants have long known about segregation in New Jersey’s public schools and have failed to remedy it, despite the Commissioner of Education’s constitutional obligation to do so.”); *see also* Andrea Alajbegović, *Still Separate and Still Unequal: Litigation as a Tool to Address New York City’s Segregated Public Schools*, 22 CUNY L. REV. 304, 331 (arguing that advocates for integrated schools in New York City should bring suit under the New York City Human Rights Law).

75. *Freeman v. Pitts*, 503 U.S. 467, 492 (1992) (“The District Court should address itself to whether the Board had complied in good faith with the desegregation decree since it was entered, and whether the vestiges of past discrimination had been eliminated to the extent practicable.” (internal citation omitted)).

76. *Id.* at 487 (internal citation omitted).

77. *Spurlock v. Fox*, 716 F.3d 383, 386 (6th Cir. 2013).

78. *Id.*

following that period⁷⁹ correlated with overall resegregation.⁸⁰ *Parents Involved* — decided in 2007 — marked “the successful culmination of a conservative effort, extending back several decades, to mold and constrain *Brown’s* meaning.”⁸¹

A. The *Parents Involved* Holding

At issue in *Parents Involved* were the school assignment policies of two school districts attempting to address racial segregation. The Seattle School District and Jefferson County Public Schools operated district-wide school choice plans that employed a variety of “tiebreakers” when demand exceeded seats available in a school.⁸² One of the “tiebreakers” was the impact of individual students’ enrollment on the school’s overall racial balance.⁸³ For a small number of students, the racial tiebreaker decided whether a student could attend her first-choice school.⁸⁴

At the time of the litigation, 41% of students in the Seattle School District were White, and most lived in the northern part of the city,⁸⁵ where four of the city’s ten high schools — all oversubscribed for the 2000–2001 school year — were located.⁸⁶ Three of the four schools were “integration positive,” meaning that White student enrollment during the previous school year was above 51%.⁸⁷ So for those three schools, one of the tiebreakers for student assignment would go to students who were not White.⁸⁸ Under the Seattle plan, if too many

79. *Freeman*, 503 U.S. at 469; see also Reardon et al., *Brown Fades*, *supra* note 22, at 34 (“[A]lmost half of the school districts that were under court order to desegregate as of 1990 were released from court oversight in the last two decades. Moreover, the rate at which districts have been released has increased over time: more than twice as many districts were released in the 2000s as in the 1990s.”).

80. See Orfield, *supra* note 18, at 8 (depicting the “Percentage of Southern Black Students in Majority White Schools, 1954–2002”); see also Reardon et al., *Brown Fades*, *supra* note 22, at 35 (“Following the release from court order, white/black desegregation levels begin to rise within a few years of release and continue to grow steadily for at least 10 years.”).

81. *DRIVER*, *supra* note 28, at 242.

82. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist.*, 551 U.S. 701, 711 (2007); see also Kathryn A. McDermott et al., *How Does Parents Involved in Community Schools Matter? Legal and Political Influence in Education Politics and Policy*, 114 *TCHRS. C. REC.* 1, 3 (2012) (providing detailed description of the school assignment policies at issue in *Parents Involved*).

83. *Parents Involved*, 551 U.S. at 712.

84. *Id.* at 711.

85. *Id.* at 712.

86. *Id.*

87. *Id.* at 713.

88. *Id.*

students listed the same school as their first choice, the first “tiebreaker” would go to students who had a sibling student attending the school. If the school was not “within 10 percentage points of the district’s overall White/nonWhite racial balance,” the second tiebreaker would favor students whose race would “serve to bring the school into balance.”⁸⁹ The final “tiebreaker” favored students who lived closest to the school.

Meanwhile, Jefferson County, Kentucky’s student population was around 34% Black and 66% White.⁹⁰ Following its grant of unitary status, the school district adopted a new voluntary assignment plan, which grouped elementary school zones into clusters based on geographic areas to “facilitate integration.”⁹¹ Families could mark their first and second preferences for schools within their cluster or would otherwise be assigned to a school in that cluster.⁹² As in Seattle, ultimate assignment decisions were based on “available space” and on whether individual assignments would contribute to the school’s “racial imbalance.”⁹³

Despite the fact that Seattle School District and Jefferson County each had histories of racial segregation, Chief Justice Roberts — in a plurality decision joined by Justices Scalia, Thomas, and Alito — stated that public schools in Seattle had “not shown that they were ever segregated by law, and were not subject to court-ordered desegregation decrees.”⁹⁴ Nor did this apply in Jefferson County, the

89. *Id.* at 712.

90. *Id.* at 716.

91. *Id.*

92. *Id.*

93. *Id.* Under Jefferson County’s plan, each school had to maintain a White majority. Interestingly, first to challenge this plan were a group of Black plaintiffs, mostly alumna of a historically Black high school that was threatened closure for failure to attract enough White students to meet the majority requirement. After they won in federal district court to keep the high school open, a second group of plaintiffs — a group of White parents — challenged the plan again, this time arguing that it discriminated against their White children. Their suit became *Parents Involved*. See GARLAND, *supra* note 53, at x.

94. *Parents Involved*, 551 U.S. at 720. This, despite the long history of racially segregated schools in Seattle, and legal challenges to that segregation during the Civil Rights Era. See *id.* at 807 (Breyer, J., dissenting) (describing the history of school segregation in Seattle during the 1940s and 1950s). As Justice Breyer noted, “[a]lthough black students made up about 3% of the total Seattle population . . . nearly all black children attended schools where a majority of the population was minority[.]” a 1956 memo for the Seattle School Board reported that its policies “permitted white students to transfer out of black schools while restricting the transfer of black students into white schools.” *Id.* at 807–08. For further critique of the de facto/de jure distinction and its failure to account for a long history of government policies explicitly intended to maintain racial segregation, see ROTHSTEIN, *supra* note 69, at vii–xvii (refuting the

plurality held. Although the Louisville schools were previously segregated by law, a district court had dissolved its desegregation decree, finding that it had “eliminated the vestiges associated with the former policy of segregation and its pernicious effects.”⁹⁵ In other words, once a school district achieved unitary status, “[a]ny continued use of race must be justified on some other basis.”⁹⁶

From this rationale, Chief Justice Roberts applied strict scrutiny to his review of the plans, reasoning that they were based on “individual racial classifications.”⁹⁷ To survive strict scrutiny review, the school districts had to show that those “individual racial classifications were narrowly tailored to achieve a compelling government interest.”⁹⁸ Two interests, according to Chief Justice Roberts, were sufficiently compelling: “remediating the effects of past intentional discrimination” and “the interest in diversity in higher education.”⁹⁹ Because neither applied, he reasoned, “allocating children to different public schools on the basis of race violated the Fourteenth Amendment guarantee of equal protection.”¹⁰⁰ Chief Justice Roberts regarded the school assignment plans, which both employed target enrollment percentages for racial groups, as “justify[ing] the imposition of racial proportionality throughout American society . . . effectively assur[ing] that race will always be relevant in American life.”¹⁰¹ He concluded then that, “[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”¹⁰²

“myth” of *de facto* segregation and arguing that it was a “disturbing,” court constructed “misrepresentation of our racial history” reiterated by Chief Justice Roberts).

95. *Parents Involved*, 551 U.S. at 715–16. The leadership of the Jefferson County School District opposed its grant of unitary status. For the history of this, see *infra* note 295.

96. *Id.* For a discussion of the ironic impact of this holding, see *infra* note 295.

97. *Parents Involved*, 551 U.S. at 720 (“It is well established that when the government distributes burdens or benefits on the basis of individual racial classifications, that action is reviewed under strict scrutiny.”).

98. *Id.* (internal quotations omitted).

99. *Id.* at 721–22.

100. *Id.* at 711.

101. *Id.* at 730 (citing *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 495 (1989)) (internal citations omitted).

102. *Id.* at 748. This conclusion maintained the assumption that racial segregation in Louisville and Seattle was the product of individual choices, not government actions. *Id.* at 736 (“The distinction between segregation by state action and racial imbalance caused by other factors has been central to our jurisprudence.”); ROTHSTEIN, *supra* note 69, at xiii–iv (pointing out that this assumption is historically inaccurate: “I hope to show that Justice Roberts and his colleagues have his facts wrong. Most segregation *does* fall into the category of open and explicit government-sponsored segregation.”).

Justice Kennedy wrote separately, and as the fifth vote, his opinion controls.¹⁰³ Although he agreed that Seattle School District's and Jefferson County's policies were subject to strict scrutiny and unconstitutional,¹⁰⁴ Justice Kennedy explicitly disagreed that the school districts had not identified a compelling interest.¹⁰⁵

But Justice Kennedy did not completely write off the notion of using race to avoid segregation. Rather than the "individualized" ways that Seattle School District and Jefferson County considered race in their school assignment policies, he observed, "it is permissible to consider the racial makeup of schools and to adopt general policies to encourage a diverse student body, one aspect of which is its racial composition."¹⁰⁶ These could include "race-conscious measures to address the problem in a general way and without treating each student in different fashion solely on the basis of a systematic, individual typing by race."¹⁰⁷ Examples of permissible, general uses of race, he explained, could involve "strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race."¹⁰⁸ Because such mechanisms were race-conscious, but would "not lead to different treatment based on a

103. *Parents Involved*, 551 U.S. at 748 (Kennedy, J., concurring). Justice Thomas also submitted a concurring opinion, reiterating his belief in a distinction between de jure segregation and "racial imbalance . . . result[ing] from any number of innocent private decisions, including voluntary housing choices." *Parents Involved*, 551 U.S. at 750 (Thomas, J., concurring).

104. *Id.* at 783–84 (Kennedy, J., concurring). This, despite Jefferson County's long track record of attempts to desegregate schools using race-neutral policies, to no avail. These included redrawing attendance zones and busing all students based on the first letter of their last name. *See id.* at 814–16 (Breyer, J., dissenting).

105. *Id.* at 783, 788 (Kennedy, J., concurring) ("To the extent the plurality opinion suggests the Constitution mandates that state and local school authorities must accept the status quo of racial isolation in schools, it is, in my view, profoundly mistaken."). Justice Kennedy concluded that Jefferson County had failed to demonstrate that it was not simply using students' races in an "ad hoc manner" and Seattle had failed to explain why it had "employed crude racial categories of 'white' and 'non-white'" when the public school population was composed of a "diversity of races." *See id.* at 786 (Kennedy, J., concurring).

106. *Id.* at 788 (Kennedy, J., concurring).

107. *Id.* at 788–89 (Kennedy, J., concurring).

108. *Id.* (Kennedy, J., concurring). *But see id.* at 851–52 (Breyer, J., dissenting) ("Nothing 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 [other than those employed by Seattle and Jefferson County] is possible to accomplish these goals.").

classification,” Justice Kennedy reasoned, they would not trigger strict scrutiny.¹⁰⁹

In conclusion, Justice Kennedy reiterated that:

The decision today should not prevent school districts from continuing the important work of bringing together students of different racial, ethnic, and economic backgrounds. 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. Those entrusted with directing our public schools can bring to bear the creativity of experts, parents, administrators, and other concerned citizens to find a way to achieve the compelling interests they face without resorting to widespread governmental allocation of benefits and burdens on the basis of racial classifications.¹¹⁰

Evidently, Justice Kennedy claimed not to foreclose efforts to avoid segregated schools and affirmed racial diversity in schools as a compelling interest. Still, despite his assurances that local efforts to integrate schools remained available, *Parents Involved* was a dramatic turn in the Court’s treatment of school desegregation.¹¹¹ It was the first time in the K–12 context that the Supreme Court found policies aimed at desegregating schools discriminatory.¹¹² And rather than *mandating* local school districts to achieve certain *ends*,¹¹³ *Parents Involved* now limited the *means* by which school districts were permitted to attempt to integrate or desegregate, should they *choose*.¹¹⁴ Justice Stevens alluded to this shift in his dissent, pointing out that “rigid adherence to tiers of scrutiny obscures *Brown*’s clear message”¹¹⁵ and that “[i]t

109. *Id.* at 784 (Kennedy, J., concurring).

110. *Id.* at 798 (Kennedy, J., concurring).

111. *See id.* at 865–66 (Breyer, J., dissenting) (“Yesterday, the citizens of this Nation could look for guidance to this Court’s unanimous pronouncements concerning desegregation. Today, they cannot. Yesterday, school boards had available to them a full range of means to combat segregated schools. Today, they do not.”).

112. McDermott et al., *supra* note 82, at 4.

113. *See supra* Part I; *see also supra* note 32 and accompanying text.

114. *See Daniels & Pereira, supra* note 71, at 646 n.97. Justice Stevens remarked on this ideological shift in his dissent in *Parents Involved, see Parents Involved*, 551 U.S. at 803 (Stevens, J., dissenting) (“It is my firm conviction that no Member of the Court that I joined in 1975 would have agreed with today’s decision”), and Justice Breyer remarked that in recent years, progress toward achieving integrated schools had “stalled.” *See id.* at 805 (Breyer, J., dissenting) (“Between 1968 and 1980, the number of black children attending a school where minority children constituted more than half of the school fell from 77% to 63% in the Nation (from 81% to 57% in the South) but then reversed direction by the year 2000, rising from 63% to 72% in the nation (from 57% to 69% in the South).”).

115. *Parents Involved*, 551 U.S. at 800–01 (Stevens, J., dissenting).

would be the height of irony if [a policy,] enacted . . . with the laudable purpose of achieving equal educational opportunities, should, by prescribing school pupil allocations based on race, founder on unsuspected shoals in the Fourteenth Amendment.”¹¹⁶

B. Fluctuating Agency Guidance

Since *Parents Involved*, three different presidential administrations have disseminated distinct messages to the public about the permissibility of using race to promote integration or avoid segregation. First, the Bush Administration read *Parents Involved* to preclude any consideration of race in school assignment at all. The Obama Administration eventually reiterated Justice Kennedy’s concurrence as its policy. The Trump Administration rescinded the Obama Administration’s position but has otherwise yet remained silent on the issue.

