

HELP! THE SUPREME COURT GAVE ME BAD
DIRECTIONS: RETHINKING *BROWN* AND
AFFIRMATIVE ACTION IN THE WAKE OF
SCHUETTE

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INTRODUCTION

This Article is written in celebration of the sixtieth anniversary of *Brown v. Board of Education* and the fiftieth anniversary of the Civil Rights Act of 1964. The Article honors the 2014 conference created by the University of Missouri–Kansas City School of Law and the Michigan State University College of Law—Pursuing the Dreams of *Brown* and the Civil Rights Act: A Living History of the Fight for Educational Equality. Given the structure of that conference, I intend for this to be digestible by legal researchers, educational researchers, practitioners, and those interested in grassroots advocacy fighting for equity, equality, and justice. My goal is to consider the United States Supreme Court’s intent conveyed through the *Brown* decision in light of the Court’s recent decisions as well as observed social implications.

[R]ace matters for reasons that really are only skin deep, that cannot be discussed any other way, and that cannot be wished away. Race matters to a young man’s view of society when he spends his teenage years watching others tense up as he passes, no matter the neighborhood where he grew up. Race matters to a young woman’s sense of self when she states her hometown, and then is pressed, “No, where are you *really* from?”, [sic] regardless of how many generations her family has been in the country. Race matters to a young person addressed by a stranger in a foreign language, which he does not understand because only English was spoken at home. Race matters because of the slights, the snickers, the silent judgments that reinforce that most crippling of thoughts: “I do not belong here.”¹

I knew what a law degree from Yale was worth when it bore the taint of racial preference. . . . I peeled a fifteen-cent price sticker off a package of cigars and stuck it on the frame of my law degree to remind myself of the

* Assistant Professor of Law, University of Wyoming College of Law. I am extremely grateful for the support of my colleagues at the University of Wyoming, especially the faculty and staff at the George W. Hopper Law Library. This Article benefited greatly from a presentation at the 2014 John Mercer Langston Black Male Faculty Writing Workshop, generally, and Professor Areto Imoukhuede’s advice, more specifically. Also, much thanks to my mentor, Professor Kevin Brown, for his continued guidance. Exceptional research assistance was provided by Nicholas Bjorklund, primarily, and Alan Walker Steinhage, secondarily. Perhaps most importantly, this research could not have been completed without economic support from the University of Wyoming College of Law Tuition Differential Funds. Thank you!

1. *Schuette v. Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equal. by Any Means Necessary*, 134 S. Ct. 1623, 1676 (2014) (Sotomayor, J., dissenting).

mistake I'd made by going to Yale. I never did change my mind about its value.²

The above statements evidence that two United States Supreme Court Justices “of color,” Justice Sotomayor and Justice Thomas, respectively, the country’s appointed leading legal minds, have very different conclusions about “race” realities. This suggests that the word race conjures a variety of meanings to different individuals. It is a “closed door” word—something that people are not supposed to talk about unless absolutely necessary. Integration—closely aligned with the word race—is another word that often elicits very different responses from different people. Placed together—racial integration—one of the most divisive topics in our society is created.³ Some, both black and white,⁴ see full implementation of racial integration as a salve for most, if not all, of the ills that plague the nation, including issues of education.⁵ Others, both black and white, see accepting the many racial, ethnic, or cultural differences as the most efficient means of achieving maximal gains⁶ for all involved.⁷

2. CLARENCE THOMAS, *MY GRANDFATHER’S SON: A MEMOIR* 87, 99-100 (2007). Justice Thomas further states that “a law degree from Yale meant one thing for white graduates and another for blacks, no matter how much anyone denied it; I couldn’t do anything about that now.” *Id.* at 99. Justice Thomas attributes this to the effects of affirmative action on the minds of potential employers. *Id.* at 86.

3. See generally ERICA FRANKENBERG, GENEVIEVE SIEGEL-HAWLEY & JIA WANG, *CHOICE WITHOUT EQUITY: CHARTER SCHOOL SEGREGATION AND THE NEED FOR CIVIL RIGHTS STANDARDS* (2010), available at <http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/choice-without-equity-2009-report/frankenberg-choices-without-equity-2010.pdf> (discussing the impact of charter schools on racial integration); see also *Does It Matter if Schools Are Racially Integrated?*, NPR (May 16, 2014, 12:01 PM), <http://www.npr.org/2014/05/16/313063913/does-it-matter-if-schools-are-racially-integrated> (discussing the importance of racial integration strategies).

4. Because of their popular and common use in mainstream media, I will use the terms black and white interchangeably with African-American and European-American, respectively. When considering others’ research, I will try to stay true to the original word choice.

5. See NAT’L ACAD. OF EDUC., *RACE-CONSCIOUS POLICIES FOR ASSIGNING STUDENTS TO SCHOOLS: SOCIAL SCIENCE RESEARCH AND THE SUPREME COURT CASES 2* (Robert L. Linn & Kevin G. Welner eds., 2007) [hereinafter Linn & Welner], available at http://www.naeducation.org/cs/groups/naedsite/documents/webpage/naed_080863.pdf (discussing four positive effects of racial integration).

6. Gains may be measured in standardized achievement scores, college enrollment, employability, etc. *Id.* at 19.

7. See W. E. Burghardt Du Bois, *Does the Negro Need Separate Schools?*, 4 J. NEGRO EDUC. 328, 335 (1935) (arguing that the “Negro needs neither segregated schools nor mixed schools . . . [but] [e]ducation”).

This Article briefly addresses some American techniques for “handling” racial integration within elementary and secondary school systems and, particularly, considers the United States Supreme Court’s intent conveyed through the *Brown* decision in light of the Court’s recent decisions as well as observed social implications. The outcomes, whether good or bad, will affect the racial attitude of this country for this and future generations. Because racial hatred, and all of its related emotions, is both taught and innate,⁸ this Article argues that a multi-levelled anti-racism campaign should be embraced.

This Article begins by very briefly reviewing the most famous racial integration case, *Brown v. Board of Education*,⁹ taking a look at its intent and its implementation. Bringing *Brown* into the present, the Article then analyzes current attempts by public educational institutions to comport with the *Brown* mandate. Two relatively recent attempts came from Louisville, Kentucky and Seattle, Washington.¹⁰ Another challenged an amendment to a state constitution.¹¹ The Article will review the U.S. Supreme Court cases that came from those attempts. In addressing the actual cases, this Article assumes that racial integration is a preferred societal good¹² and will, therefore, assess the strategies used to promote racial integration. To determine the most legally effective methods of achieving racial integration, the Article evaluates the Court’s decisions, both critiquing the Court’s analysis and seeking the

8. DEBRA VAN AUSDALE & JOE R. FEAGIN, THE FIRST R: HOW CHILDREN LEARN RACE AND RACISM 178-79, 194-96 (2001).

9. 347 U.S. 483 (1954).

10. These cases were consolidated once they reached the United States Supreme Court. *See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 426 F.3d 1162 (9th Cir. 2005), *cert. granted*, 547 U.S. 1177 (2006); *McFarland v. Jefferson Cnty. Pub. Sch.*, 416 F.3d 513 (6th Cir. 2005), *cert. granted sub nom. Meredith v. Jefferson Cnty. Bd. of Educ.*, 547 U.S. 1178 (2006). The Supreme Court opinion may be found at *Parents Involved in Community Schools v. Seattle School District No. 1 (PICS)*, 551 U.S. 701 (2007).

11. *Schuette v. Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equal. by Any Means Necessary*, 134 S. Ct. 1623, 1629 (2014).

12. *See* ELIZABETH ANDERSON, THE IMPERATIVE OF INTEGRATION 1-3 (2010); *see also* Brian L. Goff, Robert E. McCormick & Robert D. Tollison, *Racial Integration as an Innovation: Empirical Evidence from Sports Leagues*, 92 AM. ECON. REV. 16, 16 (2002) (“[R]acial integration [is] an innovation in economic process[, and] [l]ike other innovations, at some point in time firm [sic] and individuals find it advantageous to incorporate additional and potentially more productive inputs previously unavailable due to law, custom, or managerial discretion.”).

Court's direction on how to implement similar plans that will pass review. Finally, the Article suggests strategies for modern day implementation of the *Brown* mandate.

What started in Kansas, the midwestern United States, has engulfed our country.¹³ From the east (Louisville, Kentucky) to the west (Seattle, Washington), numerous localities are still attempting to comply with the Supreme Court's order in *Brown*, sixty years after the decision. Simultaneously, others are determined to return to *Plessy*.¹⁴ As the states search for direction, the very Court that created a movement confounds and confuses those that attempt to comply. This Article will, hopefully, act as a compass for those attempting to comport with *Brown*.

