

# The Battle for *Brown*

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## I. INTRODUCTION

This article contends that the battle to preserve and place the principles of *Brown v. Board of Education*<sup>1</sup> at the center of the quest for educational equality is more important than ever before. Initially, this article notes that the United States Supreme Court's stewardship of *Brown* has been uneven, and the decision's precedential force has been much diminished in the hands of the Rehnquist and Roberts Courts. But as the Court has withdrawn from vigorous enforcement of *Brown*'s desegregation mandate, segregation in public education persists, and other factors such as class, housing segregation, hypercriminalization, and employment discrimination intersect with race to condemn black and brown children to disparities in educational attainment. While Court partisans<sup>2</sup> and the nation debate whether we are a post-racial America,<sup>3</sup> many sobering realities, including disparate educational outcomes, demonstrate that racial disparity and discrimination in America remain as resilient as ever.

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1. 347 U.S. 483 (1954).

2. See, e.g., *Freeman v. Pitts*, 503 U.S. 467, 506 (1992) (Scalia, J., concurring) (“At some time, we must acknowledge that it has become absurd to assume, without any further proof, that violations of the Constitution dating from the days when Lyndon Johnson was President, or earlier, continue to have an appreciable effect upon current operation of schools.”).

3. See Sumi Cho, *Post-Racialism*, 94 IOWA L. REV. 1589, 1595 (2009) (defining post-racialism as the belief that “race does not matter, and should not be taken into account or even noticed”); Kimberlé Williams Crenshaw, *Twenty Years of Critical Race Theory: Looking Back to Move Forward*, 43 CONN. L. REV. 1253, 1313 (2011) (describing post-racialism's threat as “a compelling ideological frame . . . poised to exile racial justice discourse to the hinterlands of contemporary political thought”); see also *Room for Debate: Under Obama, Is America 'Post-Racial'?*, N.Y. TIMES (Sept. 21, 2011), <http://www.nytimes.com/roomfordebate/2011/09/21/under-obama-is-america-post-racial> (discussing the debate from various viewpoints).

Thus, the sixtieth anniversary of *Brown* must not be the occasion for nostalgic celebration, despite the importance of the decision's rejection of segregation in public education. The irony of its storied history is that its principle of full citizenship via equal education is of utmost importance in today's contemporary, global economy. The Census Bureau's prediction that the Latino and Asian populations would more than double by 2050 is on track to fulfillment.<sup>4</sup> There are demonstrably different educational outcomes for children who live their lives at the dangerous intersection of race, language, class, employment, housing discrimination, and the criminal justice system. These factors complicate our analyses of the role of race in disparate educational achievement, but evidence suggests that race alone is an imprecise lens through which to focus on educational equality. It will be the task of a new team of interdisciplinarians, much like those Charles Hamilton Houston<sup>5</sup> and Thurgood Marshall<sup>6</sup> assembled<sup>7</sup> to craft an assault on *Plessy v. Ferguson*<sup>8</sup> and create a *Brown*-grounded narrative of intersectional equality that demands constitutional recognition and constitutionally sheltered correction.

This is no embrace of a post-racial narrative.<sup>9</sup> Rather, it is a call to examine anew the relationship between the educational policies that create or exacerbate the racial and other disadvantages experienced by minority children. Under the constitutional cover of *Brown*, we must adopt education policies that promise to foster full participation of our children in an exceedingly diverse, technological, and global America.

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4. See JENNIFER M. ORTMAN & CHRISTINE E. GUARNERI, UNITED STATES POPULATION PROJECTIONS: 2000 TO 2050, at 3 (2009), available at <http://www.census.gov/population/projections/files/analytical-document09.pdf>.

5. For an account of the life of Charles Hamilton Houston, see GENNA RAE MCNEIL, GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS (1984).

6. For a biography on Thurgood Marshall, see JUAN WILLIAMS, THURGOOD MARSHALL: AMERICAN REVOLUTIONARY (1998).

7. See generally RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY (1976) (providing a detailed account of the events leading up to the *Brown* decision).

8. 163 U.S. 537 (1896).

9. See generally Cho, *supra* note 3 (describing the various features and definitions of "post-racialism" and arguing that the concept exists today as a twenty-first century ideology).

II. *BROWN*: PROLOGUE AND EPILOGUE

In *Brown*, the culmination of a twenty-year strategic effort to overturn *Plessy*, the Court offered two rationales for its conclusion that segregation in public education violated the Equal Protection Clause. First, Chief Justice Warren, writing for a unanimous court, concluded that “education [was] perhaps the most important function of state and local governments,” and that denial of equal education would make it difficult for children to perform their roles in a democratic society.<sup>10</sup> Second, the Court, based on its prior decisions in *Sweatt v. Painter*<sup>11</sup> and *McLaurin v. Oklahoma State Regents for Higher Education*<sup>12</sup> and the doll study research of Kenneth Clark,<sup>13</sup> concluded that segregation harmed black children by preventing them from interacting with their peers and generating “feeling[s] of inferiority.”<sup>14</sup>

It is now well known that Chief Justice Warren was able to achieve the unanimous opinion by postponing the Court’s decision on remedies until the next term.<sup>15</sup> That anticipated remedial decision, *Brown II*,<sup>16</sup> practically invited objections to the immediate enforcement of *Brown*’s desegregation mandate and may have encouraged the kind of opposition exemplified by the extreme examples of resistance, such as judicial proclamations

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10. *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483, 493 (1954).

11. 339 U.S. 629 (1950).

12. 339 U.S. 637 (1950).

13. See Gordon J. Beggs, *Novel Expert Evidence in Federal Civil Rights Litigation*, 45 AM. U. L. REV. 1, 9 (1995) (“At trial in *Brown*’s consolidated case . . . the National Association for the Advancement of Colored People (NAACP) presented dramatic testimony by Professor Kenneth Clark of the City College of New York. Professor Clark performed innovative psychological tests utilizing dolls to identify harms inflicted on the plaintiff children due to segregation.”).

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

15. KLUGER, *supra* note 7, at 698; see also Cass R. Sunstein, *Did Brown Matter?* NEW YORKER (May 3, 2004), <http://www.newyorker.com/magazine/2004/05/03/did-brown-matter> (“Through a combination of determination, compromise, charm, and intense work with the other justices (including visits to the hospital bed of an ailing Robert Jackson), Warren engineered something that might have seemed impossible the year before: a unanimous opinion overruling *Plessy*.”).

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

that *Brown* did not require integration,<sup>17</sup> school closings,<sup>18</sup> and outright opposition to judicial mandates.<sup>19</sup> It would take almost fifteen years for the Court to clarify its remedial requirements. A 1968 decision clearly stated that the time for delay had expired,<sup>20</sup> and a decision in 1971 fully empowered federal district courts to use their equitable powers to construct unitary school systems out of dual ones.<sup>21</sup> The delay in *Brown*'s implementation permitted doubt to develop about the meaning of the decision. Did *Brown* mean that racial segregation was per se unconstitutional? Or did *Brown* mean that only deliberate policies of racial segregation were unconstitutional? If so, do policies traceable to other societal factors such as housing discrimination or employment discrimination escape the net of *Brown*'s mandate?

The Court's decision in *Palmer v. Thompson*,<sup>22</sup> in which Jackson, Mississippi closed its swimming pools to avoid integrating them pursuant to a court order,<sup>23</sup> cast doubts on the meaning of equal protection post-*Brown*. In that case, though there was substantial evidence that the city had a racially discriminatory motive, the Court concluded that since neither blacks nor whites would swim in public pools in the future, the decision to close them was constitutional.<sup>24</sup> The irony is that by the time the Court made plain the obligation of compliance with *Brown*, it had already anticipated the demographic changes that would limit the force of its desegregation mandates.<sup>25</sup> Clearly,

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17. See *Briggs v. Elliott*, 132 F. Supp. 776, 777 (E.D.S.C. 1955) ("[I]t is important that we point out exactly what the Supreme Court has decided and what it has not decided in this case. It has not decided that the federal courts are to take over or regulate the public schools of the states. It has not decided that the states must mix persons of different races in the schools or must require them to attend schools or must deprive them of the right of choosing the schools they attend.").