In the year following the *Parents Involved* decision, the Bush Administration’s DOE issued a “Dear Colleague” letter explaining how its Office for Civil Rights (OCR) would assess school districts’ use of race in school assignment plans.¹¹⁷ The 2008 Letter emphasized that “compliance with the narrow tailoring standard . . . require[d] serious, good-faith consideration of workable race-neutral alternatives” and “strongly encourage[d] the use of race-neutral methods for assigning students to elementary and secondary schools,” such as those based on socio-economic status.¹¹⁸ The letter did not mention any ways that race-conscious school assignment policies might be permissible,¹¹⁹ thus misrepresenting the holding of *Parents Involved*.¹²⁰

116. *Id.* at 801 (citing *Sch. Comm. of Bos. v. Bd. of Educ.*, 227 N.E.2d 729, 733 (Mass. 1967)).

117. U.S. DEP’T OF EDUC. OFFICE FOR CIVIL RIGHTS, DEAR COLLEAGUE LETTER: GUIDANCE ON THE USE OF RACE IN ASSIGNING STUDENTS TO ELEMENTARY AND SECONDARY SCHOOLS (2008) [hereinafter 2008 LETTER].

118. *Id.*

119. *See id.* Following the Guidance, the NAACP Legal Defense and Education Fund issued a statement claiming OCR’s interpretation of the decision to be “inaccurate in a number of respects” namely because there is “no requirement in *Parents Involved* that school districts only use race-neutral means to promote the compelling interests in diversity and avoiding racial isolation in their schools.” Mark Walsh, *OCR Race Letter Draws Objection*, EDUC. WEEK (Sept. 23, 2008), <https://www.edweek.org/ew/articles/2008/09/24/05fedfil.h28.html> [<https://perma.cc/9FNM-FBVR>].

120. ADAI TEFERA ET AL., THE CIVIL RIGHTS PROJECT/PROYECTO DERECHOS CIVILES, SCHOOL INTEGRATION EFFORTS THREE YEARS AFTER *PARENTS INVOLVED* 1 (June 28, 2010) (“In 2008, the Bush Administration sent a letter to school districts misguidedly interpreting the *Parents Involved* decision in a way that suggested only

In 2011, the Obama Administration’s DOE replaced the 2008 Letter with a new 14-page guidance document.¹²¹ Emphasizing the importance of racially diverse schools, the document listed examples of permissible uses of race in school assignment policies provided by Justice Kennedy and pinpointed more specific strategies that school district officials could use.¹²² The 2011 Guidance, written as a “checklist,” strongly encouraged school districts to document their purpose for “seeking to achieve diversity or avoid racial isolation.”¹²³ The 2011 Guidance also called for school districts to document their “process” for arriving at school assignment decisions,¹²⁴ including considering whether any race-neutral approaches were available.¹²⁵ If there were none, the Guidance recommended considering whether “generalized use of racial criteria, such as racial demographics of feeder schools or neighborhoods,” would achieve stated goals.¹²⁶

In 2018, the Trump Administration DOE announced its rescission of the 2011 Guidance in a “Dear Colleague” letter, explaining that the 2011 Guidance had “prematurely decide[d] or appear[ed] to decide, whether particular actions violate the Constitution” in a manner

race-neutral means of pursuing integration would be legal. This was an inaccurate description of Kennedy’s controlling opinion and suggested that school authorities should abandon all efforts to intentionally pursue integration.”).

121. U.S. DEP’T OF EDUC., OFFICE FOR CIVIL RIGHTS, GUIDANCE ON THE VOLUNTARY USE OF RACE TO ACHIEVE DIVERSITY AND AVOID RACIAL ISOLATION IN ELEMENTARY AND SECONDARY SCHOOLS (2011) [hereinafter 2011 GUIDANCE].

122. *See id.*

123. *See id.* at 7–8.

124. *Id.*

125. *Id.*

126. *Id.* Following its 2011 guidance, the Obama Administration took further — albeit hesitant — steps toward promoting school diversity and integration policies. Obama’s final budget proposal included a \$120 million grant program to fund local socioeconomic school integration plans. *See* Patrick Wall, *How Betsy DeVos Could End the School Integration Comeback*, ATLANTIC (Mar. 20, 2017), <https://www.theatlantic.com/education/archive/2017/03/how-betsy-devos-could-end-the-school-integration-comeback/520113/> [https://perma.cc/F8YV-D5PN]. Although the grant represented a gesture towards the goal of integration, its language specified the use of socioeconomics, and no other indicators, as a measure. *See* Alyson Klein, *Obama Budget Would Prioritize Integration, Flat Fund Key Programs*, EDUC. WEEK (Feb. 9, 2016), blogs.edweek.org/edweek/campaign-k-12/2016/02/obamas_last_budget_would_creat.html [https://perma.cc/Y3KH-B982]. Still, the bulk of the Obama Administration’s education-related civil rights enforcement concerned discrimination within schools, not racial segregation between schools. *See* U.S. GOV’T ACCOUNTABILITY OFFICE, BETTER USE OF INFORMATION COULD HELP AGENCIES IDENTIFY DISPARITIES AND ADDRESS RACIAL DISCRIMINATION 33–35 (2016), <https://www.gao.gov/assets/680/676745.pdf> [https://perma.cc/8G9A-APTR] (describing the DOE’s efforts to address discrimination in education).

“inconsistent with governing principles for agency guidance documents.”¹²⁷ The Trump Administration has not replaced the 2011 Guidance with any new explanation of the *Parents Involved* holding.

C. *Parents Involved* in the Circuit Courts

Despite the directive in Justice Kennedy’s concurrence that “[t]he decision today should not prevent school districts from continuing the important work of bringing together students of different racial, ethnic, and economic backgrounds,” the precise holding of *Parents Involved* is still widely disputed.¹²⁸ Many academics and practitioners have observed that Justice Kennedy’s concurrence in *Parents Involved* left such a seemingly narrow opening for race-based school assignment policies that courts and school districts have avoided it.¹²⁹ Moreover, fears of legal action were warranted: plaintiffs brought challenges in the Third, Fifth, and Sixth Circuits against generalized race-conscious school assignment policies. That the plans addressed by the Fifth and Sixth Circuits arguably exacerbated racial segregation demonstrates the danger of the *Parents Involved* holding to the already tenuous state of school desegregation policies. But its application in the Third Circuit is cause for cautious optimism.

Each of those circuit courts, following Justice Kennedy’s model, declined to apply strict scrutiny, affirming Justice Kennedy’s assurance that general awareness or consideration of race when creating school assignment policies does not warrant heightened review. Such a doctrine certainly leaves victims of racial discrimination without redress. But for the same reasons, it allows school districts motivated to create more equitable and inclusive school assignment policies the freedom to discuss race openly and allow it to inform more inclusive policies.

127. U.S. DEP’T OF EDUC., OFFICE FOR CIVIL RIGHTS, DEAR COLLEAGUE LETTER (2018) [hereinafter 2018 RESCISSION LETTER]. For context, see Andrew Ujifusa, *Betsy DeVos: I’ll Look for Unnecessary Programs to Cut at the Education Dept.*, EDUC. WEEK (Feb. 14, 2017), blogs.edweek.org/edweek/campaign-k-12/2017/02/betsy_devos_programs_to_cut_education_department.html [https://perma.cc/5HYT-FTBJ].

128. See *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist.*, 551 U.S. 701, 803 (2007) (Breyer, J., dissenting) (“[The plurality] announces legal rules that will obstruct efforts by state and local governments to deal effectively with the growing resegregation of public schools.”); see also Armor & O’Neill, *supra* note 17.

129. For a review of the permissible policies listed in Justice Kennedy’s concurrence, see Heeren, *supra* note 11, at 173.

i. Fifth Circuit: Lewis v. Ascension Parish School Board

*Lewis v. Ascension Parish School Board*¹³⁰ concerned a school assignment plan in another school district after it had achieved unitary status.¹³¹ Ascension Parish School District's plan assigned students to "feeder schools" based on geographic zones.¹³² In 2006, citing severe overcrowding at one of its middle schools, the school district hired a "demographics application specialist," who employed statistical analysis to explore a variety of rezoning options to analyze enrollment data and develop three potential rezoning plans.¹³³ In preparing each of the possible plans, the specialist analyzed the projected "percentage of African-American students, . . . percentage of at-risk students," and enrollment numbers at each school.¹³⁴ Before voting on a new plan at a school board meeting, a member of the board told the audience that his greatest concern was "maintaining . . . unitary status . . . and moving the least amount of kids as possible."¹³⁵ Lewis disputed that characterization, arguing that the effect of the adopted plan was to "ensure that" the school his son attended "would maintain a disproportionately large non-White minority population," leaving two other nearby schools "predominantly White."¹³⁶

The separate analyses of the magistrate court and the Fifth Circuit embodied the widespread confusion and misunderstanding around *Parents Involved's* holding. The magistrate judge first handling the case thought that the plan's consideration of race was permissible because it was part of an effort to maintain "the racial balance" among the schools.¹³⁷ The Fifth Circuit chided this conclusion, pointing out that the use of race for any purpose was in "tension" with *Parents Involved*.¹³⁸ The Fifth Circuit thus concluded that there was a

130. 662 F.3d 343 (5th Cir. 2011).

131. In 2004, a district court in Louisiana declared the Ascension Parish School District — located in southeast Louisiana — unitary. See *Charles v. Ascension Par. Sch. Bd.*, Civil Action No. 65-3257 (M.D. La. 2004).

132. *Lewis*, 662 F.3d at 344.

133. *Id.* at 345.

134. *Id.*

135. *Id.*

136. *Id.* at 346. This was despite other accounts that said the Plan was aimed at "maintaining racial balance." See generally Mark Walsh, *Appeals Court Upholds School Zoning Plan Aimed at Maintaining Racial Balance*, EDUC. WEEK (Nov. 19, 2015),

http://blogs.edweek.org/edweek/school_law/2015/11/appeals_court_upholds_school_z.html [https://perma.cc/4UBP-YYHK].

137. *Lewis*, 662 F.3d at 349.

138. *Id.*

“genuine issue of material fact whether the Board acted with a racially discriminatory motive” and remanded the case.¹³⁹

The Fifth Circuit’s conclusion reflected either a misunderstanding of Justice Kennedy’s concurrence or of how statistical methods work, or both. Judge Haynes surmised that the software used to predict the effects of boundary adjustments on enrollments necessarily classified students by race, because it relied on demographic data of those individual students.¹⁴⁰ He further understood the discussions of public officials during the planning stages as suggesting that “the District relied upon the race of the individual students residing in different geographic locations when it re-zoned its schools.”¹⁴¹ For instance, the superintendent said, “[w]e had to make sure that . . . by this move, [we did not increase] the Black percentage at East Ascension High School . . . in all the plans we developed, we made sure that the move of the students did not increase that percentage.”¹⁴² The concurring opinion further confused the *Parents Involved* holding, concluding that “if the Board deliberately aimed at racial balancing as a device to maintain unitary status, this motivation must be tested under strict scrutiny.”¹⁴³ In fact, Justice Kennedy explicitly endorsed “drawing attendance zones with general recognition of the demographics of neighborhoods . . . and tracking enrollments, performance, and other statistics by race” as permissible, race-conscious methods.¹⁴⁴ Although demographic data used to inform school assignment policies are composed of individual students’ information, according to Justice Kennedy, their use as a composite does not target students individually by race.

ii. Third Circuit: Doe v. Lower Merion School District

The Third Circuit proved more adept at interpreting Justice Kennedy’s concurrence. In 2008, the Lower Merion School District in Pennsylvania began a redistricting process for its two new high schools.¹⁴⁵ Aware of the recent *Parents Involved* decision, the district hired two consultants, hosted a series of public forums, and collected online surveys from residents to create a plan that would “explore and

139. *Id.*

140. *Id.* at 350.

141. *Id.*

142. *Id.*

143. *Id.* at 354 (Jones, C.J., concurring).

144. See *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist.*, 551 U.S. 701, 789 (Kennedy, J., concurring).

145. *Doe v. Lower Merion Sch. Dist.* (*Doe I*), 665 F.3d 524, 532 (3d Cir. 2011)

cultivate whatever diversity — ethnic, social, economic, religious and racial — there [was] in Lower Merion.”¹⁴⁶ The district then hired a researcher to analyze projected enrollment data, including socioeconomic diversity and percentages of African-American students, for a series of redistricting proposals.¹⁴⁷ Based on these recommendations, the Lower Merion School District chose the plan that projected “racial parity” between the two high schools.¹⁴⁸ Following the approval of the plan, a group of African-American students living in a neighborhood containing “one of the highest concentrations of African-American students in the district” sued, alleging that the plan assigned them to one of the schools because of their race.¹⁴⁹

No suit had yet been brought in a federal court against a school district for “targeting” a neighborhood in a redistricting plan with the purpose of avoiding school segregation.¹⁵⁰ The Eastern Pennsylvania district court’s flawed understanding of the *Parents Involved* holding¹⁵¹ demonstrates the extent of the confusion that followed the decision.¹⁵² The district court applied strict scrutiny, reasoning that the plan had consciously drawn a new district boundary with the purpose of dividing a majority Black neighborhood among two separate high schools.¹⁵³ However, the district court decided that the plan nevertheless survived strict scrutiny because it was “narrowly tailored.”¹⁵⁴

The Third Circuit corrected the district court’s analysis,¹⁵⁵ holding that the adopted plan did “not select students based on racial classifications, . . . use race to assign benefits or burdens in the school

146. *Id.*

147. *Id.*

148. *See* Student Doe 1 v. Lower Merion Sch. Dist. (*Doe II*), No. Civ. 2095, 2010 WL 2595278, at *9 (E.D. Pa. June 24, 2010).

