

**PARENTS INVOLVED & MEREDITH: A PREDICTION REGARDING  
THE (UN)CONSTITUTIONALITY OF RACE-CONSCIOUS  
STUDENT ASSIGNMENT PLANS**

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## ABSTRACT

During the October 2006 Term, the United States Supreme Court will consider the constitutionality of voluntary race-conscious student assignment plans as employed in *Parents Involved in Community Schools v. Seattle School District No. 1* and *Meredith v. Jefferson County Board of Education*. These cases will mark the Court's first inquiry regarding the use of race to combat *de facto* segregation in public education. This article examines the constitutionality of such plans and provides a prediction regarding the Court's decisions.

The article begins with an analysis of the resegregation trend currently plaguing American educational institutions and identifies two causes for the occurrence: (1) the shift in the Supreme Court's jurisprudence regarding desegregation and (2) school officials' adherence to the "neighborhood school concept" when making student assignment decisions. The article then examines the challenged plans, specifically their attempts to create and maintain racially diverse student bodies through the use of racial tiebreakers and guidelines. After considering the Supreme Court's prior decisions and rationale regarding the use of race in education, the article predicts that the Supreme Court will strike down both plans as violative of the Equal Protection Clause. In light of this probable outcome, the article urges school officials to consider race-neutral methods to achieve diversity and to improve the quality of education provided to disadvantaged, minority students.

## INTRODUCTION

In 2003, after a twenty-five year hiatus,<sup>1</sup> the Supreme Court reentered the passionate and controversial debate surrounding affirmative action in the context of public education. The Court's dual decisions in *Grutter v. Bollinger*<sup>2</sup> and *Gratz v. Bollinger*<sup>3</sup> sanctioned the limited use of race as a factor in higher education admissions decisions. During the October Term 2006, the Court will revisit the issue of affirmative action, only this time the inquiry will concern the use of race in elementary and secondary education rather than higher education.

In a somewhat surprising announcement, the Court decided to hear the appeals of two cases challenging school districts' use of race in student assignment decisions.<sup>4</sup> Six months prior to the Court's decision to hear arguments in *Parents Involved in Community Schools v. Seattle School District No. 1*<sup>5</sup> and *Meredith v. Jefferson County Board of Education*,<sup>6</sup> the Court declined to grant certiorari in a similar case,<sup>7</sup> thereby prompting speculation as to the reasons for its apparent about face. One could attribute the Court's decision to its desire to reconcile circuit court splits regarding the constitutionality of race-conscious student assignment plans pre- and post-*Grutter*.<sup>8</sup> While this reason may be plausible, it would not appear to be the primary reason given that such

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<sup>1</sup> See *Regents of the Univ. of Calif. v. Bakke*, 438 U.S. 265 (1978) (analyzing the constitutionality of race-conscious admissions policies in higher education).

<sup>2</sup> 539 U.S. 306 (2003).

<sup>3</sup> 539 U.S. 244 (2003).

<sup>4</sup> See Charles Lane, *Justices to Hear Cases of Race-Conscious School Placements*, THE WASHINGTON POST, June 6, 2006, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/06/05/AR2006060500367.html>.

<sup>5</sup> *Parents Involved in Cmty Sch. v. Seattle Sch. Dist. No. 1*, 426 F.3d 1162 (9<sup>th</sup> Cir. 2005), cert. granted 126 S.Ct. 2351 (U.S. June 5, 2006) (No. 05-908) [hereinafter *Parents II*].

<sup>6</sup> *McFarland v. Jefferson County Public Sch.*, 330 F.Supp.2d 834, 861 (W.D.Ky. 2004), aff'd 416 F.3d 513 (6<sup>th</sup> Cir. 2005), cert. granted sub nom. *Meredith v. Jefferson County Bd. of Educ.*, 126 S.Ct. 2351 (U.S. June 5, 2006) (No. 05-915).

<sup>7</sup> See *Comfort ex rel. Neumyer v. Lynn Sch. Comm.*, 283 F.Supp.2d 328 (D. Mass. 2003), aff'd 418 F.3d 1 (1<sup>st</sup> Cir. 2005), cert. denied, 126 S.Ct. 798 (2005) (upholding the use of race in elementary and secondary education student transfer policies).

<sup>8</sup> See Petition for a Writ of Certiorari at 8-15, *Parents Involved*, 126 S.Ct. 2351 (No. 05-908), 2006 WL 1579631 (detailing circuits' conflicting holdings regarding the constitutionality of race-conscious assignment plans and urging the Supreme Court to grant certiorari "to remove uncertainty and confusion" regarding "how *Grutter* and *Gratz* affect the Equal Protection rights of students in public high schools"; Petition for a Writ of Certiorari at 8-11, *Meredith*, 126 S.Ct. 2351 (No. 05-915), 2006 WL 165912 (arguing that the Court should grant cert because "[t]he decision of the Sixth Circuit directly conflicts with decisions of the Fourth, Fifth and Ninth Circuits concerning voluntarily-adopted race-based student assignment plans designed to advance racial diversity"); see also Lane, *supra* note 4.

splits existed prior to the Court's certiorari denial in *Lynn*.<sup>9</sup> Others have hypothesized that the Court's decision to grant certiorari was precipitated by the change in its composition – a change that some think may prove to be the death knell of desegregation.<sup>10</sup>

The composition of the Court that declined to hear *Lynn* included Justice Sandra Day O'Connor, who wrote the 5 to 4 *Grutter* opinion upholding the use of race in higher education. Often thought of as the "swing vote" in controversial and pivotal cases,<sup>11</sup> Justice O'Connor retired from the Court in 2006.<sup>12</sup> Following the appointment of her replacement, Justice Samuel A. Alito, Jr., who is commonly thought to be a conservative justice,<sup>13</sup> the newly constituted Court agreed to hear *Parents Involved* and *Meredith*, which will be the first time the Court has addressed the constitutionality of the voluntary use of race in elementary and secondary school student assignment plans. While no one can

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<sup>9</sup> See Petition for a Writ of Certiorari at 7-10, *Lynn*, 126 S.Ct. 798, 2005 WL 2275949 (noting conflicts between the First, Second, Fourth, Fifth, Sixth and Ninth Circuits regarding the constitutionality of public schools voluntarily adopting race-conscious student assignment plans to achieve racial diversity).

<sup>10</sup> See Linda Greenhouse, *Court to Weigh Race as Factor in School Rolls*, THE NEW YORK TIMES, June 6, 2006, available at <http://www.nytimes.com/2006/06/06/washington/06scotus.html?ex=1307246400&en=7b7b1af6cbe f8911&ei=5088&partner=rssnyt&emc=rss> (suggesting that the change in Supreme Court justices prompted the Court to grant certiorari); Lane, *supra* note 4 (quoting Professor Goodwin Liu's thoughts of the Court's granting of cert as 'bad news for desegregation advocates.... It looks like the more conservative justices see they have a fifth vote to reverse these case.').

<sup>11</sup> See Tom Curry, *O'Connor had immense power as swing vote*, July 1, 2005, available at <http://www.msnbc.msn.com/id/5304484/> (describing Justice O'Connor as "often the swing vote that decided high-profile cases"); *Justice O'Connor's swing vote clout*, available at <http://www.msnbc.msn.com/id/9531661/> (detailing six significant Supreme Court decisions, ranging from partial birth abortion to state sovereign immunity, in which Justice O'Connor provided the fifth deciding vote).

<sup>12</sup> Although Justice O'Connor announced her resignation on July 1, 2005, it was not effective until the confirmation of her successor, which occurred on January 31, 2006 with the swearing in of Justice Alito. See William Branigin, Fred Barbash & Daniela Deane, *Supreme Court Justice O'Connor Resigns*, THE WASHINGTON POST, July 1, 2005, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/07/01/AR2005070100653.html>; *Alito sworn in as Supreme Court justice*, January 31, 2006, available at <http://www.msnbc.msn.com/id/11111624/>.

<sup>13</sup> See *Alito sworn in*, *supra* note 12 (describing Justice Alito as a "conservative lawyer for the Reagan administration"); Don Gonyea, *Republicans Praise Alito's Conservative Credentials*, available at <http://www.npr.org/templates/story/story.php?storyId=4983450> (describing Justice Alito as "a judicial favorite of the conservative movement"); Bill Mears, *Alito's record shows conservative judge*, available at <http://www.cnn.com/2005/POLITICS/10/31/alito.record/index.html> (discussing Justice Alito's "conservative judicial philosophy" and relating views that he was "the most conservative member of the" Third Circuit Court of Appeals).

know how any of the justices will vote in the cases, many affirmative action opponents hope that the additions of Justice Alito and Chief Justice John G. Roberts, Jr.<sup>14</sup> to the Court will result in the prohibition of race-conscious assignment programs in public elementary and secondary schools.<sup>15</sup> Supporters of affirmative action fear that such a ruling will prompt and exacerbate resegregation trends currently plaguing public education.<sup>16</sup> Whether the Court upholds or strikes down the assignment plans employed in the two cases, *Parents Involved* and *Meredith* will significantly contribute to the jurisprudence concerning equality in public education.

Many agree that public elementary and secondary schools are more segregated today than they were prior to the *Brown* decision.<sup>17</sup> Current

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<sup>14</sup> Following the death of Chief Justice William Rehnquist, Chief Justice Roberts was confirmed on September 29, 2005. See Charles Babington & Peter Baker, *Roberts Confirmed as 17th Chief Justice*, THE WASHINGTON POST, September 30, 2005, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/09/29/AR2005092900859.html>. Although void of a lengthy judicial history, Chief Justice Roberts' commentary regarding race-based affirmative action prior to taking the bench has led some to believe that he generally opposes race-based affirmative action.

As Acting Solicitor General, Roberts' approval of a brief opposing the Federal Communications Commission's affirmative action program for broadcast licensees and later, as a private attorney, his brief on behalf of the Associated General Contractors of America in opposition to the government's highway construction program in *Adarand Constructors v. Pena* clearly indicate that had Roberts sat in the place of Justice Sandra Day O'Connor, equal access to higher education (*Grutter v. Bollinger*) and contracting (*Adarand v. Pena*) would have been foreclosed to minorities.

See American Association for Affirmative Action Opposes Confirmation of John Roberts for Chief Justice of U.S. Supreme Court, September 5, 2005, available at <http://www.affirmativeaction.org/press.jsp> (quoting Robert Ethridge, the American Association for Affirmative Action's President).

<sup>15</sup> See Lane, *supra* note 4 ("Sharon Browne, principal attorney of the Pacific Legal Foundation, which supports the parents' lawsuits [in *Parents Involved* and *Meredith*], said she 'was pleased that the Court has decided to hear these cases. Together, these cases could put an end to schools using race as a factor to decide where children can attend school.'"); Greenhouse, *supra* note 9 (quoting Sharon Browne as saying, 'I think the writing's on the wall, or at least I hope it is.')

<sup>16</sup> See Gina Holland, *Supreme Court to Hear Schools Race Case*, CBS NEWS, June 5, 2006, available at <http://www.cbsnews.com/stories/2006/06/05/ap/politics/mainD812AB700.shtml> ("A ruling against the schools 'would be pretty devastating to suburban communities, small towns that have successfully maintained desegregation for a couple of generations,' he said. 'The same communities that were forced to desegregate would be forced to re-segregate.'") (quoting Gary Orfield, Director of the Civil Rights Project at Harvard University); Bob Egelko & Heather Knight, *Justices take cases on race-based enrollment*, SAN FRANCISCO CHRONICLE, June 6, 2006 (noting views that the consideration of race in public elementary and secondary schools is necessary to "reverse growing resegregation of the schools").

<sup>17</sup> See Hon. Robert L. Carter, *The Conception of Brown*, 32 FORDHAM URB. L.J. 93, 99 (2004) (concluding that "there are more segregated secondary and primary schools today than existed before *Brown*"); Marvin Krislov, *Affirmative Action in Higher Education: The Value, the Method, and the Future*, 72 U. CIN. L. REV. 899, 906 (2004) (concluding that many parts of the country are

resegregation trends threaten thirty years of progress that have been made in the desegregation of African-American students,<sup>18</sup> thereby impeding the fulfillment of *Brown's* promise of educational equality. Realizing the potentially devastating effects of segregated schools,<sup>19</sup> several school districts have voluntarily begun to employ race-conscious student assignment plans, such as those challenged in *Parents Involved* and *Meredith*, to prevent and remedy resegregation of their schools. This article examines the constitutionality of such plans and hypothesizes that the Supreme Court will strike down both student assignment plans employed in *Parents Involved* and *Meredith* as unconstitutional.

Part I begins with an analysis of factors contributing to resegregation in elementary and secondary schools. Just as the Supreme Court has been an invaluable tool by which to desegregate public schools, some of its decisions have also enabled resegregation to flourish. Part I also discusses the negative impact that school districts' adherence to the "neighborhood school concept" has had on the provision of equal educational opportunities to minority students.

Part II examines the District Court and Ninth Circuit's opinions in *Meredith* and *Parents Involved*. It discusses the compelling interests asserted by the school districts to justify their narrowly tailored use of race in student assignment decisions.

Part III analyzes the constitutionality of voluntary race-conscious student assignment plans as employed in *Parents Involved* and *Meredith*. Although difficult to predict, this article hypothesizes that the Court will invalidate both student assignment plans as violative of the Equal Protection Clause. This hypothesis is predicated on the Court's previous decisions and rationale concerning the use of race in the context of public education.