18. See *Griffin v. Cnty. Sch. Bd. of Prince Edward Cnty.*, 377 U.S. 218, 232-33 (1964) (criticizing tactics by the local school board to avoid desegregation by closing all public schools in Prince Edward County, Virginia).

19. See *Cooper v. Aaron*, 358 U.S. 1, 16-17 (1958) (holding desegregation orders could not be nullified by state officials in Arkansas who disagreed with the decision).

20. *Green v. Cnty. Sch. Bd. of New Kent Cnty.*, 391 U.S. 430, 438 (1968).

21. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971).

22. 403 U.S. 217 (1971).

23. *Id.* at 219.

24. See *id.* at 227.

25. See *Swann*, 402 U.S. at 31-32 ("It does not follow that the communities served by such systems will remain demographically stable, for in a growing, mobile society, few will do so. Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative

the mandate of *Brown* would reach only the decisions of school districts and not the reactions of whites to the prospect of desegregation.<sup>26</sup> Equally important was the development of renewed objections to school desegregation on federalism grounds. It was on this basis that the southern states stood against *Brown*, both before and after the decision.<sup>27</sup>

In a series of opinions, the United States Supreme Court imposed a variety of limitations on the scope of remedies for past de jure school segregation. For example, in *Milliken v. Bradley*,<sup>28</sup> the Court repudiated an order that required an inter-district remedy for segregation in the Detroit School District on the ground that the surrounding districts had not been found to have engaged in past de jure segregation.<sup>29</sup> The majority rejected the argument that the state retained control over the local school district using strong rhetoric about the tradition of “local control over the operation of schools.”<sup>30</sup> When the case returned to the Supreme Court in 1977,<sup>31</sup> the Court approved extensive reforms and remedial education expenditures,<sup>32</sup> a position it appeared to repudiate, or severely limit, almost twenty years later in *Missouri v. Jenkins*.<sup>33</sup> Other decisions curtailed the power of district courts to continue supervising districts<sup>34</sup> and invited partial relinquishment of supervision.<sup>35</sup> With these developments, the Court emphasized the importance of local control and rejected the argument that the prospect of mandatory school desegregation might drive private housing decisions.<sup>36</sup>

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duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system.”).

26. See Thomas F. Pettigrew & Robert L. Green, *School Desegregation in Large Cities: A Critique of the Coleman “White Flight” Thesis*, 46 HARV. EDUC. REV. 1, 4-5 (1976) (examining research on the causes of the “white flight” phenomenon).

27. See KLUGER, *supra* note 7, at 752 (noting resistance to the decision by southern members of Congress who considered *Brown* “a clear abuse of judicial power”).

28. 418 U.S. 717 (1974).

29. *Id.* at 752-53.

30. *Id.* at 741.

31. *Milliken v. Bradley*, 433 U.S. 267 (1977).

32. See *id.* at 290.

33. See 515 U.S. 70, 101-02 (1995) (holding court-ordered remedial actions must be designed to remedy injuries caused by past de jure discrimination).

34. See *Bd. of Educ. of Okla. City Pub. Sch. v. Dowell*, 498 U.S. 237, 250 (1991); *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 434-36 (1976).

35. See *Freeman v. Pitts*, 503 U.S. 467, 499 (1992).

36. See *id.* at 506-07 (Scalia, J., concurring) (“At some time, we must acknowledge that it has become absurd to assume, without any further proof, that violations of the Constitution dating from the days when Lyndon Johnson was President, or earlier, continue

### III. *BROWN* AND LIMITS ON VOLUNTARY SCHOOL DESEGREGATION

In my prior comments on the legacy of *Brown*, I noted the importance of assessing the decision's legacy in light of the profound equal protection developments since the decision.<sup>37</sup> Although it would be decidedly disingenuous to discount the societal transformation worked by *Brown*,<sup>38</sup> the educational developments move in two directions, both of which have limited, but not eliminated, the decision's transformative potential. One direction concerns the remedial potential of *Brown* limited by the United States Supreme Court in the series of decisions reviewed above. The second thread involves broader developments in equal protection doctrine. Some questioned whether the Court would evolve *Brown* to include an affirmative obligation to shore up full citizenship. The Court stunted this prospect in the remedial decisions but might linger in the possibility that the Court could afford voluntary K–12 measures—rather than judicially mandate ones—a more sympathetic reception. This possibility would flow from the strong support for local control that animated limitations on court-ordered remedies and a more broadly applicable idea that the Equal Protection Clause permits

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to have an appreciable effect upon current operation of schools. We are close to that time. While we must continue to prohibit, without qualification, all racial discrimination in the operation of public schools, and to afford remedies that eliminate not only the discrimination but its identified consequences, we should consider laying aside the extraordinary, and increasingly counterfactual, presumption of *Green*. We must soon revert to the ordinary principles of our law, of our democratic heritage, and of our educational tradition: that plaintiffs alleging equal protection violations must prove intent and causation and not merely the existence of racial disparity, that public schooling, even in the South, should be controlled by locally elected authorities acting in conjunction with parents, and that it is 'desirable' to permit pupils to attend 'schools nearest their homes.'" (quoting *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 28 (1971)).

37. Linda S. Greene, *From Brown to Grutter*, 36 LOYOLA U. CHI. L.J. 1, 1 (2004).

38. The late Judge Robert L. Carter, a key *Brown* strategist, noted that "*Brown* did effect a radical social transformation in this country and whatever its limited impact on the educational community, its indirect consequences of altering the style, spirit, and stance of race relations and will maintain its prominence in American jurisprudence for many years to come." Robert L. Carter, *A Reassessment of Brown v. Board*, in *SHADES OF BROWN: NEW PERSPECTIVES ON SCHOOL DESEGREGATION* 21, 21 (Derrick Bell ed., 1980); see also KLUGER, *supra* note 7, at 353 (describing the strategic role of Judge Carter in the preparation of the *Brown* litigation); Roy Reed, *Robert L. Carter, 94, Leading Strategist Against Segregation and U.S. Judge, Dies*, N.Y. TIMES, Jan. 3, 2012, at A17 (discussing the life and work of Judge Carter).

voluntary government measures to shore up inclusion and full participation in American society.<sup>39</sup>

As to these possibilities, in the 2007 decision *Parents Involved in Community Schools v. Seattle School District No. 1*,<sup>40</sup> the United States Supreme Court had the opportunity to join its *Brown* jurisprudence that limited judicially imposed remedies with its voluntary desegregation jurisprudence—exemplified by the *Bakke*<sup>41</sup> to *Grutter*<sup>42</sup> line of cases—to permit voluntary K–12 desegregation efforts.<sup>43</sup> The Court had done this in previous higher education cases, most recently in *Grutter*, which involved the University of Michigan Law School’s race-conscious admissions policy.<sup>44</sup> These decisions were closely divided, with a 5-4 decision in favor of the law school policy in *Grutter* and a 5-4 decision against a similar undergraduate admissions scheme in *Gratz*.<sup>45</sup> Despite the close vote, *Grutter* included the potential for a rethinking of the meaning of *Brown*. I so argued in 2004:

A broader reading of *Grutter* is also possible. The University of Michigan successfully urged the Court to consider *Grutter*’s implications for *Brown*’s legacy. The *Grutter* opinion draws on the civic and citizenship dimensions of constitutional equality articulated in *McLaurin*, *Sweatt*, and *Brown*. *Grutter* links these citizenship dimensions to the Court’s approval of racial inclusion policies in law schools and in undergraduate programs of the university. Justice O’Connor reminds us that the fabric of education is important to the fabric of society because it fosters the promotion of citizenship and it furthers “the dream of one [indivisible] Nation.”<sup>46</sup>

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39. See Greene, *supra* note 37, at 1-2.

40. 551 U.S. 701 (2007).

41. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

42. *Grutter v. Bollinger*, 539 U.S. 306 (2003). A companion case involved the undergraduate admissions policy at the University of Michigan. See *Gratz v. Bollinger*, 539 U.S. 244 (2003).