149. *Id.* at 1. For a discussion of the ways that school desegregation policies have often disproportionately burdened Black students in particular, see *supra* Part I.

150. *Doe II*, 2010 WL 2595278 at *2.

151. *Id.* at *16 (“Seattle did not prohibit school districts from taking race into account as one of several factors that are considered.”).

152. *Doe I*, 665 F.3d at 556; *see also* Alexandra Muolo, Note, *Issues in the Third Circuit: Not so Black and White: The Third Circuit Upholds Race-Conscious Redistricting in Doe ex rel. Doe v. Lower Merion School District*, 58 VILL. L. REV. 797, 809 (2013) (squaring the Third Circuit’s analysis in *Doe v. Lower Merion* with the *Parents Involved* holding).

153. *Doe II*, 2010 WL 2595278 at *3.

154. *Id.*

155. *Doe I*, 665 F.3d at 529 (“[W]e disagree with the District Court’s determination that strict scrutiny is the appropriate level of review, but we affirm the conclusion that the District’s school assignment plan is consonant with the Constitution.”).

assignment process, . . . apply the plan in a discriminatory manner, . . . [or] have a racially discriminatory purpose,” and therefore did not warrant strict scrutiny.¹⁵⁶ However, it commented that “[t]he Supreme Court . . . has yet to set forth any standard requiring the application of strict scrutiny when decisionmakers have discussed race,”¹⁵⁷ despite Justice Kennedy’s assertion that “it is permissible to consider the racial makeup of schools and to adopt general policies to encourage a diverse student body, one aspect of which is its racial composition.”¹⁵⁸

Because of confusion among the courts over which standard to apply — coupled with the Third Circuit’s belief that the Supreme Court has not spoken on the permissibility of general, race-conscious policies — it is understandable that today, the Lower Merion School District has no publicly stated goal regarding school diversity.¹⁵⁹ Despite having its plan upheld, the district’s recent coverage of plans for a new middle school makes no mention of the issue of race.¹⁶⁰

iii. Sixth Circuit: Spurlock v. Fox

The school assignment plan at issue in *Spurlock v. Fox*¹⁶¹ was also clearly designed with race in mind. Since Metro Nashville Public Schools had achieved unitary status in 1998, the district had employed a geography-based plan, which grouped the school district into 11 “clusters.”¹⁶² Students from elementary schools in the same cluster would be “fed” into a smaller number of middle schools and then to a

156. *Id.*

157. *Id.*

158. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist.*, 551 U.S. 701, 788 (2007) (Kennedy, J., concurring).

159. See *District Policies*, LOWER MERION SCH. DISTRICT, <https://www.lmsd.org/board/policies> [<https://perma.cc/PLC4-RB6E>] (last visited Nov. 2, 2019).

160. According to the district’s webpage, school enrollment is based on existing catchment areas and students who were already taking buses to their previously zoned middle school. See *New Middle School Update*, LOWER MERION SCH. DISTRICT, <https://www.lmsd.org/enrollment-planning/nmsnewsletter> [<https://perma.cc/RN4A-7ZPM>] (last visited Nov. 2, 2019) (“The feeder schools for the new middle school will be Penn Wynne Elementary School and Gladwyne Elementary School. Gladwyne was selected because the new middle school is in its catchment. Penn Wynne was selected because all Penn Wynne students already take buses to middle school. The other elementaries all have students who walk to either BCMS or WVMS and it wouldn’t make sense to bus students to a farther middle school when they can walk to a closer one.”).

161. 716 F.3d 383 (6th Cir. 2013).

162. *Id.* at 386.

single high school.¹⁶³ While most of the clusters were “contiguous,” appearing as a single mass on a map, some were “noncontiguous,” meaning some parts of a cluster were not adjacent to others on a map.¹⁶⁴ As a result, the mapping of some “mandatory noncontiguous transfer zones” required “students in racially isolated geographical zones [to be] bused to racially diverse schools in noncontiguous zones.”¹⁶⁵

Citing budget concerns and underuse of certain schools, the Metro Nashville School Board began looking into changes to its student assignment policies.¹⁶⁶ In 2008, the board gathered a task force of Black and White members, provided with a list of 12 factors to consider in developing a new plan.¹⁶⁷ One of those factors was “diversity, . . . defined as the benefit of different perspectives and backgrounds to the student, the classroom, the school, and the school system as a whole.”¹⁶⁸ During its planning process, the task force held community meetings and analyzed current and projected student enrollment data by race and socioeconomic status.¹⁶⁹

The new policy — implemented in 2008 — introduced “choice zones,” which allowed students a “choice of either attending the schools in their own neighborhood or being bused to schools in the same noncontiguous zone as before.”¹⁷⁰ The effect of this plan, according to its challengers, was to redirect students in a predominantly Black neighborhood from a cluster of “racially diverse schools in higher-income neighborhoods” back to “racially isolated schools in their own poverty-stricken neighborhoods.”¹⁷¹ Indeed, in assessing enrollment data from 2008–2012, the Sixth Circuit conceded that the percentage of Black students in the historically White and affluent

163. *Id.*

164. *Id.*

165. *Id.* at 385.

166. *Id.* at 387.

167. *Id.* at 387–88.

168. *Id.* at 388 (internal quotation marks omitted). The other factors were: “building under-utilization and overcrowding, choice options for students and parents, . . . enhanced academic achievement, enhanced opportunities for extracurricular activities, fiscal responsibility, more parental involvement, benefits of neighborhood schools, stability and certainty for students and parents evaluating their options, and potential unintended consequences.” *Id.*

169. *Id.* at 389.

170. *Id.* at 385.

171. *Id.* at 389.

cluster that the plan's challengers were previously bused to had dropped by more than 12 percentage points.¹⁷²

However, the Sixth Circuit, agreeing with the district court, explicitly rejected the application of strict scrutiny, explaining that the plan did not classify students on the basis of race but "on the basis of geography."¹⁷³ In fact, it explicitly rejected the challengers' argument that the "consideration of racial data" triggered strict scrutiny, responding that the court should not require of public officials a "duty of ignorance."¹⁷⁴ The Sixth Circuit cited *Parents Involved* for the proposition that the "prohibition of racial classifications has nothing to do with the use of racial demographic data in policymaking, so long as the policy itself does not classify people by race,"¹⁷⁵ in addition to the proposition that all schools need not "contain a racially diverse mix of students."¹⁷⁶

Nor was the Sixth Circuit convinced by the argument that the geography-based plan was "nothing more than race-based policies in disguise,"¹⁷⁷ or that the School Board had acted with a "segregative purpose."¹⁷⁸ Applying *Village of Arlington Heights*, the Court concluded that this "official action [could] not be held unconstitutional solely because it result[ed] in a racially disproportionate impact,"¹⁷⁹ and that the policy's challengers had not demonstrated any "proof to justify the inference that the Task Force obtained racial demographic data in furtherance of an intent to segregate."¹⁸⁰

While the outcome of this case is discouraging to those who support school integration, there is room for optimism in its analysis. Following Justice Kennedy's concurrence,¹⁸¹ the Sixth Circuit explicitly

172. *Id.* at 392 (noting "a pronounced trend in the Hillwood Cluster, where black student enrollment dropped from pre-Plan levels of 37.5 percent to 25.5 percent in the 2011–12 school year"). "In all, 790 fewer black students were enrolled in the Hillwood Cluster schools during the first year after the Rezoning Plan's implementation." *Id.*

173. *Id.* at 394.

174. *Id.*

175. *Id.*

176. *Id.* at 386.

177. *Id.* at 396.

178. *Id.*

179. *Id.* at 397 (citing *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264–65 (1977) ("[O]fficial action will not be held unconstitutional solely because it results in a racially disproportionate impact.")).

180. *Id.* at 399.

181. *See Parents Involved in Cmty. Schs. v. Seattle Sch. Dist.*, 551 U.S. 701, 852 (2007) (Kennedy, J., concurring) (citing the following examples as permissible uses of race in school assignment: "drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting

interpreted *Parents Involved* to allow analysis of demographic data, consciousness of race, and use of geography-based plans as a “race-neutral” policy.

III. PERMISSIBLE RACE-CONSCIOUS POLICIES

This Part begins by positing that, despite widespread confusion over whether *Parents Involved* allows for the consideration of race when crafting school assignment policies, close reading of the decision shows that it does allow conscious consideration of race in a general way. And it gives leaders of diverse school districts permission to implement effective strategies for encouraging integration and avoiding racial isolation. Then, this Part describes the strategies employed by five different school districts to provide models and lessons for other school districts interested in furthering those goals. This Part concludes by offering recommendations to school district leaders who want to pursue integration.

The stories in Ascension Parish, Lower Merion, and Nashville are emblematic of the broad “chilling effect” that followed the *Parents Involved* decision.¹⁸² The decision, with its lack of majority, sent a mixed message about whether or not school districts could consider race at all.¹⁸³ Still, “many district officials mistakenly believe that the *Parents Involved* decision made the use of race in student assignment illegal.”¹⁸⁴ Indeed, *Parents Involved* appears to have steered school districts into relying only on socioeconomic factors,¹⁸⁵ or else

students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race”).

182. Smith, *supra* note 15, at 1170 (noting “the chilling effect on the district’s consideration of race in future pupil assignment decisions” overall). *But see* ROSENBERG, *supra* note 25, at 72 (arguing that *Brown* had little effect on school desegregation until the federal government began to enforce its mandate).

183. Erica Frankenberg et al., *The New Politics of Diversity: Lessons from a Federal Technical Assistance Grant*, 53 AM. EDUC. RES. J. 440, 442 (finding that “[d]istrict leaders also believed the *Parents Involved* decision placed even stricter limits on race-conscious remedies than it actually did”).

184. *See* Anderson & Frankenberg, *supra* note 15.

185. While some have called for relying only on socioeconomic indicators in school reassignment plans, research points to the limitations of this approach in achieving racial diversity. *See* Tiffany D. Curtis, *Equal Protection via Equal Education: Why Congress Should Use Socioeconomic Integration as a Method of Education Reform*, 14 LOY. J. PUB. INT. L. 465, 500 (2013); Weeden, *supra* note 20. *But see* Anderson & Frankenberg, *supra* note 15 (pointing out that school districts using only socioeconomic status to measure diversity “[i]mplicitly . . . define a school as ‘integrated’ if it enrolls children from a mix of lower and higher-income backgrounds, even if those students are all of the same race” and also that the only socioeconomic data available are whether students receive free or reduced price lunch — data that are

abandoning integration efforts altogether,¹⁸⁶ creating a “legal uncertainty for leaders in school districts that were not under court order to integrate but had chosen to pursue diversity goals . . . using race-conscious [means].”¹⁸⁷ For instance, many have observed that granting unitary status to a school district often effectively forecloses its ability to engage in remedial race-conscious school assignment policies.¹⁸⁸

One common response among school district leaders was to substitute the use of race for race-neutral metrics like socioeconomic status,¹⁸⁹ because social science research points to socioeconomic status as the primary predictor for student academic outcomes.¹⁹⁰ But this measure has its pitfalls — the first being that socioeconomic status implicitly “define[s] a school as ‘integrated’ if it enrolls children from a mix of lower- and higher-income backgrounds, even if those students

often inaccurate representation of households’ social status or disposable income, and are increasingly becoming inaccessible to school districts); *id.* (“[T]he 46 districts in our study that focus solely on SES have ended up with substantially lower levels of racial integration than the districts that take into account both SES and race.”); Jonathan D. Glater & Alan Finder, *School Diversity Based on Income Segregates Some*, N.Y. TIMES (July 15, 2007), <https://www.nytimes.com/2007/07/15/education/15integrate.html> [<https://perma.cc/FQ5F-LF47>].

186. See generally TEFERA ET AL., *supra* note 120.

187. See Anderson & Frankenberg, *supra* note 15.

188. See Daniels & Pereira, *supra* note 71, at 649. McDermott et al. argue that even though *Parents Involved* does not apply to districts still under desegregation order, it may embolden critics of settlement orders to renegotiate or seek declaration of unitary status under new terms. McDermott et al., *supra* note 82, at 8. For an illustration of this phenomenon, see Don Munsch, *ECISD Board Members: New High School, or Two, Needed*, ODESSA AM. (Aug. 31, 2014), https://www.oaoa.com/premium/article_6467bbea-2ff5-11e4-b231-001a4bcf6878.html [<https://perma.cc/ME9C-YHLX>] (quoting the Superintendent of Ector County Independent School District: “we were granted unitary status because we promised that we would seek manage diversity and the way we were going to do it was outlined in this plan,” but “[t]he Supreme Court has ruled that a district could not determine diversity exclusively on race”). Justice Breyer criticized this strange result in his dissent in *Parents Involved*. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist.*, 551 U.S. 701, 821 (2007) (Breyer, J., dissenting) (“How could such a plan be lawful the day before dissolution but then become unlawful the very next day? On what legal ground can the majority rest its contrary view?”).