The article concludes with suggestions regarding policies and programs that school districts can utilize in their attempts to combat the severe costs imposed by racial and economic segregation in public education.

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experiencing segregation at levels greater than those existing when *Brown* was decided); Charles J. Ogletree, Jr., *All Deliberate Speed?: Brown's Past and Brown's Future*, 107 W. VA. L. REV. 625, 631 (2005) (noting that "public schools in many areas are more segregated than they were before *Brown*"); Leland Ware, *Race and Urban Space: Hypersegregated Housing Patterns and the Failure of School Desegregation*, 9 WIDENER L. SYMP. J. 55, 65 (2002) (stating that "public schools in many urban communities are more segregated now than they were in the pre-*Brown* era").

<sup>18</sup> See Erica Frankenberg, Chungmei Lee, & Gary Orfield, *A Multiracial Society with Segregated Schools: Are We Losing the Dream?*, Harvard Civil Rights Project Report 4 (2003), available at <http://www.civilrightsproject.harvard.edu/research/reseg03/finalexec.pdf> (discussing a twelve year decline in the desegregation of African-American students).

<sup>19</sup> See *infra* Part I (discussing the negative effects of resegregation on public education).

## I. SCHOOL HOUSE ROCK: RESEGREGATION OF PUBLIC EDUCATIONAL INSTITUTIONS

Throughout our history, public education has occupied a significant role in our society. Its importance has been the bedrock of legal decisions concerning the provision of educational opportunities to undocumented children,<sup>20</sup> children with disabilities,<sup>21</sup> and minority students.<sup>22</sup> As recognized by the Supreme Court in *Brown I*:

Today, education is perhaps the most important function of state and local governments.... It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.<sup>23</sup>

Unfortunately, *Brown I*'s recognition of the inherent inequality of racially segregated schools<sup>24</sup> has not prevented such segregation from occurring. This section explores two factors that have contributed to the resegregation of public educational institutions: first, the shift in Supreme Court jurisprudence regarding mandatory desegregation efforts and second, local school districts' adherence to the "neighborhood school concept" when making student assignment decisions. The Supreme Court's dilution of desegregation mandates and school districts' use of racially segregated neighborhoods as criteria for student assignments have both exacerbated the resegregation trends currently afflicting public educational institutions.

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<sup>20</sup> See *Plyler v. Doe*, 457 U.S. 202 (1982) (invalidating a Texas statute that denied public education to children not legally admitted to the country).

<sup>21</sup> See *Cedar Rapids Comm. Sch. Dist. v. Garret*, 526 U.S. 66, 78 (1999) (holding that Congress' intent "'to open the door of public education' to all qualified children" required the school district to provide nursing services to a quadriplegic student in accordance with federal disability law) (citing *Board of Ed. of Hendrick Hudson Central School Dist., Westchester Cty. v. Rowley*, 458 U.S. 176, 192 (1982)).

<sup>22</sup> See *Brown v. Bd. of Education*, 347 U.S. 483 (1954) [hereinafter *Brown I*] (invalidating segregation of races in public schools); *Grutter*, 539 U.S. at 325 (upholding the narrowly tailored use of race in higher education admissions decisions).

<sup>23</sup> *Brown I*, 347 U.S. at 493.

<sup>24</sup> *Id.* at 495 ("We conclude that in the field of public education the doctrine of 'separate but equal' has no place. *Separate educational facilities are inherently unequal.*") (emphasis added).

A. *The Court Giveth, the Court Taketh Away*

The attainment of equality in public education for racial and ethnic minority students has often been pursued via legal measures. From *Brown I* to *Grutter*, Supreme Court intervention has helped to open the school house doors for countless numbers of students of color.<sup>25</sup> Despite such access, however, African-American and Hispanic students continue to lag behind their white counterparts in terms of academic achievement.<sup>26</sup> This phenomenon can be explained, in part, by the environments in which many minority students are educated.<sup>27</sup>

Due to the resegregation trend experienced by many public schools, an astounding number of African-American and Hispanic children are educated in racially and economically segregated schools. "[A]lmost three-fourths of black and Latino students attend schools that are predominantly minority."<sup>28</sup> Of the 2.4 million students attending schools that are 99-100% minority, African-American and Hispanic students account for 2.3 million.<sup>29</sup> Unfortunately, "[t]he schools

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<sup>25</sup> See Brief Amici Curiae of Veterans of the Southern Civil Rights Movement and Family Members of Murdered Civil Rights Activists in Support of Respondents at 8, *Grutter*, 539 U.S. 306 (No. 02-241), 2003 WL 539178 (noting that the number of African-American college graduates has increased from less than 5% in 1960 to approximately 7.5% in 2000; in addition, the number of African-American law students has increased from 1% in 1960 to 7.4% in 1996); Danielle R. Holley, *Is Brown Dying? Exploring the Resegregation Trend in our Public Schools*, 49 N.Y.L. SCH. L. REV. 1085, 1086 & n.4 (2004-2005) (discussing the positive impact of the *Brown* decision on racial integration in public schools); Goodwin Liu & William L. Taylor, *School Choice to Achieve Desegregation*, 74 FORDHAM L. REV. 791, 791 n.4 (2005):

In 1965, only 15.2% of African-Americans between the ages of twenty-five and twenty-nine had attended college; by 1995, that number had risen to 44.9%. Among African-Americans in that age bracket, 15.3% had completed four or more years of college in 1995, compared to 6.8% in 1965. See James T. Patterson, *Brown v. Board of Education: A Civil Rights Milestone and Its Troubled Legacy* 230 (2001) (citation omitted). In the 1990s, college enrollment by students of color increased by nearly 50%. See William B. Harvey, Am. Council on Educ., *Minorities in Higher Education 2001-2002: Nineteenth Annual Status Report* 2 (2002).

<sup>26</sup> See Eboni S. Nelson, *What Price Grutter? We May Have Won the Battle, but Are We Losing the War?* 32 J. C. & U. L. 1, 8-9, 25-26 (2005) (discussing racial disparities in educational achievement).

<sup>27</sup> See *Gratz v. Bollinger*, 539 U.S. 244, 299-300 (2003) (Ginsberg, J., dissenting) (noting that "African-American and Hispanic children are all too often educated in poverty-stricken and underperforming institutions").

<sup>28</sup> Erica Frankenberg, Chungmei Lee, & Gary Orfield, *A Multiracial Society with Segregated Schools: Are We Losing the Dream?*, Harvard Civil Rights Project Report 28 (2003), available at <http://www.civilrightsproject.harvard.edu/research/reseg03/AreWeLosingtheDream.pdf>.

<sup>29</sup> *Id.*

that have the highest minority enrollment also have the highest incidence of student poverty: In 87% of schools that are over 90% minority (African-American and Hispanic), over half of the students come from families living in poverty.”<sup>30</sup> These figures are particularly disturbing when one considers the disadvantages and challenges that students attending such schools must overcome to succeed academically.<sup>31</sup>

Although the Supreme Court has issued decisions to help facilitate the provision of equal educational opportunities to minority students,<sup>32</sup> the Court has also issued opinions – three, in particular, referred to as the “resegregation trilogy”<sup>33</sup> – that have hindered the progress of desegregation.<sup>34</sup> The Court’s decisions in *Board of Education of Oklahoma City v. Dowell*,<sup>35</sup> *Freeman v. Pitts*,<sup>36</sup> and *Missouri v. Jenkins*<sup>37</sup> have relaxed school districts’ responsibilities and duties to eliminate all vestiges of racial segregation, thereby permitting the premature dissolution of federally mandated desegregation decrees when racial imbalance persists.<sup>38</sup>

The Supreme Court’s decision in *Dowell* evidences its reluctance to continue taking an active role in the desegregation of public educational

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<sup>30</sup> James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249, 273 (1999). See also Gary Orfield & Chungmei Lee, *Brown at 50: King’s Dream or Plessy’s Nightmare?*, The Civil Rights Project - Harvard Univ. 21 (2004), available at <http://www.civilrightsproject.harvard.edu/research/reseg04/brown50.pdf> (concluding that “students in highly segregated neighborhood schools are many times more likely to be in schools of concentrated poverty”).

<sup>31</sup> See Orfield & Lee, *supra* note 30, at 21-22 (detailing poverty concentrated school disadvantages such as school deterioration, lack of resources, less experienced teachers and fewer college preparatory courses).

<sup>32</sup> See *supra* notes 22 & 25; see also *Green v. Cty. Sch. Bd. of New Kent County*, 391 U.S. 430, 437-438 (1968) (placing an “affirmative duty” on school boards operating segregated systems “to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch”); *Brown v. Board of Education*, 349 U.S. 294, 301 (1955) [hereinafter *Brown II*] (instructing district courts to enter desegregation decrees that mandate the admission of African-American students into public schools “with all deliberate speed”).

<sup>33</sup> *Ware*, *supra* note 17, at 63.

<sup>34</sup> See *id.* at 65 (referring to the three cases as “a three-fold shift from an affirmative duty to eliminate all vestiges of segregation to acquiescence to resegregation”).

<sup>35</sup> 498 U.S. 237 (1991).

<sup>36</sup> 503 U.S. 467 (1992).

<sup>37</sup> 515 U.S. 70 (1995).

<sup>38</sup> See Nancy Levit, *Embracing Segregation: The Jurisprudence of Choice and Diversity in Race and Sex Separatism in Schools*, 2005 U. ILL. L. REV. 455, 465-473 (discussing the impact of the three cases on district courts’ decisions to dissolve desegregation orders, “even if desegregation actually had not been accomplished”).

institutions<sup>39</sup> as it had in previous cases.<sup>40</sup> The Court's decision appears to be guided by its pronouncement that "federal supervision of local school systems was intended as a *temporary* measure to remedy past discrimination."<sup>41</sup> To hasten the return of educational decisions to local school officials, the Court sets forth a less stringent test to determine whether a school system has successfully complied with a desegregation decree so as to warrant its dissolution. Unlike the Court's demand in *Green* that school boards develop systems "in which racial discrimination would be eliminated root and branch,"<sup>42</sup> the *Dowell* Court instructs lower courts to ask "whether the Board had complied *in good faith* with the desegregation decree..., and whether the vestiges of past discrimination had been eliminated *to the extent practicable*."<sup>43</sup> This test appears to concede the point that the complete elimination of segregation is impractical; therefore, school districts that demonstrate a good faith effort to desegregate and eliminate traces of past discrimination can be released from judicial control and supervision even though circumstances remain that hinder desegregation.<sup>44</sup>

The Court reiterated the *Dowell* test in *Freeman*<sup>45</sup> as it continued to chip away at the desegregation safeguards that it had previously helped to establish. In *Freeman*, respondents argued that a district court should not relinquish its supervision and control over a school system until the school district fully

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<sup>39</sup> See Holley, *supra* note 25, at 1090 & n.31 (describing the Supreme Court's decisions in *Dowell*, *Freeman* and *Jenkins* as evidence of its "hostility towards federal court supervision of school desegregation").

<sup>40</sup> See *supra* note 32; see also *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457, 471, 487 (1982) (striking down a state initiative intended to "interfere with desegregative busing"); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 25, 30 (1971) (upholding the ordering of a racial balance requirement and bus transportation as permissible tools of school desegregation).

<sup>41</sup> *Dowell*, 498 U.S. at 248 (emphasis added); *id.* (stating that desegregation decrees "are not intended to operate in perpetuity). Some scholars suggest that such statements evidence the Court's "impatience with the duration of desegregation orders," or perhaps, "an abandonment of the original purpose" of desegregation. See Levit, *supra* note 38, at 472 & n.91.

<sup>42</sup> *Green*, 391 U.S. at 438; see also *Swann*, 402 U.S. at 15 (stating that the Supreme Court's objective "remains to eliminate from the public schools *all* vestiges of state-imposed segregation") (emphasis added).

<sup>43</sup> *Dowell*, 498 U.S. at 249-250 (emphasis added).

<sup>44</sup> See Holley, *supra* note 25, at 1092 (concluding that the *Dowell* test excludes the possibility of resegregation as a factor for determining unitary status so as to warrant the dissolution of a desegregation decree); Levit, *supra* note 38, at 464-465 (discussing the *Dowell* test as an invitation to lower courts to dissolve desegregation decrees even if segregation continues to exist); Ware, *supra* note 17, at 64 (concluding that the *Dowell* test allows for a finding of unitary status despite a showing that schools remained racially segregated due to housing patterns)

<sup>45</sup> *Freeman*, 503 U.S. at 492.

complies with all components of a desegregation decree.<sup>46</sup> The Court rejected this argument and sanctioned the incremental withdrawal of judicial supervision once a school system is determined to be in compliance with certain categories of a desegregation order.<sup>47</sup> In arriving at its decision, the Court once again relies heavily on its desire to return control of school systems to state and local officials.<sup>48</sup>

Guided by the “ultimate objective...to return school districts to the control of local authorities,” the Court reasons that such restoration is “essential to restore [local authorities’] true accountability in our governmental system.”<sup>49</sup> One must be mindful, however, that local authorities’ previous control of school systems resulted in unequal and segregated dual systems – systems that necessitated the imposition of court-ordered desegregation decrees in attempts to remedy them. Over ten years passed before the local school officials in *Freeman* took affirmative steps to adhere to the Supreme Court’s mandate that school districts desegregate “with all deliberate speed,”<sup>50</sup> and such steps were initiated only after the respondents filed their lawsuit.<sup>51</sup> At the time the Court decided *Freeman*, over thirty-five years had passed since its decision in *Brown II*; nevertheless, the local DeKalb County school officials continued to operate a school system that was violative of the desegregation order.<sup>52</sup> Such failures and delayed action should cause district courts and the Supreme Court pause when considering the arguably premature return of school systems to local control.