43. See *Parents Involved*, 551 U.S. at 746-47.

44. *Grutter*, 539 U.S. at 312-15.

45. See Greene, *supra* note 37, at 15-17 (discussing the division of the Court in both cases).

46. *Id.* at 18 (alteration in original) (footnote omitted) (quoting *Grutter*, 539 U.S. at 332).

Implausibly, in light of some of her prior decisions,<sup>47</sup> the University of Michigan persuaded Justice O'Connor's *Grutter* majority that the need for diverse institutions was critical to both the development of talented leadership and legitimate institutions.<sup>48</sup> Although the circumstances of law schools and K-12 education differ, if K-12 officials concluded that desegregated education would be more effective for all children, the *Grutter* precedent and the absence of federalism concerns might tip the scales in favor of the constitutionality of voluntary desegregation measures at the K-12 level.

This question was presented in *Parents Involved*, which addressed the constitutionality of two plans aimed to decrease racial segregation in K-12 schools.<sup>49</sup> The school district in Seattle, Washington concluded that it had to take active steps to promote integration or its high schools would remain segregated along racial lines.<sup>50</sup> The Seattle district had implemented school choice features in its school assignment policy, but district leaders were concerned that the persistence of housing segregation in the

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47. With the exception of *Grutter*, Justice O'Connor consistently voted against the constitutionality of race-conscious voluntary inclusion measures and court-ordered, race-conscious remedies. See, e.g., *Gratz*, 539 U.S. 244 (agreeing consideration of race in undergraduate admissions policy was unconstitutional); *Missouri v. Jenkins*, 515 U.S. 70 (1995) (agreeing that district court remedies to correct de facto segregation were improper); *Shaw v. Reno*, 509 U.S. 630 (1993) (striking down minority-majority districts drawn to enhance likelihood of election of minorities to the United States House of Representatives); *Freeman v. Pitts*, 503 U.S. 467 (1992) (agreeing district court relinquishment of supervision prior to unitary status was proper); *Metro Broad., Inc. v. Fed. Comm'n's Comm'n*, 497 U.S. 547, 612-13 (1990) (O'Connor, J., dissenting) (arguing that compelling interests must be limited to identifiable institutional discrimination on the ground that other interests, such as diversity, societal discrimination, and the presence of role models, were "too amorphous" to limit the use of race); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (finding city's minority subcontractor policy unconstitutional); *United States v. Paradise*, 480 U.S. 149, 196 (1987) (O'Connor, J., dissenting) (arguing promotion quota was unconstitutional remedy for racial discriminatory hiring and promotion of black state troopers); *Local 28 of Sheet Metal Workers' Int'l Ass'n v. Equal Emp't Opportunity Comm'n*, 478 U.S. 421, 490 (1986) (O'Connor, J., concurring in part and dissenting in part) (opposing numerical goals as remedy for union discrimination against African Americans and Latinos); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 284 (1986) (O'Connor, J., concurring in part and concurring in the judgment) (arguing that societal discrimination is an insufficient basis to find discrimination against school board and to protect black teachers against layoffs); *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 583 (1984) (O'Connor, J., concurring) (agreeing that judicially approved consent decree provisions that awarded seniority rights to African Americans and Latinos were invalid)

48. *Grutter*, 539 U.S. at 332-33.

49. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 711 (2007).

50. See *id.* at 712-13 (describing the racial composition of the city's high schools).

city threatened to erode the progress made toward integrated schools.<sup>51</sup> Thus, the district made some pupil assignments using the race of students as a factor to maintain each school's racial population within ten percentage points of 41% white and 59% nonwhite, which comported with district demographics.<sup>52</sup> The companion case in *Parents Involved* included Jefferson County Public Schools, which operated schools in the Louisville, Kentucky metropolitan area.<sup>53</sup> The Jefferson County district devised a complex process to assign pupils to nonmagnet schools.<sup>54</sup> The process relied first on parental choice, but limited that choice based on the racial demographics of certain schools.<sup>55</sup> More specifically, the district sought to have schools with a racial make-up of between 15% and 50% African Americans, which loosely reflected the demographics of the community.<sup>56</sup> Though the process of pupil assignment differed in Seattle and Jefferson County, both used race as a factor when a requested assignment would negatively affect the district's demographic goals.<sup>57</sup>

However, the districts did differ with respect to findings of past de jure racial segregation. In 1973, a federal judge found de jure segregation in the Jefferson County district, and the court oversaw the district's schools until it achieved unitary status in 2000.<sup>58</sup> In Seattle, black plaintiffs filed school desegregation lawsuits in 1966 and 1977 that alleged deliberate racial discrimination, but the parties agreed to settle those lawsuits without findings of de jure segregation.<sup>59</sup>

In a split decision, the Court concluded that both plans were unconstitutional.<sup>60</sup> Chief Justice Roberts delivered the judgment of the Court, which garnered the support of Justices Scalia, Thomas, and Alito,<sup>61</sup> and the partial support of Justice Kennedy, who wrote to concur in part and to concur in the judgment.<sup>62</sup> The opinion of Chief Justice Roberts reaffirmed *Grutter's* application

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51. *See id.* at 711-13.

52. *Id.* at 711-12.

53. *Id.* at 715.

54. *Parents Involved*, 551 U.S. at 716.

55. *Id.* at 716-17.

56. *Id.* at 716.

57. *See id.* at 711.

58. *Id.* at 715-16.

59. *See Parents Involved*, 551 U.S. at 808-10 (Breyer, J., dissenting).

60. *Id.* at 747-48 (Roberts, C.J., opinion).

61. *Id.* at 708-09.

62. *See id.* at 782 (Kennedy, J., concurring in part and concurring in the judgment).

of strict scrutiny but rejected the extension of *Grutter*'s diversity rationale to the K–12 context.<sup>63</sup> Rather, the Chief Justice wrote that an interest that satisfied the compelling state interest standard was the interest in remedying the effects of past intentional discrimination.<sup>64</sup> His opinion specifically rejected the interest of remedying societal discrimination, such as housing discrimination, and also repudiated the interest of racial balancing or racial proportionality.<sup>65</sup>

Justice Kennedy disagreed with this portion of the opinion. He concluded the remediation of past intentional discrimination was a compelling interest, but he believed it was not the only compelling interest.<sup>66</sup> Justice Kennedy discussed a number of additional interests, including the educational benefits of diverse school enrollments, the reduction of the harmful effects of racial isolation, and the reduction of the effects of segregated housing, all of which furthered the pursuit of *Brown*'s objective of equal educational opportunity.<sup>67</sup> Justice Kennedy rested his decision to join in the judgment on his view that the Court had too little information on the role of race in pupil assignments, and he was not persuaded that the district had given enough thought to race-neutral alternatives.<sup>68</sup> His concern about the absence of factual clarity on the manner in which race was actually used suggests that he might have reached a different result had the facts demonstrated a clearly limited use of race in the pupil assignment process. This conclusion is consistent with Justice Kennedy's view that the outcome in the case turned on his belief that the districts' plans could be distinguished from plans previously scrutinized by the Court, such as the one from *Gratz v. Bollinger*.<sup>69</sup> Moreover, Justice Kennedy explicitly listed several examples of permissible race-conscious policies other than pupil assignment that could be employed in the interest of "encourag[ing] a diverse student body"—including race-sensitive site selection, demographically sensitive attendance zones, special resource allocation, targeted recruitment, and

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63. *Id.* at 724-25 (Roberts, C.J., opinion).

64. *Parents Involved*, 551 U.S. at 720.

65. *Id.* at 730-32.

66. *Id.* at 783 (Kennedy, J., concurring in part and concurring in the judgment).

67. *See id.* at 786-87.

68. *See id.* at 789.

69. *See Parents Involved*, 551 U.S. at 792.

statistical monitoring.<sup>70</sup> Thus, Justice Kennedy reserved the possibility that limited uses of race in pupil assignment as well as in race-conscious policy decisions might pass his constitutional muster.