189. See Curtis, *supra* note 185; Weeden, *supra* note 20.

190. See JAMES S. COLEMAN ET AL., U.S. DEP’T OF HEALTH, EDUC. & WELFARE OFF. OF EDUC., EQUALITY OF EDUCATIONAL OPPORTUNITY 21–22 (1966) (finding that “socioeconomic factors bear a strong relation to academic achievement” and that “achievement of minority pupils depends more on the schools they attend than does the achievement of majority pupils”); Barshay, *supra* note 43 (summarizing a new study finding school poverty rates to be the strongest predictor in student achievement). To view the study in its entirety, see Reardon et al., *Is Separate Still Unequal?*, *supra* note 43.

are all of the same race.”¹⁹¹ Fundamentally, reliance on socioeconomic factors alone fails to address the reason that school district officials have to combat racial segregation at all: the long history of government intervention to segregate schools by race. More practically, reliance on socioeconomic factors is widely hindered by the limited data available; free or reduced-price lunch status, which does not account for families’ disposable income, is the only measure of student socioeconomic status available to most districts.¹⁹² Most importantly and unsurprisingly, however, relying only on free or reduced-price lunch is not as effective at achieving racial diversity as using race.¹⁹³

The Supreme Court’s recognition of the deep tradition of local control of public schools¹⁹⁴ — combined with its high evidentiary bar for a showing of discrimination in a facially neutral law¹⁹⁵ — has led some scholars and practitioners to argue that school districts must

191. See Anderson & Frankenberg, *supra* note 15. But socioeconomic status does not tell the whole story in school segregation or academic achievement. Sean F. Reardon observes that “[i]t doesn’t seem that we have any knowledge about how to create high-quality schools at scale under conditions of concentrated poverty . . . [a]nd if we can’t do that, then we have to do something about segregation. Otherwise we’re consigning black and hispanic and low-income students to schools that we don’t know how to make as good as other schools. The implication is that you have got to address segregation.” Reardon et al., *Is Separate Still Unequal?*, *supra* note 43.

192. See Reardon et al., *Is Separate Still Unequal?*, *supra* note 43 (pointing out that free or reduced-price lunch status is often inaccurate representation of households’ social status or dispensable income and are increasingly becoming inaccessible to school districts); see also Thurston Domina et al., *Is Free and Reduced-Price Lunch a Valid Measure of Educational Disadvantage?*, 47 EDUC. RES. 539, 545 (2018) (finding that “schools’ administrative FRPL category data are at best imperfect proxies for the household income of students in a given year”).

193. See Anderson & Frankenberg, *supra* note 15 (“The 46 districts in our study that focus solely on SES have ended up with substantially lower levels of racial integration than the districts that take into account both SES and race.”); see also Sean F. Reardon et al., *Implications of Income-Based School Assignment Policies for Racial School Segregation*, 28 EDUC. EVAL. & POL’Y ANALYSIS 49, 67 (2006) (“[I]ncome integration does not guarantee even a modest level of racial desegregation.”).

194. See *Milliken v. Bradley*, 418 U.S. 717, 741–42 (1974) (“No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process.”); see also *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 16 (1971) (“School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities.”).

195. See *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977) (stating that a finding of intentional discrimination when a law is neutral on its face would be “rare”).

simply be more careful about voicing the intent behind their school assignment policies.¹⁹⁶ However, Justice Kennedy's concurrence makes clear that such drastic measures are not necessary because the general awareness of race in decision-making is not treated the same as a racial classification.¹⁹⁷ In fact, the Supreme Court has never applied strict scrutiny to school assignment policies aimed at desegregating schools based only on awareness or consideration of race.

While cautious strategies like using socioeconomic status or simply leaving priorities unstated are understandable, some school districts, such as those discussed, *infra*, have continued to outwardly pursue race-conscious integration policies, while others have quietly approached it once again.¹⁹⁸ One of the policies proposed by Justice Kennedy — the conscious use of “non-individualized measures of race”¹⁹⁹ — has shown some promise, and the Third and Sixth Circuits — citing *Parents Involved* — upheld its constitutionality.

The method is not new; it was employed by Boston's historic Metropolitan Council for Educational Opportunity (METCO), one of the few voluntary busing programs remaining in the country,²⁰⁰ which buses Boston students to its suburbs²⁰¹ based on neighborhood, not

196. The dissent in *Parents Involved* recognized the long history of local school districts developing school desegregation. See *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist.*, 551 U.S. 701, 804 (2007) (Breyer, J., dissenting) (“Beyond those minimum requirements, the Court left much of the determination of how to achieve integration to the judgment of local communities.”); see also Abel, *supra* note 11 (arguing that school districts should simply “avoid a finding that race was a ‘motivating factor’ in their decision[-]making process”). There is evidence that some school districts have done this: after *Parents Involved*, school district leaders in Rock Hill, South Carolina began using “balance” in place of “integration” and “desegregation” in school assignment plans. See Smith, *supra* note 15, at 1151.

197. *Parents Involved*, 551 U.S. at 782.

198. The precise number of school districts in the country outwardly pursuing race-conscious integration policies cannot be identified with certainty, although some studies have attempted it. See generally Frankenberg et al., *supra* note 183 (chronicling the voluntary efforts to integrate or desegregate in 11 different school districts).

199. See Meredith P. Richards et al., *Achieving Diversity in the Parents Involved Era: Evidence for Geographic Integration Plans in Metropolitan School Districts*, 14 BERKELEY J. AFR.-AM. L. & POL'Y 65, 68 (2012).

200. Alana Semuels, *The Utter Inadequacy of America's Efforts to Desegregate Schools*, ATLANTIC (Apr. 11, 2019), <https://www.theatlantic.com/education/archive/2019/04/boston-metco-program-school-desegregation/584224/> [https://perma.cc/PML8-JXH3] (noting “the ratio of METCO students to non-METCO students has fallen”).

201. *METCO Partner Districts*, METRO. COUNCIL FOR EDUC. OPPORTUNITY (2019), <https://metcoinc.org/partner-districts/> [https://perma.cc/33TB-REHK]. In *Parents Involved*'s immediate aftermath, there was widespread insecurity and controversy over the legality of the program. See Laura Crimaldi, *Metco Fate Unclear: School*

students' individual races.²⁰² Some school districts have built on METCO's smaller-scale idea by employing statistical methods based on neighborhood or block-level demographic census data to redraw entire attendance zone boundaries.²⁰³ Geographic boundaries are by far the most common means for assigning students to schools across the country,²⁰⁴ and are far-reaching because of their potential to affect all schools within a district.²⁰⁵

Although school boundary lines often reinforce segregation²⁰⁶ and school choice policies can create school segregation where integrated housing exists,²⁰⁷ school districts can also use these boundary policies

Desegregation System at Risk After High Court Ruling, BOS. HERALD (July 8, 2007), <https://www.bostonherald.com/2007/07/08/metco-fate-unclear-school-desegregation-system-at-risk-after-high-court-ruling/> [<https://perma.cc/5VTP-7BFV>].

202. Semuels, *supra* note 200.

203. See Halley Potter et al., *A New Wave of School Integration: Districts and Charters Pursuing Socioeconomic Diversity*, CENTURY FOUND. (Feb. 9, 2016), <https://tcf.org/content/report/a-new-wave-of-school-integration/> [<https://perma.cc/W5XZ-ZUH5>] (finding that among 91 school districts identified with policies for promoting socioeconomic integration, the most common method, employed by 38 districts, was redrawing attendance zones).

204. See *id.* (demonstrating that 82% of school districts nationwide primarily use geographic zones for school assignment).

205. See *id.*

206. See Meredith P. Richards, *The Gerrymandering of School Attendance Zones and the Segregation of Public Schools: A Geospatial Analysis*, 51 AM. EDUC. RES. J. 1119, 1149 (2014) (finding that, using a nationwide sample, "first grade attendance zone boundaries generally serve to segregate students by race and ethnicity" and also that "districts . . . under active desegregation orders . . . are affirmatively gerrymandered in ways that reduce segregation"); see also Alvin Chang, *We Can Draw School Zones to Make Classrooms Less Segregated. This Is How Well Your District Does*, VOX (Aug. 27, 2018), <https://www.vox.com/2018/1/8/16822374/school-segregation-gerrymander-map> [<https://perma.cc/B6Z2-P9RZ>] (noting that "often the attendance zones are gerrymandered to put White students in classrooms that are even whiter than the communities they live in" and providing an interactive map displaying the appearance of this phenomenon across zip codes). The scope of such policies, however, is often severely limited when school districts themselves are racially segregated from one another. See *Milliken v. Bradley*, 418 U.S. 717, 746 (1974) (holding that courts may not create desegregation orders that affect school districts that never had de jure segregation policies). For a stark look at the impact of that holding today, see Nikole Hannah-Jones, *The Resegregation of Jefferson County*, N.Y. TIMES MAG. (Sept. 6, 2017), <https://www.nytimes.com/2017/09/06/magazine/the-resegregation-of-jefferson-county.html> [<https://perma.cc/MCL8-87VQ>] (discussing the phenomenon of community secession from school districts); see also *Fault Lines: America's Most Segregating School District Borders*, EDBUILD (Aug. 23, 2016), <https://s3.amazonaws.com/edbuild-public-data/data/fault+lines/EdBuild-Fault-Lines-2016.pdf> [<https://perma.cc/B3V4-2246>].

207. HEMPHILL & MADER, *supra* note 9 (finding that New York City's schools are more racially and economically segregated than its neighborhoods).

to counteract segregation.²⁰⁸ In fact, Jeremy Anderson and Erica Frankenberg's recent study suggests that this approach "appears to have the fastest and most wide-ranging effect on enrollments," but its efficacy requires "boundaries . . . to be adjusted regularly for this mechanism to be effective, given that residential patterns often shift."²⁰⁹ Regularly revisiting boundaries to address demographic changes is critical for effective implementation of such plans, however many of the 111 school districts in Anderson and Frankenberg's study using school boundary policies to try to achieve school diversity did not revisit their plans regularly to ensure they were meeting their goals.²¹⁰

Careful use of census data is also effective in school districts where choice policies are already in place, or where distance in housing segregation makes redistricting difficult. In 2012, Meredith P. Richards, Kori J. Stroub, Julian Vasquez Heilig, and Michael R. Volonnino²¹¹ argued that the innovative race-conscious integration plan implemented in Berkeley, California should serve as a model to other school districts seeking to integrate or desegregate schools after *Parents Involved*. The authors conducted a statistical analysis using census-block data from the ten largest metropolitan school districts in the United States to predict the effects of school assignment policies to promote racial integration.

This Note collects promising evidence from the handful of school districts²¹² that are similarly using census-block or neighborhood-level

208. See Sam Brill, *The Law of School Catchment Areas*, 30 STAN. L. & POL'Y REV. 349, 398 (2019) (arguing for "more radical disruptions of catchment area law and policy, either by instituting controlled choice (as in Cambridge) or gerrymandering catchment areas in reverse (as in Wake County)"); see also Aaron J. Saiger, *The School District Boundary Problem*, 42 URB. LAW. 495, 496 (2010) (arguing that "redistricting is especially well-suited to school districts" and should be used periodically to "dissolve within-district accretions of wealth and poverty"); Tomas E. Monarrez, *School Attendance Boundary Gerrymandering and the Segregation of Schools in the US* (Oct. 2019) (unpublished draft), <https://sites.google.com/site/tmonarrez/> [<https://perma.cc/Y26U-ZN55>] ("[S]chool boundary manipulation is a remarkably responsive area of local education policy which reflects the influence of both local cost and preference factors.").

209. See Anderson & Frankenberg, *supra* note 15; see also Potter et al., *supra* note 203 ("School boundaries usually need to be readjusted regularly as populations and demographics shift in response to housing patterns. School boundary decisions are also almost always politically contentious. Families frequently buy or rent homes with particular schools in mind and may object to changes in school assignment that they view as forced.").

210. See Anderson & Frankenberg, *supra* note 15, at 4.

211. Richards et al., *supra* note 199, at 73.

212. This Section discusses assignment policies used by school districts not still under desegregation order. Since *Parents Involved*, a number of school districts have achieved unitary status, meaning that any efforts to avoid racial segregation are now

data in a general, race-conscious way to draw school zones or inform choice policies.²¹³ Using this evidence, this Note argues that these models are not only explicitly permissible under *Parents Involved*, as evidenced by similar plans upheld by the Third and Sixth Circuits and explicitly endorsed in Justice Kennedy's concurrence,²¹⁴ but also that they should be replicated by other metropolitan school districts.²¹⁵

A. Examples of Permissible, Effective, Race-Conscious Strategies for Avoiding Racial Isolation

Finding proof of generalized uses of race can be difficult, particularly when school districts are often loath to share their strategies because of fears of political backlash or litigation. For that reason, this Note focuses only on school districts already discussed or examined in scholarly research. In 2019, Anderson and Frankenberg identified 111 school districts that had adopted voluntary integration policies and, of those districts, identified 59 that had taken steps to implement their policies.²¹⁶ The 59 identified districts had similar patterns of residential segregation and were racially diverse.²¹⁷ Of those 59, 46 relied only on

voluntary. For a list of school districts that achieved unitary status between 2008 and 2015, see Daniels & Pereira, *supra* note 71, at 667. Overall, school districts declared unitary between 1990 and 2002 saw an increase in school segregation by race. GARY ORFIELD & CHUNGMEI LEE, *BROWN AT 50: KING'S DREAM OR PLESSY'S NIGHTMARE?*, THE CIVIL RIGHTS PROJECT 38–39 (2004).

213. This Section does not focus on school diversity, desegregation, or integration policies based on socioeconomic indicators, which several communities have voluntarily adopted since 2011. For a list of 91 school districts using socioeconomic factors to promote school diversity, see *A New Wave of School Integration Complete Data Set*, CENTURY FOUND. (2016), https://docs.google.com/spreadsheets/d/1Hfc5IW5q3a3X5UuRzrYkWVSwAqN06_qEIX3LbztWvxY/edit#gid=223241069 [https://perma.cc/U38F-MG2F]. These include Wake County, North Carolina, whose school board voted to end its socioeconomic integration in 2009, but then again voted to adopt a new socioeconomic diversity policy in 2011. See McDermott et al., *supra* note 82, at 9.