The *Freeman* decision may also hinder desegregation efforts because of its discussion regarding a school district’s duty (or lack thereof) to remedy racial imbalance that continues to exist in its schools. The respondents in *Freeman* presented evidence demonstrating the continuance of racial imbalance in DeKalb County schools.<sup>53</sup> Petitioners argued that such imbalance was not caused by prior *de jure* discrimination; rather, it was due to demographic changes within the

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<sup>46</sup> *See id.* at 471.

<sup>47</sup> *See id.* at 490-491.

<sup>48</sup> *See id.* at 489-490 (“Partial relinquishment of judicial control...can be an important and significant step in fulfilling the district court’s duty to return the operations and control of schools to local authorities.”).

<sup>49</sup> *Id.* at 490.

<sup>50</sup> *Brown II*, 349 U.S. at 301.

<sup>51</sup> *See Freeman*, 503 U.S. at 472 (describing the school system’s reluctant response to desegregation mandates).

<sup>52</sup> *See id.* at 474 (discussing the District Court’s findings that the school system continued to be segregated with regards to “teacher and principal assignments, resource allocation, and quality of education”).

<sup>53</sup> *See id.* at 476-477.

county.<sup>54</sup> The Supreme Court rejected the Eleventh Circuit's contention that the school district "bore the responsibility for the racial imbalance, and in order to correct that imbalance would have to take actions that 'may be administratively awkward, inconvenient, and even bizarre in some situations.'"<sup>55</sup> The Court clarified that "[o]nce racial imbalance traceable to the constitutional violation has been remedied, a school district is under no duty to remedy an imbalance that is caused by demographic factors."<sup>56</sup> When coupled with the Court's sanctioning of the incremental withdrawal of judicial supervision once a school district has been deemed to have complied with certain provisions of a desegregation decree, this pronouncement begs the question with whom does the duty lie to desegregate schools if it does not lie with local school districts? If, as in *Freeman*, school districts are partially or fully released from their desegregation orders even though their minority students continue to attend racially segregated schools, then the likelihood of achieving true desegregation in public education and the benefits that arise from such educational environments is doubtful.

School districts' ability to remedy resegregation of their educational institutions may be further hindered by the Supreme Court's decision in *Jenkins*. The District Court in *Jenkins* ordered a variety of educational programs and initiatives in its efforts to improve the educational quality of the Kansas City, Missouri School District and to eliminate all vestiges of segregation.<sup>57</sup> The two measures challenged by the State were salary increases for instructional and noninstructional staff and remedial quality education programs.<sup>58</sup> The State argued that the requirement of salary increases for teachers and non-teaching staff exceeded the District Court's remedial authority.<sup>59</sup> In upholding the State's challenge, the Supreme Court agreed that a District Court cannot use 'interdistrict' measures to remedy 'intradistrict' constitutional violations.<sup>60</sup> Concluding that measures such as salary increases were motivated by the District

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<sup>54</sup> See *id.* at 478.

<sup>55</sup> *Id.* at 485 (citing *Swann*, 402 U.S. at 28).

<sup>56</sup> *Id.* at 469.

<sup>57</sup> See *Jenkins*, 515 U.S. at 75-80 (describing District Court's ordering of class reductions, magnet school programs, capital improvements and salary increases as measures to improve academic achievement and remedy effects of segregation).

<sup>58</sup> *Id.* at 80.

<sup>59</sup> *Id.* at 84.

<sup>60</sup> *Id.* at 89-98 (citation omitted).

Court's pursuit of 'desegregative attractiveness,'<sup>61</sup> the Court rejected the Eighth Circuit's contention that '[v]oluntary interdistrict remedies may be used to make meaningful integration possible in a predominantly minority district.'<sup>62</sup> This rejection greatly restricts District Courts' ability to fashion effective measures that can be used to remedy the devastating effects of segregation.

Perhaps one of the most harmful lingering effects of segregation is minority students' lack of academic achievement.<sup>63</sup> Greater numbers of African-American students fail to complete high school as compared to white students.<sup>64</sup> African-American students, many of whom attend racial imbalanced schools, routinely score lower than their white counterparts on standardized tests.<sup>65</sup> Fewer African-American adults, as compared to white adults, obtain a college education.<sup>66</sup> Such achievement gaps are due in part to disparities existing between teacher quality at poor, minority concentrated schools and their more affluent, white counterparts.

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<sup>61</sup> *Id.* at 80. According to the Court, "desegregative attractiveness" refers to the implementation of programs and initiatives that will improve the attractiveness of schools within a school district such that nonminority students who are not presently attending schools within the district will decide to enroll, thereby helping to desegregate the schools. *See id.* at 98-100.

<sup>62</sup> *Id.* at 91 (citing *Jenkins v. Missouri*, 855 F.2d 1295, 1302 (8<sup>th</sup> Cir. 1988)).

<sup>63</sup> *See Brown I*, 347 U.S. at 494 (noting that segregation has a negative impact on the educational development of African-American children); Roslyn Arlin Mickelson, *Achieving Equality of Educational Opportunity in the Wake of Judicial Retreat From Race Sensitive Remedies: Lessons From North Carolina*, 52 AM. U. L. REV. 1477, 1485 & n.33 (2003) (citing research showing segregation's adverse effects on minority students' academic achievements); Lisa J. Holmes, Comment, *After Grutter: Ensuring Diversity in K-12 Schools*, 52 UCLA L. REV. 563, 586-587 (2004) (discussing research suggesting that segregated educational environments may have detrimental effects on the academic development of minority children).

<sup>64</sup> In 2004, the drop out rate for African-Americans age 16-24 was 11.8% as compared to 6.8% for Whites. *See* NAT'L CTR. FOR EDUC. STATISTICS, THE CONDITION OF EDUCATION 2006, STATUS DROPOUT RATES BY RACE/ETHNICITY (2006), available at <http://nces.ed.gov/programs/coe/2006/section3/table.asp?tableID=481>.

<sup>65</sup> *See* Keith R. Walsh, *Color-blind Racism in Grutter and Gratz*, 24 B.C. THIRD WORLD L.J. 443, 450-451 (2004) (discussing the gap between African-American and white students' scores on standardized admissions tests); Michael J. Songer, Note, *Decline of Title VII Disparate Impact: The Role of the 1991 Civil Rights Act and the Ideologies of Federal Judges*, 11 Mich. J. Race & L. 247, 267-268 (2005) (footnotes omitted):

The most recent study by the Civil Rights Project at Harvard University found that 70% of minority children attend American schools with majority-minority populations. More than one-third of these children attend schools that are comprised of at least 90% African American students. African American students continue to score significantly lower than White students on standardized tests used in college and graduate school admissions.

<sup>66</sup> *See* Walsh, *supra* note 65, at 450 & n.49 (noting that 28% of white adults are college educated as compared to 16% of African-American adults and that "[a]s of 2000, only 17.8% of African Americans over the age of twenty-five had completed four or more years of college, while 34% of their white counterparts could say the same").

For example, novice teachers, who are obviously not as qualified as more experienced teachers, are disproportionately assigned to high poverty, majority-minority schools.<sup>67</sup> The percentage of high school students attending high-minority, high-poverty schools that are taught English, science and mathematics by “teachers who have neither a major nor certification in the subject they teach” is twice the percentage of students encountering the same experience at schools with low minority and poverty populations.<sup>68</sup> Obviously, such disparities have a detrimental impact on minority students’ academic achievement. If such disparities could be rectified, then the positive impact on student achievement could be tremendous, and the hope of eliminating all vestiges of segregation could become a reality.

This is what the District Court in *Jenkins* attempted to accomplish by ordering the State to fund salary increases in its desegregation efforts.<sup>69</sup> Remedial measures such as salary increases can positively affect teacher quality disparities and, consequently, student achievement disparities, by attracting more highly qualified teachers and personnel to minority concentrated schools. Exposing minority students to more experienced, more educated and more effective teachers will improve their educational opportunities and lessen the detrimental effects of segregation and past discrimination.<sup>70</sup> Unfortunately, by finding that the District Court exceeded its remedial authority by ordering salary increases for school personnel, the Supreme Court deprives District Courts of a valuable tool in their efforts to eradicate vestiges of segregation and create educational equality.

The establishment of equality in public education for racial and ethnic minority students is also threatened by the Court’s admonition regarding the use of student achievement levels as a measure to determine partial unitary status. After finding that the school district “had not reached anywhere close to its ‘maximum potential because the District is still at or below national norms at

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<sup>67</sup> Novice teachers are assigned to minority concentrated schools at twice the rate as those assigned to schools with low minority populations. See Heather G. Peske & Kati Haycock, *Teaching Inequality How Poor and Minority Students are Shortchanged on Teacher Quality 2*, available at <http://www2.edtrust.org/NR/rdonlyres/010DBD9F-CED8-4D2B-9E0D-91B446746ED3/0/TQReportJune2006.pdf>.

<sup>68</sup> See NAT’L CTR. FOR EDUC. STATISTICS, THE CONDITION OF EDUCATION 2004, OUT-OF-FIELD TEACHING BY POVERTY CONCENTRATION AND MINORITY ENROLLMENT, available at <http://nces.ed.gov/programs/coe/2004/section4/indicator24.asp>; see also Peske & Haycock, *supra* note 67, at 3 (noting that “in secondary schools serving the most minority students, almost one in three classes are assigned to an out-of-field teacher compared to about one in five in low-minority schools”).

<sup>69</sup> See *Jenkins*, 515 U.S. at 80.

<sup>70</sup> See Peske & Haycock, *supra* note 67, at 10 (noting research findings indicating the positive impact interaction with highly effective teachers can have on low-performing students).

many grade levels,<sup>71</sup> the District Court ordered the State to continue funding quality education programs designed to improve the educational achievement of all students, especially African-Americans.<sup>72</sup> The State challenged the order on the grounds that improvement on test scores is not a requirement to achieve partial unitary status.<sup>73</sup> In upholding the State's challenge, the Court directed the District Court to "sharply limit, if not dispense with, its reliance on" student performance on achievement tests in its determination of partial unitary status.<sup>74</sup> Although the District Court maintained that a school district must achieve its "maximum potential" regarding its desegregation efforts before it can be deemed to have partially complied with a desegregation decree, the Supreme Court rejected this test and re-imposed the lower standard of "practicability" as articulated in *Dowell*.<sup>75</sup> By rejecting the District Court's more stringent test, the Court invites premature findings of partial unitary status despite the fact that minority students continue to suffer from reductions in academic achievement.

The Court also extends this invitation by its directive to the District Court to be mindful of its end goal to return control of a school system to state and local officials.<sup>76</sup> In its efforts to expedite the return of educational decisions to local control, the Court appears to have abandoned its previous stance "that the court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future."<sup>77</sup> As shown by the number of schools experiencing resegregation following the dissolution of desegregation decrees,<sup>78</sup> the

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<sup>71</sup> *Jenkins*, 515 U.S. at 101.

<sup>72</sup> *Id.* at 73.

<sup>73</sup> *Id.* at 101.

<sup>74</sup> *Id.*

<sup>75</sup> *See id.* (stating the partial unitary test as "whether the reduction in achievement by minority students attributable to prior *de jure* segregation has been remedied to the extent practicable) (emphasis added).

<sup>76</sup> *See id.* at 102.

<sup>77</sup> *Green*, 391 U.S. at 438 n.4 (quoting *Louisiana v. United States*, 380 U.S. 145, 154 (1965)).

<sup>78</sup> *See, e.g.*, John Charles Boger, *Education's "Perfect Storm"? Racial Resegregation, High-Stakes Testing, and School Resource Inequities: The Case of North Carolina*, 81 N. C. L. REV. 1375, 1394-1395 (2003) (noting the resegregation consequences flowing from the dissolution of a thirty-year-old desegregation decree) (footnote omitted):

The consequences flowing from the [*Capacchione v. Charlotte-Mecklenburg Schools*] ruling were swift and dramatic: in the 2002-2003 school year, the number of Charlotte-Mecklenburg schools with minority enrollment of 91% to 100% more than doubled from the previous year-- from seven elementary schools in 2001-2002 to sixteen in 2002-2003, and from two middle schools to four. There was no change in the number of elementary and middle schools with minority enrollment of 20% or less.

withdrawal of judicial oversight, based on the relaxed standards of *Dowell*, *Freeman*, and *Jenkins*, has had a negative impact both on the elimination of discriminatory effects and on the prevention of such harmful effects in the future.<sup>79</sup> Such impact is due, in part, to local officials' reliance on the "neighborhood school concept" when making student assignment decisions. As demonstrated in the following section, employing student assignment methods that are based on racially segregated neighborhoods produces resegregation in public education and the detrimental effects that accompany such environments.

#### B. *The Neighborhood School Dilemma*

Historically, the neighborhood school concept, which calls for the assignment of students to schools that are in close proximity to their homes, has been a preferred method for making school assignment decisions.<sup>80</sup> Many argue that adherence to neighborhood schools provide educational benefits ranging from increased parental and community involvement that results in improved student achievement<sup>81</sup> to reductions in transportation costs, which provide

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*See also* Holley, *supra* note 25, at 1095-1096 & n.60 (noting that thirty-four of the thirty-eight school districts that have achieved unitary status since the *Dowell* decision have experienced resegregation as measured by "a decrease in the exposure of black students to white students, and the exposure of Latino students to white students").