The dissenters, whose primary opinion was written by Justice Breyer, disagreed with almost every important point made by Chief Justice Roberts. However, they found some common ground with Justice Kennedy, even though they disagreed on the proper standard of review.<sup>71</sup> The dissenters would have applied an intermediate standard rather than strict scrutiny,<sup>72</sup> and they seemingly endorsed the benign-invidious distinction repudiated by the Court in *Adarand Constructors, Inc. v. Peña*.<sup>73</sup> In contrast to the judgment's exclusion of all interests, save the remediation of past intentional discrimination, the dissenters argued that voluntary desegregation efforts were supported by three categories of interests: (1) historical and remedial interests; (2) quality of education interests; and (3) democratic interests.<sup>74</sup> They concluded that the plans rarely used race, and when they did it was not a major factor in assignment decisions.<sup>75</sup> They also found that the plans had been carefully developed and both school districts had considered alternatives before deciding to utilize race as a factor in pupil assignments.<sup>76</sup> In the dissenters' view, the plans fought the resegregation of the districts' schools and were sheltered under *Grutter's* approval of diversity as a compelling interest.<sup>77</sup> Justice Breyer wrote that the judgment disrespected both *stare decisis* as well as local democratic decision making—he believed Chief Justice Roberts articulated a view that would harm the law and nation alike.<sup>78</sup>

The divided opinion has been widely parsed,<sup>79</sup> but this much is clear—a majority of the *Parents Involved* Court supported

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70. *Id.* at 788-89.

71. *See id.* at 837 (Breyer, J., dissenting).

72. *Id.*

73. *See id.*; *see also* 515 U.S. 200 (1995) (holding all uses of race by government must be subjected to strict scrutiny).

74. *Parents Involved*, 551 U.S. at 838-40 (Breyer, J., dissenting).

75. *Id.* at 846-47.

76. *See id.* at 848.

77. *See id.* at 864.

78. *See id.* at 865.

79. *See, e.g.,* Kevin Brown, *Reflections on Justice Kennedy's Opinion in Parents Involved: Why Fifty Years of Experience Shows Kennedy Is Right*, 59 S.C. L. REV. 735

voluntary race-conscious educational policymaking for reasons beyond the remediation of past intentional discrimination. Justice Kennedy differed with the dissenters on the permissibility of race-based pupil assignment on the facts before the Court, but he apparently agreed that school districts may pursue “the educational benefits of diverse school enrollments,” the reduction of the “harmful effects of racial isolation,” and the reduction or minimization of the effects of segregated housing.<sup>80</sup> The decision leaves open the possibility for the introduction of race-conscious efforts to increase integration and thwart segregation.

One federal appellate court has agreed with this appraisal. In *Doe v. Lower Merion School District*,<sup>81</sup> the Third Circuit Court of Appeals concluded *Parents Involved* did not prohibit the consideration of racial factors in the drawing of school district lines, nor did the decision forbid the court from considering the benefits of racial diversity as a factor in district decisions.<sup>82</sup> In *Lower Merion*, the court considered a decision by the Lower Merion School District, located in suburban Philadelphia, to utilize racial demographics as a factor in the formulation of its pupil assignment plan.<sup>83</sup> The plan did not use the race of individual students to assign students to schools but instead drew attendance zones based in part on the demographics of various neighborhoods within the district.<sup>84</sup> The plan also included some exceptions for members of the upcoming graduating class, who had the choice to either follow the redistricting plan or stay at their current high school—a form of grandfathering.<sup>85</sup> The school board explicitly based the redistricting decisions on its current and expected future needs and considered a number of scenarios for redistricting.<sup>86</sup> The court recognized that racial considerations played a role in the development of the district’s ultimate goals, but so did other considerations.<sup>87</sup> Initially, a federal district court

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(2008); Goodwin Liu, “History Will Be Heard”: An Appraisal of the Seattle/Louisville Decision, 2 HARV. L. & POL’Y REV. 53 (2008).

80. See *Parents Involved*, 551 U.S. at 786-88 (Kennedy, J., concurring in part and concurring in the judgment).

81. 665 F.3d 524 (3d Cir. 2011).

82. See *id.* at 557.

83. See *id.* at 529.

84. *Id.* at 536-37.

85. See *id.*

86. See *Lower Merion*, 665 F.3d at 532.

87. See *id.* (noting several considerations).

concluded that controlling authority did not require the application of strict scrutiny to the district's policy because it was a facially neutral redistricting plan with facially neutral guidelines.<sup>88</sup> However, the district court concluded that the United States Supreme Court's decision in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*<sup>89</sup> required the application of strict scrutiny because race was a motivating factor in the district's "decisionmaking."<sup>90</sup>

On appeal, the Third Circuit affirmed in part and reversed in part.<sup>91</sup> The court agreed with the district court that the pupil assignment plan was "race neutral" on its face because it assigned students "based only on the geographical areas in which they live."<sup>92</sup> But the appeals court noted the school district's plan was quite different from the policies subjected to strict scrutiny in cases such as *Parents Involved*, *Gratz*, and *Brown* because the Lower Merion plan did not allocate individual burdens and benefits on the basis of race.<sup>93</sup> The court found *Arlington Heights* stood for the proposition that strict scrutiny must be applied when a discriminatory purpose was a motivating factor behind the challenged conduct.<sup>94</sup> The court also distinguished between "a school assignment policy that explicitly classifies based on race with the consideration or awareness of neighborhood racial demographics during the development and selection of a policy," and one that considers race.<sup>95</sup> As to the latter, the court concluded that the consideration of race was not the equivalent of a racial classification.<sup>96</sup> The Lower Merion School District designed its policy with racial factors in mind, but it did not classify students and assign them on the basis of their race.<sup>97</sup> Rather, the court found the policies were facially neutral and held the district administered them in a race-neutral fashion.<sup>98</sup>

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88. *Student Doe 1 v. Lower Merion Sch. Dist.*, No. 09-2095, 2010 WL 2599278, at \*7 (E.D. Penn. June 24, 2010).

89. 429 U.S. 252 (1977).

90. *See Lower Merion*, 2010 WL 2599278, at \*10.

91. *Lower Merion*, 665 F.3d at 529.

92. *See id.* at 545.

93. *Id.*

94. *See id.* at 547-48.

95. *See id.* at 548.

96. *Lower Merion*, 665 F.3d at 548.

97. *Id.* at 550 ("No evidence has been provided indicating assignments based on racial classification here.").

98. *See id.* at 554.

Finally, the court considered and rejected the possibility that the district's actions had a discriminatory effect or were motivated by a discriminatory purpose.<sup>99</sup> The court found no evidence that similarly situated individuals—in this case students—of a different race were treated any differently than the black students who complained about the policies.<sup>100</sup> Under the plan, the black students were treated in the same manner as white students in the area affected by the district's redistricting plan.<sup>101</sup> In fact, the court noted that two-thirds of the students in this area were not African American.<sup>102</sup> As a result, the court found no evidence that the plan was motivated by a racially discriminatory purpose, citing *Personnel Administrator of Massachusetts v. Feeney*<sup>103</sup> for the proposition that “discriminatory purpose means that the decision maker adopted the challenged action at least partially because the action would benefit or burden an identifiable group.”<sup>104</sup> In *Lower Merion*, the court concluded that the plan was based in part upon racial demographic considerations but also noted the plan included nonracial directives of the school board, such as the goal of equalizing enrollment in district schools and not increasing the number of buses required for student transportation.<sup>105</sup>

Moreover, the court considered several community factors, including allowing students who walked to school to continue walking, minimizing travel time, and ensuring a comfortable learning environment for all students.<sup>106</sup> The court concluded that the district carefully sought to prevent any discriminatory impact when it developed its plan.<sup>107</sup> Finally, the appeals court rejected the district court's conclusion that strict scrutiny was appropriate because the affected area had a high concentration of African American students.<sup>108</sup> The court drew on United States Supreme Court cases involving electoral redistricting, such as *Bush v.*

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99. *See id.* at 549-55.

100. *Id.* at 550.

101. *Lower Merion*, 665 F.3d at 550.

102. *Id.* at 552.

103. 442 U.S. 256 (1979).

104. *See Lower Merion*, 665 F.3d at 548.

105. *Id.* at 532.