I. *BROWN I*—*BROWN V. BOARD OF EDUCATION*

Unarguably, the most famous racial-integration case in the history of the United States, *Brown* forever changed the face of American education, both literally and figuratively, and essentially created a new fundamental right.¹⁵ *Brown* brought children of all colors, races, and ethnicities into the same classroom at the same time.¹⁶ While many modern classrooms are as homogenous as they were prior to *Brown*,¹⁷ much of the cause must be associated with economic disparities and other forms of discrimination.¹⁸

13. *Brown* came out of Topeka, Kansas. A quick search of cases citing to *Brown* discloses that all fifty states have cited it in their state courts, and all but three (Alaska, Idaho, and South Dakota) have cited it in the federal courts in their states.

14. *Plessy v. Ferguson*, 163 U.S. 537 (1896), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). Voters in some places have shown distrust for integration efforts and have introduced measures to combat those efforts, arguably a step back toward *Plessy*. See, e.g., *Schuette*, 134 S. Ct. at 1629 (discussing an amendment to a state constitution prohibiting affirmative action in a wide range of governmental actions in the state); see also *infra* notes 17 and 150 (discussing the recent trends toward resegregation in America's schools).

15. Areto A. Imoukhuede, *The Fifth Freedom: The Constitutional Duty to Provide Public Education*, 22 U. FLA. J.L. & PUB. POL'Y 45, 81 (2011) (discussing the libertarian perspective as privileging the liberty of the historical majority over the duty to provide an equal educational opportunity to all of the nation's children).

16. See *Brown*, 347 U.S. at 495 ("Separate educational facilities are inherently unequal.").

17. See Linn & Welner, *supra* note 5, at 10. This research shows that black and Latino students attended "hyper-segregated schools" in greater numbers in 2001 than in 1991 in almost every region of the country. *Id.* Moreover, despite general desegregation among black students (except in the Northeast) nationwide since 1968, Latino students were significantly more segregated in 2001 than in 1968, except in the Northeast. *Id.*; see also FRANKENBERG, SIEGEL-HAWLEY & WANG,

In *Brown*, the NAACP and other civil rights organizations challenged the Supreme Court's ruling in *Plessy* and the attitude of many American citizens.¹⁹ On behalf of five school districts across the nation, a suit was filed in the U.S. Supreme Court arguing that black children were receiving an inferior education to white children, and that separate schools could never be equal schools.²⁰ While some argue that *Brown* was an indication of the benevolence of the Court and the American people,²¹ others contend that the plaintiffs strategically litigated prior cases in a way that "cornered" the Court.²² For others, this combined with pressure exerted by foreign countries upon America to reform is what led to the *Brown* decision.²³

The Court overruled *Plessy*²⁴ and reached several significant conclusions. Although the United States Constitution implies that education is left to state control,²⁵ the Court wrote that "where the state has undertaken to provide it, [education] is a right which must be made available to all on equal terms."²⁶ The Court went on to add that "[s]eparate educational facilities are inherently unequal."²⁷

supra note 3, at 7 (noting that charter schools are more likely than traditional schools to produce racially isolated schools).

18. Cedric Merlin Powell, *Schools, Rhetorical Neutrality, and the Failure of the Colorblind Equal Protection Clause*, 10 RUTGERS RACE & L. REV. 362, 410-11 (2008) (discussing the nature of white flight and residential segregation as a direct result of intentional segregation).

19. See *Brown*, 347 U.S. at 488; see also THOMAS, *supra* note 2, at 14 (discussing attitudes toward integration in Georgia following the Court's decision in *Brown*).

20. *Brown*, 347 U.S. at 486 n.1, 488.

21. Cf. Gloria Ladson-Billings, *Landing on the Wrong Note: The Price We Paid for Brown*, EDUC. RESEARCHER, Oct. 2004, at 3, 3 (discussing the reasons that "the *Brown* decision is not the result of America as a good and altruistic nation").

22. *Id.* at 4 ("[T]he case came at a time when the Court had almost no other choice but to rule in favor of the plaintiffs.").

23. Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 524 (1980) ("[T]he decision helped to provide immediate credibility to America's struggle with Communist countries to win the hearts and minds of emerging third world peoples."); Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61, 62 (1988) ("Although seemingly at odds with the restrictive approach to individual rights in other contexts, the U.S. government's participation in the desegregation cases during the McCarthy era was no anomaly." (footnote omitted)).

24. *Brown*, 347 U.S. at 494-95.

25. See U.S. CONST. amend. X; see also U.S. CONST. art. I, §§ 8-10.

26. *Brown*, 347 U.S. at 493.

27. *Id.* at 495.

Essentially, with those two thoughts, the de jure institution of separate schooling was demolished; or so we believed.

II. *BROWN II*—THE TRANSITION: “WITH ALL DELIBERATE SPEED”

School districts, many of which had known nothing other than segregated schooling,²⁸ were under court order to end a tradition.²⁹ The Court was fearful of how the states would react to its ruling.³⁰ In an attempt to accommodate those defeated in this litigation, the Court proposed a timetable that proved to be less than helpful to all involved.³¹ The Court ordered that the first *Brown* decision was to be implemented and schools were to be desegregated “with all deliberate speed.”³²

A timetable would show that, with the signing of the Declaration of Independence in 1776, the United States of America was born.³³ That makes America 238 years old. For nearly one-fourth of the life of this country, American primary and secondary education has either been attempting, failing, or ignoring compliance with the *Brown* mandate.³⁴ If the Court ordered compliance “with all deliberate speed” and such compliance has yet to be reached in approximately sixty years,³⁵ it would appear that either the 1954 Court meant, or the modern day Court has modified, “with all deliberate speed” to be something akin to “cautious coasting.”³⁶

28. See *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294, 298-99 (1955).

29. *Id.* at 298.

30. See *id.* at 298-99 (recognizing the nationwide importance of the decision, and its potential impact on the communities involved); see also Ladson-Billings, *supra* note 21, at 5 (discussing the impact of “[w]hite fear” on the implementation of *Brown*).

31. Ladson-Billings, *supra* note 21, at 6-7 (discussing continuing segregation following the *Brown* decisions and its effects).

32. *Brown II*, 349 U.S. at 301.

33. Although many travelers reached American shores far before this date, there was no definitive statement until 1776 of what the “new land” would become or be called. The Declaration of Independence established the name of the emerging nation. THE DECLARATION OF INDEPENDENCE (U.S. 1776) (“The unanimous Declaration of the thirteen united States of America.”).

34. See Ladson-Billings, *supra* note 21, at 6; Linn & Welner, *supra* note 5, at 10.

35. “If we consider *Brown* as a ruling designed to eliminate school segregation, we know that, for the most part, it has been a failure.” Ladson-Billings, *supra* note 21, at 6.

36. Powell, *supra* note 18, at 398 (discussing the limitations of the “all deliberate speed” language from *Brown II* in the context of *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971)); Darren Lenard Hutchinson,

III. CURRENT DESEGREGATION EFFORTS—LOUISVILLE, KENTUCKY AND SEATTLE, WASHINGTON

Recently, school districts within the cities of Louisville, Kentucky, and Seattle, Washington attempted actions meant to better integrate their schools.³⁷ In *Parents Involved in Community Schools (PICS)*, both school districts won before the United States district court for their respective districts.³⁸ In fact, while the *Louisville* case was decided by trial,³⁹ the *Seattle* case was so overwhelmingly strong that the matter was decided on summary judgment.⁴⁰ When appealed to the United States court of appeals for their respective circuits, both decisions were affirmed.⁴¹ In fact, the *Seattle* matter was decided en banc.⁴² The en banc hearing is a fairly rare bird, where all of the judges who hear cases in that circuit take part in the decision.⁴³ For obvious reasons, an en banc decision carries greater “prestige.”⁴⁴ Yet, given these backgrounds, the 2006 Supreme Court elected to hear these cases.

The *Seattle* matter used a student assignment plan that relied on racial classification to allocate slots in oversubscribed high schools.⁴⁵ An entering high school student (at the ninth grade level) was allowed to rank his or her choice of high schools.⁴⁶ As usual, certain

“Unexplainable on Grounds Other than Race”: *The Inversion of Privilege and Subordination in Equal Protection Jurisprudence*, 2003 U. ILL. L. REV. 615, 680 (discussing the pervasiveness of discrimination in society, including in the legal system).

37. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 426 F.3d 1162, 1169-71 (9th Cir. 2005), *rev'd*, 551 U.S. 701 (2007); *McFarland v. Jefferson Cnty. Pub. Sch.*, 330 F. Supp. 2d 834, 836 (W.D. Ky. 2004), *aff'd mem.*, 416 F.3d 513, 514 (6th Cir. 2005), *rev'd sub nom. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1 (PICS)*, 551 U.S. 701 (2007).

38. *McFarland*, 330 F. Supp. 2d at 850; *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 137 F. Supp. 2d 1224, 1240 (W.D. Wash. 2001), *aff'd en banc*, 426 F.3d 1162, 1193 (9th Cir. 2005), *rev'd*, 551 U.S. 701 (2007).