214. Justice Kennedy stated that “it is permissible to consider the racial makeup of schools and to adopt general policies to encourage a diverse student body, one aspect of which is its racial composition,” including “race-conscious measures to address the problem in a general way and without treating each student in different fashion solely on the basis of a systematic, individual typing by race.” *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist.*, 551 U.S. 701, 788–89 (2007) (Kennedy, J., concurring).

215. See *generally* Richards et al., *supra* note 199, at 73.

216. Anderson & Frankenberg, *supra* note 15, at 3.

217. The 59 districts “tend to be considerably more diverse than the national norm: 38% of their students are Latinx, 26% Black, and 29% White, and 65% are eligible for free or reduced-price lunch.” *Id.* at 2.

family socioeconomic status to guide policies, while just 13 tried to integrate students using race as well as socioeconomic status.²¹⁸

In 2016, Potter, Quick, and Davies assembled a data set of 91 districts and charter schools pursuing school diversity policies.²¹⁹ Of those 91, the vast majority used free or reduced-price lunch eligibility to inform their school assignment policies, while only 12 districts employed neighborhood-level demographic data.²²⁰ Because this Note focuses on district-wide solutions, it will not examine charter school acceptance policies, districts using neighborhood-level demographic census data only for admissions to certain schools,²²¹ districts using census data only for approval of transfer requests,²²² or neighborhood data used for inter-district transfers.²²³ Additionally, some of those districts will not be examined by this Note because their policies have not yet been implemented or are not well documented. This Note examines the policies of five districts included in the data set that can

218. *Id.* at 3.

219. See *A New Wave of School Integration Complete Data Set*, *supra* note 213.

220. Those districts, identified by this Note's author, are: Chicago Public Schools; Jefferson County Public Schools (Louisville, Kentucky); Larchmont Charter School (Los Angeles, California); Montclair Public Schools (New Jersey); Denver Public Schools; Hamilton County Public Schools (Chattanooga, Tennessee); La Crosse School District (Wisconsin); McKinney Independent School District (Texas); Minneapolis Public Schools; Polk County Public Schools (Florida); Berkeley Unified School District; Hillsborough County Public Schools (Tampa, Florida). See *generally id.* Note this dataset marked some school districts using factors "not specified," which means that this list should not be considered exhaustive.

221. For instance, Chicago uses neighborhood-level data only for admissions to its specialized high schools. See *School Data*, CHI. PUB. SCHS., <https://cps.edu/SchoolData/Pages/SchoolData.aspx> [<https://perma.cc/U73G-B7FS>] (last visited Nov. 24, 2019).

222. See *e.g.*, *District Diversity Plan*, DAVENPORT COMMUNITY SCHS., http://www.davenportschools.org/wp-content/uploads/2012/07/Diversity-Plan-3_12_15.pdf [<https://perma.cc/JHZ2-LKAT>] (last visited Nov. 24, 2019).

223. For Connecticut's inter-district plan for Hartford and its suburbs, see CONN. ST. DEP'T EDUC., <https://portal.ct.gov/SDE/School-Choice/RSCO/Regional-School-Choice-Office-Home-Page> [<https://perma.cc/3KZK-W7RT>] (last visited Nov. 24, 2019).

best serve as a model for other racially diverse²²⁴ school districts to implement district-wide policies.²²⁵

i. Berkeley, California

After the California Prohibition Against Discrimination or Preferential Treatment (Proposition 209), which prohibited “discriminat[ion]” or “preferential treatment” based on race in public education, passed in 1996,²²⁶ the Berkeley Unified School District, redesigned its controlled choice school assignment plan, which resembles those in Seattle and Louisville before *Parents Involved*. Berkeley’s new plan replaced individual student race with “geographically-based diversity indices”²²⁷ that “exploit historic patterns of neighborhood racial and socioeconomic segregation, presuming that neighborhood characteristics will reliably predict student characteristics.”²²⁸ To create the indices, Berkeley Unified uses census data to generate “a composite of attributed diversity characteristics derived from the planning area in which the student lives,”²²⁹ namely its “percent students of color, median household

224. A note on usage: The National Center for Education Statistics uses the terms “Black,” “Hispanic,” and “Two or More Races” for reporting racial data. Some school districts instead use “African American,” “Latinx,” or “multiracial.” See, e.g., BERKELEY UNIFIED SCH. DIST., ADDITIONAL INDICATORS OF PROGRESS TO ACHIEVE GOALS — THREE YEAR LOOK (2016), https://www.berkeleyschools.net/wp-content/uploads/2016/11/14_1_2016173YearOtherIndicatorsOfProgress_0.pdf [<https://perma.cc/87MT-Z8L4>]. When reporting statistics on race, this Note mirrors the terms in the primary source.

225. When publicly available, this Note relied on enrollment data provided by the school district. If recent data were not available, this Note used high school enrollment data provided by the National Center for Education Statistics. This Note chose to focus on high school enrollment to provide a snapshot of districts’ school-level racial makeup because there are fewer high schools, allowing this Note to describe the state of school-level racial diversity more simply. For those school districts with only one high school — Berkeley and Montclair — this Note also included most recent demographic data of elementary school enrollment to demonstrate the effects of policies on the redistribution of students.

226. CAL. CONST. art. I, § 31(a) (adopted November 5, 1996, through the ballot initiative measure Proposition 209) (“The State shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.”). Berkeley Unified recently survived a legal challenge that it violated Proposition 209. See *generally* Am. Civil Rights Found. v. Berkeley Unified Sch. Dist., 90 Cal. Rptr. 3d 789 (Cal. Ct. App. 2009).

227. Richards et al., *supra* note 199, at 69.

228. *Id.*

229. LISA CHAVEZ ET AL., THE CIVIL RIGHTS PROJECT/PROYECTO DERECHOS CIVILES, INTEGRATION DEFENDED: BERKELEY UNIFIED’S STRATEGY TO MAINTAIN SCHOOL DIVERSITY 4 (2009), <https://www.civilrightsproject.ucla.edu/research/k-12->

income, and mean level of adult education,”²³⁰ then uses those composite scores to assign codes to neighborhoods based on relative advantage or disadvantage.²³¹ School enrollment then operates as an open choice system unless “any school deviate[s] from the overall attendance zone average by more than 5–10 percent.”²³² In that case, “any available seats are filled with students residing in neighborhood of the category that is needed to realign the schools diversity with that of its attendance zone.”²³³ In this system, “a school that is diverse in terms of the neighborhoods it represents will also have a comparably diverse student body.”²³⁴

Berkeley Unified aims to “integrate schools” based on “parent education level, . . . parent income level[,] and . . . race and ethnicity;”²³⁵ and its plan has been largely effective, producing “substantial racial-ethnic diversity across the district’s elementary schools.”²³⁶ During the 2007–2008 school year, Berkeley’s school district, which overall was 30% White, 26% African American, 17% Latino and 7% Asian (19% of students are marked multi-racial or non-responsive to the survey), boasted racially diverse schools.²³⁷ Berkeley High, which 96% of students in the district attended, was 33% White, 28% African American, 14% Latino, and 8% Asian.²³⁸

education/integration-and-diversity/integration-defended-berkeley-unified2019s-strategy-to-maintain-school-diversity/Integration-Defended-corrected-9-16-09.pdf [https://perma.cc/CRQ3-B662].

230. Richards et al., *supra* note 199, at 70.

231. *Id.*

232. *Id.*

233. *Id.* For a map of the attendance zones, see CHAVEZ ET AL., *supra* note 229, at 4.

234. Richards et al., *supra* note 199, at 70.

235. In full, it reads:

Forty years ago, our primary goal was to racially integrate all schools. Although it is indisputable that each student’s racial and ethnic background enriches the learning environment of all students, we believe that the recognition and appreciation of the bedrock value of diversity in our schools should be expanded to consider additional factors that enhance the learning environment and recognize other factors contributing to diverse classrooms.

Information on Berkeley Unified’s Student Assignment Plan, BERKELEY UNIFIED SCH. DISTRICT (2019), <https://www.berkeleyschools.net/information-on-berkeley-unifieds-student-assignment-plan/> [https://perma.cc/6RHP-Q6DM].

236. CHAVEZ ET AL., *supra* note 229, at 4 (however, the authors note that Berkeley’s plan “is not as effective at integrating schools by socioeconomic status” as it is by race).

237. Note that these data are from 2008. *See id.* at 1.

238. *See id.* at 14. However, note that Berkeley Unified’s one other high school, Berkeley Technology Academy School, which enrolled 3% of students in the district, was 2% White, 67% African American, 19% Latino, and 3% Asian. *Id.*

Although racial demographics in Berkeley Unified have shifted slightly since 2007 — 39% of enrolled students now identify as White, 13% as multiracial, 22% as Hispanic or Latino, 17% as African American, and 8% as Asian²³⁹ — its “ethnic diversity index,” the California Department of Education’s measure for school diversity,²⁴⁰ has remained relatively constant.²⁴¹ For example, during the 2017–2018 school year, Berkeley High, which enrolled 98% of the District’s high school students, was 40% White, 15% Black, 23% Hispanic, and 9% Asian,²⁴² and its elementary schools, according to 2018–2019 data, each have relatively similar levels of racial diversity.²⁴³ Its two middle schools are slightly less racially diverse — though it may be because they appear to have a higher proportion of White students overall — their enrollments by race are similar: one middle school is 7% Asian, 15% Black, 18% Hispanic, 42% White, and 18% two or more races;²⁴⁴

239. See BERKELEY UNIFIED SCH. DIST., *supra* note 224.

240. Under this rating, a school “where all of the students are the same ethnicity would have an index of 0” and a school where students are evenly proportioned from eight different racial categories “would have an Ethnic Diversity Index of 100.” As California’s Education Data Partnership explains, “of course, no school has an index of 100 (although a few have diversity indices of 0). Currently the highest index for a school is 76.” *Ethnic Diversity Index: What Is the Ethnic Diversity Index?*, ED-DATA, <http://www.ed-data.org/article/Ethnic-Diversity-Index> [https://perma.cc/54S9-36T2] (last visited Dec. 14, 2019).

241. Berkeley High’s Ethnic Diversity Index was 62 from 2013–2016 and 61 from 2016–2018. *School Summary, Berkeley High*, ED-DATA, <http://www.ed-data.org/school/Alameda/Berkeley-Unified/Berkeley-High> [https://perma.cc/Z2XQ-GQGD] (last visited Dec. 14, 2019); *Ethnic Diversity, Berkeley High*, ED DATA, <http://www.ed-data.org/school/Alameda/Berkeley-Unified/Berkeley-High> [https://perma.cc/J3ZR-PAPV] (last visited Feb. 15, 2020).

242. The percentages reflect this author’s own calculations based on school data provided by the National Center for Education Statistics. See *Enrollment Characteristics (2017–2018 school year)*, NAT’L CTR. FOR EDUC. STATS., https://nces.ed.gov/ccd/schoolsearch/school_detail.asp?Search=1&DistrictID=0604740&SchoolPageNum=1&ID=060474000432 [https://perma.cc/EL5U-7TLP] (last visited Dec. 14, 2019).

243. The figures in the table below were calculated based on enrollment data reported by the National Center for Education Statistics. *Public School Data (2018–2019)*, NAT’L CTR. FOR EDUC. STATS., https://nces.ed.gov/ccd/schoolsearch/school_list.asp?Search=1&DistrictID=0604740&SchoolPageNum=1 [https://perma.cc/EUS4-CP5J] (last visited Mar. 8, 2020).

244. See *Enrollment Data for Willard Middle, (2018–2019)*, NAT’L CTR. FOR EDUC. STATS., https://nces.ed.gov/ccd/schoolsearch/school_detail.asp?Search=1&DistrictID=0604740&SchoolPageNum=2&ID=060474007267 [https://perma.cc/XS7M-EUQW] (last visited Mar. 8, 2020).

while the other is 8% Asian, 11% Black, 18% Hispanic, 50% White, and 17% two or more races.²⁴⁵

Table A: Berkeley Unified School Elementary School Enrollment Data²⁴⁶

Elementary School Name	Total Enrollment (number of students)	% Asian	% Black	% Hispanic	% White	% Two or More Races
Cragmont Elementary	399	9%	17%	19%	38%	17%
Emerson Elementary	320	10%	13%	18%	42%	17%
Jefferson Elementary	408	10%	9%	18%	45%	19%
John Muir Elementary	296	10%	21%	18%	38%	13%
Malcolm X Elementary	551	7%	14%	16%	48%	15%
Oxford Elementary	290	4%	19%	18%	41%	17%
Rosa Parks Environmental Science	445	7%	10%	21%	47%	15%
Sylvia Mendez Elementary	381	4%	14%	52%	23%	8%
Thousand Oaks Elementary	423	5%	12%	37%	32%	14%
Washington Elementary	500	11%	14%	17%	44%	14%

The proportional distribution of students of different races across all of Berkeley's elementary schools is remarkable, and strong evidence of this two-decade-long policy's success.

245. See *Enrollment Data for Martin Luther King Middle, (2018–2019)*, NAT'L CTR. FOR EDUC. STATS., https://nces.ed.gov/ccd/schoolsearch/school_detail.asp?Search=1&DistrictID=0604740&SchoolPageNum=1&ID=060474000443 [https://perma.cc/W2SE-8DWK] (last visited Mar. 8, 2020).