<sup>79</sup> *See* Orfield & Lee, *supra* note 30, at 18 (attributing the resegregation trend "to the impact of three Supreme Court decisions between 1991 and 1995 limiting school desegregation and authorizing a return to segregated neighborhood schools").

<sup>80</sup> *See Swann*, 402 U.S. at 28 (noting the Supreme Court's recognition that "[a]ll things being equal...it might well be desirable to assign pupils to schools nearest their homes"); *see also* Levit, *supra* note 38, at 456 & n.6 (referring to state initiatives to pass and implement "Neighborhood Schools Acts"). Student assignments based on proximity to one's home are especially favored when compared to the alternative of busing. *See* Davison M. Douglas, *The Quest for Freedom in the Post-Brown South: Desegregation and White Self-Interest*, 70 CHI.-KENT L. REV. 689, 746-747 (2004) (quoting former North Carolina Governor Robert Scott as stating, 'The neighborhood-school concept has been the strength of our public education system in North Carolina and our state has been committed to that policy for some time. It is sound educational policy and must be preserved.') (citation omitted); *Id.* at 747 (quoting former President Richard Nixon as describing neighborhood schools as 'the most appropriate...system') (citation omitted); Levit, *supra* note 38, at 456 & n.5 (referring to Congressional anti-busing legislation setting forth the government's official policy that "students attend neighborhood schools").

<sup>81</sup> *See* Patrick James McQuillan & Kerry Suzanne Englert, *The Return to Neighborhood Schools, Concentrated Poverty, and Educational Opportunity: An Agenda for Reform*, 28 HASTINGS CONST. L.Q. 739, 743 (2001).

additional funding for teacher salaries and educational programs.<sup>82</sup> These benefits, however, are greatly outweighed by the detrimental effects that accompany many neighborhood school decisions: namely, the resegregation of elementary and secondary schools and the overwhelming challenges that are present in such environments.

Following the termination of desegregation decrees and the return of educational decisions to local control, many school districts returned to the neighborhood school concept when making their student assignment decisions.<sup>83</sup> Considering the rate of residential segregation in communities throughout the country, it is not surprising that such decisions have resulted in the resegregation of public schools.<sup>84</sup> ‘One-third of all African Americans in the United States live under conditions of intense racial segregation.’<sup>85</sup> In 2000, over 230 American urban communities could be described as ‘hypersegregated’ or ‘partially segregated.’<sup>86</sup> Therefore, in accordance with student assignment policies that assign students to schools based on neighborhood proximity, schools populated

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<sup>82</sup> See Kenneth O’Neil Salyer, *Beyond Zelman: Reinventing Neighborhood Schools*, 33 J.L. & EDUC. 283, 287-288 (2004) (discussing the advantages of neighborhood schools). Other proffered advantages of neighborhood schools include the following: reduction in student-teacher ratios, reduction in travel safety hazards, creation of sense of community, and simplification of student assignment policies. *Id.* See also Kevin Brown, *Has the Supreme Court Allowed the Cure for De Jure Segregation to Replicate the Disease*, 78 CORNELL L. REV. 1, 35 (1992).

<sup>83</sup> See Molly S. McUsic, *The Future of Brown v. Board of Education: Economic Integration of the Public Schools*, 117 HARV. L. REV. 1334, 1342 (2004) (noting school districts’ reversion to “neighborhood schools placed in segregated neighborhoods”); Myron Orfield, *Choice, Equal Protection, and Metropolitan Integration: The Hope of the Minneapolis Desegregation Settlement*, 24 LAW & INEQ. 269, 294, 322-323 (2006) (discussing the impact of termination of desegregation decrees and reinstatement of neighborhood schools on the resegregation of Minneapolis schools); *Speech by Theodore M. Shaw: “From Brown to Grutter: The Legal Struggle for Racial Equality*, 16 WASH. U. J.L. & POL’Y 43, 52 (2004) (recounting of incident in which the Norfolk Virginia School District expressed “its intention to return to neighborhood schools by abandoning its desegregation plan after a declaration of unitary status”).

<sup>84</sup> See Michael Selmi, *Race in the City: The Triumph of Diversity and the Loss of Integration*, 22 J.L. & POL. 49, 69 (2006) (noting that school segregation follows housing segregation); Ware, *supra* note 17, at 56 (attributing the failure of desegregation efforts in many urban schools to pervasive segregated housing patterns).

<sup>85</sup> See Ware, *supra* note 17, at 65 (citing Douglas S. Massey & Nancy A. Denton, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 74-78 (Harvard Univ. Press 1994)).

<sup>86</sup> See Boger, *supra* note 78, at 1402 & n.97 (detailing residential segregation levels in metropolitan areas).

by students living in these areas will also experience high levels of racial segregation,<sup>87</sup> which often brings about adverse educational consequences.

Research shows that students attending racially segregated schools, which are often economically segregated as well,<sup>88</sup> encounter tremendous challenges that greatly hinder their educational achievement. Students attending schools with majority minority student populations are often educated in 'substandard and deteriorating facilities.'<sup>89</sup> Their learning environments often suffer from "shortages of library books, computers, or laboratory equipment."<sup>90</sup> The teachers who educate them are often less qualified than those teaching at racially and economically diverse schools.<sup>91</sup> This lack of resources leads to disparities in minority students' academic achievement as measured by

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<sup>87</sup> See *id.* at 1400 (predicting that "residential segregation will prove especially likely to lead to school resegregation if districts choose student assignment strategies based on neighborhood schools"); *id.* at 1407-1408 (discussing racial segregation increases in North Carolina schools following the implementation of neighborhood schools assignment plans); Gary Orfield & Chungmei Lee, *Racial Transformation and the Changing Nature of Segregation*, Harvard Civil Rights Project 9 (2006) available at [http://www.civilrightsproject.harvard.edu/research/deseg/Racial\\_Transformation.pdf](http://www.civilrightsproject.harvard.edu/research/deseg/Racial_Transformation.pdf) (noting that "[s]ince the Supreme Court authorized a return to segregated neighborhood schools. . . , the percentage of black students attending majority nonwhite schools increased in all regions from 66 percent in 1991 to 73 percent in 2003-4).

<sup>88</sup> See *supra* note 30 and accompanying text.

<sup>89</sup> See Levit, *supra* note 38, at 497 (citing Leland Ware, *Redlining Learners: Delaware's Neighborhood Schools Act*, 20 DEL. LAW. 14, 16 (2002)).

<sup>90</sup> Boger, *supra* note 78, at 1382.

<sup>91</sup> See *id.*; Levit, *supra* note 38, at 498; *supra* notes 67-68 and accompanying text.

standardized tests scores,<sup>92</sup> high school drop out and graduation rates,<sup>93</sup> college matriculation rates,<sup>94</sup> and post-graduate degrees.<sup>95</sup>

Not only are students attending segregated schools forced to overcome educational resources deficiencies, but they are also deprived of the educational benefits related to interacting with students who possess higher educational aspirations. Unfortunately, many minority students who live in lower-income, racially segregated neighborhoods and attend lower-performing schools within those neighborhoods have low expectations regarding academic achievement. In fact, some minority communities suffer from a culture that devalues academic success,<sup>96</sup> which significantly undermines minority students' academic expectations and aspirations. As noted by scholar John Charles Boger:

A pupil's achievement is strongly related to the educational backgrounds and aspirations of the other students in the school....Thus...if a minority pupil from a home without much educational strength is put with schoolmates with strong educational backgrounds, his achievement is likely to increase.<sup>97</sup>

If, in fact, "the social characteristics of a school's student body [are] the single most important school-related factor in predicting minority student achievement,"<sup>98</sup> student assignment plans that rely on poor, racially segregated

<sup>92</sup> See Curt A. Levey, *Racial Preferences in Admissions: Myths, Harms, and Alternatives*, 66 ALB. L. REV. 489, 502 (2003) (discussing racial disparities in minority and nonminority students' standardized test scores); Keith R. Walsh, *Color-blind Racism in Grutter and Gratz*, 24 B.C. THIRD WORLD L.J. 443, 449-51 (2004) (discussing disparities between Blacks and Whites regarding their performance on standardized tests).

<sup>93</sup> In 2004, the high school drop out rate for African-American students age 16-24 was 11.8% compared to 6.8% for their white counterparts. See NAT'L CTR. FOR EDUC. STATISTICS, THE CONDITION OF EDUCATION 2006, STATUS DROPOUT RATES BY RACE/ETHNICITY (2006), available at <http://nces.ed.gov/programs/coe/2006/section3/table.asp?tableID=481>. In 2005, fewer Blacks than Whites age 25 - 29 years old had completed high school (87% vs. 93%). See NAT'L CTR. FOR EDUC. STATISTICS, THE CONDITION OF EDUCATION 2006, EDUCATIONAL ATTAINMENT TBL. 31-1 (2006), available at <http://nces.ed.gov/programs/coe/2006/section3/table.asp?tableID=492>.

<sup>94</sup> In 2005, only 49.0% of African-Americans between the ages of 25-29 had completed at least some college as compared to 64.3% of Whites. See NAT'L CTR. FOR EDUC. STATISTICS, THE CONDITION OF EDUCATION 2006, EDUCATIONAL ATTAINMENT TBL. 31-2 (2006), available at <http://nces.ed.gov/programs/coe/2006/section3/table.asp?tableID=493>; see also A. Mechele Dickerson, *Race Matters in Bankruptcy*, 61 WASH. & LEE L. REV. 1725, 1769-1770 (2004).

<sup>95</sup> In 2005, 34.1% of Whites between the ages of 25-29 had obtained a bachelor's degree or higher while only 17.5% of Blacks had achieved the same educational success. See NAT'L CTR. FOR EDUC. STATISTICS, THE CONDITION OF EDUCATION 2006, EDUCATIONAL ATTAINMENT TBL. 31-3 (2006), available at <http://nces.ed.gov/programs/coe/2006/section3/table.asp?tableID=494>.

<sup>96</sup> See Nelson, *supra* note 26, at 26 & n.127.

<sup>97</sup> Boger, *supra* note 78, at 1415 (citing James S. Coleman et al., EQUALITY OF EDUCATIONAL OPPORTUNITY 22 (1966)).

<sup>98</sup> *Id.*

neighborhoods will only exacerbate the current disparities existing between minority and non-minority student achievement.

Considering the detrimental impact the creation of neighborhood schools has on desegregation efforts and, consequently, the quality of education received by many minority students, one wonders why school boards continue to advocate for and create them. While school boards' decisions to adhere to neighborhood schools may be attributable, in part, to their purported benefits,<sup>99</sup> parents' vocal opposition to busing and school boundary proposals has also greatly influenced school boards' actions. Due to the fact that the overwhelming majority of school boards are elected positions,<sup>100</sup> their members must confront political pressures that are brought to bear upon them by their constituents. Having particular influence on school board members are those voting parents who organize in efforts to oppose school boundary and student assignment proposals that attempt to diversify schools, both in terms of race and socioeconomic status.<sup>101</sup>

The school board members elected to govern the Humble Independent School District in Humble, Texas faced similar opposition in 2003 after announcing their proposals to redraw school boundaries.<sup>102</sup> Because some of the

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<sup>99</sup> See *supra* notes 81-82 and accompanying text.

<sup>100</sup> See Frederick M. Hess, *SCHOOL BOARDS AT THE DAWN OF THE 21<sup>ST</sup> CENTURY* 5 (2002) (reporting that in a survey of 2000 school boards, 93% were entirely elected), available at <http://www.nsba.org/site/docs/1200/1143.pdf>.

<sup>101</sup> While parent groups comprise 52.1% of constituent groups that are "active" in school board elections, ethnic or racial groups only comprise 18.1%. See *id.* at 37. See also Boger, *supra* note 78, at 1399-1400 (discussing parents' resistance efforts to the proposal of assigning poor, low-performing students to schools where their children attended and to the reassignment of white, middle-class students to lower income, lower performing schools); Dana Banker, *Plantation Parents Join Busing Debate School Boundaries Face Challenge at Meeting*, SOUTH FL. SUN-SENTINEL, March 27, 1995, at 1B, available in 1995 WLNR 4830234 (stating the goal of parents who oppose school boundary proposals that would require their children to be bused to a predominantly Black school to "[m]ake board members realize that this Plantation [parent] contingent is a sizable group with which to be reckoned"); John Hill, *Good schools for all Hillsborough*, ST. PETERSBURG TIMES, May 13, 2006, at 12A, available in 2006 WLNR 8296371 (stating that "[p]arents of upscale Westchase scolded, taunted and threatened the elected board with political retaliation" because of their discontentment regarding the school board's student reassignment proposal); Ginger Jenkins, *Boundary Committee endures wrath of Fall Creek residents*, April 11, 2004, available at [http://www.hcnonline.com/site/index.cfm?newsid=11289350&BRD=1574&PAG=461&dept\\_id=532207&rfti=8&xb=lutex](http://www.hcnonline.com/site/index.cfm?newsid=11289350&BRD=1574&PAG=461&dept_id=532207&rfti=8&xb=lutex) (discussing parents' vocal opposition to school boundary proposals that would zone their children to Title I schools, which have high economically-disadvantaged student populations); Scott Travis, *Parents Protest Plan to Alter School Boundary*, SOUTH FL. SUN-SENTINEL, Sept. 12, 2000, at 1B, available in 2000 WLNR 8568161 (discussing parents' opposition to a school boundary proposal that would add 163 predominantly poor, African-American students to their children's elementary school).