39. *See McFarland*, 330 F. Supp. 2d at 838.

40. *See Parents Involved*, 137 F. Supp. 2d at 1240.

41. *Parents Involved*, 426 F.3d at 1193; *McFarland*, 416 F.3d at 514.

42. *Parents Involved*, 426 F.3d at 1172.

43. *See Mario Lucero, Note, The Second Circuit's En Banc Crisis*, 2013 CARDOZO L. REV. DE NOVO 32, 33.

44. *See Christopher P. Banks, The Politics of En Banc Review in the “Mini-Supreme Court,”* 13 J.L. & POL. 377, 387-88 (1997) (discussing the benefits of en banc review, including that the “en banc decision[] epitomize[s] a court’s collective judgment and enhances its judicial legitimacy in reaching a final outcome”).

45. *Parents Involved*, 137 F. Supp. 2d at 1226.

46. *Id.*

schools were more popular than others.⁴⁷ When there were more students interested in attending a given school than there were slots available, the school district implemented a tiebreaker.⁴⁸ Here, the tiebreaker involved three issues: siblings, race, and proximity to residence.⁴⁹ If an applicant already had a sibling in the school of choice, the applicant was given preference.⁵⁰ Next, the race of the applicant was taken into consideration.⁵¹ The school district's total enrollment consisted of approximately 41% white students and 59% non-white students.⁵² "If an oversubscribed school [was] not within 10 percentage points of the district's overall white/nonwhite racial balance, it . . . [was labeled] 'integration positive.'"⁵³ Once identified as "integration positive," the tiebreaker selected students who would bring the racial composition of the school back into range (41% white/59% non-white \pm 10%).⁵⁴ Lastly, the tiebreaker considered the proximity of the school of choice to the student's residence.⁵⁵

The *Louisville* matter involved elementary schools grouped into clusters to promote integration.⁵⁶ Upon entry into kindergarten or first grade or transfer from an outside district, the parents of a student were allowed to pick the student's first and second choices within their respective cluster.⁵⁷ Placement at the school of choice was guided by space availability and a racial guideline.⁵⁸ Here, the school district's total enrollment was comprised of approximately 97,000 students who were approximately 66% white students and 34% black students.⁵⁹ Given these demographics, the school district sought to keep all non-magnet schools within a range of no less than 15% and no more than 50% black enrollment.⁶⁰

The school districts implemented these particular plans intending to accomplish certain goals. In particular, they wanted to

47. *Id.*

48. *Id.*

49. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1 (PICS)*, 551 U.S. 701, 711-12 (2007).

50. *See id.*

51. *Id.* at 712.

52. *Id.*

53. *Id.* (quoting *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 426 F.3d 1162, 1213 (2005), *rev'd*, 551 U.S. 701 (2007)).

54. *Id.*

55. *Id.*

56. *Id.* at 716.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

advance the educational benefits of racially diverse schools,⁶¹ and they wanted to avoid the harms of racial isolation.⁶² Of the educational benefits of racially diverse schools, the school districts particularly wanted to improve critical-thinking skills,⁶³ improve race relations,⁶⁴ improve African-American student achievement,⁶⁵ better prepare their students “for a diverse workplace and citizenship,”⁶⁶ and create “one community of roughly equal schools.”⁶⁷ The harms of racial isolation that the school districts wanted to avoid included lower student performance, disparities in teacher quality, and disparities in advanced courses.⁶⁸

A. Louisville and Seattle Goals

Given the direct and important connection to the *Brown* mandate, we might take a closer look at the cities of Louisville and Seattle, where the school districts articulated certain goals. Though not as broad as the arguments made throughout this Article, Louisville and Seattle had rationally thought about why they were pursuing the *Brown* mandate. These goals were briefly discussed above. The National Academy of Education (NAE) further analyzed the social science research that was associated with these goals.⁶⁹ They found five key questions that were addressed by that research:

61. Brief for Respondents at 19, *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1 (PICS)*, 551 U.S. 701 (2007) (No. 05-908).

62. *Id.*

63. *Id.* at 26 (quoting *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 72 P.3d 151, 162 (Wash. 2003)); ARTHUR L. COLEMAN, SCOTT R. PALMER & STEVEN Y. WINNICK, ECHOES OF *BAKKE*: A FRACTURED SUPREME COURT INVALIDATES TWO RACE-CONSCIOUS K-12 STUDENT ASSIGNMENT PLANS BUT AFFIRMS THE COMPELLING INTEREST IN THE EDUCATIONAL BENEFITS OF DIVERSITY (2007), *available at* http://www.collegeboard.com/prod_downloads/diversitycollaborative/EchoesofBakke.pdf.

64. Brief for Respondents, *supra* note 61, at 26 (“By attending a racially and ethnically diverse high school, students have the opportunity to learn through experience that a person’s race or ethnicity does not equate with any particular character trait or viewpoint.”); COLEMAN, PALMER & WINNICK, *supra* note 63.

65. Brief for Respondents, *supra* note 61, at 27-28; COLEMAN, PALMER & WINNICK, *supra* note 63.

66. COLEMAN, PALMER & WINNICK, *supra* note 63; Brief for Respondents, *supra* note 61, at 28.

67. COLEMAN, PALMER & WINNICK, *supra* note 63; Brief for Respondents, *supra* note 61, at 27.

68. *See* COLEMAN, PALMER & WINNICK, *supra* note 63.

69. *See* Linn & Welner, *supra* note 5, at 1.

1. Is racial diversity in a school environment associated with improved academic achievement?
2. Is racial diversity in a school environment associated with improved intergroup relations?
3. Is racial diversity in a school environment associated with improved long-term effects?
4. Is there a “critical mass” (or some counterpart) of racial diversity associated with any benefits of racial diversity?
5. Are there race-neutral alternatives that can yield benefits that are comparable to benefits that we know to be associated with race-conscious policies?⁷⁰

This Article will discuss these research questions and summarize the findings below. However, it is important to contrast the methods of analysis done by this team of researchers with that done by the Supreme Court. In arriving at its conclusions, the committee of seven,⁷¹ appointed by the NAE, reviewed approximately sixty-four “*amicus curiae* (friend of the court) briefs filed with the Supreme Court in support of petitioners and respondents in these two cases.”⁷² Its analysis, in brief, concluded that while levels of outcome will vary, planned school integration causes an increase in minority achievement while having no effect on majority achievement.⁷³ This conclusion should be contrasted with that of Supreme Court Justice Clarence Thomas whose analysis concluded that attempts to racially integrate schools were an “elitist fad.”⁷⁴ Disregarding the elitist label, Webster’s Dictionary defines a “fad” as “a practice or interest followed for a time with exaggerated

70. *Id.* at 6.

71. Noted in contrast to the nine Justices of the U.S. Supreme Court.

72. Linn & Welner, *supra* note 5, at 5.

73. *Id.* at 20.

74. James E. Ryan, *The Supreme Court and Voluntary Integration*, 121 HARV. L. REV. 131, 131 (2007) (citing *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1 (PICS)*, 551 U.S. 701, 780-81 (2007) (Thomas, J., concurring)); *see also* *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2419 (2013) (“There is disagreement about whether *Grutter* was consistent with the principles of equal protection in approving [a] compelling interest in diversity.”); *id.* at 2424 (Thomas, J., concurring) (“[T]he educational benefits flowing from student body diversity—assuming they exist—hardly qualify as a compelling state interest.”); *Grutter v. Bollinger*, 539 U.S. 306, 350 (2003) (Thomas, J., concurring in part and dissenting in part) (“The majority upholds the Law School’s racial discrimination not by interpreting the people’s Constitution, but by responding to a faddish slogan of the cognoscenti.”).

zeal.”⁷⁵ Since the *Brown* decision in 1954, there has been continual recognition of the need to integrate schools.⁷⁶ The Supreme Court supported that need when it stated that segregation “has a tendency to [retard] the educational and mental development of Negro children.”⁷⁷ The Coleman Report reinforced this fact in 1966 when it found that the achievement scores of black students will rise when the students are placed in an integrated school environment (with no adverse effect upon the white students).⁷⁸ And today, we see the plans of Seattle and Louisville continuing to address this issue.⁷⁹ Any activity spanning half of a century would be hard pressed to be labeled a fad.

Now, the Article will more fully consider the five key questions addressed by the NAE’s research.

1. *Is Racial Diversity in a School Environment Associated with Improved Academic Achievement?*

The NAE committee reviewed the studies used by both petitioners (those opposed to the Seattle and Louisville plans) and respondents.⁸⁰ The committee charted the time periods that each side relied upon in their studies.⁸¹ The petitioners relied upon ten studies while the respondents relied upon fifty-nine.⁸² Moreover, half of the studies used only by the petitioners were conducted prior to the 1980s.⁸³ Nearly all of the respondents’ studies were conducted in the 1990s or 2000s.⁸⁴ The importance of dating the studies can be found

75. MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 416 (10th ed. 2000).

76. See, e.g., *PICS*, 551 U.S. at 782 (Kennedy, J., concurring in part and concurring in the judgment) (describing racial integration as one of “our highest aspirations”); *Missouri v. Jenkins*, 515 U.S. 70, 122 (1995) (Thomas, J., concurring) (recognizing that state-enforced segregation is a harm).