246. See *id.* for the source of figures.

ii. Nashville, Tennessee

Using census demographic data to create desegregation plans is not a new method for Metro Nashville Public Schools. The District based its 1971 desegregation plan on a “pupil locator map” indicating the “home, grade level, and race of each child in Nashville schools.”²⁴⁷ But after achieving statistical desegregation,²⁴⁸ Metro Nashville experienced a decade of rapid resegregation²⁴⁹ when its assignment plan returned to reliance on neighborhood schools.²⁵⁰ In 1991, less than 1% of Black students in Metro Nashville attended a “highly concentrated minority school”; in 2009, more than 20% of Black students did.²⁵¹

In 2007, the School District formed a “Student Assignment Task Force” charged with monitoring diversity in schools,²⁵² to “consider foreseeable diversity impact with a view toward preserving or enhancing diversity as much as practicable using race-neutral means” in “cluster configuration . . . zoning and re-zoning, school expansion and renovation . . . school re-purposing . . . school openings and closings . . . siting of new schools . . . siting of special programs . . . grade organization and feeder patterns,” and several other policies related to staffing or open enrollment schools.²⁵³ The Task Force used demographic data “including student-enrollment numbers by race and socioeconomic status,” which “showed what the demographic and socioeconomic picture would look like if various proposals were adopted.”²⁵⁴ The final plan relied on school zones based on geographical residence — but instead of traditional school catchment areas, the zones became “choice zones,” wherein families could choose to attend the school within their zone or in a school in a

247. ERICKSON, *supra* note 51, at 175. Nashville’s 1971 plan closed Black schools, largely requiring Black students and teachers to adjust to historically White schools. *See id.* at 215–16.

248. Metro Nashville’s history is unique among school districts because its Whiter suburban district, Davidson County, actually merged with Nashville schools in the 1960s after litigation following *Brown*. *See id.* at 90–91; *Maxwell v. Cty. Bd. of Ed.*, 301 F.2d 828, 829 (6th Cir. 1962), *vacated in part sub nom.*, 319 F.2d 858 (6th Cir. 1963).

249. Nashville achieved unitary status in 1998. *See Spurlock v. Fox*, 716 F.3d 383, 385 (6th Cir. 2013). Since then, its resegregation has been well documented. *See Claire Smrekar, Beyond the Tipping Point: Issues of Racial Diversity in Magnet Schools Following Unitary Status*, 84 PEABODY J. EDUC. 209, 212 (2009).

250. *See Anderson & Frankenberg, supra* note 15.

251. ERICKSON, *supra* note 51, at 295.

252. *Id.* at 8.

253. *Id.* at 6.

254. *Spurlock*, 716 F.3d at 388.

different zone that had the “capacity to take in more students and stood to gain more from a diverse student body.”²⁵⁵

Like Berkeley, Nashville’s school system considers a composite of factors, including “race and ethnicity, household income, language-learner status, and disability status”²⁵⁶ when defining diversity in schools. Nashville’s process is also “distinctive in that school board members and district leaders weigh every major policy decision against its impact on diversity.”²⁵⁷ Nashville’s current assignment plan, implemented in 2013, explicitly states its aim that all students be “provided the benefits of learning in diverse settings,” and recognizing that “quality, diverse schools at all grade levels are indispensable to the civic and educational purpose of this School District.”²⁵⁸ However, its website also clarifies that “[s]tudents will not be assigned to a school or be admitted to/denied admission to an application school or open enrollment school based on the individual’s race or ethnicity.”²⁵⁹

Today, the racial composition of Nashville’s schools reflects both the successes and the failures of these efforts. Of Metro Nashville’s 17 high schools, during the 2019–2020 school year, 13 reported enrollments that were between 20–52% Black students, with no other single racial category making up a majority of the school.²⁶⁰ But four of Nashville’s high schools are hyper-segregated by race, including Pearl-Cohn, the school whose enrollment numbers were a focus of the plaintiffs in *Spurlock*.²⁶¹ Those four high schools have over 70% Black student

255. *Id.* at 389.

256. Lesli A. Maxwell, *60 Years after Brown, School Diversity More Complex Than Ever*, EDUC. WEEK (May 13, 2014), <https://www.edweek.org/ew/articles/2014/05/14/31brown-overview.h33.html> [<https://perma.cc/5TRE-9E7Y>].

257. *Id.* (“For example, the board will not approve a new charter school unless it agrees to use the same standards for student and staff diversity that the district has defined.”). Nashville’s focus on racial integration is in part made possible by the fact that its students represent a variety of racial or ethnic groups, where no group constitutes the majority. Data from 2013 indicate that the District is 44% Black, 33% White, 18% Hispanic, 4% Asian, 0.2% Native American, and 0.1% Pacific Islanders. See METRO. NASHVILLE PUB. SCHS., DIVERSITY MANAGEMENT PLAN 1 n.2 (2013), <https://static1.squarespace.com/static/57752cbcd1758e541bdeef6b/t/57927c2b414fb54f6682d70a/1469217835841/Diversity%2BManagement%2BPlan.pdf> [<https://perma.cc/7LE7-CX4L>].

258. METRO. NASHVILLE PUB. SCHS., *supra* note 257, at 1.

259. *See id.* at 2–3.

260. Percentages are the author’s own calculations, taken from enrollment numbers reported on data.nashville.gov. *Metro Nashville Public Schools Enrollment and Demographics*, METRO. GOV’T OF NASHVILLE & DAVIDSON CTY., <https://data.nashville.gov/Education/Metro-Nashville-Public-Schools-Enrollment-and-Demo/j7b8-4fv6> [<https://perma.cc/B4HB-KJTN>] (last visited Dec. 16, 2019).

261. *See supra* Section II.C.

populations and White student populations hovering around or under 10%.²⁶²

iii. Montclair, New Jersey

Montclair Public Schools is a system with a storied history of school integration efforts. Subject to court-ordered desegregation in 1968, by the 1990s, Montclair was known as an “integration Eden” and a model for other districts.²⁶³ But, because of tracking, classrooms within schools remained largely segregated by race.²⁶⁴ In Montclair, 32% of students are Black, 9% are Hispanic, 51% are White, and 5% are Asian.²⁶⁵

Following the *Parents Involved* decision, Montclair redeveloped its “open choice plan,”²⁶⁶ operating “all schools as magnet schools in order to achieve racial and socioeconomic diversity,”²⁶⁷ so that it no longer accounted for individual students’ race.²⁶⁸ The plan divides the

262. The enrollment data provided for those schools are as follows: East Nashville School: 94% Black, 3% White, 2% Hispanic/Latino, 1% Asian; Maplewood High: 71% Black; 7% White; 21% Hispanic/Latino, 1% Asian; Pearl-Cohn High: 93% Black; 2% White; 5% Hispanic/Latino; 0% Asian; Whites Creek High School: 82% Black; 12% White; 5% Hispanic/Latino; 0% Asian. See *Metro Nashville Public Schools Enrollment and Demographics*, *supra* note 260.

263. See Michael Hill, *Beyond the Image of Harmony, Inequities in Montclair Remain*, NJTV NEWS (May 3, 2018), <https://www.njtvonline.org/news/video/beyond-image-harmony-inequities-montclair-remain/> [https://perma.cc/2ME6-F6SU].

264. See Kimberly J. McLarin, *Specter of Segregation Returns; Montclair Schools Are Troubled by Racial Imbalance Among Classrooms*, N.Y. TIMES (Aug. 11, 1994), <https://www.nytimes.com/1994/08/11/nyregion/specter-segregation-returns-montclair-schools-are-troubled-racial-imbalance.html> [https://perma.cc/QV3C-C7FX]. In 1993, Montclair experimented with de-tracking — eliminating sorting by perceived academic ability — its ninth-grade classes. See Charles Strum, *Schools’ Tracks and Democracy: Sorting Students by Performance: Efficiency or Elitism?*, N.Y. TIMES (Apr. 1, 1993), <https://www.nytimes.com/1993/04/01/nyregion/schools-tracks-democracy-sorting-students-performance-efficiency-elitism.html> [https://perma.cc/W23C-2WVQ].

265. See *A New Wave of School Integration Complete Data Set*, *supra* note 213, at line 58.

266. Montclair Public Schools engaged in focus groups and planning that resulted in a 2010 report. See OHIO ST. UNIV., KIRWAN INST. FOR THE STUDY OF RACE & ETHNICITY, MONTCLAIR PUBLIC SCHOOLS: FOCUS GROUPS (2010), http://www.kirwaninstitute.osu.edu/reports/2010/03_2010_MontclairSchoolIntegrationFocusGroups.pdf [https://perma.cc/F2WZ-9LML]. The report properly characterized the holding of the *Parents Involved* decision: “a majority of [j]ustices held that in voluntary integration plans the race of individual students couldn’t be used in school assignment, the school district is updating its integration plan.” *Id.* at 1.

267. See *A New Wave of School Integration Complete Data Set*, *supra* note 213, at line 58.

268. See Zoë Burkholder, *The Future of Racially Integrated Schools: A Perspective from Montclair, N.J.*, EDUC. WEEK (May 26, 2010), <https://www.edweek.org/ew/articles/2010/05/26/33burkholder.h29.html>

District into three noncontiguous zones, based on census data on median household income, number of free or reduced-price lunch eligible students, parent education levels, household poverty rates, and “race by neighborhood” — each weighted equally.²⁶⁹ A “computerized system [then] randomly assigns students with a number, according to zones, with 1st to 6th ranking of parental preference of schools.”²⁷⁰ The database assigns students “based on school enrollment/spaces/slots,” prioritizing students enrolling at the same schools as siblings and students who require special education or English Language Learner support.²⁷¹ Today, Montclair’s average school-level racial demographics are proportional to the overall demographics of the state of New Jersey.²⁷² Its school racial makeups range from Hillside: 44% White, 33% Black, 10% Hispanic, and 4% Asian; to Bradford: 61% White, 15% Black, 8.5% Hispanic, and 8.5% Asian.²⁷³

iv. Hillsborough County, Florida (Tampa)

Hillsborough County, Florida, the school district including Tampa and its suburbs, is the eighth largest school system in the country²⁷⁴ and is racially and socioeconomically diverse.²⁷⁵ In 1969, Hillsborough

[<https://perma.cc/FTH5-48CP>]. The Board approved the plan in 2010. See Shelley Emling, *Freedom of Choice School Selection and Assignment Policy Explained*, PATCH (May 9, 2011), <https://patch.com/new-jersey/montclair/freedom-of-choice-school-selection-and-assignment-pol91b83b57ec> [<https://perma.cc/FTH5-48CP>].

269. For a map of the zones, see Emling, *supra* note 268.

270. *Id.*

271. *Id.*

272. See PAUL L. TRACTENBERG & RYAN W. COUGHLAN, CTR. FOR DIVERSITY & EQUAL. IN EDUC., *THE NEW PROMISE OF SCHOOL INTEGRATION AND THE OLD PROBLEM OF EXTREME SEGREGATION* 6 (2018), <http://www.centerfordiversityandequalityineducation.com/related-links/> [<https://perma.cc/FTH5-48CP>] (calculating that “[b]etween 10% and 25% of students would need to be exchanged with students of a different race” for Montclair schools, on average, to resemble racial demographics in New Jersey as a whole, which were 45.3% White, 27.1% Hispanic, 15.5% Black, and 9.9% Asian).

273. Jamie Julia Winters, *Report: Montclair’s Schools Reflect Community Diversity*, MONTCLAIR LOC. (May 10, 2018), <https://www.montclairlocal.news/2018/05/10/report-montclairs-schools-reflect-community-diversity/> [<https://perma.cc/FTH5-48CP>].

274. See U.S. CENSUS BUREAU, *TOP 10 LARGEST SCHOOL DISTRICTS BY ENROLLMENT AND PER PUPIL CURRENT SPENDING* (2019), <https://www.census.gov/library/visualizations/2019/comm/largest-school-districts.html> [<https://perma.cc/7UKL-PES9>].

275. Of students in the district, 57% are free or reduced-price lunch eligible, 21% are Black, 33% are Hispanic, 38% are White, and 3% are Asian. See *A New Wave of School Integration Complete Data Set*, *supra* note 213, at line 44.

County schools were placed under court-ordered desegregation.²⁷⁶ Under the district court's directive, the Hillsborough County School Board developed a school desegregation plan with the stated aim that "a White-Black ratio of 86%/14% in the senior high schools, and 79%/21% in the elementary schools would be the most acceptable and desirable form of desegregation."²⁷⁷ The plan assigned "students attending the predominately black schools to various schools based on the location of their residence or the transportation of groups of these students from satellite zones."²⁷⁸ By 1971, only one school in the county had more than a 40% Black student enrollment,²⁷⁹ and Hillsborough County was lauded as a successful school desegregation story.²⁸⁰ But by the 1990s, after the School Board had implemented certain changes to alleviate overcrowding, schools had, overall, become more segregated by race.²⁸¹

After a Florida district court denied the Hillsborough County School Board's request to lift its consent decree in 1998,²⁸² the district appealed to the Eleventh Circuit, which declared the district unitary in 2001.²⁸³ Since then, Hillsborough County has considered socioeconomic and demographic factors when drawing its attendance

276. *Mannings v. Bd. of Pub. Instruction*, 306 F. Supp. 497, 497 (M.D. Fla. 1969). For insight into the experience of desegregation in greater Tampa, see Eric Vician, *Integration at Brandon High Had Its Challenges*, TAMPA BAY TIMES (Feb. 12, 2014), <https://www.tampabay.com/news/humaninterest/integration-at-brandon-high-had-its-challenges/2165304/> [<https://perma.cc/H5NX-2PX8>].

277. *Manning v. Sch. Bd.*, 24 F. Supp. 2d 1277, 1282 (M.D. Fla. 1998).

278. *Id.*

279. *Id.* at 1283.

280. See Drew S. Days III, *The Other Desegregation Story: Eradicating the Dual School System in Hillsborough County, Florida*, 61 *FORDHAM L. REV.* 33, 34 (1992).

281. See *Manning*, 24 F. Supp. 2d at 1286 (citing a 1993 report finding that out of Hillsborough County's 151 schools, "eight (8) elementary schools and one (1) junior high school [had] student populations which were 50% or more black. Notably, Cleveland Elementary was 59% black and Robles Elementary was 90% black. In addition, there were five (5) elementary schools and two (2) junior high schools with student populations which were more than 40% black").