<sup>102</sup> See Cindy Horswell, *School boundaries draw parents' wrath/Humble ISD stirs campus controversy*, HOUS. CHRON., November 15, 2003, at A31, available in 2003 WLNR 16389739.

boundary proposals called for certain middle-upper class, predominantly white neighborhoods to be zoned to schools that would have predominantly minority, lower income student populations, parents and residents residing in the predominantly white neighborhoods voiced their dissent and lobbied school board members to vote to keep their children at the “good” schools.<sup>103</sup> Although the decision was not unanimous, the school board acquiesced and voted to accept boundary proposals that would allow the parents’ children to attend the more desirable schools.<sup>104</sup> Unfortunately, the same boundary decision also created racially and economically segregated schools due to the extraction of white, middle-class students.<sup>105</sup>

If school board members continue to employ student assignment policies that rely on racially segregated housing patterns and to yield to political parental pressures that oppose diversification and, thereby, desegregation efforts, then the goal of attaining educational equality for minority students will be unrealized. In attempts to avoid the harmful costs associated with resegregation, some school districts have voluntarily implemented plans that consider students’ race when making student assignment decisions. The next section examines two such plans and their attempts to further compelling interests via constitutional means.

## II. TAKING MATTERS INTO THEIR OWN HANDS: PUBLIC SCHOOLS’ VOLUNTARY USE OF RACE-CONSCIOUS STUDENT ASSIGNMENT PLANS

Due to the resegregation trend that is currently plaguing American public educational institutions, school districts have begun to experiment with various measures intended to diversify elementary and secondary schools. School districts have implemented school choice programs whereby parents can decide

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<sup>103</sup> See Linda Gilchrist, *Tough Choices/Humble ISD must decide controversial lines issues*, Hous. Chron., July 10, 2003, at 1, available in 2003 WLNR 16369914 (discussing Fall Creek’s (“an upscale subdivision with million-dollar homes”) opposition to being zoned to Humble High School “because it would have a greater number of minority and economically disadvantaged students”); see also Jenkins, *supra* note 101.

<sup>104</sup> See Kristen Wright, *Humble ISD adopts new boundaries/New Kingwood Park to be scaled down*, Hous. Chron., Sept. 2, 2004, at 1, available in 2004 WLNR 20930185.

<sup>105</sup> Following adoption of the new boundaries, Humble High School was projected to be 45%-65% minority and 45%-55% economically disadvantaged. Meanwhile, more affluent Kingwood High School was projected to have a student body that was only 10%-20% minority and 5-15% economically disadvantaged. The newly created high school (to which parents lobbied school board members to have their children attend) was projected to be 30%-50% minority and only 15%-25% economically disadvantaged. See DEMOGRAPHIC PROJECTIONS CORE COMMITTEE RECOMMENDATION (on file with author).

which schools they would like for their child to attend.<sup>106</sup> To encourage parents to choose schools that may have high populations of minority, economically-disadvantaged students, many school districts have introduced programs that provide pre-college courses of study such as the International Baccalaureate (IB) Diploma Program at such schools.<sup>107</sup> School districts have also created magnet schools and programs, which have a particular theme or curricular focus, such as science, technology, mathematics or performing arts, in their efforts to achieve diverse student bodies.<sup>108</sup>

Schools have also taken a more direct approach to achieve their diversity goals by considering students' race and ethnicity when making student assignment decisions. Such consideration has subjected school districts to intense and, in some cases, fatal judicial scrutiny.<sup>109</sup> The school districts in the following two cases, however, successfully overcame the constitutional challenges launched against their race-conscious student assignment plans at the circuit court level. It remains to be seen whether the same will be true following the Supreme Court's consideration of the plans.

A. *McFarland v. Jefferson County Board of Education*

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<sup>106</sup> See Robert A. Frahm, *Court Takes On Race Case School Desegregation Could Be Affected*, HARTFORD COURANT, June 6, 2006, at A1, available in 2006 WLNR 9686740 (discussing Connecticut's use of school choice to promote racial diversity in elementary and secondary education)

<sup>107</sup> In 2006, the Humble Independent School District in Humble, TX announced its plans to institute the IB Diploma Program at Humble High School, which is the most racially diverse and economically-disadvantaged high school in the district. See *What in the World is IB?*, available at <http://www.humble.k12.tx.us/ibpage.htm>. During the 2004-2005 school year, 25.4% of Humble High School's student population was economically disadvantaged, compared to only 3.3% at Kingwood High School. The minority enrollment at Humble High School is also significantly greater than that at Kingwood High School (50.6% vs. 14%). See 2004-2005 ACADEMIC EXCELLENCE INDICATOR SYSTEM CAMPUS REPORTS, available at <http://www.tea.state.tx.us/perfreport/aeis/2005/campus.srch.html>.

<sup>108</sup> See Hill, *supra* note 101 (discussing a school district's implementation of school choice as a means to "maintain integrated schools by making them more attractive to residents outside their neighborhoods"); Harold A. McDougall, *Brown at Sixty: The Case for Black Reparations*, 47 HOW. L.J. 863, 892 (2004) (discussing the goal of magnet schools "to accomplish or maintain desegregation").

<sup>109</sup> See, e.g., *Eisenberg v. Montgomery County Pub. Sch.*, 197 F.3d 123 (4<sup>th</sup> Cir. 1999) (invalidating a race-conscious student transfer plan that denied students' transfer requests if they would have an adverse impact on the assigned or requested school's diversity levels); *Tuttle v. Arlington County Sch. Bd.*, 195 F.3d 698 (4<sup>th</sup> Cir. 1999) (invalidating an assignment plan that based admission into an alternative kindergarten in part on students' race and ethnicity); *Wessman v. Gittens*, 160 F.3d 790 (1<sup>st</sup> Cir. 1998) (invalidating Boston Latin School's race-conscious admissions policy).

In its attempts to maintain an integrated school system following the lifting of a desegregation decree, the Jefferson County Public Schools (the “Board”) implemented a student assignment plan that includes racial guidelines.<sup>110</sup> While students have the ability to choose which school they would like to attend, their ultimate assignment can be affected by the operation of the racial guidelines, which require African-American student enrollment to be “at least 15% and no more than 50%” of the student body.<sup>111</sup> Although many other non-racial factors affect student assignment, the racial guidelines prohibit some students’ admission into particular schools or academic programs based on their race.<sup>112</sup> Because of such effect, students and parents challenged the constitutionality of the Board’s race-conscious student assignment plan.

In reviewing the constitutionality of the plan, the District Court applied strict scrutiny, which requires the Board to demonstrate that its use of race furthers a compelling governmental interest and does so using narrowly tailored means.<sup>113</sup> In formulating what appears to be a novel justification for the use of race in education, the Court held that the maintenance of racially integrated elementary and secondary schools constitutes a compelling interest.<sup>114</sup> In assessing the Board’s asserted interests,<sup>115</sup> the Court found that the educational and societal benefits that are derived from racial diversity in higher education are also produced in the context of elementary and secondary education.<sup>116</sup> The Court accepted the Board’s argument that “school integration benefits the system as a whole by creating a system of roughly equal components...not one rich and another poor, not one Black and another White.”<sup>117</sup> Finally, in holding that the Board’s interests are compelling, the Court held that the Board was not engaged in unconstitutional “racial balancing” because of its demonstrated commitment to

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<sup>110</sup> See *McFarland*, 330 F.Supp.2d at 836.

<sup>111</sup> *Id.* at 842.

<sup>112</sup> See *id.*

<sup>113</sup> See *id.* at 837, 848-849.

<sup>114</sup> See *id.* at 855.

<sup>115</sup> The Court’s statement of the Board’s asserted interests is as follows:

To give all students the benefits of an education in a racially integrated school and to maintain community commitment to the entire school system precisely express the Board’s own vision of *Brown*’s promise. The benefits the JCPS hopes to achieve go to the heart of its educational mission: (1) a better academic education for all students; (2) better appreciation of our political and cultural heritage for all students; (3) more competitive and attractive public schools; and (4) broader community support for all JCPS schools.

*Id.* at 850 & n.29.

<sup>116</sup> See *id.* at 853.

<sup>117</sup> *Id.* at 854.

integration and educational equality and the “academic, social and institutional benefits [they] achieve[ ].”<sup>118</sup>

Not only did the District Court find that the Board used race in its pursuit of compelling interests, but it also concluded that, in most respects, it utilized narrowly tailored means to pursue such interests.<sup>119</sup> The Court applied the following four criteria in determining the constitutionality of the race-conscious student assignment plan:

- (1) whether the 2001 Plan amounts to a quota that seeks a fixed number of desirable minority students and insulates one group of applicants from another, (2) whether the applicant is afforded individualized review, (3) whether the 2001 Plan “unduly harm[s] members of any racial group,” and (4) whether JCPS has given “serious, good faith consideration of workable race-neutral alternatives” to achieve its goals.<sup>120</sup>

In finding that the racial guidelines did not operate as a quota, the District Court reasoned that they represented a “quite flexible and broad target range,” such as that permitted in *Grutter*, and not a “relatively precise target.”<sup>121</sup> This reasoning, however, fails to address the fact that the “target range” is actually a Board requirement that African-American students comprise 15%-50% of a school’s student enrollment.<sup>122</sup> The Board’s formulation of its diversity goal as a numerical mandate may prove to be fatal in its quest to seek constitutional approval from the Supreme Court.<sup>123</sup>

Related to the quota criteria is the narrowly tailored requirement that race-conscious student assignment plans afford each student holistic, individualized review. Unlike other courts that have held that the requirement is inapplicable in the context of elementary and secondary education,<sup>124</sup> the District

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<sup>118</sup> *Id.* at 855.

<sup>119</sup> *See id.* at 855-862.

<sup>120</sup> *Id.* at 856 (internal citations omitted).

<sup>121</sup> *Id.* at 857. The Court also relied on the varying actual percentages of Black students present at individual schools (20.1%-50.4%) to support its conclusion that the guidelines did not operate as a quota. *See id.*

<sup>122</sup> *See id.* at 842 (stating that “the 2001 Plan requires each school to seek a Black student enrollment of at least 15% and no more than 50%”) (emphasis added).

<sup>123</sup> For further discussion, see *infra* Part III.

<sup>124</sup> *See, e.g., Parents II*, 426 F.3d at 1183 (concluding “that if a noncompetitive, voluntary student assignment plan is otherwise narrowly tailored, a district need not consider each student in a individualized, holistic manner”); *Comfort*, 418 F.3d at 18 (“Unlike the *Gratz* and *Grutter* policies, the Lynn Plan is designed to achieve racial diversity rather than viewpoint diversity. The only relevant criterion, then, is a student’s race; individualized consideration beyond that is irrelevant to the compelling interest.”) (footnote omitted).

Court considered the requirement and found that the Board's plan allows for individualized review, albeit "of a different kind in a different context than the Supreme Court found in *Grutter*."<sup>125</sup> The Court reasoned that the Board considers many aspects of each student's application when determining student assignments. "[R]ace is simply one possible factor among many, acting only occasionally as a permissible "tipping" factor in most of the [Board] assignment process."<sup>126</sup> Because the Board successfully demonstrated that its plan complied with this as well as the other narrowly tailored requirements, the Court concluded that its use of race in student assignments was constitutionally permissible.<sup>127</sup>

B. *Parents Involved in Community Schools v. Seattle School District No. 1*

Employing similar rationale as that utilized by the Board in *McFarland*, the Seattle School District Number 1 (the "District") also adopted an open choice student assignment plan in its attempts to create racially diverse schools and to prevent racial imbalance that would result from adherence to the neighborhood school concept. The plan allows parents to choose which of the ten high schools they want their children to attend, provided a particular school has availability.<sup>128</sup> To address situations in which a school is oversubscribed,<sup>129</sup> the District employs four tiebreakers, the second one being a student's race.<sup>130</sup> Although the District has never engaged in *de jure* segregation and, therefore, has never been ordered to desegregate,<sup>131</sup> as had the *McFarland* Board, it voluntarily uses the racial tiebreaker to ensure diversity or "balance" in the racial composition of its public high schools.<sup>132</sup> The operation of the racial tiebreaker is as follows: If a school's student population deviates from the goal of 40% white and 60% minority (+/- 15%), then the racial tiebreaker is used to grant automatic admission to those students whose race will enable the school to move closer to the desired racial

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<sup>125</sup> *McFarland*, 330 F.Supp.2d at 859.

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

<sup>127</sup> The Court did conclude, however, that with regards to the traditional school assignments in which African-American and white students are placed on separate assignment tracks, the narrowly tailored requirement was not met; therefore, the Board's use of race was constitutionally impermissible. *See id.* at 862-864. The Court of Appeals affirmed the District Court's judgment without issuing a detailed written opinion. *See McFarland*, 416 F.3d 513 (6<sup>th</sup> Cir. 2005).

<sup>128</sup> *See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 377 F.3d 949, 954-955, (9<sup>th</sup> Cir. 2004) [hereinafter *Parents I*], *rev'd Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 426 F.3d 1162 (9<sup>th</sup> Cir. 2005) (en banc).

<sup>129</sup> A school is considered to be "oversubscribed" "when more students want to attend that school than there are spaces available." *See id.* at 955.

<sup>130</sup> *See id.*

<sup>131</sup> *See id.* at 954.