77. *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954) (alteration in original) (quoting a finding from the Kansas district court case); Linn & Welner, *supra* note 5, at 13.

78. See JAMES S. COLEMAN ET AL., EQUALITY OF EDUCATIONAL OPPORTUNITY 28-29 (1966).

79. See *supra* Part III.A (discussing the goals of the school districts in the *PICS* case).

80. See Linn & Welner, *supra* note 5, at 5-6 (discussing the methodology of the study).

81. *Id.* at 13 tbl.3 (summarizing the *amicus curiae* briefs submitted in *PICS* by decade).

82. *Id.*

83. *Id.*

84. *Id.*

in the statistical tools available.⁸⁵ In part because of the increased sophistication of computers from the 1960s to the present, many higher levels of analysis were simply not attainable in older studies.⁸⁶ While the committee specifically refrained from drawing causal connections, it concluded that racial diversity in a school environment does not negatively impinge upon non-minority students and positively benefits minority students, especially in the earlier grades.⁸⁷

2. *Is Racial Diversity in a School Environment Associated with Improved Intergroup Relations?*

Repeating the breadth of analysis found in the first issue, “the briefs opposing race-conscious policies cite an average of roughly five studies,” while “the briefs supporting race-conscious policies cite an average of more than 13 studies related to this issue (with one citing almost 50).”⁸⁸ After reviewing all studies cited in briefs that argued intergroup relations, the committee found that “[i]n sum, racially diverse schools and classrooms will not guarantee improved intergroup relations. However, current research supports the conclusion that, generally speaking, such diverse environments are likely to be constructive in this regard.”⁸⁹

3. *Is Racial Diversity in a School Environment Associated with Improved Long-Term Effects?*

While the NAE recognized that results in this area are difficult to define, it once again distinguished the briefs opposing race-conscious policies as generally failing to address long-term effects.⁹⁰ On the other hand, “[a] half-dozen of the *amicus* briefs supporting race-conscious student assignment policies include[d] substantial

85. See *id.* at 15 & n.14 (noting that the early studies often did not have individual student data available to them and that many studies use free and reduced-price lunch as a proxy for socioeconomic status because household income is not available to them).

86. See generally A. Baines, *Statistics and Computers*, 12 J. ROYAL STAT. SOC’Y, SERIES D (THE STATISTICIAN) 32 (1962) (discussing the effects of the advent of the electronic computer on statistical work and the role of the statistician).

87. Linn & Welner, *supra* note 5, at 20.

88. *Id.* at 22.

89. *Id.* at 27.

90. *Id.* at 30.

discussions of the long-term effects of desegregated schools.”⁹¹ The committee concluded that “[t]he weight of the research evidence supports the conclusion that there are long-term benefits of desegregation in elementary and secondary schools. Under some circumstances and over the long term, experience in desegregated schools increases the likelihood of greater tolerance and better intergroup relations among adults of different racial groups.”⁹²

4. *Is There a “Critical Mass” (or Some Counterpart) of Racial Diversity Associated with Any Benefits in Racial Diversity?*

Critical mass essentially means having enough of a given race to ensure that the members of that race are not left in isolation or perceived as being the voice of that race.⁹³ The “critical” aspect of this analysis suggests use of critical race theory (CRT). An element of CRT is storytelling.⁹⁴ Here, it seems appropriate to engage storytelling to highlight the need for “critical mass.”

Imagine being the only African-American graduate student sitting in a room with fifty other students when the topic of subsidized housing arises. Proportionally, the majority of recipients of subsidized housing are African-American.⁹⁵ As the discussion turns on the societal costs of supporting such housing,⁹⁶ many of the majority (read: European-American) students, who are mostly from middle- to upper-class backgrounds, begin to question why the economic advantages they earned as a birthright should be decreased

91. *Id.*

92. *Id.* at 2.

93. *See id.* at 33.

94. *See* RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION 10 (2d ed. 2012) (discussing the “legal storytelling” movement).

95. *See* U.S. DEP’T OF HOUS. & URBAN DEV. & U.S. DEP’T OF COMMERCE, AMERICAN HOUSING SURVEY FOR THE UNITED STATES: 2011, at 120 tbl.C-17-RO (2013). This study shows that, among 38,816 renter-occupied units, 5,283 were owned by a public housing authority or were paid by some government subsidy. *Id.* Of those 5,283 units, 2,044 were occupied by “Black[s] alone.” *Id.* This was more than twice the number occupied by “Hispanic[s]” (984). *Id.* Finally, it should be noted that 25% of black households in the study were subsidized, compared to 13% of all households sampled. *Id.*

96. *See, e.g.,* Ingrid Gould Ellen et al., *Does Federally Subsidized Rental Housing Depress Neighborhood Property Values?*, 26 J. POL’Y ANALYSIS & MGMT. 257, 278-79 (2007) (finding, *inter alia*, that subsidized housing for low-income families has a more negative impact on the surrounding community than housing for the elderly, and that Section 8 housing had a significant negative impact on the community).

in order to support a group that “cannot support themselves.” The focus then turns to the single African-American student to justify why white people should support black people.⁹⁷ Regardless of whether the African-American student ever resided in subsidized housing, the moment can only go from bad to worse. To argue in support of subsidized housing only reinforces the idea that “of course you’d support your people.” To argue against subsidized housing will likely lead to a labeling of “you’re not like the rest of them.” Neither result is desirable, especially in an educational setting.

To challenge the European-American perspective, one might suggest this exercise: As a European-American, travel to an African country such as Zimbabwe, Rwanda, or the Democratic Republic of Congo. Plan to stay for at least ten years. While there, in each and every group setting, argue in support of the “white perspective.” In reality, most will never undertake such an endeavor. There will be many reasons to justify the lack of any attempt, but the bottom line is, even if financially plausible and lacking any time constraints, most would decline because that situation would be overwhelmingly uncomfortable. Yet that is the exact situation most “educated” African Americans find themselves in . . . each and every day of their lives.

The NAE committee found that this was yet another area that was difficult to define. In large part, the briefs on both sides of the matter avoided discussing this topic.⁹⁸ Even within its own analysis, the committee was unable to pinpoint the moment in which “critical mass” occurs.⁹⁹ However, research indicates “to avoid the harms associated with racial isolation,” minority percentages should be no less than 15% to 30%.¹⁰⁰

5. Are There Race-Neutral Alternatives That Can Yield Benefits That Are Comparable to Benefits That We Know to Be Associated with Race-Conscious Policies?

Race-neutral alternatives are clearly the choice of today’s Supreme Court and likely the preference of all involved. Current

97. See *Grutter v. Bollinger*, 539 U.S. 306, 333 (2003) (acknowledging, by negating it, that minority students are often viewed as expressing a “characteristic minority viewpoint on any issue” (quoting Brief for Respondents at 30, *Grutter*, 539 U.S. 306 (No. 02-241))).

98. Linn & Welner, *supra* note 5, at 33.

99. *Id.* at 34-35.

100. *Id.* at 35; these figures are intended as guides, not absolutes.

race-neutral suggestions involve income-focused criteria,¹⁰¹ magnet schools,¹⁰² and lottery-style selection.¹⁰³ However, implementation without effective outcomes is a waste of time, energy, and resources. The NAE committee found “that school choice generally, and magnet schools in particular, do have some potential to reduce racial isolation. However, that potential is only likely to be realized to any significant degree if enrollment constraints (race-neutral or race-conscious . . .) are part of the school choice policy.”¹⁰⁴ Moreover, “although assignments made on the basis of socioeconomic status are likely to marginally reduce racial isolation and may have other benefits—none of the proposed alternatives is as effective as race-conscious policies for achieving racial diversity.”¹⁰⁵

Thus, the research exists to support the goals of Seattle and Louisville.¹⁰⁶ Each city should feel confident that what it does is done in the best interests of the children.¹⁰⁷ Now, the emphasis must turn to annihilating all legal obstacles.

B. United States Supreme Court Review

The Supreme Court reviewed the *Louisville* and *Seattle* cases using its highest level of review: strict scrutiny.¹⁰⁸ This level is reserved for reviewing governmental actions involving race or national origin.¹⁰⁹ This is distinguished from intermediate scrutiny, which is used for issues such as gender and sexual orientation,¹¹⁰ and

101. *Id.* at 40-41.

102. *Id.* at 39.

103. *Id.* at 41.

104. *Id.* at 40.