106. *Id.* at 552.

107. *See id.* at 551.

108. *Id.* at 555.

*Vera*,<sup>109</sup> to conclude that strict scrutiny did not apply simply because redistricting was performed with “consciousness of race,” or because authorities sought to create a majority-minority district.<sup>110</sup> The electoral redistricting cases, according to the court, demonstrated strict scrutiny only applied if race was the dominant factor that motivated the legislature’s redistricting decisions.<sup>111</sup> Thus, strict scrutiny would only apply if the decisions could not be explained on grounds other than race.<sup>112</sup> Since the district articulated several alternative grounds, the court applied a mere rational basis standard.<sup>113</sup>

The possibility that voluntary race-conscious efforts remain viable after *Parents Involved* is an important window in light of the persistence of racial segregation in K–12 schools and the racially disproportionate levels of educational achievement. This article turns next to those factors that might lead school districts to act with race in mind for the reasons supported by a majority of the Justices in *Parents Involved*.

#### IV. THE CURRENT PERSISTENCE OF SCHOOL SEGREGATION AND ITS EFFECTS ON MINORITY CHILDREN

Over two decades, the work of Gary Orfield and his associates has documented the persistent lack of desegregation progress in America. For example, in 1993, his research showed a decreasing percentage of white students in schools attended by black and Latino students from 1980 to 1991.<sup>114</sup> His colleague, Erica Frankenberg, noted similar trends, particularly the growing trend of white isolation from predominantly minority-populated schools.<sup>115</sup> Later work that coincided with the fiftieth anniversary

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109. 517 U.S. 952 (1996).

110. See *Lower Merion*, 665 F.3d at 555 (quoting *Bush*, 517 U.S. at 958) (internal quotation marks omitted).

111. See *id.* at 555-56.

112. *Id.*

113. *Id.* at 556.

114. GARY ORFIELD ET AL., THE GROWTH OF SEGREGATION IN AMERICAN SCHOOLS: CHANGING PATTERNS OF SEPARATION AND POVERTY SINCE 1968, at 15 (1993), available at <http://files.eric.ed.gov/fulltext/ED366689.pdf>.

115. ERICA FRANKENBERG & CHUNGMEI LEE, RACE IN AMERICAN PUBLIC SCHOOLS: RAPIDLY RESEGREGATING SCHOOL DISTRICTS 6 (2002), available at <http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/race-in-american-public-schools-rapidly-resegregating-school-districts/frankenbergs-rapidly-resegregating-2002.pdf>.

of *Brown* emphasized that more effective methods of tracking high school dropout and graduation rates would provide a fuller picture of the extent to which the promise of *Brown* must be assessed, not simply by measuring integration, but also by measuring high school completion by race.<sup>116</sup> On the sixtieth anniversary of *Brown*, Orfield and Frankenberg noted the continued persistence of racial segregation and its complexities:

New national statistics show a vast transformation of the nation's school population since the civil rights era. Particularly dramatic have been an almost 30% drop in white students and close to quintupling of Latino students. The nation's two largest regions now have a majority of what were called "minorities" and whites are only the second largest group in the West. The South, always the home of most black students, now has more Latinos than blacks and is a profoundly tri-racial region. Desegregation progress was very substantial for blacks, and occurred in the South from the mid-1960s to the late 1980s. Contrary to many claims, the South has not gone back to the level of segregation before *Brown*. It has lost all of the additional progress made after 1967 but is still the least segregated region for black students. The growth of segregation has been most dramatic for Latino students, particularly in the West, where there was substantial integration in the 1960s, and segregation has soared. A clear pattern is developing of black and Latino students sharing the same schools; it deserves serious attention from educators and policymakers. Segregation is typically segregation by both race and poverty. Black and Latino students tend to be in schools with a substantial majority of poor children, but white and Asian students are typically in middle-class schools. Segregation is by far the most serious in the central cities of the largest metropolitan areas, but it is also severe in central cities of all sizes and suburbs of the largest metro areas, which are now half nonwhite. Latinos are significantly more segregated than blacks in suburban America.<sup>117</sup>

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116. See GARY ORFIELD ET AL., LOSING OUR FUTURE: HOW MINORITY CHILDREN ARE BEING LEFT BEHIND BY THE GRADUATION RATE CRISIS 7 (2004), available at <http://civilrightsproject.ucla.edu/research/k-12-education/school-dropouts/losing-our-future-how-minority-youth-are-being-left-behind-by-the-graduation-rate-crisis/orfield-losing-our-future-2004.pdf>.

117. GARY ORFIELD ET AL., *BROWN AT 60: GREAT PROGRESS, A LONG RETREAT AND AN UNCERTAIN FUTURE* 2 (2014), available at <http://civilrightsproject.ucla.edu/research/k->

Much of the discussion of school segregation takes place with the urban condition in mind, but the demographics of suburban schools are also quite dynamic. In recent research, Frankenberg and Orfield observed, “[i]n the suburbs of the largest metropolitan areas 58.5 percent of students were white, 20.5 percent Latino, . . . 6.4 percent Asian,” and 14% African American.<sup>118</sup> And in the seven of the twenty-five largest metropolitan areas, “seven of them had a majority nonwhite enrollment.”<sup>119</sup> Some of these suburban districts also display new diversity dimensions as the characteristics of their Latino populations shift. For example, in one Boston suburb, the Latino population itself is morphing:

Waltham is home to a relatively young and growing Latino population, within which a declining Puerto Rican population is being replaced by a newer immigrant population, principally from Mexico and Guatemala. The city’s black (heavily Haitian) population is growing. The city’s white population has slowly declined and is aging but still makes up three-quarters of its residents. Poverty is on the rise both in the city and its schools. The city’s resident population has increased in recent years (and only slightly over the last two decades) again, largely because of immigration.<sup>120</sup>

In Waltham, the number of students who do not speak English as their first language grew from 26% in 2000 to 34.3% in 2011.<sup>121</sup> Orfield observed, “[t]he day of a solid white middle-class suburbia is history, and some of the classic postwar suburbs that set the mold for a new suburban society are now deeply affected by the kind of poverty and resegregation that occurred long ago

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12-education/integration-and-diversity/brown-at-60-great-progress-a-long-retreat-and-an-uncertain-future/Brown-at-60-051814.pdf.

118. Erica Frankenberg & Gary Orfield, *Why Racial Change in the Suburbs Matters*, in *THE RESEGREGATION OF SUBURBAN SCHOOLS: A HIDDEN CRISIS IN AMERICAN EDUCATION* 1, 13 (Erica Frankenberg & Gary Orfield eds., 2012).

119. *Id.*

120. Susan Eaton, *Help Wanted: The Challenges and Opportunities of Immigration and Cultural Change in a Working-Class Boston Suburb*, in *THE RESEGREGATION OF SUBURBAN SCHOOLS: A HIDDEN CRISIS IN AMERICAN EDUCATION*, *supra* note 118, at 91, 96.

121. *Id.* at 97.

in the central city.”<sup>122</sup>

If racial segregation continues to deprive minority children of the sword of equal protection in their quest for better educational outcomes, so too does hyper-criminalization create the risk of for negative educational outcomes for minority children.<sup>123</sup> The Departments of Justice and Education recently acknowledged that “on any given day in 2011 there still were more than 60,000 young people detained or committed to juvenile justice residential and secure care facilities” in the United States.<sup>124</sup> In addition to their concerns that incarcerated youth were more likely to reoffend and that youth with mental health conditions were at greater risk for suicide, the report noted that “committing youth disrupts their education and can have an adverse effect on their employability,” as many children do not return to school, and of those who do, many drop out before completing high school.<sup>125</sup> The racial consequences of these

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122. Gary Orfield, *Conclusion: Going Forward*, in *THE RESEGREGATION OF SUBURBAN SCHOOLS: A HIDDEN CRISIS IN AMERICAN EDUCATION*, *supra* note 118, at 215, 96.