<sup>132</sup> *See id.* at 955.

composition.<sup>133</sup> Conversely, the racial tiebreaker also operates to deny admission to those students whose race does not further the District's diversity goals.<sup>134</sup> Because the District, a state actor, utilizes student assignment policies that are based in part on race, such policies are subject to strict scrutiny and, thus, must employ 'narrowly tailored measures that further compelling governmental interests.'<sup>135</sup>

In *Parents I*, the Ninth Circuit found that the racial tiebreaker program did not pass constitutional scrutiny. While the Court recognized the pursuit of educational and societal benefits that accompany racially diverse learning environments as a compelling interest,<sup>136</sup> it found that the racial tiebreaker was not narrowly tailored to further such interest.<sup>137</sup> Upon rehearing *en banc*, the Ninth Circuit sanctioned the use of the racial tiebreaker and found that the measure was narrowly tailored to further the District's compelling interest in achieving racially and ethnically diverse student bodies.<sup>138</sup> Similar to the District Court in *McFarland*, the Court also recognized another compelling interest - "ameliorating racial isolation or concentration in . . . high schools by ensuring . . . [student] assignments do not simply replicate . . . segregated housing patterns."<sup>139</sup>

Both Courts in *Parents I* and *Parents II* agreed that "one compelling reason for considering race is to achieve the educational benefits of diversity."<sup>140</sup> Both Courts found that the District's educational goals complied with the constitutionally permissible diversity rationale as set forth by the Supreme Court in *Grutter*.<sup>141</sup> In so doing, the Court in *Parents I* alluded to the prevention of

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<sup>133</sup> *See id.* at 955-956.

<sup>134</sup> *See id.* at n.7.

<sup>135</sup> *Id.* at 960 (quoting *Gratz*, 539 U.S. at 270). *Cf.* *Parents II*, 426 F.3d at 1194 (Kozinski, J., concurring) (advocating a rational basis standard of review "because the Seattle plan carries none of the baggage the Supreme Court has found objectionable in cases where it has applied strict scrutiny and narrow tailoring").

<sup>136</sup> *See id.* at 964.

<sup>137</sup> *See id.* at 969.

<sup>138</sup> *See Parents II*, 426 F.3d at 1166.

<sup>139</sup> *Id.*; *see also* James E. Ryan, *Voluntary Integration: Asking the Right Questions*, 67 OHIO ST. L.J. 327, 334 (2006) (formulating the constitutional issue related to voluntary race-conscious student assignment plans as "whether [public schools] have a compelling interest in creating or maintaining a racially integrated student body").

<sup>140</sup> *Id.* at 1173; *see also Parents I*, 377 F.3d at 964.

<sup>141</sup> *See id.* at 962 (discussing the Supreme Court's sanctioning of the diversity rationale in *Grutter*); *id.* at 964 (concluding that "each of the School District's proffered interests in using its racial tiebreaker falls comfortably within the diversity rationale as . . . articulated to (and embraced by) the Court"); *see also Parents II*, 426 F.3d at 1173 (describing *Grutter*'s compelling interest as "the promotion of the specific educational and societal benefits that flow from diversity").

racial isolation as a permissible goal,<sup>142</sup> while *Parents II* directly held that “ameliorating real, identifiable *de facto* racial segregation” is a separate compelling interest.<sup>143</sup>

Although the Supreme Court has never recognized the elimination of *de facto* racial segregation as a compelling interest,<sup>144</sup> other lower courts have.<sup>145</sup> In advocating for a new compelling interest for using race in an education context, the Ninth Circuit employs the following reasoning:

The benefits that flow from integration (or desegregation) exist whether or not a state actor was responsible for the earlier racial isolation. *Brown*’s statement that “in the field of public education ... [s]eparate educational facilities are inherently unequal” retains its validity today. The District is entitled to seek the benefits of racial integration and avoid the harms of segregation even in the absence of a court order deeming it a violator of the U.S. Constitution.<sup>146</sup>

The Court also relies on the Supreme Court’s school desegregation jurisprudence to justify its sanctioning of school districts’ voluntary race-conscious integration efforts.<sup>147</sup>

Unlike the three-judge panel in *Parents I*, the *Parents II* Court held that the race-conscious student assignment plan used by the District was narrowly tailored to achieve its compelling interests. The contrary holdings may be due, in part, to the differing narrowly tailored tests utilized by the Courts. *Parents I* identified and applied the following six narrowly tailoring requirements: (1) prohibition of racial quotas; (2) flexible, individualized consideration of each applicant; (3) prohibition of mechanical or conclusive consideration of race; (4) earnest consideration of race-neutral alternatives; (5) minimization of adverse impact on non-preferred group members; and (6) time limitation.<sup>148</sup> *Parents II*, however, identified the following five factors and only applied factors two through five: “(1) individualized consideration of applicants; (2) the absence of quotas; (3) serious, good-faith consideration of race-neutral alternatives to the affirmative action program; (4) that no member of any racial group was unduly

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<sup>142</sup> See *Parents I*, 377 F.3d at 963.

<sup>143</sup> See *Parents II*, 426 F.3d at 1178-1179.

<sup>144</sup> See, e.g., *Freeman*, 503 U.S. at 494 (“Racial balance is not to be achieved for its own sake. It is to be pursued when racial imbalance has been caused by a *constitutional violation*.”) (emphasis added).

<sup>145</sup> See *Parents II*, 426 F.3d at 1178 (citing district and appellate court decisions holding that the creation and maintenance of desegregated schools serve compelling governmental interests).

<sup>146</sup> *Id.* at 1179 (citation omitted).

<sup>147</sup> See *id.*

<sup>148</sup> See *Parents I*, 377 F.3d at 968-969.

harm; and (5) that the program had a sunset provision or some other end point.”<sup>149</sup>

In finding the individualized consideration factor inapplicable to the District’s plan, the Ninth Circuit relied heavily on the different contexts of higher education admissions and secondary education assignments.<sup>150</sup> The Court argued that the protections afforded by individualized consideration in a competitive university admission context are not relevant in a non-competitive student assignment context.<sup>151</sup> The Supreme Court in *Grutter* and *Gratz* employed the requirement “in order to prevent race from being used as a mechanical proxy for an applicant’s qualifications.”<sup>152</sup> As asserted by the Ninth Circuit, the requirement is unnecessary in the present case because students’ qualifications are unrelated to their assignment to a particular school. If students’ qualifications, such as performance on standardized tests, grades, and artistic and athletic abilities, are not factors in student assignment decisions, then a holistic, individualized review or consideration of such factors is not necessary.<sup>153</sup>

The Court also argued that the differences in compelling interests advanced by universities and elementary and secondary schools warrant the non-application of individualized review. While the use of race in both contexts seeks to obtain the social and educational benefits of diversity, the university context lacks the second compelling interest that is present in the high school context, which is preventing the replication of segregated housing patterns in public education.<sup>154</sup> “Because race itself is the relevant consideration when attempting to ameliorate *de facto* segregation, the District’s tiebreaker must necessarily focus on the race of its students.”<sup>155</sup> In the Court’s opinion, to require school districts to focus on attributes other than race, such as leadership potential, grades, or life experiences, would undermine their ability to achieve and maintain racially integrated schools.

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<sup>149</sup> *Parents II*, 426 F.3d at 1180.

<sup>150</sup> See Ryan, *supra* note 139, at 335-336, 339 (arguing that the narrow tailoring test must be formulated in light of the context in which race is used).

<sup>151</sup> See *id.* at 1180-1181; see also Ryan, *supra* note 139, at 335-336, 339-344 (arguing that given the different context of employing non-merit based, non-competitive race-conscious assignment plans, public schools should not be required to give individualized consideration to each student).

<sup>152</sup> *Id.* at 1181.

<sup>153</sup> See *id.*; see also Holmes, *supra* note 63, at 595-596 (asserting similar arguments regarding the inapplicability of *Grutter*’s individualized consideration requirement to “non-merit-based race-conscious student assignment” programs).

<sup>154</sup> See *Parents II*, 426 F.3d at 1183.

<sup>155</sup> *Id.*

The Court in *Parents I* did not appear to address the different contexts of higher and secondary education as they relate to the individualized consideration requirement. They merely recognized the requirement as a narrow tailored factor and applied it to the present case. In so doing, the Court found that instead of considering several different factors to determine student assignment (as constitutionally mandated in *Grutter* and *Gratz*), the racial tiebreaker “automatically and mechanically admits...[and denies] hundreds of white and non-white applicants *solely* because of their race.”<sup>156</sup> The Court concluded that such operation fails the narrow tailored test as set forth in *Grutter* by establishing a ‘*de jure* [policy] of automatic acceptance or rejection based on a[ ] single ‘soft’ variable.’<sup>157</sup> As demonstrated by the conflicting holdings in *Parents I* and *Parents II*, the Supreme Court’s formulation of the compelling interests (if any) and the narrowly tailored requirements to advance such interests will have a significant impact on its findings regarding the constitutionality of voluntary race-conscious student assignment plans.

### III. A GLIMPSE INSIDE THE COURT’S CRYSTAL BALL: THE BLEAK FUTURE FOR RACE-CONSCIOUS STUDENT ASSIGNMENT PLANS

When one considers the importance of the issues raised in *Parents Involved* and *Meredith* and their potential impact on the provision of educational opportunities to minority students, it is clear that the decisions will significantly contribute to the jurisprudence concerning public education in this country. In determining the constitutionality of race-conscious student assignment plans, the Supreme Court will either sanction or prohibit school districts’ use of race as a means to create and maintain racially diverse learning environments. Unfortunately, the Court’s reasoning and holdings in previous cases involving the use of race in education present difficult and, in all likelihood, insurmountable challenges to the sanctioning of voluntary race-conscious student assignment plans as employed in the cases at bar.

In assessing the constitutionality of voluntary race-conscious student assignment plans, the Supreme Court must first determine whether the plans serve a compelling interest.<sup>158</sup> Although the Court has never provided a precise

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<sup>156</sup> *Parents I*, 377 F.3d at 970 (emphasis added).

<sup>157</sup> *Id.*

<sup>158</sup> According to the Supreme Court’s holding in *Adarand*, all government imposed racial classifications “must be analyzed by a reviewing court under strict scrutiny.” *See Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995). Therefore, the school districts’ race-conscious student assignment plans “are constitutional only if they are narrowly tailored measures that further compelling governmental interests.” *Id.* For a contrary view regarding the appropriate standard of review, *see Parents II*, 426 F.3d at 1194 (Kozinski, J., concurring) (advocating a rational basis standard of review “because the Seattle plan carries none of the baggage the Supreme Court has found objectionable in cases where it has applied strict scrutiny and narrow tailoring”).

definition of what constitutes a “compelling interest,”<sup>159</sup> the term is generally assumed to refer to those interests that are ‘of the highest order,’ ‘overriding,’ or ‘unusually important.’<sup>160</sup> To date, the Supreme Court has recognized two compelling interests that justify the government’s constitutional use of race: (1) to remedy past discrimination<sup>161</sup> and (2) to achieve student body diversity in higher education.<sup>162</sup> The school districts in *Meredith* and *Parents Involved* ask the Court to recognize a third – to achieve and maintain racially integrated elementary and secondary schools.<sup>163</sup> Considering the Court’s prior discussions and holdings regarding government’s remedial authority in the context of *de facto* segregation and its prohibition against racial balancing, it is unlikely that it will “expand[ ] the range of permissible uses of race”<sup>164</sup> to include the creation and maintenance of racially diverse public schools. Even if the school districts succeed in demonstrating a compelling interest, the Court will likely prohibit their continued use of race under the challenged plans due to their failure to meet narrowly tailored requirements.

#### A. *De Jure vs. De Facto Segregation*

Directly addressing the constitutionality of the voluntary use of race to remedy *de facto* segregation in public education will be a case of first impression for the Court.<sup>165</sup> The Court, however, has had previous opportunities to consider the use of race to remedy *de jure* segregation in the educational context.<sup>166</sup> In its desegregation jurisprudence, the Court has permitted school districts to employ race-conscious measures in their attempts to eliminate unconstitutional dual

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<sup>159</sup> See Thomas R. Bender, *Does the Right to Trial by Jury Place Constitutional Limits on Prejudgment Interest?*, 39 Suffolk U. L. Rev. 935, 950-951 (2006).

<sup>160</sup> *Id.*; see also *McFarland*, 330 F.Supp.2d at 850 (stating that “[w]hether an asserted interest is truly compelling is revealed only by assessing the objective validity of the goal, its importance to [the government actor] and the sincerity of [the government actor’s] interest”).

<sup>161</sup> See *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986).

<sup>162</sup> See *Grutter*, 539 U.S. at 325.

<sup>163</sup> See Brief in Opposition at 11-13, *Meredith*, 126 S.Ct. 2351 (No. 05-915), 2006 WL 448513; Brief in Opposition at 16, *Parents Involved*, 126 S.Ct. 2351 (No. 05-908), 2006 WL 789611.

<sup>164</sup> *Grutter*, 539 U.S. at 357 (Thomas, J., concurring in part and dissenting in part).

<sup>165</sup> See *Parents II*, 426 F.3d at 1173 (noting that “the Supreme Court has never decided a case involving the consideration of race in a voluntarily imposed school assignment plan intended to promote racially and ethnically diverse secondary schools”).

<sup>166</sup> See, *Swann*, 402 U.S. 1; *United States v. Montgomery Cty. Bd. of Educ.*, 365 U.S. 225 (1969).

educational systems.<sup>167</sup> The measures, however, were restricted to circumstances in which schools' student bodies and faculties were racially imbalanced as a result of the districts' intentional discrimination. Such circumstances do not exist in *Parents Involved* and *Meredith*.