105. *Id.* at 42.

106. *Id.* at 45.

107. *See id.* at 43-45 (discussing the benefits of integration).

108. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1 (PICS)*, 551 U.S. 701, 720 (2007).

109. *See id.*; *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985).

110. *United States v. Virginia*, 518 U.S. 515, 531-33 (1996) (explaining why an intermediate level of scrutiny would be used for classifications based on sex); *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (“Between these extremes of rational basis review and strict scrutiny lies a level of intermediate scrutiny, which generally has been applied to discriminatory classifications based on sex or illegitimacy.”); *Windsor v. United States*, 699 F.3d 169, 185 (2d Cir. 2012), *aff’d*, 133 S. Ct. 2675 (2013) (concluding that homosexuals constitute a quasi-suspect class and that classifications based on such a status are subject to intermediate scrutiny); *see also Virginia*, 518 U.S. at 567-68 (Scalia, J., dissenting) (criticizing the majority opinion for application of an intermediate level of scrutiny to sex-based classifications).

rational basis review, the weakest review level.¹¹¹ Under strict scrutiny, a plan must be “‘narrowly tailored’ to achieve a ‘compelling’ government interest.”¹¹² In the arena of schooling, the Court has currently recognized two areas that will meet strict scrutiny. One relies on remedying the effects of past intentional discrimination.¹¹³ The other is founded on an interest in increasing diversity within higher education.¹¹⁴

“At issue was the constitutionality of desegregation policies voluntarily adopted by the Jefferson County School District (in Louisville, Kentucky) and the Seattle School District asking whether these race-based student assignment policies violated the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.”¹¹⁵ Using strict scrutiny, the Court found, in a fractured four-one-four¹¹⁶ opinion, that

the racial classifications employed by the districts are not narrowly tailored to the goal of achieving the educational and social benefits asserted to flow from racial diversity. In design and operation, the plans are directed only to racial balance, pure and simple, an objective this Court has repeatedly condemned as illegitimate.¹¹⁷

In so finding, the Court temporarily halted efforts by the school districts to comply with *Brown*’s mandate.¹¹⁸

111. *Clark*, 486 U.S. at 461 (“At a minimum, a statutory classification must be rationally related to a legitimate governmental purpose.”).

112. *PICS*, 551 U.S. at 720.

113. *See Grutter v. Bollinger*, 539 U.S. 306, 328 (2003). Ironically, the Louisville school district had previously been under court order to remedy the past effects of discrimination within their district. In 2000, the court lifted the order stating that the school district had done all that it could do to desegregate its population. *Hampton v. Jefferson Cnty. Bd. of Educ.*, 102 F. Supp. 2d 358, 382 (W.D. Ky. 2000). One could argue that the school district disagreed with the court’s analysis because it continued to pursue actions that would create better racial balance within its schools. Yet, rarely does any institution desire to be under court order. The continual oversight by an institution not equipped to efficiently manage education and the stigma attached are but two reasons for avoidance.

114. *See Grutter*, 539 U.S. at 325; *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2419 (2013).

115. *Linn & Welner*, *supra* note 5, at 5 (footnote omitted).

116. 4—Chief Justice Roberts was joined by Justices Alito, Scalia, and Thomas in the concurring opinion; 1—Justice Kennedy concurred in part and concurred in the judgment; and 4—Justice Breyer was joined by Justices Ginsberg, Souter, and Stevens in dissent. *PICS*, 551 U.S. at 701.

117. *Id.* at 726.

118. For a more thorough analysis of *PICS* that fully critiques the Supreme Court’s utilization of a post-racial constitutionalism grounded in liberal individualism and considers Justice Thomas’s analysis of race, see generally Cedric

An updated Seattle school-assignment plan uses a system of attendance area, option, and service schools.¹¹⁹ The attendance areas from which the students are chosen are drawn with nine factors in mind: proximity of students to schools, walk zones established by the City, efficiency of bus routing for elementary and middle schools, metro-transit options for high schools, *demographics, opportunities for creating diversity within boundaries*, physical barriers like water, balanced target enrollment for middle schools, and availability of “Open Choice” seats.¹²⁰ Students may apply to attend a different attendance area school than the one to which they are assigned.¹²¹ If an attendance area school is over-subscribed, then a set of tiebreakers is used to determine who is admitted.¹²² The tiebreakers differ for elementary, middle, and high schools.¹²³ The first tiebreaker at all schools is the sibling tiebreaker, which means that if an applicant has a sibling who attends the school and will attend the following year, then that student gets priority.¹²⁴ At the middle school level, there is a feeder school tiebreaker.¹²⁵ This tiebreaker is unclear, but it seems to give priority to students who are trying to attend a middle school that is in their feeder school program.¹²⁶ The only way this tiebreaker is likely to be used is in the situation where a student was going to be assigned to their desired school, but it doesn’t offer the services they need (accelerated, bilingual, special needs, etc.).¹²⁷ Finally, there is a lottery tiebreaker at all levels.¹²⁸ The lottery tiebreaker works by randomly assigning a rank to each student using a computer.¹²⁹

Merlin Powell, *Justice Thomas, Brown, and Post-Racial Determinism*, 53 WASHBURN L.J. 451 (2014).

119. SEATTLE PUB. SCH., STUDENT ASSIGNMENT PLAN 7 (2009), available at <http://www.seattleschools.org/modules/groups/homepagefiles/cms/1583136/File/Departmental%20Content/enrollment%20planning/New%20Student%20Assignment%20Plan.pdf>.

120. *Id.* at 10-11. The italicized factors, used in determining the boundaries for attendance areas, indicate that the district is still considering race in allocating students, but it is doing so in accord with Justice Kennedy’s concurrence. *PICS*, 551 U.S. at 789 (Kennedy, J., concurring in part and concurring in the judgment).

121. SEATTLE PUB. SCH., *supra* note 119, at 8.

122. *Id.*

123. *Id.* at 13.

124. *Id.*

125. *Id.*

126. *Id.* at 14.

127. *See id.* at 7.

128. *Id.* at 13.

129. *Id.* at 14.

To their credit, the school districts have attempted to follow the suggestions implied by Justice Kennedy's opinion. As interpreted by Linn & Welner, Justice Kennedy suggests that "race-conscious considerations can be used for making such non-individualized decisions as school site selection, drawing attendance zones, and targeted recruitment of students and faculty."¹³⁰ While the new approach may seem more in line with the direction articulated by the Court, this strategy will likely still fall short of the mandate of today's Supreme Court.¹³¹ Already, the plaintiffs in the prior litigation have indicated a desire to bring the proposed plan before the prior trial judge.¹³² If Louisville (as well as Seattle and other school districts) wants to overcome the challenges already identified, the district must re-think its goals, the design of the plan, and its strategies, as the district heads toward litigation.

130. Linn & Welner, *supra* note 5, at 9. Race-conscious student assignment policies (RCSAPs) are often the most effective means for obtaining the benefits of racial integration. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 426 F.3d 1162, 1178 (9th Cir. 2005) ("[H]igh schools in Seattle would be highly segregated absent race conscious measures."), *rev'd*, 551 U.S. 701 (2007); Kevin Brown, *The Constitutionality of Racial Classifications in Public School Admissions*, 29 HOFSTRA L. REV. 1, 79-80 (2000) (concluding from the then-current direction of federal jurisprudence that, "[i]n terms of strict scrutiny, public schools have a compelling state interest in inculcating the values derived from the Equal Protection Clause, and using racial classifications in an effort to promote voluntary integration may be narrowly tailored to advance such an interest"); Michael J. Kaufman, *PICS in Focus: A Majority of the Supreme Court Reaffirms the Constitutionality of Race-Conscious School Integration Strategies*, 35 HASTINGS CONST. L.Q. 1, 11-16 (2007) (discussing *PICS* and the view of a majority of the Court that RCSAPs generally serve a compelling government interest and can be narrowly tailored to achieve that interest); Kevin G. Welner, *K-12 Race-Conscious Student Assignment Policies: Law, Social Science, and Diversity*, 76 REV. EDUC. RES. 349, 377 (2006) (concluding, after discussing the social science research showing the benefits of racial integration, that "[f]or policymakers willing to acknowledge and confront [the] reality [of a society in which race still matters], RCSAPs might be an important policy option for the near future"). *But see* Kathryn A. McDermott, *Diversity or Desegregation? Implications of Arguments for Diversity in K-12 and Higher Education*, 15 EDUC. POL'Y 452, 471 (2001) (warning against replacing integration with diversity and thereby achieving less than optimal results in educational opportunity for inner-city minority children).

131. See Antoinette Konz & Chris Kenning, *Income, Race, Education Criteria for Assignments*, COURIER-J., Jan. 29, 2008, at A1 ("On the surface, without seeing a detailed review of the JCPS proposed plan, this new student assignment seems to be unconstitutional." (quoting "Teddy Gordon, the lawyer who fought to throw out the district's old desegregation policy"))).