282. See *id.* at 1335, clarified in part by *Manning v. Sch. Bd.*, 28 F. Supp. 2d 1353 (M.D. Fla. 1998); see also The Associated Press, *Tampa Schools Fail to End Desegregation Order*, N.Y. TIMES (Oct. 29, 1998), <https://www.nytimes.com/1998/10/29/us/tampa-schools-fail-to-end-desegregation-order.html> [<https://perma.cc/R56D-8HMH>].

283. See *Manning ex rel. Manning v. Sch. Bd.*, 244 F.3d 927, 929 (11th Cir. 2001); see also Robert C. Johnston, *Hillsborough, Fla., District Declared 'Unitary'*, EDUC. WEEK (Mar. 28, 2001), <https://www.edweek.org/ew/articles/2001/03/28/28deseg.h20.html> [<https://perma.cc/T7YM-34AA>].

zones²⁸⁴ and today, the Hillsborough County School Board draws boundaries for each school in the district.²⁸⁵ Its policies require monitoring student enrollment to see if changes may be justified based on: “considerations of safe student transportation and travel; . . . access to schools; . . . financial efficiency; . . . the effectiveness of the instructional program; . . . [and the] balance of student populations as mandated in the Florida Constitution and State law,” but explicitly prohibits assignments that discriminate based on “race, color, religion, sex, age, national or ethnic origin, political beliefs, marital status, handicapping condition, sexual orientation, or social and family background.”²⁸⁶ Attendance boundaries are updated frequently, subject to votes by the school board.²⁸⁷

Despite its apparent reluctance to boast its school diversity goals, the School Board’s frequent adjustment of its school boundaries and its consideration of community input throughout the process,²⁸⁸ ostensibly focused on accounting for accommodating influxes of new students,²⁸⁹ have sustained arguably the most racially diverse among those

284. See RICHARD. D. KAHLBERG, *THE CENTURY FOUND., TURNAROUND SCHOOLS THAT WORK: MOVING BEYOND SEPARATE BUT EQUAL 20* (2009), <https://school-diversity.org/pdf/KahlenbergTurnaroundSchools.pdf>.

285. *Policy Manual: 5120 – Assignment within District*, HILLSBOROUGH COUNTY PUB. SCHS. (Mar. 10, 2020), <https://www.sdhc.k12.fl.us/policymanual/detail/536> [<https://perma.cc/369B-KGB2>].

286. *Id.*

287. *Attendance Boundary Changes: Proposed and Recently Changed*, HILLSBOROUGH COUNTY PUB. SCHS., <https://www.sdhc.k12.fl.us/doc/251/growth-management/resources/boundary/> [<https://perma.cc/4TJH-NN8F>] (last visited Dec. 18, 2019). For a view of high school boundary maps and changes to them, see *High School Attendance Boundary Realignment Maps*, HILLSBOROUGH CTY. PUB. SCHS., <https://www.sdhc.k12.fl.us/doc/2400/growth-management/resources/maps/> [<https://perma.cc/QJ3Y-V9A4>] (last visited Mar. 8, 2020).

288. See *Attendance Boundary Changes: Proposed and Recently Changed*, *supra* note 287; see also, e.g., Marlene Sokol, *East Hillsborough School Zoning Raises Concerns*, TAMPA BAY TIMES (Dec. 16, 2019), <https://www.tampabay.com/news/gradebook/2019/12/16/east-hillsborough-school-zoning-raises-concerns/> [<https://perma.cc/XJM4-DG3Z>]; *Proposed Middle School Attendance Boundary Changes*, YOUTUBE (Jan. 9, 2020), <https://www.youtube.com/watch?v=zezrewu1XI8> [<https://perma.cc/5EKV-LS8R>].

289. See Marlene Sokol, *Boundary Changes Affecting More Than a Dozen Hillsborough Schools Come to a Vote on Tuesday*, TAMPA BAY TIMES (May 12, 2017), <https://www.tampabay.com/news/education/k12/boundary-changes-affecting-more-than-a-dozen-hillsborough-schools-come-to/2323602> [<https://perma.cc/V6SV-N8NY>] (predicting that, as a result of this change, “[s]chools in North Tampa could become racially segregated.” For instance, “Cahoon . . . is now 51 percent black while Van Buren is 61 percent black [,] Hunter’s Green is 29 percent black[, and] Clark is 19 percent black. The new arrangement will likely result in a mostly black pre K-8 school, and Whiter populations at Clark and Hunter’s Green.”).

examined by this Note. During the 2017–2018 school year in Hillsborough County, no high school had less than 10% or more than 71% White student enrollment, or less than 14% or more than 57% Hispanic enrollment.²⁹⁰ Black student enrollment was as low as 5% of some schools' populations,²⁹¹ but did not exceed 49% at any school.²⁹² High schools with more than 100 students on average enrolled 23% Black students, 35% Hispanic students, 34% White students, and 4% Asian students.²⁹³ Nine of Hillsborough County's 34 high schools had student populations that were no less than 20% and no greater than 50% of Black, Hispanic, or White students,²⁹⁴ and several other schools were not far from those figures.²⁹⁵

v. Jefferson County, Kentucky (Louisville)

The school district of Jefferson County, Kentucky (JCPS) achieved unitary status in 2000 against its own school board's will.²⁹⁶ Although

290. Percentages are the author's own calculations taken from National Center for Education Statistics school enrollment data. See *Hillsborough (2018–2019)*, NAT'L CTR. FOR EDUC. STATS., https://nces.ed.gov/ccd/districtsearch/district_detail.asp?ID2=1200870 [https://perma.cc/T5PK-6BFD] (last visited Dec. 16, 2019). Calculations include all high schools — public and charter — with more than 100 students enrolled. See app.

291. At Steinbrenner High School, 5% of students were Black, 23% were Hispanic, 64% were White, and 3% were Asian; at Strawberry Crest High School, 5% of students were Black, 37% were Hispanic, 47% were White, and 7% were Asian. App. at 715.

292. Middleton High School's student enrollment was 49% Black, 21% Hispanic, 18% White, and 9% Asian. App. at 715. Tampa Bay Tech High School's student population was 49% Black, 28% Hispanic, 13% White, and 5% Asian. App. at 716.

293. See app. at 716.

294. Those schools are: Armwood High School; Blake High School; Bowers-Whitley Career Center; Brandon High School; Brooks DeBartolo Collegiate High School; East Bay High School; Freedom High School; Pepin Academies; and Wharton High School. See app. at 714–15.

295. For example: Chamberlain High School: 31% Black, 46% Hispanic, 16% White, 2% Asian; Hillsborough High School: 33% Black, 42% Hispanic, 15% White, 7% Asian; King High School: 43% Black, 18% Hispanic; 18% White, 17% Asian; Plant City High School: 13% Black, 44% Hispanic, 40% White, 1% Asian; Riverview High School: 17% Black, 34% Hispanic, 41% White, 3% Asian; Robinson High School: 15% Black, 24% Hispanic, 47% White, 7% Asian; Spoto High School: 38% Black, 39% Hispanic, 17% White, 2% Asian. App. at 714–16.

296. In *Hampton v. Jefferson County Board of Education*, 102 F. Supp. 2d 358, 370 (W.D. Ky. 2000), the court held that “[b]ecause [Jefferson County Public Schools] ha[d] demonstrated good faith [to desegregate schools] over such a long period of time, the Court, the students, the parents, and the community [could] be justifiably confident that the Board will never again condone segregation or any other form of discrimination against African-American student.” This despite the fact that the Jefferson County School Board objected to the unitary status designation, arguing that lifting the desegregation decree would cause schools to “re-segregate,” *id.* at 371, and the fact that the suit was brought by African-American families challenging the

the Supreme Court blocked its continued efforts to integrate schools, the board's response to the *Parents Involved* decision — dramatically different from that of Seattle's school district — was to return to the drawing board. The board retained diversity as a stated goal in its student assignment policy and embarked on a process of consultation with civil rights groups, data analysis, and community engagement, before adopting a new plan in 2008,²⁹⁷ which retained a combination of zoned, neighborhood schools and magnet schools.²⁹⁸

The new plan uses census-block data on “average household income, percentage of white residents, and educational attainment,” to create a “diversity index rating” informing the boundaries of regional clusters for elementary schools, then assigns elementary students based on “family preference ratings and the target school diversity index range.”²⁹⁹ Middle and high school zones, using the same data, are “drawn to maximize the diversity” of neighborhoods.

Critics of the plan, however, noted that it resulted in students of color bearing the burden of desegregation³⁰⁰ because it had the effect of busing students from disadvantaged neighborhoods across town, whereas wealthier families typically did not rank the schools in disadvantaged neighborhoods highly.³⁰¹ In 2017, a committee of

district's use of “hard racial quotas” for its magnet schools, arguing that it denied them enrollment based on their race. *Id.* at 360. Actually, it was the same lawyer who represented a group of Black plaintiffs, whose suit would become *Parents Involved*, who brought legal action for a declaration of unitary status so that he would be able to challenge a plan no longer under consent decree. *See* GARLAND, *supra* note 53, at 152–54.

297. *See* McDermott et al., *supra* note 82, at 11. Today, Jefferson County, Kentucky proclaims on its website: “In the beginning, diversity was based on the race of an individual student, but in 2007, we began looking at diversity through a wider lens based on characteristics of the neighborhood (i.e., census block group) in which students live.” *See Student Assignment Plan*, JEFFERSON COUNTY PUB. SCHS., https://www.jefferson.kyschools.us/sites/default/files/JCPS_Student_Assignment_brochure.pdf [<https://perma.cc/3A8K-HMQH>] (last visited Oct. 28, 2019).

298. *See* Smrekar, *supra* note 249, at 209.

299. KIM BRIDGES, THE CENTURY FOUND., JEFFERSON COUNTY PUBLIC SCHOOLS: FROM LEGAL ENFORCEMENT TO ONGOING COMMITMENT (2016), <https://tcf.org/content/report/jefferson-county-public-schools/>.

300. This has been common among school desegregation policies, which often rely on busing Black and poor students to wealthier, whiter schools, without requiring White students to do the same. *See, e.g.*, Woodward, *supra* note 52, at 24. One prominent exception to this norm was Charlotte, North Carolina, where “relatively few whites fled the public schools” and, “in some cases, [would] put[] their own children on buses to attend a historically black high school.” WELLS ET AL., *supra* note 52, at 264.

301. Olivia Krauth, *Is a Proposed JCPS Assignment Plan the Key to Equity or a Step Back?*, INSIDER LOUISVILLE (July 30, 2019), <https://insiderlouisville.com/education/is->

parents, teachers, administrators, and community members began a review of the JCPS' plan to account for demographic shifts and a newly developed Racial Equity Plan.³⁰² The new proposed plan would provide students living in disadvantaged neighborhoods the choice to automatically enroll in a school close by or one in a wealthier neighborhood.³⁰³

As it stands today, during the 2019–2020 school year, most schools in Jefferson County are relatively desegregated.³⁰⁴ No high school has a student enrollment that exceeds 70% of any racial group³⁰⁵ and seven of Jefferson County's 20 high schools do not have enrollments that exceed 50% of any single racial group.³⁰⁶ How the new plan might affect these data, therefore, remains to be seen.

B. Lessons for School District Leaders Who Want to Integrate Schools

Noticeably, the school district policies examined in the research for this Note all include explicit language stating compliance with *Parents Involved*,³⁰⁷ and often employed outside consultants to conduct statistical analysis.³⁰⁸ This observation, though not conclusive, suggests that school districts more positioned to employ legal counsel or

a-proposed-jcps-assignment-plan-the-key-to-equity-or-a-step-back/
[<https://perma.cc/6JYZ-PP4M>].

302. See STUDENT ASSIGNMENT PLAN, *supra* note 297. The Racial Equity Plan created new targets for diversity in curriculum, improved school culture for students of color, increased programmatic access for students of color, increased racial diversity of students and staff, and committed to racial equity from the Central Office. *Racial Equity Policy Advisory Council Meeting*, JEFFERSON COUNTY (Dec. 12, 2018), <https://portal.ksba.org/public/Meeting.aspx?PublicAgencyID=89&PublicMeetingID=25498&AgencyTypeID=> [<https://perma.cc/5UUM-6NKW>].

303. Kevin Wheatley, *JCPS Panel Advances Plan to Give Some Option to Attend Middle, High Schools Close to Home*, WDRB (July 23, 2019), https://www.wdrb.com/in-depth/jcps-panel-advances-plan-to-give-some-option-to-attend/article_f1b1f226-adaa-11e9-ac35-d35d45ce44d1.html [<https://perma.cc/KJ9C-SYR3>]. Noticeably, the school district policies examined in the research for this Note all include explicit language stating compliance with *Parents Involved*.

304. See *JCPS District Data 2019–20 High School*, JEFFERSON COUNTY PUB. SCHS., <https://www.jefferson.kyschools.us/data-books-2016-high-school> [<https://perma.cc/7QRL-QYM5>] (last visited Dec. 18, 2019).

305. Western High School is 70% Black, 21% White, and 5% Hispanic. *See id.*

306. Those high schools are Butler: 50% Black, 38% White, 6% Hispanic; Doss: 48% Black, 28% White, 18% Hispanic; Fern Creek: 38% Black, 37% White, 15% Hispanic; Jeffersontown: 37% Black, 42% White, 14% Hispanic; Marion C. Moore: 35% Black, 36% White, 22% Hispanic; Seneca: 40% Black, 33% White, 19% Hispanic; Southern: 32% Black, 40% White, 22% Hispanic. *See id.*

307. *See, e.g.*, OHIO ST. UNIV., *supra* note 266, at 1.