As previously discussed, the District in *Parents Involved* has never experienced legal segregation and, therefore, has never been subject to a desegregation decree.<sup>168</sup> The District's use of race does not seek to remedy the effects of intentional discrimination but rather to prevent racial imbalance that would result from student assignments based on racially segregated housing patterns. The same is true for the Board's utilization of race in *McFarland*.

Although the Board had previously been subject to a desegregation decree, the decree was dissolved in June 2000, ten months prior to the Board's adoption of the race-conscious student assignment plan.<sup>169</sup> To justify the dissolution of the decree, the District Court found that "[t]o the greatest extent practicable, the Decree has eliminated the vestiges associated with the former policy of segregation and its pernicious effects."<sup>170</sup> Therefore, arguably, the Board's use of racial guidelines is not necessary to eliminate vestiges of racial discrimination since such effects have been deemed to already have been eliminated. Instead, the Board utilizes the racial guidelines to maintain the racially integrated schools created under the desegregation decree.

As noted by the District Court responsible for lifting the decree in *McFarland*, student assignment racial guidelines and ratios "were shielded from normal constitutional scrutiny" if employed under a federally mandated desegregation order.<sup>171</sup> Due to school districts' blatant disregard for the Supreme Court's mandate to desegregate, there existed an urgent need for courts to take an active role in directing desegregation efforts.<sup>172</sup> Within this role, courts issued various desegregation mandates, and school districts implemented various policies and programs in their efforts to comply with such mandates. Even though "voluntary school integration" may be viewed "as an extension of the

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<sup>167</sup> See *id.* at 235-236 (sanctioning the establishment of racial ratios for school faculties as a desegregation measure); see also, *Swann*, 402 U.S. at 25 (permitting the use of racial mathematical ratios to ensure student body diversity).

<sup>168</sup> See *Parents I*, 377 F.3d at 954.

<sup>169</sup> See *McFarland*, 330 F.Supp.2d at 841.

<sup>170</sup> *Hampton v. Jefferson Cty. Bd. of Educ.*, 102 F.Supp.2d 358, 360 (W.D.Ky. 2000) [hereinafter *Hampton II*].

<sup>171</sup> *Id.* at 376; see also *Hampton v. Jefferson Cty. Bd. of Educ.*, 72 F.Supp.2d 753, 777 (W.D.Ky. 1999) [hereinafter *Hampton I*] ("When the Board acts pursuant to the continuing Decree, it acts lawfully.").

<sup>172</sup> See *Freeman*, 503 U.S. at 472 (acknowledging school districts' delay in complying with *Brown I* and *Brown II* desegregation mandates); *Brown II*, 349 U.S. at 301 (instructing district courts to enter desegregation decrees to require schools to desegregate "with all deliberate speed").

Supreme Court's school desegregation jurisprudence,"<sup>173</sup> it does not necessarily follow that policies implemented under the legal protection of a desegregation decree will survive constitutional scrutiny once the order has been lifted.<sup>174</sup>

As argued in *Parents Involved* and *Meredith*, the context in which state actors use race and ethnicity is extremely important when determining the constitutionality of their usage.<sup>175</sup> Just as the benefits attained by using race in elementary and secondary education may differ from those attained from using race in higher education, the necessity of racial considerations in federally mandated student assignment plans may differ from the necessity of such considerations in voluntary plans. In *Jenkins*, the Supreme Court clarified that its pronouncement in *Brown I* "was tied *purely* to *de jure* segregation, not *de facto* segregation."<sup>176</sup> Because states had intentionally required Blacks to attend separate, inferior schools, states had an affirmative duty to implement those measures that would effectively eliminate dual educational systems.<sup>177</sup> The Court found that measures involving racial guidelines and ratios were necessary to remedy the harms caused by *de jure* segregation.<sup>178</sup> Once states had practically eliminated the harms associated with *de jure* segregation, the Court held that desegregation duties had been fulfilled since "mere *de facto* segregation (unaccompanied by discriminatory inequalities in educational resources) does not constitute a continuing harm after the end of *de jure* segregation."<sup>179</sup> In *Freeman*, the Court further clarified that with regards to its jurisprudence concerning the imposition of "'awkward,' 'inconvenient, and 'even bizarre' measures to achieve racial balance in student assignment," such measures were reserved to the context

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<sup>173</sup> *McFarland*, 330 F.Supp.2d at 851; see also *Parents II*, 426 F.3d at 1179 (concluding that the Supreme Court's reference to "the *voluntary integration* of schools as sound educational policy within the discretion of local school officials" supports the Court's finding that "[t]he District is entitled to seek the benefits of racial integration and avoid the harms of segregation even in the absence of a court order deeming it a violator of the U.S. Constitution") (emphasis in original).

<sup>174</sup> See, e.g., *Hampton II*, 102 F.Supp.2d at 381 (holding that the Board's race-conscious magnet school student assignment plan that had previously been permissible under the desegregation decree was not narrowly tailored to achieve a compelling governmental interest).

<sup>175</sup> See *Parents II*, 426 F.3d at 1173 (stating that "[c]ontext matters when reviewing race-based governmental action under the Equal Protection Clause") (quoting *Grutter*, 539 U.S. at 326); *McFarland*, 330 F.Supp.2d at 849-850 (reasoning that "[t]he different context 'matters' because, under the Equal Protection Clause, '[n]ot every decision influenced by race is equally objectionable...") (quoting *Grutter*, 539 U.S. at 327).

<sup>176</sup> *Jenkins*, 515 U.S. at 120 (emphasis added).

<sup>177</sup> See *Green*, 391 U.S. at 437-438.

<sup>178</sup> See *supra* note 162.

<sup>179</sup> *Jenkins*, 515 U.S. at 122.

of *de jure* segregation, not phrases “when the imbalance is attributable...to independent demographic forces.”<sup>180</sup>

The current Supreme Court may rely on this rationale to find that the elimination of racial isolation attributable to *de facto* segregation in public schools does not justify the use of racial guidelines and tiebreakers in voluntary student assignment plans. In its reluctance to expand the justifications for the voluntary use of racial classifications, the Court may confine such race-based measures to the context of *de jure* segregation, which, as previously discussed, is inapplicable in the present cases.<sup>181</sup>

## B. *Racial Balancing*

Despite the various contexts in which race and ethnicity have been employed to achieve governmental interests, the Supreme Court has routinely rejected voluntary racial balancing as a permissible interest to justify their usage.<sup>182</sup> In rejecting racial balancing “for its own sake,” the Court in *Freeman* limited its pursuit to those circumstances in which “racial imbalance has been caused by a constitutional violation.”<sup>183</sup> Considering the arguments advanced by the petitioners in *Parents Involved* and *Meredith*,<sup>184</sup> it is apparent that both school districts will have to overcome the Court’s prohibition against racial balancing to sustain their utilization of race-conscious student assignment plans.

In *Grutter*, the Supreme Court attempted to distinguish between racial balancing and the pursuit of a “critical mass” of minority students. According to the court, a school’s attempt ‘to assure within [a] student body some specified percentage of a particular group merely because of its race or ethnic origin’

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<sup>180</sup> See *Freeman*, 503 U.S. at 493

<sup>181</sup> See *Parents II*, 426 F.3d at 1208, n.17 (Bea, J., dissenting) (noting that the Supreme Court’s desegregation jurisprudence sanctions the use of race to “to combat past *de jure* segregation” not “to achieve racial balance absent *de jure* segregation”).

<sup>182</sup> See *Grutter*, 539 U.S. at 329-330 (holding that “outright racial balancing...is patently unconstitutional”); *Bakke*, 438 U.S. at 306-307 (rejecting racial balancing as facially invalid).

<sup>183</sup> *Freeman*, 503 U.S. at 494.

<sup>184</sup> For example, one of the questions presented by the petitioner in *Parents Involved* asks the following:

May a school district that is not racially segregated and that normally permits a student to attend any high school of her choosing deny a child admission to her chosen school solely because of her race in an effort to achieve a desired *racial balance* in particular schools, or does such *racial balancing* violate the Equal Protection Clause of the Fourteenth Amendment?

Petition for a Writ of Certiorari at i, *Parents Involved*, 126 S.Ct. 2351 (No. 05-908), 2006 WL 1579631 (emphasis added); see also Brief of Petitioner at 5-6, *Meredith*, 126 S.Ct. 2351 (No. 05-915), 2006 WL 2433475 (arguing that the Board’s imposition of racial guidelines “is simply an action for the sake of reflecting racial distribution”).

amounts to unconstitutional racial balancing.<sup>185</sup> If, however, a school defines its diversity pursuits “by reference to the educational benefits that diversity is designed to produce,” then such pursuits may be constitutionally permissible.<sup>186</sup> The respondents in *Parents Involved* and *Meredith* argue that their race-conscious plans have met this test.

The respondents in *Parents Involved* argue that the District’s plan, including the integration tiebreaker, does not amount to racial balancing because it does “not seek to achieve a pre-determined racial distribution in any school,” as proscribed by the Constitution.<sup>187</sup> Rather, the plan seeks to afford white and minority students the opportunity to attend popular schools that may not be close to their neighborhoods.<sup>188</sup> Similarly, the respondents in *Meredith* also argue that their use of racial guidelines in student assignments is not motivated by constitutionally impermissible interests.<sup>189</sup> Rather, the guidelines are used to promote the Board’s good faith interest in maintaining racial integration in its schools and the educational benefits that flow from such environments.<sup>190</sup> The District Court agreed with this argument and relied on the fact that the Board had “precisely described the academic, social and institutional benefits it achieves from integrated schools” to demonstrate that it had not implemented the racial guidelines to achieve racial balancing “merely for its own sake.”<sup>191</sup> This argument, however, fails to adequately address the potentially defeating counterargument that the 15%-50% racial guidelines are mechanical *mandates* intended to assure a *specified* percentage of African-American students in each school.<sup>192</sup> Such racial mandates, which could be termed “quotas,” are absolutely proscribed by the Constitution.<sup>193</sup>

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<sup>185</sup> *Grutter*, 539 U.S. at 329-330.

<sup>186</sup> *Id.* at 330. The Majority’s proffered distinction drew much disagreement from other Justices. *See, e.g. id.* at 355 (Thomas, J., concurring in part and dissenting in part) (questioning how the Law Schools’ interest in educational benefits is not racial balancing considering the Law School’s apparent belief “that only a racially mixed student body can lead to the educational benefits it seeks”); *id.* at 379, 383 (Rehnquist, C.J., dissenting) (arguing that “[s]tripped of its ‘critical mass’ veil, the Law School’s program is revealed as a naked effort to achieve racial balancing” due to its precise attention to numbers when making admissions decisions).

<sup>187</sup> Brief in Opposition at 17, *Parents Involved*, 126 S.Ct. 2351 (No. 05-908), 2006 WL 789611.

<sup>188</sup> *Id.*

<sup>189</sup> *See* Brief in Opposition at 14, *Meredith*, 126 S.Ct. 2351 (No. 05-915), 2006 WL 448513.

<sup>190</sup> *See id.*

<sup>191</sup> *McFarland*, 330 F.Supp.2d at 855.

<sup>192</sup> *See supra* notes 121-122 and accompanying text.

<sup>193</sup> *See Grutter*, 539 U.S. at 334; *Bakke*, 438 U.S. at 315.

As defined by the Supreme Court:

Quotas 'impose a fixed number or percentage which must be attained, or which cannot be exceeded,' and 'insulate the individual from comparison with all other candidates for the available seats.' In contrast, 'a permissible goal ... require[s] only a good-faith effort ... to come within a range demarcated by the goal itself,' and permits consideration of race as a 'plus' factor in any given case while still ensuring that each candidate 'compete[s] with all other qualified applicants.'<sup>194</sup>

The attainment of a student body that is composed of no fewer than 15% and no more than 50% African-American students is not a "goal" that the Board strives to achieve. Rather, it is a fixed percentage with which schools are *required* to seek compliance.<sup>195</sup> The respondents, in fact, state that "[t]he Plan provides that each school (except preschools, kindergartens, alternative and special schools, and the four exempted magnet schools) *shall* have not less than 15% and not more than 50% black students."<sup>196</sup> Including such directive does not appear to comport with the Supreme Court's sanctioning of the use of race-conscious measures in public education.

Considering that both student assignment plans seek to create and maintain racially balanced schools, both are vulnerable to the Court's proscription of unconstitutional racial balancing. Now that Justice O'Connor, the drafter of the *Grutter* majority, is no longer on the bench, it is not apparent that the current members of the Court will accept the racially balancing test as articulated by the majority in *Grutter*. Rather, the Court may employ a more exacting standard to ensure that the interests motivating the utilization of voluntary race-conscious plans are constitutionally permissible.

### C. *Individualized Consideration*

A final impediment to the constitutionality of the race-conscious plans is their failure to meet narrowly tailoring requirements. As required by the standard of review set forth in *Grutter*, all admissions plans that use racial classifications must be narrowly tailored to further compelling interests.<sup>197</sup> Constitutional race-conscious admissions plans are 'flexible enough to consider all pertinent elements of diversity' and "ensure that each applicant is evaluated as an individual and not in a way that makes race or ethnicity the defining feature of

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<sup>194</sup> *Grutter*, 539 U.S. at 335 (citations omitted).

<sup>195</sup> See *supra* note 122.

<sup>196</sup> Brief in Opposition at 3-4, *Meredith*, 126 S.Ct. 2351 (No. 05-915), 2006 WL 448513 (emphasis added).