132. *Id.* ("I urge JCPS to immediately submit this to Judge Heyburn (U.S. District Judge John Heyburn II) for his review to avoid costly litigation." (quoting Teddy Gordon)).

Ultimately, the Court, the schools, and the people must decide what they want from their schools, their government, and society. The Court should not continue to waffle on its analysis or its mandates. *Brown II* was clear about what was expected “with all deliberate speed.”¹³³ The current courts want a *Brown* outcome but not at *Brown* costs.¹³⁴ The Court wishes to achieve an effect without implementing the causes required. The Court will only be pushed if schools continue to bombard the docket with continual efforts.¹³⁵ The *Brown* litigation was strategically mapped over decades.¹³⁶ Schools will have to apply equally long-range planning in order to tactically position the Court.¹³⁷ And communities must be willing to support their schools and the idea of improvement for all. The lack of community support leaves each and every school leader subject to overwhelming pressure and chastisement. It will take a village, not just to raise a child, but also to raise the achievement of all children.

IV. SCHUETTE

If *PICS* was the Court taking the legs out from *Brown*, *Schuette*¹³⁸ is the stake in *Brown*'s heart. *Schuette* revolved around Michigan's battle over how, or whether, to consider race in state activities.¹³⁹ For purposes of this Article, relevant state activities revolve around state-sponsored schooling. Each state has budgets and authorities governing how schooling should best exist at the elementary, secondary, and post-secondary levels.¹⁴⁰ While State A's

133. *Brown II*, 349 U.S. 294, 301 (1955).

134. *See generally PICS*, 551 U.S. 701 (holding that, while serving important societal goals, race-conscious efforts to integrate the schools are unconstitutional).

135. *See Ladson-Billings*, *supra* note 21, at 4 (discussing the long-term strategy employed by the plaintiffs in *Brown*).

136. *Id.*

137. *See id.* at 3-5. The strategy cornering the Court that was used in *Brown* worked there. There is no reason it would not work again.

138. *Schuette v. Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equal. by Any Means Necessary*, 134 S. Ct. 1623 (2014).

139. In response to *Gratz v. Bollinger*, 539 U.S. 244 (2003), the voters of the State of Michigan adopted an amendment to the State Constitution prohibiting the granting of preferences based on race in a wide range of actions and decisions, including university admissions. *Schuette*, 134 S. Ct. at 1629.

140. *See, e.g., KY. CONST. § 183* (charging the Kentucky General Assembly with “provid[ing] for an efficient system of common schools throughout the State”); *MICH. CONST. art. 8, § 3* (creating the Michigan State Board of Education and

schooling might look slightly different than State B's schooling (e.g., high school might include grades nine through twelve in State A, but only grades ten through twelve in State B), *Brown* ordered that as long as the state is involved in schooling, separate cannot be equal.¹⁴¹ While interpretations have differed, *Brown's* order required desegregation and integration. This Article adopts Elizabeth Anderson's argument surrounding *The Imperative of Integration*.¹⁴²

Michigan universities used a variety of techniques in hopes of achieving *Brown's* mandate. The Supreme Court previously reviewed these techniques, finding some legal and others not.¹⁴³ In the wake of the Supreme Court's analysis, Michigan voters took to the polls and amended their state constitution to order that (even) the acts the Supreme Court said are legal are no longer legal.¹⁴⁴

Another helpful exercise for the reader might be comparing the activities in *Schuetz* to the activities surrounding *Brown*, where in the middle of the twentieth century, many states were emphatic about maintaining segregated state activities (e.g., schooling, housing, transportation).¹⁴⁵ Citizens within those states often violently protested community and legal efforts to integrate.¹⁴⁶ Clearly, if those citizens had the option to pass an amendment to their state constitution forbidding integration and had the blessing of the Supreme Court to do so, today's societal landscape would look incredibly different.

Readers might also note the legal framework that structured each case. In *Brown*, the "segregation was alleged to deprive the

describing its powers); WASH. CONST. art. 9, § 2 (charging the Washington State Legislature with the provision of a "general and uniform system of public schools").

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

142. See generally ANDERSON, *supra* note 12.

143. *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003) (holding that a state university law school had a compelling interest in promoting diversity in its student body, and that its admission policy favoring admission of underrepresented minorities was sufficiently narrowly tailored to survive strict scrutiny); *Gratz*, 539 U.S. at 255, 275 (holding that, even if a state university had a compelling interest in diversity among its students, an undergraduate admissions policy that automatically awarded 20% of the required points for guaranteed admission based on race alone was not sufficiently narrowly tailored to survive strict scrutiny and was therefore unconstitutional).

144. *Schuetz*, 134 S. Ct. at 1629.

145. See *Brown*, 347 U.S. at 495 & n.13 (explaining that the order resulting from the case would follow supplemental briefing and argument due to the wide applicability and disparate effects of the Court's decision).

146. See THOMAS, *supra* note 2, at 14 (discussing attitudes toward integration in Georgia following the Court's decision in *Brown*).

plaintiffs of the equal protection of the laws under the Fourteenth Amendment.”¹⁴⁷ Similarly, in *Schuette*, the issue was “whether an amendment to the Constitution of the State of Michigan, approved and enacted by its voters, is invalid under the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.”¹⁴⁸ The issues have not changed, but the perspectives have.¹⁴⁹

The Court has gone from breathing life into the words “all men are created equal” to reviving “segregation now . . . segregation tomorrow . . . segregation forever.”¹⁵⁰ *Brown* recognized the invidious origins of America and the reality those origins played in stymieing equality.¹⁵¹ *Schuette* chooses either to dismiss the origins recognized in *Brown* or, fantastically, conclude that sixty years have eradicated a 400-year history.¹⁵² Individual states are provided authority to reject the *Brown* mandate under a variety of de facto and implicit bias mechanisms.¹⁵³ Under either reasoning, there is little that “*Brown* can do for you” today.¹⁵⁴

147. *Brown*, 347 U.S. at 488.

148. *Schuette*, 134 S. Ct. at 1629.

149. For a detailed discussion on the various perspectives surrounding a key issue in *Schuette*, the political-process doctrine, as well as additional analysis by Justice Sotomayor about race, see *id.* at 1651-83 (Sotomayor, J., dissenting).

150. Governor George C. Wallace, The Inaugural Address of Governor George C. Wallace 2 (Jan. 14, 1963) (alteration in original), available at <http://digital.archives.alabama.gov/cdm/%20singleitem/collection/voices/id/2952/re/c/5>. These infamous words from Governor Wallace have, unfortunately, proven true. In the South, there has been significant progress toward integration, but many of the gains in integration have been erased in recent years. In 1954, 0% of black students in the South attended majority white schools. GARY ORFIELD ET AL., *BROWN AT 60: GREAT PROGRESS, A LONG RETREAT AND AN UNCERTAIN FUTURE* 10 tbl.3 (2014), available at <http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/brown-at-60-great-progress-a-long-retreat-and-an-uncertain-future/Brown-at-60-051814.pdf>. Approximately thirty years after *Brown*, in 1986, 42.9% of black students in the South attended majority white schools. *Id.* By 2011, this number had fallen to 23.2%. *Id.* During the 2011–2012 school year, nationwide, the average black student attended a school that was 72.4% minority, and the average Latino student attended a school that was 74.9% minority. *Id.* at 12 tbl.4.

151. *Brown*, 347 U.S. at 492-93 (“In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when Plessy v. Ferguson was written. We must consider public education in the light of its . . . present place in American life throughout the Nation.”).

152. See *Schuette*, 134 S. Ct. at 1654-56 (Sotomayor, J., dissenting) (discussing the historical context underlying the *Schuette* case).

153. See *id.* at 1638 (majority opinion).

154. This language is borrowed from an ad campaign from UPS. It involved a series of commercials with a person explaining one thing UPS can do for “you.”

V. EDUCATIONAL INTEGRATION STRATEGIES

The final Part of this Article will focus on strategies that Seattle and Louisville (and any other similarly situated school district) should implement to achieve success. The progressive thinkers have, for too long, taken a defensive approach.¹⁵⁵ This can be seen by the off-balance measures used to counter the anti-affirmative action propositions launched by Ward Connerly and the Center for Equal Opportunity.¹⁵⁶ Seattle and Louisville should be congratulated for reversing this trend. Assuming that Louisville and Seattle's ultimate goal is voluntary integration, James Ryan's analysis provides significant insight into how to proceed.¹⁵⁷

A. Integration Analysis

Before discussing Professor Ryan's ideas, this Article will further critique those assumed goals. The goal of voluntary integration should not be considered lightly. The school is a "microcosm of society."¹⁵⁸ If societal choices have led to segregated communities, should the schools be any different? Conceding the obvious, that the economic status of most historically marginalized communities, on average, places them in a situation where residential

For example, one such commercial discusses the reliability UPS can offer. See UPSWBCampaign, *UPS Whiteboard—Reliability*, YOUTUBE (Apr. 25, 2007), <https://www.youtube.com/watch?v=6hLThc0RSrc&list=PL08B53A305DC8B228&index=9>. Each video ends with the campaign slogan "What can Brown do for you?" See, e.g., *id.* at 0:26.