123. See Sabina E. Vaught, *Prison Schooling: Segregation, Post-Racialism, and the Criminalization of Black and Brown Youth*, in *THE RESEGREGATION OF SCHOOLS: EDUCATION AND RACE IN THE TWENTY-FIRST CENTURY* 110, 115 (Jamel K. Donnor & Adrienne D. Dixson eds., 2013) (noting the link between education and the school-to-prison pipeline); Garrett Albert Duncan, *Urban Pedagogies and the Ceiling of Adolescents of Color*, *SOC. JUST.*, Fall 2000, at 29, 29 (“[U]rban pedagogies effectively serve an economic function: to channel young people of color in the U.S. into the prison system.”).

124. U.S. DEP’T OF EDUC. & U.S. DEP’T OF JUSTICE, *GUIDING PRINCIPLES FOR PROVIDING HIGH-QUALITY EDUCATION IN JUVENILE JUSTICE SECURE CARE SETTINGS 1* (2014), available at <http://www2.ed.gov/policy/gen/guid/correctional-education/guiding-principles.pdf>.

125. *Id.* The report advanced five guiding principles to ensure these youth are not deprived of education:

- (1) A safe, healthy, facility-wide climate that prioritizes education, provides the conditions for learning, and encourages the necessary behavioral and social support services that address the individual needs of all youths, including those with disabilities and English learners.
- (2) Necessary funding to support educational opportunities for all youths within long-term secure care facilities, including those with disabilities and English learners, comparable to opportunities for peers who are not system-involved.
- (3) Recruitment, employment, and retention of qualified education staff with skills relevant to juvenile justice settings who can positively impact long-term student outcomes through demonstrated abilities to create and sustain effective teaching and learning environments.
- (4) Rigorous and relevant curricula aligned with state academic and career and technical education standards that utilize instructional methods, tools,

phenomena are underscored by statistics that demonstrate that a disproportionate number of these children are minority teenagers. A December 8, 2014 letter from United States Secretary of Education Arne Duncan and United States Attorney General Eric Holder to state education leaders reemphasized the prevention of youth incarceration, noting that this burden fell disproportionately on minority youth:

We must also do more to address the problem of disproportionate minority contact with the justice system—the reality is that Black, Latino, and Native American youth are more likely to be stopped, arrested, and adjudicated, and thereafter, more harshly punished, than their white peers who engage in the very same behaviors.<sup>126</sup>

Citing to the National Center for Education statistics, a commentator found profound disparities in both suspensions and incarcerations for minority teenagers:

Although Black youth make up 15 percent of the overall U.S. juvenile population, they are 44 percent of all detained youth, and over one-third of all committed, or incarcerated, youth. Black male youth are arrested, detained, and incarcerated at rates that wildly outstrip their race and gender counterparts. In urban centers in the United States, where schools and school districts have been extremely resegregated, approximately 50 percent of Black male youth are under the control of the juvenile legal system.<sup>127</sup>

A complete critique of *Brown* at sixty must incorporate an assessment of the educational consequences of criminal system contact on minority youth.<sup>128</sup>

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materials and practices that promote college and career-readiness.

(5) Formal processes and procedures—through statute, memoranda of understanding, and practice—that ensure successful navigation across child-serving systems and smooth reentry into communities.

*Id.* at 5.

126. Letter from Arne Duncan, U.S. Sec’y of Educ., & Eric Holder, U.S. Attorney Gen., to Chief State Sch. Officers and State Attorneys Gen. (December 8, 2014), available at <http://www2.ed.gov/policy/gen/guid/correctional-education/csso-state-attorneys-general-letter.pdf>.

127. Vaught, *supra* note 123, at 118 (citation omitted).

128. As James Baldwin stated in 1963:

America is not the world and if America is going to become a nation, she must find a way—and this child must help her to find a way to use the tremendous

The 2013 work of Richard Rothstein draws important connections between racial segregation and educational achievement.<sup>129</sup> He noted that politicians and critics of public education have abandoned integration as a priority and seem content with keeping black students in racially homogenous schools.<sup>130</sup> Moreover, these politicians and critics consider the test score gap, rather than racial isolation, as the new civil rights issue.<sup>131</sup>

In his work, Rothstein documents the many factors that influence school performance.<sup>132</sup> They include racial isolation, concentrated poverty, housing discrimination, inferior living conditions, joblessness, and employment disparities, all of which must be addressed if minority children are to have a chance to compete in our society.<sup>133</sup>

Rothstein's work goes beyond a discussion of the usual factors associated with disparate minority achievement, such as poverty, to more nuanced explanations for poor educational outcomes. These include the educational attainment and literacy of parents, the general background knowledge and experience children have when they enter school, the need for smaller class sizes to ensure students get the attention they need at the early and crucial stage in their educational journey, and the importance of access to primary health care.<sup>134</sup> As such, Rothstein does not simply catalogue factors associated with poor achievement, but emphasizes the process through which segregated schools produce lower achievement.<sup>135</sup>

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potential and tremendous energy which this child represents. If this country does not find a way to use that energy, it will be destroyed by that energy.

James Baldwin, *The Negro Child—His Self-Image* (Oct. 16, 1963), in JAMES BALDWIN, *THE PRICE OF THE TICKET* at 325, 332 (1985).

129. See RICHARD ROTHSTEIN, *FOR PUBLIC SCHOOLS, SEGREGATION THEN, SEGREGATION SINCE: EDUCATION AND THE UNFINISHED MARCH* (2013) [hereinafter ROTHSTEIN, *UNFINISHED MARCH*], available at <http://www.epi.org/publication/unfinished-march-public-school-segregation/>; see also Richard Rothstein, *Racial Segregation and Black Student Achievement*, in EDUCATION, JUSTICE, AND DEMOCRACY 173, 173-195 (Danielle Allen & Rob Reich eds., 2013) (discussing the achievement gap in general).

130. ROTHSTEIN, *UNFINISHED MARCH*, *supra* note 129, at 2.

131. *Id.*

132. *See id.*

133. *Id.*

134. *Id.* at 9-10.

135. These associations are not new. In 2001, the National Center for Education Statistics documented the intersection between race and socioeconomic conditions that lead to long-term gaps in educational achievement. NAT'L CTR. FOR EDUC. STATISTICS,

This type of inquiry promises to help link the new racial segregation to policies that either exacerbate negative education outcomes or ameliorate them. This analysis may lay the groundwork for a new approach that justifies the use of racially targeted measures for minority children in schools that remain racially segregated, or for targeted aid and efforts to support schools at which the intersection of various factors dooms minority children to an education in schools ill-equipped to meet their educational needs. The decisions in which the Court abandoned the remedial promise of *Brown* involved different circumstances than those that exist today. Social scientists and civil rights lawyers must explore the new inequality and boldly seek new strategies under the constitutional cover of *Brown*. It remains important to document the manner in which race matters to educational equality, and also the way it eschews reliance on platitudes solely based on racial integration as an ideal. Race matters.<sup>136</sup>

These approaches to educational equality are all the more important in light of the sixty years of litigation and billions of federal dollars spent on education. As the judicial landscape has shifted, exemplified by the Court's refusal to offer the sword of equal protection to ensure equal expenditures on the quality of education<sup>137</sup> and its withdrawal from the enforcement of the racial desegregation mandate of *Brown*, it is ironic that the federal government holds states and local school authorities accountable for student performance and student outcomes.

In the context of No Child Left Behind (NCLB), which replaced the Elementary and Secondary Education Act as the

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ENTERING KINDERGARTEN: FINDINGS FROM THE CONDITION OF EDUCATION 2000, at 18 (2001), available at <http://nces.ed.gov/pubs2001/2001035.pdf>. Their research observed that three-quarters of entering kindergartners from black families had one or more risk factors as compared to whites. *Id.* The proportion of children with two or more risk factors was four times larger among blacks than whites, and reading scores among African Americans also lagged behind whites at ages nine, thirteen, and seventeen. NAT'L CTR. FOR EDUC. STATISTICS, THE CONDITION OF EDUCATION 2001, at 119 (2001), available at <http://nces.ed.gov/pubs2001/2001072.pdf>. Mathematics performance also lagged behind whites among the same age groups. *See id.* at 123.