308. See *supra* Part III for discussion of Berkeley, Nashville, and Jefferson County.

statisticians also are better positioned to implement effective and legal desegregation plans.³⁰⁹ This provides an opening for state education departments and the federal government to provide funding and incentive structures for similar analyses.

What is more, the school districts discussed in this Note share a stated commitment to racial diversity in schools. Some districts have demonstrated this by recommitting to school diversity following *Parents Involved*,³¹⁰ others by hiring outside consultants or statisticians to design effective and permissible race-conscious policies,³¹¹ and others by representing a wide array of groups and voices in decision-making processes.³¹² But it is apparent that their efforts — at statistical desegregation at least — have, overall, been effective. While most students in the country attend racially segregated schools,³¹³ most public school students in Berkeley, Nashville, Montclair, Tampa, and Louisville do not.

Exploiting characteristics that are the products of a long history of government-enforced segregation³¹⁴ — namely neighborhood-level demographics — can be a successful proxy for race because “segregation continues to be a largely neighborhood-level phenomenon.”³¹⁵ Furthermore, using such demographic characteristics has shown to be effective.³¹⁶ Richards et al. have already used statistical modeling of census block-level data to predict

309. Online resources compiling demographic data on school attendance zones may make such strategies more accessible. *See, e.g., Education Demographic and Geographic Estimates*, NAT’L CTR. FOR EDUC. STATS., <https://nces.ed.gov/programs/edge/SABS> [<https://perma.cc/Q6S4-K4ML>] (last visited Feb. 26, 2020); *Welcome to SABINS*, SCH. ATTENDANCE BOUNDARY INFO. SYS. (SABINS), <https://www.sabinsdata.org/> [<https://perma.cc/P36C-Y4FM>] (last visited Feb. 26, 2020).

310. *See supra* Part III (discussing *Berkeley Unified*).

311. *See, e.g.,* OHIO ST. UNIV., *supra* note 266, at 1.

312. *See* ERICKSON, *supra* note 51, at 294–95.

313. GARY ORFIELD & ERICA FRANKENBERG, THE CIVIL RIGHTS PROJECT/PROYECTO DERECHOS CIVILES, *BROWN AT 60: GREAT PROGRESS, A LONG RETREAT, AND AN UNCERTAIN FUTURE* 15 (2014), <https://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/brown-at-60-great-progress-a-long-retreat-and-an-uncertain-future/Brown-at-60-051814.pdf> [<https://perma.cc/Q8T3-U8GP>].

314. *See* ROTHSTEIN, *supra* note 69, at xv (“[M]ost segregation *does* fall into the category of open and explicit government-sponsored segregation.”).

315. Richards et al., *supra* note 199, at 72.

316. *Id.* (pointing out that “extant social science research lends empirical credence to the core assumptions of geographic integration plans” and finding that school assignment based on census-block data is more effective at achieving racial diversity than using median income or parental educational achievement).

its effects on racial segregation in the ten most populous metropolitan school districts in the country.³¹⁷ Using a random sample of schools in Dallas, a city “fairly typical among the sample districts in terms of its level of segregation and block group diversity,”³¹⁸ the authors found that (1) “owing to the segregated nature of metropolitan residential patterns, block group-level demographic and socioeconomic characteristics are fairly accurate proxies for student race/ethnicity”³¹⁹ and that (2) 70% of schools would “experience gains in diversity [either] under a geographic integration plan using only the neighborhood’s percentage of students of color . . . [or by] using a geographic integration approach premised on Berkeley’s composite diversity factor.”³²⁰ While Berkeley’s precise model may be difficult and perhaps unwise to replicate in school districts that use student assignment based on geography,³²¹ its use of census block demographic data, rather than imprecise race-neutral measures like free or reduced-price lunch eligibility, should serve as a model for districts with geography-based school rezoning plans.³²²

CONCLUSION

In the future perhaps, the federal government may once again drive local policy priorities toward school integration.³²³ Federal

317. These include:

Los Angeles Unified School District, CA; Broward County Public Schools, FL; Miami-Dade County Public Schools, FL; Chicago Public School, IL; Detroit Public Schools, MI; Clark County School District, NV; New York Public Schools, N.Y.; The School District of Philadelphia, PA; Dallas Independent School District, TX; and Houston Independent School District, TX.

Id. at 74.

318. *Id.* at 84.

319. *See id.* at 81.

320. *Id.* at 90.

321. *Id.* at 86.

322. *See generally* LISA CHAVEZ & ERICA FRANKENBERG, THE CIVIL RIGHTS PROJECT/PROYECTO DERECHOS CIVILES, INTEGRATION DEFENDED: BERKELEY UNIFIED’S STRATEGY TO MAINTAIN SCHOOL DIVERSITY (2009), <https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/integration-defended-berkeley-unified2019s-strategy-to-maintain-school-diversity/Integration-Defended-corrected-9-16-09.pdf> [https://perma.cc/4RHZ-ALMF].

323. For instance, the federal government can “further desegregation” by “provid[ing] rhetorical framing of — public support for — the need for policies to address racial segregation in an ostensibly postracial society,” thus “giv[ing] localities political cover to implement more far-reaching policies.” Erica Frankenberg & Kendra Taylor, *ESEA and the Civil Rights Act: An Interbranch Approach to Furthering Desegregation*, 1 RUSSELL SAGE FOUND. J. SOC. SCI. 32, 47 (2015). The Obama

encouragements such as agency guidances can inform school districts' voluntary attempts to use race to promote diversity and integration through school assignment policies,³²⁴ and Title I funding formulas can be redesigned to encourage desegregation efforts.³²⁵ In September 2018, Senator Chris Murphy of Connecticut introduced the Strength in Diversity Act, awarding “competitive grants for the development or implementation of plans to improve diversity or eliminate socioeconomic or racial isolation” in schools.³²⁶ But for the time being, federal efforts to promote school integration are hesitant and rare. Meanwhile, schools are becoming increasingly segregated and as a result, inequality grows larger and American society is becoming more polarized.

Since the Civil Rights Era, however, desegregation and integration efforts have been carried out voluntarily by school districts,³²⁷ and while national focus on school segregation has regressed over the decades,³²⁸ a small resurgence in local priorities is cause for some

Administration tried this, “most prominently in the form of guidance about how districts could voluntarily pursue integration.” *Id.* A 2016 GAO report recommended that the U.S. DOE use school-level data to better track segregation among schools. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 8, at 36.

324. For an optimistic view of the effects of the 2011 Guidance, see generally McDermott et al., *supra* note 82.

325. Currently, because the federal government allocates Title I funding to schools with more than 60% of students living in poverty, it “allow[s] districts to concentrate poverty into single schools or small clusters of schools, and discourage intradistrict and interdistrict cooperation that could aid in desegregation and deconcentration efforts because schools on both sides of student transfers have either no financial incentive or financial disincentives to participate in such efforts.” See NAT'L COAL. ON SCH. DIVERSITY, TITLE I FUNDING AND SCHOOL INTEGRATION: THE CURRENT FUNDING FORMULA'S DISINCENTIVES TO DECONCENTRATE POVERTY AND POTENTIAL WAYS FORWARD 6 (2019), <https://school-diversity.org/pdf/DiversityIssueBriefNo9.pdf> [<https://perma.cc/HS7Z-NCVA>].

326. The Bill proposes to amend the Elementary and Secondary Act of 1965 with a “Strength in Diversity Program.” Strength in Diversity Act, S. 3413, 115th Cong. (2018).

327. See generally FRANKENBERG, ET AL., *supra* note 31 (chronicling the voluntary efforts to integrate or desegregate in 11 different school districts). See also *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist.*, 551 U.S. 701, 805 (2007) (Breyer, J., dissenting) (As a result of federal courts' directive that school districts comply with *Brown*, “different districts — some acting under court decree, some acting in order to avoid threatened lawsuits, some seeking to comply with federal administrative orders, some acting purely voluntarily, some acting after federal courts had dissolved earlier orders — adopted, modified, and experimented with hosts of different kinds of plans, including race-conscious plans, all with a similar objective: greater racial integration of public schools.”).

328. Daniels & Pereira, *supra* note 71, at 650.

optimism.³²⁹ A handful of other school districts, too, are once again revisiting their school boundaries in the interest of promoting diversity and avoiding segregation.³³⁰ The courts have left an open invitation to diverse school districts to pursue diversity and desegregation through conscientious redistricting where housing segregation exists, and through school choice methods where it does not. Lessons from the history of Civil Rights Era desegregation should further inform modern school assignment policies. Historically marginalized communities must be included and prioritized in decision-making so as not to bear an unequal burden.

Although student assignment reflects only one step forward in the path towards equitable and integrated educations, general, race-conscious strategies are more available and reliable than ever, are legally permissible and, if implemented thoughtfully and equitably, can lead us closer to schools that engender a more cohesive, equitable, and democratic society.

329. See *supra* Sections III.A.i–v. Although the 2011 Obama Guidance was rescinded in 2018, none of the school districts examined in this Note appear to have altered their stated diversity goals.

330. See, e.g., Regina Cano & Sarah Rankin, *Parent Resistance Thwarts Local School Desegregation Efforts*, STAR TRIB. (Jan. 29, 2020), <http://stage-www.startribune.com/parent-resistance-thwarts-local-school-desegregation-efforts/567392562/> [<https://perma.cc/PHK3-XLA7>]; Tom Lappas, *Exhaustive Redistricting Process Churns Toward Finish*, HENRICO CITIZEN (Feb. 21, 2020), <https://www.henricocitizen.com/articles/exhaustive-redistricting-process-churns-toward-finish/> [<https://perma.cc/AQN2-32CV>]; Caitlyn Peetz, *MCPS Moves to Second Phase of Boundary Analysis as Release of Interim Report Nears*, BETHESDA MAG. (Feb. 19, 2020), <https://bethesdamagazine.com/bethesda-beat/schools/mcps-moves-to-second-phase-of-boundary-analysis-as-release-of-interim-report-nears/> [<https://perma.cc/DRS8-PBC2>]; Kate Taylor, *Rezoning Plan to Remake 3 Upper West Side Schools Will Proceed, City Says*, N.Y. TIMES (Nov. 9, 2016), <https://www.nytimes.com/2016/11/10/nyregion/rezoning-plan-for-3-upper-west-side-schools-will-proceed-city-says.html> [<https://perma.cc/AFQ3-XYAF>].

APPENDIX

Table B: High School Enrollment by Race in Hillsborough County, Florida, 2018–2019³³¹

School Name	Total Students	% American Indian or Alaska Native	% Black	% Hispanic	% White	% multi-racial	% Asian
Alonso High School	2648	0.26%	6%	56%	29%	3%	5%
Armwood High School	2252	0.49%	35%	30%	29%	4%	1%
Bell Creek Academy High School	391	0.00%	9%	30%	49%	7%	4%
Blake High School	1671	0.18%	41%	27%	25%	5%	1%
Bloomington High School	2346	0.51%	12%	28%	52%	4%	2%
Bowers-Whitley Career Center	131	0.76%	44%	29%	30%	2%	1%
Brandon High School	1945	0.36%	23%	34%	36%	4%	2%
Brooks Debartolo Collegiate High School	604	0.00%	21%	25%	47%	4%	3%
Chamberlain High School	1645	0.43%	31%	46%	16%	4%	2%
Durant High School	2401	0.37%	10%	32%	52%	3%	2%
East Bay High School	2311	0.26%	25%	34%	32%	5%	2%
Freedom High School	1979	0.10%	26%	34%	32%	4%	5%
Gaither High School	2020	0.35%	10%	44%	37%	4%	4%
Hillsborough High School	1983	0.15%	33%	42%	15%	2%	7%
Hillsborough Virtual School	369	0.54%	9%	29%	52%	8%	2%
Jefferson High School	1818	0.28%	29%	57%	10%	2%	1%

331. Data provided by the National Center for Education Statistics. *Hillsborough (2018-2019)*, *supra* note 290.

Table B: High School Enrollment by Race in Hillsborough County, Florida, 2018–2019 (Cont'd)

School Name	Total Students	% American Indian or Alaska Native	% Black	% Hispanic	% White	% multi-racial	% Asian
King High School	1748	0.34%	43%	18%	18%	4%	17%
Lennard High School	2902	0.21%	18%	52%	25%	3%	2%
Leto High School	2298	0.13%	7%	78%	10%	2%	2%
Middleton High School	1667	0.18%	49%	21%	18%	3%	9%
Newsome High School	2857	0.28%	6%	14%	71%	5%	3%
Pepin Academies	765	0.13%	28%	28%	39%	3%	2%
Plant City High School	2434	0.33%	13%	44%	40%	2%	1%
Plant High School	2399	0.25%	8%	19%	65%	4%	3%
Riverview High School	2541	0.39%	17%	34%	41%	5%	3%
Robinson High School	1637	0.24%	15%	24%	47%	7%	7%
Seminole Heights Charter High School	269	0.00%	48%	33%	11%	7%	1%
Sickles High School	2306	0.39%	6%	38%	46%	4%	6%
Sports Leadership & Management Academy (Tampa)	382	0.00%	8%	65%	22%	4%	1%
Spoto High School	1681	0.42%	38%	39%	17%	4%	2%
Steinbrenner High School	2432	0.12%	5%	23%	64%	4%	3%
Strawberry Crest High School	2235	0.36%	5%	37%	47%	3%	7%

**Table B: High School Enrollment by Race in Hillsborough County,
Florida, 2018–2019 (Cont'd)**

School Name	Total Students	% American Indian or Alaska Native	% Black	% Hispanic	% White	% multi-racial	% Asian
Tampa Bay Tech High School	2074	0.48%	49%	28%	13%	4%	5%
West University Charter High School	283	0.35%	53%	34%	10%	2%	1%
Wharton High School	2471	0.32%	31%	28%	31%	4%	6%
Average		0%	23%	35%	34%	4%	4%