155. See John W. Whitehead & John M. Beckett, *A Dysfunctional Supreme Court: Remedies and a Comparative Analysis*, 4 CHARLESTON L. REV. 171, 180 (2009) (discussing judicial minimalism as a strategic and defensive response to conservative justices striking down progressive legislation).

156. See Michael Arceneaux, *Confused White People Call "My Brother's Keeper" Racist*, NEWSONE (Mar. 6, 2014), <http://newsone.com/2946506/confused-white-people-call-my-brothers-keeper-racist/> (criticizing statements by Roger Clegg of the Center for Equal Opportunity, while also claiming that there need to be "real efforts to tackle the policies that place the majority of minorities at an immediate disadvantage at birth"); Nathan Harden, *Serious Questions for Ward Connerly*, NAT'L REV (Jan. 20, 2012), <http://www.nationalreview.com/phi-beta-cons/288765/serious-questions-ward-connerly-nathan-harden> (discussing allegations of financial impropriety made against Mr. Connerly).

157. Ryan, *supra* note 74, at 146-48.

158. See Ann Llewellyn, *The Abuse of Children with Physical Disabilities in Mainstream Schooling*, 37 DEVELOPMENTAL MED. & CHILD NEUROLOGY 740, 740 (1995) ("A school is merely a microcosm of society, a place in which one learns and experiments with how to relate to others.").

segregation is a given outcome,¹⁵⁹ whether desired or not, would integration by any race be a choice if all factors were distributed evenly? One must consider factors of proximity to “good” employment and schools, crime rate, access to safe recreation, etc. If one assumes that all of these factors could be evenly achieved by each and every race, would the races voluntarily integrate? Or, would they segregate into clans (or communities) that were based upon shared backgrounds and beliefs?

To present yet another question: What if states “taxed” their population, then assigned an equal portion to each and every school? What if the federal government took on that role and assigned every school in the nation an equal portion? Would separate be equal? Would “achievements” be similar? The federal government has clearly indicated its intention to be a factor in education.¹⁶⁰ This is evidenced by the latitude given to No Child Left Behind,¹⁶¹ Race to the Top,¹⁶² and the Supreme Court’s continual involvement on local plans to decrease educational segregation.¹⁶³ If the federal government wants some level of control, perhaps it is time for the people to demand that control be either in full or completely ceded.

While the NAACP¹⁶⁴ argued for and the Supreme Court found that separate can never be equal within the education setting,¹⁶⁵

159. See U.S. CENSUS BUREAU, THE 2012 STATISTICAL ABSTRACT 456 tbl.697 (2012), available at <https://www.census.gov/compendia/statab/2012edition.html>. This table shows that black families had a median income of \$38,409 in 2009, and Hispanic families had median income of \$39,730, compared to \$62,545 for white families. *Id.* This is a nearly 40% difference between black and white.

160. See Ryan, *supra* note 74, at 150 (“*Parents Involved* . . . is hard to square with a commitment to local control, . . . federalism, and judicial restraint.”).

161. No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2002).

162. This refers to a grant program that was part of the stimulus bill passed in 2009. American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115.

163. See, e.g., *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1 (PICS)*, 551 U.S. 701, 710-11 (2007); *Gutter v. Bollinger*, 539 U.S. 306, 322 (2003).

164. A group that Du Bois challenges when he states, “The N.A.A.C.P. and other Negro organizations have spent thousands of dollars to prevent the establishment of segregated Negro schools, but scarcely a single cent to see that the division of funds between white and Negro schools, North and South, is carried out with some faint approximation of justice.” Du Bois, *supra* note 7, at 332.

165. *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (“Separate educational facilities are inherently unequal.”).

W.E.B. Du Bois raised the implications of just such a possibility in 1935.¹⁶⁶ He did so, because, according to Du Bois,

Any agitation and action aimed at compelling a rich and powerful majority of the citizens to do what they will not do, is useless . . . [and] the futile attempt to compel even by law a group to do what it is determined not to do, is a silly waste of money, time, and temper.¹⁶⁷

Though analyzed through a 1935 lens, this same contempt and futility exists today.¹⁶⁸ With an eerie forecast to modern times, Du Bois wrote that if all of the public schools in the South were opened to all the races, “the education that colored children would get in them would be worse than pitiable.”¹⁶⁹ Du Bois continued, “[t]he plain fact faces us, that either he will have separate schools or he will not be educated.”¹⁷⁰

Du Bois, in stark contrast to many modern-day academicians, chose not to lay the fault upon the souls of white people.¹⁷¹ Assuredly, he would include their perspectives and actions in any equation analyzing the black plight.¹⁷² However, Du Bois chose to focus within. He chose to challenge the very race he desired to inspire. Instead of blaming “the others,” Du Bois says that

[a]s long as the Negro student wishes to graduate from Columbia, not because Columbia is an institution of learning, but because it is attended by white students; as long as a Negro student is ashamed to attend Fisk or Howard because these institutions are largely run by black folk, just so long the main problem of Negro education will not be segregation but self-knowledge and self-respect.¹⁷³

Thus, whether a school is integrated, evenly financed, or any combination in-between, the African-American students will not

166. See generally Du Bois, *supra* note 7.

167. *Id.* at 329.

168. “The rest of the country appears to have turned its back on integration.” Ryan, *supra* note 74, at 155.

169. Du Bois, *supra* note 7, at 329.

170. *Id.*

171. See W. E. Burghardt Du Bois, *The Souls of White Folk*, 69 INDEPENDENT 339, 342 (1910) (discussing the impact of science and religion on racial discourse).

172. See *id.* at 339. Du Bois posits that the subtext of every conversation between white and black is

“My poor un-white thing! Weep not nor rage. I know, too well, that the curse of God lies heavy on you. Why? That is not for me to say; but be brave! Do your work in your lowly sphere, praying the good Lord that into heaven above, where all is love, you may, one day, be born—white!”

Id.

173. Du Bois, *supra* note 7, at 331.

achieve the same achievement outcomes as their European-American counterparts until the self-knowledge and self-respect of the African-American race equals that of any other race.¹⁷⁴ This is an argument for self-determination, instead of reliance. This is an argument that would be hard pressed to find disfavor among either progressives or conservatives.

The Journal of Blacks in Higher Education reports that, out of fifty-five Historically Black Colleges or Universities (HBCUs), only four graduate more than 50% of their students.¹⁷⁵ Even worse, the number of African-American males who graduate is abysmal.¹⁷⁶ This contrasts with the graduation rate for African-Americans in elite institutions. There, African-Americans graduate at a rate consistent with their European-American contemporaries—above 90%.¹⁷⁷ Also of note are the disproportionate endowments “majority universities” receive over “minority universities.”¹⁷⁸ If we consider the same analysis on the elementary and secondary education level, one would predict a similar outcome. Without similar resources, one must expect a highly correlated outcome. Less funding will likely lead to fewer graduates.¹⁷⁹ Confounding variables surely exist; each one

174. *Id.*

175. *Tracking Graduation Rates at HBCUs*, J. BLACKS HIGHER EDUC. (Jan. 5, 2012), <http://www.jbhe.com/2012/01/tracking-graduation-rates-at-hbcus/>.

176. *Black Student College Graduation Rates Remain Low, but Modest Progress Begins to Show*, J. BLACKS HIGHER EDUC. (Sept. 8, 2014), http://www.jbhe.com/features/50_blackstudent_gradrates.html (showing that, overall, black men are graduating at a rate of 11% less than their female counterparts).

177. *Id.* (showing nine of the top schools in the United States with black graduation rates of at least 90%; also showing five prestigious schools with higher black graduation rates than for whites).

178. Howard University, a private HBCU, has the largest HBCU endowment at \$513.7 million. *2013 Top 10 HBCU Endowments*, HBCU MONEY (Feb. 3, 2014), <http://hbcumoney.com/2014/02/03/2013-hbcu-endowments/>. By comparison, Harvard University, a private university, has the largest endowment at \$30 billion dollars. Devon Haynie, *Universities with the Largest Financial Endowments*, U.S. NEWS & WORLD REP. (Oct. 1, 2013, 10:00 AM), <http://www.usnews.com/education/best-colleges/the-short-list-college/articles/2013/10/01/universities-with-the-largest-financial-endowments-colleges-with-the-largest-financial-endowments>. Harvard’s endowment is almost sixty times greater than the largest HBCU. Even the tenth largest endowment of a non-HBCU, at University of Notre Dame, is more than twelve times that of the largest HBCU. *See id.*

179. Indeed, this has already proven true. A study from 2012 showed that the national graduation rate for black male students was 52% in the 2009–2010 school year, while the graduation rate for white males was 78%. SCHOTT FOUND. FOR PUB. EDUC., *THE URGENCY OF NOW: THE SCHOTT 50 STATE REPORT ON PUBLIC*

should be addressed and eliminated rather than simply shuffled in hopes of finding the “magic” variable that will end all disparities.