136. *See* Grutter v. Bollinger, 539 U.S. 306, 345 (2003) (Ginsburg, J., concurring) ("It is well documented that conscious and unconscious race bias, even rank discrimination based on race, remain alive in our land, impeding realization of our highest values and ideals.").

137. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 54-55 (1973) (holding that a school district's system of unequally financing different schools through local property tax assessments did not violate the Fourteenth Amendment Equal Protection Clause).

framework for federal financial assistance to public schools, states must meet stringent requirements for progress toward federally mandated goals in order to continue to receive financial assistance.<sup>138</sup> NCLB and the voluntary adoption of the Common Core<sup>139</sup> by forty-three states and the District of Columbia have transformed the discussion of educational equality from a focus on equalizing inputs to a focus on educational outcomes. Yet despite the millions of dollars spent on these efforts, and the creation of what Professor Douglas S. Reed has deemed “the education state,”<sup>140</sup> there is little evidence that NCLB has significantly altered the trajectory of math and reading scores in the United States.<sup>141</sup> Further, there is clear evidence that disparities between white and minority students on math and reading scores remain.<sup>142</sup> Among many trenchant observations, one is salient—federal education reform has prioritized localism while seeking to impose federal educational initiatives within a framework of conditional federal funding.<sup>143</sup> There are strong cries from school districts around the nation that funding is

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138. See 20 U.S.C. § 6311 (2012) (imposing onerous achievement standards on state education systems and penalizing states that fail to meet the enumerated requirements).

139. Common Core is a state educational standard for English and mathematics achievement to foster preparation of K–12 students for higher education. See COMMON CORE, <http://www.corestandards.org/> (last visited Jan. 18, 2015). The Preamble to the Common Core includes the following objectives:

The Common Core State Standards define the rigorous skills and knowledge in English Language Arts and Mathematics that need to be effectively taught and learned for students to be ready to succeed academically in credit-bearing, college-entry courses and in workforce training programs. These standards have been developed to be:

- (1) Fewer, clearer, and higher, to best drive effective policy and practice;
- (2) Aligned with college and work expectations, so that all students are prepared for success upon graduating from high school;
- (3) Inclusive of rigorous content and applications of knowledge through higher-order skills, so that all students are prepared for the 21st century;
- (4) Internationally benchmarked, so that all students are prepared for succeeding in our global economy and society; and
- (5) Research and evidence-based.

COMMON CORE STANDARDS INITIATIVE, STANDARDS-SETTING CRITERIA 1 (n.d.), available at <http://www.corestandards.org/assets/criteria.pdf>.

140. DOUGLAS S. REED, BUILDING THE FEDERAL SCHOOLHOUSE: LOCALISM AND THE AMERICAN EDUCATION STATE 3 (2014).

141. *Id.* at 2.

142. *Id.*

143. See *id.* at 4-5.

inadequate.<sup>144</sup> Localism has not produced equal outcomes for minority children, and after twelve years of NCLB, many are dissatisfied with the results.<sup>145</sup>

The new accountability framework fosters a zero-sum game of blame that results in the local electorate holding school boards, superintendents, and mayors accountable for seemingly ubiquitous failing schools. The changes in perceptions of accountability are evident in the examples of city mayors taking direct responsibility for school progress.<sup>146</sup> In November 2014, New York City Mayor Bill De Blasio revealed plans for improvement of the city's troubled schools.<sup>147</sup> He stated, "[t]he previous administration had a policy that a school like this was left to fend for itself, and that's why we're here today, because we reject the notion of giving up on any of our schools."<sup>148</sup> Mayor De Blasio sought to emphasize that the circumstances related to student achievement are often beyond the control of schools to address alone.<sup>149</sup> His proposals not only involved changes in the hours of instruction and straightforward criteria for acceptable graduation rates, but also addressed family, community health, mental health, and the nutritional needs of students.<sup>150</sup> The ritual of reform must be repeated across the country as political tides shift to meet the demands of the new national education state.

The stakes are indeed high. Numerous studies reveal that the quest to provide equal educational resources and to ensure

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144. See, e.g., *Sch. Dist. of City of Pontiac v. Spellings*, No. Civ.A. 05-CV-71535-D, 2005 WL 3149545 (E.D. Mich. Nov. 23, 2005) (rejecting the argument of three states and education associations from ten states that NCLB forced them to spend state and local funds in violation of NCLB's prohibition on unfunded mandates), *rev'd*, *Sch. Dist. of City of Pontiac v. Sec'y of U.S. Dep't of Educ.*, 512 F.3d 252 (6th Cir. 2008), *aff'd on reh'g*, 584 F.3d 253 (6th Cir. 2009) (en banc).

145. See REED, *supra* note 140, at 1 ("The gurus of educational policymaking are perplexed. The puzzling persistence of educational underachievement continues to beset US schools, despite major changes in the role of the federal government in public education.").

146. See, e.g., *Mayors Increasingly Seek to Take Charge of Schools*, USA TODAY (Jan. 1, 2007, 12:52 PM), [http://usatoday30.usatoday.com/news/education/2007-01-07-mayors-schools\\_x.htm](http://usatoday30.usatoday.com/news/education/2007-01-07-mayors-schools_x.htm) (noting mayoral takeover efforts in Baltimore, Boston, Chicago, Cleveland, Los Angeles, Philadelphia, Harrisburg, Pennsylvania, and Providence, Rhode Island); Ericka Mellon, *Should the Mayor Take Over Houston Schools?*, HOUS. CHRON. (May 9, 2009), <http://www.chron.com/news/houston-texas/article/Should-the-mayor-take-over-Houston-schools-1721263.php> (discussing possible mayoral takeover of Houston schools).

147. Elizabeth A. Harris, *De Blasio Unveils New Plans for Troubled Schools*, N.Y. TIMES, Nov. 4, 2014, at A17.

148. *Id.* (internal quotation marks omitted).

149. See *id.*

150. *Id.*

equal educational results remains elusive.<sup>151</sup> The current landscape of K–12 education involves federal and local funding, private and public policymaking, and initiatives and accountability measures that emphasize test results.

Sixty years post-*Brown*, the post-racial debate continues despite irrefutable evidence that racial disparities in educational outcomes persist, and these disparities are inextricably linked to poverty, racial isolation, language differences, housing segregation, and employment discrimination.

## V. CONCLUSION: THE BATTLE FOR *BROWN*

Abraham Lincoln once said: “There are no accidents in my philosophy. Every effect must have its cause. The past is the cause of the present, and the present will be the cause of the future. All these are links in the endless chain stretching from the finite to the infinite.”<sup>152</sup>

So too it is with *Brown*. *Brown* was not an isolated event but rather a link in the chain from slavery to the present. The citizenship dimensions of *Brown* link to *Dred Scott*'s<sup>153</sup> failure to recognize citizenship as inclusive of other important rights for blacks, whether slave or free. *Brown* is our symbolic link to the post-Civil War *Plessy* era, during which the promise of equal citizenship, articulated boldly in the *Slaughter-House Cases*,<sup>154</sup> was broken in *Strauder*,<sup>155</sup> the *Civil Rights Cases*,<sup>156</sup> *Plessy*,<sup>157</sup> and *Cumming*.<sup>158</sup> *Brown*, though judicially limited as a force for racial integration in the twentieth century, remains worthy of precedent in the twenty-first for both its symbolic significance

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151. For example, a study of school segregation and educational outcomes in North Carolina schools revealed teachers, especially experienced ones, gravitate to schools that are white and affluent, further exacerbating the consequences of racially segregated schools for black children. See CHARLES T. CLOTFELTER ET AL., NAT'L CTR. FOR ANALYSES OF LONGITUDINAL DATA IN EDUC. RESEARCH, SCHOOL SEGREGATION UNDER COLOR-BLIND JURISPRUDENCE: THE CASE OF NORTH CAROLINA 16-17 (2008), available at <http://files.eric.ed.gov/fulltext/ED509669.pdf>.

152. *Abraham Lincoln Quotes*, AM. CIV. WAR STORY, <http://www.americancivilwarstory.com/abraham-lincoln-quotes.html> (last visited Jan. 19, 2015).