<sup>197</sup> See *Grutter*, 539 U.S. at 308.

the application.”<sup>198</sup> Unfortunately, the race-conscious student assignment plans utilized in *Parents Involved* and *Meredith* fail both criteria.

Although the Ninth Circuit held that the non-competitive context of elementary and secondary education does not require individualized review,<sup>199</sup> it is doubtful that the Supreme Court will adopt a similar view. While it is true that “context matters when reviewing” race-based measures,<sup>200</sup> the context of elementary and secondary elementary does not warrant the inapplicability of individualized consideration. Rather, it is, perhaps, the most pertinent context that necessitates individualized review.

All racial classifications are subject to strict scrutiny to guard against the infringement of personal rights guaranteed by the Equal Protection Clause of the Constitution.<sup>201</sup> Strict scrutiny is necessary to protect individuals from the potential stigmatic harms imposed by group-based racial classifications.<sup>202</sup> More so than in other contexts, such protections must be afforded to children in elementary and secondary education. There is, perhaps, no other more necessary context for such protections than elementary and secondary education. The potential harms that can result from telling a child that he or she cannot attend a particular school because he or she is of the wrong race are immeasurable. “Harms such as promotion of racial inferiority, strengthening of racial stereotypes, [and] heightening of racial hostility”<sup>203</sup> are precisely those harms that the Court’s desegregation cases attempted to remedy.<sup>204</sup> It is, therefore, highly improbable that the current Supreme Court would permit the use of racial classifications in elementary and secondary education without requiring that they meet *every* element of strict scrutiny.

Contrary to the narrowly tailored criteria set forth in *Grutter*, the student assignment plans in question do not afford meaningful consideration to diversity elements other than race and ethnicity. The District Court in *McFarland* argues that the Board’s plan is constitutional because it considers other diversity factors “such as place of residence and student choice of school or program.”<sup>205</sup> Such argument cannot sustain the constitutionality of the plan because the operation of

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<sup>198</sup> *Id.* at 309 (citation omitted).

<sup>199</sup> *See Parents II*, 426 F.3d at 1183.

<sup>200</sup> *Grutter*, 539 U.S. at 308.

<sup>201</sup> *See Adarand*, 515 U.S. at 227.

<sup>202</sup> *See Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989).

<sup>203</sup> Nelson, *supra* note 26, at 38.

<sup>204</sup> *See, e.g., Brown I*, 347 U.S. at 494 (noting that legally sanctioned racial segregation produces feelings of inferiority, which detrimentally “affects the motivation of a child to learn”).

<sup>205</sup> *McFarland*, 330 F.Supp.2d at 859.

the plan is such that these factors are effectively irrelevant if a student attempts to enroll in a school where the racial composition will fall outside the racial guidelines if he or she is admitted. Despite the student's other "diversity factors," he or she will most likely be denied admission.<sup>206</sup> The racial tiebreaker employed in *Parents Involved* operates in a similar manner in that depending on the racial makeup of a particular school to which a student is applying for admission, his or her race can be the determinative factor in deciding whether he or she is admitted or denied.<sup>207</sup> In both plans, race operates as the defining and decisive feature of a student's application not as a constitutionally permissible "plus" factor.<sup>208</sup> Therefore, the plans are not narrowly tailored and, thus, cannot pass constitutional scrutiny.

#### CONCLUSION: FULFILLING *BROWN*'S MANDATE

In assessing the constitutionality of voluntary race-conscious student assignment plans in the context of *de facto* racial isolation in elementary and secondary schools, the Supreme Court will be guided by its previous holdings and rationales. As it attempts to balance the proffered interests in creating and maintaining racial integration against the constitutional protections provided by the Equal Protection Clause of the Constitution, the Court will be guided by the principle that "[t]he Constitution does not prevent individuals from choosing to live together, to work together, or to send their children to school together, *so long as the State does not interfere with their choices on the basis of race.*"<sup>209</sup> Once the inquiry has been completed, the challenged plans will most likely be invalidated. In light of this probable outcome, local, state and federal officials should immediately engage in the development of race-neutral programs and policies that can effectively address the harmful effects of resegregation of public schools.

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<sup>206</sup> As noted by the District Court:

[W]here the racial composition of an entire school lies near either end of the racial guidelines, the application of any student for open enrollment, transfer or even to a magnet program could be affected. In a specific case, a student's race, whether Black or White, could determine whether that student receives his or her first, second, third or fourth choice of school.

*See id.* at 842.

<sup>207</sup> *See Parents I*, 377 F.3d at 955-956 (explaining that the racial tiebreaker operates to grant automatic admission to students who are of the preferred race needed to help schools attain the desired racial ratio of white and minority students).

<sup>208</sup> *See Gratz*, 539 U.S. at 271-272 (invalidating a race-conscious admissions policy because of its use of race as the decisive factor in an admissions decision rather than as a "plus" factor along with many different diversity criteria).

<sup>209</sup> *Jenkins*, 515 U.S. at 121 (emphasis added).

School officials should not retard the progress that has been made in the provision of educational opportunities to minority students by paving “a one-way street” to racially and economically segregated neighborhood schools.<sup>210</sup> As previously discussed, students attending such schools face challenges, which are often insurmountable, that range from less qualified teachers<sup>211</sup> to a culture of lower academic expectations.<sup>212</sup> To combat these challenges, schools should employ race-neutral<sup>213</sup> student assignment plans and implement educational policies that effectively address deficiencies in the provision of equal educational opportunities to minority students.

Some schools have already begun to experiment with race-neutral measures in their efforts to achieve racially diverse student bodies.<sup>214</sup> Such measures include the consideration of ‘diversity in student achievement’ and ‘diversity in socioeconomic status.’<sup>215</sup> Limiting concentrations of low-performing students in schools will impact student body diversity since minority students often perform lower than their white counterparts on academic measures.<sup>216</sup> Similarly, assigning students to schools based on their socioeconomic status can also achieve racial diversity because of the existing

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<sup>210</sup> *Hampton II*, 102 F.Supp.2d at 379.

<sup>211</sup> *See supra* notes 67-68, 89-95 and accompanying text.

<sup>212</sup> *See supra* note 96 and accompanying text.

<sup>213</sup> In the context of student assignments, “race-neutral” refers to those plans that do not classify students based on their race or ethnicity. Such plans are not “race-blind” in that they ignore the effects of race on educational opportunities. They simply do not consider a student’s race when assigning him or her to a particular school. *See Nelson, supra* note 26, at 7-11 (discussing the meaning of “race-neutral” alternatives in the context of higher education admissions decisions).

<sup>214</sup> *See, e.g., Boger, supra* note 78, at 1397-1400 (discussing the implementation of race-neutral student assignment plans in Wake County, North Carolina).

<sup>215</sup> *Id.* at 1397.

<sup>216</sup> For example, in 2004, black and Hispanic children age 9, 13 and 17 had lower average reading scale scores than white students. *See* NAT’L CTR. FOR EDUC. STATISTICS, DIGEST OF EDUCATION STATISTICS 2005 TBL. 108, available at [http://nces.ed.gov/programs/digest/d05/tables/dt05\\_108.asp](http://nces.ed.gov/programs/digest/d05/tables/dt05_108.asp). The same was true for their performance in mathematics. *See id.*, at TBL. 118, available at [http://nces.ed.gov/programs/digest/d05/tables/dt05\\_118.asp](http://nces.ed.gov/programs/digest/d05/tables/dt05_118.asp). In 2001, the average geography and U.S. history scores for white students were higher than those achieved by black and Hispanic students. *See id.*, at TBL. 116, available at [http://nces.ed.gov/programs/digest/d05/tables/dt05\\_116.asp](http://nces.ed.gov/programs/digest/d05/tables/dt05_116.asp).

racial gaps in socioeconomic status.<sup>217</sup> Such “class-based” assignment plans are also beneficial because they provide the added benefit of socioeconomic diversity, which may, in fact, be more educationally beneficial than racial diversity.

Some scholars have concluded that “[n]o other single social measure is consistently more strongly related than poverty to school achievement.”<sup>218</sup> Consequently, “overall socioeconomic composition of schools seem[ ] more predictive of academic achievement than [does] a student's individual socioeconomic status.”<sup>219</sup> If this is true, school officials should direct their attention to achieving and maintaining socioeconomic diversity rather than racial diversity. Presumably, such efforts would not be subject to the heightened and, potentially, fatal standard of strict scrutiny because they neither employ racial classifications nor seek to achieve racial diversity benefits.<sup>220</sup> Rather, they seek to achieve the educational benefits of socioeconomic integration.

In their attempts to provide equal educational opportunities to all students, school officials should implement policies to remedy the disparities that currently exist between minority, economically disadvantaged schools and their non-minority economically advantaged counterparts. As often noted by many scholars, “[t]o those who need the best our education system has to offer, we give the least. The least well-trained teachers. The lowest-level curriculum. The oldest books. The least instructional time. Our lowest expectations. Less, indeed, of everything that we believe makes a difference.”<sup>221</sup> As previously discussed, one glaring disparity is the level of teacher quality.<sup>222</sup> Students attending high minority, low socioeconomic schools are disproportionately subjected to being

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<sup>217</sup> See NAT'L CTR. FOR EDUC. STATISTICS, THE CONDITION OF EDUCATION 2006 TBL. 6-1, available at <http://nces.ed.gov/programs/coe/2006/section1/table.asp?tableID=440> (indicating that 70% of black 4<sup>th</sup>-graders and 73% of Hispanic 4<sup>th</sup>-graders are eligible for free or reduced lunch, as compared to only 24% of white 4<sup>th</sup>-graders); see also Dickerson, *supra* note 94, at 1756-1758 (noting significant racial disparities in wealth as shown by levels of home ownership, personal assets and business ownership).

<sup>218</sup> Boger, *supra* note 78, at 1416.

<sup>219</sup> *Id.*; see also *supra* notes 97-98 and accompanying text; Orfield, *supra* note 83, at 280 (concluding that peer socioeconomic status accounts for more than 75% of the difference between minority and white students' academic achievement).

<sup>220</sup> See *id.* at 1398-1399 (concluding that race-neutral student assignment plans should not be subject to strict scrutiny as long as they have not “been adopted as a mere pretext for continuing racial assignments”); see also Levit, *supra* note 38, at 511 (encouraging schools to “first try experiments that are more likely to be successful and less likely to be unconstitutional” in their efforts to achieve educational goals).

<sup>221</sup> See Susan P. Leviton & Matthew H. Joseph, *An Adequate Education for All Maryland's Children: Morally Right, Economically Necessary, and Constitutionally Required*, 52 MD. L. REV. 1137, 1142 (1993).

<sup>222</sup> See *supra* notes 67-68 and accompanying text.

taught by lesser qualified teachers.<sup>223</sup> Such inequitable learning environments negatively affects not only the quality of education that students receive<sup>224</sup> but also their psychological well-being by sending and reinforcing messages ‘that society doesn’t care enough about whether they learn.’<sup>225</sup>

To combat such debilitating effects, school officials should invest in the quality of their teachers, especially those teaching in lower-performing schools, by implementing initiatives that are designed to improve teacher qualifications and effectiveness, such as pre-service teacher education, mentoring programs and continual professional development.<sup>226</sup> School officials should also provide incentives to encourage more qualified teachers to teach at lower-performing schools. Such incentives could be immediate such as salary increases, or they could be long-term such as early retirement opportunities. More qualified teachers may be enticed to teach at high minority, low socioeconomic schools if doing so afforded them the opportunity to be eligible for retirement five or ten years earlier than their counterparts teaching at more affluent schools. Coupled with intensive recruitment efforts at the high school and college levels, schools implementing such beneficial policies could see a significant improvement in the quality of their teachers and, consequently, the academic quality of their students.<sup>227</sup>

Implementing race-neutral assignment policies and teacher quality initiatives is merely the beginning in addressing the significant costs imposed by segregated learning environments. To fulfill *Brown*’s mandate of educational equality, economically disadvantaged minority students must have the opportunity to interact with peers from diverse backgrounds to broaden and heighten their educational goals and possibilities.<sup>228</sup> Whether or not the Supreme Court allows schools to facilitate this interaction through the use of race-conscious student assignment plans, our schools and our country have the moral responsibility to ensure that such interaction takes place and that it occurs within

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<sup>223</sup> See *id.*; see also Linda Darling-Hammond, *Teacher Quality and Student Achievement: A Review of State Policy Evidence*, 8 EDUC. POL’Y ANALYSIS ARCHIVES 1 (2000), available at <http://epaa.asu.edu/epaa/v8n1/> (reporting findings that poor minority students are taught by less qualified teachers than their non-minority socially advantaged peers).

<sup>224</sup> See *id.* (concluding that student outcomes and student achievement are negatively affected by poor teacher quality).

<sup>225</sup> See Jeannie Oakes, *Education Inadequacy, Inequality, and Failed State Policy: A Synthesis of Expert Reports Prepared for Williams v. State of California* 1, 9-10 available at [http://www.decentschools.org/expert\\_reports/oakes\\_report.pdf](http://www.decentschools.org/expert_reports/oakes_report.pdf).

<sup>226</sup> See Darling-Hammond, *supra* note 223.

<sup>227</sup> See *id.* (describing significant student achievement gains made in North Carolina and Connecticut following the states’ enactment of substantial reforms targeting teacher quality).

<sup>228</sup> See *supra* notes 97-98 and accompanying text.

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educational institutions that provide all students access to equal resources necessary to create and fulfill their academic dreams.