B. Integration Strategies

Assuming that, after due deliberation, the Louisville and Seattle school districts determine that voluntary integration is their goal, Professor Ryan articulates aspects that the school districts must analyze.¹⁸⁰ He starts with a question that simply evaluates whether his article is even necessary: “is this decision important and, if so, why?”¹⁸¹ He answers with a stoic “maybe” and supports his conclusions by assessing the confusion that the Supreme Court has brought to the voluntary-integration arena.¹⁸² Plans that would not only have been approved, but also encouraged in the 1950s, 1960s, and 1970s are now being rejected, without hesitation.¹⁸³ Professor Ryan points out one very important strategy though—“The Court left open whether [the Louisville and Seattle] plans might satisfy some different, not-yet-recognized compelling interest.”¹⁸⁴ Professor Ryan highlights a portion of Justice Kennedy’s opinion that should guide Seattle, Louisville, and other similarly situated school districts:

“[School officials,] if necessary, [can conduct] a more nuanced, individual evaluation of school needs and student characteristics that might include race as a component. The latter approach would be informed by *Grutter*, though of course the criteria relevant to student placement would differ based on the age of the students, the needs of the parents, and the role of the schools.”¹⁸⁵

This must be the strategy for Seattle, Louisville, and comparable school districts. The school districts in the *Louisville* and *Seattle* cases must view themselves in the same light as the parties in

EDUCATION AND BLACK MALES 7 (2012), available at <http://blackboysreport.org/urgency-of-now.pdf>.

180. Ryan, *supra* note 74, at 132; see also James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249, 307-15 (1999) (suggesting two strategies for increasing integration; namely, using school finance cases to remedy the deprivation of adequate or equal education through racial and socioeconomic integration and working within the school-choice framework to benefit disadvantaged students).

181. Ryan, *supra* note 74, at 132.

182. *Id.*

183. See *id.* at 139-42.

184. *Id.* at 135.

185. *Id.* at 136 (alteration in original) (quoting *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1 (PICS)*, 551 U.S. 701, 790 (2007) (Kennedy, J., concurring in part and concurring in the judgment)).

the *Gratz* case.¹⁸⁶ Their controlling strategy should be to align themselves in a way that simulates the University of Michigan in the *Grutter* decision.¹⁸⁷ Those who argue that elementary and secondary schooling differ from higher education are missing the point. Each of these situations involved an educational institution making choices.¹⁸⁸ The plaintiffs complained because that choice used race as a factor in coming to a decision, and the plaintiffs did not receive their first choice of schools.¹⁸⁹ These factors replicate those found in the *Grutter* and *Gratz* decisions.¹⁹⁰ Although the Court has supported the need to promote diversity at the higher education level, a majority of Justices suggested that the same support might be found for elementary and secondary education if the plans were tailored correctly.¹⁹¹

The mistake made in the *Gratz* case was the use of a numeric formula in weighting the applications from students of color.¹⁹² The Court had little patience for a strategy that involved no individual assessment of an applicant.¹⁹³ The admissions office was unable to provide any significant level of analysis that showed that their specific process enhanced diversity on campus.¹⁹⁴ In contrast, the admissions office in the *Grutter* case used “criteria [that] included the requirement that students be evaluated on an ‘individualized, holistic’ basis, which entailed consideration of all of the ways in which they might contribute to a diverse student body.”¹⁹⁵

All school districts that choose to implement voluntary integration already have the research to support their goals.¹⁹⁶ This was one of the major issues addressed in the *Grutter* decision.¹⁹⁷ The school districts must keep recruiting additional benefactors who can

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

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

188. *PICS*, 551 U.S. at 709-11.

189. *Id.*

190. *Gratz*, 539 U.S. at 252; *Grutter*, 539 U.S. at 316.

191. See Ryan, *supra* note 74, at 135, 138; see also Kaufman, *supra* note 130, at 11-12 (stating that a majority of the Court in *PICS* recognized a compelling governmental interest that justifies race-conscious integration strategies).

192. *Gratz*, 539 U.S. at 270.

193. *Id.* at 271-72.

194. *Id.* at 270.

195. Ryan, *supra* note 74, at 136 (quoting *Grutter*, 539 U.S. at 337).

196. See Linn & Welner, *supra* note 5, at 3 (“[T]he overall academic and social effects of increased racial diversity are likely to be positive.”); see also *Grutter*, 539 U.S. at 343 (recognizing “a compelling interest in obtaining the educational benefits that flow from a diverse student body”).

197. See 539 U.S. at 343.

contribute money, time, and legal analysis to the effort. These should include Fortune 500 companies, think tanks, universities, 501(c)(3) organizations, and a mosaic of individuals and entities representing the American public. Each should be poised to inundate the Court with briefs in support of the evidence of economic, social, moral, and even spiritual reasons why voluntary-integration strategies are essential to the country.

The proponents of voluntary integration should also be ready to recite each and every opinion ever authored by Justice Kennedy, as he has been widely viewed as the crucial swing vote on the current Court, regarding the future of affirmative action and its close relative, integration.¹⁹⁸ They should be familiar with not simply his Supreme Court opinions involving race, but also every opinion in every court on which he has sat. The opinions should be reviewed with precision regarding the manner in which Justice Kennedy follows his own precedent and guidance. He has surely commented in the past about how parties faltered in their attempts. Surely those same parties renewed their efforts and, potentially, reappeared before Justice Kennedy or one of his previous courts. His willingness to stand behind his comments in the past should provide judicial and public leverage for his continued consistency.¹⁹⁹ Any failure to act in such a way will draw criticism and even ridicule upon a Court that has fashioned itself as a Court of little to no public sway, a Court that will stringently follow precedent.²⁰⁰

198. See Mario L. Barnes & Erwin Chemerinsky, *The Once and Future Equal Protection Doctrine?*, 43 CONN. L. REV. 1059, 1065 n.27 (2011) (discussing Equal Protection jurisprudence, including Justice Kennedy's role as the "crucial vote in determining the scope of Fourteenth Amendment protection" in cases involving questions of race).

199. While this Article focuses on the *Brown* mandate and suggests Justice Kennedy's analysis as one strategy for further implementation, other forms of *Brown* analysis, interpretation, and strategy should be simultaneously employed for the most effective and efficient implementation of *Brown*. See generally Kevin Brown, *The Road Not Taken in Brown: Recognizing the Dual Harm of Segregation*, 90 VA. L. REV. 1579 (2004) (discussing the reasoning that was available to the Court in *Brown*, but was not employed, which showed that segregation harms children of all races, ultimately concluding that this dual-harm argument would have been more effective in garnering support for integration).

200. See generally Areto A. Imoukhuede, *Education Rights and the New Due Process*, 47 IND. L. REV. 467 (2014); Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747 (2011) (arguing that pluralism anxiety has led the Court to curtail equal protection rights and expand due process rights); Rex D. Glensy, *The Right to Dignity*, 43 COLUM. HUM. RTS. L. REV. 65 (2011) (arguing that human dignity is the most basic of values and should be recognized as such in American

CONCLUSION

This research was meant to address the measures attempted by different school districts to comport with the mandates of *Brown*. These measures, whether taken with the best of intentions or not, should always be studied regarding whether they are narrowing the “achievement gap.” Any failure to reach that outcome should result in critiquing the technique. Du Bois may have captured the point perfectly:

[T]heoretically, the Negro needs neither segregated schools nor mixed schools. What he needs is Education. What he must remember is that there is no magic, either in mixed schools or in segregated schools. A mixed school with poor and unsympathetic teachers, with hostile public opinion, and no teaching of truth concerning black folk, is bad. A segregated school with ignorant placeholders, inadequate equipment, poor salaries, and wretched housing, is equally bad. Other things being equal, the mixed school is the broader, more natural basis for the education of all youth. It gives wider contacts; it inspires greater self-confidence; and suppresses the inferiority complex. But other things seldom are equal, and in that case, Sympathy, Knowledge, and the Truth, outweigh all that the mixed school can offer.²⁰¹

jurisprudence); James W. Paulsen, *The Significance of Lawrence v. Texas*, HOUS. LAW., Jan./Feb. 2004, http://www.thehoustonlawyer.com/aa_jan04/page32.htm (stating that the 2003 Term of the Court was “a confirmation of ‘the endless capacity of the Court to astonish and surprise’” (quoting Robert C. Post, *Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 4 (2003))).

201. Du Bois, *supra* note 7, at 335.