153. See *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856).

154. See 83 U.S. (16 Wall.) 36 (1872).

155. See *Strauder v. West Virginia*, 100 U.S. 303 (1879).

156. See 109 U.S. 3 (1883).

157. See *Plessy v. Ferguson*, 163 U.S. 537 (1896).

158. *Cumming v. Cnty. Bd. of Educ.*, 175 U.S. 528 (1899).

and the potential power of its vision of full citizenship, premised the right to a public education suitable for full participation in the civic and economic life of a nation.<sup>159</sup> So viewed, we must judge *Brown* not solely on the basis of whether we have realized its ambition of racially integrated schools, but against the power of its goal of full citizenship in a complex educational environment, where for so many the promise of equal education is still more a dream than a reality.

The power and authority of *Brown* remains clear. Although in *Parents Involved*, the Court divided sharply on the constitutional legitimacy of school desegregation efforts in Seattle and Louisville, all of the Justices took constitutional cover under the cloak of *Brown*,<sup>160</sup> even as they argued over standards of review, legitimate and compelling interests, and the permissibility of race-conscious action. There is no doubt that the meaning of *Brown* is not yet settled, and that its shelter will be important in the future of equal-education litigation.

To be sure, an end to racial isolation is a worthy substantive and symbolic goal, grounded in a vision of a working society, in children coming to share in a common goal of worth and connectedness, and in inclusion. Partisans who question the possibility of integration will choose litigation or policymaking to advance their limited vision of *Brown*. However, for many, including those who oversee and deliver educational services, often in hyper-segregated communities, the clamor is not for the nostalgia of racial desegregation, but for structural reforms in schools and communities that will support educational outcomes consistent with full occupational and political participation in an increasingly diverse and global America. The Census Bureau's prediction that the Hispanic and Asian populations would more than double by 2050 is on track to fulfillment,<sup>161</sup> and our school districts at the intersection of race, language, class, and criminal supervision complicate our analyses of disparate educational

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159. See Gloria Ladson-Billings, *Landing on the Wrong Note: The Price We Paid for Brown*, EDUC. RESEARCHER, Oct. 2004, at 3, 10 (arguing *Brown* must “serve as a re-articulation of freedom. . . . [and] a hypothesis for a new future”).

160. See, e.g., *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 746-748 (2007) (Roberts, C.J., opinion) (relying on *Brown*); *id.* at 772-774 (Thomas, J., concurring) (same); *id.* at 788, 798 (Kennedy, J., concurring in part and concurring in the judgment) (same); *id.* at 799-803 (Stevens, J., dissenting) (relying on *Brown*).

161. See ORTMAN & GUARNERI, *supra* note 4, at 3.

achievement, rendering race alone an imprecise lens through which to focus on educational equality.<sup>162</sup>

It is the task of a new team of interdisciplinarians, much like the one Houston and Marshall assembled to craft a post-*Plessy* vision of equality, to create a *Brown*-grounded narrative of intersectional equality<sup>163</sup> that demands constitutional recognition and constitutionally sheltered correction. This is no embrace of a post-racial narrative. Rather, it is a call to examine anew the relationship between school decisions and societal circumstances that create or exacerbate negative educational outcomes and

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162. Professor Lani Guinier put it this way: “[T]he continuing puzzle is how to address the complex ways race adapts its syntax to mask class and code geography. Racism is a structural phenomenon that fabricates independent yet paradoxical relationships between race, class and geography . . . .” Lani Guinier, *From Racial Liberalism to Racial Literacy: Brown v. Board of Education and the Interest-Divergence Dilemma*, 91 J. AM. HIST. 92, 100 (2004). Gary Orfield also emphasized the importance of a multiracial, metropolitan, and economic lens:

Educational stratification and inequality today are basically defined by school district boundary lines interacting with metropolitan patterns of housing segregation much more than by problems within one district . . . . In a multiracial society, we must redefine segregation and inequality in multiracial terms and devise multiracial remedies. . . . [I]t is much more accurate to speak of segregation of the Black plus the Latino students in schools of intense poverty, isolated from real opportunity.

Gary Orfield, *Tenth Annual Brown Lecture in Education Research: A New Civil Rights Agenda for American Education*, 43 EDUC. RESEARCHER, Aug./Sept. 2014, at 273, 281.

163. For primers on intersectionality theory in the United States, see Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139; Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990); see also Judy Scales-Trent, *Black Women and the Constitution: Finding Our Place, Asserting Our Rights*, 24 HARV. C.R.-C.L. L. REV. 9 (1989); Symposium, *Black Women Law Professors: Building a Community at the Intersection of Race and Gender*, 6 BERKELEY WOMEN’S L.J. 1 (1990). Intersectionality has expanded beyond race and gender to other contexts. See Elvia R. Arriola, *Gendered Inequality: Lesbians, Gays, and Feminist Legal Theory*, 9 BERKELEY WOMEN’S L.J. 103 (1994); Johanna E. Bond, *International Intersectionality: A Theoretical and Pragmatic Exploration of Women’s International Human Rights Violations*, 52 EMORY L.J. 71 (2003); Frank Rudy Cooper, *Against Bipolar Black Masculinity: Intersectionality, Assimilation, Identity Performance, and Hierarchy*, 39 U.C. DAVIS L. REV. 853 (2006); Robert Westley, Introduction, *Lat Crit Theory and the Problematics of Internal/External Oppression: A Comparison of Forms of Oppression and InterGroup/IntraGroup Solidarity*, 53 U. MIAMI L. REV. 761 (1999); Mary Jo Wiggins, Foreword, *The Future of Intersectionality and Critical Race Feminism*, 11 J. CONTEMP. LEGAL ISSUES 677 (2001).

cripple too many children in their competition for a role in a new technological and global world.<sup>164</sup>

*Brown* is much like the flag that once flew over embattled Fort McHenry, made famous by Francis Scott Key. That flag is much too valuable to discard, and it is conserved, restored, and cherished because its symbolic force shelters a nation.<sup>165</sup> Like that flag, *Brown* too must shelter a more diverse, complex, and non-dichotomous nation. We must theoretically reweave the constitutional fabric so that it is strong enough to support a new educational vision for the twenty-second century and beyond.<sup>166</sup>

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164. See *Paynter v. New York*, 100 N.Y.2d 434 (2003). In *Paynter*, New York's highest court rejected the claim by children from impoverished, segregated, and crime-ridden school districts that state law guaranteed a "sound education" and that the court should order resources and restructuring that would ameliorate the consequences of their demographic environments. See *id.* at 442-43. Judge Smith dissented:

In essence, the argument is that schools that are racially and socially segregated do not provide the opportunity for a sound basic education even if the funding may be adequate. The alleged cause of the problem, the high concentration of poor and minority students, is not one that is beyond the powers of the State to remedy. The Constitution does not place the responsibility of providing a sound education on local school districts, or towns, or cities. It places that responsibility squarely on the State. The purpose of the Education Article was to constitutionalize the State's responsibility to ensure that students would have access to a sound education. If students cannot depend on the State for the opportunity of a sound education, the alternative is to attend schools that do not offer the opportunity for a sound education and to face the significant likelihood of becoming unproductive citizens.

*Id.* at 468-69 (Smith, J., dissenting).

165. See *Star-Spangled Banner and the War of 1812*, ENCYCLOPEDIA SMITHSONIAN, [http://www.si.edu/Encyclopedia\\_SI/nmah/starflag.htm](http://www.si.edu/Encyclopedia_SI/nmah/starflag.htm) (last visited Feb. 16, 2015) (describing the conservation of the flag).

166. Judge Carter, who crafted the psychological injury and stigma strategy that the Court adopted in *Brown*, agreed that the involvement of educators will be key to the realization of the equal educational opportunity:

If I had to prepare for *Brown* today, instead of looking principally to the social scientists to demonstrate the adverse consequences of segregation, I would seek to recruit educators to formulate a concrete definition of the meaning of equality in education, and I would base my argument on that definition and seek to persuade the Court that equal education in its constitutional dimensions must, at the very least, conform to the contours of equal education as defined by the educators.

Carter, *supra* note 38, at 27.